

Deportation and Sentencing: An Emerging Area of Jurisprudence

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The number of people being deported from Australia because they have been sentenced for criminal offending has risen significantly in recent years. This is primarily due to federal legislation introduced in 2014 that automatically cancels the visa of any non-citizens who have been sentenced to 12 months or more in prison. As a result, Australian courts are increasingly grappling with whether an offender's future deportation should affect the sentence imposed, and if so, to what extent.

This review does not seek to advocate any change in the law. Rather, the aim is to provide an overview of:

- the changes brought in by the 2014 legislation;
- the number of people deported each year as a result of that legislation;
- the various ways in which deportation can be relevant to sentencing in Victoria; and
- the issues Victorian courts may face when sentencing non-citizens that may benefit from clarification.

While the *Migration Act 1958* (Cth) is a federal statute, sentencing law is governed by both state and federal legislation. In Victoria, sentencing is governed by the *Sentencing Act 1991* (Vic). Therefore, although this review draws on relevant case law from other Australian jurisdictions, the specific focus is the emerging jurisprudence in Victoria on the relevance of deportation to sentencing.

The 2014 legislation

1. Prior to legislative amendments in 2014,¹ the federal immigration minister had discretion to cancel a person's visa if they no longer satisfied a 'character test'.² A person could fail the character test if, among other things, they had a 'substantial criminal record'.³ In turn, a person had a substantial criminal record if, among other things, they received a single sentence of imprisonment of 12 months or more or they were sentenced to imprisonment on multiple occasions that, when added together, exceeded two years.⁴

1. *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).

2. *Migration Act 1958* (Cth) ss 501(3)(b)–(c), (4) (in effect to 3 November 2014).

3. *Migration Act 1958* (Cth) s 501(6)(d)(i) (in effect to 3 November 2014).

4. *Migration Act 1958* (Cth) ss 501(7)(a), (c), (d) (in effect to 3 November 2014).

2. The immigration minister retains discretion to cancel visas in most circumstances. However, the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) made a number of significant changes to the *Migration Act 1958* (Cth), including that:
 - a. visa cancellation is now *automatic* if a person has been sentenced to a term of imprisonment of 12 months or more;⁵ and
 - b. concurrent sentences (sentences served at the same time) are now taken into account for the purpose of determining whether the person has a ‘substantial criminal record’; for example, two concurrent six-month imprisonment sentences now constitute 12 months’ imprisonment.⁶
3. Visa cancellation remains discretionary (and not mandatory) if the offender’s substantial criminal record is based on sentences of imprisonment imposed on two or more occasions and, on each occasion, the sentence imposed is less than 12 months’ imprisonment.⁷ However, the minimum combined period of imprisonment required for the minister to exercise that discretion has been reduced from two years to 12 months.⁸ The federal government also recently introduced a Bill to expand the grounds on which a visa may be cancelled as a result of a non-citizen’s criminal record; if it passes, any non-citizen convicted of a crime punishable by two years’ imprisonment or more may have their visa cancelled regardless of whether a prison sentence is actually imposed.⁹
4. The visa cancellation is triggered when staff at the Department of Home Affairs receive regular lists of prisoners, assess whether any prisoners are subject to the mandatory cancellation provisions and then act if appropriate.¹⁰
5. Non-citizens whose visas are mandatorily cancelled because they have been sentenced to a term of 12 months’ imprisonment or more in a single case may apply to have that cancellation overturned by the minister or their delegate.¹¹ In deciding whether to revoke the visa cancellation, a Ministerial Direction requires

5. *Migration Act 1958* (Cth) s 501(3A).

6. *Migration Act 1958* (Cth) s 501(7A).

7. *Migration Act 1958* (Cth) s 501(3A)(a)(i) only requires automatic visa cancellation if the offender has a substantial criminal record based on subsections 501(7)(a)–(c). Subsection 501(7)(d) defines two or more terms of imprisonment as a substantial criminal record, but that subsection does not attract automatic visa cancellation.

8. *Migration Act 1958* (Cth) s 501(7)(d).

9. Migration Amendment (Strengthening the Character Test) Bill 2019 (Cth) s 6 (definition of *designated offence*).

10. Joint Standing Committee on Migration, *The Report of the Inquiry into Review Processes Associated with Visa Cancellations Made on Criminal Grounds* (2019) 29.

11. *Migration Act 1958* (Cth) s 501CA.

decision-makers to take into account three primary considerations and five secondary considerations. The three primary considerations are:

- a.** protection of the Australian community from criminal or other serious conduct;
- b.** the best interests of any of the offender's minor children still in Australia; and
- c.** the expectations of the Australian community.¹²

6. The secondary considerations are:

- a.** international non-refoulement obligations (not sending refugees or asylum seekers to countries where they are at risk of persecution);
- b.** the strength, nature and duration of the offender's ties to Australia;
- c.** the impact on Australian business interests;
- d.** the impact on victims; and
- e.** the extent of impediments to the offender if they are removed from Australia (such as substantial language barriers).¹³

7. The Ministerial Direction then provides further guidance about how a decision-maker should assess each of those considerations. For instance, in assessing the expectations of the Australian community, the Ministerial Direction specifies that:

[t]he Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to cancel the visa held by such a person. Visa cancellation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not continue to hold a visa. Decision-makers should have due regard to the Government's views in this respect.¹⁴

8. If the decision-maker is a delegate of the minister and they refuse the application, the offender may apply for administrative review of that decision. If, however, the minister makes the decision personally, there is no avenue of appeal.¹⁵

12. Minister for Immigration and Border Protection, *Direction no. 65 under Section 499 of the Migration Act 1958 – Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (22 December 2014).

13. *Ibid.* The Joint Standing Committee on Migration recently recommended amending the Ministerial Direction such that, in cases of serious violent offending, the likelihood of recidivism and the impact of the crime on victims would become primary considerations, and the offender's ties to Australia would become a secondary consideration: Joint Standing Committee on Migration (2019), above n 10, 74–75. Those recommendations have not yet been implemented.

