

**‘AN “ALIEN” BY THE BAREST OF THREADS’* —
THE LEGALITY OF THE DEPORTATION OF
LONG-TERM RESIDENTS FROM AUSTRALIA**

MICHELLE FOSTER[†]

[The banishment of long-term permanent residents from Australia following criminal conviction is a controversial practice, yet one that has been increasingly employed by the Australian government in recent years. This article assesses the legality of this practice both in terms of domestic and international law. The article first considers the history of both constitutional doctrine and legislative developments in this area, explaining how it is that the Commonwealth can lawfully engage in the deportation of Australian residents who are citizens but for ‘the barest of technicalities’. In the latter half of the article, the analysis turns to consider the international law context to this issue, with particular focus on the extent to which the advent of international human rights law has curtailed states’ plenary power in this arena. The article concludes that the deportation of long-term residents implicates a number of Australia’s key international obligations and thus makes recommendations for urgent reform of the Migration Act 1958 (Cth).]

CONTENTS

I	Introduction.....	484
II	The Deportation of Long-Term Residents from Australia: Constitutional Background.....	489
III	The Deportation of Long-Term Residents from Australia: Legislative Background.....	503
	A Legislative History: Deportation.....	504
	B Legislative History: The Character Test.....	507
	C Administration of Sections 200, 201 and 501 in Practice.....	511
IV	International Law and the Deportation of Long-Term Residents.....	514
	A Right to ‘One’s Own Country’.....	515
	B Right to Life and Protection from Cruel, Inhuman or Degrading Treatment.....	527
	C The Principle of <i>Ne Bis in Idem</i>	531
	D Right to Family Life.....	534
	E Administrative Review.....	538
V	Conclusion.....	540

* *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, 422 (Moore and Gyles JJ) (*‘Nystrom (Full Court)’*).

[†] BCom (Hons), LLB (UNSW), LLM, SJD (Mich); Senior Lecturer and Director, Research Programme in International Refugee Law, Institute for International Law and the Humanities, Melbourne Law School, The University of Melbourne. I am greatly indebted to Anne Kallies for extensive and excellent research assistance in the preparation of this article. I am also grateful for the very helpful and efficient research assistance of Kat Brazenor and Nawaar Hassan. Thanks are also due to Mary Crock and to the anonymous referees who provided thoughtful and very helpful comments on an earlier draft. Any errors remain my own. The research for this article was supported by a University of Melbourne Early Career Researcher Grant.

I INTRODUCTION

On 12 August 2004, the Commonwealth Minister for Immigration cancelled the permanent visa of Mr Stefan Nystrom — a 31-year-old man who had lived in Australia since he was 27 days old — on the basis that his criminal record rendered him incapable of satisfying the ‘character’ test in the *Migration Act 1958* (Cth) (*‘Migration Act’*).¹ The cancellation subjected him to indefinite executive detention pending removal² and, more significantly, to permanent banishment from Australia³ and deportation to Sweden — his country of birth, which he had not visited since leaving to settle in Australia with his family on 27 January 1974.⁴ Although accurately described as a ‘constitutional alien, and a citizen of Sweden’ by Gummow and Hayne JJ in the High Court of Australia,⁵ he had never learnt the Swedish language, had almost no contact with relatives in Sweden and had been ‘entirely brought up in Australia’.⁶ In the words of Moore

¹ Section 501(2) of the *Migration Act* provides that:

The Minister may cancel a visa that has been granted to a person if:

- (a) the Minister reasonably suspects that the person does not pass the character test; and
- (b) the person does not satisfy the Minister that the person passes the character test.

Sections 501(6)–(11) set out further detail as to when a person does not pass the character test.

² It should be noted that, while the new federal government has announced new ‘immigration detention values’ to guide the use of immigration detention powers in the *Migration Act*, the Minister for Immigration and Citizenship has made it clear that mandatory detention will continue to apply to ‘unlawful non-citizens who present unacceptable risks to the community’: Joint Standing Committee on Migration, Parliament of Australia, *Immigration Detention in Australia: A New Beginning — Criteria for Release from Immigration Detention* (2008) 6, quoting Chris Evans, ‘New Directions in Detention — Restoring Integrity to Australia’s Immigration System’ (Speech delivered at The Australian National University, Canberra, 29 July 2008). As pointed out by the Joint Standing Committee in its December 2008 report, ‘[i]t has [not been] clarified whether those detained under section 501 will be eligible for release into the community, or whether their criminal background or other character assessments will automatically preclude them from release under the “unacceptable risk” criterion’: Joint Standing Committee on Migration, *Immigration Detention in Australia*, above n 2, 47. The Joint Standing Committee recommended that the Department ‘individually assess all persons in immigration detention, including those detained following a section 501 visa cancellation, for risk posed against the unacceptable risk criteria’: at 54 (recommendation 7). However, according to a Bill introduced into the Senate on 25 June 2009 to entrench the new ‘immigration detention values’ into law, mandatory immigration detention is to stay in place for those who represent ‘an unacceptable risk to the Australian community’, which is defined to include where ‘the person’s visa has been cancelled under s 501’: see Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) sch 1 item 9, inserting *Migration Act* ss 189(1)(b)(i), (1A)(b).

³ A person whose visa is cancelled under s 501 of the *Migration Act* is subject to a permanent ban from applying for another visa while in Australia (except a protection visa) (s 501E), cancellation of any other visas the person holds (ss 501F(2)–(3)), and permanent exclusion from Australia (*Migration Regulations 1994* (Cth) reg 1.03 (definition of ‘special return criterion’), sch 5 item 5001 para (b)). See also Human Rights and Equal Opportunity Commission (‘HREOC’), *Background Paper: Immigration Detention and Visa Cancellation under Section 501 of the Migration Act* (2009) 6–7. Stefan Nystrom was deported on 29 December 2006: Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (2007) 7.

⁴ *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 572 (Gummow and Hayne JJ), 594 (Heydon and Crennan JJ) (*‘Nystrom’*).

⁵ *Ibid* 572.

⁶ *Nystrom (Full Court)* (2005) 143 FCR 420, 422 (Moore and Gyles JJ). In the High Court, Heydon and Crennan JJ noted that Nystrom ‘accepts that he is an alien under the *Constitution* and has never contended to the contrary’: *Nystrom* (2006) 228 CLR 566, 594. This follows the line of High Court authority discussed below in Part II.

and Gyles JJ of the Full Court of the Federal Court of Australia, the effect of this cancellation was ‘the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere.’⁷ Their Honours went on to observe:

The appellant has indeed behaved badly, but no worse than many of his age who have also lived as members of the Australian community all their lives but who happen to be citizens. The difference is the barest of technicalities. It is the chance result of an accident of birth, the inaction of the appellant’s parents and some contestable High Court decisions. Apart from the dire punishment of the individual involved, it presumes that Australia can export its problems elsewhere.⁸

This is not a unique case. Rather, there is evidence that s 501 of the *Migration Act* — a provision which empowers the relevant Minister to refuse to grant or to cancel the visa of any person who fails to meet the ‘character test’ — has increasingly been invoked in recent years to cancel the visas of long-term residents in Australia (that is, those non-citizens who have been in Australia for more than 10 years and/or migrated to Australia as children).⁹ While it is difficult to obtain precise figures concerning the use of s 501 in the context of long-term residents,¹⁰ in June 2008 the Minister for Immigration and Citizenship informed the Senate that as of 7 May 2008 there were 25 people in immigration detention

⁷ *Nystrom (Full Court)* (2005) 143 FCR 420, 429.

⁸ *Ibid* 429–30.

⁹ See generally Senate Legal and Constitutional References Committee, Parliament of Australia, *Administration and Operation of the Migration Act 1958* (2006) 280–1, 285–9. See also Commonwealth Ombudsman, *Department of Immigration and Multicultural Affairs: Administration of s 501 of the Migration Act 1958 as It Applies to Long Term Residents* (2006) 13; HREOC, Submission No 99 to Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, 4 August 2008, 19. The period of 10 years’ lawful permanent residence has been chosen as the benchmark for describing a person as a long-term resident based on *Migration Act* s 201; for the similar approach adopted by the Ombudsman, see Commonwealth Ombudsman, above n 9, 1. New Zealand legislation similarly allows deportation only for crimes committed within 10 years: *Immigration Act 1987* (NZ) ss 91–3. It is also interesting to note that the *Australian Citizenship Act 2007* (Cth) provides in s 12(1)(b) that a person born in Australia is an Australian citizen ‘by birth’ if he or she is ‘ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born.’ I am grateful to Charlie Powles for pointing out this provision to me. In addition, this is supported in the academic literature: see, eg, Ruth Rubio-Marín, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (2000) 237, who recommends that ‘after no longer than ten years resident aliens [should be] included in the sphere of enjoyment of equal rights.’ However, some scholars suggest an even shorter period is appropriate: see, eg, David Wood, ‘Deportation, the Immigration Power, and Absorption into the Australian Community’ (1986) 16 *Federal Law Review* 288, 302. This is supported by recent developments in the European Union: see below Part IV.

¹⁰ The annual reports of the Department of Immigration and Citizenship (‘DIAC’) record only the total number of cancellations under *Migration Act* s 501 without a breakdown as to other factors: see, eg, DIAC, *Annual Report 2007–08* (2008) 31. In its 2006 report, the Senate Legal and Constitutional References Committee published figures provided by the Department as to the number of permanent residents deported in 2002–03 (which was 115), 2003–04 (which was 44) and 2004–05 (which was 74), but again these do not indicate length of residence: see Senate Legal and Constitutional References Committee, above n 9, 293. For further discussion of the difficulties in obtaining statistics, see Susan Harris Rimmer, ‘The Dangers of Character Tests: Dr Haneef and Other Cautionary Tales’ (Discussion Paper No 101, The Australia Institute, October 2008) 10–11.

following the cancellation of their visas pursuant to s 501.¹¹ Of those 25 persons, only 1 had been in Australia for less than 5 years, with the remaining 24 having been in Australia for between 11 and 45 years prior to visa cancellation.¹² Indeed, 2 of those persons had been in Australia for between 41 and 45 years prior to visa cancellation.¹³ Further, by far the majority of those persons had first entered Australia when they were children or youths, with 19 of the 25 having arrived before the age of 21.¹⁴ Finally, all of the individuals had spent a lengthy period in detention while awaiting removal, with only one having spent less than 100 days in detention as at 7 May 2008.¹⁵ Eight persons had been in immigration detention for between 100 and 200 days, another eight for between 201 and 300 days, while the final eight had been in detention for between 301 and 1100 days.¹⁶ Such lengthy periods of indefinite executive detention are common for long-term residents whose visas are cancelled under s 501, particularly given the difficulty in organising travel documents for persons whose connection with another country is attenuated by long (sometimes lifelong) residence in Australia.¹⁷

The practice of applying s 501 to long-term residents has been widely criticised including by the Senate Legal and Constitutional References Committee,¹⁸ the Commonwealth Ombudsman¹⁹ and the Australian Human Rights and Equal Opportunity Commission,²⁰ as well as various members of the Federal Court.²¹ However, while Stefan Nystrom successfully challenged the

¹¹ Commonwealth, *Parliamentary Debates*, Senate, 17 June 2008, 2625 (Chris Evans, Minister for Immigration and Citizenship).

¹² Commonwealth, *Parliamentary Debates*, Senate, 17 June 2008, 2626 (Chris Evans, Minister for Immigration and Citizenship).

¹³ Commonwealth, *Parliamentary Debates*, Senate, 17 June 2008, 2626 (Chris Evans, Minister for Immigration and Citizenship).

¹⁴ Commonwealth, *Parliamentary Debates*, Senate, 17 June 2008, 2626 (Chris Evans, Minister for Immigration and Citizenship).

¹⁵ Commonwealth, *Parliamentary Debates*, Senate, 17 June 2008, 2626 (Chris Evans, Minister for Immigration and Citizenship).

¹⁶ Commonwealth, *Parliamentary Debates*, Senate, 17 June 2008, 2626 (Chris Evans, Minister for Immigration and Citizenship). The Minister explained that '[t]here may be a number of reasons that prevent a person's immediate removal, ... includ[ing] active litigation, administrative or judicial review and issues surrounding the acquisition of the person's travel documentation': at 2627.

¹⁷ See Commonwealth, *Parliamentary Debates*, Senate, 17 June 2008, 2626–7 (Chris Evans, Minister for Immigration and Citizenship). See also Senate Legal and Constitutional References Committee, above n 9, 293. Indeed, the Ombudsman noted in his 2006 report that, in some cases, the cancellation of a visa under s 501 may result in a person becoming effectively stateless, which itself can result in indefinite detention: Commonwealth Ombudsman, above n 9, 35.

¹⁸ See Senate Legal and Constitutional References Committee, above n 9, 295 (recommendation 58).

¹⁹ See Commonwealth Ombudsman, above n 9.

²⁰ See HREOC, Submission No 99, above n 9, 18–20; HREOC, *Background Paper*, above n 3, 7.

²¹ See *Nystrom (Full Court)* (2005) 143 FCR 420, 421–2 (Moore and Gyles JJ), referring also to previous criticisms in *Shaw v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 142 FCR 402, 404 (Spender J) ('*Shaw (Full Court)*') and *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 126 FCR 152, 154 (Sackville J), 165–8 (Allsop J) ('*Ayan*'). For similar comments made in the Administrative Appeals Tribunal ('AAT'), see *Re Say and Minister for Immigration and Multicultural Affairs* (2006) 91 ALD 212, 231 (Senior Member J Handley). In a recent decision of the Full Federal Court, the application of

cancellation of his visa in the Full Federal Court, that decision was overturned by the High Court.²² The High Court affirmed the position that, while a person who has been lawfully in Australia for more than 10 years is protected from deportation pursuant to the deportation power in ss 200 and 201, he or she always remains liable to visa cancellation and removal under s 501 of the *Migration Act*, regardless of length of residence or connection to the Australian community. There is thus apparently no domestic legal barrier to the government's continuing reliance on this section for those non-citizens considered 'undesirable'. Further, while it is clear that the practice of effectively circumventing the protection of long-term residents intrinsic in s 201 of the *Migration Act* by reliance on s 501 was particularly favoured under the Howard government,²³ the new Rudd government has recently passed legislation reinforcing its ability to cancel the visas of long-term residents.²⁴ Although the federal government has also recently softened policy guidelines in this area, which may well ameliorate the most dramatic impact of s 501 vis-à-vis long-term

s 501 to a long-term resident was said to be 'tragic': *Toia v Minister for Immigration and Citizenship* (2009) 177 FCR 125, 139 (Stone and Jacobson JJ).

²² *Nystrom* (2006) 228 CLR 566, 571–2 (Gleeson CJ), 592 (Gummow and Hayne JJ), 616–17 (Heydon and Crennan JJ).

²³ See Senate Legal and Constitutional References Committee, above n 9, 280–95; Commonwealth Ombudsman, above n 9. I note that while the Secretary of the Department of Immigration and Multicultural Affairs ('DIMA') agreed with most of the Ombudsman's recommendations (at 6), in response to the recommendation for substantial policy review of whether *Migration Act* s 501 should be applied to long-term residents, the Secretary replied that '[a]ny change to existing policy on this issue is solely a matter for Government' (at 7).

²⁴ In *Sales v Minister for Immigration and Citizenship* (2008) 171 FCR 56, 61–2 (Gyles and Graham JJ), 73 (Buchanan J) ('*Sales*'), the Full Federal Court held that the Minister had no power to cancel the (long-term resident) appellant's Transitional Permanent (Class BF) Visa under s 501(2) of the *Migration Act* since that visa had not been 'granted' to the appellant within the meaning of s 501(2). In the wake of this judgment, 23 people were released into the community from immigration detention, many of whom were long-term residents who came to Australia as children: see Sarah Smiles, 'Ban on Deportations Reversed', *The Age* (Melbourne), 10 October 2008, 3. In response, the government introduced the *Migration Legislation Amendment Act (No 1) 2008* (Cth) to rectify this 'technical error'. Schedule 4 item 5 (inserting *Migration Act* s 501HA) provides that the holder of a relevant visa is 'taken ... to have been granted a visa'. The speed with which the amendment Act passed through Parliament is nothing short of amazing. Introduced in the Senate on 25 June 2008 (Commonwealth, *Parliamentary Debates*, Senate, 25 June 2008, 3295 (Kim Carr, Minister for Innovation, Industry, Science and Research)), on 26 June the Senate Selection of Bills Committee recommended that the Bill not be referred to Committee (Senate Selection of Bills Committee, Parliament of Australia, *Report No 7 of 2008* (2008) [3]). In the House of Representatives, the first reading took place 1 September 2008 (Commonwealth, *Parliamentary Debates*, House of Representatives, 1 September 2008, 6649), the second and third readings on 4 September 2008 (Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2008, 7162, 7180 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services)). Royal assent was given 15 September 2008 and the Act commenced on 19 September 2008: *Migration Legislation Amendment Act (No 1) 2008* (Cth) s 2(1) items 1, 6. I note that there is no reference whatsoever in the parliamentary debates to the fact that this amendment would have a particular impact on long-term residents: see especially Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2008, 7164 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services), 7169–70 (Graham Perrett), 7175 (Mark Dreyfus), 7179 (Louise Markus). For a decision discussing the meaning of this amendment, see *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 341–50 (Rares J) ('*Martinez*').

residents,²⁵ it seems clear that it wishes to retain the discretion to invoke s 501 to cancel the visas of long-term residents who have established their life in Australia.²⁶

Section 501 has been described as ‘ultimately about the sovereign powers of a nation to deny or revoke permission for entry to those individuals it deems to be of “bad character”’.²⁷ This is despite the growing awareness of the international law ramifications of a state’s decision to deport long-term residents and the increasing commitment to strengthening, rather than weakening, protection for long-term residents in other parts of the world, especially Europe. In light of this, it is timely to consider how it is that we are able to engage in this practice legally as a matter of domestic and international law.²⁸ In particular, this article will interrogate and question whether the traditional binary distinction between ‘citizens’ and ‘aliens’ — both in Australian constitutional doctrine and international law — can and should continue to be maintained.

Part II of this article considers the history of High Court doctrine in this area, explaining how it is that the Commonwealth can lawfully engage in the deportation of Australian residents who are citizens but for ‘the barest of technicalities.’²⁹ Although it is now clear that there is little constitutional restriction on Parliament’s freedom in this area, Part II closely examines the salient debates and competing views expressed in the key judgments. As it reveals, while some judges have recognised that a binary distinction between statutory citizens and aliens is overly simplistic, ultimately the courts have been reluctant to infuse the concept of ‘alien’ with any meaningful assessment of membership in the Australian community, instead favouring a formalistic and superficial approach to interpretation of that term. The analysis in this Part suggests two underlying explanations for this outcome: a clear reluctance on the part of the High Court to interfere with the Parliament’s ability to control ‘the means of determining the composition of the population of [this] country’,³⁰ and a failure to accommodate the possibility that non-citizens may have a claim to fundamental human rights akin to those of citizens.

Part III of this article then briefly sets out the legislative background and history of s 501, particularly as it relates to the deportation power in s 200 of the

²⁵ See Minister for Immigration and Citizenship, *Direction [No 41] — Visa Refusal and Cancellation under Section 501* (2009) (*Direction No 41*), discussed at length below in Part IV.

²⁶ *Direction No 41* para 10.4. This is on the basis that there seems no likelihood of any legislative change in the near future.

²⁷ Joint Standing Committee on Migration, *Immigration Detention in Australia*, above n 2, 48–9. This is also echoed in some of the case law in this area. For example, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 174 (*Ex parte Te*), Gleeson CJ rejected the argument that the prosecutors had been absorbed into the Australian community and were therefore outside Parliament’s powers of deportation partly on the basis that, were it otherwise, ‘[t]he implications for Australia’s capacity, as a sovereign nation, to deport resident aliens [would be] large’; see also at 192–3 (Gummow J).

²⁸ It should be noted that s 501 has come under scrutiny from a variety of perspectives recently, most notably in relation to the Haneef affair: see generally Rimmer, above n 10. However, this article considers s 501 only from the perspective of its impact on long-term residents.

²⁹ *Nystrom (Full Court)* (2005) 143 FCR 420, 430 (Moore and Gyles JJ).

³⁰ *Koon Wing Lau v Calwell* (1949) 80 CLR 533, 560–1 (Latham CJ) (*Koon Wing Lau*).

Migration Act. As this history illustrates, despite the High Court's reluctance to recognise a constitutional status of 'non-alienage' based on belonging or membership, Parliament itself recognised the deficiencies in the strict binary dichotomy of 'citizens versus aliens'. It accordingly sought to limit the potential for deportation of non-citizen permanent residents in introducing temporal limits to the deportation power in 1983. The clear intent evident in this legislative history provides persuasive evidence that the current administration of the *Migration Act* by the executive in this context has 'lost its way'.³¹

Part IV of the article then turns to consider the international law context of this issue. One of the traditional hallmarks of sovereignty is the ability of states to determine exclusively the composition of their communities by determining the rules for the acquisition and regulation of nationality or citizenship³² and by maintaining absolute control over immigration. However, with the advent of international human rights law, states' plenary power in this arena has been curtailed and restricted, and the deportation of long-term residents potentially engages a number of areas of state responsibility. Part IV considers both the international law jurisprudence as well as 'best practice' developments in other countries and concludes, in the light of this persuasive authority, that Australian migration law should move beyond the simplistic binary categories of citizen and alien, and recognise and protect the special status of 'denizen'.³³

II THE DEPORTATION OF LONG-TERM RESIDENTS FROM AUSTRALIA: CONSTITUTIONAL BACKGROUND

The *Australian Constitution* 'does not identify any specific criterion for membership of the Australian body politic or for the withdrawal of that membership.'³⁴ This is not surprising when we consider that there is no provision for the acquisition of Australian citizenship nor indeed any plenary

³¹ *Nystrom (Full Court)* (2005) 143 FCR 420, 422 (Moore and Gyles JJ). Moore and Gyles JJ indicated that the use of s 501 in such a case 'suggests that administration of this aspect of the Act may have lost its way': at 421–2.

³² The formal or legal status of membership in a state is understood as 'nationality' at international law. The concept of citizenship has been said to be 'remarkably capacious' (Audrey Macklin, 'Who Is the Citizen's Other? Considering the Heft of Citizenship' (2007) 8 *Theoretical Inquiries in Law* 333, 334); however, in this context, I use the concepts nationality and citizenship interchangeably to refer to formal, legal membership of a state.

³³ This term seems first to have been employed in this context by T Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State and American Citizenship* (2002) 147, who argues that

[o]ur current models of membership are too binary: one is either a citizen or an 'alien.' ... More textured understandings of membership, however, are gaining currency, as western democracies come to grips with several decades of high levels of immigration. It is increasingly suggested that lawful residents who participate in and contribute to the social and economic life of a community should be recognized, to some degree, as members of that community entitled to a set of rights and a guarantee of fair treatment. I will adopt the label 'denizenship' to describe this membership status of resident 'aliens.'

See also at 152, 174.

³⁴ *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 409 (Gaudron J) ('*Re Patterson*').

power granted to the Commonwealth with respect to ‘citizenship’.³⁵ Indeed, the concept of citizenship is mentioned in only one context, namely, the disqualification of *foreign* citizens to stand for Parliament.³⁶ This is explained on historical grounds since, as is now well understood, Federation did not automatically translate into independence for the new Australian nation.³⁷ Accordingly, the inhabitants of the new federated nation were not considered ‘Australian citizens’ in constitutional terms; instead, they remained ‘subject[s] of the Queen’.³⁸ Rather than granting legislative power over citizenship, the *Constitution* instead granted power to the Commonwealth Parliament to legislate with respect to ‘immigration and emigration’³⁹ and ‘naturalization and aliens’,⁴⁰ and it has been these powers which have underpinned the Commonwealth’s historically strict control over immigration to this country and, concomitantly, membership of the nation.⁴¹ For this reason, the body of litigation contesting the Commonwealth’s scope to define the criteria for membership of the Australian body politic has not centred on notions of ‘citizenship’, but instead on whether and when a person ceases to be an ‘immigrant’ and whether there is any limit to the ability of the Parliament to define ‘alienage’ for the purpose of its power over aliens.⁴² In other words, in

³⁵ See generally Kim Rubenstein, *Australian Citizenship Law in Context* (2002) chs 2, 4; Helen Irving, ‘Still Call Australia Home: The *Constitution* and the Citizen’s Right of Abode’ (2008) 30 *Sydney Law Review* 131, 131–2.

