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Ghosts of the past: rethinking spent convictions in migration character decisions under s 501 of the Migration Act 1958 (Cth)

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ABSTRACT

This article critically examines the exclusion of migration decisions from Australia's spent convictions scheme, focusing on character cancellations and refusals under s 501 of the *Migration Act 1958* (Cth). While Part VIIC of the *Crimes Act 1914* (Cth) reflects a legislative commitment to rehabilitation by shielding old, minor convictions from consideration, s 85ZZH(d) expressly exempts migration decisions from this protection. The article argues that this exemption undermines administrative law principles of fairness, rationality, and consistency, and leads to unjust outcomes – particularly for long-term residents facing deportation due solely to spent offences. Through doctrinal, empirical, and policy analysis, supported by case law including *Frugtniet* and *Lesianawai*, the article proposes legislative reform to ensure that spent convictions are no longer used in character assessments under the Migration Act. Aligning migration law with rehabilitative principles would enhance justice, promote reintegration, and restore coherence to the broader legal framework governing criminal history and administrative decision-making in Australia.

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Introduction

The analysis in this article is informed by the author's current professional experience as a legal academic at Western Sydney University and Barrister, with particular expertise in migration and administrative law. That perspective informs the article's emphasis on the operation and review of statutory character decisions, and on the administrative-law consequences of permitting spent convictions to be considered under s 501.

Australia's *Migration Act 1958* (Cth) endows the Minister for Home Affairs (and delegates) with broad powers to refuse or cancel visas on 'character' grounds, most notably through s 501 which contains the character test.¹ A visa applicant or holder will fail this test, for example, if they have a substantial criminal record (generally meaning a sentence

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¹*Migration Act 1958* (Cth) pt 9.

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of 12 months or more imprisonment) or if the Minister reasonably suspects they are not of good character based on past or present conduct.²

In recent years, use of these character powers – especially following 2014 amendments introducing mandatory visa cancellation for certain prisoners³ – has expanded dramatically, leading to thousands of visa cancellations and deportations of non-citizens with criminal histories.⁴ This trend has raised serious questions of fairness and justice, particularly when long-term Australian residents are removed from the only country they have ever known, often after serving criminal sentences in Australia.⁵

One under-examined aspect of Australia's character cancellation regime is its intersection with the federal spent convictions framework.⁶ Under Part VIIC of the *Crimes Act 1914* (Cth) (**Crimes Act**), certain old criminal convictions become 'spent' after a crime-free period, meaning the individual is generally not required to disclose them to Commonwealth authorities and those authorities must not take the spent conviction into account.⁷ This scheme reflects a legislative commitment to rehabilitation and the idea that after a sufficient period of good behaviour, a person should be freed from the stigma and consequences of their past minor offenses.⁸ However, regulations and exceptions in the Crimes Act expressly exclude various decisions from the spent convictions scheme's protection – including decisions made under the Migration Act.⁹ In effect, this exclusion (found in Crimes Act s 85ZZH(d)) means that when assessing a person's character for visa purposes, decision-makers can consider and rely upon criminal history that would otherwise be considered wiped clean by law. For instance, in one recent case the Minister took into account offences the individual had committed as a teenager 15 years earlier – convictions that were legally 'spent' and ordinarily protected from disclosure – in deciding to cancel his visa on character grounds.¹⁰

This article argues that the blanket exclusion of Migration Act decisions from the spent convictions scheme is neither necessary nor appropriate, especially in the context of character cancellations and refusals under s 501. From an administrative law perspective, there are compelling reasons why the exceptions in s 85ZZH of the Crimes Act should not apply to character-related matters under the Migration Act. In other words, decision-makers considering visa applicants' or holders' character should be bound by the same spent convictions rules that apply to most other areas of public administration, thereby disallowing consideration of old, spent criminal records. This argument will be developed through a combination of doctrinal analysis (examining

²Migration Act 1958 (Cth) s 501(6).

³Migration Act 1958 (Cth) ss 501(3A) and 501CA(4).

⁴Rebecca Powell, *Questions of fairness: New Zealander experiences of Section 501 and the case of Shane Martin*, Overland (Blog Post, 6 June 2019): <<https://overland.org.au/2019/06/questions-of-fairness-new-zealander-experiences-of-section-501-and-the-case-of-shane-martin/>>

⁵Australian Human Rights Commission, 'What are the human rights issues raised by refusal or cancellation of visas under section 501 of the Migration Act 1958 (Cth)': <<https://humanrights.gov.au/our-work/4-what-are-human-rights-issues-raised-refusal-or-cancellation-visas-under-section-501>>

⁶Crimes Act 1914 (Cth) ss 85ZV and 85ZW.

⁷Crimes Act 1914 (Cth) ss 85ZM and 85ZW.

⁸Bronwyn Naylor and Moira Paterson, 'Australian Spent Convictions Reform: A Contextual Analysis' (2011) 34(3) *UNSW Law Journal* 919, 938.

⁹Migration Act 1958 (Cth) s 85ZZH(d).

¹⁰*Mr Burgess v Commonwealth of Australia* (Department of Home Affairs and Minister for Home Affairs) [2025] AushRC 182 (Report, Australian Human Rights Commission, July 2025): <<https://humanrights.gov.au/sites/default/files/document/publication/Mr%20Burgess%20v%20Commonwealth%20of%20Australia%20%28Department%20of%20Home%20Affairs%20and%20Minister%20for%20Home%20Affairs%29%20%5B2025%5D%20AusHRC%20182.pdf>>

the legislation and case law), empirical and policy critique (drawing on data and human impacts of the current law), and theoretical discussion (emphasising rehabilitation and fairness). Relevant High Court and Federal Court decisions interpreting the character test and the spent convictions scheme will be referenced to ground the analysis in real jurisprudence.

Ultimately, the article suggests that aligning the Migration Act with the rehabilitative aims of the spent convictions regime would enhance consistency in administrative decision-making and better respect the prospects for reform and reintegration of former offenders, without unduly compromising the protection of the Australian community.

