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Resilient nations.*

# WORKING WITH DEPORTED INDIVIDUALS IN THE PACIFIC:

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Legal and Ethical Issues



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**DEPORTED**  
INDIVIDUALS  
IN THE PACIFIC:

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Legal and Ethical Issues

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# Contents

<b>Acronyms</b>	vii
<b>Foreword</b>	viii
<b>Guide Structure</b>	ix
<b>Introduction</b>	1
<b>Pacific Approaches and Partnerships</b>	3
<b>Part One: Legislation Governing Criminal Deportations to the Pacific Islands from the United States, Australia and New Zealand</b>	5
Objective	6
Structure	6
1. What is the Legislation that governs deportation in the United States of America, Australia and New Zealand?	7
2. Which classes of non-citizens are potentially deportable?	8
3. What types of criminal activity make a non-citizen deportable?	9
4. What are the removal procedures for each of the countries?	13
5. What bilateral agreements and/ or diplomatic Memorandums of Understanding (MoUs) with recipient States must be in place in order to deport?	17
6. What are the relevant human rights standards in the context of deportation?	18
<b>Overview &amp; Comparisons</b>	23
<b>Bibliography</b>	25
<b>Part Two: Working with Deportees in an Ethical Manner: Approaches for Engagement and Service Provision</b>	27
Scope	28
Ethical Approaches for Engagement and Service Provision	29
<b>Appendix 1 – Aggravated Felonies</b>	36
<b>Appendix 2: International human rights norms applicable to the United States of America, Australia and New Zealand</b>	37
<b>Appendix 3: Capacity Assessment Tool for Service Providers</b>	41
<b>References</b>	50

## List of Tables

Table 1: Category of crimes that constitutes moral turpitude	10
Table 2: International Human Rights Norms	37

## List of IN FOCUS Boxes

IN FOCUS 1: What do we mean by ethics?	29
IN FOCUS 2: Disability & Deportation	29
IN FOCUS 3: Women & Deportation	30
IN FOCUS 4: Information Management	31
IN FOCUS 5: Unlawful Activity	32
IN FOCUS 6: Practical Tool: Increasing Competencies through Capacity Assessment	33

## Acronyms

AAT	Administrative Appeals Tribunal
AEDPA	Anti-Terrorism and Effective Death Penalty Act
ASIO	Australian Security Intelligence Organisation
CPR	Crisis Prevention & Recovery
DOJ	Department of Justice
DHS	Department of Homeland Security
DIAC	Department of Immigration and Citizenship
FRSC	Forum Regional Security Committee
FSM	Federated States of Micronesia
INA	Immigration and Nationality Act
IIRIRA	Illegal Immigration Reform and Responsibility Act
IOM	International Organization for Migration
MOUs	memorandums of understanding
NTA	Notice to Appear
PICP	Pacific Islands Chiefs of Police
PICs	Pacific Island Countries
PIDC	Pacific Immigration Directors Conference
PIFS	Pacific Islands Forum Secretariat
RMI	Republic of Marshall Islands
UNDP PC	United Nations Development Programme Pacific Center
UNESCO	United Nations Educational, Scientific and Cultural Organization
USA	United States of America

## Foreword

The issue of Pacific Islanders who have been forcefully repatriated for criminal offences abroad has been the focus of many debates amongst international organizations, governments and those in the academic fields for some time, however, little has been done to enable inclusive and effective dialogue on the topic and open the space for a more collaborative and comprehensive responses to the challenges.

UNDP Pacific Center (UNDP PC) through its Crisis Prevention and Recovery (CPR) Unit has long been a leader in the Pacific on efforts to develop a regional human security framework. This Unit seeks out opportunities to broaden perspectives and understanding of the security issues that underlie crises and conflicts in our region and produce tools to prevent or address them.

UNDP Pacific Centre through the CPR Unit recognizes the importance of contributing to peace and security by enabling diverse social actor's access to forums and institutions to share knowledge and cooperate across political or sectarian lines. To further open an inclusive dialogue on the topic of deportation, the CPR Unit hired a technical expert to advise governments on multidisciplinary approaches to resettlement and reintegration of individuals forcefully repatriated for criminal offenses.

UNDP PC through the CPR Unit aims to work to strengthen institutional capacity, approaches, policies and interventions towards human security in the region, and to support national governments and regional organisations, in line with the Pacific Plan.

This will require the cooperation of all social actors, without exception, to provide a long-term perspective on the resettlement of those who are returned to their country of origin. We believe that decision-making procedures will be more effective if they include the affected populations and if policies are specially designed to ensure co-ordination and effective response for those being repatriated.

It is my hope that is report leads to the advancement of dialogue, knowledge and processes that are conducive to the universal values of justice, freedom and human dignity. Ultimately we would like to see positive actions to improve the quality of live for these populations and the Pacific communities in which they live.

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Tracy Vienings  
CPR Unit Team Leader

## Guide Structure

This report intends to provide policy makers, governments and civil society organizations with an easily accessible source of background information, approaches and assessments to work effectively with deported communities. It is not an exhaustive resource; rather one that provides a preliminary look at the issues of deportation and how they may be approached through engagement and service provision by civil society organizations or government departments. It is easy to read, accessible and flexible enough to be adapted to various circumstances and approaches amongst organizations aiming to engage and provide services to deported individuals.

The report is divided into two parts;

**Part 1: Legislations Governing Criminal Deportation to the Pacific Islands from the United States, Australia and New Zealand** which aims to help develop a clearer understanding about the processes that govern deportation to Pacific Islands Countries (PICs).

**Part 2: Working with Deportees in an Ethical Manner: Approaches for Engagement & Service Provision** which aims to highlight ethical values, principles and standards to gain knowledge and better understand the situation for those people who are deported back to PICs.

The report is designed for readers to go directly to sections that are of most relevant them; however it is advisable that all readers read the introductory section to gain a basic understanding of deportation issues in PICs.

## Introduction

Deportation as described by the International Organization for Migration (IOM) refers to “the act of a State in the exercise of its sovereignty in removing an alien from its territory to a certain place after refusal of admission or termination of permission to remain.”<sup>1</sup> Therefore, for *criminal deportation* cases this refers to the removal of an alien (non-citizen) after committing a criminal act in the state.

Currently, the three main countries deporting Pacific Islanders for criminal offences are Australia, New Zealand and the United States of America (USA). It is unknown how many deported individuals there are in all PICs due to limited and unknown statistical data; however countries such as Samoa and Tonga have recognized the increased numbers of deported individuals and have actively established mechanisms with law enforcement agencies and civil society organizations to manage and support individuals who have been deported for criminal offences.

According to the *Return[ed] To Paradise – The Deportation Experience in Samoa & Tonga*<sup>2</sup> report the average length of time deported individuals spent incarcerated was just over four years, with the majority serving less than two years in prison. The most common offences reported were common/aggravated assaults; equal second were aggravated robbery/ burglary and theft/robbery/burglary/; and third were drug related charges although violent and other serious offences were also reported. It was also reported that approximately 40 per cent of deported individuals that participated in the study had at some point reoffended with a small number having served prison time in-country.

In terms of reintegration the report found that there were significant barriers, some of which are as follows:

- Deported individuals face significant social dislocation on arrival as they have typically spent most of their lives abroad; they suffer from family separation and are often not prepared to start a new life in an unfamiliar country.
- Lack connectedness with community/village and culture; limited connections with family and poor local language skills make employment difficult; deported individuals generally rely on money remitted by relatives abroad.
- Discrimination and xenophobia create further barriers to reintegration; local communities may express shame, fear or rejection of the deported individuals.
- The dislocation and barriers to reintegration may give rise to serious mental illness; inability to deal with already existing disabilities and despair; completed suicide cases have been reported; recidivism has been reported due to lack of economic and social options.

Supporting PICs to establish and enhance mechanisms that assist deported individuals through the period of reintegration will enable them to become responsible, participating members of the society, this is not only from a human rights perspective, but also from a security perspective. Ensuring that deported individuals have a wide range of choices and opportunities to facilitate their reintegration is a multidisciplinary and long-term approach that benefits both the community and the individual (re-)engaging with that community.

## Pacific Approaches and Partnerships

To address the needs of deported individuals various national, regional and international organizations have undertaken various initiatives. The most notable are those by the Samoan and Tongan Governments who alongside their civil society organizations (CSOs) have accomplished a number of significant achievements.

The Tongan Government paved the way in 2008 with a high-level National Workshop on Deportees where the Outcome Statement supported activities that would assist the reintegration of deportees. The two CSOs that assisted with programmes were the Ironman Ministry Incorporated and the Foki ki 'Api Deportation Reconnection programme through the Tonga Lifeline Crisis Ministry of the Free Wesleyan Church.

Similarly, the National Workshop on Deportees to Samoa held in 2010 by the United Nations Educational, Scientific, Cultural Organization (UNESCO) accelerated initiatives by the Criminal Deportee Task Force that was led by the Attorney General and consisted of several government agencies<sup>3</sup>; representatives from a number of CSOs<sup>4</sup>; representatives of the deported community; UNESCO and the Pacific Islands Forum Secretariat (PIFS) who were invited to provide technical advice, support and act as observers. The Task Force developed a unique framework to coordinate law enforcement activities and with Cabinet endorsement, the Task Force created the Samoan Returnee Charitable Trust to provide reintegration services to deported individuals.

At the regional level, organisations such as PIFS, the Pacific Islands Chiefs of Police (PICP) and the Pacific Immigration Directors Conference (PIDC) have consulted with one another and undertaken various works, these include;

The 2007/08, PIFS scoping study of deportees in Samoa, Tonga and the Cook Islands, which initially was concerned with managing the potential law enforcement threats posed by deportees, however it identified wider issues to be addressed such as a) the lack of national policies and coordination mechanisms between governments for managing criminal deportation; b) the stigmatisation of criminal deportees by communities; and c) the lack of resources/community services such as counselling and rehabilitation.