³⁶ *Constitution* s 44(i).

³⁷ See generally *Sue v Hill* (1999) 199 CLR 462. For extensive discussion of this point in the Convention Debates, see Rubenstein, *Australian Citizenship Law in Context*, above n 35, 24–46. Irving, above n 35, 132 (citations omitted) also explains that the absence of a head of legislative power over citizenship is unremarkable since:

Until 1914, British subject-status (except where acquired by naturalisation) was governed by common law, not legislation. For the framers of the *Constitution* to have given the Commonwealth Parliament power to pass laws with respect to citizenship would have contemplated a departure from common law, at a time in history when the law governing personal membership of the British Empire was among the subjects in respect of which Britain sought to maintain imperial uniformity.

See also Mary Crook, ‘Defining Strangers: Human Rights, Immigrants and the Foundations for a Just Society’ (2007) 31 *Melbourne University Law Review* 1053, 1057–9.

³⁸ See *Constitution* ss 34(ii), 117. The question of who is included in the phrase ‘subjects of the Queen’ has been the subject of a number of tightly contested decisions of the High Court, especially as the process of achieving independence is understood to be an evolutionary one. An example is the differing views of the majority and minority Justices in *Shaw* as to when British subjects were no longer considered subjects of the Queen for constitutional purposes: see *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 40–1 (Gleeson CJ, Gummow and Hayne JJ), 63–6 (Kirby J), 79–80 (Callinan J), 87 (Heydon J) (*‘Shaw’*). It should also be noted that the *Constitution* at times refers to ‘the people of the Commonwealth’ (for example, in s 24); however, there is little guidance as to the meaning of this phrase.

³⁹ *Constitution* s 51(xxvii).

⁴⁰ *Constitution* s 51(xix). It should be noted that the ‘external affairs’ power (*Constitution* s 51(xxix)) has also sometimes been adverted to in this context, but never relied upon.

⁴¹ Indeed, Dauvergne argues correctly that immigration law has been much more instrumental in shaping the Australian nation than citizenship law: see Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (2008) 46. See also Mary Crook, *Immigration and Refugee Law in Australia* (1998) 1–5.

⁴² Indeed, it is surprising to discover that there is not necessarily a clear basis on which the *Australian Citizenship Act 2007* (Cth) (and prior similar legislation) is upheld: see generally Rubenstein, *Australian Citizenship Law in Context*, above n 35, 65–74.

Australian constitutional law we ask not ‘who is the citizen?’, but rather ‘who is the citizen’s Other?’⁴³

Notwithstanding the absence of an express constitutional concept of citizenship, the High Court has been required to grapple with the scope of the Commonwealth’s power to control and limit membership of the Australian community in a number of contexts. Soon after its inception, the High Court began to explore the limits of the Commonwealth’s power to legislate with respect to ‘immigration’, deciding in *Potter v Minahan* (1908) 7 CLR 277 (*Potter*) that the Parliament’s power was not at large since ‘a person whose permanent home is in Australia and who therefore is a member of the Australian community is not, on arriving in Australia from abroad, an immigrant in respect of whose entry the parliament can legislate’ under the immigration power.⁴⁴ The Court subsequently applied this principle to the context of deportation, with a majority of Justices finding that a person who enters Australia as an immigrant may ultimately become ‘absorbed’ as a member of the Australian community and thus cease to fall within the ambit of Commonwealth power with respect to ‘immigration’. In *Ex parte Walsh; Re Yates*, Knox CJ explained that

a person who has originally entered Australia as an immigrant may, in course of time and by force of circumstances, cease to be an immigrant and becomes a member of the Australian community. He may, so to speak, grow out of the condition of being an immigrant and thus become exempt from the operation of the immigration power.⁴⁵

This was, however, a highly contested notion in the early jurisprudence, with ‘a sharp division of opinion on the Court’.⁴⁶ A number of Justices expressed a strong preference for a wider approach to the Commonwealth immigration power, untrammelled by the notion of absorption, which was clearly underpinned by a concern to protect the ultimate sovereignty of the Parliament to determine

⁴³ Macklin, above n 32, 335. This is particularly evident in the case of *Singh v Commonwealth* (2004) 222 CLR 322 (*Singh*), where, instead of asking who is a non-alien, a majority of the High Court adopted the criterion of allegiance to another country to define alienage: see Michelle Foster, ‘Membership in the Australian Community: *Singh v The Commonwealth* and Its Consequences for Australian Citizenship Law’ (2006) 34 *Federal Law Review* 161, 166–9, 173, citing *Singh* (2004) 222 CLR 322, 344, 364–5 (McHugh J), 381, 395, 398, 400 (Gummow, Hayne and Heydon JJ).

⁴⁴ This is the way in which Knox CJ paraphrased the decision in *Potter: Ex parte Walsh; Re Yates* (1925) 37 CLR 36, 63 (*Ex parte Walsh*). His Honour goes on to quote directly from all the Justices in *Potter*.

⁴⁵ (1925) 37 CLR 36, 64. This case concerned a section of the *Immigration Act 1901–25* (Cth) that permitted the Minister to remove from Australia any person whose continued presence was likely to be injurious in certain specific ways: *Ex parte Walsh* (1925) 37 CLR 36, 60 (Knox CJ); see also at 138 (Starke J). This decision was based, at least in part, on the distinction between immigration — the act or action of immigrating, which is a process that must come to an end — and immigrants. As Higgins J explained, it would be ‘a fundamental mistake to treat the power to make laws as to immigration as if it were a power to make laws as to immigrants’: at 110. See also *Ex parte Te* (2002) 212 CLR 162, 171 (Gleeson CJ), quoting P H Lane, ‘Immigration Power’ (1966) 39 *Australian Law Journal* 302, 306 (‘[i]mmigration is “an activity which *ex vi termini* is one day to be completed and looks forward (usually, at any rate) to that day”’) and citing with approval *Cunliffe v Commonwealth* (1994) 182 CLR 272, 295 (Mason CJ).

⁴⁶ *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369, 383 (Jacobs J) (*Ex parte Henry*).

the composition of the Australian nation.⁴⁷ Notwithstanding this, the ‘narrow’ view ultimately prevailed and it is now beyond doubt that the notion of absorption suffices to take one outside Commonwealth power with respect to ‘immigration’.⁴⁸ As explained by Jacobs J in *R v Director-General of Social Welfare (Vic); Ex parte Henry*, ‘a day comes ... when an immigrant is absorbed into the Australian community so that he cannot thereafter be deported under the immigration power.’⁴⁹ Whether or not a person has in fact become absorbed at the relevant time is a ‘constitutional fact’⁵⁰ which involves an assessment by the court as to whether a person has been absorbed ‘into the Australian community as a member thereof’,⁵¹ ‘has become a full member of the Australian community’,⁵² or has made his or her home in Australia and ‘become part of its people’.⁵³

⁴⁷ See, eg, *Ex parte Walsh* (1925) 37 CLR 36, 81, where Isaacs J summarised his view in the aphorism: ‘Once an immigrant always an immigrant.’ It is interesting to note the particularly emotive language engaged by Isaacs J, describing the majority view as ‘a tragedy’: at 82. He undertakes a passionate and lengthy exposition of his view: at 81–9; see also at 127 (Rich J). This view was later adopted by a number of the Justices in *Koon Wing Lau* (1949) 80 CLR 533. McTiernan J stated that Isaacs J’s interpretation in *Ex parte Walsh* is ‘to be preferred’ (at 583) and Latham CJ, while not explicitly adopting this view, did take a wider approach to Commonwealth power in finding that the immigration power could apply even where an immigrant had established a permanent home in Australia (see at 566). Latham CJ seemed to be concerned not only about the Court improperly interfering with the sovereignty of Parliament (at 561–3), but also was adamant that ‘[n]o person simply by his own act can make himself a member of the community if the community refuses to have him as a member’ (at 561). By contrast, Rich J explained that, although in *Ex parte Walsh* he took ‘a wide view of the range of the immigration power’, he ‘since considered that the majority view should be accepted as settling the meaning of the power’: at 569. Similarly, Williams J took the view that *Ex parte Walsh* is ‘a definite decision of this Court that the immigration power does not authorize Parliament to legislate with respect to persons who originally immigrated to Australia but have since become members of the Australian community’: at 588.

⁴⁸ See *Ex parte Henry* (1975) 133 CLR 369, 371 (Barwick CJ), 374 (Gibbs J), 377–8 (Stephen J), 380 (Mason J), 383 (Jacobs J). In more recent decisions this is put beyond doubt by the straightforward acceptance by the Court that, in cases involving long-term residents (further discussed below), there is no question of the immigration power applying since the person concerned has clearly become absorbed; thus only the aliens power is at issue in these cases. Indeed, in *Re Patterson* (2001) 207 CLR 391, 407, 412–13 (Gaudron J), the Commonwealth conceded that when the Parliamentary Secretary made the decision to cancel the applicant’s visa ‘he was completely absorbed into the community’; thus the matter was argued on the assumption that s 501(3) of the *Migration Act* ‘cannot be supported in its application to him by reference to the [immigration power]’. See also at 425 (McHugh J), 476–7 (Kirby J), 515 (Callinan J). This was also accepted by the Court in *Ex parte Te* (2002) 212 CLR 162, 171–2 (Gleeson CJ), 189 (McHugh J), 193 (Gummow J), 210 (Kirby J), 228 (Callinan J); see also at 219–20 (Hayne J).

⁴⁹ (1975) 133 CLR 369, 385. It should be noted that the court has held that Parliament may make laws ‘which would prevent a person who migrates to Australia from being accepted into the community except under certain circumstances or conditions’: *Johnson v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 136 FCR 494, 508 (French J) (*Johnson*), citing *O’Keefe v Calwell* (1949) 77 CLR 261, 276–7 (Latham CJ); *Koon Wing Lau* (1949) 80 CLR 533; *R v Forbes*; *Ex parte Kwan Lee* (1971) 124 CLR 168.

⁵⁰ *Ex parte Te* (2002) 212 CLR 162, 193 (Gummow J).

⁵¹ *Ex parte Henry* (1975) 133 CLR 369, 372 (Barwick CJ). See also at 374 (Gibbs J): a person must have ‘been fully absorbed into the Australian community’.

⁵² *Ibid* 374 (Gibbs J).

⁵³ *Ibid* 383 (Jacobs J), quoting *Ex parte Walsh* (1925) 37 CLR 36, 62 (Knox CJ). See also *Ex parte Te* (2002) 212 CLR 162, 192 (Gummow J).

While it is well settled that Commonwealth power over immigration is limited by the doctrine of ‘absorption’, regardless of the precise parameters of that concept, what has been much more controversial in recent times is whether it is possible to insert ‘into the universe occupied by Australian citizens and aliens a third class formed by those who are identified as non-citizens but non-aliens’.⁵⁴ As in the context of the immigration power, the court has been challenged to devise a method to circumscribe Parliament’s broad power in this area. In the context of alienage, this would effectively require the formulation of a notion of Australian *constitutional* citizenship or nationality with an autonomous meaning and content beyond mere statutory citizenship. This has proven to be much more controversial and difficult, presumably because so to do would challenge at its core the ultimate authority of the people (through Parliament) to determine membership of the body politic.

This issue has arisen in a variety of contexts, but most relevant for present purposes is a series of cases concerned with the attempt by the Commonwealth to deport long-term (non-citizen) residents who had committed criminal offences. In *Pochi v Macphee* (*‘Pochi’*) in 1982,⁵⁵ the High Court held that, although a non-citizen may be outside the immigration power due to absorption into the Australian community, he or she remained always an alien (at least until naturalised) and thus, despite his or her absorption, within the ambit of Commonwealth power over aliens. In that case, all members of the Court held that the plaintiff’s argument — that his having ‘become totally absorbed into the Australian community meant that he is no longer an alien’ — was ‘impossible to maintain.’⁵⁶ This was on the basis that ‘[i]t was well settled at common law that naturalization could only be achieved by Act of Parliament’.⁵⁷ This reasoning essentially equated alienage with statutory non-citizenship — arguably a questionable approach to constitutional interpretation, as it effectively permits the Parliament to define the scope of its own power.⁵⁸

Notwithstanding the fact that at least one member of the Court in *Pochi* thought that ‘[t]he concept of alien was not fully explored in the presentation of this case,’⁵⁹ the same reasoning was applied in the subsequent decision in *Nolan v Minister of State for Immigration and Ethnic Affairs* (*‘Nolan’*),⁶⁰ which concerned the proposed deportation of a citizen of the United Kingdom who had migrated to Australia with his family at age 9 years and 11 months and had lived

⁵⁴ *Ex parte Te* (2002) 212 CLR 162, 200 (Gummow J).

⁵⁵ (1982) 151 CLR 101.

⁵⁶ *Ibid* 111 (Gibbs CJ); see also at 112 (Mason J), 116 (Wilson J). (Aickin J died before judgment was delivered: at 116.) The facts of this case were particularly compelling as Pochi had been in Australia for many years and had in fact applied for citizenship, the application for which was not complete because of an administrative error by the Department of Immigration: see at 104 (Gibbs CJ).

⁵⁷ *Ibid* 111 (Gibbs CJ).

⁵⁸ For a more detailed exploration of this issue in later cases concerned with the aliens power, see Foster, ‘Membership in the Australian Community’, above n 43.

⁵⁹ *Pochi* (1982) 151 CLR 101, 112 (Murphy J). However, Murphy J, at 116, nonetheless upheld the validity of *Migration Act 1958–83* (Cth) s 12.

⁶⁰ (1988) 165 CLR 178.

as a permanent resident in Australia for almost 18 years prior to the decision to deport.⁶¹ The majority of the Court in *Nolan* held that the reasoning in *Pochi* applied equally to Nolan, notwithstanding that he was, unlike Pochi, a British subject.⁶² Only Gaudron J, in dissent, was willing to take a less deferential approach to Parliament's definition of its own authority under the 'aliens' power, holding that an alien is, 'in essence, a person who is not a member of the community which constitutes the body politic of the nation state from whose perspective the question of alien status is to be determined.'⁶³ Gaudron J's reasoning alone signalled the possibility of a more meaningful and qualitative approach to an assessment of alienage in Australian constitutional law and a willingness to assert an autonomous understanding of the concept independent of that dictated by the Parliament.

Gaudron J's preference for a more complex analysis was subsequently taken up and explored in depth in a fascinating trilogy of cases decided within two years of each other and on the basis of tightly contested majorities in two of the three decisions.⁶⁴ The High Court proceeded to overturn *Nolan*,⁶⁵ then distinguish this new approach in a second case,⁶⁶ only to return to the reasoning in *Nolan* in a third and final decision.⁶⁷ While in the final decision the Court has clearly precluded the possibility of developing a more progressive and evaluative approach — akin to recognising a status of constitutional non-alien or 'denizen' — for long-term residents who are Australian but for 'the barest of technicalities',⁶⁸ it is nonetheless important to draw out the conflicting reasoning underlying these decisions.

In the first decision, *Re Patterson; Ex parte Taylor* ('*Re Patterson*'),⁶⁹ a majority of four Justices overruled *Nolan* to find that a non-citizen who had

⁶¹ Ibid 181 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

⁶² Ibid 183–7.

⁶³ Ibid 189.

⁶⁴ *Re Patterson* and *Shaw* were both 4:3 decisions, although *Ex parte Te* was unanimous.

⁶⁵ *Re Patterson* (2001) 207 CLR 391. See below n 70.

⁶⁶ *Ex parte Te* (2002) 212 CLR 162.

⁶⁷ The joint judgment in *Shaw* explicitly disavowed *Re Patterson* and stated that it 'develops but is designedly harmonious with the reasoning in *Nolan*': *Shaw* (2003) 218 CLR 28, 44 (Gleeson CJ, Gummow and Hayne JJ). See generally Glen Cranwell, 'Casenote: *Shaw v Minister for Immigration and Multicultural Affairs*' (2004) 11 *Australian Journal of Administrative Law* 151. It should be noted that this double reversal in a short time was controversial. In his dissent in *Shaw* (2003) 218 CLR 28, 56 (citations omitted), Kirby J criticised

the spectacle of deliberate persistence in attempts to overrule recent constitutional decisions on identical questions on the basis of nothing more intellectually persuasive than the retirement of a member of a past majority and the replacement of that Justice by a new appointee who may hold a different view.

(Gaudron J had retired and been replaced by Heydon J.)

⁶⁸ This was the phrase used by the Full Federal Court in *Nystrom (Full Court)* (2005) 143 FCR 420, 430 (Moore and Gyles JJ). These cases have been discussed in more detail and from a different perspective elsewhere: see generally Rubenstein, *Australian Citizenship Law in Context*, above n 35, 65–70; Kim Rubenstein, 'Meanings of Membership: Mary Gaudron's Contributions to Australian Citizenship' (2004) 15 *Public Law Review* 305, 306–9; Genevieve Ebbeck, 'A Constitutional Concept of Australian Citizenship' (2004) 25 *Adelaide Law Review* 137; Mary Crock and Laurie Berg, *Immigration and Refugee Law in Australia* (2nd ed, forthcoming) ch 3.

⁶⁹ (2001) 207 CLR 391.

entered Australia as a British subject was *not* an alien and thus s 501 of the *Migration Act* did not validly apply to him.⁷⁰ Gaudron J based her reasoning on the fact that, in her view, Taylor was not an alien when he entered Australia (due to his special status as a British subject) and that the Parliament's power 'to legislate to deprive a person of his or her membership of the body politic ... can only be exercised by reference to some change in the relationship between the individual and the community', no such change having occurred in this case.⁷¹ McHugh J held that the emergence of Australia as an independent nation 'converted' British born 'subjects of the Queen of the United Kingdom living in Australia' into 'subjects of the Queen of Australia', resulting in their being outside Commonwealth power with respect to aliens.⁷²

Of most relevance for present purposes is that Kirby J (with whose reasoning Callinan J explicitly agreed)⁷³ held not only that the applicant was not an alien on entry to Australia, but also that 'when the attempt was made to treat him as an "alien" ... he had been absorbed into the people of the Commonwealth' and '[o]nce so absorbed, he could not ex post facto be deprived of his nationality status as a non-alien'.⁷⁴ In other words, '[o]nce, after their arrival, [people in the same position as Taylor] were absorbed into the Australian community they could not, retrospectively, be classified as "aliens" for constitutional purposes'.⁷⁵ This represents a clear acceptance by two of the majority Justices that the notion of absorption may be relevant not only to the immigration power but also to the aliens power. It recognises that assessing alienage (and its converse, non-alienage) must involve a meaningful, qualitative assessment of a person's ties to and membership of the Australian community.

The significance of the decision in *Re Patterson* was, as Kirby J explained, that 'the simple notion of a dichotomy between an Australian citizen and a constitutional "alien" could no longer be maintained'.⁷⁶ Thus it is not surprising that the plaintiffs in the second of the trilogy of cases — *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* ('*Ex parte Te*')⁷⁷ — attempted to explore this potential for 'a more complex notion of Australian

⁷⁰ Although there seems to be some debate in later cases about whether *Re Patterson* did in fact overrule *Nolan*, the Justices in the majority explicitly did so: *Re Patterson* (2001) 207 CLR 391, 409 (Gaudron J), 421 (McHugh J), 491 (Kirby J), 518 (Callinan J).

⁷¹ *Re Patterson* (2001) 207 CLR 391, 411.

⁷² *Ibid* 421. McHugh J held that the '[t]he applicant and all other British subjects, born in the United Kingdom, who were living in Australia at the commencement of the *Royal Style and Titles Act 1973* (Cth) and who have continued to reside here ... are not and never have been aliens.' The *Royal Style and Titles Act 1973* (Cth) was relied upon as the significant date because it symbolised the final evolution of the 'Queen in right of the United Kingdom' into the 'Queen of Australia': *ibid* 432.

⁷³ I note that Callinan J explicitly adopted the reasoning of Kirby J at 493–4: *Re Patterson* (2001) 207 CLR 391, 518. Further, this was the interpretation of these judgments by Gleeson CJ in *Ex parte Te* (2002) 212 CLR 162, 176. It should be noted that Callinan J also agreed with McHugh J: *Re Patterson* (2001) 207 CLR 391, 518.

⁷⁴ *Re Patterson* (2001) 207 CLR 391, 492 (citations omitted). Kirby J's reliance on absorption as relevant to the aliens power is further supported in his reasoning at 491–4.

⁷⁵ *Ibid* 494 (Kirby J).

⁷⁶ *Ex parte Te* (2002) 212 CLR 162, 209; see also at 212 (Kirby J), 186–7 (McHugh J).

⁷⁷ (2002) 212 CLR 162.

nationality⁷⁸ in a case concerning the proposed deportation of two non-citizens who had come to Australia as refugees from Vietnam and Cambodia (and thus had clearly not entered as non-alien British subjects) but had settled in Australia and considered it their home.⁷⁹ While, as explained above, various members of the majority in *Re Patterson* had expressed the rationale for their decision in different terms,⁸⁰ at least two bases of that decision appeared relevant and arguable in *Ex parte Te*, namely, Gaudron J's view of Taylor as a member 'of the body politic that constitutes the Australian community'⁸¹ and Kirby J's notion of 'absorption into the Australian community'.⁸² However, none of the reasoning in *Re Patterson* was said to avail the applicants Messrs Te and Dang. This was primarily on the basis that, unlike Taylor, neither applicant was a "natural-born subject" of the Crown nor 'within the category of persons admitted to Australia as migrants who were British subjects ... before 1 May 1987'.⁸³

In addition, five of the Justices in *Ex parte Te* explicitly considered and rejected the relevance of absorption to the scope of the aliens power.⁸⁴ While both Kirby and Callinan JJ left open the possibility that the concept of absorption may well limit Commonwealth power over 'aliens', they rejected its application in that case.⁸⁵ Kirby J found that the applicants were unable to rely on the notion of 'membership of the body politic'⁸⁶ since they had not been naturalised, could not vote in federal and state elections or referenda to alter the *Constitution* (unlike Taylor), and were not liable to jury service 'and other like civic

⁷⁸ *Shaw* (2003) 218 CLR 28, 54 (Kirby J).

⁷⁹ (2002) 212 CLR 162, 163. Te, however, had been in Australia only nine years prior to his first conviction, while Dang had been here for more than 10.

⁸⁰ Leading the High Court to note in later decisions the lack of a clear ratio: see *Ex parte Te* (2002) 212 CLR 162, 170 (Gleeson CJ). Indeed, McHugh J held in *Ex parte Te* that *Re Patterson* 'has no precedent value beyond its own facts': *Ex parte Te* (2002) 212 CLR 162, 187. For extensive discussion of this, see *Shaw* (2003) 218 CLR 28, 43–5 (Gleeson CJ, Gummow and Hayne JJ).

⁸¹ *Ex parte Te* (2002) 212 CLR 162, 210–11 (Kirby J), citing *Re Patterson* (2001) 207 CLR 391, 409–12 (Gaudron J).

⁸² *Ex parte Te* (2002) 212 CLR 162, 211 (Kirby J). Te and Dang also argued that they had allegiance to the Crown, based on McHugh J's argument in *Re Patterson* (2001) 207 CLR 391, 421, but this was rejected by all members of the Court: see *Ex parte Te* (2002) 212 CLR 162, 164 (C M Maxwell QC), 174 (Gleeson CJ), 189 (Gummow J), 214 (Kirby J), 226 (Callinan J); see also at 219–20 (Hayne J).

⁸³ *Ex parte Te* (2002) 212 CLR 162, 212 (Kirby J); see also at 179 (Gaudron J), 188–9 (McHugh J). Of course, this was more the position of those Justices who had been in the majority in *Re Patterson*, as they had to distinguish that case, whereas those who had been in minority in *Re Patterson* tended to reiterate their views from their dissents: see, eg, *Ex parte Te* (2002) 212 CLR 162, 173–4 (Gleeson CJ), 188 (Gummow J).

