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Welcome to this edition of Legaldate, which has the criminal law as its focus. A quick internet search brings up the following definition of the criminal law. It is: ‘[a] body of rules and statutes that defines conduct prohibited by the government because it threatens and harms public safety and welfare and that establishes punishment to be imposed for the commission of such acts.’ The importance of the topic of this Legaldate edition lies in the tension that exists at the heart of that definition. On the one hand, the criminal law is fundamental to the maintenance of order in society and we rely on the protection that it affords us as we go about our daily lives. On the other hand, the criminal law represents the most significant power that the state has over us as individuals. It is the means by which the state sets and enforces the rules of our society.

In Australia, the most severe punishment that the criminal law imposes for the transgression of those rules is to deprive an individual of his or her liberty. In other societies, the most extreme form of punishment can be death. One of the most important recurrent themes in discussions about the criminal law is how to reconcile this tension: on one side, the need to safeguard and respect the rights and freedoms of the individual and, on the other, the extent of the power given to the state to punish its citizens in order to ‘protect’ society.

The articles in this edition of Legaldate touch on two different facets of the criminal law within this broad context. The first examines how the body of criminal law (the ‘rules and statutes’ from the definition) has developed in the different jurisdictions of Australia over time and the key features of the criminal law in those jurisdictions today. The second article considers a very specific aspect of the fundamental tension within the criminal law that has already been touched on: particular human rights implications of the cancellation of visas following conviction for criminal offences.

Student activities

1. How could the laws created for New South Wales differ from those of the United Kingdom?
2. What is the meaning of ‘treatises by prominent jurists were routinely relied upon by the courts as repositories of the criminal law of England’?
THE DEVELOPMENT OF THE CRIMINAL LAW IN AUSTRALIA

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Origins and pre-federation
The origins of the criminal law in Australia lie in the common law of England, which was imported into Australia with the arrival of the First Fleet in 1788. The ‘reception’ of English common law into Australia was confirmed by the Parliament of the United Kingdom in the Australian Courts Act 1828 (UK). Under this Act, all laws and statutes in force in England on 25 July 1828 were to apply to the administration of justice in New South Wales (which then incorporated what are now Queensland and Victoria) and Van Dieman’s Land (now Tasmania) to the extent that those laws and statutes were applicable to the local conditions. In the words of the statute, English law was to apply ‘so far as the circumstances and condition of the said colony shall require and admit’.

Legislation passed by the United Kingdom in 1823, the New South Wales Act 1923 (UK), created the first Legislative Council, established the Supreme Court of NSW and set up a hierarchy of courts, effectively in the image of the UK court structure, in that colony. As the colonies of Western Australia and South Australia came into existence, they too, ‘received’ English law (in 1829 and 1836 respectively).

Most of the criminal law received into the colonies was not in statutory form. Rather, both offences and the principles of criminal responsibility that governed them were located in the common law. In the absence of comprehensive authorised court reports, treatises by prominent jurists were routinely relied upon by the courts as repositories of the criminal law of England (and, thus, of the Australian colonies). Such works included the four volumes of William Blackstone’s Commentaries on the Laws of England (which were published between 1765 and 1769 and which arrived in the new colony on the First Fleet)

In putting the case to the jury, His Honor stated, that notwithstanding the ingenious arguments used by [the defence], he was bound to tell them that boxing or fighting was an illegal act, not only according to the opinion of Justice Foster [a renowned English judge who sat on the King’s Bench during the 1700s], who was one of the highest authorities that could be quoted on criminal law; but also on the authority of Blackstone, Sir Matthew Hale [who wrote The History of the Pleas of the Crown, published in 1736], Sergeant Hawkins, and on that of East’s Pleas of the Crown (page 207). If these authorities were not to be relied on, he did not know what authorities could be quoted in criminal courts of justice.

Over the course of the early and middle parts of the 19th century, the colonial courts interpreted, and, in doing so, adapted, the received criminal law in light of particular local circumstances and needs. In addition, legislative councils began to legislate on criminal law matters, and most commonly, procedural ones.

