This factsheet explains whether refugees who commit crimes in Australia can be deported. The factsheet sets out the position in Australia, explains whether this is consistent with international law, and explains what other countries, such as New Zealand, the United Kingdom and the United States do. The factsheet also includes a list of further reading.

What is the position in Australia?

The Migration Act 1958 (Cth) (the Act) prescribes the circumstances in which a non-citizen may be deported from Australia on the basis that they have committed a crime. These provisions apply to non-citizens in Australia generally, including refugees.¹

Under section 201 of the Act, a non-citizen may be deported from Australia if he or she has been convicted of an offence for which they were sentenced to a term of imprisonment of one year or more.² This applies to an offence committed by a non-citizen who has been in Australia as permanent resident for less than 10 years.³

In a 2006 Senate Inquiry into the Administration and Operation of the Migration Act, it was found that the Commonwealth had ‘abandoned reliance on the criminal deportation provisions (section 201) in favour of the wider power to cancel visas on character grounds under section 501, where a person has been convicted of a criminal offence.’⁴

Under section 501 of the Act, a non-citizen’s visa may be cancelled on the basis that he or she does not pass the ‘character test’.⁵ A person will not pass the character test if he or she falls under one of the categories listed in section 501, such as if the person has a ‘substantial criminal record’, is found not to be of good character having regard to their ‘past and present criminal conduct’, has been convicted an offence committed in (or while having escaped from) immigration detention, or if there is a ‘significant risk that the person will engage in criminal conduct in Australia’.⁶ A person has a ‘substantial criminal record’ if, among other things, he or she has been sentenced to a gaol term of at least one year, or acquitted of an offence due to unsoundness of mind and consequently detained in an institution.⁷

Section 501 is a discretionary power. This means that if a non-citizen does not pass the character test, it is up to the decision-maker whether or not to cancel that person’s visa. The decision-maker must consider a number of factors, including the protection of the Australian community, the strength of the person’s ties to Australia, the best interests of any children in
Australia, and whether Australia has *non-refoulement* obligations (that is, an obligation not to return the person to persecution or other forms of serious harm). Ministerial Direction 55, which guides the exercise of the discretion, provides:

The existence of a non-refoulement obligation does not preclude cancellation of a person’s visa. This is because Australia will not necessarily remove a person, as a consequence of the cancellation of their visa, to the country in respect of which the non-refoulement obligation exists.

Unlike section 201, section 501 applies irrespective of the number of years that the non-citizen has lived in Australia. If a non-citizen’s visa is cancelled under section 501 on the grounds of either a substantial criminal record, past and present criminal conduct or past and present general conduct, then he or she is permanently excluded from Australia.

In 2013, the Coalition announced that if elected to government, it would remove the discretion from section 501. Instead, non-citizens convicted of a crime punishable by a gaol term of at least one year would have their visas cancelled automatically – even if they were sentenced to less than a year’s imprisonment. Once deported, non-citizens could not return to Australia for 20 years.

The Coalition has indicated that refugees whose visas are cancelled could be sent back to their country of origin, or if that is not possible, indefinitely detained until deportation becomes possible. They would also lose their right to appeal against their visa cancellation, except in ‘special circumstances’.

Is the Australian position consistent with international law?

The central tenet of refugee law is that countries undertake not to send refugees back to places where they have a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group. This is known as the principle of *non-refoulement*. Under the Refugee Convention, the benefit of this principle cannot be claimed where there are ‘reasonable grounds for regarding [a refugee] as a danger to the security of the country’, or if a refugee, having been convicted by a final judgment of a particularly serious crime’, ‘constitutes a danger to the community of [the] country’.

According to the UNHCR, ‘in view of the serious consequences to a refugee of being returned to a country where he or she is in danger of persecution, the exception provided for in Article 33 (2) should be applied with the greatest caution’. Hence, the application of the ‘particularly serious crime’ exception should only be considered where ‘one or several convictions are symptomatic of the basically criminal, incorrigible nature of the person and where other measures, such as detention, assigned residence or resettlement in another country are not practical to prevent him or her from endangering the community’. The kinds of crimes typically considered to be of such gravity include rape, murder, arson, drug trafficking and armed robbery.
Although there may be some overlap between the grounds under which a non-citizen’s visa may be cancelled in Australia under section 501 of the Act and the grounds under Article 33(2) of the Refugee Convention, the breadth of the existing power under section 501 raises the concern that its application may in some cases be inconsistent with the very high threshold required by Article 33(2) of the Refugee Convention.\(^{16}\)

The Coalition’s proposed changes are also likely to be inconsistent with the requirements of the Refugee Convention. This is in part because the reference point for visa cancellation is the maximum length of sentence for a crime, rather than the particular circumstances of the offender. There are numerous crimes in Australia with a maximum penalty of at least a year’s imprisonment, many of which fall short of the gravity contemplated by Article 33(2) of the Refugee Convention.\(^{17}\) An approach in terms of the penalty imposed alone is likely to be arbitrary and inconsistent with Article 33(2) of the Refugee Convention.\(^{18}\)