⁸⁴ See, eg, *Ex parte Te* (2002) 212 CLR 162, 176 (Gleeson CJ), 180 (Gaudron J), 186–8 (McHugh J) (citing *Pochi* (1982) 151 CLR 101, 111 (Gibbs CJ)), 192–3 (Gummow J), 220 (Hayne J). The majority position was confirmed in *Shaw* (2003) 218 CLR 28 — the third case in the trilogy — where Gleeson CJ, Gummow and Hayne JJ (with whom Heydon J agreed at 87) held that 'the applicant entered Australia as an alien' and 'did not lose that status by reason of his subsequent personal history in this country' (at 43).

⁸⁵ *Ex parte Te* (2002) 212 CLR 162, 218–19 (Kirby J), 229 (Callinan J). Kirby J left open the possibility that absorption may be relevant in an extreme case of very long-term residents: at 217–18.

⁸⁶ *Ibid* 215.

responsibilities and privileges in Australia.⁸⁷ As to the argument that the applicants had lost their alien status by a process of absorption, Kirby J held that:

Far from showing allegiance or being absorbed into the Australian body politic, the repeated conduct of the applicants constitutes a public renunciation of the norms of the community. Far from there being any long-term participation in the duties and obligations of civic life, that might conceivably in a particular case be treated as equivalent to a public demonstration of allegiance, commitment or adherence to the Australian community, each of the applicants has repeatedly broken this country's laws.⁸⁸

Their criminal behaviour was also relied upon by Callinan J, who held that 'their criminal activities are incompatible with absorption within the community.'⁸⁹

There are two immediately striking points about this reasoning. First, Kirby J's focus on 'civic duty' could be said to represent a very abstract and formalistic sense of what constitutes membership of and participation in a society. There does not appear to have been any evidence that Taylor had ever availed himself of the right to vote or served in a jury; the focus was rather on his *right* to do so. Conversely, there was no evidence of the participation or otherwise of Te and Dang in the political affairs or activities of their community, other than the fact that they did not have the formal right to vote. However, a focus on formal civil rights alone is a questionable barometer of commitment to or membership of the body politic and arguably represents a sterile view of membership that is far from the reality of people's lives.⁹⁰ As Callinan J acknowledged in the subsequent decision of *Shaw v Minister for Immigration and Multicultural Affairs*, the fact that the applicant could not 'vote in Australian elections is a factor, but standing alone, and in the case of a longstanding resident, does not detract from his integration in, and participation as, a member of the Australian community.'⁹¹ Indeed, this must be so given that many Australian citizens are excluded from the right to vote⁹² and from participation in jury service.⁹³ As to

⁸⁷ Ibid 216. Kirby J reiterated this view of membership in the body politic in *Shaw* (2003) 218 CLR 28, 62, 65.

⁸⁸ *Ex parte Te* (2002) 212 CLR 162, 218.

⁸⁹ Ibid 228. However, he also expressed disquiet about extreme cases: at 229.

⁹⁰ It is interesting to note that in *Shaw* (2003) 218 CLR 28 Kirby J seemed more willing to take a less formal approach to this question. In the context of responding to an argument that a child who arrived with his family as immigrants could not be considered to have moved outside the immigration power until attaining adulthood, Kirby J noted that any differentiation of the position of children by postponement of the conclusion of their process of immigration during their minority would run 'counter to the realities of family immigration as a process': at 70.

⁹¹ Ibid 86. Of course, Callinan J was in dissent, but he agreed with the majority on this issue.

⁹² See, eg, *Commonwealth Electoral Act 1918* (Cth) s 93. See also *Roach v Electoral Commissioner* (2007) 233 CLR 162. *Roach* clearly leaves open the possibility that the exclusion from voting of some non-citizens is constitutional: see, eg, at 182 (Gleeson CJ), 203–4 (Gummow, Kirby and Crennan JJ). Ironically, this was referred to by Gleeson CJ in the context of arguing that voting rights do not necessarily equate with non-alienage: see, eg, *Ex parte Te* (2002) 212 CLR 162, 173.

⁹³ Every state and territory disqualifies, excludes or exempts specified persons from jury service: see *Juries Act 1967* (ACT) ss 10–11; *Jury Act 1977* (NSW) ss 6–7; *Juries Act 1962* (NT) ss 10–11; *Jury Act 1995* (Qld) s 4(3); *Juries Act 1927* (SA) ss 12–13; *Juries Act 2003* (Tas) s 6; *Juries Act 2000* (Vic) ss 5(2)–(3); *Juries Act 1957* (WA) s 5.

the relevance of a failure to acquire citizenship by naturalisation, where this issue is discussed it is apparently assumed that this is the result of a conscious decision.⁹⁴ However, this overlooks the fact that it is often the case, especially with those who have migrated as children, that non-citizens are simply unaware of their lack of citizenship or its consequences.⁹⁵

Rather than focusing on such formalities, it is arguable that in Dang's case, for example, the fact that he had established a family (his wife and son were both Australian citizens)⁹⁶ should be far more significant in terms of his perception of belonging than any formal civic status.⁹⁷ Certainly, an approach that considered the human rights of established non-citizens as relevant to the notion of absorption would undoubtedly have taken such issues into account.⁹⁸

The second major point about this reasoning is that, as Peter Prince notes, 'it is not self-evident why ... criminal activities are "incompatible with absorption [within] the community".'⁹⁹ One could argue that not every offence against the law involves 'an attack on social values of such degree that a proposition could be advanced that the [visa holder] had renounced the norms of, and any regard for, the society [he or she was] in'.¹⁰⁰ In any event, even if engaging in criminal

⁹⁴ See, eg, *Ex parte Te* (2002) 212 CLR 162, 172, where Gleeson CJ states that failure to acquire citizenship in this way may be either a result of 'design' or 'neglect'.

⁹⁵ See Commonwealth Ombudsman, above n 9, 20. See also *Ayan* (2003) 126 FCR 152, 167, where Allsop J noted that: 'at no time had the appellant been warned during the 1990s of the danger in which his antisocial behaviour was placing him, in terms of his possible removal from this country.'

⁹⁶ *Ex parte Te* (2002) 212 CLR 162, 218 (Kirby J).

⁹⁷ See *Shaw* (2003) 218 CLR 28, 62, where Kirby J refers to the fact that the applicants did not see themselves as aliens, thereby suggesting that subjective views are relevant here. However, Kirby J seems to view family life considerations more as reasons for feeling sympathetic towards the applicants rather than as a basis for recognising their connection with or membership in the community: see *ibid*.

⁹⁸ For an early and passionate assertion of concerns related to family life, see *Pochi* (1982) 151 CLR 101, 115 (citations omitted), where Murphy J stated: 'Breaking-up families is generally regarded as inhumane and uncivilized. It was one of the worst aspects of slavery, and is a horrifying feature of literature about the American slave colonies and States, and the Queensland blackbirding and forced labour of "kanakas"'. His Honour held that '[w]here, as here, an alien migrant has a family (spouse and children) living with him in Australia, exercising the power so as to break-up the family would be inhumane and uncivilized' (at 115), thus concluding that 's 12 of the Act is valid but does not permit the Minister to order the deportation of the plaintiff in circumstances which would either break-up his family or compel his wife and children, who are Australians, to leave Australia' (at 116). His Honour was in dissent on this point. For discussion of right to family life, see below Part IV(D).

⁹⁹ Peter Prince, 'The High Court and Deportation under the *Australian Constitution*' (Current Issues Brief No 26, Department of the Parliamentary Library, 15 April 2003) 9, quoting *Ex parte Te* (2002) 212 CLR 162, 228 (Callinan J). This is supported by a number of decisions of the Federal Court: see, eg, *Moore v Minister for Immigration and Citizenship* (2007) 161 FCR 236, 248 (Gyles, Graham and Tracey JJ) ('*Moore*'): 'A person's criminal record will be a relevant consideration but, in most cases it will not be determinative on the question of whether a person has been absorbed into the Australian community.' In applying this to that case, their Honours, at 249-50, stated: 'The fact that [the appellant Moore] may have gone off the rails along the way is quite a different thing from a rejection by him of the Australian way of life and all that that entails.' See also *Toia v Minister for Immigration and Citizenship* [2009] FCA 166 (Unreported, Foster J, 27 February 2009) [219].

¹⁰⁰ *Hollis v Minister for Immigration and Multicultural Affairs* (2003) 202 ALR 483, 491 (Lee J) ('*Hollis*'), citing *R v Governor of Metropolitan Gaol; Ex parte Molinari* [1962] VR 156, 173 (Sholl J). This is supported by reference to the list of crimes for which a conviction was secured

conduct necessarily signifies ‘a public renunciation of the norms of the community’,¹⁰¹ in ‘every community there will be those who implicitly renounce the accepted values of a peaceful and ordered society by committing crimes.’¹⁰² Indeed, what is most troubling about these comments by Kirby and Callinan JJ is that they imply a view of antisocial behaviour in the form of criminal activity as a kind of aberration, the perpetrators of which must be banished from Australia, as though such behaviour is foreign to what it means to be ‘Australian’.¹⁰³ However, as noted by Moore and Gyles JJ in *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (*‘Nystrom (Full Court)’*), while the appellant in that case had ‘indeed behaved badly,’ his conduct was ‘no worse than [that of] many of his age who have also lived as members of the Australian community all their lives but who happen to be citizens’.¹⁰⁴ There is no basis upon which an Australian citizen could be stripped of his or her citizenship due to similar criminal behaviour and sought to be sent elsewhere.¹⁰⁵ Apart from the logistical impossibility of reinstating ‘transportation’ as a form of criminal punishment, the fact that we punish the criminal behaviour of citizens not by

against the 25 individuals in immigration detention following a s 501 cancellation as at 7 May 2008. While many are indeed extremely serious (such as child sex offences and murder), the list also includes possession of stolen goods, trespass, and driving offences: see Commonwealth, *Parliamentary Debates*, Senate, 17 June 2008, 2627 (Chris Evans, Minister for Immigration and Citizenship). According to a 2008 media report, some long-term residents have had their visas cancelled for offences as minor as shoplifting: see Smiles, above n 24, 3.

¹⁰¹ *Ex parte Te* (2002) 212 CLR 162, 218 (Kirby J).

¹⁰² Prince, above n 99, 9.

¹⁰³ Interestingly, Kirby J also seems to have taken a different view of these arguments, at least in relation to the question of whether criminal activity can affect the process of absorption for the purposes of the immigration power: see *Shaw* (2003) 218 CLR 28, 69–70. In *Shaw*, the Minister had relied on the comments of both Kirby and Callinan JJ in *Ex parte Te* regarding criminality and absorption, and argued that those comments applied to a situation where, like in the case of *Shaw*, the criminal behaviour had begun in adolescence and continued into adulthood: see *Shaw* (2003) 218 CLR 28, 69–70. However, Kirby J dismissed such arguments on the basis that child immigrants were taken to have been absorbed with their parents: at 70. Presumably, any subsequent criminality could not affect this process. Callinan J stated that he ‘adhere[d] to the view ... that persistent serious criminal activity from soon after the inception of residence here is likely to be regarded as antipathetic to absorption into the general community’, but similarly dismissed the argument in that case on the basis that *Shaw* had been resident in Australia for more than 10 years with his parents before the commission by him of serious crime: at 79.

¹⁰⁴ (2005) 143 FCR 420, 429–30. See also *Hollis* (2003) 202 ALR 483, 491, where, in the context of deciding whether it could be said that criminality had disrupted the otherwise clear trajectory towards absorption of the applicant, Lee J concluded:

The better view may be that the applicant committed offences for which he was adequately punished and that his criminal conduct, while not insignificant, did not involve repudiation of the society in which he lived, nor allow it to be said that he remained outside and unabsorbed by that community. In truth he was a member of society who had committed offences ...

It should be noted that in *Nystrom* it had been agreed between the parties, but not decided by the courts, that *Nystrom* had been granted an absorbed person visa and that he had been absorbed into the Australian community by the time he was 10 and a half years of age: see *Nystrom* (2006) 228 CLR 566, 573, 576 (Gummow and Hayne JJ), 598 (Heydon and Crennan JJ); *Nystrom (Full Court)* (2005) 143 FCR 420, 424 (Moore and Gyles JJ). This was prior to his commission of crime: *Nystrom* (2006) 228 CLR 566, 594 (Heydon and Crennan JJ).

¹⁰⁵ The *Australian Citizenship Act 2007* (Cth) does not contain any provision for revocation of the citizenship of citizens by birth (see pt 2 div 1 for the situations in which a person acquires citizenship in this manner). For citizens by descent or conferral, ss 34(1)–(2), (5) permit revocation in certain circumstances, but they all relate to pre-citizenship behaviour.

banishment but by imprisonment followed by eventual reintegration into society reflects the fact that as a community we take responsibility for the behaviour of the individuals produced by our community. Given that many long-term residents could be said to be products of their life in Australia, particularly in the case of persons who immigrated to Australia under the age of criminal responsibility and have therefore spent their formative years in Australia, the better view is that they are ‘member[s] of society who ha[ve] committed offences’,¹⁰⁶ and as such their banishment is best understood as an attempt to ‘export [our] problems elsewhere.’¹⁰⁷ In short, the idea that criminal activity is indicative of non-absorption is difficult to sustain.¹⁰⁸

This analysis reveals that, even where individual judges have been prepared to countenance the possibility of developing an autonomous meaning of ‘non-alien’ derived from a person’s connection to and membership of the community, they have primarily relied on a circular approach that defers to Parliament’s conferral of certain civic rights and benefits as well as questionable assumptions about what constitutes evidence of a person’s connection (or not) to the community. In addition, there has been a complete reluctance to consider the issue from the perspective of the human rights of long-established non-citizens.¹⁰⁹

¹⁰⁶ *Hollis* (2003) 202 ALR 483, 491 (Lee J). For discussion of similar concerns expressed in early AAT decisions on this point, see Crock, *Immigration and Refugee Law in Australia*, above n 41, 240.

¹⁰⁷ *Nystrom (Full Court)* (2005) 143 FCR 420, 430 (Moore and Gyles JJ). Similar sentiments have been expressed in decisions of the Federal Court: see, eg, *Watson v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1654 (Unreported, Spender J, 15 December 2004) [6] (where Spender J remarked that ‘it seems extraordinarily unfair to Scotland to send Mr Watson there’); *Shaw (Full Court)* (2005) 142 FCR 402, 406 (where Spender J stated that Shaw ‘is now 32 years of age. I note that it seems thoroughly unfair to the United Kingdom to send Mr Shaw there for no good reason other than that he is now a person of poor character who happens to have spent the first 18 months of his life there’). The AAT has made similar comments: see, eg, *Glusheski v Minister for Immigration and Multicultural Affairs* [2000] AATA 717 (Unreported, McMahon DP, 18 August 2000) [34] (‘*Glusheski*’), where the AAT commented in relation to a Macedonian citizen who had arrived in Australia aged 25 and had lived in Australia for 37 years that ‘[i]t seems fairer to believe that if Mr Glusheski is now a problem, he should be regarded as Australia’s problem.’ See also Nicholls, above n 3, 10, 160. For a very interesting discussion on this point of whether other states are indeed required to take back such persons as a matter of international law, see Gregor Noll, ‘Return of Persons to States of Origin and Third States’ in T A Aleinikoff and V Chetail (eds), *Migration and International Legal Norms* (2003) 61, 61–74. For an account of the impact of deportation in countries of deportation, see Daniel Kanstroom, ‘Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?’ (2007) 3 *Stanford Journal of Civil Rights and Civil Liberties* 195, 218–21.

¹⁰⁸ Indeed, so much appears to have been conceded later by at least Callinan J in *Shaw* (2003) 218 CLR 28, 79, where his Honour held that the applicant’s residence for more than 10 years prior to ‘the commission by him of serious crime’ produced the result that he had become an absorbed member of the Australian community, at least for the purpose of the immigration power. Callinan J also noted that he ‘would not regard that first conviction, occurring as it did when he was so young [at age 14], as putting him beyond the community of ordinary Australians’: at 86. This was so despite the fact that Callinan J described Shaw as ‘this criminal who would, in consequence of my decision if it were to prevail, continue to be a charge upon the Australian people’ (at 87) and ‘an immigrant from the United Kingdom of persistent criminal inclination’ (at 72). See also at 69–70 (Kirby J) and above n 103. It was not necessary for the majority members of the Court to discuss the immigration power since they upheld the legislation on the basis of the aliens power: see above n 84 and accompanying text.

¹⁰⁹ This is largely explicable on the basis that Australia has no constitutional bill of rights: see generally National Human Rights Consultation Committee, *National Human Rights Consulta-*

But what of the Justices who have rejected the relevance of absorption altogether? One broader objection to the invocation of the absorption doctrine in the context of alienage expressed by certain members of the High Court is said to be ‘that “no bell [rings]” to inform’ a person when he or she has become absorbed into the Australian community.¹¹⁰ However, while it might well be difficult to identify the precise moment at which a person has become ‘absorbed’,¹¹¹ the requirement to ascertain such constitutional facts is not unique to either the immigration or aliens power and is a task well within the competence of the federal courts.¹¹² In a number of decisions, all members of the High Court have had no difficulty accepting that, at the relevant time, the prosecutor or applicant had been absorbed so as to be outside the immigration power.¹¹³ Similarly, in a number of very strongly worded judgments, various Justices of the Federal Court have had little difficulty in expressing the view that s 501 of the *Migration Act* has been unfairly applied to long-term residents who are essentially ‘Australian’ (invoking at least implicitly the notion of absorption).¹¹⁴

tion: Report (2009) ch 10. That said, the omission is particularly curious in the case of Kirby J, as his Honour was one of the few Justices to have been willing to take into account international law, including international human rights law, in interpreting constitutional terms: see, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562, 623–4 (Kirby J). Indeed, in the later case of *Koroitama v Commonwealth* (2006) 227 CLR 31, 50, his Honour stated: ‘I accept that the Australian constitutional notions of alienage and nationality are to be understood in the context of any universal principles of fundamental human rights applicable to and accepted by, the community of civilised nations’.

¹¹⁰ *Ex parte Te* (2002) 212 CLR 162, 176 (Gleeson CJ). In *Re Patterson* (2001) 207 CLR 391, 473, Gummow and Hayne JJ in dissent relied upon the fact that the notion of absorption ‘is not easy of application and turns into constitutional facts many details of the lives of individuals’ as an additional reason for rejecting it as relevant to the aliens power. Their other major objection was that the adoption of the ‘absorption’ doctrine in relation to the aliens power would cloud the distinction between the heads of power with respect to ‘immigration’ and ‘aliens’: at 472. However, this seems to be a weak rationale; the potential for clouding this distinction does not prevent the Court from devising some other method of assessing non-alienage.

¹¹¹ This is acknowledged by a number of Justices of the High Court: see, eg, *Koon Wing Lau* (1949) 80 CLR 533, 577 (Dixon J) (‘there does not appear to be any general agreement as to the tests for the application of this very vague conception’); *Ex parte Henry* (1975) 133 CLR 369, 382 (Mason J) (‘[a]dmittedly there will be difficulties in determining when it is that the Minister’s guardianship in a particular case terminates’). See also *Shaw* (2003) 218 CLR 28, 52 (Kirby J): the ‘test of “absorption into the Australian community” is concededly vague’ and ‘[t]he precise moment when it occurs may be a matter of dispute in a particular case’. In the same case, Callinan J noted that ‘[p]recisely how long a period of residence must have passed, or what communal activities, or abstention from anti-social activities, must have taken place, for absorption into the Australian community to have occurred has not so far been settled by this Court’: at 78–9.

¹¹² This is also the case in relation to the defence power: see, eg, *Thomas v Mowbray* (2007) 233 CLR 307. For suggestions as to the factors which may be most appropriately considered in the immigration context, see Wood, above n 9, 294–300.

¹¹³ For examples, see the cases cited above in n 48. See also *Ex parte Walsh* (1925) 37 CLR 36, an earlier decision. For an explicit discussion of the relevant factors, see *Re Patterson* (2002) 207 CLR 391, 476–7, where Kirby J refers to the concession that, if absorbed, a person is no longer an immigrant. Kirby J states that this concession was ‘properly made, both as a matter of law and as a matter of fact’ (at 477 (citations omitted)), noting in support of the latter proposition the ‘thirty-four years that had elapsed between the arrival of [Taylor] in Australia and the decision [to deport him], ... together with his upbringing in Australia, his familial and other connections with Australia and the fact that he had never left Australia following his arrival as a child’ (at 477 fn 291).

¹¹⁴ See, eg, *Nystrom (Full Court)* (2005) 143 FCR 420, 429 (Moore and Gyles JJ).

For example, in *Shaw v Minister for Immigration and Multicultural and Indigenous Affairs* Spender J stated:

In my opinion, it cannot be a lawful exercise of the power conferred on the Executive with respect to aliens, to deport to the United Kingdom a person who has spent almost the entirety of his life in Australia, who has an Australian wife and two Australian sons, who has absolutely no connection with the United Kingdom, other than being born there of parents who were then nationals of the United Kingdom but who later became Australian citizens, and having spent the first 18 months of his life there, simply because he is a criminal.¹¹⁵

Further, the fact that a person has ‘ceased to be an immigrant’¹¹⁶ is an explicit criterion for grant of an absorbed person visa pursuant to s 34 of the *Migration Act*.¹¹⁷ While this phrase is not further defined in the *Migration Act*, the Federal Court has devised a list of relevant guiding factors to assist in ascertaining whether this criterion is satisfied in an individual case,¹¹⁸ the application of which appears to have been straightforward in the decisions on this point.¹¹⁹

¹¹⁵ *Shaw (Full Court)* (2005) 142 FCR 402, 404. Similarly, in *Ayan* (2003) 126 FCR 152, 154, Sackville J noted that ‘[t]he circumstances of the case make it impossible not to feel sympathy for the appellant and his family. Whatever view one takes of the appellant’s criminal conduct, it might be thought difficult to resist the proposition that in every respect, except citizenship, he is an Australian’; see also at 166–8. The Commonwealth Ombudsman, above n 9, 1, notes that the permanent residents under examination in that report

have been here so long that they, and the communities they live in, see them as Australians. All have lived in Australia for more than 10 years, often much longer. They came as babies or children and have spent the bulk of their formative years, and all their adult years, in Australia. They have well-established family and community ties here, and often have children themselves.

¹¹⁶ *Migration Act* s 34(2)(b).

¹¹⁷ The background to this visa is set out in a number of decisions of the Federal Court and the High Court: see, eg, *Nystrom* (2006) 228 CLR 566, 574–8 (Gummow and Hayne JJ), 598–604 (Heydon and Crennan JJ); *Nystrom (Full Court)* (2005) 143 FCR 420, 423–4, 427 (Moore and Gyles JJ).

¹¹⁸ In *Johnson* (2004) 136 FCR 494, 510, French J explained that the concept of absorption ‘is an evaluative metaphor which invites consideration of a variety of factors relevant to its application.’ His Honour then went on to identify, at 510–11, a list of factors relevant to assessing whether a person ‘has become a member of the Australian community’ as follows:

- 1 The time that has elapsed since the person’s entry into Australia.
- 2 The existence and timing of the formation of an intention to settle permanently in Australia.
- 3 The number and duration of absences.
- 4 Family or other close personal ties in Australia.
- 5 The presence of family members in Australia or the commitment of family members to come to Australia to join the person.
- 6 Employment history.
- 7 Economic ties including property ownership.
- 8 Contribution to, and participation in, community activities.
- 9 Any criminal record.

His Honour concluded by noting that this list of factors is ‘plainly not exhaustive. Rather, it illustrates the multi-dimensional character of the judgment involved’: at 511. His Honour warned that ‘[i]t is also necessary in making that judgment to avoid narrow mono-cultural assumptions about what constitutes membership of the Australian community.’