In NSW, after a long and difficult process that began in 1870, the Criminal Law Amendment Act became NSW law in 1883. However, that Act made little change to the substantive criminal law, derived from the common law, that was already in operation in the colony. By contrast, in the last decade of the 19th century, Queensland undertook a highly ambitious
legislative project: the drafting of a comprehensive criminal code. In 1897, the code’s author, Sir Samuel Griffith, sent the draft code he had created for Queensland along with a letter of explanation to the colony’s Attorney General. In his letter, he stated that his intention had been to produce a ‘collected and explicit statement of the Criminal Law’ by reducing the ‘definitely known and settled’ law (including that expressed in a multitude of cases and treatises) to an ‘orderly written system’. He had also aimed to draft the code so that it was intelligible to ‘any intelligent person able to read’. Griffith’s draft code became the Criminal Code Act 1899 (Qld).

**Federation**

With federation in 1901, a new criminal law jurisdiction was created: the Commonwealth or federal jurisdiction. However, the power of the Commonwealth to enact legislation was limited by the Commonwealth Constitution, with the result that it could only create criminal offences in relation to itself and to the specific heads of power the Constitution had granted to it (particularly under sections 51 and 52). The first criminal offences to come into force in the federal jurisdiction were created by the Audit Act 1901 (Cth), the fourth statute ever passed by the Commonwealth Parliament. Amongst other offences, the Act prohibited public service misappropriation of public funds (s 64), forgery (s 65), and perjury (s 68). The primary piece of federal criminal legislation, the Crimes Act 1914 (Cth), which contained a range of serious federal criminal offences, such as the capital offence of treason in s24, did not come into effect until over a decade after federation.

**Post-federation**

Following federation, each state continued to administer its own criminal law regime and, as we have seen, the new Commonwealth Parliament started to create federal offences within its areas of constitutional competence. As a result of the addition of the self-governing territories to the federation (the NT and ACT), a total of nine criminal law jurisdictions currently exist in Australia.

In the post-federation period, each jurisdiction developed its criminal law by choosing one of the two paths taken by Queensland and NSW (see above): either codifying the criminal law or maintaining a common law approach. In WA, Tasmania and the NT, comprehensive legislative codes (based on the original Queensland Code drafted by Samuel Griffiths in 1897) were adopted over time. Whereas, NSW, SA, Victoria and, until relatively recently, the ACT and the Commonwealth remained common law jurisdictions. The path chosen by those jurisdictions was to create more or less extensive criminal legislation (usually centred around a major crimes act) that was to be interpreted by the courts by reference to common law criminal principles (that is, core concepts and doctrines judicially developed through the courts).

**The Development of the Model Criminal Code**

The disparate approaches and the resulting differences in substantive criminal law of the various jurisdictions, led to consideration, in the late 20th century, of a means to bring consistency to the criminal law across every Australian jurisdiction. In 1990, the Standing Committee of Attorneys-General (SCAG) decided to pursue the development of a uniform Model Criminal Code that could be adopted in each state and territory. The SCAG established a committee of experts, which began the long and involved process of drafting a Model Criminal Code (MCC) that could eventually be implemented in each Australian jurisdiction. A key difference between the modern MCC and the old Griffith-based codes was the inclusion of a complete chapter of ‘Principles of criminal responsibility’. Chapter 2 of the MCC provided detailed definitions of key criminal law principles (such as the existence and meaning of physical and fault elements, the definitions of key concepts such as ‘conduct’, ‘intention’, ‘recklessness’ et cetera) that were to apply to all substantive offences both within the Code and in other legislation providing for criminal offences.

The original aim of the project was to achieve uniformity of the criminal law across Australia. However, it became apparent, over time, that there was no longer political will in each jurisdiction to achieve the uniformity originally envisioned. Instead, as the project progressed, certain jurisdictions engaged in cherry-picking parts of the MCC and inserting them into their pre-existing crimes acts. On the other hand, Queensland moved away from the project, engaged in its own review and chose to make other, unconnected, amendments to its pre-existing Griffith Code.

One jurisdiction that did embrace the MCC was the Commonwealth. Federal Parliament enacted the first part of the Criminal Code Act 1995 (Cth) at a time when

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10 Criminal Code Act 1913 (WA) (first enacted in 1902); Criminal Code Act 1924 (Tas); and Criminal Code Act 1983 (NT).