Significantly, however, Australia is not only bound by the Refugee Convention but also by international human rights treaties. Under the International Convention on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Australia has additional non-refoulement obligations which are absolute and non-derogable.\(^{19}\) Australia is not permitted to return people to countries where they would face arbitrary deprivation of life, or torture or cruel, inhuman or degrading treatment or punishment, regardless of the seriousness of their offending in Australia. This has led some scholars to argue that the exception in Article 33(2) of the Refugee Convention is effectively rendered redundant by modern human rights standards, since ‘persecution’ is encompassed by the types of serious harm listed above.\(^{20}\)

Under the Coalition’s policy, people who cannot be deported will be detained indefinitely. This would undeniably constitute a breach of international law. Detention is only lawful if it is reasonable, necessary and proportionate in all the circumstances, and can be periodically reviewed.\(^{21}\) On numerous occasions, Australia’s policy of detaining refugees has been found to be in breach of international law.\(^{22}\) Most recently, in August 2013, the UN Human Rights Committee found that Australia’s indefinite detention of refugees amounted to cruel, inhuman and degrading treatment.\(^{23}\)

The Coalition has also indicated that non-citizens convicted of crimes would lose their right to appeal against their deportation.\(^{24}\) According to Professor Ben Saul, ‘[t]his is inconsistent with international law. A person has a right to a fair hearing before a competent tribunal. It need not be a court, but it must be independent. A person is also entitled to see and challenge the evidence against them.’\(^{25}\)

In short, if a refugee commits a crime in Australia, the most appropriate course of action is to allow them to remain in Australia to serve the appropriate sentence for their crime, and then be released into the community at the end of that sentence. They should not be subjected either to a disproportionate punishment (eg deportation to persecution or indefinite detention) or to a double punishment (eg deportation after serving the sentence).
What do other countries do?

New Zealand

Part 6 of the Immigration Act 2009 (NZ) prescribes the circumstances in which a non-citizen convicted of an offence may be deported. These depend on how long the non-citizen has been resident in NZ:

- If the non-citizen committed an offence within two years of holding a residence visa, he or she may be deported if convicted of a crime for which a court has the power to impose imprisonment for a term of three months or more.
- If the non-citizen committed an offence within five years of holding a residence visa, he or she may be deported if convicted of a crime for which a court has the power to impose imprisonment for a term of two years or more.
- If the non-citizen committed an offence within 10 years of holding a residence visa, he or she may be deported if convicted of a crime for which a court sentenced the non-citizen to imprisonment for a term of five years or more.

Significantly, however, a refugee or protected person cannot be deported, subject only to two exceptions: (1) a refugee may be deported if Article 32.1 or 33 of the Refugee Convention allows deportation of the person, and (2) a protected person may be deported to any country other than one where they would face torture, arbitrary deprivation of life or cruel treatment. In other words, removal is premised solely on what international law does or does not permit.

United Kingdom

Under section 32 of the UK Borders Act 2007, the Secretary of State is obliged to make a deportation order where a non-citizen is convicted of a crime and sentenced to imprisonment for a term of one year or more. However, there are exceptions to this rule, including if deportation would breach the UK’s obligations under the Refugee Convention or the European Convention on Human Rights (ECHR).

Under section 3(6) of the Immigration Act 1971, a non-citizen may be liable to deportation if he or she has been convicted of an offence punishable by imprisonment, and on conviction, he or she has been recommended for deportation by a court. Where such a recommendation has been made, the UK Border Agency determines whether to proceed with deportation. However, deportation is not permissible if it would breach the UK’s obligations under the Refugee Convention or ECHR.

Article 3 of the ECHR prohibits the return of individuals to countries where they would face torture or inhuman or degrading treatment or punishment. In 2011, the European Court of Human Rights reaffirmed a long line of cases holding that the duty to protect individuals from torture or inhuman treatment was absolute, regardless of the level of seriousness of a non-citizen’s offending.
United States

The *Immigration and Nationality Act of 1952* (contained in *Title 8 of the US Code*) outlines the circumstances in which a non-citizen (‘alien’ is the term used) may be deported. *Section 1227* of Title 8 provides a list of the types of convictions that may render a non-citizen liable to deportation. These include:

- Conviction of a crime involving ‘moral turpitude’; 
- Conviction of a controlled substance offence;
- Conviction of a firearm or destructive device offence;
- Conviction of specific types of aggravated felony;
- Conviction of a crime of domestic violence, stalking, child abuse, child neglect, child abandonment, or violation of a protection order.