¹¹⁹ For examples of this in the Full Federal Court, see *Moore* (2007) 161 FCR 236, 247–50 (Gyles, Graham and Tracey JJ); *Toia v Minister for Immigration and Citizenship* (2009) 177 FCR 125, 136–7 (Stone and Jacobson JJ). Examples in the Federal Court include *Pull v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCA 20 (Unreported, Besanko J, 23 January 2007) [18]–[19]; *Charlie v Minister for Immigration and Citizenship* (2008)

The difficulty in sustaining this objection thus suggests that the rejection of the absorption concept with respect to the aliens power reflects a deeper concern — one that is fundamentally about the appropriateness of the High Court effectively placing ‘a considerable fetter on the power of the federal Parliament to identify those who are to be treated ... as nationals of Australia.’¹²⁰ This is borne out in more recent cases in which the Court has fortified its reluctance to curtail the Commonwealth’s ability to define alienage. While continuing to insist that the word ‘alien’ involves a ‘constitutional concept’ to be interpreted by the Court,¹²¹ and thus that Parliament ‘cannot, simply by giving its own definition of “alien”, expand the power ... to include persons who could not possibly answer the description of “aliens” in the ordinary understanding of the word’,¹²² the High Court has nonetheless consistently resisted arguments that Parliament’s power is so limited in other specific contexts.¹²³

Against that background, I now turn to the legislative history of the deportation and character provisions in the *Migration Act* — history which reveals that the Parliament has actually been more willing to accommodate the subtleties of this area than the High Court.

III THE DEPORTATION OF LONG-TERM RESIDENTS FROM AUSTRALIA: LEGISLATIVE BACKGROUND

The *Migration Act* has a ‘tortuous ... history’¹²⁴ and it is not here intended to provide an exhaustive description of its evolution. However, it is important to outline the key historical developments in order to understand the context of the current provisions examined in this article.¹²⁵ This is because, as this history reveals, the Parliament long ago recognised the special status and concomitant entitlement to protection from deportation of long-term residents — a

171 FCR 44, 50–1 (Branson J); *Toia v Minister for Immigration and Citizenship* [2009] FCA 166 (Unreported, Foster J, 27 February 2009) [196]–[220].

¹²⁰ *Singh* (2004) 222 CLR 322, 396–7 (Gummow, Hayne and Heydon JJ), quoted in *Koroitamana v Commonwealth* (2006) 227 CLR 31, 38 (Gleeson CJ and Heydon J); see also at 46 (Gummow, Hayne and Crennan JJ).

¹²¹ See *Ex parte Te* (2002) 212 CLR 162, 205 (Kirby J).

¹²² This was initially expressed by Gibbs CJ in *Pochi* (1982) 151 CLR 101, 109, and has been reiterated by the Court in later cases: see, eg, *Ex parte Te* (2002) 212 CLR 162, 173 (Gleeson CJ), 179 (Gaudron J); *Singh* (2004) 222 CLR 322, 329 (Gleeson CJ), 372, 375 (McHugh J), 382–3 (Gummow, Hayne and Heydon JJ), 408 (Kirby J), 429 (Callinan J). In *Shaw* (2004) 218 CLR 28, 36, Gleeson CJ, Gummow and Hayne JJ agreed that the term alien is not ‘at large’.

¹²³ See, eg, *Singh* (2004) 222 CLR 322, 341–2 (Gleeson CJ), 381, 400 (Gummow, Hayne and Heydon JJ), 415 (Kirby J). I note that there were strong dissents in that case, for a discussion of which see Foster, ‘Membership in the Australian Community’, above n 43, 168–70. See also *Koroitamana v Commonwealth* (2006) 227 CLR 31.

¹²⁴ *Nystrom* (2006) 228 CLR 566, 574 (Gummow and Hayne JJ).

¹²⁵ As Heydon and Crennan JJ noted in *Nystrom* (2006) 228 CLR 566, 599, quoting *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ):

the current approach to statutory interpretation ... ‘uses “context” in its widest sense to include such things as the existing state of the law and the mischief which ... one may discern the statute was intended to remedy’ and recognises the importance of legislative history in construing amendments ...

recognition that has been considerably undermined by the executive's reliance on an entirely separate and different provision: s 501.

A Legislative History: Deportation

The *Migration Act* has always (since enactment in 1958) contained provisions allowing for the deportation of criminal aliens or non-citizens. Originally, s 12 gave the Minister a broad discretion to deport if an alien was convicted of a particular type of crime or sentenced to imprisonment of one year or more.¹²⁶ However, the term 'alien' was defined to exclude British subjects, Irish citizens and protected persons.¹²⁷ Accordingly, s 13 of the *Migration Act* originally conferred a deportation power with respect to immigrants (which could include British subjects), but only in respect of matters occurring within the first five years of their residence.¹²⁸

In 1983, the Hawke government introduced the *Migration Amendment Act 1983* (Cth),¹²⁹ which was intended (inter alia) to reconceive the constitutional basis of the *Migration Act*, shifting reliance from the immigration power to the aliens power.¹³⁰ One of the key rationales for this change was the desire to avoid any limitations on the scope of the immigration power, in particular the possibility that a person could eventually become absorbed and therefore fall outside its scope.¹³¹ However, although the government wished to avoid the

¹²⁶ *Migration Act 1958–83* (Cth) s 12, later amended by *Migration Amendment Act 1983* (Cth) s 10. See also *Nystrom* (2006) 228 CLR 566, 600, 608 (Heydon and Crennan JJ).

¹²⁷ The Act defined an 'alien' as a person who was not 'a British subject', 'an Irish citizen' or a 'protected person': *Migration Act 1958–83* (Cth) s 5(1) (definition of 'alien' paras (a)–(c)). This was consistent with the *Nationality and Citizenship Act 1948* (Cth), which had introduced the concept of Australian citizenship and which, in its original form, retained the concept of British subject such that British subjects were not aliens (s 5(1) defined an 'alien' as 'a person who is not a British subject, an Irish citizen or a protected person'). See also *Re Patterson* (2001) 207 CLR 391, 430 (McHugh J). An 'immigrant' was defined in *Migration Act 1958–83* (Cth) s 5(1) to include 'a person intending to enter, or who has entered, Australia for a temporary stay only, where he would be an immigrant if he intended to enter, or had entered, Australia for the purpose of staying permanently'. See also *Nystrom* (2006) 228 CLR 566, 599 (Heydon and Crennan JJ). See generally Rubenstein, *Australian Citizenship Law in Context*, above n 35, 79–86.

¹²⁸ *Migration Act 1958–83* (Cth) ss 13(a)–(c), repealed by *Migration Amendment Act 1983* (Cth) s 10. See also *Nystrom* (2006) 228 CLR 566, 608 (Heydon and Crennan JJ).

¹²⁹ This came into force on 2 April 1984: Commonwealth, *Gazette: Special*, No S 119, 30 March 1984. See also *Nolan* (1988) 165 CLR 178, 195 (Gaudron J).

¹³⁰ The most obvious manifestation of this is that *Migration Amendment Act 1983* (Cth) s 4 replaced the definition of 'immigrant' (in *Migration Act 1958–83* (Cth) s 5(1)) with 'non-citizen' (and repealed the definition of 'alien'). The constitutional shift was noted by Gummow and Hayne JJ in *Nystrom* (2006) 228 CLR 566, 574. As their Honours explained:

whereas under the old s 6 only 'immigrants' were required to hold entry permits in order to enter and to remain in Australia (thereby excluding persons who, by absorption into the Australian community, had ceased to be immigrants in the constitutional sense), the amendments required all 'non-citizens' to hold an entry permit ...

For further discussion, see at 600–1 (Heydon and Crennan JJ). See also *Re Patterson* (2001) 207 CLR 391, 477 (Kirby J).

¹³¹ See Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1983, 1085–6 (Stewart West, Minister for Immigration and Ethnic Affairs). On absorption, see above nn 44–54, 84 and accompanying text.

limitations inherent in the immigration power,¹³² it is clear that it continued to believe that there was a meaningful distinction between a mere alien and ‘a non-citizen [who] has become a constituent member of the Australian community and as such should not be subject to deportation.’¹³³

Rather than being an oversight or a ‘quirk of history’,¹³⁴ the changes made to the deportation power in 1983, which introduced the 10-year limitation,¹³⁵ were specific and intentional. One of the major problems at which the amendments were aimed was that, prior to these amendments, the deportation power effectively discriminated between Commonwealth subjects (who were not considered ‘aliens’) and permanent resident aliens from non-Commonwealth countries, in that while the former were not liable for deportation after five years

¹³² This was a result of the decision of the High Court in *Pochi* (1982) 151 CLR 101: see above n 122 and accompanying text.

¹³³ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1983, 2775 (Stewart West, Minister for Immigration and Ethnic Affairs). For a fascinating political history of these developments, see Nicholls, above n 3, 118–22. The significance of the clear intention to protect long-term residents on the basis of a moral claim that such persons should not be subject to deportation seems to have been misunderstood by the High Court in *Nystrom* (2006) 228 CLR 566. While Heydon and Crennan JJ did refer to Senator Button’s explanation of the introduction of the 10-year limitation in 1983 as fulfilling a commitment that ‘non-citizens should be free from the threat of deportation after a certain period’ (at 609–10, quoting Commonwealth, *Parliamentary Debates*, Senate, 7 September 1983, 374 (John Button, Minister for Industry and Commerce)), their Honours effectively dismissed the significance of this history (see at 616) by concluding that *Migration Act 1958–89* (Cth) s 12(b)(ii) (as amended by *Migration Amendment Act 1983* (Cth) s 10) ‘derived its language from the previous s 13(a) which was confined to immigrants’ and linked to absorption — a concept not relevant to the aliens power on which s 501 relies (at 610). This is difficult to reconcile with their earlier acknowledgement that the 1983 amendments effected a reconception of the basis of the entire Act from the immigration power to the aliens power (see at 600), as indicated by the use of the concept of ‘non-citizen’ in the new s 12. (*Migration Act 1958–89* (Cth) s 12 was later renumbered by *Migration Legislation Amendment Act 1989* (Cth) s 35 to become *Migration Act 1958–94* (Cth) s 55, and this provision was again renumbered and amended by *Migration Legislation Amendment Act 1994* (Cth) s 83 to become the current *Migration Act* s 201.) In addition, the way in which the issue was discussed by the Minister for Immigration and Ethnic Affairs during the debate of the 1983 amendments (the Migration Amendment Bill 1983 (Cth)) does not support their Honours’ finding. In the course of debate in the House of Representatives regarding the introduction of the 10-year limit, the Minister stated:

As I said previously and now repeat, non-citizens, wherever they come from, should be able to settle in this country of their choice without fear of deportation after 10 years’ lawful permanent residence in Australia. To deny this specific statutory period of liability to a particular class of offenders, apart from the security matters, is to introduce inequality of treatment amongst non-citizens.

Commonwealth, *Parliamentary Debates*, House of Representatives, 24 August 1983, 235 (Stewart West, Minister for Immigration and Ethnic Affairs). See also Explanatory Memorandum, Migration Amendment Bill 1983 (Cth) 1, which states that the purpose of the Bill was to ‘remove the distinction between aliens and immigrants in relation to entry and deportation controls and to put all non-Australian citizens on the same footing in relation to those controls.’

¹³⁴ As was incorrectly stated by the Joint Standing Committee on Migration, Parliament of Australia, *Deportation of Non-Citizen Criminals* (1998) 40, relying on Evidence to Joint Standing Committee on Migration, Parliament of Australia, Canberra, 17 October 1997, 272 (Senator McKiernan), 273 (Mark Sullivan, Deputy Secretary, DIMA).

¹³⁵ *Migration Amendment Act 1983* (Cth) s 10.

from entry the latter always remained subject to possible deportation,¹³⁶ as was highlighted so starkly in *Pochi*.¹³⁷

The 1983 amendments introduced into s 12 of the *Migration Act* a 10-year limit after which all lawful permanent residents could no longer be deported.¹³⁸ This provision was intended to apply to all categories of permanent resident, so as to remove any distinction based on national origin. In his second reading speech introducing these amendments, the then Minister for Immigration and Ethnic Affairs, Mr Stewart West, referred to a pre-election commitment ‘that non-citizens should be free from the threat of deportation after a certain period.’¹³⁹ The Minister remarked that:

In administering a large-scale immigration program the Government and the community must be prepared to accept some ‘bad with the good’. The overwhelming majority of non-citizens who settle in this country are law-abiding members of the community and have a right to expect, after 10 years of lawful residence, that they will not be expelled.¹⁴⁰

In committee debates concerning the proposed amendments, the Minister elaborated on the reasoning of the government in introducing the 10-year limit on liability for deportation as follows:

Let us say that a 12-year-old Greek or Italian comes here and stays for 15 or 20 years. We will have moulded him. He will have been here for most of his life and will have been through our schools and universities and have lived under our social system. If at the end of that time he does something such as grow marihuana, do we then say: ‘We do not want you. We will send you back from whence you came and that country or government can be responsible for you after we have been responsible for creating the type of citizen you are now?’ That is not acceptable to us ... [W]e have responsibility for these people after 10 years, whether we like it or not.¹⁴¹

This legislative background is highly significant as it indicates that the Parliament considered that there was indeed effectively a ‘third class’ of Australian residents formed by those who had ‘become ... constituent member[s]

¹³⁶ See above nn 126–8 and accompanying text.

¹³⁷ See Nicholls, above n 3, 118–20, who describes the increasing focus on this discrimination, culminating in *Pochi*.

¹³⁸ *Migration Amendment Act 1983* (Cth) s 10, substituting a new *Migration Act 1958–89* (Cth) s 12, which was directed to ‘[d]eportation of non-citizens present in Australia for less than 10 years who are convicted of crimes’. See especially s 12(b)(ii), cited in *Nystrom* (2006) 228 CLR 566, 609 (Heydon and Crennan JJ). It should be noted that s 204(1) of the current *Migration Act* provides that any periods spent in prison are disregarded for the purposes of calculating the 10-year period.

¹³⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1983, 1086. As the Minister later affirmed, ‘I have removed all the discrimination and said: “After 10 years everyone who is a permanent resident of Australia can be considered part of Australia”’: Commonwealth, *Parliamentary Debates*, House of Representatives, 24 August 1983, 236.

¹⁴⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1983, 1086. For similar statements in the Senate, see also Commonwealth, *Parliamentary Debates*, Senate, 7 September 1983, 373–4 (John Button, Minister for Industry and Commerce), quoted by Heydon and Crennan JJ in *Nystrom* (2006) 228 CLR 566, 609–10.

¹⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 August 1983, 236.

of the Australian community¹⁴² and as such had a *right* not to be expelled — a kind of denizenship status.¹⁴³ If, as Helen Irving argues, it is ‘the right of abode in Australia, free from the risk of ... deportation’, that ‘goes to the core of what it means to be a citizen’,¹⁴⁴ then it is significant that in 1983 the Parliament recognised that long-term residents (denizens) were entitled to be effectively equated with citizens in such a fundamental respect.

Although there have been some minor changes to this provision, including its being renumbered to appear as s 201 in the present form of the *Migration Act*,¹⁴⁵ the deportation power remains fundamentally that introduced by the Hawke government, retaining the important 10-year limit on liability for deportation.¹⁴⁶

B Legislative History: The Character Test

The *Migration Act* in its original form did not contain a character test; rather, this was introduced in 1992 with the insertion of a new s 180A (later to become s 501), which provided a special power to refuse or to cancel a visa or entry permit where the Minister was satisfied that a person was ‘not of good character’.¹⁴⁷ The legislative history of the provision makes it abundantly clear

¹⁴² Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1983, 2775 (Stewart West, Minister for Immigration and Ethnic Affairs). See generally Nicholls, above n 3, 118–21.

¹⁴³ I note that this legislative history was not adequately considered by the High Court in *Nystrom*. In addition to the concerns mentioned above in n 133, three of the Justices failed to consider the explicit rationale and intent of Parliament in introducing in 1983 the 10-year limitation in *Migration Act 1958–89* (Cth) s 55 (now *Migration Act* s 201). Neither Gleeson CJ nor Gummow and Hayne JJ examined the background material relating to the introduction of either provision (although Gleeson CJ agreed with Heydon and Crennan JJ, who did); Gummow and Hayne JJ instead quote only the 1998 report of the Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, above n 134, 73: see *Nystrom* (2006) 228 CLR 566, 571–2 (Gleeson CJ), 592 (Gummow and Hayne JJ), 609–10 (Heydon and Crennan JJ). This is important because Gleeson CJ acknowledged that ‘if one provision, or group of provisions, were directed with particularity to the case of a person such as the respondent, and the other were merely of general application,’ then ‘that would be a reason for accepting the respondent’s contention’: at 571–2.

¹⁴⁴ Irving, above n 35, 139.

¹⁴⁵ See above n 133.

¹⁴⁶ The current *Migration Act* s 200 was introduced as s 55A by *Migration Reform Act 1992* (Cth) s 14, and accordingly a reference to s 55A was inserted into s 55(c) by *Migration Reform Act 1992* (Cth) s 38, sch 1. *Migration Act 1958–94* (Cth) s 55A (along with s 55) was amended and renumbered to s 200 (and s 201) by *Migration Legislation Amendment Act 1994* (Cth) s 38. In Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, above n 134, xviii, the Committee criticised the fact that the *Migration Act* limits non-citizen liability for criminal deportation to a maximum of 10 years, even where a non citizen commits ‘the most heinous of crimes after that time’. Accordingly, it made recommendations for some changes. However, it is important to note that the Committee recommended that the 10-year rule should ‘continue to be applicable to those who came to Australia under the age of 18’. This was said to maintain ‘an appropriate balance between the need to protect the community and the obligation Australia accepts for very young immigrants.’ Ultimately, notwithstanding this report, no legislative changes were made to Australia’s deportation regime. The only exception to this protection is that s 203(1) of the *Migration Act* applies the deportation power in s 200 to any person who has committed a specified offence, regardless of length of stay. However, the specified offences relate to treason, sabotage, inciting mutiny and assisting prisoners of war to escape (see s 203(1)(c)), and are apparently rarely, if ever, relied upon.

¹⁴⁷ *Migration Act 1958–94* (Cth) s 180A(2), inserted by *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth) s 5. (Section 180A was renumbered by *Migration Legisla-*

that the rationale for its introduction was to provide greater scope than had previously existed for the government to *exclude* — not deport — from Australia persons thought to be undesirable.

The catalyst appears to have been, in the words of the then Minister for Immigration, Local Government and Ethnic Affairs, Mr Gerald Hand, ‘the challenge to the decision to exclude from Australia non-Australian members of the Hell’s Angels Motor Cycle Club’.¹⁴⁸ In 1991, the Minister had tried to exclude non-Australian members of Hell’s Angels from entry into Australia on the basis of ‘public interest’ considerations. This decision was overturned by a single judge in the Federal Court.¹⁴⁹ Although the Minister succeeded in his appeal to the Full Court,¹⁵⁰ the matter resulted in ‘close scrutiny of the decision-making regime for the exclusion of persons of bad character and of persons generally who may represent a danger to the Australian community or a segment of it.’¹⁵¹ The introduction of s 180A thus represented ‘the results of that process and enable[d] the Minister to exclude from Australia persons of bad character and other undesirable persons.’¹⁵²

As this suggests, the parliamentary debate was confined solely to discussion of the need to *exclude* unwanted immigrants and visitors. An example provided by Dr Andrew Theophanous, the Member for Calwell, illustrates the focus of the debate, viz:

The Minister has put forward a Bill which will give the Minister the power to exclude certain people who have committed offences or whom for several reasons it is undesirable to have in Australia. The kind of person we are thinking about is someone who specialises in preaching messages of hatred and racial tension, someone who wants to promulgate extreme views about violence, or someone who has a criminal record.¹⁵³

tion Amendment Act 1994 (Cth) s 83 to become the current *Migration Act* s 501.) *Migration Act 1958–94* (Cth) s 180A(1) allowed the Minister to refuse a visa or entry permit where a person would ‘be likely to engage in criminal conduct’ (sub-s (b)(i)), ‘vilify a segment of the Australian community’ (sub-s (b)(ii)), ‘incite discord in the Australian community or a segment’ thereof (sub-s (b)(iii)), or otherwise ‘represent a danger to’ Australia (sub-s (b)(iv)). I note that in *Nystrom* (2006) 228 CLR 566, 583, Gummow and Hayne JJ state that the character test was introduced by the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth), but this is not accurate. However, at 591 their Honours note the differences between the character test before and after the 1998 amendments. It should also be noted that the Act in its original form, *Migration Act 1958–83* (Cth), did contain a s 16, which deemed certain persons to be ‘prohibited immigrants’. (*Migration Act 1958–83* (Cth) s 16 was later amended by *Migration Amendment Act 1983* (Cth) s 14(c) and repealed by *Migration Legislation Amendment Act 1989* (Cth) s 7. See also *Nystrom* (2006) 228 CLR 566, 608 (Heydon and Crennan JJ).)

¹⁴⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992, 4121.

¹⁴⁹ *Hell’s Angels Motorcycle Club Inc v Hand* (1991) 25 ALD 659.

¹⁵⁰ *Hand v Hell’s Angels Motorcycle Club Inc* (1991) 25 ALD 667.

¹⁵¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992, 4121 (Gerald Hand, Minister for Immigration, Local Government and Ethnic Affairs).

¹⁵² Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992, 4121 (Gerald Hand, Minister for Immigration, Local Government and Ethnic Affairs).

¹⁵³ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992, 4160.

Of particular significance is the fact that there was no discussion whatsoever of the interaction between the new character provisions and the existing power to deport. Although technically the new character provisions were capable of applying to any non-citizen, regardless of length of residence, there is no evidence that the parliamentary intention was to undermine or detract from the protection provided to residents of more than 10 years in s 201.

The insertion of the power to cancel as well as refuse a visa in the original s 180A¹⁵⁴ was logically explained by Moore and Gyles JJ of the Full Federal Court in *Nystrom (Full Court)* as follows:

Checking of the character of offshore applicants is difficult. If it transpires that a mistake was made in granting a visa because of inadequate information concerning character, it is not surprising that there would be a ready power of cancellation when further information comes to hand.¹⁵⁵

Their Honours noted that the section is ‘not confined to cancellation proximate to grant.’¹⁵⁶ However, the background material clearly suggests that the purpose of introducing the character test was primarily to deal with the regulation of entry of non-citizens.¹⁵⁷

The first Minister for Immigration and Multicultural Affairs in the Howard government, Mr Philip Ruddock, initiated an inquiry into ‘the policies and practices relating to criminal deportation’¹⁵⁸ soon after coming into power in 1996.¹⁵⁹ The centrepiece of the inquiry was an assessment of ‘the adequacy of existing arrangements for dealing with permanent residents who are convicted of serious criminal offences’ and, in particular, a review of ‘the appropriateness of the current 10 year limit on liability for criminal deportation’.¹⁶⁰ However, ultimately the government did not await the outcome of the Committee’s report before introducing amendments to the *Migration Act* and in any event did not seek to alter the deportation power at all.¹⁶¹ Rather, the 1998 amendments were

¹⁵⁴ *Migration Act 1958–94* (Cth) s 180A.

¹⁵⁵ (2005) 143 FCR 420, 427.

¹⁵⁶ *Ibid.*

¹⁵⁷ This is further supported by debate in the House of Representatives at the second reading stage of the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997 (Cth) (see below nn 161–5 and accompanying text), where one member of the Opposition agreed that ‘if a person has managed to enter Australia, despite not being of good character, the government should be able to act quickly to remove that person’: Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 1997, 10 669 (Martin Ferguson).

¹⁵⁸ Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, above n 134, xiii.

¹⁵⁹ For the political background to these developments, see Nicholls, above n 3, ch 10.

¹⁶⁰ Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, above n 134, xiii (terms of reference 1 and 3).

¹⁶¹ Indeed, the Commonwealth Ombudsman, above n 9, 33–4, quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1244 (Philip Ruddock, Minister for Immigration and Multicultural Affairs), notes:

The Minister made the following statement during the Second Reading debate:

In relation to this bill, there were some other points made during the debate. The honourable member for Calwell was concerned about the Joint Standing Committee on Migration report into criminal deportations. There will be more legislation arising from the committee’s work.

focused not on criminal deportation but on strengthening the Minister's power to refuse or cancel a visa on character grounds. Some of the key changes included: reframing the character test as a test that an applicant must satisfy, thus shifting the onus from the decision-maker to an applicant;¹⁶² the introduction of provisions that deemed non-citizens who have been convicted and sentenced to a single sentence of detention of 12 months or more to have failed the character test (the provision which has subsequently been most relevant to long-term residents);¹⁶³ the introduction of a power in the Minister to issue binding directions on all decision-makers (including merits review tribunals) as to the factors to be considered when determining whether to cancel a visa on these grounds;¹⁶⁴ and the introduction of the power of the Minister to set aside decisions of the Administrative Appeals Tribunal ('AAT') or a delegate where either has decided not to refuse or decided not to cancel a visa on character grounds.¹⁶⁵

While there is no doubt that the intention of the legislature was to strengthen the powers of the Department and the Minister personally to 'prevent the entry and stay in Australia of non-citizens who have a criminal background or have criminal associations',¹⁶⁶ there was again no discussion whatsoever of the relationship between s 501 and the deportation powers in ss 200 and 201.¹⁶⁷ Specifically, there was no suggestion that s 501 was intended to be used to undermine or circumvent the limits in s 201. As the Senate Legal and Constitutional References Committee found in 2006:

The emphasis during debate was on screening people seeking to enter Australia and the prompt removal of people who committed a serious offence while in

This was dealing with character issues in the broad. It was not dealing with criminal deportation and obviously the report is one we will be responding to.