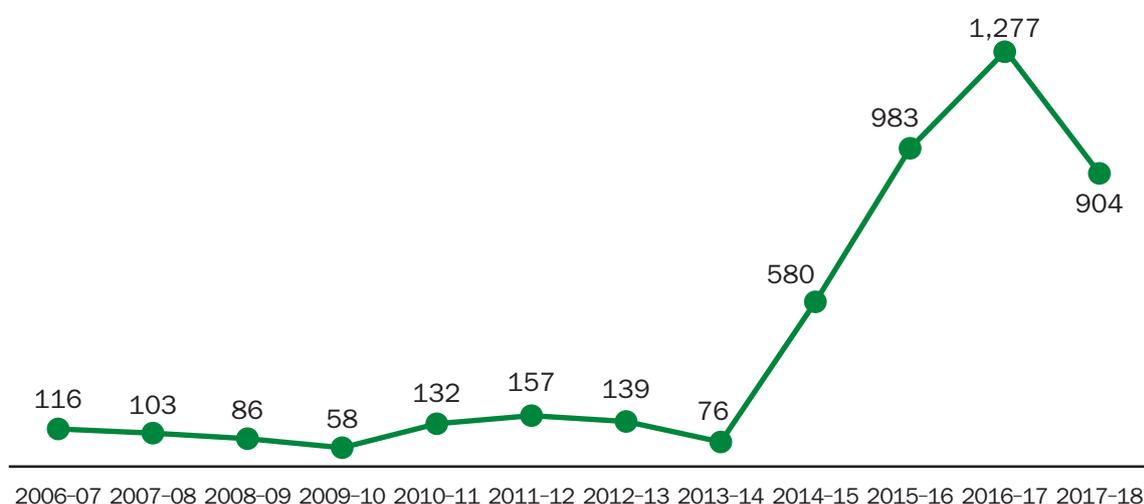
14. Minister for Immigration and Border Protection, *Direction no. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014) [9.3]. For a recent analysis of how immigration courts have assessed individuals' risk of further offending, see Peter Billings, 'Getting Rid of Risky Foreigners: Promoting Community Protection at the Expense of Administrative Justice?' (2019) 47(2) *Federal Law Review* 231.

15. *Migration Act 1958* (Cth) s 500(1)(b). The vast majority of decisions are made by delegates rather than the minister. For instance, in 2017–18, 71 decisions were made personally by the minister while 1,371 decisions were made by a delegate: Department of Home Affairs, *Statistics for Years 2015/16 to 2018/19, for Each Power within Subsections of s501 and s116 of the Migration Act*, FA19/01/00060 (2019).

How many visas are mandatorily cancelled each year?

9. The 2014 legislation had an immediate effect on the number of people having their visas cancelled due to their substantial criminal record. In a 2016 report, the Commonwealth Ombudsman found that the number of visas cancelled pursuant to section 501 of the *Migration Act 1958* (Cth) increased from 76 in 2013–14 to 983 in 2015–16,¹⁶ almost all of which were based on the visa-holder having a substantial criminal record.¹⁷ Subsequent information released by the Department of Home Affairs in response to a freedom of information request shows that the numbers increased again in 2016–17 to 1,277, but then fell in 2017–18 to 904.¹⁸

Figure 1: The number of section 501 visa cancellations, 2006–07 to 2017–18



10. New Zealanders have been disproportionately affected by the new legislation in comparison to non-citizens from other countries. In the two years to March 2018, just over 1,000 New Zealanders had their visas cancelled pursuant to section 501 of the *Migration Act 1958* (Cth).¹⁹ By mid-2018, that number had risen to 1,300, at least 60% of whom identified as Maori or Pacific Islander,²⁰ and by early 2019 it

16. Commonwealth Ombudsman, *The Department of Immigration and Border Protection: The Administration of Section 501 of the Migration Act 1958*, Report no. 08 (2016), 1, 6.

17. Joint Standing Committee on Migration (2019), above n 10, 35.

18. Department of Home Affairs (2019), above n 15. There were also 443 visas cancelled in the first six months of the 2018–19 financial year.

19. Ben Doherty, 'Deporting Offending New Zealanders "Fair and Just", Turnbull Says', *The Guardian* (Australian Edition) 2 March 2018 <<https://www.theguardian.com/australia-news/2018/mar/02/deporting-offending-new-zealanders-fair-and-just-turnbull-says>> at 14 October 2019.

20. Sylvia V. O'Regan, 'Why New Zealand Is Furious about Australia's Deportation Policy', *New York Times*, 3 July 2018 <<https://www.nytimes.com/2018/07/03/world/asia/new-zealand-australia-deportations.html>> at 14 October 2019; Patrick Keyzer and Dave Martin, 'Why New Zealanders Are Feeling the Hard Edge of Australia's Deportation Policy', *The Conversation* (Australian Edition) 12 July 2018 <<https://theconversation.com/why-new-zealanders-are-feeling-the-hard-edge-of-australias-deportation-policy-99447>> at 14 October 2019.

was more than 1,500.²¹ New Zealanders represent less than 10% of the migrant population in Australia, and ‘historically they have not had a strong incentive to take out citizenship because there was no need’.²²

11. The most common types of offences that led to mandatory visa cancellations between January 2014 and February 2016 were violent offences (481 of 1,219 cancelled visas), sex offences (164) and drug offences (148).²³ There were 31 offenders who had their visas cancelled as a result of homicide offences.
12. The jurisdictions with the highest rates of cancelled visas were New South Wales (32%), Queensland (30%), Victoria (18%) and Western Australia (14%). The remaining jurisdictions (Tasmania, South Australia, the Northern Territory and the Australian Capital Territory) collectively accounted for the remaining 6% of visa cancellations.²⁴

The permissible relevance of deportation in sentencing

13. There is no national consensus on whether, and to what extent, an offender’s deportation should be taken into account in sentencing.²⁵ The National Judicial College of Australia has summarised the position of the various Australian jurisdictions (Table 1).²⁶

Table 1: Australian jurisdictions and whether they take an offender’s deportation into account in sentencing

Jurisdiction	Is the risk of deportation a permissible sentencing factor?
VIC	✓
QLD	✓
ACT	✓
TAS	✓
NSW	✗
WA	✗
NT	✗
SA	Unsettled

21. Stephen Dziedzic, ‘Jacinda Ardern Lashes “Corrosive” Deportations from Australia to New Zealand’, *ABC News* (Online), 22 February 2019 <<https://www.abc.net.au/news/2019-02-22/nz-prime-minister-lashes-australias-corrosive-deportations/10839120>> at 14 October 2019.

22. Joint Standing Committee on Migration (2019), above n 10, 59.

23. Commonwealth Ombudsman (2016), above n 16, 7.

24. *Ibid* 8.