However, non-citizens may not be deported to a country if they can establish that it is ‘more likely than not’ that their ‘life or freedom would be threatened in that country because of [their] race, religion, nationality, membership in a particular social group, or political opinion’ – in other words, if they are refugees. This is called ‘withholding of removal’. While it precludes removal to the country where the person’s life or freedom is at risk, it does not preclude removal to a third country where life or freedom would not be threatened. The benefit of withholding of removal does not apply in certain circumstances, including if the person, ‘having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States’.

Moreover, a non-citizen may not be removed to a country where he or she would be ‘more likely than not to be tortured’. Torture is defined in US law as ‘an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture’. A person who is able to establish that he or she is more likely than not to be tortured may be entitled to withholding of removal or alternatively, deferral of removal, the latter being a more temporary form of protection.

**Further reading**


Department of Immigration and Border Protection, *Fact Sheet 79 – The Character Requirement* (January 2013)


Harris-Rimmer, Susan, *The Dangers of Character Tests: Dr Haneef and Other Cautionary Tales* (The Australia Institute, Discussion Paper No 101, October 2008)

Lee, Jane, ‘Coalition to Deport Most Foreign Criminals’, The Age, 1 July 2013

McAdam, Jane and Robert Woods, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011, 31 May 2011

Minister of Immigration and Citizenship, Ministerial Direction No 55: Visa Refusal and Cancellation under s 501 (25 July 2012)

Saul, Ben, ‘Refugees Deserve Second Chances Too’, The Sydney Morning Herald, 19 June 2013

Senate Legal and Constitutional Affairs Committee, Inquiry into the Administration and Operation of the Migration Act 1958 (2 March 2006)


Endnotes

1 It should be noted that refugees who have committed serious crimes prior to seeking protection in Australia may be excluded under article 1F of the Refugee Convention. This provision excludes from refugee status persons ‘with respect to whom there are serious reasons for considering that’ they have ‘committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes’; ‘a serious non-political crime outside the country of refuge prior to [their] admission to that country as a refugee’; or ‘been guilty of acts contrary to the purposes and principles of the United Nations’.

2 Migration Act 1958 (Cth) s 201.

3 Migration Act 1958 (Cth) s 201(b). A non-citizen may also be deported if they are convicted of certain serious offences, such as treason and inciting mutiny: Migration Act 1958 (Cth) s 203.


5 Migration Act 1958 (Cth) s 501(2).

6 Migration Act 1958 (Cth) s 501(6).

7 Migration Act 1958 (Cth) s 501(7).


9 Ibid.


15 Ibid.


19 The Human Rights Committee has held that there is an obligation of non-refoulement implied from the ICCPR, requiring States not to return individuals to countries where they face harm contrary to ICCPR Arts 6 and 7: Human Rights Committee, General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant (ICCPR), UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [12]. On the non-derogable nature of ICCPR Arts 6 and 7, see Human Rights Committee, General Comment No 6: The Right to Life, 16th sess, UN Doc HRI/GEN/1/Rev.1 (30 April 1982), 1, and Human Rights Committee, General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment), 44th sess, UN Doc HRI/GEN/1/Rev.1 (10 March 1992), [3]. On the non-derogable nature of CAT Art 3, see Committee against Torture, Decision: Communication No 39/1996, UN Doc CAT/C/18/D/39/1996 (28 April 1997), [14.5] (‘Paez v Sweden’).

20 Goodwin-Gill and McAdam, above n 18, 243–4.


24 Saul, above n 17; Cowie, above n 12.

25 Saul, above n 17.

26 Immigration Act 2009 (NZ) s 161.

27 A ‘protected person’ is a person who has been recognised under the Immigration Act 2009 (NZ) as engaging NZ’s non-refoulement obligations under the ICCPR or CAT.

28 Refugee Convention Art 32.1 allows States to expel refugees on grounds of national security or public order.

29 Immigration Act 2009 (NZ) s 164.


31 This applies to non-citizens who are over 17 years of age: Immigration Act 1971 (UK) s 3(6).


33 Ibid.

34 Sufi and Elmi v The United Kingdom (European Court of Human Rights, Application Nos 8319/07 and 11449/07, 28 June 2011).

35 Immigration and Nationality Act of 1952, 8 USC § 1227.

36 ‘Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.’: In re Fualaa, 21 I&N Dec. 475, 477 (BIA 1996). ‘[N]either the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. It is rather a question of the offender’s evil intent or corruption of the mind.’: Matter of Serna, 20 I&N Dec. 579, 581 (BIA 1992).


38 US Department of Justice, above n 37, 6.

39 Immigration and Nationality Act of 1952, 8 USC § 1231(3).

40 Ibid: 8 CFR §§ 208.16, 208.17.

41 8 CFR §§ 208.18.

42 US Department of Justice, above n 37, 6.