¹⁶² See *Migration Act s 501(2)(b)*, as amended by *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) sch 1 item 23.

¹⁶³ See *Migration Act s 501(7)*, as amended by *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) sch 1 item 23.

¹⁶⁴ See *Migration Act s 499*, as amended by *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) sch 1 items 16–17. For discussion of such directions, see below Part IV.

¹⁶⁵ See *Migration Act s 501A*, inserted by *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) sch 1 item 23. See Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 1997, 10 363–5 (Philip Ruddock, Minister for Immigration and Multicultural Affairs) for explanation of these changes in the second reading speech. Interestingly, in 2006 Senator Andrew Bartlett introduced the *Migration Legislation Amendment (Provisions Relating to Character and Conduct) Bill 2006* (Cth), which sought 'to repeal the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998*': Explanatory Memorandum, *Migration Legislation Amendment (Provisions Relating to Character and Conduct) Bill 2006* (Cth). See also Commonwealth, *Parliamentary Debates*, Senate, 14 August 2006, 58–9 (Andrew Bartlett) for the second reading speech. However, this Bill did not pass.

¹⁶⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 1997, 10 363 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

¹⁶⁷ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 1997, 10 363 (Philip Ruddock, Minister for Immigration and Multicultural Affairs); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 1997, 10 669–70 (Martin Ferguson), 10 672 (Gary Hardgrave), 10 674 (Kelvin Thomson), 10 678 (Kay Elson).

Australia. There is no evidence that the bill was intended to apply to long term permanent residents and no suggestion that section 201 should be repealed.¹⁶⁸

C Administration of Sections 200, 201 and 501 in Practice

In 2005, the Senate Legal and Constitutional References Committee undertook a wide-ranging inquiry into the administration and operation of the *Migration Act*.¹⁶⁹ In relation to the deportation of long-term Australian residents convicted of criminal offences, the Committee noted that the evidence it received indicated that

the Commonwealth has 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.¹⁷⁰

Indeed, this was apparently accepted by the Department in its response to criticisms by several witnesses that s 501 is being used so as to circumvent ‘the justifiable limitations enshrined in section 201’.¹⁷¹ The Department of Immigration and Multicultural and Indigenous Affairs (‘DIMIA’), now the Department of Immigration and Citizenship, responded by arguing ‘that, in its view, section 201 has been effectively superseded by section 501’.¹⁷²

The Senate Legal and Constitutional References Committee took a different view, reiterating that ‘there is no evidence in the parliamentary record that amendments to section 501 were intended to supersede the criminal deportation provisions, and the committee rejects the proposition that section 201 [has been] repealed.’¹⁷³ Indeed, the Committee continued that to accept DIMIA’s submission ‘would be in effect to bypass the role of the Parliament in the debate and passage of laws which affect the fundamental rights and interests of Australians’.¹⁷⁴ Thus the Committee stated:

the committee does not accept the argument that amendments to section 501 implicitly supersede the criminal deportation provisions. The abolition of a significant safeguard against deportation of people who are, in all practical senses, Australian is a matter of serious public policy. Section 201 is the current

¹⁶⁸ Senate Legal and Constitutional References Committee, above n 9, 282, citing Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1229 (Philip Ruddock, Minister for Immigration and Multicultural Affairs). This can be supported by reference to the debate in the House of Representatives concerning this Bill at the second reading stage: see generally Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 1997, 10 669–98.

¹⁶⁹ Senate Legal and Constitutional References Committee, above n 9.

¹⁷⁰ *Ibid* 280.

¹⁷¹ *Ibid* 291–2.

¹⁷² *Ibid* 292. See also Commonwealth Ombudsman, above n 9, 13; Susan Kneebone, ‘Before the High Court: *Ruddock and Others v Taylor*’ (2005) 27 *Sydney Law Review* 143, 144; Ray Turner, ‘Ridding the Country of “Bad Aliens” — The Operation of the Character and Conduct Provisions in the *Migration Act 1958*’ (2002) 6 *Immigration Review* 7, 9; Nicholls, above n 3, 154–8.

¹⁷³ Senate Legal and Constitutional References Committee, above n 9, 294. This view was also taken by the Commonwealth Ombudsman, above n 9, 12.

¹⁷⁴ Senate Legal and Constitutional References Committee, above n 9, 294.

Australian law in relation to criminal deportation of permanent residents and the abolition of the ten year rule, if it is to occur, must be repealed by the Parliament not by administrative practice.¹⁷⁵

It therefore ultimately recommended that the practice of using s 501 to cancel permanent resident visas ‘should not be applied to people who arrived as minors and have stayed for more than ten years.’¹⁷⁶

As a result of growing concern regarding the operation of s 501, and particularly following ‘[s]everal serious complaints ... to the Ombudsman ... about the adequacy of administration ... of s 501’ (especially as it applies to long-term residents),¹⁷⁷ the Commonwealth Ombudsman decided to undertake an ‘own motion’ investigation into ‘matters of administration relating to actions of [the Department of Immigration and Multicultural Affairs] concerning cancellation under s 501 of the *Migration Act* of visas held by long-term permanent residents.’¹⁷⁸ While his 2006 report is primarily concerned with issues of procedure and measures to improve the quality of the Department’s administration of s 501 cases, the Ombudsman nonetheless also considered there to be a ‘remaining issue’ of ‘the fairness and reasonableness of the extensive application of s 501 to long-term permanent residents.’¹⁷⁹

The interaction of the deportation and cancellation powers has thus been the subject of considerable debate by various key parliamentary and executive bodies at the federal level. However, notwithstanding the persuasive arguments outlined above concerning the clear intent of the legislature’s insertion of the 10-year limit, the High Court has now categorically rejected the argument that s 201 in any way limits the power to cancel a visa in s 501.

In *Nystrom (Full Court)*, a majority of the Full Federal Court found that the Minister had made a jurisdictional error in cancelling Nystrom’s visa under s 501 on the basis that the Minister had failed to appreciate that Nystrom was the holder of an absorbed person visa under s 34 of the *Migration Act* and had thus failed to take into account ‘the nature of that visa’ in assessing whether to cancel the visa.¹⁸⁰ In rejecting the argument by the Minister that the same decision

¹⁷⁵ Ibid.

¹⁷⁶ Ibid 295 (recommendation 58).

¹⁷⁷ Commonwealth Ombudsman, above n 9, 1.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid 44. The Ombudsman questioned whether it is appropriate to apply s 501:

to a person who meets the following criteria:

- arrived in Australia as a minor and spent his or her formative years in Australia
- has effectively been absorbed into the Australian community, using criteria similar to those considered in relation to [*Migration Act*] s 34
- has strong ties — particularly strong family ties — to the Australian community
- has no ties with the likely receiving country and return there would impose hardship in terms of language, culture, education and employment
- has family members in Australia who would face hardship as a result of the visa holder’s separation from them
- could not be removed under s 200 criminal deportation provisions [and]
- would not constitute a significant risk to the Australian community if released from detention.

¹⁸⁰ (2005) 143 FCR 420, 427 (Moore and Gyles JJ); see also at 428. I note that Emmett J was in dissent on this issue, although his Honour also stated, at 433, that he

would have been reached even had she appreciated the specific nature of Nystrom's visa, their Honours expressed the view that 'it is timely for there to be review by the Minister of the proper approach to matters such as this'¹⁸¹ as 'it is difficult to envisage the bona fide use of s 501 to cancel the permanent absorbed person visa of a person of over 30 years of age who has spent all of his life in Australia'.¹⁸² In particular, their Honours suggested that s 501 'should not be used to circumvent the limitations in s 201'.¹⁸³ They noted that, although it had not been argued before them (and thus was not a basis for their decision),

it may be that the specific power conferred by s 201 to deport non-citizens who have committed crimes is the only source of power to deport (in a case such as the present) and not indirectly ... the power conferred by s 501 to cancel a visa enlivening the power to remove under s 198 ...¹⁸⁴

This specific argument was taken up by Nystrom (the respondent) in the appeal by the Minister to the High Court. In a notice of contention, Nystrom submitted that the power under s 501(2) is 'unavailable in the circumstances that obtained in this case where there was no power to deport the respondent under ss 200 and 201 of the Principal Act'.¹⁸⁵ This was said to be because s 201 conferred

a 'specific statutory protection from exclusion from Australia' and that 'on ordinary principles' that protection could not 'be impliedly repealed by the subsequent conferral of an additional and general method of exclusion in s 501'.¹⁸⁶

However, not only did the High Court unanimously allow the Minister's appeal against the Full Federal Court's decision regarding jurisdictional error,¹⁸⁷ it also rejected the respondent's argument concerning the conferral by s 201 of an implied statutory protection.¹⁸⁸

share[d] the disquiet expressed by their Honours concerning the circumstances in which a man who has spent all of his life in Australia and who has no knowledge of the Swedish language will be removed to Sweden and banished from Australia because of what must be characterised as an accident of history and an oversight on the part of his parents.

¹⁸¹ Ibid 429 (Moore and Gyles JJ).

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid, citing *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 and *Hoffman v Chief of Army* (2004) 137 FCR 520.

¹⁸⁵ *Nystrom* (2006) 228 CLR 566, 573 (Gummow and Hayne JJ).

¹⁸⁶ Ibid 583 (citations omitted).

¹⁸⁷ Ibid 571 (Gleeson CJ), 592 (Gummow and Hayne JJ), 606–7, 616 (Heydon and Crennan JJ).

¹⁸⁸ According to Gummow and Hayne JJ, ss 201 and 501 could not be said to be directed to 'the "same power"' (ibid 589 (citations omitted)) on the basis of an arguably highly artificial distinction between the 'different consequences for the status of individuals' of the operation of the two provisions, namely, that, '[w]here a deportation order is made, the individual has the status of a lawful non-citizen who is subject to deportation', while on an order under s 501(2) the 'status of the individual changes to that of an unlawful non-citizen' (at 592). This was also accepted by Heydon and Crennan JJ: at 613, 616. For discussion regarding *Sales* (2008) 171 FCR 56, which held that, at the time, s 501 did not apply to transitional visas because of the precise wording of s 501, see above n 24. As the Full Federal Court noted in *Sales*, this issue was not considered by the High Court in *Nystrom* as the High Court assumed (incorrectly) that

Thus, while the majority in the Full Federal Court (along with other single Justices of the Federal Court in previous decisions)¹⁸⁹ had been willing to question the appropriateness and fairness of the executive's circumvention of the clear and intentional protection for long-term residents conferred by s 201, the High Court again evinced a reticence to fetter discretion (although on this occasion in the context of executive rather than legislative power).¹⁹⁰ Further, while earlier consideration of this issue had referred to the fundamental human rights of non-citizens either explicitly¹⁹¹ or implicitly,¹⁹² the High Court did not consider this a relevant factor in assessing the executive's invocation of s 501 in the context of long-term residents.¹⁹³

Having thus concluded in Parts II and III that there is effectively no constitutional or legislative basis upon which a long-term permanent Australian resident can seek protection from deportation, I now turn to consider the international law ramifications of this position.

IV INTERNATIONAL LAW AND THE DEPORTATION OF LONG-TERM RESIDENTS

The expulsion of criminal long-term residents raises a number of issues concerning Australia's compliance with its international human rights obligations. As noted above, while historically states had absolute control over migration decisions at international law, international human rights law now

Nystrom's visa was subject to cancellation under (that is, had been 'granted' within the meaning of) s 501: *Sales* (2008) 171 FCR 56, 59 (Gyles and Graham JJ).

¹⁸⁹ See above n 107.

¹⁹⁰ There was no constitutional issue in *Nystrom*, the issues having been well settled by that stage: see above n 6.

¹⁹¹ Both the Senate Legal and Constitutional References Committee and the Ombudsman view these issues as involving fundamental human rights and interests of Australians: Senate Legal and Constitutional References Committee, above n 9, 294 (these issues raise 'the fundamental rights and interests of Australians'); Commonwealth Ombudsman, above n 9, 16. See also HREOC, *Background Paper*, above n 3, 7.

¹⁹² The discussion and critique of the application of s 501 to long-term residents in previous Federal Court decisions is more implicit: see, eg, *Nystrom (Full Court)* (2005) 143 FCR 420, 421–2 (Moore and Gyles JJ); *Shaw (Full Court)* (2005) 142 FCR 402, 404 (Spender J). See also above n 21. However, in some decisions, the Federal Court has explicitly acknowledged the impact of s 501 cancellations on the rights of long-term residents. For example, in *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364, 372, Burchett and Lee JJ explained that the statutory predecessor to *Migration Act* s 501 deprived the persons caught by it 'of one of their most precious rights, their right of community' (quoted in *Martinez* (2009) 177 FCR 337, 345 (Rares J)). In *Martinez*, Rares J described a visa cancellation as having a 'profound effect on the rights of the visa holder.'

¹⁹³ It is interesting and curious that none of Justices of the High Court took into account two well-established principles of statutory construction in the *Nystrom* case, particularly given that the case focused on statutory interpretation rather than constitutional issues. The principles are, first, that where a statute is ambiguous it should be given a construction that is consistent with Australia's international law obligations (see *Minister For Immigration and Ethnic Affairs v Teoh* (1994) 183 CLR 273, 287 (Mason CJ and Deane J)) and, secondly, that an interpreter should assume that the legislature did not intend to abrogate fundamental rights and liberties in the absence of clear words of statutory intent: see *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). See also *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 442–4 (Black CJ, French and Weinberg JJ); *Martinez* (2009) 177 FCR 337, 344–5 (Rares J).

clearly constrains a state's ability to expel or deport a person in certain circumstances. This Part accordingly considers the key international obligations assumed by Australia which may be enlivened in criminal deportation decisions, particularly in the context of long-term residents. It begins by exploring whether there are any substantive obligations that prohibit absolutely the deportation of long-term residents and concludes by considering whether the current process of deportation decision-making adequately takes into account international obligations.

A Right to 'One's Own Country'

One of the fundamental hallmarks of citizenship is the right to enter and remain in one's country of nationality or citizenship.¹⁹⁴ However, international human rights law extends this right to persons who do not necessarily enjoy formal citizenship or nationality. Article 12(4) of the *International Covenant on Civil and Political Rights* ('ICCPR') provides that '[n]o one shall be arbitrarily deprived of the right to enter *his own country*'¹⁹⁵ — a protection which logically implies a right not to be deported.¹⁹⁶ While the invocation of such a broad phrase, 'own country', appears deliberately wider than mere citizenship or nationality, a question remains as to what is the precise meaning of this phrase and how it might be applied in the context of permanent (non-citizen) long-term residents. The Human Rights Committee's ('HRC's') jurisprudence in this area is evolving, and this obligation is indeed the subject of a pending communication against Australia in *Nystrom v Australia*.¹⁹⁷

¹⁹⁴ As the International Law Commission has recently noted, 'the principle of non-expulsion of nationals' is a general principle that is 'widely recognized as applicable to the expulsion of aliens': Maurice Kamto, International Law Commission, *Third Report on the Expulsion of Aliens*, [11], UN Doc A/CN.4/581 (2007).

¹⁹⁵ Opened for signature 16 December 1966, 999 UNTS 171, art 12(4) (entered into force 23 March 1976) (emphasis added).

¹⁹⁶ See Human Rights Committee, *General Comments Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: Addendum — General Comment No 27*, 67th sess, 1783rd mtg, [19], UN Doc CCPR/C/21/Rev.1/Add.9 (1999) ('*General Comment No 27*'): '[i]t implies the right to remain in one's own country.'

¹⁹⁷ See Human Rights Law Resource Centre, 'Individual Communication under the *Optional Protocol to the International Covenant on Civil and Political Rights* — Original Communication', Communication to the HRC in *Nystrom v Australia*, 4 April 2007, [77]–[103] <<http://www.hrlrc.org.au/files/PXB9OSNUM6/Individual%20Communication.pdf>>. The HRC is constituted under ICCPR pt IV as the body which has responsibility for implementation of the ICCPR (see especially art 40). The views of the HRC, especially under the *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976),

represent an authoritative determination by the organ established under the *Covenant* itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the *Covenant* and the *Optional Protocol*.

HRC, *General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 94th sess, [13], UN Doc CCPR/C/GC/33 (2008). See also at [15]:

The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the *Optional*

What then is the appropriate approach to the interpretation of this phrase? The *Vienna Convention on the Law of Treaties* ('VCLT') requires that a treaty be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms ... in their context and in the light of its object and purpose.'¹⁹⁸ The ordinary meaning of the phrase 'own country' is plainly distinct from the specific concepts of nationality or citizenship.¹⁹⁹ This must be so given that the significance at international law of the concept of nationality has long been well understood and, indeed, has been employed explicitly in comparable provisions in regional human rights treaties in contrast to the language in *ICCPR* art 12(4).²⁰⁰

In addition to the primary rule of interpretation, *VCLT* art 32 also permits recourse 'to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm' the ordinary meaning or where the meaning is 'ambiguous or obscure'.²⁰¹ Article 13(2) of the *Universal Declaration of Human Rights* ('UDHR')²⁰² — the predecessor to the *ICCPR* — provides that '[e]veryone has the right to leave any country, including his own, and to return to his country.' There appears little background in the drafting history of art 13 of the *UDHR* to suggest the intended meaning of the phrase 'own country'.²⁰³ However, reference to the drafting history in relation to art 12(4) of the *ICCPR* makes it clear that the phrase was deliberately chosen. The United Nations Secretary-General's annotations to the draft text explain that, while '[t]he early drafts [of art 12(4)] dealt only with the

Protocol and in relation to the *Covenant* itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.

¹⁹⁸ Opened for signature 23 May 1969, 1155 UNTS 331, art 31(1) (entered into force 27 January 1980).

¹⁹⁹ Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (1987) 58–9. Hannum concludes that the interpretation that this phrase 'includes nationals, citizens and permanent residents' is 'most consistent with the ordinary meaning of the words in the text, and with at least portions of the *travaux préparatoires*': at 59 (citations omitted).

²⁰⁰ Article 3(2) of *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol Thereto*, opened for signature 16 September 1963, 1496 UNTS 263 (entered into force 2 May 1968), as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, opened for signature 11 May 1994, 2061 UNTS 7 (entered into force 1 November 1998), states that '[n]o one shall be deprived of the right to enter the territory of the state of which he is a national.' Article 22(5) of the *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 27 August 1979) provides that '[n]o one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.' This was also accepted by the majority in *Stewart v Canada*: HRC, *Views: Communication No 538/1993*, 58th sess, 15, UN Doc CCPR/C/58/D/538/1993 (1996) ('*Stewart v Canada*'). On the other hand, art 12(2) of the *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) is similar to *ICCPR* art 12(4). The former provides that '[e]very individual shall have the right to leave any country including his own, and to return to his country.'

²⁰¹ *VCLT* art 32(a).

²⁰² GA Res 217 (III), UN GAOR, 3rd sess, 183rd plen mtg, 71, UN Doc A/810 (1948).

²⁰³ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (1999) 73–5, 332.

right of nationals to “enter” their country’,²⁰⁴ ‘difficulties arose ... for States in which the right to return to one’s country was governed, not by rules of nationality or citizenship, but by the idea of a permanent home.’²⁰⁵ Australia thus proposed an amendment based on *UDHR* art 13(2) to replace the reference to ‘country of which he is a national’ with the words ‘his own country’, which was accepted by a vote of 10:2.²⁰⁶

In a number of subsequent treaties, the phrase ‘own country’ has also been adopted in the context of the right to leave and return, including in the *International Convention on the Elimination of All Forms of Racial Discrimination*,²⁰⁷ the *Convention on the Rights of the Child* (‘*CRC*’),²⁰⁸ and, most recently, the *Convention on the Rights of Persons with Disabilities*.²⁰⁹ One could argue that the persistent invocation of this phrase (‘own country’), even in light of the controversy in its meaning and interpretation (discussed below), supports the view that it has a separate and distinct meaning from nationality or citizenship.²¹⁰

The HRC’s interpretation of art 12(4), especially in the context of long-term residents, has been controversial. In the first communication to raise these issues, *Stewart v Canada* in 1996, the Committee had no difficulty in finding that ‘the phrase “his own country” is broader than the concept “country of his nationality”’²¹¹ and that ‘it embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien.’²¹² The Committee set out three examples of such a

²⁰⁴ *Annotations on the Text of the Draft International Covenants on Human Rights*, UN GAOR, 10th sess, Agenda Item 28 (Part II), 39, UN Doc A/2929 (1955). See also Marc J Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights* (1987) 261.

²⁰⁵ *Annotations on the Text of the Draft International Covenants on Human Rights*, above n 204, 39. See also Bossuyt, above n 204, 261.

²⁰⁶ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005) 284. See also Hannum, above n 199, 56, who summarises some conflicting views on this topic.

²⁰⁷ Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969). Article 5 provides that:

States Parties undertake to ... guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights ...

(d) Other civil rights, in particular ...

(ii) The right to leave any country, including one’s own, and to return to one’s country ...

²⁰⁸ Opened for signature 20 November 1989, 1577 UNTS 3, art 10(2) (entered into force 2 September 1990).

²⁰⁹ Opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008). Article 18(1) provides that States Parties shall ensure:

that persons with disabilities ...

(d) are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

Australia ratified this convention in 2008: Attorney-General, *Convention on the Rights of Persons with Disabilities Declaration 2009* (Cth) sch 2 (‘Instrument of Ratification’).

²¹⁰ I note that in the case of each of these three conventions, the drafting history does not shed much light on the reason for adopting this phrase.

²¹¹ *Stewart v Canada*, above n 200, 15.

²¹² *Ibid* 16.

situation,²¹³ but also acknowledged that the phrase ‘might embrace other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.’²¹⁴ However, in applying these principles to the case of Mr Stewart — a 36-year-old citizen of the UK who had immigrated to Canada at age seven and had thus lived in Canada for most of his life — a majority of the Committee took a very narrow approach. It dismissed his claim under art 12(4) on the basis that ‘[w]hile he has lived in Canada for most of his life he never applied for Canadian nationality. ... Furthermore, even had he applied and been denied nationality because of his criminal record, this disability was of his own making.’²¹⁵

In a strongly worded dissent by three members of the Committee in *Stewart v Canada*,²¹⁶ with which another three members explicitly agreed,²¹⁷ the majority view was rejected as overly narrow.²¹⁸ The dissenting view asserted that the majority had failed to consider the *raison d’être* of art 12(4), which was said to be that

[i]ndividuals cannot be deprived of the right to enter ‘their own country’ because it is deemed unacceptable to deprive any person of close contact with his family, or his friends or, put in general terms, with the web of relationships that form his or her social environment.²¹⁹

In *Stewart v Canada*, it was the dissenters’ view that Stewart had become ‘in practical terms a member of the Canadian community’ and, since he knew ‘no other country’, Canada must be considered his own.²²⁰ A few months later, in *Canepa v Canada*,²²¹ a majority of the Committee reiterated its position in *Stewart v Canada*,²²² while four individual members reiterated their contrary view.²²³

The majority position expressed in this case law has some resonance with the majority approach of the High Court in defining the aliens power, in that it indicates a reticence to fetter state sovereignty in such a controversial area.

²¹³ Ibid. The examples given were of ‘nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied [to] them.’

²¹⁴ Ibid.

²¹⁵ Ibid. See also at 16–17.

²¹⁶ Ibid 20 (‘Individual opinion by Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco Jose Aguilar Urbina’).

²¹⁷ Ibid 22–3 (‘Individual opinion by Christine Chanet, co-signed by Julio Prado Vallejo’), 23 (‘Individual opinion by Prafullachandra Bhagwati’).

