

AUSTRALIAN ■■■■■
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FOR INTERNATIONAL
JUSTICE ■■■■■

Review of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

Submission to the Parliamentary Joint
Committee on Intelligence and Security

14 October 2019

About the Australian Centre for International Justice

The Australian Centre for International Justice is a newly established independent and not-for-profit legal centre working to develop Australia's universal jurisdiction practice by providing access to justice in Australia to survivors and victims of serious human rights violations which amount to the international crimes of torture, war crimes, crimes against humanity and genocide.

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1 Introduction

1. The Australian Centre for International Justice (**ACIJ**) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security's (the **Committee**) review of the *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (the **Bill**).
2. The ACIJ notes the Committee is conducting a concurrent review: *Review of the Australian Citizenship renunciation by conduct and cessation provisions* and note our previous submission dated 19 July 2019 in relation to that review. The ACIJ relies on that submission which should be read in conjunction with this submission. We do not wish to restate the entirety for this particular review and provide supplementary material in responding to this review.
3. Although this Bill represents an attempt by the government to address criticisms of the citizenship revocation provisions and addresses some of the recommendations of the Independent National Security Legislation Monitor (ISNLM), the ACIJ opposes the citizenship revocation provisions and states the amendments set forth in this Bill do not alleviate any of the concerns raised in our previous submission.
4. The ACIJ's prime concern and opposition to these provisions, and the focus of this submission and our more detailed submission in July 2019 to the Committee, is relevant to the implications that arise as a result of the automatic revocation provisions based on conduct by operation of sections 33AA and 35 - now reflected in the Bill as proposed s 36B.
5. The revocation of citizenship of foreign fighters whilst offshore has raised practical and legal challenges regarding extradition and prosecution and has impacted on Australia's opportunity and responsibility to prosecute its own citizens for international crimes.
6. In addition, the ACIJ is critical of the prosecutorial strategy which conveniences terrorism charges. The revocation of citizenship as a result of section 35A which is being proposed to be replaced with s 36D, following conviction of terrorism related offences only without significant efforts to pursue prosecutions for international crimes where there is strong indication that such crimes were committed, risks misrepresenting the potential involvement of international crimes of the perpetrators. It represents a prosecutorial strategy that conveniences domestic counterterrorism efforts only and entrenches the climate of impunity for perpetrators of international crimes.

7. In addition, the Bill does not sufficiently address the concerns raised regarding the violation of fundamental human rights including that foreign fighters who are stripped of their Australian citizenship offshore are exposed to a real risk of torture and other inhuman treatment. They also face the prospect of unfair trials and the death penalty in Iraq or Syria. In addition, they expose persons to the risk of statelessness. The provisions also threaten the rule of law, restrict the right to access remedies and shift fundamental notions of citizenship and the devaluation of citizenship attached to dual nationals. All of these concerns have been competently addressed in submissions already made to the Committee by relevant experts in previous enquiries.
8. Ultimately, the ACIJ believes that revoking citizenship from foreign fighters to protect Australia's national security is an ineffective way of responding to the risks foreign fighters represent. All of these provisions and the proposed amendments are wholly inconsistent with Australia's obligation and duty to prosecute international crimes.
9. The Australian government has an obligation and responsibility to repatriate, extradite and prosecute its citizens for international crimes but has not acted on its responsibility and has left the burden and risk the foreign fighters represent, on other nation states that are inadequately resourced or prepared to meet the expectation.

Escalating crisis in Syria and Australia's international relations

10. The ongoing conflict in north east Syria, where foreign terrorist fighters are being held, and the escalation of the crisis in recent weeks has increased the risk that groups such as IS will regroup. This has evidenced how fundamentally flawed Australia's policy in responding to its foreign terrorist fighters. Australia's failure to act in accordance with its international obligations has contributed to worsening regional and international peace and security.
11. The UN Special Rapporteur on Counter-Terrorism and Human Rights, Fionnuala Ní Aoláin, highlighted the urgency of the current crisis and urged states to effect speedy and ordered returns of their nationals, grounded in the advancement of the rule of law, criminal accountability, and the rights of women and children under international law. She further writes that:

There are multiple reasons to bring home the individuals being held by SDF forces. They include the inhumane, degrading and increasingly dangerous conditions that women and children are experiencing in detention, where they are trapped in a

situation, which, for many, is not of their own making. It seems obvious to note that countries have a positive obligation to take necessary and reasonable steps to intervene in favor of their nationals abroad, when there are reasonable grounds to believe that they face treatment in flagrant violation of international human rights law. This includes denial of justice; the imposition of the death penalty; torture or cruel, inhuman or degrading treatment; sexual violence; or deprivation of liberty in grave violation of human rights standards, including arbitrary detention, incommunicado detention, and detention that fails to comply with the most basic standards of humanity.¹

12. In addition, the Special Rapporteur states:

An effective return process is the only meaningful way we are likely to hold individuals accountable for the serious and systematic crimes committed in Syria and Iraq. It is, in fact, the only way to close the enormous impunity gap for which the inadequate and dysfunctional judicial systems in both Iraq and Syria are not an answer. There is an urgent need for justice for all of the victims who have suffered violations of human rights and humanitarian law in the region. Returning these individuals to the countries from which they have come will start to address this complete lack of justice that has festered in Iraq and Syria since the start of the conflict(s) in the region.

Supporting investigations and prosecutions of international crimes

13. The ACIJ reiterates the fundamental reasons why Australia must consider investigating, extraditing and prosecuting its citizens for international crimes. Firstly, Australia is under an obligation to investigate and prosecute international crimes.

14. Secondly, the prosecution of international crimes provides meaningful opportunities for justice and accountability for the victims and survivors of the crimes.