The spent convictions scheme: rehabilitation through non-disclosure

Australia's spent convictions scheme, contained in Part VIIC of the Crimes Act, is a legal mechanism designed to limit the disclosure and use of older, less serious criminal history in order to support rehabilitation.¹¹ The core idea is that if an individual remains crime-free for a specified 'waiting period' after a minor conviction, that conviction becomes spent.¹² According to the statutory definitions, a conviction is eligible to be spent if it did not result in imprisonment longer than 30 months and the person has completed a waiting period of 10 years (for adults) without re-offending.¹³

Once a conviction is spent, federal law deems that 'the fact that a person has been charged with or convicted of an offence that is spent shall not be taken into account by a Commonwealth authority'.¹⁴ Furthermore, individuals are legally permitted (and in some cases, encouraged) not to disclose spent convictions when dealing with Commonwealth authorities, and those authorities are generally prohibited from requesting or considering such information.¹⁵ The legislation even covers situations where a person was found guilty without a conviction being formally recorded – these too can become 'spent' after the requisite period.¹⁶

The spent convictions scheme represents a legislative balancing of interests.¹⁷ On one hand, it recognises the public interest in rehabilitation: giving people who have made mistakes a chance to move on without indefinite collateral consequences for relatively minor past crimes.¹⁸ As a matter of policy, this promotes reintegration of former offenders into society, encouraging them to obtain employment and participate in community life without the constant burden of an old criminal record.¹⁹ It also reflects a basic fairness notion that a person should not be perpetually marked by a minor

¹¹Office of the Australian Information Commissioner (OAIC), *Criminal records* (Web page, May 2024): <<https://www.oaic.gov.au/privacy/your-privacy-rights/more-privacy-rights/criminal-records>>

¹²Megan C Kurlychek, Robert Brame and Shawn D Bushway, 'Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?' (2006) 5(3) *Criminology & Public Policy* 483, 496–97.

¹³*Crimes Act 1914* (Cth) s 85ZM(2).

¹⁴*Crimes Act 1914* (Cth) s 85ZW.

¹⁵Devah Pager, 'Evidence-Based Policy for Successful Prisoner Reentry' (2006) 5(3) *Criminology & Public Policy* 505, 507.

¹⁶*Crimes Act 1914* (Cth) s 85ZM(1)(b).

¹⁷Kieran Lee Marshall, 'Reformed Offenders, Criminal Record Disclosures and Employment' (2019) 78(3) *Cambridge Law Journal* 503, 504–05.

¹⁸TJ McIntyre and Ian O'Donnell, 'Criminals, Data Protection and the Right to a Second Chance' (2017) 58 *Irish Jurist* 27.

¹⁹E B Adams, E Y Chen and R Chapman, 'Erasing the Mark of a Criminal Past: Ex-Offenders' Expectations and Experiences with Record Clearance' (2016) 19(1) *Punishment & Society* 23.

infraction from many years ago, especially if they have demonstrated law-abiding behaviour since.²⁰

Indeed, the very concept of a ‘rehabilitation period’ (embodied in the 10-year waiting period) is rooted in criminological research that after a certain time without re-offending, an individual’s likelihood of recidivism greatly decreases, approaching that of someone with no criminal record.²¹ In this sense, the law is effectively saying that a decades-old conviction, in the absence of further misconduct, is no longer predictive of bad character or future offending risk and therefore should no longer be held against the person.²²

On the other hand, the scheme carves out exceptions for contexts where full disclosure of criminal history is deemed necessary to protect compelling societal interests.²³ Division 6 of Part VIIC (particularly s 85ZZH) of the Crimes Act lists various exclusions – circumstances in which the normal rules about non-disclosure and non-consideration of spent convictions do not apply. Many of these exclusions relate to the administration of justice²⁴ and public safety.²⁵

For example, courts are exempted when considering evidence and sentencing; law enforcement agencies and intelligence agencies are exempt for obvious reasons; certain professional regulators and licensing bodies (such as those for childcare or teaching) may be exempt in assessing an individual’s suitability.²⁶

These exceptions acknowledge that in some situations the interest of public protection or integrity outweighs the individual’s interest in concealing an old conviction.²⁷ In practice, Part VIIC and its associated regulations strike a compromise: for most jobs, government benefits, and ordinary interactions with Commonwealth agencies, spent convictions are off-limits, but for sensitive roles or decisions impacting public safety, the information can still be used.²⁸

Notably, the legislative history indicates that when Part VIIC was introduced (in 1989–90), the aim was to reform a patchwork of laws and practices that formerly allowed any and all past convictions to be considered by decision-makers.²⁹ Parliament intended to override those older laws to the extent they conflicted with the new non-disclosure rules – except in the specific areas delineated by the exclusions.³⁰ In effect, unless an exception in s 85ZZH applies, Part VIIC operates as a kind of partial repeal of prior legal provisions that mandated disclosure of criminal history or permitted consideration

²⁰Alfred Blumstein and Kiminori Nakamura, ‘Redemption in an Era of Widespread Criminal Background Checks’ (*NIJ Journal* Issue 263, National Institute of Justice, June 2009) 10–17: <<https://www.ojp.gov/pdffiles1/nij/226872.pdf>>

²¹Megan C Kurlychek, Robert Brame and Shawn D Bushway, ‘Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?’ (2006) 5(3) *Criminology & Public Policy* 483, 489–91.

²²R K Hanson, ‘Long-Term Recidivism Studies Show That Desistance Is the Norm’ (2018) 45(9) *Criminal Justice and Behavior* 1340.

²³*Crimes Act 1914* (Cth) ss 85ZZGA–85ZZJA.

²⁴*Crimes Act 1914* (Cth) s 85ZZH(c).

²⁵*Crimes Act 1914* (Cth) s 85ZZJ.

²⁶*Crimes Act 1914* (Cth) ss 85ZZGA–85ZZJA.

²⁷Keith Soothill and Brian Francis, ‘When Do Ex-Offenders Become Like Non-Offenders?’ (2009) 48(4) *The Howard Journal of Criminal Justice* 373.

²⁸Australian Federal Police, *Spent Convictions Laws and Police Checks* (Web Page, 2024): <<https://www.afp.gov.au/our-services/national-police-checks/spent-convictions-laws-police-checks>>

²⁹See further Australian Law Reform Commission, *Spent Convictions* (Report No 37, June 1987): <<https://www.alrc.gov.au/publication/spent-convictions-alrc-report-37/>>

³⁰Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1989, 2545 (Lionel Bowen, Attorney-General).

of spent records.³¹ Where an exclusion does apply, however, it's as if the spent conviction scheme never existed for that purpose, and the older rules or broad discretion to consider convictions remain in force.³² As we will see, one of these exclusions is directly relevant to immigration: decisions made under the *Migration Act 1958* (Cth) (the **Migration Act**).

Section 85ZZH exceptions and the migration act

Section 85ZZH of the Crimes Act sets out the categories of people or decisions that are exempt from the spent convictions scheme.³³ Importantly, paragraph 85ZZH(d) excludes 'a person who makes a decision under the Migration Act 1958' from the operation of Division 3 of Part VIIC (the division containing the non-disclosure and non-consideration rules).³⁴

In plain terms, this means that when a delegate of the Minister or the Minister personally is making a decision under the Migration Act – such as whether to grant a visa, refuse an application, cancel an existing visa, etc. – they are not bound by the usual prohibition on considering spent convictions.³⁵

The law explicitly allows them to receive information about an applicant's spent convictions and to take that information into account in the decision-making process.³⁶ As a result, the Department of Home Affairs requires visa applicants to disclose all convictions, 'spent' or not,³⁷ and failing to do so truthfully can itself lead to visa refusal or cancellation for providing false information.³⁸ Likewise, when assessing a person's character, the Minister or delegate can weigh even very old minor offences³⁹ that other agencies would be legally obliged to ignore.

