



SENATOR DAVID POCOCK
Senator for the ACT

13 February 2024

Submission to the Review of the amendments made by the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023

Background

The *Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023* is a significant improvement on the legislation enacted in 2020, which utilised a Ministerial discretion model to cease the citizenship of people who had engaged in terrorism-related conduct to the extent that they were seen to have repudiated their allegiance to Australia.

Various recent rulings of the High Court of Australia¹ have held that Chapter III of the Australian Constitution retains the imposition of punishment as an express function of the Judiciary, and that powers to punish cannot be attributed to the executive.

The Citizenship Repudiation Bill improved the legislation such that it ensured that the powers to strip citizenship were vested in the Courts. However, I do retain some significant concerns.

Our obligations to protect children from harm

It is well established that vulnerability to radicalisation often happens due to social marginalisation, frustration, distress and exclusion². Extremist groups can offer a sense of community and belonging to those who are otherwise disaffected. Evidence suggests that there is a link between child abuse and extremism, and that children who grow up in radicalised families are more susceptible to extremist views³.

It is my view that it is the responsibility of adults who care for children to protect them from exposure to extremist views. These adults may be their parents or guardians, their teachers, and professionals who come into contact with them through the child protection system. The exposure of children to extremist ideas and the development of their motivation towards violence and acts of terrorism is a form of grooming, and is a child safeguarding issue. We

¹ *Alexander v Minister for Home Affairs* [2022] HCA 19 (*Alexander*), *Benbrika v Minister for Home Affairs* [2023] HCA 33 (*Benbrika*) and *NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

² 'Preventing Violent Extremism and Radicalisation in Australia', Attorney-General's Department, Commonwealth of Australia 2015, p. 6

³ Ex Post Paper, 'Vulnerable children who are brought up in an extremist environment', Radicalisation Awareness Network 2018, p.3

as a society have a responsibility to protect children from radicalisation, just as we have a responsibility to protect them from other forms of harm.

This view is supported by UNICEF, who submitted to a 2015 Parliamentary Joint Committee on Intelligence and Security (this committee) inquiry into the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*. In their submission, they say that *'the involvement of children in armed conflict and violence is first and foremost a child protection issue.'* They further argue that the cessation of the citizenship of a child cannot be considered to be in their best interest, and that Australia owes an obligation to protect children from violence and exploitation.

In February 2022, the United Nations Special Rapporteur on 'the promotion and protection of human rights and fundamental freedoms while countering terrorism' published a position paper on the human rights implications of citizenship stripping. The paper outlines the significant impact of this action on children, saying that the despair and social ostracism resulting from this form of punishment can have a lifelong impact on a child's mental health and social functioning. Depending on the nation to which their dual citizenship relates, the action may also expose them to significantly reduced economic opportunities and human rights outcomes for the rest of their lives⁴.

The Director-General of Security at ASIO, Mike Burgess, said in his 2022 Annual Threat Assessment that radicalisation in young people can happen quickly, in 'days and weeks, not months and years', and that children are more vulnerable when they are under stress⁵.

Given the reduced culpability of children and the societal failures implied by their radicalisation, I circulated an amendment to the Citizenship Repudiation Bill in the Senate that sought to exclude children under the age of 18 years from the operation of the legislation (Independent Sheet 2284 - persons aged under 18). Where children under the age of 18 years have been radicalised in our communities, we have failed them. We owe them the opportunity to be supported and rehabilitated, just as we owed them early intervention to prevent them from turning to extremist views and actions.

Good international citizenship - a shared responsibility

As noted by Professor Ben Saul, who in late 2023 was appointed to the United Nations role of Special Rapporteur on Human Rights and Counter-terrorism, the purpose of stripping citizenship is to enable the expulsion of convicted terrorists from Australia. In the case of this legislation, this would occur after they have served their custodial sentence in an Australian prison. As Prof. Saul explains, this is inconsistent with our international obligations:

'the approach is [also] inconsistent with Australia's international counter-terrorism

⁴ Professor Fionnuala Ní Aoláin, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *'The Human Rights Consequences of Citizenship Stripping in the Context of Counter-Terrorism with a Particular Application to North-East Syria'*, p. 18

⁵ Australian Strategic Policy Institute, *ASIO chief flags alarming increase in children lured to extremism*, accessed 2/02/2024, <https://www.aspistrategist.org.au/asio-chief-flags-alarming-increase-in-children-lured-to-extremism/#:~:text=As%20a%20society%2C%20we%20have,>

*obligations, which are built on global coordination and cooperation to suppress terrorism, not unilateral measures designed to make one country safer at the expense of others, and which shift the burden of 'our' terrorists onto other countries.'*⁶

While the current legislation differs from the 2015 version of the laws in that the repudiation of citizenship will occur during the sentencing process (implying that the perpetrator has been brought to justice in Australia), the issues are similar in that expulsion after the sentence has been served necessarily precludes access to the monitoring, surveillance and rehabilitation tools available in Australia. In some instances, the expulsion of offenders may be to a state with far weaker rule of law, or where conflict is ongoing or to a failed state. Placing Australian terrorists into these situations is likely to make them more of a risk to Australian citizens, particularly those overseas, and could allow for re-offending with relative impunity.