11 Crimes Act 1958 (Vic); Crimes Act 1900 (NSW); Criminal Law Consolidation Act 1935 (SA); Crimes Act 1900 (ACT); Crimes Act 1914 (Cth).

12 A striking example of wholesale adoption of MCC offences by NSW are the computer crime offences in Pt 6 of the Crimes Act 1900 (NSW).
the goal of uniformity was still foremost in the minds of federal legislators.\footnote{13} It continued to expand the Code (through insertion of offences derived from those drafted under the MCC project) over ensuing years. Major legislation that inserted MCC based offences into the federal Code included: the Cybercrime Act 2001 (in relation to computer related offences) and the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (in relation to property and fraud offences against the Commonwealth).

Moving from a common law to a MCC jurisdiction required the Commonwealth to navigate a period of transition whereby offences previously in the Crimes Act 1914 (Cth) or elsewhere were replaced by new Code offences. Not all criminal offences were to be located within the Code, though. They would still be found in a variety of other Commonwealth acts. However, the Code specified that the principles of criminal responsibility set out in Chapter 2 of the Code were to apply to all Commonwealth offences (no matter what act they were located in) five years after the date of the Code receiving Royal Assent.\footnote{14} Up until that time, those offences sitting outside of the Code were to continue to be interpreted in accordance with the principles of criminal responsibility derived from the common law. As a result, a process of ‘harmonisation’ was required to ensure that each Commonwealth offence across every offence-creating Commonwealth act would operate appropriately under the new Chapter 2 principles. This was no small undertaking. The harmonisation process began in 1997 and concluded in time for the Chapter 2 principles to apply to all federal offences from 15 December 2001.

Whilst the federal jurisdiction was the earliest adopter of the MCC, its Code does not cover the broad range of criminal law offences (including offences against the person, such as assault, murder and manslaughter) that come under state and territory regimes. As we have seen, the Commonwealth is restricted by the Constitution in terms of the areas upon which it can legislate. Nevertheless, its enumerated powers are sufficiently broad to cover a broad range of criminal activity. To give just two examples: the trade and commerce and external affairs powers in sections 51(i) and (xxix) of the Constitution, allow the Commonwealth Parliament to legislate in relation to the drug trade; and the power to make laws in relation to ‘postal, telegraphic, telephone and like services’ under section 51(v) grounds the extensive range of federal cybercrime offences in Chapter 3 of the federal Criminal Code.

The first state or territory to transition towards an MCC-based Code is the ACT (which was previously a common law criminal jurisdiction in the sense described above). The second, is the NT (which is unique in Australia in the sense that it is the only jurisdiction that is undertaking a progressive reform of its Griffith Code, the Criminal Code Act 1983 (NT) in accordance with principles and offences contained in the MCC). Of the two, the ACT is significantly further along in the process of codification than the NT, which began the reform process with the adoption, in 2005, of Chapter 2 of the MCC (with a few modifications): Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT). Since 2002, the ACT has had an MCC-based criminal code, the Criminal Code 2002 (ACT), whose chapters have gradually expanded over time. Operating in parallel has been the Crimes Act 1900 (ACT), which still houses offences against the person. These offences will eventually be covered by Chapter 5 of the ACT Code.

The ACT ‘harmonisation’ process has been a longer one than that undergone in the federal arena. The date for application of Chapter 2 principles to non-Code offences in the ACT was originally 1 July 2007,\footnote{15} but that date has been deferred a number of times whilst the consideration of existing non-Code offences for compatibility with Chapter 2 principles is assessed. The ‘application date’ is now defined in the Code as meaning ‘a date declared by the minister’.\footnote{16}

In the meantime, the ACT remains a hybrid jurisdiction, with a Criminal Code, (to whose offences Chapter 2 principles apply) operating alongside a significantly stripped back crimes act (as well as a variety of other acts containing criminal offences) to which, for the most part, common law principles and doctrines are still relevant. Hopefully, the long-awaited conclusion to the harmonisation process will soon be over.