The 2010 Criminal Deportees Project undertaken by the PICP which focused on deportees as well as administrative<sup>5</sup> and family member repatriation<sup>6</sup>. This Project which was based on the 2008 FRSC report on deportees sought to determine the impact that deported individuals had

on crime statistics and made recommendations on how these impacts could be minimised in PICP member countries.

International organizations such as UNESCO and the United Nations Development Programme (UNDP) – Pacific Centre have contributed to enhancing knowledge and multidisciplinary approaches to the reintegration of deported individuals. The works undertaken include;

In 2009 UNESCO Office for the Pacific States started a research that culminated in 2011 with a publication titled *Return[ed] to Paradise: The Deportation Experience in Samoa and Tonga*. The baseline study which involved consultations with 56 deportees in Samoa and Tonga, examined the experiences and issues faced by deported individuals. The report findings included the average length of time incarcerated, types of offences, transportation and treatment at the border, reintegration and issues of marginalisation and discrimination.

To follow on in 2010 two national consultations in Samoa and Tonga were conducted with deported individuals to identify specific programmes that may assist them in their reintegration. In both countries the top three programmatic areas were: 1) employment, 2) job training and educational courses, and 3) counselling/therapy. This information was then feed into the above mentioned National Workshop on Deportees to Samoa which lead national stakeholders to develop a plan to provide effective, detailed and comprehensive approaches to reintegration.

In 2011, UNDP Pacific Centre and PIFS in response to FRSC outcomes published the *Urban Youth in the Pacific: Increasing resilience and reducing risk for involvement in crime and violence* report. The report looked at six countries: the Republic of the Marshall Islands, Federated States of Micronesia, Tonga, Samoa, Papua New Guinea, and Solomon Islands. Whilst the report findings were extensive, the countries that highlighted the issue of deported individuals included: Samoa, Tonga, the Republic of Marshall Islands and Federated States of Micronesia. The main recommendation of this report concluded that the provision of support for reintegration and resettlement services was necessary to effectively support deported individuals.

Finally, in 2011 to advance and support the work undertaken to date in the region, UNDP Pacific Centre, PIFS with the support of UNESCO jointly convened an inaugural regional meeting on deportation at the PIFS Headquarters in Suva, Fiji. The event allowed key stakeholders from the region to share knowledge, coordinate efforts and resources to enhance national level capacity and develop guidelines for processing and assisting deported individuals. This regional meeting was attended by country representatives from Samoa, Tonga, Republic of Marshall Islands (RMI) and Federated States of Micronesia (FSM).

# Part 1

## Part One: Legislation Governing Criminal Deportations to the Pacific Islands from the United States, Australia and New Zealand

Since 2006 various reports have highlighted the issues faced by Pacific Islanders who due to criminal offences are deported back to their country of citizenship. Many of those deported face significant barriers to reintegration<sup>7</sup> contributing to what the Forum Secretariat's Regional Security Forum Committee (FRSC) states as concerns over the potential law enforcement threat.<sup>8</sup> However, to date very limited resources have been allocated to understanding the legislations that govern deportation and even further yet to coordinating PICs government activities, particularly in the area of reintegration to reduce instances of recidivism.

### Objective

This research paper aims to help develop a clearer understanding about the legislations that govern deportation to PICs from the United States of America (USA), Australia and New Zealand.

### Structure

The scope for study and evaluation of national immigration laws and procedures is potentially vast. For clarity and ease of reference, this paper is therefore limited to and structured around six commonly-asked questions:

- 1) What is the legislation that governs deportation in the United States of America, Australia and New Zealand?
- 2) Which classes of non-citizens are potentially deportable?
- 3) What types of criminal activity make a non-citizen deportable?
- 4) What are the removal procedures for each of the countries?
- 5) What bilateral agreements and/or diplomatic memorandums of understanding (MOUs) with recipient States must be in place in order to deport?
- 6) What are the relevant human rights standards in the context of deportation?

## 1. What is the Legislation that governs deportation in the United States of America, Australia and New Zealand?

### 1.1 United States of America

The primary piece of immigration legislation in the United States of America (USA) is the **Immigration and Nationality Act (INA) 1952**. It covers the breadth of immigration law, including the selection system, qualifications for admission, grounds of removability, issuance of entry documents, and citizenship issues. For the purposes of this paper the most significant parts are Subchapter II, Part II, which deals with inadmissible aliens and Part IV, which deals with inspection, apprehension, examination, exclusion and removal. Parts II and IV outline the grounds on which a non-citizen would be rendered inadmissible or deportable. Part IV outlines the removal proceedings.

The Immigration and Nationality Act was significantly modified by the **Illegal Immigration Reform and Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA)**, both enacted in 1996. Instead of exclusion and deportation proceedings, IIRIRA introduced removal proceedings, during which an immigration judge will determine whether an alien is inadmissible or deportable, and thus subject to be removed from the United States. As one commentator has observed, “together, the AEDPA and IIRIRA added more than fifty different crimes to the list of deportable offenses.”<sup>9</sup> These amendments were generally applied with retrospective effect. This meant that individuals who had committed crimes prior to 1996 that were not then classified as “aggravated felonies” fell within the scope of the new definition, and thus may be detained and placed into removal proceedings.

### 1.2 Australia

The primary immigration statute in Australia is the **Migration Act (1958)**. This is another large piece of legislation, which covers the breadth of immigration law from visa applications and procedures to detentions and removals. In Australia ‘removal’ is the term used to describe the departure of all non-citizens from Australia who do not hold a visa and, hence, are unlawful. This includes persons whose visas have been cancelled or refused under the Migration Act character requirements, set out in Section 501. The term ‘deportation’ on the other hand is concerned with persons who are leaving Australia subject to a deportation order under the Act. When a deportee leaves Australia, they are a lawful non-citizen who holds a visa. Their visa ceases when they leave Australia.

Deportation powers are not used often in Australia. In most cases, persons who have committed a crime serious enough to warrant removal from Australia will have their visa cancelled under the Act and they will be removed from Australia as an unlawful non-citizen under section 198.

### 1.3 New Zealand

Immigration law in New Zealand was consolidated by the **Immigration Act, 2009**. According to the government, this Act “modernises New Zealand’s immigration laws.”<sup>10</sup> This is a comprehensive piece of immigration legislation, which outlines the law surrounding visas, residency, arrivals and departures, refugee status and a host of immigration issues. For the purposes of this paper, the most significant section is Part 6, which deals with deportation. This section covers the different types of circumstances that can make a person liable for deportation, including criminal conviction.<sup>11</sup> It also outlines the rules regarding the deportation process.

## 2. Which classes of non-citizens are potentially deportable?

### 2.1 United States of America

Throughout immigration law the term “alien” is defined as “any person not a citizen or national of the United States.”<sup>12</sup> Generally, the rules regarding deportability apply equally to all non-citizens, whether they are in the country illegally, hold a temporary visa or a permanent resident card (informally known as a green card) or are present without authorization, and regardless of the length of time they have spent living in the USA. If a person is not a citizen or a national, then that person is an alien, and can therefore potentially be removed.<sup>13</sup>

### 2.2 Australia

Australian law distinguishes between “lawful non-citizens” and “unlawful non-citizens”.<sup>14</sup> Lawful non-citizens are persons in Australia who are not Australian citizens but have a valid visa, including permanent residents. Unlawful non-citizens are persons in Australia who are not Australian citizens whose visa has expired or has been cancelled. Lawful non-citizens become unlawful non-citizens if their visa is cancelled.<sup>15</sup> One of the grounds for cancelling a visa is if the person has committed certain crimes.<sup>16</sup> Unlawful non-citizens are liable to be deported; regardless of the number of years they have spent living in Australia before their visa was cancelled.

### 2.3 New Zealand

Generally New Zealand law does not have a special term for persons who are not New Zealand citizens. The Immigration Act 2009 makes the distinction that whereas New Zealand citizens may freely enter the territory, all other persons must hold a visa to do so.<sup>17</sup> Visas may be temporary or residence class. The same Act details all the ways in which a person holding a visa can become liable for deportation, such as a person’s visa being granted in error or held under a false identity, or the person being convicted of a criminal offence.

### 3. What types of criminal activity make a non-citizen deportable?

#### 3.1 United States of America

##### 3.1.i *The Immigration and Nationality Act (INA)*

The INA outlines the criminal activities for which an alien is considered inadmissible or deportable and therefore, subject to removal. Depending on the provision at issue, an alien may be rendered removable based upon a conviction or admission of having committed the criminal offense.

The INA refers to broad categories of crimes, including: a) the violation of any state or federal law or regulation relating to a controlled substance; b) purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying any weapon, part, or accessory which is a firearm or destructive device in violation of any law; c) aggravated felonies and d) crimes of moral turpitude. The latter two categories are broad and are further explored below.

##### 3.1.ii *Aggravated Felonies*

Originally the term ‘aggravated felony’ encompassed three things: murder, drug trafficking and the trafficking of offensive weapons.<sup>19</sup> Over time however, the IIRIRA and AEDPA increased the number of offences in this category to encompass a wide range of other crimes. According to the U.S. Code,<sup>20</sup> the term ‘aggravated felony’ presently encompasses more than fifty offences including murder, rape, sexual abuse of a child, drug trafficking, money laundering and certain theft offences (see Appendix A).

The interplay of crimes which constitute grounds for deportation under state and federal criminal statutes is very complicated and can even vary in different judicial districts within the USA. For example, for some of the enumerated aggravated felonies, a state offense must be a felony for the aggravated felony definition to apply, but in other instances a misdemeanor can suffice. Questions on interpretation of INA provisions and specific state or federal convictions may warrant consultation with legal counsel.