²¹⁸ Although it is not clear from the decision, *ICCPR* art 28(1) establishes that the HRC is composed of 18 members. In this case, given that there were two individual concurring opinions as well as the dissenting views of 6 members, the majority must have been composed of 10 members.

²¹⁹ *Stewart v Canada*, above n 200, 21.

²²⁰ Ibid.

²²¹ HRC, *Views: Communication No 558/1993*, 59th sess, UN Doc CCPR/C/59/D/558/1993 (1997) (‘*Canepa v Canada*’).

²²² See *ibid* 9–10. Since there were 14 participating members in this decision, 10 formed the majority: see at 2 *fn* *.

²²³ See *ibid* 11–12.

However, it appears that there is further scope for and there are strong arguments to support an evolution in the Committee's interpretation of this provision. The existing majority approach has been described by leading academic commentators as 'controversial',²²⁴ 'unfortunate'²²⁵ and 'quite harsh',²²⁶ and the balance of academic opinion favours the view that long-term residents who have acquired strong personal and emotional relationships to their country of residence fall within the ambit of 'own country'.²²⁷

Interestingly, in a general comment issued just two years after the above decisions, the Committee appears to have indicated 'a willingness to adopt a more liberal approach in the future'.²²⁸ In *General Comment No 27*, the Committee confirmed that "his own country" is broader than the concept "country of his nationality" and reiterated that it may include categories previously described in *Stewart v Canada*.²²⁹ It then went on to emphasise that, since

other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.²³⁰

This signals the possibility of a reconsideration of the narrow majority view, which arguably failed to give a full and expansive meaning to art 12(4) that is consistent with the underlying object and purpose of the *ICCPR*. Given that it is well-established that human rights treaties are to be interpreted in a dynamic and

²²⁴ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) 376; Nowak, above n 206, 285.

²²⁵ Nowak, above n 206, 286.

²²⁶ Joseph, Schultz and Castan, above n 224, 376.

²²⁷ See Hannum, above n 199, 58–9; Nowak, above n 206, 287; Stig Jagerskiold, 'The Freedom of Movement' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 166, 181; Rosalyn Higgins, 'The Right in International Law of an Individual to Enter, Stay in and Leave a Country' (1973) 49 *International Affairs* 341, 349–50; Lewis Saideman, 'Do Palestinian Refugees Have a Right of Return to Israel? An Examination of the Scope of and Limitations on the Right of Return' (2004) 44 *Virginia Journal of International Law* 829, 848–54. Kälin argues that art 12(4) applies where 'the link between the immigrant and the country of immigration has become so intensive that the country of origin is now the point of reference in his or her life': Walter Kälin, 'Limits to Expulsion under the *International Covenant on Civil and Political Rights*' in Francesco Salerno (ed), *Diritti dell'uomo, estradizione ed espulsione* (2003) 143, 151. See also *Beldjoudi v France* (1992) 234-A Eur Court HR (ser A) 37, 38 fn 11 (Judge Martens); *Nasri v France* (1995) 320-B Eur Court HR (ser A) 30–1 (Judge Morenilla). For the contrary position, see Giorgio Gaja, 'Expulsion of Aliens: Some Old and New Issues in International Law' (1999) 3 *Cursos Euromediterráneos Bancaja de Derecho Internacional* 283, 293, who argues that art 12(4) must be limited to nationals because it 'assumes that a person can consider as his or her own only one country'; however, this has no basis in authority and is a questionable interpretation.

²²⁸ Nowak, above n 206, 286.

²²⁹ *General Comment No 27*, above n 196, [20].

²³⁰ *Ibid.*

evolutionary fashion,²³¹ there is a real possibility that the Committee will adopt a more complex view of ‘own country’ in the future.

Such reconsideration is to be encouraged as it would offer the opportunity to grapple fully with the fundamental problem of the deportation of long-term residents in a way that is not possible merely by assessing piecemeal aspects of a person’s life, such as the impact of deportation on the deportee’s family or children — as important as those individual facets may be.²³² One’s connection to one’s own country is about ‘the web of relationships that form [one’s] social environment’,²³³ but it is also, in a fundamental way, about a person’s identity — his or her language, culture, work, community, sense of self and place in the world.

In addition to the textual and historical arguments outlined above, and the increasing recognition that human rights are not dependent on citizenship,²³⁴ there are a number of contemporary developments on which the Committee could draw in reconsidering the ‘ordinary meaning’ of ‘own country’ in art 12(4). Most relevant in this regard is recent jurisprudence emanating from the European Court of Human Rights concerning the right to private life in art 8 of the *European Convention on Human Rights* (‘ECHR’).²³⁵ While the European Court has long been concerned with the ‘family life’ aspect of art 8 as it pertains to long-term residents,²³⁶ in recent cases the Court has sought to explore in more depth the meaning of the connected but separate concept of ‘private life’.²³⁷ In *Slivenko v Latvia*, the Grand Chamber of the Court considered the purported expulsion of a Soviet army officer and his family who had lived in Latvia most of their lives but were not citizens.²³⁸ The expulsion did not raise the family life

²³¹ For a detailed discussion of this issue, see Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) 59–63.

²³² Indeed, as the European Court of Human Rights has recently noted, ‘not all [permanent residents] necessarily enjoy “family life” in the country from which they are to be expelled, “no matter how long they have been residing” there: *Maslov v Austria*, Application No 1638/03 (Unreported, European Court of Human Rights, Grand Chamber, 23 June 2008) [63].

²³³ *Stewart v Canada*, above n 200, 21.

²³⁴ See HRC, *General Comment No 15: The Position of Aliens under the Covenant*, 27th sess. [2], UN Doc HRI/GEN/1/Rev.9 (vol I) (1986).

²³⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, opened for signature 11 May 1994, 2061 UNTS 7 (entered into force 1 November 1998) (‘ECHR’). Article 8 provides:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a free and democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

²³⁶ See below n 350 and accompanying text.

²³⁷ See generally Daniel Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ (2008) 57 *International and Comparative Law Quarterly* 87.

²³⁸ [2003] X Eur Court HR 229. For the background to the case, see at 237–42.

aspect of art 8 as the entire family was to be deported.²³⁹ The Court, however, noted that, although its main emphasis in the past had been on the family life aspect of art 8 in decisions concerning deportation or expulsion, the private life aspect offers distinct and possibly wider protection.²⁴⁰ In that case it was said that the deportation of the family violated their right to private life since they were ‘removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being.’²⁴¹ In the subsequent decision of the Grand Chamber in *Maslov v Austria*, the Court noted that the right to private life ‘also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual’s social identity’; it thus encompasses ‘the totality of social ties between settled migrants and the community in which they are living’.²⁴²

It is not being suggested that this jurisprudence should inform an interpretation of the protection from arbitrary interference with a person’s ‘privacy’ offered by *ICCPR* art 17.²⁴³ Rather, it is submitted that this analysis goes to the heart of what it means to have ‘one’s own country’ and provides analogous reasoning on which the HRC could draw in developing a more complex and meaningful interpretation of art 12(4).

A related concept at international law that could shed light on the ‘ordinary meaning’ of ‘one’s own country’ is the private international law concept of ‘domicile’, which is distinguished from habitual and ordinary residence on the basis that at its ‘heart ... lies the idea of a permanent home.’²⁴⁴ Ascertaining domicile involves a qualitative assessment that considers both the ‘mere fact of residence’ and ‘an intention of permanent settlement’²⁴⁵ — an assessment that might prove relevant to the arguably related concept of ‘one’s own country’. Yet

²³⁹ *Ibid* 259–60.

²⁴⁰ *Ibid* 258–9.

²⁴¹ *Ibid* 259. This was in relation to the first applicant who had arrived in Latvia at the age of one month — similarly to Nystrom.

²⁴² Application No 1638/03 (Unreported, European Court of Human Rights, Grand Chamber, 23 June 2008) [63].

²⁴³ I note that it has been argued in Nystrom’s communication to the HRC that his removal constituted arbitrary interference with his ‘privacy’ and ‘home’ contrary to *ICCPR* art 17: see Human Rights Law Resource Centre, ‘Individual Communication under the *Optional Protocol to the International Covenant on Civil and Political Rights* — Original Communication’, Communication to the HRC in *Nystrom v Australia*, 4 April 2007, [130]–[136]. (I note that ‘home’ is not found in the text of art 17.) There are two reasons why I argue that under the *ICCPR* these arguments are most appropriately made within the rubric of art 12(4) rather than art 17. First, the *ECHR* refers in art 8 to ‘private life’, which is arguably different from the concept of ‘privacy’ in *ICCPR* art 17. Secondly and most importantly, in the case of regional instruments, as noted above in n 200, the right to remain in a territory is generally restricted to nationals. This explains why it is necessary to rely on the right to private life for protection against the deportation of long-term residents in the context of these regional treaties. However, given that *ICCPR* art 12(4) has an independent, autonomous protection for those who can establish their ‘own country’, this is the appropriate source of protection for long-term residents under the *ICCPR*.

²⁴⁴ Dora Kostakopoulou, *The Future Governance of Citizenship* (2008) 113 (citations omitted). I also note that early Australian decisions discussed the idea of domicile: see, eg, *Koon Wing Lau* (1940) 80 CLR 533, 555 (Latham CJ).

²⁴⁵ Kostakopoulou, above n 244, 113; see also at 114–15.

another relevant concept is the doctrine of ‘effective nationality’, developed by the International Court of Justice (‘ICJ’) in the context of ascertaining whether a claim of nationality is effective for the purposes of the exercise of diplomatic protection. As the ICJ has explained, ‘nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.’²⁴⁶ Given that in many cases of long-term residents ‘the nationality link’ with another country ‘in no way reflects the real situation in human terms’,²⁴⁷ the notion of effective nationality could provide a relevant guide to interpreting ‘own country’ in art 12(4).²⁴⁸

It is also relevant to take account of state practice in the area of protection of long-term residents. While it is not being contended that there is anything close to uniform and constant state practice which ‘establishes the agreement of the parties regarding [the] interpretation’²⁴⁹ of the *ICCPR*, there is certainly increasing recognition, particularly in Europe, of the need for stronger protection for long-term residents, which may further support the need for a dynamic and more progressive view of *ICCPR* art 12(4).

In *Recommendation 1504 (2001) — Non-Expulsion of Long-Term Immigrants*, the Council of Europe Parliamentary Assembly unequivocally argued for protection from expulsion of long-term residents on the basis that the application of expulsion measures is both ‘disproportionate and discriminatory’²⁵⁰ and ‘weakens the process of integration into society of aliens and their communities’.²⁵¹ Although not binding on member states, the Recommendation represents the views of the Assembly, which noted specifically: ‘Under no circumstances

²⁴⁶ *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4, 23 (‘*Nottebohm*’), quoted in Human Rights Law Resource Centre, ‘Individual Communication under the *Optional Protocol to the International Covenant on Civil and Political Rights* — Original Communication’, Communication to the HRC in *Nystrom v Australia*, 4 April 2007, [81]. The ICJ went on to explain (*Nottebohm* [1955] ICJ Rep 4, 24) that the question was: ‘At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?’ The concept of effective nationality has also been invoked in the context of international refugee law: see, eg, Ryszard Piotrowicz, ‘*Lay Kon Tji v Minister for Immigration & Ethnic Affairs*: The Function and Meaning of Effective Nationality in the Assessment of Applications for Asylum’ (1999) 11 *International Journal of Refugee Law* 544.

²⁴⁷ *Beldjoudi v France* (1992) 234-A Eur Court HR (ser A) 40, 43–4 (European Commission of Human Rights), quoted in P van Dijk, ‘Protection of “Integrated” Aliens against Expulsion under the *European Convention on Human Rights*’ (1999) 1 *European Journal of Migration and Law* 293, 309.

²⁴⁸ Of course, it must be acknowledged that this doctrine has developed in the context of conflicting nationalities, yet it is still arguably helpful. See also Kim Rubenstein and Daniel Adler, ‘International Citizenship: The Future of Nationality in a Globalized World’ (1999) 7 *Indiana Journal of Global Legal Studies* 519, 546, who review *Nottebohm* [1955] ICJ Rep 4 and subsequent case law, and argue that the concept of effective nationality ‘facilitates a theoretical (if not yet a practical) entry point for the acknowledgement of layered and/or fragmented nationality appropriate to the circumstances of our participation in ... given national, supranational, regional, or even nonterritorial communities.’

²⁴⁹ *VCLT* art 31(3)(b).

²⁵⁰ Parliamentary Assembly, Council of Europe, *Recommendation 1504 (2001) — Non-Expulsion of Long-Term Immigrants* (adopted 14 March 2001) para 3 (‘*Recommendation 1504*’).

²⁵¹ *Ibid* para 4.

should expulsion be applied to people born or brought up in the host country or to under-age children.²⁵² It further recommended that ‘expulsion may only be applied in highly exceptional cases, and when it has been proven, with due regard to the presumption of innocence, that the person concerned represents a real danger to the state.’²⁵³ It is also relevant to note that the Council of Europe’s Committee of Ministers earlier recommended in *Recommendation 15 (2000) concerning the Security of Residence of Long-Term Migrants* that long-term residents born in the host country or admitted thereto under the age of 10 should not be expellable²⁵⁴ and no long-term resident should be expellable after 20 years of residence.²⁵⁵ In addition, it encouraged states to consider extending protection to aliens who have resided there for five years or more, except where the person has committed an especially serious crime.²⁵⁶

Further, the European Union (‘EU’) has adopted (the binding) *Council Directive 2003/109/EC of 25 November 2003 concerning the Status of Third-Country Nationals Who Are Long-Term Residents* (defined to mean third-country nationals who have resided legally and continuously for five years),²⁵⁷ an instrument that effectively grants a kind of European denizenship to ‘third country nationals’.²⁵⁸ Most relevant for present purposes is that art 12 of the Directive states that ‘Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security.’²⁵⁹ Although this exception has yet to be

²⁵² Ibid para 7. It goes on to invite the governments of member states to ‘guarantee that migrants who were born or raised in the host country and their under-age children cannot be expelled under any circumstances’: para 11(ii)(h).

²⁵³ Ibid para 10. It also recommended that the Committee of Ministers ‘take steps to formulate a protocol to the *European Convention on Human Rights* concerning the protection of long-term migrants against expulsion’: para 11(i). However, this has not as yet eventuated.

²⁵⁴ Committee of Ministers, Council of Europe, *Recommendation 15 (2000) concerning the Security of Residence of Long-Term Migrants* (adopted 13 September 2000) para 4(c) (‘*Recommendation 15*’).

²⁵⁵ Ibid para 4(b).

²⁵⁶ Ibid. Interestingly, Groenendijk explains that the instigation for this recommendation was the concurring opinion of Judge Pettiti in *Nasri v France* (1995) 320-B Eur Court HR (ser A) 28, where he admonished states for not having devised a harmonised solution to this issue: Kees Groenendijk, ‘Long-Term Immigrants and the Council of Europe’ (1999) 1 *European Journal of Migration and Law* 275, 285.

²⁵⁷ *Council Directive 2003/109/EC of 25 November 2003 concerning the Status of Third-Country Nationals Who Are Long-Term Residents* [2004] OJ L 16/44, art 4(1) (‘*Council Directive 2003/109/EC*’). The Directive required transposition by 23 January 2006: art 26.

²⁵⁸ Kostakopoulou, above n 244, 166. This is described as ‘the grant of civil, economic and social rights to residents’, but not full citizenship. While Kostakopoulou describes this as a ‘welcome development since it widens the circle of “belongers” to the European civil society,’ she also criticises it as not going far enough. See also Yongmi Schibel, ‘Transposing EU Law on Legal Migration’ (2004) 6 *European Journal of Migration and Law* 395; Steve Peers, ‘Implementing Equality? The Directive on Long-Term Resident Third-Country Nationals’ (2004) 29 *European Law Review* 437; Louise Halleskov, ‘The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?’ (2005) 7 *European Journal of Migration and Law* 181; Sonja Boelaert-Suominen, ‘Non-EU Nationals and *Council Directive 2003/109/EC on the Status of Third-Country Nationals Who Are Long-Term Residents*: Five Paces Forward and Possibly Three Paces Back’ (2005) 42 *Common Market Law Review* 1011.

²⁵⁹ *Council Directive 2003/109/EC*, above n 257, art 12(1).

interpreted by the European Court of Justice ('ECJ'),²⁶⁰ the ECJ has consistently stated that similar exceptions in respect of security of residence for EU citizens 'must be interpreted strictly and that states' measures must comply with the principle of proportionality.'²⁶¹ In particular, 'member states cannot order the expulsion of an EU citizen as a deterrent or a general preventive action.'²⁶²

In terms of domestic law, five European states (Austria, Belgium, Hungary, Portugal and Sweden) have provisions in place that prohibit the deportation of non-citizens who arrived during childhood, even where they are convicted of a criminal offence.²⁶³ For example, the Aliens Act of Sweden provides that:

An alien may not be expelled if the alien came to Sweden before he or she attained the age of 15 and had been here for at least five years when prosecution was initiated.²⁶⁴

Similarly, Belgian law provides:

In no case can the following people be deported or expelled from the Kingdom:

- (1) the foreigner born in the Kingdom or who arrived before the age of 12 and who has regularly and principally resided there since ...²⁶⁵

In addition to those above, a further two member states of the Council of Europe (Iceland and Norway) prohibit the deportation of second-generation immigrants born in the host country.²⁶⁶

A number of states allow the deportation of long-term residents only in exceptional circumstances.²⁶⁷ For example, French law prohibits the expulsion, except in very limited circumstances,²⁶⁸ of the following aliens:

²⁶⁰ The only cases to have been decided by the ECJ concerning this Directive to date appear to concern the failure by some States to have transposed it into domestic law by the required date: see, eg, *Commission of the European Communities v Luxembourg* (C-34/07, European Court of Justice, 29 November 2007); *Commission of the European Communities v Spain* (C-59/07, European Court of Justice, 15 November 2007); *Commission of the European Communities v Portugal* (C-5/07, European Court of Justice, 27 September 2007); *Commission of the European Communities v Hungary* (C-30/07, European Court of Justice, 27 November 2007); *Commission of the European Communities v Italy* (C-104/07, European Court of Justice, 25 June 2007); *Commission of the European Communities v France* (C-37/07, European Court of Justice, 12 September 2007).

²⁶¹ Kostakopoulou, above n 244, 140 (citations omitted).

²⁶² *Ibid* 141. See also Elspeth Guild, 'Security of Residence and Expulsion of Foreigners: European Community Law' in Elspeth Guild and Paul Minderhoud (eds), *Security of Residence and Expulsion: Protection of Aliens in Europe* (2001) 59. Peers, above n 258, 443, argues that 'any ambiguity in the text of this [long-term residents] Directive should be resolved in favour of the long-term resident and family members as far as possible. As a corollary, any exceptions to their rights should be interpreted narrowly.'

²⁶³ See *Üner v Netherlands* (2007) 45 EHRR 421, 429, where the European Court of Human Rights discusses this.

²⁶⁴ *Utlänningslag* (Sweden) No 2005:716, ch 8 s 12 para 3 [Ministry for Foreign Affairs (Sweden) trans, *Aliens Act (2005:716)* (2006) <<http://www.sweden.gov.se/sb/d/5805/a/66122>>].

²⁶⁵ *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* [Law of 15 December 1980 on the Access to the Territory, the Stay, the Establishment and the Removal of Foreigners] (Belgium) art 21(1) [Nawaar Hassan trans].

²⁶⁶ See *Üner v Netherlands* (2007) 45 EHRR 421, 429.

²⁶⁷ For example, the Swedish Aliens Act provides that an alien who has 'been in Sweden on a permanent residence permit for at least four years when prosecution was initiated' or has been 'resident in Sweden for at least five years' may be expelled 'only when there are exceptional

- (1) a foreigner who has legally resided in France since the age of at least 13 years;
- (2) a foreigner who has resided in France for 20 years;
- (3) a foreigner who has resided in France for 10 years and ... is married to a French national ...;
- (4) a foreigner who has resided in France for 10 years and ... is the parent of a French child ...²⁶⁹

This evolution in state practice provides further support for the view that the simplistic binary distinction between citizens and aliens is gradually eroding and that Australian policymakers should take account of such developments in reassessing the legitimacy of Australia's current deportation policy, particularly in the context of persons who have a strong claim that Australia has become their 'own country' pursuant to art 12(4) of the *ICCPR*.

The final point to note is that, assuming that Australia is properly characterised as a person's 'own country' in the case of long-term residents, it remains to be assessed whether deportation constitutes *arbitrary* interference with that right in violation of art 12(4). The HRC has explained that the reference to the concept of arbitrariness 'guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the *Covenant* and should be, in any event, reasonable'.²⁷⁰ It has further stated that 'there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.²⁷¹ This would particularly be the case where such deprivation was imposed in a discriminatory fashion, as is the case in Australian law.²⁷²

grounds': *Utlänningslag* (Sweden) No 2005:716, ch 8 s 12 para 1 [Ministry for Foreign Affairs (Sweden) trans, *Aliens Act (2005:716)* (2006) <<http://www.sweden.gov.se/sb/d/5805/a/66122>>].

²⁶⁸ These are 'in the case of behaviour which threatens the fundamental interests of the State, or which is linked to terrorist activity, or which constitutes deliberate provocation of discrimination, hatred or violence against a person or a group of persons': see *Code de l'entrée et du séjour des étrangers et du droit d'asile* [Code on the Entry and Stay of Foreigners and on the Right of Asylum] (France) art L521-3 [Nawaar Hassan trans].

²⁶⁹ *Code de l'entrée et du séjour des étrangers et du droit d'asile* [Code on the Entry and Stay of Foreigners and on the Right of Asylum] (France) art L521-3 [Nawaar Hassan trans]. In addition, Kostakopoulou, above n 244, 139, notes that:

In certain European states, ... such as Finland and Denmark, national legislation has incorporated the so called 'sliding scale principle', according to which the longer the period a resident has resided in the country, the stronger is his/her claim to protection against deportation or removal.

For reference to the law in the Netherlands, see *Beldjoudi v France* (1992) 234-A Eur Court HR (ser A) 37, 39 fn 4 (Judge Martens). For an overview (albeit now outdated) of relevant domestic law, see Groenendijk, above n 256, 290. I note that until 9 December 2008 there was a United Kingdom Border Agency policy which created a presumption that families with a child with seven or more years' continuous residence in the UK would not be deported. That policy was ended on 9 December 2008; however, there is still a very wide range of factors taken into account in deportation decisions, consistently with art 8 of the *ECHR*: see Arabella Thorp, 'Immigration: Deportation and Removal of Families with Children' (Standard Note SN/HA/4082, House of Commons Library, 20 January 2009) 1, 4–9.

²⁷⁰ *General Comment No 27*, above n 196, [21].

²⁷¹ *Ibid.*

²⁷² This is supported by Nowak, above n 206, 287–8, who argues that, if a person has acquired 'such strong ties to his or her country of residence' so as to meet the definition of 'one's "own country"', 'criminal acts should be sanctioned in the same way as with respect to nationals.' It is

In summary, while it is not possible to conclude categorically that Australia is in violation of art 12(4), it has been established that there is a cogent argument that long-term residents, particularly those who arrived as children, have made Australia their 'own' for the purposes of international law and thus should never be deported. Further, given developments in the practice of other comparable states, it is timely for Australia to reconsider the operation of *Migration Act* s 501 in the context of long-term residents.

An encouraging development in this regard is the recently promulgated *Direction [No 41] — Visa Refusal and Cancellation under Section 501 ('Direction No 41')*,²⁷³ a new direction that commenced on 15 June 2009²⁷⁴ to replace²⁷⁵ the previous *Direction No 21 — Visa Refusal and Cancellation under Section 501 ('Direction No 21')*.²⁷⁶ Although this is of course not a legislative change and thus does not alter the fact that s 501 remains available to be invoked in the case of long-term residents, it does bind administrative decision-makers (other than the Minister personally)²⁷⁷ and thus can be expected to have an impact on the future operation and application of s 501 in this context.²⁷⁸

also supported by Parliamentary Assembly, Council of Europe, *Recommendation 1504*, above n 250, para 3, which notes that '[t]he application of expulsion measures against [long-term immigrants] seems both disproportionate and discriminatory: disproportionate because it has lifelong consequences ... and discriminatory' because of the different treatment of nationals in the same situation. In a number of dissenting judgments, several judges of the European Court of Human Rights have argued that long-term residents should not be expelled as such a fate does not befall citizens: see *Boughanemi v France* [1996] II Eur Court HR 593, 616 (Judge Baka); *Bouchelkia v France* [1997] I Eur Court HR 47, 67 (Judge Palm); *El Boujaidi v France* [1997] VI Eur Court HR 1980, 1994 (Judge Foighel); *Boujlifa v France* [1997] VI Eur Court HR 2250, 2267–8 (Judges Baka and van Dijk).