The inclusion of Migration Act decisions among the exceptions in s 85ZZH was a policy choice that accompanied the creation of the federal spent convictions scheme.⁴⁰ The rationale appears to be that immigration decisions – especially those about who should be allowed to enter or remain in Australia – were deemed analogous to national security or law enforcement contexts, where having access to the full criminal history of an individual might be considered crucial.⁴¹

Indeed, in debates and explanatory materials at the time, legislators voiced concerns that individuals with past criminal conduct could pose risks to the community if admitted or allowed to stay, and that migration officers should not be 'blindfolded' by a non-disclosure rule in such cases.⁴²

The Migration Act's character test itself is framed broadly, encompassing not just serious convictions but also general criminal conduct and even

³¹Part VIIC did not wholly repeal those existing laws but would have repealed them only to the extent to which they were inconsistent.

³²See *Crimes Legislation Amendment Act 1989* (Cth).

³³*Rothfield v Office of the Australian Information Commissioner* [2021] FCA 1524 [43]–[44].

³⁴*Crimes Act 1914* (Cth) ss 85ZV and 85ZW.

³⁵*Crimes Act 1914* (Cth) s 85ZZH(d).

³⁶*Ibid.*

³⁷Department of Home Affairs (Cth), *Character Requirements* (Web Page, 2024): <<https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/character>>

³⁸See Direction No. 110, cl 8.1.1(1)(g).

³⁹*Migration Act 1958* (Cth) s 501(6)(c).

⁴⁰See further *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250.

⁴¹*Crimes Act 1914* (Cth) ss 85ZZH– 85ZZJA.

⁴²See Explanatory Memorandum, *Crimes Legislation Amendment Bill (No 2) 1989* (Cth).

associations,⁴³ reflecting a precautionary or protective approach. Thus, one can infer that Parliament carved out migration decisions so that visa decision-makers would have unrestricted access to an applicant's background,⁴⁴ enabling them to refuse or cancel visas on the basis of any criminal conduct regardless of its vintage.⁴⁵

However, this blanket exclusion has some troubling implications, and it sits in tension with other parts of the Migration Act that acknowledge rehabilitation. It is instructive to compare how the law treats two different types of 'character' assessments under the Act: (1) visa applicants/holders under s 501, and (2) aspiring migration agents (advisers) under Part 3 of the Act. For the latter category – people seeking registration as migration agents – the Act explicitly prohibits consideration of spent convictions.⁴⁶

Section 290(2)(c) provides that, in determining whether an applicant for registration is fit and proper, the Migration Agents Registration Authority (MARA) must take into account any relevant conviction of the applicant '(except a conviction that is spent under Part VIIC of the Crimes Act 1914)'.⁴⁷ Furthermore, s 279 of the Migration Act pointedly states: 'Despite paragraph 85ZZH(d) of the *Crimes Act 1914*, Part VIIC of that Act applies to this Part'. In other words, for the purpose of migration agent registration (Part 3 of the Act), the spent convictions scheme is to be applied, notwithstanding the general exclusion for Migration Act decisions. The effect of these provisions is to 'turn back on' the spent conviction protections in this specific context, ensuring that old offences do not count against someone trying to become a registered migration agent.⁴⁸

This contrast is striking. In the migration agent context, Parliament has evidently concluded that it would be unjust or unnecessary to weigh spent convictions in assessing a person's fitness to provide immigration assistance.⁴⁹ MARA, by law, may not take such convictions into account.⁵⁰ Yet the very same individual, if they were instead applying for a visa or facing visa cancellation, would find that their spent convictions are fair game for consideration by the Department.⁵¹ The differential treatment suggests that the exclusion in s 85ZZH(d) may be overly broad. If spent convictions can safely be ignored when licensing those who handle sensitive immigration matters (agents), why not also ignore them when judging immigrants themselves? The stakes for the individual are arguably higher in the latter case – loss of liberty through immigration detention and permanent separation from family and community through deportation⁵² – so one would think principles of fairness and rehabilitation should carry at least equal weight.

It is true that some might distinguish migration agent registration (a professional suitability question) from visa grant/cancellation (a sovereign right to

⁴³*Migration Act 1958* (Cth) s 501(6).

⁴⁴*Crimes Act 1914* (Cth) s 85ZZH(d).

⁴⁵Compare *XMBQ v Minister for Immigration and Multicultural Affairs* [2025] FCA 553, where Justice Horan concluded that s 501BA of the Migration Act 1958 (Cth) is subject to an implied temporal limitation, meaning the Minister must exercise the power to set aside a decision and cancel a visa within a reasonable time after the original decision by the delegate or Tribunal. If not exercised within that timeframe, the necessary connection to the original decision is lost, and the Minister can no longer be said to be responding to the consequences of that decision.

⁴⁶*Migration Act 1958* (Cth) s 290(2)(c).

⁴⁷*Pilkington and Migration Agents Registration Authority* [2008] AATA 886 [67].

⁴⁸*Migration Act 1958* (Cth) s 279.

⁴⁹*Seymour v Migration Agents Registration Authority* [2006] FCA 965 [47], [54]–[55].

⁵⁰*Mottaghi and Migration Agents Registration Authority* [2007] AATA 60 [39].

⁵¹*Crimes Act 1914* (Cth) s 85ZZH(d).

⁵²*Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 [3].

control borders).⁵³ In practice, however, both involve an evaluation of character and both implicate the public interest (one in protecting clients from unscrupulous agents,⁵⁴ the other in protecting the community from potential harm).⁵⁵

The current law creates a peculiar scenario where a person's decade-old minor conviction is considered irrelevant to their integrity as a migration agent⁵⁶ but could still trigger the loss of their visa or bar their entry into Australia.⁵⁷ This inconsistency undermines the coherence of the legal framework and, as will be argued below, undermines administrative law norms of rational and fair decision-making.

Character decisions under the migration act: scope and impact

Section 501 of the Migration Act is the primary vehicle for character-based visa decisions. It provides that the Minister or their delegate may refuse to grant a visa, or may cancel an existing visa, if the person does not pass the 'character test'.⁵⁸ The character test is defined in s 501(6) to include a range of grounds. The most clear-cut ground is having a 'substantial criminal record', which is defined (in s 501(7)) to include being sentenced to a term of imprisonment of 12 months or more, among other things.⁵⁹ By operation of a later amendment,⁶⁰ if a person is currently in prison serving such a sentence (or has been convicted of certain serious sexual or violent offences against minors), the Minister must cancel their visa automatically (**mandatory cancellation provision**).⁶¹

In practical terms, failing the character test has draconian consequences.⁶² A visa refusal on character grounds will bar the person from entering Australia, often indefinitely.⁶³ A visa cancellation (particularly of a permanent resident's visa) typically results in the person being detained in immigration detention⁶⁴ and eventually deported from Australia,⁶⁵ often separating them from close family members and the life they have built over years or decades in the country.⁶⁶ Because Australian citizens are not subject to the Migration Act's visa system,⁶⁷ the character provisions disproportionately affect

⁵³ *Migration Act 1958* (Cth) s 4 and pt 3.