15. Third, prosecuting international crimes reflects the scope and nature of the violations committed and provides an accurate historical record of the crimes. Whereas resorting to terrorism charges for convenience misrepresents the involvement of international

¹ Fionnuala Ní Aoláin, 'Returning Foreign Fighters and Their Families Takes on New Urgency After Trump's Syria Decision', *Just Security* (8 October 2009) <<https://www.justsecurity.org/66502/returning-foreign-fighters-and-their-families-takes-on-new-urgency-after-trumps-syria-decision/>>.

crimes and risks undermining efforts to prevent the commission of these crimes and ensure compliance with international humanitarian law.

16. More broadly, the prosecution of international crimes can have a powerful deterrent objective because these crimes are considered to be so egregious they are against all of humanity and States are obligated to prevent and punish their commission.

2 International duty and obligations

International obligations to prosecute

17. In the previous submission the ACIJ listed the international obligations to investigate and prosecute allegations of international crimes and set out Australia's legislative framework for prosecuting international crimes in the Commonwealth Criminal Code.
18. The ACIJ also noted the international crimes prosecutions being conducted abroad, particularly in Europe for returned foreign terrorist fighters including two recent trials in Germany and Finland. The ACIJ noted the role of national prosecutions as a key to countering the prevailing climate of impunity.

The UN Security Council Guiding Principles

19. In December 2018, the UN Security Council's Counter-Terrorism Committee issued the *Security Council Guiding Principles on Foreign Terrorist Fighters: The 2015 Madrid Guiding Principles + 2018 Addendum*.² These principles provide guidance based on UN Security Council resolutions on the required international response to the threat foreign terrorist fighters represent. In Chapter IV, the guidelines impress upon Member States to activate judicial measures and international cooperation. Furthermore, referring to previous Security Council Resolutions, the principles reiterate the following:

- the ability to prosecute and penalise the acts in a manner duly reflecting the seriousness of the offences, in accordance with domestic and applicable international human rights law and international humanitarian law;
- developing and implementing appropriate investigative and prosecutorial strategies;

² United Nations Security Council Counter-Terrorism Committee *Security Council Guiding Principles on Foreign Terrorist Fighters: The 2015 Madrid Guiding Principles + 2018 Addendum* (December 2018).

- that those responsible for committing or otherwise responsible for terrorist acts and violations of international humanitarian law or violations or abuses of human rights to be held accountable;
- all States should afford each other the greatest measure of assistance in assistance with criminal investigations or criminal proceedings, including assistance in obtaining evidence; and
- the Security Council called on States to take measures to improve the collection, handling, preservation and sharing of relevant information and evidence in accordance with domestic and international law.

3 Implications arising from the failure to prosecute

Impact on survivors and impact on access to remedies

20. In the previous submission the ACIJ raised various implications that flow from the failure to prosecute. We highlighted the case of Neil Prakash as an example of this failure and the missed opportunity to extradite him. The ACIJ strongly criticised the prosecutorial strategy of pursuing terrorism only charges and the implications that flow from that strategy.
21. The ACIJ noted the continuing climate of impunity for perpetrators of international crimes in Syria and Iraq including crimes perpetrated against the Yazidi community who were subjected to horrific acts of brutality and violence, including sexual and gender-based violence, said to amount to genocidal violence. The victims and survivors of these crimes are prevented from accessing justice and accountability for the harm they have suffered when perpetrators are stripped of their citizenship or when they are only pursued for terrorist-related offences only.
22. In addition failure to repatriate and prosecute foreign terrorist fighters, prevents victims and survivors from accessing their right to remedies such as compensation. For example, consider a recent case relating to a request for compensation or access to the NSW Victims Rights and Support Fund.³ The case was brought by five Yazidi women now living in Germany. The women were abducted, trafficked and subjected to horrific acts of sexual violence in Syria and northern Iraq. They identified Australian IS member Khaled Sharrouf as the perpetrator of those crimes. Their case went for review before the NSW Civil and

³ *DRJ; DRK; DRL; DRM; DRN v Commissioner of Victims Rights* [2019] NSWCATAD 195.

Administrative Tribunal. They were denied access to the fund and to compensation. Despite some of the problematic nature of the Tribunal's reasoning and conclusion, the Tribunal noted that the particular Australian IS member was never prosecuted and hence there has been no opportunity for a determination to be made under the relevant legislation that even if the offence occurred outside of NSW, a prosecution would have determined that the offences constituted a threat to the peace, order or good government and warranted criminal punishment. Failure by Australia to repatriate and prosecute its citizens will prevent in the future, survivors from accessing such remedies highlighting another concern with the automatic conduct-based provisions.

Recommendations

- 1) Recommend that this Bill not be passed and recommend the repeal of the current provisions of 33AA and 35, 35AA and 35A and ensure a prosecutorial strategy where Australians suspected of international crimes are repatriated, extradited and prosecuted for these crimes.
- 2) Where there is sufficient evidence to link a suspect to torture, war crimes, crimes against humanity, or genocide, do not limit charges to terrorism offenses.
- 3) Recommend that Australian authorities engage and cooperate with other States, and international partners including the UN International, Impartial and Independent Mechanism on Syria, multi-state and non-governmental and civil society organisations who have been collecting, documenting and analysing the evidence.
- 4) Recommend more broadly the establishment of a permanent, dedicated and specialist war crimes unit with adequate ongoing training for investigators, prosecutors, judges and lawyers in interviewing torture and trauma witnesses and assessing their needs with a particular focus on established good practice relating to investigating sexual and gender-based crimes; and ensure the unit has access to regional experts and experienced translators.