##### 3.1.iii *Crimes of Moral Turpitude*

Crimes of moral turpitude are crimes that are deemed by the system to be inherently evil or depraved, or contrary to the accepted rules of morality or duties owed between persons. A non-citizen can be deported for the commission of a single crime of moral turpitude if that crime is committed within the first five years of admission and results in a sentence of 1 year

or more. Non-citizens who have been legally admitted for more than five years can also be deported if they commit two or more crimes of moral turpitude, not arising out of a single scheme of criminal misconduct. Moral turpitude is a term of art; there is no fixed list of moral turpitude crimes. Rather a crime will be deemed by the courts to involve moral turpitude if it contains certain elements, the most common of which are: fraud (knowingly making false representations), larceny (taking someone else’s property without permission with the intent to keep it) or the intent to harm persons or things.

Some examples of crimes that commonly do and do not constitute crime involving moral turpitude are outlined in Table 1.<sup>21</sup> This table, which is designed to give one an idea of the types of crimes that could constitute crimes involving moral turpitude, is not exhaustive; also, it is important to bear in mind that the interpretation of ‘crime involving moral turpitude’ can vary within the USA due to jurisdictions. Distinctions below may not hold true for specific offenses.

Category of Crime	Examples of crimes which commonly do constitute moral turpitude	Examples of crimes which typically do not constitute moral turpitude
Crimes committed against property	Arson, blackmail, burglary, embezzlement, extortion, forgery, robbery, theft, transporting and/or receiving stolen property with guilty knowledge (i.e. with the knowledge that the property is stolen)	
	Accidental damage to private property, unknowingly passing bad checks, unknowingly possessing stolen property, juvenile delinquency	
Crimes committed against governmental authority	Bribery, counterfeiting, mail fraud, perjury (e.g. where a witness is shown to have knowingly given false evidence in court), wilful tax evasion.	Black market violations, breach of the peace, carrying a concealed weapon, drinking and/or reckless driving, escaping from prison, gambling violations, liquor violations, vagrancy

Crimes committed against person, family relationship and sexual morality

Abandonment of a minor child, assault (with intent to kill, rape, commit robbery, or commit serious bodily harm), assault with a dangerous or deadly weapon, bigamy, contributing to the delinquency of a minor, incest, kidnapping, voluntary manslaughter (intentional killing where there was adequate provocation), involuntary manslaughter (reckless killing), mayhem, murder, pandering, prostitution and rape (rape includes statutory rape where the sexual intercourse is consensual but the victim is under the statutory age), gross indecency and lewdness (obscene sexual exposure or activity conducted in public)

Assault without 'evil intent or depraved motive', illegitimacy (having children outside of marriage), libel, riot, attempted suicide

As with aggravated felonies, attempting or assisting to commit a crime involving moral turpitude, is in itself a crime involving moral turpitude. As you can see from the Table 1, in some cases there is a fine line between those crimes that do and do not amount to moral turpitude. The distinction in these cases turns on whether the statute contains a specific intent element. If the statute provides for a crime where intent was fraudulent (i.e., deliberately making a false representation) or otherwise 'evil', the crime is likely to be one of moral turpitude. Furthermore, the classification of a crime as constituting moral turpitude changes over time with changes in public opinion. For example, until recent decades, homosexuality was treated as conduct amounting to a crime of moral turpitude.<sup>22</sup>

## 3.2 Australia

### 3.2.i The Migration Act

Division 9 of the 1958 Migration Act sets out three main situations in which the Minister of Immigration (hereafter known as the Minister) may order the deportation of a non-citizen. The first is where the individual has been a resident in Australia for less than 10 years (total) and has committed a crime for which they have been sentenced to death, life imprisonment or a prison sentence of no less than 1 year.<sup>22</sup> The second is where the individual is assessed by the Australian Security Intelligence Organisation (ASIO) to be a threat to security. In this situation the individual has 30 days to appeal that assessment before a tribunal. If they fail to appeal within that timeframe, or if the tribunal upholds the assessment, they can be deported.<sup>24</sup> The third category of deportable crime is much broader: where a non-citizen has, either before or after the commencement of this subsection, been convicted in Australia of a number of defined, serious offences such as sedition and treason.<sup>25</sup> This section applies irrespective of how long the individual had been resident in Australia.

However, Division 9 was "effectively superseded"<sup>26</sup> in 1999 when the Migration Act was amended and section 501 was repealed and replaced. Under this new section, the Minister may cancel a visa where the individual fails the 'character test', explored in more detail in the section below. As you will see, Section 501 is broad enough to encompass all three situations set out above. In contrast to Division 9 however, there is no distinction made based on the length of time the individual has been resident in Australia.

### 3.2.ii The Section 501 Character Test

Under Section 501, a non-citizen may have their visa cancelled (and therefore be liable for deportation) if they do not pass the character test. A person falling under one of the following categories will fail the character test:

- Persons with a substantial criminal record; meaning persons who have been sentenced to death, life imprisonment, a single prison term of 1 year or more, multiple prison terms where the cumulative total is 2 years or more. Also includes persons who were acquitted of a crime on grounds of insanity and who have been detained in an institution.
- Persons who escape immigration detention.
- Persons who commit any crime whilst in or escaping from, immigration detention.
- Persons who have an association with another person or group, whom the Minister suspects has been involved in criminal conduct.
- Persons who, having considered their criminal conduct versus their general conduct are deemed to be not of good character.
- Persons who pose a risk of engaging in criminal conduct, harassment and inciting discord or otherwise disrupting the community if they remain in Australia.<sup>27</sup>

If a person fails the character test, the Minister has then the discretion to cancel their visa, depending on the specific circumstances of the case. This process is explored in more detail in Section 4.

To conclude, as confirmed by the first bullet point of the character test, the sentence length given during the initial trial is pivotal as to whether the person will be liable for deportation. In Australia the sentences attached to different crimes can vary greatly from each state or territory. As an example in South Australia all of the following crimes would make a person liable for deportation: murder (carries a maximum penalty of life imprisonment), basic assault (up to two years), theft (up to ten years), passing valueless cheques (up to two years), basic criminal trespass (up to three years) and making a false report to a police officer (up to two years).<sup>28</sup>

### 3.3 New Zealand

#### 3.3.i The Immigration Act

Part 6 of the Immigration Act (2009) sets out the offences for which a non-citizen can be deported. This piece of legislation makes far more distinctions based on the length of time a non-citizen has been in the country than its counterparts in the USA and Australia.

- If a person holds a temporary visa or was resident for less than two years at the time of committing the offence, they may be deported for crimes with a sentence of three months or more.
- If the person had been a resident for less than five years at the time of committing the offence, they may be deported for crimes with a sentence of two years or more.
- If the person had been a resident for less than 10 years at the time of committing the offence, they may be deported for crimes with a sentence of five years or more.<sup>29</sup>

As in Australia the length of sentence given during the initial trial is pivotal as to whether the person will be liable for deportation. The statistics on sentence length by type of crime are not readily available. Each crime carries its own maximum sentence length, but this is usually well above the normal sentence imposed. For example, “the offence of burglary carries a maximum sentence of ten years imprisonment... [with] the average sentence being 10.9 months in 1995.”<sup>30</sup> Furthermore, life imprisonment is mandatory for murder and treason and is the maximum available sentence for manslaughter and Class A drug dealing. Meanwhile trespass can incur a prison sentence of three months.<sup>31</sup> According to a census conducted by the New Zealand Department of Corrections the most common sentence length imposed on inmates is between one and two years.<sup>32</sup>

## 4. What are the removal procedures for each of the countries?

### 4.1 United States of America

#### 4.1.i Detention and removal procedure

The Department of Homeland Security (DHS) has authority to arrest persons unlawfully present or subject to removal in the first instance. It is also authorized to lodge detainees on individuals arrested or incarcerated by other law enforcement agencies. Once lodged, the detainer requests that a law enforcement agency hold the individual for up to 48 hours beyond when the person would have otherwise been released.

The DHS also issues a Notice to Appear (NTA) to the individual, which states the case against them. This should be issued within 72 hours of DHS detention. The NTA is divided into two parts. The first part, (“Allegations”) details the individual’s name, country of origin, and the

date and manner they entered the USA. It also gives the factual basis or reason for removal. The second part (“Charges”) lists the sections of the law under which the individual may be charged with removability.

Not all removal proceedings are conducted before an immigration judge. Under INA Section 235 expedited removal proceedings may also be conducted by DHS personnel, although the Department of Justice (DOJ) may conduct further proceedings if DHS determines the individual has a credible fear of return to the designated country of removal. Furthermore, under INA Section 238, there are administrative removal proceedings for non-permanent resident aliens who have a conviction for an aggravated felony offense.

The consideration of a removal decisions is generally a three-step process: First, the judge (or DHS official) will decide if the individual is removable (i.e., is the crime committed a deportable offence). Next, the judge will decide if there is any form of “relief” available to the individual. Finally, the judge will decide whether the individual meets the legal and discretionary standards to be given that form of relief. Most decisions made by an immigration judge are subject to administrative appeal to the Board of Immigration Appeals and judicial review before the courts of appeals.

#### 4.1.ii Forms of relief and protection from removal<sup>33</sup>

- Cancellation of removal

Aliens who have been found to be removable may apply for ‘cancellation of removal’ if they meet certain criteria. The cancellation of removal, as the name implies, cancels the removal order and allows the alien to (re)adjust their status to that of a permanent resident. For permanent resident aliens, the criteria that must be demonstrated are as follows:

- The individual must have continuously resided in the USA for 7 years after being admitted and before committing the offence that submitted them to removal.
- The individual must have been a lawful permanent resident for 5 years or more.
- The individual cannot have a conviction for an aggravated felony.
- The individual cannot have previously been granted cancellation of removal or a waiver under 212(c) of the Immigration and Nationality Act (INA).<sup>34</sup>

If an individual establishes these criteria, it is then up to the judge to decide on balance whether to grant a cancellation of removal. The type of information which will be taken into account in these discretionary decisions includes: family ties within the USA, length of residency within the USA, evidence of hardship to family members if deported, evidence of hardship to individual if deported, history of employment and property ownership within

the USA.<sup>35</sup> Non-permanent residents may also apply for cancellation of removal if they meet a series of requirements. However the law in this area is complex and the criteria are such that the majority of individuals with criminal convictions would not be eligible.