²⁷³ Minister for Immigration and Citizenship, *Direction [No 41] — Visa Refusal and Cancellation under Section 501* (2009).

²⁷⁴ *Direction No 41* para 2. Minister for Immigration and Citizenship, *Revocation of Section 499 Direction No 21* (2009) revoked *Direction No 21* effective 15 June 2009.

²⁷⁵ *Direction No 41* paras 3–4.

²⁷⁶ Minister for Immigration and Multicultural Affairs, *Direction No 21 — Visa Refusal and Cancellation under Section 501* (2001). For an interesting account of the previous history of policy in this area, see Crock, *Immigration and Refugee Law in Australia*, above n 41, 233–4.

²⁷⁷ The direction is not binding on the Minister but is binding on Ministerial delegates and the AAT: *Rocca v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 87 ALD 529, 544 (Nicholson and Sundberg JJ); *AB v Minister for Immigration and Citizenship* (2007) 96 ALD 53, 59 (Tracey J) ('AB').

²⁷⁸ The previous *Direction No 21* was subject to considerable criticism in that it was clearly not drafted with long-term residents in mind. In particular, the factors required to be considered pursuant to Minister for Immigration and Multicultural Affairs, *Direction No 9 — Australia's Criminal Deportation Policy — Criminal Deportation under Section 200 of the Migration Act 1958* (1998) ('*Direction No 9*') in the case of cancellations under s 201 (that is, for people who have resided in Australia for less than 10 years) were much more relevant, inclusive and appropriate than the limited factors set out in *Direction No 21*, which governed refusals and cancellations under s 501: see *Nystrom (Full Court)* (2005) 143 FCR 420, 429 (Moore and Gyles JJ); Kneebone, above n 172, 145; Senate Legal and Constitutional References Committee, above n 9, 282–3; Commonwealth Ombudsman, above n 9, 17 (criticising DIMA, *Migration Series Instruction 254: The Character Requirement — Visa Refusal and Cancellation under Section 501* (1999) (commonly known as 'MSI-254')). One major problem was that, while *Direction No 9* para 22 sets out the factors that should be considered as part of an assessment of hardship to be suffered by the deportee in a decision under *Migration Act* s 201, the factors set out in sub-para (b) (length of residence), (c) (ties with country of return), and (f) (situation in country of proposed return) were not factors to which a decision-maker should have regard under *Migration Act* s 501 pursuant to the previous *Direction No 21*: see *Cockrell v Minister for*

Significantly, unlike the previous *Direction No 21*, *Direction No 41* lists as ‘primary considerations’ in deciding whether to cancel a person’s visa (inter alia) ‘whether the person was a minor when they began living in Australia’²⁷⁹ and the ‘length of time that the person has been ordinarily resident in Australia prior to engaging in criminal activity or other relevant conduct’.²⁸⁰ These considerations must be balanced against other factors such as ‘the protection of the Australian community from serious criminal or other harmful conduct’,²⁸¹ and thus do not prevent the deportation of long-term residents; however, they represent a significant improvement on previous policy directions in this area.²⁸² This indicates a willingness by the executive to think beyond the dichotomy of citizen versus alien and may well result in fewer deportations of long-term residents in the future. It remains the case, however, that there is a powerful argument for amending s 501 in order to guarantee that long-term residents enjoy security from deportation, as originally envisaged by the Parliament in enacting s 201, thus ensuring that no long-term Australian resident shall ever be deprived of his or her ‘own country’.

B Right to Life and Protection from Cruel, Inhuman or Degrading Treatment

The right to life (*ICCPR* art 6) and right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (*ICCPR* art 7) each encompass two aspects of relevance in the context of the deportation of long-term residents. First, there is a question as to whether deportation *itself* constitutes cruel, inhuman or degrading treatment, in violation of art 7, in that it might be argued that depriving a person of his or her home, family, social network — indeed, all that is entailed in the permanent banishment of a person from his or her own country — amounts to cruel, inhuman or degrading treatment.²⁸³ The HRC has declined ‘to draw up a list of prohibited acts’ pursuant to art 7, emphasising that assessing the harm depends on ‘the nature, purpose and severity of the treatment applied.’²⁸⁴ It has, however, made clear

Immigration and Citizenship (2007) 100 ALD 52, 63 (Besanko J) (‘*Cockrell*’); *Glusheski* [2000] AATA 717 (Unreported, McMahon DP, 18 August 2000) [15].

²⁷⁹ *Direction No 41* para 10(1)(b). ‘Minor’ is defined in *Migration Act* s 5(1) as a person under 18 years. See also *Direction No 41* para 10.2, where further guidance on this point is provided.

²⁸⁰ *Direction No 41* para 10(1)(c). See also para 10.3, where further guidance is provided. Interestingly, the note to para 10.3 states: ‘For example, a period of more than 10 years of residence in Australia prior to a person engaging in criminal activity or activity which bears negatively on the person’s character would be an important consideration.’

²⁸¹ *Direction No 41* para 10(1)(a).

²⁸² This is especially so given that *Direction No 41* para 5.2(4) also notes that ‘[i]n some circumstances it may be appropriate for the Australian community to accept more risk where the person concerned has, in effect, become part of the Australian community owing to their having spent their formative years, or a major portion of their life, in Australia.’

²⁸³ I note that this issue has not been argued by Nystrom before the UN HRC: see Human Rights Law Resource Centre, ‘Individual Communication under the *Optional Protocol to the International Covenant on Civil and Political Rights* — Original Communication’, Communication to the HRC in *Nystrom v Australia*, 4 April 2007, [13].

²⁸⁴ HRC, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, [4], UN Doc HRI/GEN/1/Rev.9 (vol I) (1992) (‘*General Comment No 20*’).

that the aim of art 7 ‘is to protect both the dignity and the physical and mental integrity of the individual.’²⁸⁵ It is not difficult to construct an argument that ‘a probable life term of separation from his home, family, job and adopted country’²⁸⁶ attains the necessary level of severity and fundamentally undermines the inherent dignity and mental integrity of an individual subjected to such treatment.²⁸⁷ Further, as art 7 ‘allows of no limitation’,²⁸⁸ a determination that deportation amounted to cruel or degrading treatment would require an absolute prohibition on such deportation. This does not appear to be an issue currently considered by Australian decision-makers in the administration of s 501 vis-à-vis long-term residents.

Secondly, it is well-established that the rights protected in arts 6 and 7 of the *ICCPR* entail an implicit obligation not to return a person to a country in which those rights may be at risk.²⁸⁹ This is well accepted by the Australian government,²⁹⁰ as evidenced in *Direction No 41* (and the previous *Direction No 21*).²⁹¹ Indeed, the new *Direction No 41* has elevated these *non-refoulement* obligations to ‘primary considerations’ now equal in weight to the obligation under the *CRC* to have regard to the best interests of the child.²⁹² As explained above, as a matter of international law, there is no exception whatsoever to these obligations — once it is established that deportation or expulsion may risk violation of one of these rights, such deportation is absolutely prohibited. However, *Direction*

²⁸⁵ *Ibid* [2].

²⁸⁶ *Beharry v Reno*, 183 F Supp 2d 584, 602 (Weinstein J) (EDNY, 2002) (*‘Beharry’*). The United States District Court took the view that the equivalent US scheme ‘inflicted unusually cruel and harsh punishment on the non-citizen, as compared to the citizen, where the actual result of deportation is “a probable life term of separation from his home, family, job and adopted country”’: Sara A Rodriguez, ‘Exile and the Not-So-Lawful Permanent Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Non-Citizen Convicted of Certain Crimes?’ (2005) 20 *Georgetown Immigration Law Journal* 483, 501–2, quoting *Beharry*, 183 F Supp 2d 584, 602 (Weinstein J) (EDNY, 2002).

²⁸⁷ A number of dissenting or concurring judges in expulsion or deportation cases in the European Court of Human Rights have expressed the view that such deportation violates *ECHR* art 3 (the equivalent provision to *ICCPR* art 7): *Boughanemi v France* [1996] II Eur Court HR 593, 613–15 (Judge Martens), discussing the views of Judge De Meyer in *Beldjoudi v France* (1992) 234-A Eur Court HR (ser A) 35 and Judge Morenilla in *Nasri v France* (1995) 320-B Eur Court HR (ser A) 30. See also *Nasri v France* (1995) 320-B Eur Court HR (ser A) 29 (Judge De Meyer). However, I note that in *Canepa v Canada*, the HRC dismissed the author’s argument that removal from Canada ‘constituted a violation of article 7 of the *Covenant*, since the separation of his family amounts to cruel, inhuman and degrading treatment’, but this was on the basis of the facts of this case: *Canepa v Canada*, above n 221, 9. The HRC did not rule out the possibility that such an argument may apply in a different case.

²⁸⁸ *General Comment No 20*, above n 284, [3].

²⁸⁹ See HRC, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, 2187th mtg, [12], UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

²⁹⁰ In a number of communications lodged against Australia with the HRC, Australia has accepted that arts 6–7 entail an implied *non-refoulement* obligation: see, eg, HRC, *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights — Communication No 900/1999*, 76th sess, [4.11], UN Doc CCPR/C/76/D/900/1999 (2002) (*‘C v Australia’*) (reproduced in *Report of the Human Rights Committee*, UN GAOR, 58th sess, Supp No 40, 188, UN Doc A/58/40 (vol II) (2003)).

²⁹¹ *Direction No 21* para 2.19.

²⁹² See *Direction No 41* paras 10(1)(d)(i)–(ii); see also para 10.4. Under the previous *Direction No 21* para 2.3(c), only the *CRC* was listed as a primary consideration.

No 41 provides conflicting guidance to decision-makers on this issue: while it states in one section that these obligations are ‘absolute’ and that there is ‘no balancing of other factors if the removal of a person ... would amount to refoulement’,²⁹³ it earlier notes that, ‘[n]otwithstanding international obligations, the power to refuse to grant a visa or cancel a visa must inherently remain a fundamental exercise of Australian sovereignty’ and thus that ‘the responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies within the discretion of the responsible Minister.’²⁹⁴ Further, the Federal Court has affirmed that ‘[i]n the absence of legislative requirement’ the Minister is not bound to consider Australia’s international obligations at all in exercising personally his or her powers under s 501.²⁹⁵

There is evidence to suggest that such obligations have not in recent times been properly or adequately assessed in the determination of s 501 cancellations, particularly in the context of the deportation of persons who have special medical needs or are destitute. Section 501(7) of the *Migration Act* clearly contemplates visa cancellation in relation to a person with mental health concerns, in that ‘substantial criminal record’ (one of the criteria that may enliven jurisdiction to cancel a visa)²⁹⁶ is defined to include situations where ‘the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution’,²⁹⁷ while s 501(9) states that where a person has been ordered by a court ‘to participate in ... a residential program for the mentally ill’²⁹⁸ ‘the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.’ However, reference to the availability of health facilities or treatment in the country of return as a relevant factor in considering whether to cancel a visa pursuant to s 501 was not made in (the former) *Direction No 21*, and the Department’s own account of its past treatment of this issue raises serious

²⁹³ *Direction No 41* para 10.4.3(1)(c).

²⁹⁴ *Direction No 41* para 10.4 (note). This statement was also in *Direction No 21* para 2.24. See generally Savitri Taylor, ‘Exclusion from Protection of Persons of “Bad Character”: Is Australia Fulfilling Its Treaty-Based Non-Refoulement Obligations?’ (2002) 8(1) *Australian Journal of Human Rights* 83.

²⁹⁵ *AB* (2007) 96 ALD 53, 63 (Tracey J). See also *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875 (Unreported, French J, 5 July 2004) [63]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 33 (McHugh and Gummow JJ) (*‘Ex parte Lam’*). Further, if the Minister does ‘have regard to treaty obligations but, in some way, misunderstand[s] the full extent or purport of the obligations, this will not constitute jurisdictional error’: *AB* (2007) 96 ALD 53, 63 (Tracey J). See also *Cockrell* (2007) 100 ALD 52, 63, where Besanko J suggested that the Tribunal was not required to consider international obligations at all.

²⁹⁶ See *Migration Act* s 501(6), which relevantly provides:

For the purposes of this section, a person does not pass the character test if:

(a) the person has a substantial criminal record (as defined by subsection (7)) ...

There are other grounds on which a person may fail the character test that do not require criminal conviction: see *Migration Act* ss 501(6)(b)–(d).

²⁹⁷ *Migration Act* s 501(7)(e).

²⁹⁸ *Migration Act* s 501(9)(b).

concerns.²⁹⁹ Indeed, the Commonwealth Ombudsman has noted that, in a number of cases, long-term residents who had severe physical and mental health issues that could not be accommodated in their country of return and/or who were destitute have been deported.³⁰⁰ There is a strong argument that deportations in these circumstances place Australia at risk of violating its obligation under the *ICCPR* not to return a person to a country in which it is foreseeable that he or she will be subjected to cruel, inhuman or degrading treatment or a violation of the right to life.³⁰¹

Importantly, the Minister appears to have taken account of such critiques in formulating the new *Direction No 41*. Decision-makers are now directed to consider the physical and mental health needs both of persons who do not pass the character test due to an acquittal resulting from unsoundness of mind or insanity³⁰² and in other cases as well.³⁰³ In particular, consideration is to be given

²⁹⁹ I note that the relevant internal instruction manual does make reference to this issue: see DIMIA, *Procedures Advice Manual 3 — Policy and Procedural Instructions for Officers Administering Migration Law* (9 November 2009) Migration Act — Character Instructions — A066 ('s 501: The character test, visa refusal & visa cancellation') section 43 ('Key policy issues — Other health considerations') (often referred to as 'PAM3') <<http://www.immi.gov.au/business-services/legend/>>. However, I note that DIMIA gave evidence to the 2005 Senate Inquiry that special needs are taken into account as follows:

if a person has special medical needs, the Department may arrange for the person to be met by medical staff or referred to a medical facility upon their arrival. If a person is destitute then the Department may provide them with a small allowance that will allow the person to obtain accommodation, purchase food and arrange travel back to their preferred destination within the country.

Senate Legal and Constitutional References Committee, above n 9, 293, quoting DIMIA, Answers to Questions on Notice to Senate Legal and Constitutional References Committee, *Inquiry into the Administration and Operation of the Migration Act*, 5 December 2005, 97. Despite this, the Committee reports that DIMIA admitted that '[t]here have been instances where intended support arrangements are not properly effected or break down following the person's return': Senate Legal and Constitutional References Committee, above n 9, 294, quoting DIMIA, above n 299, 97. Further, DIMIA did not seem to advert at all to the possibility that it might decline to deport in light of such concerns.

³⁰⁰ Commonwealth Ombudsman, above n 9, 27–8. See also Nicholls, above n 3, 156–7; Senate Legal and Constitutional References Committee, above n 9, 288. There have been several high profile cases of the visas of mentally ill long-term residents being cancelled under *Migration Act* s 501. The case of Ali Tastan made headlines after he was found homeless on the streets of Ankara: Nicholls, above n 3, 157. The AAT had decided not to cancel his visa as '[t]o deport him would remove this essential aid [family support] and would transport him to a society where he has very few contacts and where his mental illness and associated disabilities would place him in an extremely vulnerable position': *Re Tastan and Minister for Immigration and Multicultural Affairs* (1999) 29 AAR 296, 327 (Chappell DP). However, the Minister overrode this decision: Nicholls, above n 3, 157. (As to the power to do so, see below nn 357–8 and accompanying text.) Tastan was later brought back to Australia following public pressure: see Nicholls, above n 3, 158. The Ombudsman thus recommended that DIMA assess 'the hardship likely to be experienced by the visa holder, including the implications of any serious medical condition ... as a "primary consideration"': Commonwealth Ombudsman, above n 9, 2 (recommendation 1).

³⁰¹ See Michelle Foster, 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' [2009] *New Zealand Law Review* (forthcoming). For discussion of the case of SZ who was 'facing significant health problems, that could be life threatening', but was nonetheless deported, see Commonwealth Ombudsman, above n 9, 27.

³⁰² *Direction No 41* para 10.1.1(5). This is included under the rubric of one of the 'primary considerations', namely, the protection of the Australian community.

³⁰³ *Direction No 41* para 11(3)(c), although these are listed as 'other considerations' (para 11(1)) which are given 'less weight' (para 11(2)).

to whether a person ‘would have access to appropriate medication or treatment in the country to which they would be removed’.³⁰⁴ Although not discussed under the rubric of art 7 of the *ICCPR*, nor formulated as ‘primary considerations’ in *Direction No 41* (and thus accorded ‘less weight’ than primary considerations),³⁰⁵ these changes nonetheless signal the possibility that such vital concerns may well prevent deportations of long-term residents in the future. However, as in the context of *ICCPR* art 12(4), it is clear that legislative change — particularly, in this context, the introduction of a clear legislative right to protection from deportation where arts 6 or 7 are at risk of being violated — is the only secure method of fully protecting the rights of non-citizens in Australian law.³⁰⁶

C *The Principle of Ne Bis in Idem*

Another potential substantive barrier to deportation is art 14(7) of the *ICCPR*, which provides that ‘[n]o one shall be liable to be tried *or punished* again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.’³⁰⁷ The use of the disjunctive (‘or’) suggests that this obligation applies where a state *either* subjects an offender to trial *or* punishment in relation to an offence for which the person has already been convicted and sentenced.³⁰⁸ Whether Australia is in violation of this provision in deporting persons convicted of criminal offences thus turns on whether deportation following criminal conviction can be characterised as ‘punishment’.³⁰⁹

³⁰⁴ *Direction No 41* para 10.1.1(5)(b) (regarding persons of unsound mind); see also para 11(3)(c)(i)(A) (regarding other people).

³⁰⁵ *Direction No 41* para 11(2).

³⁰⁶ It should be noted that the Australian government has recently introduced a Bill into Parliament which, if passed, will expand the criteria for a ‘protection visa’ to those whose deportation may place Australia at risk of violation of (inter alia) arts 6 and 7 of the *ICCPR*: see Migration Amendment (Complementary Protection) Bill 2009 (Cth); see especially cls 11, 13. The Bill was introduced into the House of Representatives on 9 September 2009: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2009, 8986 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services). However, persons who qualify for a protection visa may nonetheless be refused a visa under s 501; thus it is unclear that this development would assist in the present context.

³⁰⁷ *ICCPR* art 14(7) (emphasis added).

³⁰⁸ The fact that both trial and punishment are mentioned in art 14(7) was intentional: see Nowak, above n 206, 355–7, for discussion of the drafting history. I note that an argument based on art 14(7) has been made to the HRC in *Nystrom*: Human Rights Law Resource Centre, ‘Individual Communication under the *Optional Protocol to the International Covenant on Civil and Political Rights* — Original Communication’, Communication to the HRC in *Nystrom v Australia*, 4 April 2007, [104]–[112]. There does not appear to be any existing authority on this question from the HRC (the point apparently not having been argued in similar previous cases), and the recent general comment on *ICCPR* art 14 says nothing of relevance: see HRC, *General Comment No 32 — Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, 90th sess., [54]–[57], UN Doc CCPR/C/GC/32 (2007). The HRC is yet to release a decision in *Nystrom v Australia*.

³⁰⁹ But see *Üner v Netherlands* (2007) 45 EHRR 421, 434, for the view of the European Court of Human Rights that such deportation is not punitive; cf at 441 (Judges Costa, Zupančič and Türmen), whose dissenting opinion refers to the fact that this ‘double punishment’ can ‘shatter a life or lives’. The US Supreme Court has also rejected the argument that deportation is imposed

The view has been expressed by both DIMIA and the Senate Legal and Constitutional References Committee that visa cancellation and removal ‘is not an additional punishment,’ rather ‘it is an administrative decision taken by Australia pursuant to its sovereign right to decide the circumstances in which a non-citizen is permitted to enter and remain within its jurisdiction’.³¹⁰ However, there is a strong argument that deportation in this context is punitive, especially since it is acknowledged by DIMIA that ‘a substantial criminal record is a trigger for considering the exercise of the power’.³¹¹ Indeed, ‘substantial criminal record’ is defined in *Migration Act* s 501(7)(c) to include situations where ‘the person has been sentenced to a term of imprisonment of 12 months or more’. Thus, it is often the commission of a single offence for which a person has been sentenced to a term of imprisonment of 12 months or more that enlivens the exercise of the cancellation power in s 501, the power often being exercised once the person has completed the relevant term of imprisonment.

How do we assess whether or not a particular measure constitutes punishment? For the purposes of assessing whether a measure imposed by the executive is an impermissible exercise of judicial power, the High Court has held that the question is not ultimately whether the *effect* of the law is punitive, but rather whether one of the *purposes* of the law is punitive. As explained by McHugh J in *Re Woolley; Ex parte Applicants M276/2003* (*‘Re Woolley’*),

[i]f the effect of the law is not readily distinguishable from the effect of inflicting punishment, a rebuttable inference will arise that the purpose of the law is to inflict punishment. But, in determining whether a law authorises or requires punishment to be inflicted in breach of Ch III of the *Constitution*, it is the purpose of the law that is decisive.³¹²

In the context of deportations of criminal, long-term residents, a convincing argument can be made that the effect of the law is indeed punitive, thus giving rise to the ‘rebuttable inference’ that the purpose of the law is to inflict punishment. As David Wood notes, ‘[I]osing the right to live in what one regards

as punishment: *Reno v American–Arab Anti-Discrimination Committee*, 525 US 471, 491 (Scalia J for Rehnquist CJ, O’Connor, Scalia, Kennedy and Thomas JJ) (1999), cited in Kanstroom, above n 107, 208 fn 76. However, there is some authority in the lower courts that deportation is punishment: *Beharry*, 183 F Supp 2d 584 (EDNY, 2002), discussed in Rodriguez, above n 286, 499–503. For the rejection of this argument by the Supreme Court of Canada, see *Minister of Employment and Immigration (Canada) v Chiarelli* [1992] 1 SCR 711. In Parliamentary Assembly, Council of Europe, *Recommendation 1504*, above n 250, the Parliamentary Assembly stated that an ‘irreversible order to leave a country’s territory is a penalty’ (para 6) and thus invited member states ‘to accept that expelling persons after they have served a prison sentence is a double punishment’ (para 11(ii)(e)).

³¹⁰ Senate Legal and Constitutional References Committee, above n 9, 291, quoting DIMIA, above n 299, 93. The Committee took the view that ‘technically’ deportation is not a ‘second punishment’.

³¹¹ Senate Legal and Constitutional References Committee, above n 9, 291, quoting DIMIA, above n 299, 93.

³¹² *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 35 (McHugh J).

as one's homeland can be seen as even more serious a deprivation than losing one's liberty.³¹³

As to purpose, an argument can be made that at least one of the clear purposes of the s 501 cancellation power is punitive. In *Re Woolley*, McHugh J explained that if 'deterrence is one of the principal objects of the law and the detention can be regarded as punishment to deter others' then it will be regarded as punitive.³¹⁴ Unlike the case of indefinite executive immigration detention, one of the principal factors to be assessed in exercising the s 501 discretion has historically been the 'protection of the Australian community',³¹⁵ which in turn has required consideration of 'general deterrence — the likelihood that visa refusal or visa cancellation would prevent (or inhibit the commission of) like offences by other persons'.³¹⁶ The former *Direction No 21* stated that deterring 'other people from committing the same or a similar offence' is 'an important factor in determining whether to refuse or cancel a visa'.³¹⁷ Further, this has clearly been a key issue considered by the AAT in reviewing decisions by a delegate to cancel a visa pursuant to s 501.³¹⁸ In *Re Sam and Minister for Immigration and Multicultural*

³¹³ Wood, above n 9, 288 (citations omitted). It should be noted that the same arguments may not apply to those who have been in Australia for a much shorter period. Interestingly, in *Shaw (Full Court)* (2005) 142 FCR 402, 409, Spender J (in dissent) held that:

In the present case, where the deportation concerns a permanent resident of the country of very long standing, who has an Australian family and Australian children, the deportation order is not genuinely an exercise of the power of the executive government in respect of aliens, but is punitive in nature, done because the long-term Australian resident is guilty of wrongdoing. Deportation of such a person is therefore penal, going beyond the exclusionary purpose, which purpose is properly an incident of the executive power. In my view the deportation of Mr Shaw, even though he is a non-national, is properly to be regarded as punitive, and is an invalid exercise of judicial power by the executive.