⁵⁴ *Podger and Migration Agents Registration Authority* [2025] ARTA 1148.

⁵⁵ *DJHT and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 883.

⁵⁶ *Migration Act 1958* (Cth) s 290(2)(c).

⁵⁷ *Crimes Act 1914* (Cth) s 85ZZH(d).

⁵⁸ Jason Donnelly, "Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door" (2017) 24 *Australian Journal of Administrative Law* 99, 100–01.

⁵⁹ A person does not pass the character test under s 501(6) of the *Migration Act 1958* (Cth) if they have a substantial criminal record, have committed offences in or relating to immigration detention, or have been convicted under s 197A. The test also fails if the Minister reasonably suspects the person is or was associated with criminal groups or has engaged in serious conduct such as people smuggling, human trafficking, or international crimes like genocide. A person may also fail the test if their past or present criminal or general conduct shows they are not of good character, or if there is a risk they would engage in harmful conduct in Australia, including criminal activity, harassment, vilification, or inciting discord. Additional grounds include convictions or findings of guilt for child sex offences, charges for serious international crimes, an adverse ASIO security assessment, or an Interpol notice suggesting the person poses a risk to the Australian community.

⁶⁰ *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).

⁶¹ *Migration Act 1958* (Cth) s 501(3A).

⁶² See Peter Billings, 'Regulating Crimmigrants through the "Character Test": Exploring the Consequences of Mandatory Visa Cancellation for the Fundamental Rights of Non-Citizens in Australia' (2019) 71 *Crime, Law and Social Change* 1.

⁶³ *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) (2024) 98 ALJR 196.

⁶⁴ *Migration Act 1958* (Cth) s 189.

⁶⁵ *Migration Act 1958* (Cth) s 198.

⁶⁶ *JFPT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 1080.

⁶⁷ *Migration Act 1958* (Cth) s 4.

long-term residents who never naturalised. Many such individuals arrived as children and know no other home; yet a criminal conviction – even from long ago – can render them deportable.⁶⁸

The Australian Human Rights Commission⁶⁹ and other observers have documented numerous cases of non-citizens with very deep ties to Australia who were removed under s 501 after serving criminal sentences, leading to significant hardship and questions about double punishment.⁷⁰ In *Nystrom v Australia*, for example, a man who had lived in Australia since he was 27 days old was deported to Sweden (a country entirely foreign to him) due to a history of criminal offences; the United Nations Human Rights Committee later found that Australia's deportation of Mr Nystrom was an arbitrary deprivation of his right to enter his 'own country' under Article 12(4) of the ICCPR, given his virtually lifelong connection to Australia.⁷¹

The policy justifications for such stringent character powers are framed around protecting the Australian community from individuals who pose a risk of re-offending or whose past conduct demonstrates a disregard for the law and societal values.⁷² Ministerial Directions (binding rules issued to guide delegates' exercise of the s 501 discretion)⁷³ emphasise protection of the community and the expectations of the Australian community as 'primary considerations' in deciding whether to cancel or refuse for bad character.⁷⁴

However, these Directions also acknowledge, at least in principle, the relevance of factors like the strength of the individual's ties to Australia, their time in the community, and any evidence of rehabilitation or reform.⁷⁵ For instance, current policy instructs that Australia 'may afford a higher level of tolerance' to criminal conduct by a non-citizen who has lived in Australia most of their life.⁷⁶ In practice, though, these mitigating factors can be and often are outweighed by the seriousness of past crimes or perceived future risk.⁷⁷ Moreover, when the Minister acts personally to cancel a visa (using s 501(3) or s 501A), they are not bound to follow their own Departmental Directions at all, and there is no merits review available – meaning such decisions can be quite unyielding.⁷⁸

Within this context, the role of spent convictions becomes critical. A person might have a criminal record that is decades old with no subsequent offending. Under ordinary circumstances, much of that record might be spent and thus legally ignored. But because of s 85ZZH(d), the Department and Minister will treat those convictions as still

⁶⁸Garratt and Minister for Immigration, Citizenship and Multicultural Affairs (*Migration*) [2022] AATA 4857.

⁶⁹Australian Human Rights Commission, *What are the human rights issues raised by refusal or cancellation of visas under section 501 of the Migration Act 1958 (Cth)*, Australian Human Rights Commission (background paper, June 2013):

⁷⁰Jason Donnelly, "Double Counting Family Violence for the Same Purpose – Permissible Decision-making or Legal Unreasonableness?" (2023) 29 *Australian Journal of Administrative Law* 267.

⁷¹*Human Rights Committee, Views: Communication No 1557/2007*, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011) ('*Nystrom v Australia*').

⁷²Peter Billings and Khanh Hoang, 'Characters of Concern, or Concerning Character Tests? Regulating Risk through Visa Cancellation, Containment and Removal from Australia' in Peter Billings and Jonathon L Moses (eds), *Crimmigration in Australia* (Springer, 2019) 119.

⁷³*Migration Act 1958 (Cth)* s 499A.

⁷⁴Minister for Home Affairs, *Direction No 110 – Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (22 January 2024) cls 8.1, 8.5.

⁷⁵*ibid* cls 8.1.2, 8.3, 8.4.

⁷⁶See further the cls 5.2 and 8.3 in *Direction No. 110*.

⁷⁷*JFPT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2025] ARTA 275.

⁷⁸*Makasa v Minister for Immigration and Border Protection* (2020) 376 ALR 191.

relevant.⁷⁹ The visa application forms explicitly require disclosure of all convictions, even ones that would normally be considered ‘spent’.⁸⁰

Failure to disclose is itself a separate ground for visa refusal/cancellation (under Public Interest Criterion 4020 regarding false or misleading information)⁸¹ – a rule that could well generate debate about whether it effectively punishes individuals for initially following the logic of the spent convictions law (i.e. not volunteering information they’re entitled to withhold). And once disclosed, even a very old conviction can trigger a negative character assessment.⁸² For example, consider someone convicted earlier in life of criminal offences, who then led an upstanding life for 15 or 20 years. If they never applied for citizenship, and later seek to travel or renew their visa, those past offences can be cited as evidence of failing the character test (perhaps under the ‘past and present general conduct’ limb in s 501(6)(c) of the Migration Act).

There have indeed been cases in which convictions from long ago – which would meet all criteria of being spent – were central to visa cancellation decisions. The *Burgess* case is one: Mr Burgess’s visa was cancelled in 2016 with the Minister taking into account juvenile offences from 15 years prior.⁸³ Without the s 85ZZH(d) exception in the Crimes Act, such old convictions would not have been legitimately considered.