#### - Other forms of relief

Other forms of relief or protection from removal to a particular country may be available if the individual can demonstrate that he/she is at risk of persecution or torture if he/she is returned. For example, an individual may be able to make a claim for asylum under the INA Section 208 if he/she is a refugee within the definition of INA Section 101(a) (42), because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion. INA Section 241(b)(3) provides for 'withholding of removal' protection for individuals who face a clear probability of persecution in a particular country, but certain criminal acts and national security concerns can exclude an individual from such protection. Pursuant to U.S. treaty obligations, even certain criminal aliens who are not eligible for asylum or withholding of removal may be granted protection from removal to particular country if they can demonstrate that they would be tortured if removed there.

The Secretary of Homeland Security may designate certain countries for 'Temporary Protected Status' (TPS), under which eligible aliens are allowed to live and work in the USA for a defined period of time not exceeding 18 months; these periods can be extended by the President Secretary of Homeland Security. TPS is usually granted in response to a particular disaster, as an example Haiti has one in place until 2013, due to the earthquake. However TPS is not applicable to individuals whom have been convicted of any felony or two or more misdemeanours therefore it is not available to most criminal aliens.<sup>36</sup>

Finally, under certain circumstances, a removable criminal alien may also be eligible for relief under the since-repealed section 212(c) of the INA, where the alien is a lawful permanent resident and has accrued seven years of relinquished domicile.

## 4.2 Australia

### 4.2.i Detention and removal procedure

Under Australian Law, if a law enforcement officer reasonably suspects that a person is an unlawful citizen, they are obliged by law to detain that person.<sup>37</sup> The removal procedure can commence whilst the individual is serving their prison sentence, or at the end of this sentence.

There are technically two ways to being deported depending on whether the individual is removed under section 201 or 501 of the Migration Act (see 3.2.i). However, since section 501 is predominantly used now, this segment will focus on that procedure.

As mentioned in Section 3.2.ii, if a person fails the character test set out in section 501, the Minister (or his/her delegate) then has the discretion to cancel their visa, depending on the specific circumstances of the case. The government gave guidance on this decision-making process in Ministerial Direction 41 (2009), which states that the Minister must consider the following: the protection of the Australian community from serious criminal or other harmful conduct, particularly crimes involving violence; whether the person was a minor when they began living in Australia; the length of time that the person has been ordinarily resident in Australia prior to engaging in criminal activity or other relevant conduct; and relevant international legal obligations. Specifically it states that: "In some circumstances it may be appropriate for the Australian community to accept more risk where the person concerned has, in effect, become part of the Australian community owing to their having spent their formative years, or a major portion of their life, in Australia."<sup>38</sup>

### 4.2.ii Appeals

The decision to cancel an individual's visa can be made by the Minister personally (usually reserved for national security cases) or by a delegate of the Minister, such as an officer of the Department of Immigration and Citizenship (DIAC). If the Minister makes the decision personally, there is no appeal available.<sup>39</sup> However if a delegate makes the decision, it can be appealed at the Administrative Appeals Tribunal (AAT). The individual has nine days<sup>40</sup> from date of notification to seek review in this way. The AAT will hold a hearing, where they will examine all of the evidence presented by the individual and the Minister's delegate. The AAT does not have power to re-examine whether the individual was rightly convicted for the original criminal activity. It simply looks at whether section 501 character test has been rightly applied – example: if the grounds for deportation are 'substantial criminal record', the AAT will review whether the crime that was committed fits within the definition. It will also consider the same primary considerations applied by the Minister's delegate in the initial decision (protection of the Australian community; the length of time that the person has been ordinarily resident in Australia prior to engaging in criminal activity or other relevant conduct; and relevant international legal obligations). If the AAT finds that the wrong decision has been made, it has power to reverse a visa cancellation. However, "the Minister still has a right to overrule an AAT decision if he/she thinks it is not in the public interest."<sup>41</sup> Once a final decision has been made by the Minister personally (rather than a delegate) there is no further right of appeal and the individual will be deported.

## 4.3 New Zealand

### 4.3.i Deportation procedure

Under New Zealand law, the deportation process usually starts with the serving of a 'Deportation Liability Notice'. This Notice details the grounds for deportation, whether there is a right of appeal and, if so, how to exercise it.<sup>42</sup> If the person is not currently in prison when the Notice is served, they may be arrested and detained at that point.<sup>43</sup>

### 4.3.ii Appeals

Whether a person can appeal against their deportation liability to the Immigration and Protection Tribunal depends on the type of visa they hold and the grounds for their liability of deportation. Permanent residents who are liable because they have been convicted of a criminal offence may appeal on humanitarian grounds only and must do so within 28 days of being served with the notice.<sup>44</sup> An appeal on humanitarian grounds will be allowed where the Tribunal is satisfied that "there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh" for the individual to be deported and where the Tribunal is satisfied that allowing the individual to remain in New Zealand would not be contrary to public interest.<sup>45</sup> If the individual does not appeal, or if their appeal fails, the process ends with the serving of a 'Deportation Notice', which informs the individual that they are to be deported, that their visa has been cancelled and the consequences of attempting to return.<sup>46</sup>

## 5. What bilateral agreements and/or diplomatic Memorandums of Understanding (MoUs) with recipient States must be in place in order to deport?

It is a generally accepted principle that nation states must accept the return of their nationals who have been ordered expelled from another country. Bilateral agreements exist between States to govern the practical details of the deportation process such as the documents that must be included with a repatriation request and the timeframe and method for communicating a decision. The absence of such agreements can in some cases result in prolonged detention.

### 5.1 United States of America

The USA does have written agreements with some nation states governing repatriation, but such agreements are not required by most nations for acceptance of their recognized nationals. Under individual agreement with many sovereign nations, foreign nationals ordered removed from the USA, by competent authority, may be removed without a formal written repatriation agreement.

### 5.2 Australia

Removals are conducted under the provisions of the Migration Act. There is no mandatory requirement to have in place a Memorandum of Understanding (MoU). Australia has, however, signed MoU's with a number of receiving countries in order to enhance the efficiency and effectiveness of removals. Australia has not signed MoU's with any Pacific countries to date.

### 5.3 New Zealand

New Zealand does not have any formal bilateral agreements or MOU's with other countries pertaining to deportation. New Zealand will only deport persons to countries where the person has an unfettered right of entry according to the validity of their travel document (generally their country of nationality or citizenship). When deporting criminal offenders to PICs New Zealand provides advance notice of those deportations via the Interpol mechanism. New Zealand observes relevant UN Advisories in respect to non-returnable countries.

## 6. What are the relevant human rights standards in the context of deportation?

Human rights are applicable to all persons on a state's territory irrespective of a person's nationality or statelessness. States are required to respect, protect, and fulfil the human rights of citizens and non-citizens. Therefore, the rights set forth in the core human rights treaties<sup>47</sup> to which a state is a party to, equally apply to non-citizens on a state's territory.

The UN Special Rapporteur on the Prevention of Discrimination and the Rights of Non-Citizens concluded that all persons should by virtue of their essential humanity enjoy all human rights. Exceptions to this principle may be made only if they are to serve a legitimate state objective and are proportional to the achievement of that objective.<sup>48</sup> The Committee on the Elimination of Racial Discrimination held that any differential treatment on the basis of citizenship or immigration status constitutes discrimination as long as the basis for differential treatment does not pursue a legitimate aim, and is not proportional to the achievement of that aim.<sup>49</sup>

Appendix 2 provides an overview of international human rights law relevant in the context of deportation, including information on the ratification status of relevant treaties by the USA, Australia, and New Zealand.

## 6.1 Human rights obligations and the power of states to deport

The power to decide who can and cannot enter a territory is the sovereign right of every nation state. Nevertheless, governments have the duty to make sure they exercise their immigration power in a way that does not violate the fundamental human rights of non-citizens. When making the decision to deport an individual, states are bound by international law to consider the individual's human rights and the consequences of deportation thereon. The United Nations Human Rights Committee, an independent body of experts mandated to oversee state compliance and implementation of the Covenant on Civil and Political Rights, has issued the following authoritative guidance:

"It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect of family life arises."<sup>50</sup>

### **The Doctrine of non-refoulement**

The principle of non-refoulement in international law forbids states to deport persons to a place where he/she faces persecution or torture. The protection from refoulement for persons who face persecution can only be derogated in certain limited circumstances. The protection from refoulement for persons who face torture is absolute. The principle is codified in both human rights and refugee law.

The Refugee Convention prohibits the return of refugees to places where their life or freedom would be threatened on the grounds of race, religion, nationality, membership of a particular social group or political opinion.<sup>51</sup> Under human rights law, states must refrain from exposing any individual "to the danger of torture, or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or refoulement."<sup>52</sup> The UN Human Rights Committee provides authoritative guidance on this provision. It argued that the prohibition of non-refoulement extends to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. The Committee further notes that prolonged solitary confinement may also amount to a prohibited act. Consequently, states must not deport nationals to countries where they face such treatment.<sup>53</sup>

### **Right to family life and rights of the child**

A person's right to family life, privacy and protection from arbitrary interference is codified in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child.<sup>54</sup> The right to family unity and to family life applies to the context of deportation as it imposes, in some instances, limits on states' powers to deport. The Human Rights Committee for example noted that even though it remains a matter for the state to decide who it will admit to its territory, with regards to considerations of family life, an alien may enjoy the protection of his/her rights in relation to residence or entry to a country.<sup>55</sup>

The UN Human Rights Committee found in *Madafferi v. Australia* that the deportation of an Italian national due to criminal convictions would violate his rights to privacy, family and home, because he was married to an Australian national and had four Australian children.<sup>56</sup> Similarly, the Inter-American Commission on Human Rights found in *Wayne Smith, Hugo Armendariz, et al. v. United States* that the USA acted in violation of the American Declaration of the Rights and Duties of Man's provisions with regards to private, family life and protection for children because it failed, inter alia, to provide for an individualized balancing test to weigh the state's interest in preserving the general welfare, against the fundamental rights of non-citizens.<sup>57</sup> Similar guidance comes from the European Court of Human Rights, which held that states must – among other factors – consider the severity of offence and danger emanating from a person in deportation decisions and must also take due account of spousal relationship and existence of children.<sup>58</sup>

## 6.2 Human rights obligations and receiving PICs

The duty to uphold the rights of individuals who have been deported/removed for criminal offences applies not only to states that deport/remove but also to those that admit individuals upon return. Therefore, PICs are obliged as signatories to standards and/or conventions that pertain to human rights to ensure that individuals who have been deported/removed for criminal offences, as citizens of their countries, have their fundamental freedom and rights recognised and protected.