See also *Nystrom (Full Court)* (2005) 143 FCR 420, 430, where Moore and Gyles JJ refer to the 'punishment' imposed by the s 501 cancellation.

³¹⁴ *Re Woolley* (2004) 225 CLR 1, 26. The centrality of deterrence as a principle of punishment is not confined to Australian law; on the contrary, deterrence has been said to be 'perhaps the best known of the justifications of punishment': Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (2007) 20. Indeed, it may well be said to represent one of the 'general principles of law' under *Statute of the International Court of Justice* art 38(1)(c), particularly given its acceptance in most domestic legal systems as well as in the *Statute* and jurisprudence of the International Criminal Court: see *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) Preamble para 5; Cryer et al, above n 314, 21. See also Gerhard Werle, *Principles of International Criminal Law* (2005) 30–1; Antonio Cassese, *International Criminal Law* (2nd ed, 2008) 420–1. This is highly relevant to the interpretation of an international treaty such as the *ICCPR* (see *VCLT* art 31(3)(c)), and suggests that there is a strong argument that Australia is in violation of art 14(7) in effecting a policy of deporting long-term residents following criminal conviction.

³¹⁵ See, eg, *Direction No 21* para 2.3(a).

³¹⁶ *Direction No 21* para 2.11.

³¹⁷ *Direction No 21* para 2.11.

³¹⁸ See, eg, *Re Truong and Minister for Immigration and Citizenship* [2008] AATA 515 (Unreported, Senior Member John Handley, 20 June 2008) [28], where the AAT noted that:

It is impossible to know whether the outcome of these proceedings will be known beyond the applicant's immediate family although I expect that some discussion may be generated, either in specific or general terms, that criminal activity will not be tolerated and may result in visa cancellation.

See also *Re Aporo and Minister for Immigration and Citizenship* [2008] AATA 629 (Unreported, Walker DP, 18 July 2008); *Re Lui and Minister for Immigration and Citizenship* [2008] AATA 531 (Unreported, Senior Member G D Friedman, 25 June 2008) [24] ('cancellation of [the

and *Indigenous Affairs*, the AAT noted that '[c]riminology and social science research indicate that general deterrence is a more important factor in influencing crime rates than was sometimes previously believed',³¹⁹ and thus '[d]eterrence, and the need to maintain a visible probability of sanctions, point in favour of cancelling the applicant's visa in this case.'³²⁰

It should be noted, however, that the new *Direction No 41* has removed reference to general deterrence from the list of relevant considerations to be taken into account by decision-makers other than the Minister. Thus, it may well be that an assessment of whether the application of s 501 to long-term residents has either the purpose or effect of punishment will depend on the extent to which *Direction No 41* alters its future operation.

D Right to Family Life

The decision to expel a long-term resident frequently raises a question concerning compatibility with that person's right not to suffer arbitrary interference with his or her family (*ICCPR* art 17) and the right to protection of the family by the state (*ICCPR* art 23).³²¹ While these provisions do not absolutely prevent state action, such as expulsion, that interferes with family life,³²² it is clear that where deportation will result in 'substantial changes to long-settled family life'³²³ the Australian government is required to balance 'the State party's reasons for the removal of the person concerned' on the one hand and, 'on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.'³²⁴ In addition, the *CRC* requires that, in assessing the decision whether to cancel a visa, 'the best interests of the child shall be a primary consideration.'³²⁵

applicant's] visa may prevent or discourage similar conduct by other persons'); *Re Kelly and Minister for Immigration and Citizenship* [2007] AATA 1678 (Unreported, Walker DP, 20 August 2007) [112] ('[a]ffirming the decision under review in this case would send a clear message to other non-citizens contemplating criminal violence').

³¹⁹ [2004] AATA 1003 (Unreported, Walker DP, 24 September 2004) [31], citing Philip M Bodman and Cameron Maultby, 'Crime, Punishment and Deterrence in Australia: A Further Empirical Investigation' (1997) 24 *International Journal of Social Economics* 884, 896.

³²⁰ [2004] AATA 1003 (Unreported, Walker DP, 24 September 2004) [31].

³²¹ See also *CRC* art 9, which is broadly equivalent to this provision. These concerns were also raised in an early report by the Human Rights Commission, *Human Rights and the Deportation of Convicted Aliens and Immigrants* (1983), discussed in M Sornarajah, 'Deportation of Aliens and Immigrants from Australia' (1985) 34 *International and Comparative Law Quarterly* 498, 515–16.

³²² This is because art 17 prevents only arbitrary interference: see HRC, *Views: Communication No 930/2000*, 72nd sess, 11, UN Doc CCPR/C/72/D/930/2000 (2001) ('*Winata v Australia*').

³²³ *Ibid*; HRC, *Views: Communication No 1011/2001*, 81st sess, 21, UN Doc CCPR/C/81/D/1011/2001 (2004) ('*Madafferi v Australia*'). The Committee has repeatedly stated that a deportation that would compel family members to choose whether they should accompany the deportee or remain is to be considered interference with family life: see *ibid* 10–11; *Madafferi v Australia*, above n 323, 21; HRC, *Views: Communication No 1222/2003*, 82nd sess, 11, UN Doc CCPR/C/82/D/1222/2003 (2004) ('*Byahuranga v Denmark*'). The concept of family is given a 'broad interpretation': HRC, *General Comment No 16: Article 17 (Right to Privacy)*, 32nd sess, [5], UN Doc HRI/GEN/1/Rev.9 (vol I) (1988).

³²⁴ *Madafferi v Australia*, above n 323, 21. See also *Byahuranga v Denmark*, above n 323, 11.

³²⁵ *CRC* art 3(1).

At present, there are concerns in relation to the way in which the decision to deport long-term residents is undertaken in light of these international obligations. As mentioned above, the new *Direction No 41* provides that, in exercising the discretion to refuse or cancel a visa pursuant to s 501, there are four primary considerations that must be taken into account in every case.³²⁶ Although one of the primary considerations is said to be ‘relevant international obligations’,³²⁷ these appear to be restricted to the *CRC* and the *non-refoulement* obligations discussed above.³²⁸ The fact that *Direction No 41* para 10(1)(d)(i) assigns the ‘best interests of the child’ a primary status in determining whether to cancel a visa is of course appropriate and consistent with our obligations under the *CRC*.³²⁹ In the past, there have been some concerns about the way in which this factor has been assessed,³³⁰ particularly given that the weight accorded to this consideration cannot be subject to judicial review;³³¹ nonetheless, the fact that it is a primary consideration is important.

However, there is a real question as to whether the right to family life embodied in *ICCPR* arts 17 and 23 is or will be adequately assessed in *Migration Act* s 501 cancellations, both in terms of the existing practice as well as that potentially heralded by the new *Direction*. The right to family life was *not* included as one of the primary considerations in *Direction No 21*,³³² and this has not been rectified in the new *Direction No 41*.³³³ While relevant factors are set out in *Direction No 41* as ‘other considerations’, such factors are to ‘be given

³²⁶ *Direction No 41* para 9(1).

³²⁷ *Direction No 41* para 10(1)(d).

³²⁸ I note that, although *Direction No 41* para 10(1)(d) refers to ‘relevant international obligations, including but not limited to’ those obligations, the elaboration of these international obligations later in the *Direction* nowhere mentions the possibility of obligations other than those specifically listed as being potentially relevant: see paras 10.4–10.4.3.

³²⁹ This factor is fleshed out more fully in para 10.4.1. In particular, *Direction No 41* para 10.4.1(4) notes that, ‘[u]nder Australian law, it is generally presumed that a child’s best interests will be served if the child remains with its parents.’

³³⁰ See Commonwealth Ombudsman, above n 9, 25, where it is noted that, ‘in many of the cases reviewed, assessment of the best interests of the child is characterised by a paucity of evidence and failure to determine what those best interests might be.’ The Ombudsman goes on to illustrate this with specific examples: at 25–6. See also HREOC, *Background Paper*, above n 3, 11. As Crock notes, historically ‘the most problematic deportation cases for the AAT are those involving offenders who are parents of Australian citizen children’: Crock, *Immigration and Refugee Law in Australia*, above n 41, 240.

³³¹ *Holani v Minister for Immigration and Citizenship* [2007] FCA 1140 (Unreported, Collier J, 3 August 2007) [22], citing *Taylor v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 208 (Unreported, Marshall, Mansfield and Siopis JJ, 30 September 2005) [19] (Marshall, Mansfield and Siopis JJ). However, the court has assumed that, if the Minister failed to have regard to the interests of the child, that would constitute jurisdictional error: see *Yalniz v Minister for Immigration and Citizenship* [2007] FCA 426 (Unreported, Kenny J, 28 March 2007) [18], citing *Minister for Immigration and Multicultural and Indigenous Affairs v Lorenzo* [2005] FCAFC 13 (Unreported, Wilcox, Sackville and Finn JJ, 22 February 2005) [57] (Wilcox, Sackville and Finn JJ). Further, in *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, 140, 142, the Full Court (Branson, North and Stone JJ) held that it was necessary for the decision-maker to identify what the best interests of the children were.

³³² See *Direction No 21* para 2.3.

³³³ *Direction No 21* para 2.17 listed family life considerations (in sub-para (a)–(d)) as ‘other considerations’, as do *Direction No 41* paras 11(1), (3)(a).

less weight than that given to primary considerations.³³⁴ Failing to give primary weight to these issues means that it is difficult for a decision-maker adequately to assess whether ‘the separation of [a person] from his family and its effects on him’³³⁵ caused by a proposed deportation will be disproportionate — the test adopted by the HRC to determine whether an interference in family life is arbitrary.³³⁶ Indeed, by according the interests of the state a primary and clearly superior position in the balancing exercise, there is a real risk that a decision-maker will fail to accord equal weight to ‘the degree of hardship’ the family and its members would encounter as a consequence of such removal.³³⁷ This may well be exacerbated by the fact that, whereas *Direction No 21* made explicit reference to *ICCPR* arts 17 and 23,³³⁸ reference to these international obligations has been completely omitted from the new *Direction*. There is a concern therefore that decision-makers implementing the new *Direction* will fail to appreciate the significance of family life considerations as a *right* of the deported person to be balanced equally against the interests of the state.

On the other hand, *Direction No 41* has made significant improvements in setting out a more comprehensive list of ‘other considerations’ pertaining to the right to family life than *Direction No 21*.³³⁹ In formulating *Direction No 41*, the Minister has added the following important factors to the previously somewhat minimal reference to family life considerations: ‘family ties, [and] the nature and extent of any relationships’,³⁴⁰ including the ‘nature and duration’ of any marital relationship or de facto relationship with a citizen or permanent resident;³⁴¹ ‘the degree to which the partner is financially, physically or psychologically

³³⁴ *Direction No 41* para 11(2). See also *Direction No 21* para 2.17.

³³⁵ *Canepa v Canada*, above n 221, 10.

³³⁶ See *ibid.* This is also the approach taken by the Inter-American Commission on Human Rights: see Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, [166], OAS Doc OEA/Ser.L/V/II.106 (2000).

³³⁷ *Madafferi v Australia*, above n 323, 21. See also *Byahuranga v Denmark*, above n 323, 11. As the HRC held in *Winata v Australia*, above n 322, 11, the ‘substantial changes to long-settled family life’ that would follow the deportation of non-citizen parents are to be considered ‘interference’ with the family. Further, there was no adequate justification in that case for the interference. That case involved non-citizens who had illegally overstayed their visas: at 3. As the Ombudsman noted (in relation to *Direction No 21*), ‘there is no guidance for a decision-maker on how to balance competing considerations ... [or] under what circumstances might the “other considerations” ... outweigh the “primary” expectation ... that permanent residents obey Australian laws’: Commonwealth Ombudsman, above n 9, 16. For particular problems in assessing family life considerations, see at 28–9.

³³⁸ *Direction No 21* para 2.17(a), which extracted the relevant text from *ICCPR* arts 17(1) and 23(1).

³³⁹ In *Direction No 21* para 2.17, the relevant factors were confined to the following:

- (a) the extent of disruption to the non-citizen’s family, business and other ties to the Australian community ...
- (b) genuine marriage to, or de facto or interdependent relationship with, an Australian citizen, permanent resident or eligible New Zealand citizen ...
- (c) the degree of hardship which would be caused to immediate family members lawfully resident in Australia ... [and]
- (d) family composition of the non-citizen’s family, both in Australia and overseas ...

³⁴⁰ *Direction No 41* para 11(3)(a).

³⁴¹ *Direction No 41* para 11(3)(a)(ii)(A).

dependent on the non-citizen’;³⁴² and ‘the impact of separation resulting from the person’s removal from Australia’.³⁴³ Further, the new Direction is more explicit in requiring decision-makers to consider whether the person has any ‘significant familial ties or support’³⁴⁴ in the country of removal, and also explicitly requires consideration of ‘hardship likely to be experienced by the person’³⁴⁵ as well as to ‘immediate family members’,³⁴⁶ including ‘the ability of the person, together with any accompanying family members, to acquire new language skills and ... to obtain support.’³⁴⁷

Providing for this more extensive range of factors is consistent with developments in international and regional human rights law, including the right to family life embodied in art 8 of the *ECHR*, as well as other instruments of both the Council of Europe³⁴⁸ and EU.³⁴⁹ The European Court of Human Rights has made it clear that, if a state wishes to expel a non-citizen on the basis of criminal activity, *ECHR* art 8 requires the state to undertake that assessment with regard to a wide range of factors including not only ‘the nature and seriousness of the offence’ but also:

- the length of the [non-citizen’s] stay in the [host country]; ...
- the nationalities of the various persons concerned;
- the [non-citizen’s] family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple’s family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age; ...

³⁴² *Direction No 41* para 11(3)(a)(ii)(A).

³⁴³ *Direction No 41* para 11(3)(a)(ii)(A).

³⁴⁴ *Direction No 41* para 11(3)(d), which can be compared with the more minimal *Direction No 21* para 2.17(d).

³⁴⁵ *Direction No 41* para 11(3)(e); see also para 11(3)(b)(ii), which states that a factor in a person’s favour, ‘where they are living with or under the care and control of a parental or care figure, [is] the negative impact that refusal or cancellation (and probable consequential removal from Australia) may have on the person, whether or not they are a minor’.

³⁴⁶ *Direction No 41* para 11(3)(e).

³⁴⁷ *Direction No 41* para 11(3)(e)(ii). For similar considerations to be assessed under the rubric of ‘the best interests of the child’ — a primary consideration — see para 10.4.1(5).

³⁴⁸ Committee of Ministers, Council of Europe, *Recommendation 15*, above n 254, para 4(a) requires that any decision on expulsion of a long-term immigrant should take account of:

- the personal behaviour of the immigrant;
- the duration of residence;
- the consequences for both the immigrant and his or her family;
- and existing links of the immigrant and his or her family to his or her country of origin.

³⁴⁹ *Council Directive 2003/109/EC*, above n 257, art 12(3) requires that:

Before taking a decision to expel a long-term resident, Member States shall have regard to the following factors:

- (a) the duration of residence in their territory;
- (b) the age of the person concerned;
- (c) the consequences for the person concerned and family members;
- (d) links with the country of residence or the absence of links with the country of origin.

- the seriousness of any difficulties which the spouse is likely to encounter in the country to which the [non-citizen] is to be expelled; ...
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the [non-citizen] are likely to encounter in the country to which the [non-citizen] is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.³⁵⁰

In the context of long-term residents, the Court has emphasised that ‘regard is to be had to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there’.³⁵¹ Thus, ‘for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion.’³⁵²

In short, whether *Direction No 41* is capable of rectifying the serious problems in the operation of s 501 under previous directions remains to be seen. It is important that the impact of s 501 on family life issues is monitored with a view to potentially amending *Direction No 41* in the future to ensure that *all* international law obligations are accorded primary weight.

E *Administrative Review*

The final major issue of concern relates to the procedural irregularities in the s 501 process. First, the Minister may personally make a decision to cancel a visa pursuant to s 501(3). In such a case, this decision is not subject to the rules of natural justice,³⁵³ nor is it reviewable on the merits.³⁵⁴ Nor, as alluded to above,

³⁵⁰ *Üner v Netherlands* (2007) 45 EHRR 421, 435. Under *Immigration Act 1987* (NZ) s 22(5), the Deportation Review Tribunal is directed not to ‘confirm the revocation of a residence permit ... if it is satisfied that it would be unjust or unduly harsh for the appellant to lose the right to be in New Zealand indefinitely.’ In determining any such appeal, the Tribunal is required by s 22(6) to consider the following factors:

- (a) The appellant’s age;
- (b) The length of time during which the appellant has been in New Zealand lawfully;
- (c) The appellant’s personal and domestic circumstances;
- (d) The appellant’s work record;
- (e) The grounds on which the permit was revoked;
- (f) The interests of the appellant’s family;
- (g) Such other matters as the Tribunal considers relevant.

See also ss 104–5.

³⁵¹ *Maslov v Austria*, Application No 1638/03 (Unreported, European Court of Human Rights, Grand Chamber, 23 June 2008) [74], citing *Üner v Netherlands* (2007) 45 EHRR 421, 435. While deportation has been permitted in some cases, in many others, especially concerning long-term residents who migrated from birth, deportation has been found to be in violation of art 8. These cases are listed by Charlotte Steinorth, ‘*Üner v The Netherlands: Expulsion of Long-Term Immigrants and the Right to Respect for Private and Family Life*’ (2008) 8 *Human Rights Law Review* 185, 186 fn 6.

³⁵² *Maslov v Austria*, Application No 1638/03 (Unreported, European Court of Human Rights, Grand Chamber, 23 June 2008) [75].

³⁵³ *Migration Act* s 501(5).

is the Minister bound (in Australian law) by any of the matters set out in ministerial directions, including, most relevantly for present purposes, any of Australia's international obligations.³⁵⁵ This is highly significant as it means that the important improvements evident in *Direction No 41* can be entirely bypassed where the Minister chooses to rely on his or her personal power to cancel. While these ministerial decisions are subject to review in the federal courts, they are classed as 'privative clause decision[s]',³⁵⁶ which means the grounds for review are limited.³⁵⁷

Secondly, even where a decision has been made not to cancel a visa by a delegate or the AAT, s 501A of the *Migration Act* grants power to the Minister to set aside the decision of a delegate or the AAT not to exercise the power in s 501(2) to cancel a visa. The Minister exercises 'personally' this power to set aside the original decision not to cancel a visa and to substitute for it a decision to cancel a visa.³⁵⁸ Further, the rules of natural justice do not apply to such a decision,³⁵⁹ nor is it reviewable on the merits.³⁶⁰

This raises concerns about compliance with international law, given that ICCPR art 2(3) requires Australia:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; [and]
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy ...

The problem with s 501A is that it undermines and effectively makes redundant the remedy provided for by the AAT hearing, by permitting the Minister to ignore the AAT findings and substitute his or her own decision.³⁶¹ In addition,

³⁵⁴ Section 500(1)(b) of the *Migration Act* only allows for reviews of 'decisions of a delegate of the Minister under s 501'. For discussion of this provision by Kirby J (in dissent), see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 243.

³⁵⁵ See above n 295, where *AB* (2007) 96 ALD 53, *Ex parte Lam* (2003) 214 CLR 1 and other cases are discussed.

³⁵⁶ *Migration Act* ss 474(1)–(2).

³⁵⁷ See *Migration Act* s 474; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. The Ombudsman notes that, '[h]istorically, the majority of s 501 decisions have been made by the Minister': Commonwealth Ombudsman, above n 9, 9. In more recent times, although the proportion of cancellations made by the Minister has declined significantly, a sizeable proportion of decisions is still made by the Minister: at 10.

³⁵⁸ *Migration Act* s 501A(5).

³⁵⁹ *Migration Act* s 501A(4).

³⁶⁰ *Migration Act* ss 501A(2), (4), (7). I note that the new Minister for Immigration, Senator Chris Evans, has expressed disquiet about this position: see Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 29 May 2008, 75.

³⁶¹ For a good explanation of the problems with this process, see Kerry Murphy, 'AAT Review of Character Cases: Section 501' (2004) 18 *Immigration Review* 7, 12–13.

since this power of personal intervention does not apply to deportation decisions under ss 200 or 201, this is a further example of a lack of congruity between ss 201 and 501.³⁶²

V CONCLUSION

The analysis in this article suggests that, while there is currently no constitutional or legislative impediment to deporting persons who have effectively established Australia as their 'home', this is a position that requires review. The critique in Part II revealed that the High Court's reticence to give the aliens power an autonomous meaning effectively permits Parliament to define the scope of its own legislative power. This is an unsatisfactory position and one that is in urgent need of reconsideration by the Court. The analysis in this article suggests that any attempt by the Court to give real meaning to the oft-repeated proviso that the Parliament could not seek to regulate under the aliens power 'persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word'³⁶³ should be guided by contemporary political and social developments, including Australia's international law obligations and the changing approach to the protection of 'denizens' in other major regions of the world.

The second major conclusion is that the current administration of the *Migration Act* raises questions of serious concern. As outlined in Part III, the history of the introduction of the character test in the *Migration Act* makes it clear that it was never intended to apply to long-term residents. On the contrary, the deportation power was specifically limited to those who have been in Australia less than 10 years. The fact that s 501 is now invoked in order to circumvent this limitation in s 201, while lawful, undermines the sound policy reasons behind the limitation in s 201. In Part IV, it was established that the application of s 501 to long-term residents clearly implicates Australia's international obligations and that these obligations are not adequately considered in the way in which the *Migration Act* is currently administered. In light of these considerations, it is

³⁶² It is interesting to note that back in 1983 the then Minister for Immigration and Ethnic Affairs, Stewart West, emphasised the need to have deportation decisions subject to review. As he noted:

administrative decisions made privately and for undisclosed reasons are not in the best interests of an enlightened society. I do not disparage the good intentions of past Ministers but it must be accepted that the mere election to public office does not, of itself, guarantee enlightened and just decision making ...

Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1983, 2776. It is also clearly out of step with evolving state practice, especially in Europe. For example, art 12(4) of the EU *Council Directive 2003/109/EC*, above n 257, requires that, '[w]here an expulsion decision has been adopted, a judicial redress procedure shall be available to the long-term resident', and art 12(5) requires that legal aid shall be provided 'on the same terms as' for nationals (see also above n 257 and accompanying text). Committee of Ministers, Council of Europe, *Recommendation 15*, above n 254, para 5(c) notes that, '[w]here a decision is taken ... to expel a long-term immigrant, he or she should be entitled to the same legal protection provided for in the legislation of the member state as is normally accorded to nationals of that state in administrative procedures.' This includes a review on the merits: para 5(d). See also Parliamentary Assembly, Council of Europe, *Recommendation 1504*, above n 250, para 11(j).

³⁶³ *Ex parte Te* (2002) 212 CLR 162, 173 (Gleeson CJ), citing *Pochi* (1982) 151 CLR 101, 109 (Gibbs CJ). See also above n 122.

clear that this is an area in which urgent reform is required. Specifically, s 501 of the *Migration Act* ought to be amended to prohibit its application to persons who cannot be deported under s 201 (that is, so as to return to the 10-year rule) and to juveniles who arrived before the age of 18 (regardless of whether they have lived in Australia for 10 years). In addition, the Department might well consider what steps can be taken to encourage long-term residents to obtain Australian citizenship. In the interim, it is encouraging that changes have been made to the relevant policy Direction; however, it must be emphasised that, while this change may well improve the administration of the character test, the ultimate goal should be to discontinue its application altogether to those who have established their life in Australia.