25. See for example, Mirko Bagaric, Lidia Xynas and Victoria Lambropoulos, ‘The Irrelevance to Sentencing of (Most) Incidental Hardships Suffered by Offenders’ (2016) 39(1) *UNSW Law Journal* 47.

26. National Judicial College of Australia, ‘Deportation’, *Commonwealth Sentencing Database* (National Judicial College of Australia, 2019) <<https://csd.njca.com.au/deportation2/>> at 14 October 2019.

14. It appears that sentencing courts in Victoria, Queensland, the Australian Capital Territory and Tasmania may all permissibly consider an offender's future deportation as a mitigating factor in sentencing. In comparison, courts in New South Wales, Western Australia and the Northern Territory prohibit deportation from constituting a mitigating factor. The lack of consensus on this issue is not unique to Australia; various jurisdictions in the United States are similarly split about whether deportation can permissibly constitute a mitigating factor in sentencing.²⁷
15. In 2017, the South Australian Supreme Court expressly followed the Victorian and Queensland²⁸ approach of taking deportation into account,²⁹ but it failed to expressly consider – and therefore did not expressly overrule – prior inconsistent case law that followed the approach in New South Wales where deportation is irrelevant to sentencing.³⁰ This conflicting case law is the reason for South Australia's unsettled position. The issue has subsequently been raised for clarification in a number of cases; however, on each occasion the appellate court has disposed of the appeal on alternative grounds without reaching a conclusion on this point.³¹

How often is deportation a relevant consideration?

16. There has been a significant increase in the number of cases in which the issue of deportation has been raised in sentence appeals heard by the Victorian Court of Appeal. In the 2018 calendar year, the Court of Appeal delivered 356 appellate decisions, 172 of which included an appeal against sentence.³² Of those 172 sentence appeals, the possibility that the offender could be deported was raised as a relevant sentencing factor in 25 cases involving 23 unique offenders.³³

27. Francesca Brody, 'Extracting Compassion from Confusion: Sentencing Noncitizens after United States v. Booker' (2011) 79(5) *Fordham Law Review* 2129.

28. See for example, *R v UE* [2016] QCA 58 (11 March 2016) [16] ('The prospect of deportation may affect the impact of a sentence of imprisonment, because it makes the period of incarceration more burdensome, and also because upon release, the fact of imprisonment will result in the offender being deprived of the opportunity of permanent residence in Australia').

29. *R v Zhang* [2017] SASCFC 5 (16 February 2017) [106]–[113].

30. *R v Berlinsky* [2005] SASC 316 (8 September 2005) [27].

31. *R v Leka* [2017] SASCFC 77 (6 July 2017); *R v Taheri* [2017] SASCFC 115 (8 September 2017); *R v Arrowsmith* [2018] SASCFC 47 (7 June 2018).

32. Data is based on a search of AustLII for all reported Court of Appeal decisions in 2018 and an identification of how many of those decisions involved an appeal against sentence.

33. *Jones v the Queen* [2018] VSCA 11 (2 February 2018); *Teoh v the Queen* [2018] VSCA 27 (19 February 2018); *Zhao v the Queen* [2018] VSCA 28 (19 February 2018); *Director of Public Prosecutions v Tewksbury (A Pseudonym)* [2018] VSCA 38 (27 February 2018); *Lord v the Queen* [2018] VSCA 52 (7 March 2018); *Director of Public Prosecutions v L'Eveille* [2018] VSCA 60 (19 March 2018); *Khan v the Queen* [2018] VSCA 61 (19 March 2018); *Hoang v the Queen* [2018] VSCA 86 (9 April 2018); *Schanker v the Queen* [2018] VSCA 94 (18 April 2018); *Tran v the Queen* [2018] VSCA 107 (1 May 2018); *Rosales (A Pseudonym) v the Queen* [2018] VSCA 130 (18 May 2018); *Arico v the Queen* [2018] VSCA 135 (24 May 2018); *Mitchell v the Queen* [2018] VSCA 158 (21 June 2018); *Finley v the Queen* [2018] VSCA 202 (6 August 2018); *Apineru & Ors v the Queen* [2018] VSCA 206

One in every seven sentence appeals heard by the Court of Appeal involved an offender who faced cancellation of their visa and consequent deportation.

17. At the completion of their sentence, offenders would be deported to countries including Italy, the United Kingdom, New Zealand, Malaysia, China, Vietnam, Pakistan, Lebanon, Mauritius, South Sudan, Ethiopia, Sierra Leone and Burma. Offenders were most often citizens of New Zealand (five of the 23 offenders) and Vietnam (four offenders).

Deportation as a mitigating factor

18. An offender's possible deportation could potentially constitute a mitigating factor in sentencing in four ways:³⁴
 - A** the offender's future deportation can be considered an extra-curial form of punishment;
 - B** the offender's time in prison may be more burdensome than it is for others due to anxiety about the prospect of their future deportation;
 - C** the offender may have reduced prospects of being granted parole because the Adult Parole Board may not grant parole to offenders who face deportation upon release from prison; and
 - D** the offender's time in prison may be more burdensome than it is for others due to anxiety about their reduced prospects of being granted parole.³⁵
19. The first and third of these are premised on an external fact (deportation and reduced prospects of parole). However, the second and fourth relate to the effect of those facts on the offender's time in prison in that the prospects of deportation and not being eligible for parole might make their time in prison more difficult than it is for others.

(15 August 2018); *Guode v the Queen* [2018] VSCA 205 (16 August 2018); *McLean v the Queen* [2018] VSCA 209 (24 August 2018); *Wan v the Queen* [2018] VSCA 217 (28 August 2018); *Allouch v the Queen* [2018] VSCA 244 (24 September 2018); *Zhao v the Queen* [2018] VSCA 267 (24 October 2018); *Henson (A Pseudonym) v the Queen* [2018] VSCA 283 (7 November 2018); *Woldesilassie v the Queen* [2018] VSCA 285 (9 November 2018); *Ah-Kau and Another v the Queen* [2018] VSCA 296 (14 November 2018); *Pham v the Queen* [2018] VSCA 308 (21 November 2018); *Le v the Queen* [2018] VSCA 309 (21 November 2018); *Nguyen and Another v the Queen* [2018] VSCA 322 (4 December 2018). There were two decisions each in relation to Zhao and Pham: the first was to grant or refuse leave to appeal, and the second was the substantive appeal.