It bears emphasising the sheer increase in the use of s 501 powers after 2014, because it underscores how many people might be affected by the spent conviction issue. Since the December 2014 amendments to the Migration Act,⁸⁴ the use of s 501 powers – particularly the mandatory cancellation power under s 501(3A) – has increased dramatically. In 2013–14, only 74 visas were cancelled on character grounds,⁸⁵ but this rose sharply to 983 in 2015–16 and peaked at 1278 in 2016–17.⁸⁶ Although the number of cancellations gradually declined in later years, they remained significantly higher than pre-2014 levels, with 937 in 2018–19, 1015 in 2019–20, and 938 in 2020–21.⁸⁷ The trend continued with 656 cancellations in 2021–22, 625 in 2022–23, and 603 in 2023–24, confirming the enduring impact of the legislative shift.⁸⁸

As of March 2025, 534 individuals were in immigration detention due to visa cancellations under s 501, accounting for over half of all immigration detainees at the time.⁸⁹ These figures highlight the sheer scale and sustained use of character powers post-2014, marking a thirteen-fold increase in cancellations within one year and a broader

⁷⁹Fitzpatrick and Minister for Immigration and Multicultural Affairs (*Migration*) [2025] ARTA 708.

⁸⁰Agape Henry Crux, ‘Do I Need to Disclose Minor Offences or Spent Convictions on My Visa Applications?’ (AHC Lawyers, May 2025): <<https://www.ahclawyers.com/news-articles/25/05/08/do-i-need-to-disclose-minor-offences-or-spent-convictions-on-my-visa-applications>>

⁸¹*Migration Regulations 1994* (Cth), Schedule 4.

⁸²*Migration Act 1958* (Cth) s 501(6).

⁸³See *Burgess v Minister for Immigration and Border Protection* (2018) 259 FCR 197; *Burgess v Assistant Minister for Home Affairs* [2019] FCA 34; *Burgess v Assistant Minister for Home Affairs* (2019) 271 FCR 181.

⁸⁴*Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).

⁸⁵Nevett Ford Lawyers, *Mandatory Visa Cancellation of Australian Visas under Section 501 of the Migration Act 1958* (Web Page): <<https://nevetfordlawyers.com.au/mandatory-visa-cancellation-of-australian-visas-under-section-501-of-the-migration-act-1958/>>

⁸⁶Department of Home Affairs (Cth), *Immigration Detention and Community Statistics Summary – 31 March 2025* (Report, 2025): <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-community-statistics-31-march-2025.pdf>>

⁸⁷*ibid.*

⁸⁸Department of Home Affairs (Cth), *Character and General Visa Cancellation Statistics Summary – 30 June 2024* (Report, 2024): <<https://www.homeaffairs.gov.au/research-and-stats/files/character-and-general-cancellation-stats-30-jun-2024.pdf>>

⁸⁹*ibid.*

transformation of Australia's immigration enforcement landscape.⁹⁰ The data underscores how the s 501 regime evolved from a rarely used provision to a central mechanism of visa regulation.

In such a high-volume environment, even a subset of cases where the only or decisive negative information is a spent conviction would translate to a significant number of lives uprooted arguably without sufficient justification.

Judicial interpretation and the spent convictions anomaly

Several court decisions, while not directly resolving the policy question, shed light on how the law of spent convictions and character tests has been interpreted and applied. A particularly relevant High Court case is *Frugtniet v Australian Securities and Investments Commission*.⁹¹ Although it concerned a financial industry banning decision⁹² rather than an immigration matter, the principles at stake were analogous – and the High Court's reasoning underscored the primacy of the spent convictions scheme where it is not expressly excluded.

In *Frugtniet*, the Administrative Appeals Tribunal (AAT)⁹³ had been reviewing ASIC's decision to ban Mr Frugtniet from providing financial services.⁹⁴ ASIC, by law, was prohibited from considering Mr Frugtniet's old criminal convictions that were spent (under the relevant financial legislation which expressly applied Part VIIC).⁹⁵ However, when Mr Frugtniet appealed to the AAT, the Tribunal decided that *it* was free to consider the spent convictions, pointing to s 85ZZH(c) of the Crimes Act – an exclusion which provides that the non-disclosure rule does not apply to *courts or tribunals* taking information into account.⁹⁶ The AAT thus factored in decades-old convictions in affirming the ban.⁹⁷ This raised a legal question: if the original decision-maker (ASIC) couldn't consider the spent convictions, could the merits review tribunal do so, given that s 85ZZH(c) generally exempts tribunals?

The High Court ultimately ruled in Mr Frugtniet's favour, holding that the AAT should not have considered the spent convictions.⁹⁸ The reasoning was technical but significant. The Court noted that when the AAT stands in the shoes of the original decision-maker, it is generally bound by the same substantive law and constraints that applied to the primary decision-maker.⁹⁹

Although s 85ZZH(c) appears broad, the Court found no clear legislative intent that a merits review body should apply a different standard regarding spent convictions than the original agency where that agency was bound by Part VIIC.¹⁰⁰ In essence, the absence of an explicit allowance for the AAT to use spent convictions in that context implied it should not do so. The result was that Mr Frugtniet's case was remitted to the Tribunal to

⁹⁰*ibid.*

⁹¹(2019) 266 CLR 250.

⁹²*ibid* [1].

⁹³Now the Administrative Review Tribunal.

⁹⁴*Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 [1].

⁹⁵*ibid.*

⁹⁶*ibid* [43].

⁹⁷*ibid.*

⁹⁸*ibid* [53].

⁹⁹*ibid* [51].

¹⁰⁰*ibid* [24].

be decided *without reference to his spent convictions*, aligning with the spirit of the rehabilitation regime.¹⁰¹

Frugtniet highlights a general judicial respect for the spent convictions framework: courts are willing to enforce the prohibition on considering old convictions unless an exception clearly applies. It underscores that exceptions like s 85ZZH(c) (courts/tribunals) and s 85ZZH(d) (Migration Act decisions) will not be given any wider scope than the text and context absolutely require. In the migration sphere, this suggests that while s 85ZZH(d) unquestionably permits the Minister and Department to consider spent convictions, it would likely be construed narrowly by courts if there were any ambiguity. The stark reality, though, is that s 85ZZH(d) is quite clear and categorical¹⁰² – hence the need for legislative change rather than a judicial fix.

Another relevant decision is the Federal Court’s comments in *Cunliffe v Minister for Immigration and Citizenship*.¹⁰³ That case involved a British citizen, Leslie Cunliffe, who had lived in Australia for 43 years before his visa was cancelled for serious sexual offences (for which he served 12 years in prison).¹⁰⁴ The case did not turn on spent convictions – Cunliffe’s crimes were serious and recent enough not to be spent – but the Court’s upholding of the Minister’s decision¹⁰⁵ exemplified how broad the Minister’s personal discretion is, even for ultra-long-term residents.