## 6.3 Detainment of deported individuals upon return

The Universal Declaration of Human Rights stipulates that no one shall be subjected to arbitrary arrest, detention or exile.<sup>59</sup> The International Covenant on Civil and Political Rights in addition regulates that no one shall be deprived of liberty except on grounds and in accordance to

established law. Furthermore, any person detained shall be informed at the time of arrest about the reason for the arrest and be promptly informed of any charges.<sup>60</sup> With this in mind, PICs that admit individuals who have been deported/removed for criminal offences need to consider served sentences for the convictions and recognise that upon admission to their country of citizenship individuals are generally not suspected of or charged with any crime.

The Covenant also regulates that a person shall have the liberty of movement within his or her country and the freedom to choose his or her residence. States cannot restrict these rights except if it is provided for by existing law and necessary to protect national security, public order, health, morals, or the rights and freedoms of others. This is of course as long as they are consistent with the other rights recognized by the Covenant.<sup>61</sup>

#### **6.4 Collection of DNA, fingerprints and other personal information upon return**

With regards to the collection and storing of deoxyribonucleic acid (DNA), fingerprints and other personal information of individuals who have been deported/removed for criminal offences, states admitting their nationals need to strike a balance between the privacy rights of the individual (given that these samples contain sensitive information such as health and genetic relationships) whilst recognizing the interests of society at large to combat criminality.<sup>62</sup> Guidance with regards to the collection and retention of DNA or fingerprints and an individual's right to privacy comes from the European Court of Human Rights and the United Nations Human Rights Committee.

A case considered by the European Court of Human Rights dealt with the retention of DNA and other personal information of individuals who were suspects but were never convicted of a crime and whose records of DNA and other information were indefinitely kept. In their case, the Court ruled that the indefinite retention of these profiles was a breach of their privacy rights. The Court did not specifically consider the legitimacy of retaining DNA and other information of criminal convicts, which is common practice. The Court did note, however, that it was essential to have clear and detailed rules, as well as safeguards, that govern the scope and application of DNA, fingerprints, and cellular sample collection and retention by States including to prevent use of such data in a manner that is inconsistent with an individual's right to privacy. Also, the Court held that the collection and retention of fingerprint and DNA information pursues a legitimate purpose, namely the detection, and therefore, prevention of crime.<sup>63</sup>

Similarly, on databases and other information management systems the United Nations Human Rights Committee holds that:

"The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes."<sup>64</sup>

## Overview and Comparisons

### a) Potential deportability of non-citizens

We have seen that, in each of the three studied countries, all adult non-citizens are potentially deportable if they commit certain crimes. This is true irrespective of their length of stay and the personal and professional ties they have made within those countries, although these factors may be taken into account when assessing the merits of an individual case.

### b) Breadth of offences for which a person can be deported

We have seen that, particularly in Australia and New Zealand, liability for deportation depends very much on the length of sentence given at the original trial. It is therefore difficult to get a complete picture of the range of offences for which a person can be deported without a statistical breakdown of the length of sentence typically awarded for different types of crime.

That being said, we have seen that in the USA crimes which can make an individual deportable range from murder, rape and incest to mail fraud and wilful tax evasion. Meanwhile in Australia and New Zealand crimes such as trespass, passing valueless cheques and making false reports to the police can potentially attract a long enough prison sentence to make the accused liable for deportation.

Given the importance of the type of criminal offense and length of sentence in determining an individual's deportability, the legal advice that he or she receives from his or her criminal defence attorney during a domestic criminal prosecution can be very important. For example, in the USA it may be possible to avoid deportation for some crimes that might otherwise amount to aggravated felonies by submitting a guilty plea under a different criminal statutory provision or pleading guilty on the condition of receiving a sentence of less than one year, either of which in certain circumstances could avoid immigration consequences.<sup>65</sup> Of course,

each case is unique and non-citizens should consult with experienced immigration attorneys to understand how a criminal plea may affect their U.S. immigration status. Similarly in Australia and New Zealand it may be possible to secure a sentence that just falls beneath the required length for deportability.

Owing to this huge potential impact on immigration status, the United States Supreme Court has recently held that defence attorneys must inform their clients when a guilty plea carries a risk of deportation.<sup>66</sup>

### c) Procedure

The procedure for deportation, although not identical in each state, is similar, in that in most cases – the individual is detained and issued with a notice of deportation and he/she then has a limited amount of time to contest the notice before being deported.

Deportation is largely dominated by a mass of black letter law – defining crimes, outlining procedures, detailing transportation etc. However, across all three states there is a point at which individual discretion comes into play in many cases – in the USA, it is DHS's decision whether to initiate removal proceedings or the immigration judge's decision in removal proceedings whether to grant cancellation of removal and/or some other discretionary relief from removal; in Australia, it could be the Minister considering the advice of the AAT; and in New Zealand, it could be the Tribunal considering an appeal on humanitarian grounds. In many cases there is an opportunity for the non-citizen to present the reasons why they should not be deported – their social and emotional ties to the state, their human rights that may be violated by deportation etc. For this reason, just as adequate legal representation was essential during their initial trial, it is perhaps even more so at the deportation stage.

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# Part 2

## Part Two: Working with Deportees in an Ethical Manner: Approaches for Engagement and Service Provision

Ethical values, principles and standards increases efforts to gain knowledge to better understand the real situation of those individuals who due to criminal offences are deported back to PICs. The values which inform the principles assist in the formulation of standards. This ensures that highly sensitive situations and information do not result in further social, physical and/or psychological harm.

The provision of ethically responsible engagement and service provision ensures the respect and dignity due to deported individuals as well as any other resident of the country. It ensures a benefit to the whole community and encourages responsibility, professionalism and a commitment to good practice.

### Scope

The following approach sets forth values, ethical principles and standards by which engagement and service provision to deported individuals can be progressed and evaluated. Whilst they are interrelated and complementary they aim to promote the responsiveness and ethical reflection of all stakeholders, these may include:

- Members of the deported community;
- Members of government
- Members of civil society organizations;
- Institutions undertaking research and researchers;
- Service providers;
- Funding agencies;
- International organisations.

The value of this approach means that it highlights the complexity and diversity of the current working environment. It can complement existing professional standards and be flexible enough to take into account cultural sensitivities and their implications for meaningful engagement and service provision to deported individuals. It may also be used as a reference to consider protocols and policies within institutions and therefore act as a tool to address issues, questions and other concerns prior to the commencement of service delivery. Finally, this approach facilitates attention to and reflection of ethical standards that are required prior to engagement and/or service provision to deported individuals.

### IN FOCUS 1: What do we mean by ethics?

A basic definition of 'ethics' is concerned with the capacity of an individual to choose the values he/she will use to relate, treat and act towards others. It is the understanding of norms and standards that provide morals and rules of conduct.<sup>67</sup> In working with deportees, the awareness of one's own values, preconceptions, prejudices and other forms of conflicts/dilemmas can have implications for what is sought to be achieved.

## Ethical Approaches for Engagement & Service Provision

### Respect

The value of respect involves the acknowledgement and regard for a person, family, groups and/or community's beliefs, customs, culture, welfare and views. The regard for this is fundamental to empowering people, enhancing their wellbeing, capacity, opportunities and in turn reinforcing each person's intrinsic value and their dignity.<sup>68</sup>

When working with deported individuals it is about respectful engagement. This recognises the fact that all human beings are unique and have value; *this value* informs the way in which interaction occurs between people; engagement. Recognising the importance of human autonomy provides an understanding that there must be an empowerment aspect to the engagement. Respectful engagement often means creating the ability that allows an individual his/her own decision-making process regarding what might be best for them in their life. In some cases, this value may involve protection for those individuals with limited autonomy.

### IN FOCUS 2: Disability & Deportation

Despite ongoing attempts by disability-rights advocates, the deportation of people with psychiatric and physical disabilities to PICs continues. The vulnerabilities and barriers experienced by those with disabilities arriving in-country can be made worse due to: limited familial-links, lack of support, limited employment opportunities, limited access to health care or medication, inappropriate accommodation arrangements and a lack of transportation. Community service providers aiming to assist deported individuals with disabilities require a range of skills that is not limited to an anti-discrimination approach. This can include a social integration approach that allows people to participate in their own resettlement plans and are allowed to advocate for their own rights against the barriers they see in their communities.