34. The Court of Appeal alluded to the first two of these in the seminal case of *Guden v The Queen*, stating that 'the prospect of deportation is a factor which may bear on the impact which a sentence of imprisonment will have on the offender, both during the currency of the incarceration and upon his/her release': *Guden v The Queen* [2010] VSCA 196 (6 August 2010) [25].
35. One offender also attempted to argue that his deportation meant that he could not be a risk to the community in the future, but abandoned that argument on appeal: *Hoang v The Queen* [2018] VSCA 86 (9 April 2018) n 3.

A. Deportation as extra-curial punishment

20. The most common basis on which offenders argue that their future deportation should be classified as a mitigating factor in sentencing is that being deported constitutes an extra-curial form of punishment. In particular, courts often take into account that deportation may separate the offender from their family and friends, and that it will deprive them of the ‘opportunity of settling permanently in Australia’.³⁶
21. Three issues arise in this context:
- a. the likelihood of the offender’s future deportation;
 - b. the relevance of the offender’s ties to both Australia and their country of citizenship; and
 - c. the relevance of an imprisonment sentence over the 12-month threshold triggering the automatic cancellation of the offender’s visa.

Likelihood of deportation

22. According to a 2016 report by the Commonwealth Ombudsman, approximately 66% of people whose visa has been cancelled pursuant to section 501 of the *Migration Act 1958* (Cth) made a request for the minister to overturn that cancellation (805 of 1,219).³⁷ Most had not been finalised (78% or 627), but of the finalised applications, 73 were successful and 105 were unsuccessful.³⁸
23. More recent data would seem to confirm this early finding, albeit with a slightly higher rate of applications to overturn the visa cancellation and a slightly lower rate of success. In 2016–17, 78% of ‘foreign nationals whose visas were subject to mandatory cancellation sought revocation of the decision’.³⁹ Of the 794 requests that were finalised in 2017, 40% were successful (320) and 60% were unsuccessful, withdrawn or invalid (474).⁴⁰ Similarly, of the 645 requests that were finalised in 2018, 34% were successful (217) and 66% were unsuccessful, withdrawn or invalid (428).⁴¹
24. It therefore appears that most offenders who have their visa mandatorily cancelled apply to overturn that cancellation, and the success rates in those applications has ranged from 34% to 41%.

36. See for example, *Ah-Kau and Another v The Queen* [2018] VSCA 296 (14 November 2018) [24].

37. Commonwealth Ombudsman (2016), above n 16, 6.

38. *Ibid.*

39. Joint Standing Committee on Migration (2019), above n 10, 29.

40. Australian Human Rights Commission, *Review Processes Associated with Visa Cancellations Made on Criminal Grounds*, Submission to the Joint Standing Committee on Migration (2018) 30.

41. Department of Home Affairs, ‘Visa Statistics’ (homeaffairs.gov.au, 2019) <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>> at 14 October 2019.

25. It is perhaps for this reason that the Court of Appeal has confirmed that the changes to the federal legislation do not render visa cancellation a guaranteed outcome:
- [A]lthough it may be said with some confidence that the visa of an offender in the applicant's position will be cancelled, it cannot be assumed that the Minister will not revoke the original decision to do so ... the amendments do not require any change to the approach in sentencing.⁴²
26. Indeed, the Court of Appeal appears to be appropriately taking into account the unique facts of each case and each individual offender's prospects of overturning their automatic visa cancellation. In 2018, the Court of Appeal classified the likelihood of various offenders' deportation as a result of automatic visa cancellation as inevitable or definite,⁴³ probable,⁴⁴ likely,⁴⁵ possible⁴⁶ and uncertain.⁴⁷
27. The difficulty that sentencing courts face is how they should assess the prospects of a particular offender having their visa cancellation overturned. Lawyers and judges experienced in criminal law are not necessarily equally experienced in administrative law. Should sentencing courts effectively step into the shoes of an administrative decision-maker and assess how the considerations in the relevant Ministerial Direction might be applied?⁴⁸
28. Whatever approach is taken, the Court of Appeal has, on numerous occasions, commented on how important it is that sentencing courts are provided with evidence, where available, on which to base its assessment.⁴⁹

42. *Konamala v The Queen* [2016] VSCA 48 (21 March 2016) [35]–[36].

43. *Rosales (A Pseudonym) v The Queen* [2018] VSCA 130 (18 May 2018) [14]; *Le v The Queen* [2018] VSCA 309 (21 November 2018) [14] ('will be deported'); *Ah-Kau and Another v The Queen* [2018] VSCA 296 (14 November 2018) [24] ('will be deported'). The Court of Appeal has similarly classified the prospect of deportation as 'clear' and 'probable or near certain': *Wan v The Queen* [2018] VSCA 217 (28 August 2018) [19]; *Arico v The Queen* [2018] VSCA 135 (24 May 2018) [319].

44. *Guode v The Queen* [2018] VSCA 205 (16 August 2018) [42].

45. *Henson (A Pseudonym) v The Queen* [2018] VSCA 283 (7 November 2018) [47].

46. *Pham v The Queen* [2018] VSCA 308 (21 November 2018) [11]–[12] (the court referred to 'the prospect of deportation', rather than certainty, on the basis that the minister may overturn the automatic visa cancellation).

47. *Khan v The Queen* [2018] VSCA 61 (19 March 2018) [26]; *Woldesilassie v The Queen* [2018] VSCA 285 (9 November 2018) [20]. See also *Director of Public Prosecutions v Za Lian and Another* [2019] VSCA 75 (8 April 2019) [108] ('the prospect – the likelihood of which cannot, at this time, be determined – that they will ultimately be deported...').

48. Minister for Immigration and Border Protection, *Direction no. 65 under Section 499 of the Migration Act 1958 – Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (22 December 2014). It is also worth noting the efficiency and resourcing issues inherent in asking sentencing courts to undertake what may be complex qualitative assessments of an offender's likelihood of deportation.