The Court acknowledged that Cunliffe’s ties to Australia were extremely strong,¹⁰⁶ yet it was lawful for the Minister to give greater weight to the nature of his offence and the need to protect the community.¹⁰⁷ This kind of outcome has been criticised by the Commonwealth Ombudsman and the AHRC as going beyond the original intent of s 501.¹⁰⁸

For our purposes, *Cunliffe* illustrates that if the law permits consideration of negative factors (whether serious recent crimes or minor old ones), the Minister can lawfully prioritise those factors over humanitarian considerations. Therefore, if we as a society believe spent convictions should not count, it is not enough to assume the Minister will ignore them out of benevolence – the law must actively forbid their consideration.¹⁰⁹

One might ask: have there been any cases directly challenging a character decision under the Migration Act on the ground that it considered a spent conviction? The short answer is no. But given s 85ZZH(d) is so explicit, decision-makers know they are entitled to consider such convictions. Thus, judicial review has offered no relief on this point; the battle lines are drawn by the legislation itself.

Administrative law perspectives: fairness, rationality, and consistency

From an administrative law standpoint, the Migration Act’s exemption from the spent convictions scheme raises concerns in three key areas: procedural fairness, rational relevance, and consistency of law.

¹⁰¹*ibid* [55].

¹⁰²See further *Kocic v Commissioner of Police, NSW Police Force* (2014) 88 NSWLR 159.

¹⁰³(2012) 129 ALD 233.

¹⁰⁴*ibid* [37].

¹⁰⁵*ibid* [135].

¹⁰⁶*ibid* [101].

¹⁰⁷*ibid* [133] [135].

¹⁰⁸Australian Human Rights Commission, n 5 above.

¹⁰⁹See further S O’Toole and P Keyzer, ‘Rudy Frugtniet v ASIC: Things to Consider if Victoria Introduces a Spent Convictions Regime (with “A Message to You, Rudy”)’ (2019) 44(4) *Alternative Law Journal* 260, 260.

Procedural fairness (natural justice)

At first glance, one might argue that as long as a person is given an opportunity to respond to adverse information (including old convictions) before a visa is refused or cancelled, procedural fairness is satisfied.¹¹⁰ Australian courts have indeed held that non-citizens facing visa cancellation are owed procedural fairness,¹¹¹ but the content of that obligation can be tightly constrained by the statute (for instance, under s 501(5), no obligation exists to give natural justice for certain personal Minister decisions).

Assuming fairness applies, is it ‘unfair’ for a decision-maker to dredge up decades-old convictions? Many would say yes – it blindsides individuals who reasonably believed those convictions were no longer relevant. A visa holder might have interpreted the general spent convictions law as a signal that they could effectively ‘move on’ from their old offence.

Requiring them to defend their visa against stale charges may seem contrary to the spirit of giving someone a fresh start. In practice, individuals may express shock and dismay that convictions from their distant past are used against them in immigration decisions.¹¹² While the courts have not deemed this *legal* unfairness (because the statute permits it, and everyone is deemed to know the law),¹¹³ from a policy perspective it has the flavour of a ‘booby trap’ for the unwary. One could analogise it to entrapment by prior policy: the government on one hand tells former offenders their record will be sealed and need not be disclosed, yet on the other hand, in immigration context, demands full disclosure and penalises them for the very same record.¹¹⁴

There is also the issue of consistency with legitimate expectations. This concept in administrative law holds that if the government has made representations or established a regular practice, individuals are entitled to expect it will be followed unless they are informed otherwise.¹¹⁵

The existence of Part VIIC arguably creates a legitimate expectation (outside of explicitly exempt contexts) that spent convictions will not be considered by authorities. However, the explicit legislative exclusion in s 85ZZH(d) would likely be taken by courts as negating any such expectation in immigration matters. Still, it is telling that the government found it necessary to insert questions on visa application forms specifically instructing applicants to disclose spent convictions¹¹⁶ – indicating that without such instruction, applicants might *rightly assume* they do not need to reveal old convictions. The overall scenario thus tests the boundaries of fairness: the law demands honesty about something it elsewhere says can be kept secret. A reform that removed the exception would

¹¹⁰*SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152.

¹¹¹*Stowers v Minister for Immigration and Border Protection* (2018) 265 FCR 177.

¹¹²See further Dimitra Blitsa and others, ‘Criminal Records and Immigration: Comparing the United States and the European Union’ (2016) 39 *Fordham Int'l LJ* 205.

¹¹³*Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250.

¹¹⁴See further Geoff Cebula, ‘The Problem of Foreign Convictions in U.S. Immigration Law the Problem of Foreign Convictions in U.S. Immigration Law’ (2020) 96 *Notre Dame Law Review* 897.

¹¹⁵See Matthew Nathan Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 32 *Melbourne University Law Review* 470.

¹¹⁶Department of Home Affairs (Cth), *Form 80 – Personal Particulars for Character Assessment* (Form, July 2021): <<https://immi.homeaffairs.gov.au/form-listing/forms/80.pdf>>

eliminate this tension and make the process more straightforward and fair in the eyes of applicants and visa holders.

Rational relevance and proportionality

Administrative decision-makers are generally expected to base decisions on logically probative material and to give weight to factors in proportion to their importance.¹¹⁷ Using very old convictions as a basis to judge current character can be questioned on rationality grounds.

Criminological evidence suggests that after a certain period of crime-free behaviour, an old conviction has little predictive value regarding a person's future risk (this underpins the spent convictions concept).¹¹⁸ To treat a 20-year-old conviction for a low-level offence as a serious indicator of present bad character may border on *irrational*, or at least *unreasonable* in the *Wednesbury* sense¹¹⁹ – particularly if all other evidence points to rehabilitation.

Indeed, in other contexts, courts have held that requiring disclosure of extremely old or minor infractions could be beyond power.¹²⁰ For example, in *Lesianawai*,¹²¹ the High Court of Australia unanimously held that the Minister's delegate committed a jurisdictional error by cancelling Mr Lesianawai's visa under s 501(2) of the Migration Act based, in part, on offences he committed as a child under 16, for which no conviction could be recorded under NSW law. Applying its earlier decision in *Thornton*,¹²² the Court confirmed that under ss 85ZR and 85ZS of the Crimes Act, the delegate was precluded from treating those findings of guilt as convictions for any purpose, including visa cancellation. A writ of certiorari was issued to quash the decision.

Beyond *Lesianawai* and *Thornton*, however, the law in immigration cases explicitly authorises spent convictions to be taken into account.¹²³ Yet the question remains: is this *good administration*? The principle of proportionality, which has increasingly influenced Australian administrative law (especially “via the lens” of international human rights obligations and the concept of *arbitrariness* in detention, would counsel that government actions not be excessive relative to their aim.¹²⁴

Cancelling a person's visa and exiling them from their community for an offence so old that it is spent under the law's own criteria can be seen as a disproportionate response – *unless* there is specific evidence of ongoing risk. If a person has lived crime-free for, say, 15 years, the mere fact of a minor 15-year-old conviction contributing to a decision to deport seems more punitive than protective. The punitive character of such an outcome is hard to deny: the person is essentially being punished again, long after their formal sentence is served.¹²⁵

¹¹⁷*FMA17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 456 [101].