**Conclusion**

There is no uniformity of the criminal law across Australia. The differences between both substantive offences and broader approaches to the criminal law that are observable between our nine different jurisdictions reflect a multiplicity of factors, including our colonial history and the decisions made about the nature of our federation. They also reflect the changes that can flow both from bold departures from that history and from failures to follow through on ambitious ideas. The project undertaken by Sir Samuel Griffith in the late 1890s, which has shaped the criminal law of Queensland and other jurisdictions, is an example of the former. An example of the latter, the ultimate failure of the MCC to achieve uniform criminal law in Australia is, unfortunately, our current reality.
3. How could the laws created for New South Wales differ from those of the United Kingdom?

4. What is the meaning of ‘treatises by prominent jurists were routinely relied upon by the courts as repositories of the criminal law of England’?

5. How did the case of the homicide in the boxing match demonstrate how influential these treatises were?

6. What do you think was the purpose of Griffith’s draft code?

7. Why was the Commonwealth Parliament restricted in what criminal offences it could legislate?

8. Explain why there are a total of nine criminal jurisdictions in Australia.

9. How do the paths relating to creating criminal law in Queensland and NSW differ?


11. How did the Model Criminal Code substantially differ from Queensland’s Griffith Code?

12. What occurred as a result of consultations and investigations relating to the Model Criminal Code?

13. What action did the Commonwealth Parliament take in relation to the Model Criminal Code? How did this action create considerable work?

14. What is the meaning of codification?

15. Why is the Commonwealth Parliament able to legislate in relation to cybercrime under the Constitution?

16. Do you think the criminal law across Australia should have been ‘harmonised’? Explain.

17. What is our current reality relating to criminal law in Australia?
How would you feel if your teacher did not turn up to class one day and the principal told you that the teacher had gone back to her home country because her visa was cancelled? Shocked, surprised, outraged, sad, or confused? This was exactly what happened in my child’s high school where a popular art teacher had to leave Australia without the chance of saying goodbye to her students.

The obvious questions asked by her students were: ‘Why did she have to leave and why so quickly? What will happen when she gets back to her own country? Will she ever come back to Australia? If so when can she come back? If not, why not?’

This article will try to answer these questions from the perspective of Australian migration law. In doing so, it will focus on how that law operates in relation to visa cancellation.

This visa cancellation occurred without any wrongdoing on the part of my child’s art teacher. However, there are extra complications involved where a non-citizen has committed criminal offences in Australia. Indeed, visa cancellation has been a hot topic over the last two years because of the effect it has had on families and communities of non-citizens (especially New Zealanders) who have engaged in criminal activity in this country.1 Therefore, the primary focus of this article will be on discussions relating to visa cancellation for reasons of criminal offences committed by non-citizens. I will explain the character provisions in the *Migration Act 1958* (Cth) and will conclude with some observations.

**How does the law work?**

To understand the legal framework under which migration legislation operates, we must first look to the Australian Constitution. The Constitution gives the Commonwealth Parliament the power to make laws with respect to immigration and aliens. The most relevant sub-sections of the Constitution are s51(xix) (naturalisation and aliens) and (xxvii) (immigration and emigration).

The first piece of federal legislation governing migration was the Immigration Restriction Act 1901 (Cth). It was later replaced by the *Migration Act* in 1958.

As a matter of law, the only persons who have an unqualified right to enter, live, study and work in Australia are people who are able to demonstrate their Australian citizenship. The constitutional term ‘alien’ refers to anyone who is not a citizen of Australia or, in other words, a non-citizen.2 However, the *Migration Act* and associated regulations3 use the term ‘non-citizen’ instead of ‘alien’. The legislation distinguishes between lawful and unlawful non-citizens. In fact, the object of the Act is to regulate the coming into, and the presence in, Australia of non-citizens. It makes clear that the *Migration Act* is the only source of the right of non-citizens to enter or remain in Australia.4

**What is a visa?**

To understand why the art teacher had to leave, it is important to know how she was in Australia in the first place.