49. See for example, *Guden v The Queen* [2010] VSCA 196 (6 August 2010) [29]; *HAT v The Queen* [2011] VSCA 427 (20 December 2011) [126]; *Allouch v The Queen* [2018] VSCA 244 (24 September 2018) [41]; ('the failure to inform the sentencing judge of the applicant's immigration status was not a deliberate decision, knowingly taken. It appears to have been the result of ignorance on the part

As the Supreme Court recently stated in *Director of Public Prosecutions v Jensen*:

Although the prospect of deportation has been recognised by our Court of Appeal as potentially relevant to sentencing ... there must be a proper evidentiary basis for the sentencing court to act on or there must be an appropriate concession by the prosecution.⁵⁰

29. If sentencing courts do make an assessment of an offender's prospects of deportation, this creates the possible risk of penalising offenders who are proactive in applying to retain their visa or who are honest about their intentions to do so. For example, one offender in South Australia applied to have his visa cancellation overturned before his sentence appeal had been finalised. Because that request had not been finalised at the time of the sentence appeal, the court refused to 'speculate about a decision that [was] still to be made',⁵¹ and therefore refused to give his potential future deportation as much weight as it might have, had the offender not yet made the application.
30. To overcome that particular issue, the Queensland Court of Appeal has established a common law presumption that if deportation truly is a hardship for an offender, then it is 'inevitable' that they will make an 'application for revocation of the cancellation of [their] visa', and that, as a result, their deportation is by no means certain.⁵² Similarly, in a recent Victorian Supreme Court decision, Beale J was informed that the offender would 'not be contesting the cancellation of [his] visa', but Beale J refused to consider the matter settled, stating that '[w]hether you will maintain that attitude remains to be seen'.⁵³

Issue 1 for clarification

If sentencing courts are to assess the prospects of an offender's deportation, what test should courts apply in making that assessment?

of the applicant's legal representatives as to the potential importance of such evidence'); *Zhao v The Queen* [2018] VSCA 267 (24 October 2018) [71] ('It should be noted that we were not provided with any information as to what would happen to the appellant should he in fact be granted parole'); *Lofuts v The Queen* [2019] VSCA 24 (19 February 2019) [66]–[67], [70]; *Magedi v The Queen* [2019] VSCA 102 (13 May 2019) [43], [47] ('It is common ground that [the appellant's] 'immigration status' was not raised before the sentencing judge ... the prospect of deportation should only lead to a lesser sentence where there was sufficient evidence of both the risk of deportation and the impact of that risk'); *Sahhitanandan v The Queen* [2019] VSCA 115 (29 May 2019) [39] ('Sentencing judges, and this Court, are entitled to expect full submissions as to the legal position concerning an offender whose sentence depends partly on immigration matters, as well as evidence where relevant as to the nature and circumstances of detention').

50. *Director of Public Prosecutions v Jensen* [2019] VSC 327 (17 May 2019) [51].

51. *R v Arrowsmith* [2018] SASFC 47 (7 June 2018) [38].

52. *R v Schelvis and Another* [2016] QCA 294 (15 November 2016) [77].

53. *Director of Public Prosecutions v Jensen* [2019] VSC 327 (17 May 2019) [50].

31. In this context of the certainty or uncertainty of an offender's future deportation, a further issue is the extent to which confirmation of visa cancellation might constitute 'fresh evidence'⁵⁴ and might provide a basis for a possible sentence appeal.⁵⁵
32. In *Tran v The Queen*,⁵⁶ the offender appealed his sentence on a number of grounds, one of which was that he had received formal notice of the cancellation of his visa and that this constituted fresh evidence. The Court of Appeal disagreed, reasoning that because the relevant provisions requiring automatic cancellation were in effect at the time, the formal notice of the offender's visa was simply an administrative step in a predictable process:
- The relevant provisions of the *Migration Act 1958* were in force at the time of sentencing. All that has occurred since sentencing is that a mandatory cancellation power, the existence of which was not unknown at the time of sentencing, has been exercised.⁵⁷
33. In contrast, in *Zhao v The Queen*⁵⁸ a ground of appeal was that the appellant had received confirmation that his student visa had been cancelled and no application had been made to have that decision revoked, and the Court of Appeal accepted, on a concession by the prosecution, that this constituted fresh evidence that vitiated the original sentence and reopened the sentencing discretion.⁵⁹

Issue 2 for clarification

May any of the following permissibly constitute 'fresh evidence' on which an offender may base a sentence appeal?

1. initial correspondence advising the offender that their visa has been mandatorily cancelled (including the passing of the 28-day period during which an application must be made to overturn that cancellation);
2. subsequent correspondence advising the offender that their application to overturn their visa cancellation has been unsuccessful; and/or
3. confirmation that the offender has been unsuccessful in an application for administrative review of the decision not to overturn their visa cancellation.

54. On the circumstances in which fresh evidence may appropriately found a sentence appeal, see *Nguyen v The Queen* [2006] VSCA 184 (8 September 2006) [36].

55. This is distinct from the argument raised by some offenders immediately after the *Migration Act 1958* (Cth) was amended in 2014, that the new legislation constituted 'fresh evidence' about their likely prospects of deportation: *Konamala v The Queen* [2016] VSCA 48 (21 March 2016); *Nguyen v The Queen* [2016] VSCA 198 (11 August 2016); *Da Costa Junior v The Queen* [2016] VSCA 49 (21 March 2016).

56. *Tran v The Queen* [2018] VSCA 107 (1 May 2018).

57. *Tran v The Queen* [2018] VSCA 107 (1 May 2018) [52]–[53].

58. *Zhao v The Queen* [2018] VSCA 267 (24 October 2018).

59. *Zhao v The Queen* [2018] VSCA 267 (24 October 2018) [72]–[73], [80].

Ties to Australia and country of citizenship

34. The punitive effect of deportation tends to vary depending on the offender's connection with both Australia and their country of citizenship.⁶⁰ For offenders who have lived in Australia for many years, often since childhood, and who have significant familial and community connections, deportation is considered to be particularly difficult. In *Guode v The Queen*:

[I]t might be expected that the applicant will do her time 'hard', given that ... she will likely spend her time incarcerated in the expectation that she will ultimately be deported (obliterating any hope of building a life in this country and forcing a separation from her surviving children).⁶¹

In *Magedi v The Queen*:

He has no family in Afghanistan, having been aged three when he fled that country. If he were returned to Afghanistan, he would have no documentation, and would not be able to work. He would not be able to speak the local language.⁶²

In *Apineru & Ors v The Queen*:

[H]is mother is in Samoa, he has never met his father, and his remaining family all reside in Australia.⁶³

35. In comparison, the mitigating effect of deportation is significantly reduced for offenders who have more moderate, even tenuous, ties with Australia. In *Director of Public Prosecutions v Tewksbury (A Pseudonym)*:

The judge was also right to take into account the hardship caused to the respondent by the risk that he will be deported to New Zealand after his release from prison, but to moderate the weight to be given to this factor due to the fact that the respondent had lived in New Zealand for a significant period, continued to have family connections in that country and no longer has strong family ties in Australia.⁶⁴

In *Director of Public Prosecutions v Wan* and *Wan v The Queen*:

The materials tendered on your plea demonstrate that you had intended, when you finished your studies at RMIT, to return to China and to marry your girlfriend there. Thus, the deportation of you may not be as punitive to you as it is in the case of other persons who are convicted and deported.⁶⁵

It was clear that at the completion of his sentence he would be deported back to China. As it had always been his intention to return to that country, the prospect of deportation carried less weight than it might otherwise have done.⁶⁶

60. Note that this only applies in the context of *lawful* non-citizens who are sentenced while in Australia. Non-citizens who are in Australia unlawfully are generally not entitled to mitigation as a result of any future deportation: *Nguyen v The Queen* [2019] VSCA 134 (17 June 2019) [18], [22], [41].

61. *Guode v The Queen* [2018] VSCA 205 (16 August 2018) [70].

62. *Magedi v The Queen* [2019] VSCA 102 (13 May 2019) [28].

63. *Apineru & Ors v The Queen* [2018] VSCA 206 (15 August 2018) [44] (this was an argument made by defence counsel, but it appears to have been accepted by the court).

64. *Director of Public Prosecutions v Tewksbury (A Pseudonym)* [2018] VSCA 38 (27 February 2018) [96]. See also *Director of Public Prosecutions (Cth) v Peng* [2014] VSCA 128 (20 June 2014).

65. *Director of Public Prosecutions v Wan* [2018] VSC 195 (30 April 2018) [40].

66. *Wan v The Queen* [2018] VSCA 217 (28 August 2018) [19].

In *Konamala v The Queen*:

It is an unhappy fact that many offenders come to this country for the sole purpose of criminal activity. They have no interest in making Australia their home. For offenders such as those, deportation to their country of origin may impose no burden upon them at all. Indeed, deportation might be something of a blessing, particularly where language or culture have caused them to be isolated.⁶⁷

36. This delineation, between offenders with strong ties to Australia and those with less strong ties, is consistent with the approach taken in all Australian jurisdictions where deportation is a relevant sentencing factor.⁶⁸

Sentence reduction to avoid deportation

37. In *Allouch v The Queen*,⁶⁹ the offender had been sentenced to a total effective sentence of 12 months' imprisonment, with a non-parole period of six months, for a number of dishonesty offences.⁷⁰ He appealed his sentence on a number of grounds. During the appeal proceedings, his legal representatives became aware that he was a non-citizen and amended the appeal grounds to argue that this constituted fresh evidence that should mitigate his sentence.
38. The court was wary of admitting this new fact because courts may generally only accept fresh evidence 'if it is evidence of which the accused was unaware at the time of his trial and it is evidence which he could not have discovered with reasonable diligence'.⁷¹ While the offender seemed to misunderstand his legal status, having told his legal representatives during the original plea hearing that he was a 'permanent citizen', the court found it 'difficult to see how it can be said that he could not, with reasonable diligence, have discovered his true position'.⁷² Therefore, rather than treat the offender's risk of deportation as 'fresh evidence', the court instead exercised its discretion to admit it as additional evidence in the interests of justice.⁷³

67. *Konamala v The Queen* [2016] VSCA 48 (21 March 2016) [34].

68. See for example, *R v Aniezue* [2016] ACTSC 82 (11 April 2016) [68]; *R v UE* [2016] QCA 58 (11 March 2016) [21].

69. *Allouch v The Queen* [2018] VSCA 244 (24 September 2018).

70. Courts sentencing an offender to a term of imprisonment of between one year and less than two years have discretion to impose a non-parole period; a lesser sentence may not have a non-parole period, and a harsher sentence must have one: *Sentencing Act 1991* (Vic) s 11.

71. *Lawless v The Queen* [1979] HCA 49 (12 October 1979) [2]; see also *Ratten v R* [1974] HCA 35 (25 September 1974).

72. *Allouch v The Queen* [2018] VSCA 244 (24 September 2018) [46].

73. The court cited as authority *Betts v The Queen* [2016] HCA 25 (15 June 2016) [2] ('an appellate court has the flexibility to receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice').

39. It was not clear, however, what the miscarriage of justice would have been: the general failure to consider the offender's risk of deportation because of his seemingly honest mistake or, more specifically, that the sentence would trigger the automatic cancellation of his visa. In other words, it was not clear whether courts could permissibly alter a sentence that would otherwise be appropriate in order to avoid the automatic cancellation of the offender's visa.
40. The Court of Appeal later clarified this point. In *Loftus v The Queen*,⁷⁴ the court specifically held (albeit in *obiter*) that '[i]t would be an error for the sentencing judge to impose a sentence, that would otherwise not be appropriate, for the purpose of avoiding the operation of the *Migration Act*'.⁷⁵

B. Prospect of future deportation making prison more burdensome

41. The second way deportation might constitute a mitigating factor is by rendering the offender's time in prison more burdensome because of their anxiety about, or expectation of, being deported upon release. As the Court of Appeal stated in *Guden v The Queen*:

[T]he fact that an offender will serve his/her term of imprisonment in expectation of being deported following release may well mean that the burden of imprisonment will be greater for that person than for someone who faces no such risk.⁷⁶

42. *Guden v The Queen* was the first time that the Court of Appeal had confirmed that sentencing courts may permissibly take into account that an offender's anxiety over their prospects of being deported might render their time in prison more burdensome, so long as there is a proper evidentiary basis for doing so.⁷⁷ This is distinct from other characteristics of offenders who face deportation that might make their imprisonment experience a more anxious one. They may, for example, have language difficulties,⁷⁸ or they may be less likely to have friends or family that will visit them.⁷⁹ Instead, it adds to the list of factors that courts may consider as rendering an offender's time in prison more burdensome, such as being a police officer, being placed in protective custody or being of ill-health.⁸⁰

74. *Loftus v The Queen* [2019] VSCA 24 (19 February 2019).

75. *Loftus v The Queen* [2019] VSCA 24 (19 February 2019) [81].

76. *Guden v The Queen* [2010] VSCA 196 (6 August 2010) [27].