As noted by Bertram in the *Journal for Deradicalization*⁷, there is evidence that the deradicalisation process becomes more likely if a person returns to or remains in their country of origin - particularly where the person is a member of a terrorist organisation that has a location or territory of operation. Disengaging from the ideological narrative is far more difficult and unlikely while in that territory and subject to ongoing exposure, while the ability and opportunity to reintegrate and restart a productive life in a country such as Australia provides opportunities for rehabilitation.

Overall, it is contrary to Australia's international responsibilities and security to remove those charged with terrorism from our borders - as this places them outside of our scope of monitoring, and pushes the responsibility onto states that may be less able to contain any risk.

To address this notion of international responsibility for those who may have become radicalised in our communities, I circulated two amendments to the Bill for the Senate's consideration - Independent Sheet 2288 [certain persons born in Australia] and Independent Sheet 2287 [Aboriginal or Torres Strait Islander persons]. These two amendments aim to ensure that Australia retains responsibility for the monitoring and rehabilitation of those who have been raised in our communities - regardless of whether they hold dual citizenship.

Certain persons born in Australia - Amendment 2288

This amendment excludes persons born in Australia from the operation of the Bill. It is drafted to capture those who were born in Australia regardless of whether they became citizens by conferral (through an application process) or by descent (born to an Australian citizen parent). It includes those who became citizens of Australia because they were born in Australia to parents who are stateless, and who may have later become dual citizens.

It is my view that persons who are born and raised in Australia are squarely Australia's responsibility, and must be treated as such. Preventing radicalisation and extremism in our

⁶ Submission 2, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, p.2

⁷ Bertram 2014, 'How Could a Terrorist be Deradicalized?', *Journal for Deradicalization*, Winter 2015/2015, no.5, p. 140

communities is paramount to Australia's security, and must be treated as a priority. Early intervention programs for young people at risk, along with support for communities to recognise the signs of radicalisation and extremism and to know how to prevent it is key. We must work to ensure that we prioritise our nation's social cohesion and that we support marginalised communities to feel a sense of belonging. The answer to extremism and radicalisation is not to export perpetrators to continue to cause harm to others - but to face it head on with effective and evidence based programs.

Aboriginal or Torres Strait Islander persons - Amendment 2287

This amendment excludes Aboriginal and Torres Strait Islander persons from the operation of the Bill. It is drafted to purposefully avoid the use of the current common legislative phrase that defines an Aboriginal or Indigenous person as 'a person who is a descendant of an indigenous inhabitant of Australia', or a member or a person 'of the Aboriginal race of Australia'. The determination of who is considered to be First Nations person is a live issue and subject to much debate, including in the recent High Court matters of *Love v Commonwealth of Australia & Thoms v Commonwealth of Australia [2020]*. This terminology also removes the problematic reference to 'race'.

The absurdity of cancelling the citizenship of an Aboriginal or Torres Strait Islander person is best phrased by Justice Bell of the High Court of Australia, who noted in the case of *Love* that '*an Aboriginal Australian cannot be said to belong to another place.*' Regardless of any action they might take or offence they may commit that could cause others to have their citizenship stripped under these laws, the First Nations peoples of Australia have inhabited this land under their own laws and customs for over 60,000 years. An Aboriginal or Torres Strait Islander person simply cannot repudiate their citizenship of this land, and it is my view that this must be made explicit in these laws, rather than relying on the common law to ensure they are protected.

This is particularly important given that no legislative response to the decision of *Love & Thoms* has thus far been forthcoming from the government, and because the Bill states at subsection 36C(10) that it applies to any person regardless of how they became an Australian citizen, including upon their birth.

Amendments circulated by Senator Lydia Thorpe [Independent Sheet 2323 & Independent Sheet 2318]

I support the amendments circulated by Senator Lydia Thorpe to increase the minimum sentencing threshold for these laws from the current 3 years to 5 years, and to ensure that those offences that attract concurrent sentences are only counted once for the purposes of calculating those 5 years. This would mean that only the most serious of offences would attract this punishment, and is a position that has been consistently supported by the Law Council of Australia in their submissions⁸ on various iterations of these laws. In fact, they have recommended that only offenders who have been sentenced to 6 years or more are

⁸ Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, p. 117

captured by the operation of the legislation, in line with the recommendations of this committee in 2015.

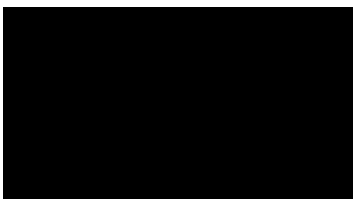
Conclusion

Citizenship cancellation is a serious matter, and is one of the most severe punishments a state can apply to its citizens. As a nation, we have a responsibility to prevent and punish terrorist acts not only to keep our community safe, but also to contribute to international efforts to combat terrorism on a global scale. While the removal of citizenship may be an easy solution to prevent domestic acts of terrorism, there is evidence that this action may increase risk to Australians abroad and provide impunity for the planning of terrorist acts against Australia - outside of the reach of our domestic monitoring regime.

At the very least, it is my view that the following recommendations should be enacted in this legislation:

- 1. Australia must take responsibility for the rehabilitation and monitoring of those who were born in Australia and have become radicalised within our communities.**
- 2. We must refrain from cancelling the citizenship of children under the age of 18 years, due to their lower level of culpability and vulnerability to manipulation and exploitation by adults.**
- 3. We must explicitly protect against the cancellation of the citizenship of Aboriginal and Torres Strait Islander people.**

Kind regards



Senator David Pocock