## Justice

Justice is fundamental to all men and women as it ensures the accessibility to resources and opportunities, the enjoyment of rights and privileges, the promotion of safe environments as well as protection from unsafe environments. Social justice seeks to promote social change when discrimination, marginalisation, oppression and other forms of injustice are present. The result of social justice activities improves access to resources, services and knowledge. It fosters equal opportunities and meaningful engagement in decision-making forums, especially for those most affected by social injustices. This in turn promotes the enhancement of capacity that then leads to social change.<sup>69</sup>

### IN FOCUS 3: Women & Deportation

The position of women who have been deported back to PICs has been identified as a priority area due to the increased risk of sexual and gender based violence, sexual and labor exploitation (particularly in unprotected informal sectors such as domestic work), limited access to land and/or other income generation activities. This means that women, who have limited familial links in-country, limited training and/or employment skills, have substance use issues and limited access to health services in particular reproductive health, become a particularly vulnerable population. Service providers aiming to assist women who have been deported require the integration of a gender perspective to analyze the position of women in the context of deportation in-country and develop strategies, policies and programs that counter exploitation, discrimination and violence.

## Integrity

Integrity sustains and upholds the consistency of values, ethical standards and principles that are integral to enhancing human wellbeing. Integrity defines a person's actions through honest, truthful and responsible behaviours. It promotes responsibility for enhancing the human rights and self-determination of marginalised populations including deportees. Acting with integrity ensures the rights of those whose autonomy has been diminished, is safeguarded and protected.

Integrity involves remaining attentive to and avoiding real or potential conflict of interest. Conflict of interest arises when any professional relationship is used to gain or exploit another to further business, personal, political and/or religious interests.<sup>70</sup> Working with integrity aims to expose unethical conducts and maintain adequate measures in order to prevent future misconduct.

Working with integrity means the constant monitoring and evaluation of policies, programs and practises in the field. It includes contributing to developing knowledge, continuing with education, and development to assist in identifying emerging needs. Integrity also safeguards against incompetency which might be initially seen as corrupt behaviours.

#### **IN FOCUS 4: Information Management**

Information gathering concerning deported individuals needs to be carefully assessed against any risks and/or benefits. Whilst many law enforcement agencies are obliged to gather information from and about deported individuals, this must be done with due respect to fundamental ethical values and legislations regarding human rights (refer to Legislation Governing Deportation Section 6.2).

Other government and civil society institutions need to weigh the importance of such activity against the respect to privacy, autonomy and freedom.<sup>71</sup> If absolutely necessary, information gathering needs to demonstrate the most minimal risk to deported individuals and should build on experience and good practise.

Records and documents need to be accurate and demonstrate services provided. They should remain confidential and must only include information directly relevant to the service provided. Records and information relating to the service users need to be accessible to them.<sup>72</sup> The provision of information or access to personal records to third parties and/or other service users should not be permitted unless directed by a service user and/or by their legal guardian.

## **Informed Consent**

Once the risks and benefits are determined and understood, voluntary informed consent should be acquired. The use of clear and understandable documents and/or language should outline the purpose, risks and limitations of service provision. It should also outline a person's right to refuse and/or withdraw from the service(s) and have input to the time frame covered by the consent. Adequate measures need to be put in place to ensure the comprehension of and protection of deported individuals who may not be fully autonomous. This should include seeking the permission of legal guardians and or caregivers.<sup>73</sup> Attaining informed consent from deported individuals may be a challenge due to assumed or real suspicions, fear and/or previous negative experiences. Building rapport and basic trust is essential and a foundation block to enabling best outcomes for deported individuals.

#### **IN FOCUS 5: Unlawful Activity**

During the course of work, instances of deportees undertaking unlawful activities may be exposed. This can be both current notifiable activities and/or planned future unlawful activities. It is recommended that clear standards are established that dictate what staff/volunteers and organisations are obliged to disclose, the legal implications and the vulnerabilities that may exist. It is recommended that staff/volunteers and organisations are clear with service users about their legal obligations and the extent in which information can remain confidential.

## **Risk & Benefits**

The engagement of and service provision to deported individuals requires a justifiable benefit and the adequate assessment of risk for everyone involved. It ensures that the respect for all stakeholders is not compromised, the benefits reach beneficiaries and any risks are minimised through identification, gauging the probability/severity of negative impact and its management.<sup>74</sup>

The highest priority should be the risk and benefit to deported individuals. The benefit of any undertaking must justify any potential harm, discomfort and/or inconvenience to deported individuals. This is done by identifying risks, gauging the probability and/or severity of these risks, assessing how they can be minimised and/or determining its justification against potential benefits, and finally, understanding how and if these risks can be managed.<sup>75</sup> A clear example of risk and benefit in relation to deported individuals is around the prevention of re-traumatisation. Many circumstances may call for deported individuals to reveal personal information; this may be in relation to their deportation, incarceration, family life and so forth. Some of these experiences may be painful, humiliating and may cause extreme levels of stress, anxiety and/or other psychological conditions. It is for this reason that situations that may cause re-traumatisation should be minimised and be done only for specific purposes that are beneficial to deported individuals.<sup>76</sup>

Considering the risk and benefits to staff/volunteers engaged to work with deported individuals should also be a priority. Staff/volunteers need to be screened carefully, made aware of the sensitivities around the work and be fully prepared to engage with complex issues. When considering who may be selected to work with deported individuals, local staff/volunteers should be made aware of possible stigmatisation and/or moral codes with which they can be branded due to their work. Further, when selecting staff/volunteers to work with deported individuals' consideration should be given to the life experience of candidates, including the

languages they speak and cultural background and/or other cultures they have interacted with positively.<sup>77</sup> Finally, considerations about physical safety and psychological trauma that may be experienced due to the work should be considered and minimised through adequate supervision.

Organisations engaging with vulnerable populations and especially providing services to deported individuals need to consider how information that is made available to them via programs and/or research might be utilised and stored (for further information see In Focus Box 4). Information must be stored away in a secure place where minimal numbers of people have access. Service providers must ensure information that is required to be shared with third parties is done so in a safe and ethical manner. This process ensures that the risks and benefits associated with the storage and provision of information assist in developing better outcomes for deportees and assist with better coordination between organisations. It ensures that information will not be misinterpreted or cause further prejudices and/or stereotypes against deported individuals. All information attained needs to lead back to adequate advocacy and be reported back to deported individuals.

Finally, organizations engaged in service provision need to carefully consider the possible risk to the wider community. This may be in relation to certain activities that are done with deported individuals but may be attended by or expose other potentially vulnerable populations, such as children or at-risk young people. Or it may be in relation to reoffending behaviours that may be encouraged by other deported individuals during activities that are intended for supporting their reintegration.

#### **IN FOCUS 6: Practical Tool: Increasing Competencies through Capacity Assessment**

The capacity assessment tool (see Appendix 3) is very practical for organisations that aim to work with deported individuals and other marginalised or vulnerable populations. It assists in furthering organizations effectiveness, performance and independence ensuring sustainable benefits for beneficiaries and the community at large. It outlines an accessible, flexible and systematic approach for identifying capacity needs, planning technical support and monitoring and evaluating the effect of capacity development. It can also be used as an advocacy tool for increasing funding in capacity development of service providers.

## Concluding Remarks

As demonstrated ethical values, principles and standards increases knowledge and encourages responsibility, professionalism and a commitment to good practice. It sets forth an approach by which engagement and service provision to deported individuals can be progressed and evaluated. It facilitates attention to and reflection of ethical standards that are required prior to engagement and/or service provision to deported individuals, but most of all it ensures: respect, justice and integrity in all the work that is undertaken.

## Recommended Resources

The following resources have been selected to further knowledge and information about the deportation experience, ethical values, standards and principles. It is not exhaustive, however it provides preliminary information that can be useful to government departments, civil society and members of the deported community.

Aotearoa New Zealand Association of Social Workers, (2008) *Aotearoa New Zealand Association of Social Workers*, <http://anzasw.org.nz/publications-2/code-of-ethics/>

Australian Association of Social Workers, (2010) *Australian Association of Social Workers Code of Ethics*, <http://www.aasw.asn.au/document/item/740>

Department of Health and Human Services, (2007) *Introduction to the Responsible Conduct of Research*, <http://ori.hhs.gov/documents/rcrintro.pdf>

Pereira, N. (2011) Return[ed] to Paradise: *The Deportation Experience in Samoa and Tonga*, <http://unesdoc.unesco.org/images/0019/001928/192858e.pdf>

University of Otago, (2012) *Responsible Practice in Research – Code of Conduct* <http://www.otago.ac.nz/administration/policies/otago003211.html>

## Appendix 1 – Aggravated Felonies

Source: The Code of Laws of the United States of America, Section 8 U.S.C. § 1101(a) (43)

- Murder
- Rape
- Sexual abuse of a child;
- Trafficking of controlled substances, including drug trafficking
- Trafficking of firearms, destructive devices or explosive materials
- Money laundering
- Crimes related to the manufacture and retail of explosives and firearms (e.g., selling or making explosive materials without a licence, selling firearms without or paying the necessary taxes, distributing explosive materials to under 21s, etc.)
- “Crimes of violence” (i.e., the use, attempted use or threatened use of physical force against the person or property of another) for which a sentence of at least one year of imprisonment was imposed
- Theft or burglary offenses for which a sentence of at least one year of imprisonment was imposed
- Demanding or receiving ransoms
- Child pornography crimes
- Racketeering and gambling crimes for which a sentence of one year imprisonment or more may be imposed;
- Crimes related to owning, controlling, managing, or supervising of a prostitution business, including trafficking for the purpose of prostitution
- Peonage and involuntary servitude offenses
- Disclosing national security information
- Fraud or deceit, where the loss exceeds \$10,000
- Smuggling a non-citizen
- Illegally entering or re-entering the USA after a prior deportation after conviction for an aggravated felony
- Passport fraud and other document fraud offences for which a sentence of one year imprisonment or more may be imposed
- Failure to appear to serve a sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more
- Crimes related to commercial bribery, counterfeiting or forgery, where a sentence of one year imprisonment or was imposed
- Crimes related to the obstruction of justice, perjury or with bribery of a witness, where a sentence of at least one year imprisonment or was imposed
- Failure to appear in response to a court order in a felony prosecution for which a sentence of two years or may be imposed.

Any attempt or conspiracy to commit the above crimes also counts as an aggravated felony.