77. *Guden v The Queen* [2010] VSCA 196 (6 August 2010) [26]; *Director of Public Prosecutions v Jensen* [2019] VSC 327 (17 May 2019) [51].

78. See for example, *R v Manh* [2007] VSC 136 (4 May 2007).

79. See for example, *R v Pahwa* [2008] VSC 619 (4 December 2008) [18]; *Director of Public Prosecutions v Gundmundsdson* [2019] VCC 1000 (3 July 2019) [57].

80. Judicial College of Victoria, '33.9.8 – Hardship to Offender', *Victorian Sentencing Manual* (Judicial College of Victoria, 2019) <<http://www.judicialcollege.vic.edu.au/eManuals/VSM/10469.htm>> at 14 October 2019.

C. Reduced prospects of parole

43. For a number of years, the above two considerations – deportation as an extra-curial form of punishment and the effect of prospective deportation on a person’s experience of prison – were the only bases on which a court could mitigate an offender’s sentence as a result of the prospect of deportation.⁸¹ However, offenders have recently begun arguing that the cancellation of their visa also means that they will probably not be granted parole when they become eligible, because they will in all likelihood be held in immigration detention for deportation upon release.
44. Ordinarily, this would not be a permissible sentencing consideration. Section 5(2AA) of the *Sentencing Act 1991* (Vic) provides as follows:
- (2AA) Despite anything to the contrary in this Act, in sentencing an offender a court must not have regard to—
- (a) any possibility or likelihood that the length of time actually spent in custody by the offender will be affected by executive action of any kind[.]
45. The Court of Appeal has consistently interpreted this provision as meaning that a sentencing court may not have regard to any decision that a parole board may make in relation to an offender.⁸² If the offender is being sentenced for an offence that they committed while on parole, the court may not take into account the possibility that the Parole Board will activate the remainder of their previous sentence⁸³ (the court may, though, reopen the sentencing discretion for that later offending if the Parole Board does actually go on to cancel the offender’s parole⁸⁴). Similarly, a court must not sentence an offender ‘on the basis that [they probably] would be granted parole’ at some stage before the expiry of their total effective sentence.⁸⁵ Most relevantly to the present context, a court must not sentence an offender on the basis that the Parole Board is unlikely to grant parole to someone who, if released, would be placed in immigration detention for deportation.⁸⁶

81. *Da Costa Junior v The Queen* [2016] VSCA 49 (21 March 2016) [24] (‘the prospect of deportation was capable of bearing upon the sentencing decision in two distinct ways’); *Loftus v The Queen* [2019] VSCA 24 (19 February 2019) [65]; *Magedi v The Queen* [2019] VSCA 102 (13 May 2019) [47].

82. The provision is also consistent with previous common law authority on the issue, such that the nationality of an offender was not a permissible consideration in determining whether a sentencing court should allow for a period of parole eligibility at some point in the sentence: *R v Shrestha* [1991] HCA 26 (20 June 1991) [10] (per Deane, Dawson and Toohey JJ); *R v Binder* [1990] VR 563 (11 August 1989) 569–570.

83. *R v Piacentino and Another* [2007] VSCA 49 (23 March 2007); *Director of Public Prosecutions v Dickson* [2011] VSCA 222 (10 August 2011); *R v Alashkar and Another* [2007] VSCA 182 (6 September 2007).

84. *Arnautovic v The Queen* [2012] VSCA 112 (14 June 2012).

85. *Strangio v The Queen (No 2)* [2017] VSCA 6 (25 January 2017) [15]; *Gianello v The Queen* [2015] VSCA 205 (5 August 2015) [34]; *Manariti v The Queen* [2015] VSCA 160 (23 June 2015); *R v Hunter* [2006] VSCA 129 (21 June 2006) [29].

86. *Wan v The Queen* [2019] VSCA 81 (11 April 2019) [32].

46. In the recent case of *Zhao v The Queen*,⁸⁷ the appellant argued that a recent change in the practice of the Adult Parole Board meant that he was unlikely to be granted parole and that this should be taken into account in sentencing:

It was submitted in support of this proposed ground that the evidence concerned the recent change in practice, on the part of the Parole Board, making it less likely that parole will be granted for anyone subject to deportation, was a matter that should be taken into account. At the very least, the knowledge that there was little, if any, likelihood that the appellant would be granted parole, meaning that there was a high probability that he would have to serve his entire total effective sentence, would itself make his term of imprisonment more burdensome. It was submitted that this should now be taken into account, both as vitiating the original sentence, and by this Court in the event of any resentencing.⁸⁸

47. In support of that argument, the appellant tendered the following email from the Adult Parole Board:

Recently, due to a range of issues, the Board has reviewed its decision-making process on deportation for prisoners with a parole period. The difficulty in monitoring prisoners placed in immigration centres or overseas are some of the reasons why the Board has reviewed its decision-making for deportation ... While every matter is considered on its merits, the Board is now less inclined to grant parole to a prisoner who is to be deported on release from prison. There have, nevertheless, been occasions when, in the circumstances presented to it, the Board has granted parole knowing the prisoner will be deported on release from prison.⁸⁹

48. This represented a significant shift in the Parole Board's practice: 'Prior to 2017, in cases where a prisoner was subject to deportation, it was common for the Board to grant parole on or soon after the expiry of the prisoner's non-parole period'.⁹⁰
49. The court did not, however, appear to address the appellant's argument in this regard; the court upheld the appellant's sentence appeal for other reasons. Importantly, though, the offender did not limit his argument to suggesting that his reduced prospects of parole should be taken into account. He also (or instead) argued that those reduced prospects of parole would render his time in prison more burdensome.

87. *Zhao v The Queen* [2018] VSCA 267 (24 October 2018).

88. *Zhao v The Queen* [2018] VSCA 267 (24 October 2018) [70].

89. *Zhao v The Queen* [2018] VSCA 267 (24 October 2018) [62].

90. *Zhao v The Queen* [2018] VSCA 267 (24 October 2018) [63], citing Adult Parole Board of Victoria, *Parole Manual* (2018) 34–35.