¹¹⁸See Megan C. Kurlychek, Robert Brame and Shawn D. Bushway, “Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement” (2007) 53 *Crime & Delinquency* 64.

¹¹⁹Stacey Stellatos, ‘Looking for *Wednesbury*’s Reasonable Interpretation’ (2014) *UNSWLJ Student Series* No 14-07.

¹²⁰*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 97 ALJR 488.

¹²¹*Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 475.

¹²²*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 97 ALJR 488.

¹²³*Crimes Act 1914* (Cth), s 85ZZH(d).

¹²⁴See Grant Hooper, ‘Judicial Review and Proportionality: Making a Far-Reaching Difference to Administrative Law in Australia or a Misplaced and Injudicious Search for Administrative Justice?’ (2017) 11 *AIAL Forum* 11.

¹²⁵Beth Caldwell, ‘Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment’ (2013) 34 *Cardozo Law Review* 2262.

Critics have labelled this as a form of double punishment or even ‘multiple punishment’ when considering that the individual might have been imprisoned, then detained in immigration custody, deported, and in some cases further sanctioned in their homeland because of the deportation.¹²⁶ Administrative law traditionally does not prohibit double punishment (that’s more of a criminal law principle),¹²⁷ but it does value *consistency* and avoidance of *abuse of power*.¹²⁸ If a power is used in a way that effectively circumvents rehabilitative mechanisms, one could argue it’s an abuse of the intent behind the overall legal system.

Consistency of the law

As highlighted earlier, the Migration Act’s approach to spent convictions is internally inconsistent – welcoming them in character decisions for visa applicants but excluding them in character decisions for migration agent applicants.¹²⁹ Moreover, it is inconsistent with the approach taken in most other Australian jurisdictions and contexts. All states and territories have their own spent conviction legislation (or equivalent, often called ‘rehabilitation of offenders’ acts) which similarly limit the use of old convictions, with similar carve-outs for certain jobs or processes.¹³⁰

The Migration Act stands out as a major Commonwealth law that *deliberately opts out* of these rehabilitative norms.¹³¹ The question is: what makes non-citizens so different that they should not get the benefit of rehabilitation policies that every Australian citizen enjoys? This cuts to a deeper normative issue – whether non-citizens are owed the same consideration of personal reform as citizens. The current law sends a message that they are not.

If one commits a crime and later turns their life around, a citizen can eventually have that crime ‘forgotten’ by law for most purposes, but a non-citizen is forever liable to be judged by it.¹³² This two-tier system of post-sentence consequences offends the administrative law value of equal treatment under the law,¹³³ except where objectively justified. One might justify it by saying non-citizens have no right to remain,¹³⁴ so any bad mark is enough to extinguish the privilege of a visa. But when non-citizens in question are effectively members of the Australian community (often since childhood), that rationale weakens – they are part of ‘us’ in every way except legal citizenship status.

The High Court in cases like *Love*¹³⁵ has begun to recognise that membership in the Australian community can transcend formal citizenship in certain contexts (in *Love*, for Indigenous Australians). While *Love* concerned a constitutional limit – the Court held

¹²⁶Elisabeth Sethi, ‘Punishment After the Punishment: How Deportation of Juvenile Offenders Violates the Eighth Amendment and International Law’ (2024) 28 *Lewis and Clark Law Review* 359.

¹²⁷*Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352.

¹²⁸*FYBR v Minister for Home Affairs* (2019) 272 FCR 454 [63].

¹²⁹Compare s 85ZZH(d) of the *Crimes Act 1914* (Cth) and s 290(2)(c) of the *Migration Act 1958* (Cth).

¹³⁰*Criminal Records Act 1991* (NSW); *Spent Convictions Act 2021* (Vic); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld); *Spent Convictions Act 1988* (WA); *Spent Convictions Act 2009* (SA); *Annulled Convictions Act 2003* (Tas); *Criminal Records (Spent Convictions) Act 2000* (ACT); *Spent Convictions Act 2000* (NT).

¹³¹*Crimes Act 1914* (Cth), s 85ZZH(d).

¹³²*Crimes Act 1914* (Cth), ss 85ZZH(c)–(d).

¹³³Jason Donnelly, ‘Utilisation of National Interest Criteria in the Migration Act 1958 (Cth) – A Threat to Rule of Law Values?’ (2017) 7(1) *Victoria University Law and Justice Journal* 94, 100–01.

¹³⁴*Migration Act 1958* (Cth), ss 13–14.

¹³⁵*Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* (2020) 270 CLR 152.

that Aboriginal Australians cannot be deemed ‘aliens’ and deported – it reflects a judicial discomfort with unchecked deportation powers, especially where they conflict with fundamental notions of membership and community.

Long-term residents and rehabilitated former offenders, while not constitutionally protected in the same way, do present a moral challenge to the rigidity of s 501. Administrative law, through principles of reasonableness and proper purpose, would encourage that discretionary powers be exercised in a manner that is congruent with the purpose of the legislation and the values of the legal system as a whole. If the purpose of s 501 is to protect the community,¹³⁶ one must ask: is the community truly protected by deporting someone whose prior crime is so old that the ordinary law deems it no longer relevant? Or is such an act better described as a retrospective *punishment* or banishment?

In summary, from an administrative law perspective, removing the s 85ZZH(d) exception and thereby preventing consideration of spent convictions in migration decisions would likely *improve* the quality of decision-making. It would ensure decisions focus on current and serious risk factors rather than historical baggage. It would align immigration decision-making with broader legal standards of fairness and rationality. It would also reduce anomalies and technical traps (like the disclosure trap under PIC 4020 for spent convictions). The outcome would be a more consistent and principled administrative process.

Proposals for reform and conclusion

If the exceptions in s 85ZZH were to be altered so as not to apply to character matters under the Migration Act, what form should this take? There are a couple of legislative pathways:

- (1) **Repeal or Amend s 85ZZH(d).** The most direct approach would be to remove ‘a person who makes a decision under the Migration Act 1958’ from the list of exclusions in the Crimes Act. This would immediately bring immigration decisions within the ambit of the spent convictions scheme. Decision-makers would then be bound by s 85ZW, meaning they could not take into account any spent conviction in visa decisions. Visa application forms and procedures would need updating to reflect that applicants are *not* required to declare spent convictions. This straightforward reform would ensure uniform Commonwealth practice regarding spent convictions.
- (2) **Selective Carve-Outs in the Migration Act.** Alternatively, Parliament could insert a provision into the Migration Act itself (akin to the existing s 279 for migration agents) stating that Part VIIC of the Crimes Act applies to character assessments under s 501. For example, a new subsection of s 501 could read: ‘Despite paragraph 85ZZH(d) of the Crimes Act 1914, Division 3 of Part VIIC of that Act (spent convictions) applies to decisions under this section’. This method might be more politically palatable if there is a desire to retain the exclusion for other migration decisions (though it is hard to see a rationale for allowing spent convictions in any migration context if we disallow them for s 501). A narrower tweak could also specify that *certain types* of convictions (e.g. those that are spent *and* did not result in prison time) cannot be considered, but that would be messier than simply incorporating the whole Part VIIC regime.