## Appendix 2: International human rights norms applicable to the United States of America, Australia & New Zealand

With regards to the USA, Australia and New Zealand, the table below provides an overview of relevant human rights provisions that may be particularly pertinent in the deportation context. The table includes the provisions, their source, and the ratification status by country.

**Table 2: International Human Rights Norms**

Name of Human Rights Treaty / Declaration	Relevant Provisions	Ratification Status
Universal Declaration of Human Rights (UDHR) Adopted in 1948	<p>Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.</p> <p>Article 16(3): The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.</p> <p>Article 25(2): Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.</p>	All UN Member States have committed themselves to uphold and realize the rights contained in the UDHR.
International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Adopted in 1965	Article 1(3): Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.	<p>USA: 1994</p> <p>Australia: 1975</p> <p>New Zealand: 1972</p>

International Covenant on Civil and Political Rights (ICCPR)  
Adopted in 1966

Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 13: An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority.

Article 17: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 23(1): The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

USA: 1992

Australia: 1980

	Article 24(1): Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.	
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) Adopted in 1984	Article 3(1): No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.	Australia: 1989 New Zealand: 1993
Convention on the Rights of the Child (CRC) Adopted in 1989	Article 9(1),(4): States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. (4) Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential	USA: Not ratified Australia: 1990 New Zealand: 1993

	information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the Child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.	
Convention Relating to the Status of Refugees Adopted in 1951	Article 32 (1),(2) Expulsion. (1) The Contracting States shall not expel a refugee lawfully in their territory on grounds of national security or public order.  (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.	USA: 1968 (only ratified 1967 Protocol) Australia: 1954 New Zealand: 1960
	Article 33(1) Prohibition of expulsion or return ("refoulement") (1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.	

## Appendix 3: Capacity Assessment Tool for Service Providers

The capacity assessment tool is mainly intended for staff/volunteers in civil society organizations (CSOs), although it may also be useful for government departments aiming to provide services to deported individuals. It has been designed to be self-administered by a service provider or as a tool to facilitate group discussions about adequate service provision in a workshop setting.

The outcome of the capacity assessment tool will highlight capacity strengths as well as identify needs and gaps. These needs and gaps will be entered into the capacity development action-plan that will serve as a basic action-oriented and time framed tool to assist organizations in delegating responsibilities and resources to achieve maximum capacity.<sup>78</sup>

### Key Concept: Capacity Development

UNDP defines capacity development as the process through which individuals, organizations and societies obtain, strengthen and maintain the capabilities to set and achieve their own development objectives over time.<sup>79</sup>

## Specific Capacity Areas

The following three capacity areas have been identified as critical to an organizations ability to respond to the needs of their service users, in this case deported individuals, as well as its own ability to efficiently manage its own governance and programmatic areas.

### • Organisational Capacity

This capacity area looks at the presence of structures, systems and strategies within the organization that would allow it to effectively function and perform at its most efficient capability. It is by no means an exhaustive list; however it offers service providers with a basic list to begin discussions (see Recommended Resources).

### • Advocacy and Communication Capacity

This capacity area looks at the organizations ability to effectively create, sustain and promote networking and partnerships with other organizations, government and/or donor agencies so as to respond relevantly to beneficiaries and the current operating environment.

### • Programming and Technical Capacity

This capacity area looks at various forms of programming and technical capacities that organizations may and may not provide. Generally, when responding to the needs of deported individuals it would be advised that an exhaustive social service needs assessments is conducted to determine appropriate programming and adequate technical capacities required. This may be done in various forms (see Recommended Resources) however, this tool provides an initial basic and easy model.

## Capacity Assessment Tool

### Organizational Capacity

Specific Capacity Area	Clear need for increased capacity	Basic level of capacity	Moderate level of capacity	High level of capacity	Comments
The organization is registered with all legal requirements up to standard					
Vision, mission & values clearly stated & shared in the organization					
Organization has a board of management represented by women & men from diverse socio-political backgrounds					
Organization has a clearly set out organizational structure, which includes a legal constitution, roles & responsibilities etc.					
Project management are consistent with all stages of the project cycle					
Projects are consulted with all relevant stakeholders particularly beneficiaries					
Projects are implemented with clear & logical work plans & budgets					

Clear recruitment policies & procedures

Policy & procedure manuals that have documented staff remunerations, job descriptions, grievances procedures etc.

System for reviewing and managing staff/volunteer performance, training & development

Financial management systems are implemented that prevent fraud & record financial transactions

Clear procedures for managing projects/organizational budget are implemented & understood by staff

Yearly audit is conducted & recommendations implemented

Gender is mainstreamed into organizations strategic plan & programming

Resource mobilization strategy implemented & is executed by management board & staff

### Advocacy, Policy & Communication Capacity

Specific Capacity Area	Clear need for increased capacity	Basic level of capacity	Moderate level of capacity	High level of capacity	Comments
Advocacy strategy has clear & logical objectives that are consistent with set activities & materials					
Advocacy activities & materials are based on research & adequate for intended audiences					
Advocacy activities & materials are consulted with key stakeholders					
Policy is guided by national policy frameworks and/or international best practise					
Policy development & review is guided by key stakeholders particularly beneficiaries of services					
Organization engages policy makers, international organizations and/or funding bodies in policy discussions					
Organization participates in policy advocacy, lobbying & dissemination					
Communication strategy has clear & logical objectives that are consistent with set activities & materials					
Communication activities & materials are adequate for intended audiences					

Communication activities & materials are consulted with key stakeholders

Organization has a networking & collaboration strategy

Organization maintains collaborative relationships with government, private sector, media & other CSOs

### Programming & Technical Capacity

Specific Capacity Area	Clear need for increased capacity	Basic level of capacity	Moderate level	High level of capacity	Comments
Participation of beneficiaries					
Programme staff/volunteer use participatory approaches to programme development					
Programme staff/volunteers have educational/skill development opportunities					
Participatory approaches to programme development are reflected in the organization strategy & planning					
Health & Wellbeing Support					
Staff/volunteers through educational/skills development have basic health care skills					
Staff/volunteers have access to a clear health care referral list/ record					

Staff/volunteers through educational/skills development have basic sanitation & good nutrition information

**Psychosocial Support**

Organization has specific psychosocial support framework/ interventions/tools

Staff/volunteers are trained prior to undertaking psychosocial support

Staff/volunteers through educational/skills development are trained in care & support interventions

Policy & procedure manuals are up to date & are put into practise

**Socioeconomic & Educational Support**

Staff/volunteers have knowledge & skill in educational assessments &/or support

Organization has specific income generating activities

Staff/volunteers have through educational/skills development knowledge in micro-enterprise development & management

Organization supports/provides access to microfinance &/or credit services

**Conflict Mitigation & Resolution**

Staff/volunteers have through educational/skills development knowledge/skills in conflict mitigation/resolution skills

**Risk Assessment & Management**

Staff/volunteers have through educational/skills development knowledge/skills basic risk assessment & management skills

### Capacity Development Plan

The capacity development plan is a basic matrix that allows the organization to systematically address through an action-oriented and time framed tool, responsibilities and resources to achieve maximum capacity.

**Organizational Capacity**

Capacity Area	Current level of capacity	Action Required	By when? DD/MM/YYYY	With/by Who?	Resources Required?

**Advocacy, Policy & Communication Capacity**

Capacity Area	Current level of capacity	Action Required	By when? DD/MM/YYYY	With/by Who?	Resources Required?

**Programming & Technical Capacity**

Capacity Area	Current level of capacity	Action Required	By when? DD/MM/YYYY	With/by Who?	Resources Required?

### Progress Report

I/we confirm that I/we have completed the process report of the above Capacity Building Plan as follows:

	Name of Signatory	Position on signatory	Signature	Date
Progress at				
DD/MM/YYYY				
Progress at				
DD/MM/YYYY				
Progress at				
DD/MM/YYYY				

### Recommended Resources

The following resources have been selected to further knowledge and information about capacity development in organizational settings. It is not exhaustive, however it provides preliminary information that can be useful to civil society, government departments and members of the deported community.

Australian Government, (2008) *Developing Capacity Building Plans 2006-2007*, [http://www.workplace.gov.au/NR/rdonlyres/488D4A89-13FA-4B74-A33D-597F2C174172/0/CDEP\\_Capacity\\_Building\\_Plan.pdf](http://www.workplace.gov.au/NR/rdonlyres/488D4A89-13FA-4B74-A33D-597F2C174172/0/CDEP_Capacity_Building_Plan.pdf)

Canadian International Development Agency, (1996) *Capacity and Institutional Assessment: Frameworks, Methods and Tools for Analysis*, [www.seesac.org/sasp2/english/publications/7/capacity/8.pdf](http://www.seesac.org/sasp2/english/publications/7/capacity/8.pdf)

European Commission, (2006) *Institutional Assessment and Capacity Development*, [http://ec.europa.eu/europeaid/multimedia/publications/publications/manuals-tools/t106\\_en.htm](http://ec.europa.eu/europeaid/multimedia/publications/publications/manuals-tools/t106_en.htm)

JSI Research & Training Institute, (2009) *A Guide to Monitoring and Evaluation of NGO Capacity Building Interventions in Conflict Affected Settings*, [http://www.africancso.org/tools/-/asset\\_publisher/hkK1/document/id/11791.jsessionid=7411247CD87F63BAC5E73B9C9A948AD9](http://www.africancso.org/tools/-/asset_publisher/hkK1/document/id/11791.jsessionid=7411247CD87F63BAC5E73B9C9A948AD9)