D. Knowledge of reduced prospects of parole making prison more burdensome

50. That issue emerged again for more detailed consideration in *Wan v The Queen*,⁹¹ in which the offender was convicted of manslaughter. The sentencing judge took into account the likelihood that the offender would be deported upon release from prison. That factor was not, however, given significant weight because the offender had intended to return to China after completing his studies.⁹² After being sentenced, he unsuccessfully applied for leave to appeal his sentence on the basis that it was manifestly excessive.⁹³

51. One of the offender's arguments on appeal was that:

[T]he current practice of the Adult Parole Board 'appears to be not to grant parole to those awaiting deportation' ... [and the] uncertainty as to whether or not the applicant would be eligible for parole as a result of his expected deportation upon release put him in a special position of 'uncertain suspense', or anxiety, as to his anticipated date of release, which would make imprisonment more burdensome.⁹⁴

52. The Court of Appeal described the potential relevance of the Parole Board's new practice to sentencing to be 'a vexed question'.⁹⁵ Although the court did not reach a final decision on the issue, it was willing to 'assume ... that taking account of such anxiety, and the fact that it may make prison more burdensome for the applicant than for another prisoner not similarly subject to deportation, would not infringe s 5(2AA)(a)'.⁹⁶

53. Despite that assumption, the court refused to take the offender's possible anxiety (about probably not being eligible for parole) into account for a number of reasons. First, 'the evidentiary basis for the submission [was] lacking'.⁹⁷ There was no evidence before the court to show that the current attitude of the Parole Board would in fact render the offender's prospects of parole 'highly unlikely' nor demonstrate the offender's state of mind in this regard. The court did not make reference to the email outlining the Parole Board's practice in *Zhao v The Queen* nor the guidelines outlined in the Parole Manual, which is publicly available online. This may be because neither of the parties drew these resources to the court's attention. The Parole Manual states that:

In considering parole for a prisoner who is subject to deportation, the Board needs also to have regard to the following factors.

91. *Director of Public Prosecutions v Wan* [2018] VSC 195 (30 April 2018).

92. *Director of Public Prosecutions v Wan* [2018] VSC 195 (30 April 2018) [40].

93. *Wan v The Queen* [2018] VSCA 217 (28 August 2018); *Wan v The Queen* [2019] VSCA 81 (11 April 2019).

94. *Wan v The Queen* [2019] VSCA 81 (11 April 2019) [25], [28].

95. *Wan v The Queen* [2019] VSCA 81 (11 April 2019) [28].

96. *Wan v The Queen* [2019] VSCA 81 (11 April 2019) [32].

97. *Wan v The Queen* [2019] VSCA 81 (11 April 2019) [28].

- Whether the prisoner is seeking to overturn the cancellation of their visa or to challenge their removal from Australia. The Board will ordinarily avoid paroling such a prisoner until they have exhausted any such challenges. This is because if the Board were to parole such a prisoner, they would go into Federal immigration detention pending the resolution of their matter. While in Federal immigration detention an unlawful noncitizen is in practice unable to comply with the ordinary requirements of parole and may be moved to a facility outside Victoria and hence outside the Board's jurisdiction.

...

- ... To mitigate this potential disparity [between the more favourable position of a prisoner who is deported on release not being subject to parole conditions once they leave Australia, and the less favourable position of being denied parole because they are subject to removal such that parole is not feasible] ... the Board may decide to release a prisoner who is subject to deportation at a later point in his or her potential parole period than may have been the case if the prisoner was not subject to deportation.⁹⁸

54. Prisoners subject to deportation who have not yet exhausted all their avenues for challenging the cancellation of their visa are therefore less likely to be granted parole than those who are not subject to deportation. And if they are granted parole, it may be much later in their period of eligibility for parole than for other prisoners.
55. Second, even if there were evidence about the Parole Board's practice, there was 'no evidence' that the offender considered his position uncertain or that any such uncertainty made him anxious.⁹⁹ Third, the court also stated that even if there were evidence of anxiety, there was no basis on which to treat a prisoner differently because they faced reduced prospects of parole due to prospective deportation as other prisoners face reduced or uncertain prospects of parole but for other reasons.¹⁰⁰
56. The court in *Wan v The Queen* therefore took a narrow approach to the potential relevance of the Parole Board's new practice on an offender's time in prison. There would need to be evidence that the Parole Board's practice or guidelines would render an offender unlikely to be granted parole when they become eligible, evidence that the offender was anxious about the prospect of serving all (or most) of their prison sentence, and a good argument as to why a deportee's low prospects of parole render their prison experience any more burdensome than other offenders with low prospects of parole.
57. Despite this narrow approach, however, the possibility remains that an offender with proper evidence and submissions could potentially argue that their anxiety about not being granted parole could render their time in prison more burdensome. That raises a question that the court did not address: If section 5(2AA)(a) of the *Sentencing Act 1991* (Vic) prohibits a sentencing court from having regard to an

98. Adult Parole Board of Victoria (2018), above n 90, 34–35.

99. *Wan v The Queen* [2019] VSCA 81 (11 April 2019) [34].

100. *Wan v The Queen* [2019] VSCA 81 (11 April 2019) [34].

offender's prospects of parole, then on what basis may a court take into account the effect of an offender's prospects of parole (an impermissible consideration) on the offender's time in prison?

Issue 3 for clarification

In light of section 5(2AA)(a), and assuming that there is evidence of:

1. the offender being unlikely to be granted parole (or if they are granted parole, that it may be later in their parole period than other prisoners);
2. the offender's uncertainty about being granted parole; and
3. the offender's anxiety about that uncertainty –

May sentencing courts permissibly take that anxiety into account as a mitigating factor by virtue of it rendering the offender's time in prison more burdensome (and if so, on what basis)?

Concluding remarks

58. This review has identified that deportation is an increasingly relevant factor for consideration during sentencing, both at first instance and on appeal. There is no national consensus about what role deportation should play in that context; in addition, there appear to be a number of issues that could benefit from some clarity in Victoria specifically, including:

- how courts should approach their assessment of the prospects of deportation for an offender whose visa will be mandatorily cancelled as a result of the sentence imposed;
- the circumstances, if any, in which decisions relating to an offender's deportation might constitute 'fresh evidence' on which to base a sentence appeal; and
- the circumstances, if any, in which an offender's reduced prospects of parole will render their time in prison more burdensome and constitute a mitigating factor.

59. Above and beyond these issues, however, the most apparent challenge that Victorian courts face is that they are being asked to make decisions that take account of an offender's deportation with limited submissions from counsel on the likelihood of that deportation, and the likely effect of the prospects of deportation on the offender's time in prison. As stated in numerous cases,¹⁰¹ courts may be assisted by being provided with further materials on these matters, where such information can be obtained.

101. See above n 49.

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