As mentioned above, the *Migration Act* allows non-citizens to enter Australia and/or to remain in Australia. This is done primarily through the grant of visas. Before 1994, there was a complicated system of granting entry permits or visas for different classes of non-citizens. Since 1 September 1994, all non-citizens seeking to enter and stay in Australia are required to hold a valid visa.5 This determines if the person is a lawful or unlawful non-citizen.

The type of visas that can be granted to non-citizens is dependent on the reason for or purpose of them coming to Australia. They are required to make a valid application and are then assessed on the eligibility criteria for a visa to be granted.6

The Minister for Home Affairs, whose portfolio includes Immigration and Border Protection, has the power to

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1 Stephanie Anderson, ‘Malcolm Turnbull, John Key to discuss asylum seekers as NZ suffers brunt of visa cancellation’ (17 February 2016) ABC News (online) <http://www.abc.net.au/news/2016-02-17/visa-cancellations-on-agenda-for-turnbull-key/7176516>.

2 See the definition of a ‘non-citizen’ in s 5(1) of the *Migration Act*.

3 The *Migration Regulations 1994* (Cth).


5 See the *Migration Legislation Amendment Act 1994* (Cth), Schedule 1, Item 7 for example.

6 The validity criteria are found in ss 45 and 46 of the Act and reg 2.07, Schedule 1, whereas eligibility criteria for visa grant are set out in Schedule 2 of the Regulations.
make decisions under the Migration Act. In reality, most of the decisions are made by delegates of the minister (that is, officers of the Department of Home Affairs).

It is more than likely that the art teacher was granted a temporary work visa and was permitted to work at our local school, sponsored by her employer, the ACT Department of Education. The visa would have been granted on the basis of that sponsorship.

How can a visa be cancelled?

Whilst the Minister can grant a visa to a non-citizen, he or she can also take the visa away under certain circumstances. This process is called visa cancellation and is mainly used to ensure compliance with visa conditions by visa holders.

Under the Act, the minister has powers to cancel visas on a number of grounds. Sometimes, a visa is cancelled through no fault of the non-citizen. This may happen when, for example, the sponsoring employer is no longer able or willing to sponsor the non-citizen. Lack of sponsorship would result in a breach of visa conditions (because visa conditions require the non-citizen to work for the sponsor for the duration of the visa) and, consequently, visa cancellation.

Visa cancellation on criminal grounds

Australia has a long history of removing from the country what the legislation regards as ‘undesirable’ migrants. As early as 1901, the Immigration Restriction Act 1901 (Cth) contained an embryonic form of ‘character test’. Those who failed a dictation test; had been convicted of an offence, suffered from infectious diseases; were mentally ill; or were prostitutes were included in the definition of ‘prohibited immigrants’.

Since then, the character provisions in the Migration Act have continued to develop. In recent years, there has been a dramatic increase in the number of visas cancelled on criminal grounds. These are commonly referred to as ‘character’ or ‘section 501’ cancellations because they are authorised under that provision of the Migration Act.

Section 501 is one of the most complex provisions of the Migration Act. Very often a person fails the character test because he or she has a ‘substantial criminal record’ (defined in s501(7)) as: being sentenced to death, life imprisonment, or one or more terms of imprisonment of 12 months. Terms of imprisonment are calculated by reference to head sentences (the maximum period to be served including the non-parole period). Any suspended sentences (where the offender is excused from serving time in prison subject to various conditions) or concurrent sentences (a sentence that runs at the same time as another sentence) are added together in working out the total of the terms.

The character provisions take precedence over all other legislative provisions in the Act. This means that meeting the character test determines whether a non-citizen is granted a visa as well as whether that visa is cancelled, even if all other requirements have been met. Further, the character test places no time limit or territorial boundaries on the criminal offences committed, and a visa may be cancelled more than once through the use of the same cancellation power.8

In considering character related cases, decision makers are guided by ‘Ministerial Direction No. 65 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA’ and must take into account considerations such as ‘Protection of the Australian community’ and ‘The best interests of minor children in Australia’.

Mandatory character cancellation

The most recent substantial amendment to the character provisions occurred at the end of 2014.9 It introduced s501(3A) – a provision that, for the first time in the history of the Migration Act, mandates that the minister cancel visas in certain circumstances.