### References

- 1 IOM 2004 International Migration Law – Migration Glossary
- 2 Pereira, N. 2011 *Return[ed] to Paradise: The Deportation Experience in Samoa and Tonga*, <http://unesdoc.unesco.org/images/0019/001928/192858e.pdf>
- 3 Office of the Attorney General, Ministry of Police, Ministry of Women, Community and Social Development, Ministry of the Prime Minister, Ministry of Foreign Affairs and Trade, Ministry of Justice and Courts Administration.
- 4 Samoa Council of Churches, Samoa Umbrella for Non-Governmental Organisations, and US Military Veterans Association.
- 5 Visa expiries.
- 6 Families voluntarily send their children home to be cared by their relatives.
- 7 Pereira, N. 2011 *Return[ed] to Paradise: The Deportation Experience in Samoa and Tonga*, <http://unesdoc.unesco.org/images/0019/001928/192858e.pdf>
- 8 PIFS 2011 Pacific Transnational Crime Assessment PIFS:Suva
- 9 Trinh, The Impact of New Policies Adopted After September 11 on Lawful Permanent Residents Facing Deportation Under the AEDPA and the Hope of Relief Under the Family Reunification Act, 33 Ga. J. Int'l & Comp. L. 543-572 2004-2005
- 10 New Zealand government immigration website, available here: <http://www.immigration.govt.nz/migrant/general/generalinformation/immigrationact/>
- 11 New Zealand, Immigration Act 2009, Part 6 S 161
- 12 USA, Immigration and Nationality Act (INA) 1952, Sect. 101(a) (3);8 U.S.C. § 101(a)(3)
- 13 By way of illustration: citizens from the Federated States of Micronesia (FSM) may enter the USA as non-immigrants, because their government entered in to an agreement with the USA called the “Compact of Free Association.” However, if an FSM citizen is found guilty of breaking the law while in the USA, then “they will be treated as any other foreign national and deported if convicted of a deportable crime.” Source: FSM embassy website, available here: <http://www.fsmembassydc.org/faq.htm#12> (accessed 29 October 2011).
- 14 Australia, Migration Act 1958, S13-14
- 15 Australia, Migration Act 1958, S15
- 16 Australia, Migration Act 1958, S501
- 17 New Zealand, Immigration Act 2009, Part 2
- 18 New Zealand, Immigration Act 2009, Part 6
- 19 The Anti-Drug Abuse Act of 1988 first introduced the concept of aggravated felony for these three types of offences,
- 20 USA, Section 8 U.S.C. § 1101(a)(43)).

- 21 Guidance is given on the interpretation of moral turpitude in the USU.S. Department of State Foreign Affairs Manual, (available online: <http://www.state.gov/m/a/dir/regs/fam/index.htm>), Section 9 FAM 40.21(a) N2 MORAL TURPITUDE.
- 22 An analysis of the development of law in this area can be found in Canaday, "Who is a homosexual?: The consolidation of sexual identities in mid-twentieth-century American Immigration Law", *Law & Social Inquiry*, Vol. 28, No. 2 (Spring, 2003), pp. 351-386. The USA's current position is outlined in INS Interpretation document 316.1(e), "The fact that a petitioner is or has been practicing private homosexual acts with consenting adults during the relevant statutory period is not, in itself, a sufficient basis for a finding that he or she lacks the necessary good moral character where the homosexual conduct is not a criminal offense under the law of the jurisdiction. 71h / This Service view applies notwithstanding that sexual deviates are excludable from admission to the United States."
- 23 Australia, Migration Act 1958, S201
- 24 Australia, Migration Act 1958, S202
- 25 Australia, Migration Act 1958, S203
- 26 Grewcock, Punishment, deportation and parole: The detention and removal of prisoners under section 501 Migration Act 1958, *Australian & New Zealand Journal of Criminology* 2011 44: 56, page 58
- 27 Australia, Migration Act 1958, S501(6)
- 28 South Australia, Summary Offences Act 1953, various, available at <http://www.legislation.sa.gov.au/LZ/C/A/SUMMARY%20OFFENCES%20ACT%201953/CURRENT/1953.55.UN.PDF>
- 29 New Zealand, Immigration Act 2009, S161
- 30 New Zealand, Sentencing Policy and Guidance - A Discussion Paper (1997), available at <http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper>
- 31 New Zealand, Trespass Act 1980, S11(2)
- 32 New Zealand Department of Corrections, Census of Prison Inmates and Home Detainees 2003, S4.1, available at <http://www.corrections.govt.nz/research/census-of-prison-inmates-and-home-detainees/census-of-prison-inmates-and-home-detainees-2003/4-current-sentence/4.html>
- 33 USA, INA Act 240A
- 34 INA § 212(c) was repealed in 1996; however, a previous waiver under this section remains a bar to both types of cancellation.
- 35 The Legal Aid Society, *IMMIGRATION DETENTION AND REMOVAL: A Guide for Detainees and Their Families* (2004), available at <http://www.shusterman.com/pdf/detention1004.pdf>
- 36 Eligibility requirements are outlined on the US Citizenship and Immigration Services website: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=848f7f2ef0745210VgnVCM100000082ca60aRCRD&vgnnextchannel=848f7f2ef0745210VgnVCM100000082ca60aRCRD#EligibilityRequirements>
- 37 Australia, Migration Act 1958, S189
- 38 Australia, Direction [No 41] – Visa Refusal and Cancellation under section 501, 2009, Section 5.2(4)
- 39 Michael Clothier, "Review Rights", in "The Law handbook", Fitzroy Legal Service Inc, available at: <http://www.lawhandbook.org.au/handbook/ch22s01s06.php>
- 40 Australia, Migration Act 1958, S 500(6B)
- 41 Michael Clothier, "Review Rights", in "The Law handbook", Fitzroy Legal Service Inc, available at: <http://www.lawhandbook.org.au/handbook/ch22s01s06.php>
- 42 New Zealand, Immigration Act 2009, S171
- 43 New Zealand, Immigration Act 2009, s 309
- 44 New Zealand, Immigration Act 2009, S161
- 45 New Zealand, Immigration Act 2009, s207
- 46 New Zealand, Immigration Act 2009, s176
- 47 The nine core human rights treaties are: International Covenant on Civil and Political Rights; International Covenant on Economic, Social, and Cultural Rights; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Convention of the Rights of Persons with Disabilities; International Convention for the Protection of All Persons from Enforced Disappearance.
- 48 UN Special Rapporteur for the Prevention of Discrimination and the Rights of Non-Citizens, "Final report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283," para.1.
- 49 UN Committee on the Elimination of Racial Discrimination, General Recommendation No.30, "Discrimination Against Non Citizens," 2004, para. 4.
- 50 Human Rights Committee, "The Position of Aliens under the Covenant," General Comment No.15, 1986, para. 5.
- 51 1951 Convention Relating to the Status of Refugees, art. 33.
- 52 International Covenant on Civil and Political Rights, art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3; Human Rights Committee, General Comment No.20, paras. 5.6.

- 53 The UN Office of the High Commissioner for Human Rights has compiled an overview of legislative compliance of Pacific Island countries with regards to torture and ill-treatment of detainees. UN Office of the High Commissioner for Human Rights, "A Region-wide Assessment of Laws on the Prevention of Torture and other Ill-Treatment of Detainees," 2009, [http://pacific.ohchr.org/docs/Torture\\_ill\\_treatment\\_Study.pdf](http://pacific.ohchr.org/docs/Torture_ill_treatment_Study.pdf) (accessed January 5, 2012).
- 54 Universal Declaration of Human Rights, art.12; International Covenant on Civil and Political Rights, arts. 17, 23, 24; Convention on the Rights of the Child, art.9.
- 55 Human Rights Committee, "The Position of Aliens under the Covenant," General Comment No.15, 1986, para. 5.
- 56 Madafferi v. Australia, Communication No. 1011/2001, U.N. Doc., CCPR/C/81/D/1011/2001 (2004).
- 57 Inter-American Commission on Human Rights, Wayne Smith, Hugo Armendariz, et al. v. United States, Report No. 81/10, Case No. 12,562, 2010.
- 58 European Court of Human Rights, Boultif v. Switzerland, application no. 5427/00, 2001, available at [www.echr.coe.int](http://www.echr.coe.int)
- 59 Universal Declaration of Human Rights, art.9.
- 60 International Covenant on Civil and Political Rights, art. 9
- 61 International Covenant on Civil and Political Rights, art. 12.
- 62 International Covenant on Civil and Political Rights, art. 17; Universal Declaration of Human Rights, art. 12.
- 63 European Court of Human Rights, S. and Marper v. the United Kingdom, Application Nos. 30562/04 and 30566/04, judgment of December 4, 2008, available at [www.echr.coe.int](http://www.echr.coe.int)
- 64 Human Rights Committee, General Comment No. 16, para. 10.
- 65 Immigration Legal Resource Centre, "How to Plead a Non-Citizen Defendant to a California Burglary Charge", available at [http://www.ilrc.org/files/documents/how\\_to\\_plead\\_noncitizen\\_to\\_cpc\\_459\\_oct\\_25\\_2011.pdf](http://www.ilrc.org/files/documents/how_to_plead_noncitizen_to_cpc_459_oct_25_2011.pdf)
- 66 USA, Padilla v. Kentucky, 130 S.Ct. 1473, 1483-84 (2010)
- 67 Sarah Banks, ed., Ethics and Values in Social Work (New York: Palgrave MacMillan, 2006)
- 68 Noel Preston, ed. Understanding Ethics (Sydney: Federation Press, 2007)
- 69 National Association of Social Workers, Code of Ethics of the National Association of Social Workers, <http://www.socialworkers.org/pubs/code/code.asp> (Feb. 09, 2012)
- 69 Ibid., 4
- 70 Ibid., 6
- 71 Nuffield Council on Bioethics, The Forensic Use of Bioinformation: Ethical Issues, <http://www.nuffieldbioethics.org/bioinformation/bioinformation-chapter-downloads> (Feb. 23, 2012)
- 72 Ibid., 27
- 73 National Association of Social Workers, Code of Ethics of the National Association of Social Workers, <http://www.socialworkers.org/pubs/code/code.asp> (Feb. 09, 2012)
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