¹³⁶*Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424.

- (3) **Ministerial Direction or Policy Change.** Short of legislative amendment, the Minister could issue a policy Direction indicating that delegates should generally give no weight to spent convictions, or only consider them in exceptional circumstances. However, such a Direction would not bind the Minister personally. It would also be an insecure solution – a new minister could change it – and it would not remove the obligation on applicants to disclose spent convictions (since that obligation flows from law). Therefore, a policy tweak alone is insufficient; it would need backing by law to truly protect applicants.

The preferred approach is to amend the law itself, either by excising Migration Act decisions from s 85ZZH(d) or by positively re-imposing Part VIIC onto the Migration Act. This would bring immediate and concrete benefits:

- (1) **Fairness and Clarity.** Applicants and visa holders would no longer face the dilemma of whether to disclose an old conviction (and risk visa refusal) or not disclose it (and risk a refusal for nondisclosure). The forms would simply exclude spent matters, aligning with the general principle that people can lawfully answer ‘no’ if asked about a criminal record that is spent. Decision letters would not cite ancient history as reasons for exile, enhancing the perceived fairness of outcomes.
- (2) **Focus on Relevant Risks.** Decision-makers would concentrate on recent or serious misconduct – the things that truly indicate current risk to the community – rather than padding their decisions with laundry lists of every trivial offence the person ever committed. This could also streamline the decision process: less time dredging up decades-old court records, more time assessing current behaviour, rehabilitation efforts, and support networks (which are better indicators of recidivism risk).
- (3) **Reducing Hardship in Edge Cases.** While serious offenders would still be caught by s 501 (since serious crimes usually carry over 12-month sentences and would not be spent, or there would be other evidence of risk), those who committed minor offences long ago would no longer be automatically at peril. The community is not meaningfully protected by deporting someone whose only negative record is, for instance, a 20-year-old shoplifting fine. But that person’s family and their own wellbeing are certainly harmed by such an action. Removing spent convictions from consideration would prevent such disproportionate outcomes. It would particularly benefit individuals who were young at the time of offending and have since turned their lives around – precisely the scenario the spent conviction scheme contemplates as deserving of relief.
- (4) **Aligning with Rehabilitation and International Norms.** This reform would symbolically and practically affirm Australia’s commitment to rehabilitation. It would show that Australia distinguishes between those who remain dangerous and those who have paid their dues and reformed. It might ease diplomatic friction, especially with countries like New Zealand,¹³⁷ by ameliorating some of the perceived excesses of our deportation regime (for example, New Zealanders with very old minor records

¹³⁷SBS News, ‘Australia Makes Changes to “Corrosive” Deportation Policy Affecting New Zealanders’ (Web Page, 3 February 2023): <<https://www.sbs.com.au/news/article/australia-makes-changes-to-corrosive-deportation-policy-affecting-new-zealanders/b0a120q0v>>

might no longer be deported, which has been a sore point).¹³⁸ It also could reduce the likelihood of adverse findings by international bodies, since cases like *Nystrom* would presumably not recur if the only convictions were ancient and minor.¹³⁹

Of course, a counter-argument can be anticipated: *What if even a spent conviction reveals something fundamentally bad about character (e.g. a pattern of offending that just fell outside the 10-year window)?* Couldn't a person have, say, multiple violent offences that are technically spent but still reflect a propensity for violence? In such cases, other aspects of the character test could still come into play – e.g. if there truly is a pattern, likely not all convictions would be spent, or the general conduct limb could be invoked if recent behaviour hints at unresolved issues.

Additionally, if someone had serious crimes but just long ago, one might question whether they should be treated as harmless. However, recall that truly serious crimes (e.g. rape, armed robbery) usually carry sentences that exceed the threshold to ever become spent (over 30 months imprisonment means never spent). The spent convictions scheme is calibrated such that only less serious crimes can be wiped.¹⁴⁰

If a crime was serious but an offender got leniency in sentencing (under 30 months) and then stayed clean for a decade, that itself is evidence leaning in favour of rehabilitation. In any event, the Minister would still retain the power to refuse or cancel if there are tangible current concerns – the reform simply stops the automatic resurrection of old convictions as a basis.

In conclusion, the blanket exclusion of migration character decisions from the spent convictions scheme is an outdated and unjust feature of Australian law. It stands at odds with principles of administrative justice – promoting inconsistency and potential unfairness – and it undercuts the rehabilitative purpose that modern criminal justice endorses. High Court jurisprudence like *Frugtniet* confirms that, absent such an exclusion, spent convictions are rightly treated as irrelevant and not to be considered. There is no sound reason why immigration decisions, particularly those under s 501, should not follow the same approach. Non-citizens who have genuinely reformed deserve the same opportunity to move past their old mistakes as citizens do. Removing or narrowing the s 85ZZH(d) exception would not open the floodgates to dangerous individuals – it would simply ensure that migration authorities focus on real, present risks rather than ghosts of the past.

The Migration Act's character test should be about *character* in the present, not ancient history. As one commentator poignantly observed regarding s 501, it has led to *the institutionalisation of double punishment*¹⁴¹ and a system skewed heavily towards risk aversion at the cost of fundamental values like fairness and rehabilitation.¹⁴²

Adjusting the law to respect spent convictions in character matters would be a modest, sensible recalibration of that balance. It would uphold the integrity of Australia's borders

¹³⁸Ben Packham, 'NZ Seeks Talks with Canberra over Direction 99 Reform' *The Australian* (online, 28 May 2024): <<https://www.theaustralian.com.au/nation/nz-seeks-talks-with-canberra-over-direction-99-reform/news-story/8a6c11231fd819a5057891836d0a4b9c>>

¹³⁹*Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.

¹⁴⁰*Crimes Act 1914* (Cth), s 85ZM.

¹⁴¹Michael Grewcock, 'Conviction, Detention and Removal: The Multiple Punishment of Offenders Under Section 501 Migration Act' [2009] *UNSWLRS* 49.

¹⁴²*ibid.*

without sacrificing our commitment to justice and second chances. In the final analysis, a more humane and consistent character decision framework – one that does *not* ignore the parliament’s own judgment that certain convictions should be treated as spent – would strengthen both the fairness and the credibility of Australia’s immigration system.

Disclosure statement

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