Under this provision, if a person has a ‘substantial criminal record’ or has been charged or convicted of sexually based offences involving a child (thereby failing the character test) and, in either case, is also serving a full-time sentence of imprisonment for an offence against the laws of the Commonwealth, a state or territory, the minister must cancel the person’s visa without notice. Following cancellation, the non-citizen may request a revocation.10 The minister may only revoke the original decision if satisfied either that the person passes the character test; or that there is another reason for the original decision to be revoked.11

Effect of visa cancellation

The mandatory cancellation regime has resulted in people being detained and deported or removed from

9 Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth).
10 Migration Act, s 501CA(3)(b) and reg 2.52(2)(b).
11 Migration Act, s 501CA(4).
Australia. Most have been New Zealand citizens. Another affected group are former holders of refugee visas, some of whom have already been detained for years and face an uncertain future of indefinite detention.

If a non-citizen’s visa is cancelled due to character, the cancellation takes effect immediately. The person is detained and cannot be granted any other visa. He or she must either depart voluntarily, apply for review or be removed. Having left, the person may be permanently excluded from ever entering Australia.

Observations

Since migration law determines the lawful status of a non-citizen in Australia, it is also used as a way to exclude criminal non-citizens. This is where migration law intersects most starkly with the criminal law.

It is beyond controversy that the introduction of s501(3A) in 2014 represents a fundamental shift in the visa cancellation regime. Prior to that, discretionary powers applied to all character related cases even if the non-citizen was non-compliant or failed the character test. With mandatory cancellation, the minister is under an obligation to cancel. Even if there is a reason not to do so, the Minister cannot consider it unless revocation is sought.

Secondly, the Department’s National Character Consideration Centre (NCCC) now receives regular reports from state/territory correctional services on prisoners who are visa holders. This may work well for the Federal Government in terms of visa cancellation; but it is to the detriment of visa holders because there are often time gaps between the criminal justice proceedings and the visa cancellation process. In many cases, by the time the criminal trial takes place, the person’s visa has already been cancelled.

Finally, statistically the prison population represents some of the most vulnerable and disadvantaged people in our society – the homeless, indigenous people and the mentally ill. While there is some data on the nationality of people whose visas have been cancelled on character grounds (including the type of offences committed), little is known about their family background, personal circumstances or health conditions. New Zealanders, for example, are a diverse group. From my experience in practice, many of them are from Pacific Island nations. They have had limited opportunity for education or training. Some are not proficient in their own language or English and have either worked as labourers or been unemployed. These disadvantages are often compounded by family violence, drug and alcohol abuse, and in some cases, sexual abuse.

Conclusion

By now, you should be able to answer some of the questions asked by students in our local high school. Unlike visa cancellation on character grounds, the art teacher may be able to come back to Australia in the future if she is eligible to be granted another visa.

But the impact of her departure has been devastating on the school and for her students. Likewise, the impact of visa cancellation is devastating on families and communities.

The challenge for us now is to shape the law so that it strikes the right balance between protecting the Australian community from serious crimes and ensuring Australian families are not unreasonably separated by visa cancellation decisions.

14 Migration Act, ss 15 and 82(1).
Student activities

1. Under the law what condition is necessary before you can live and work in Australia?

2. What determines whether a citizen is a lawful non-citizen or an unlawful non-citizen?

3. Which minister has the power to make decisions under the Migration Act?

4. Explain the main ground for the cancellation of a visa. Give an example.

5. What are the effects of mandatory character cancellation? What steps can an unlawful non-citizen take if their visa is cancelled in this way?

6. Why is it unlikely that a non-citizen can stop a mandatory character cancellation? Explain.

7. Which is the largest group of non-citizens that have been affected by mandatory character cancellations? Why do you think this would be the case?

8. Do you believe that mandatory character cancellations are necessary or do you believe that the minister should have discretion to override these decisions? Explain your thoughts on this.

9. After reading this article and other articles in the press about visa cancellation and mandatory detention, discuss the merits of mandatory detention and the difficulties experienced by people trying to get a permanent visa in Australia.

10. Do you believe Australia should allow more asylum seekers the right to settle here? Discuss the advantages and disadvantages of this.

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