

PROSECUTE;
DON'T PERPETRATE
*Ending impunity for sexual
violence in armed conflict*

SUBMISSION TO THE REVIEW OF THE AUSTRALIAN CITIZENSHIP
RENUNCIATION BY CONDUCT AND CESSATION PROVISIONS

Introduction

Prosecute; don't perpetrate is glad to provide a submission to the Joint Parliamentary Committee on Intelligence and Security for their review of the operation, effectiveness and implications of sections 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007* and any other provision of that Act. Our campaign is primarily concerned with the unintended consequences of the implementation of this legislation, in particular the barrier it poses to the government's prosecution of war crimes, crimes against humanity and genocide perpetrated by Da'esh fighters. Nonetheless, this submission will also address matters of operation and effectiveness of the provisions. We have raised some of these concerns with members and the chair of the committee in the past. While the review and the legislation use the language of renunciation and cessation of citizenship, for a range of reasons, this submission will use the term revocation of citizenship. The submission will close with some recommendations.

Operation

The legislation allowing for the revocation of citizenship lacks due process. The fact that section 33AA (9) describes citizenship revocation as automatic means it lacks the due process required under international law. Processes involving the Citizenship Loss Board and decisions by the Minister also fail this requirement. Article 8 of the *Convention on the Reduction of Statelessness 1961*, to which Australia is party, says "a Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless."¹ If a Contracting State wished to revoke citizenship because a person "has conducted himself in a manner seriously prejudicial to the vital interests of the State" then the person has "the right to a fair hearing by a court or other independent body." At present, the process outlined in the *Australian Citizenship Act 2007* and used by the Australian government does not meet these criteria.

The individuals subject to this legislation are not just suspected terrorists; they are also likely to have committed war crimes, crimes against humanity and genocide. For those crimes, Australia is obliged to investigate and prosecute them in accordance with the *Rome Statute of the International Criminal Court 1998*² and Section 268 of the *Commonwealth Criminal Code 1995*. It is unreasonable that information on the behaviour of Australian citizens who may have committed these, the worst crimes under international law would be shared for the purposes of loss of citizenship, but not for the purposes of criminal accountability for those crimes. At the very least, those comprising the Citizenship Loss Board should also be considering if candidates for revocation might have

¹ <https://www.ohchr.org/Documents/ProfessionalInterest/statelessness.pdf>

² https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

perpetrated war crimes, crimes against humanity and genocide. Our obligation to prosecute these crimes should significantly affect the decisions of the Citizenship Loss Board and the Minister.

Effectiveness

Citizenship loss is not a suitable response to the threat of foreign fighters. The majority of Australians who have died in terrorist attacks have died overseas. Further isolating extremists from moderate Australian communities and preventing their re-entry to Australia will do nothing to stop their training, planning and conduct of terrorist networks and attacks in our region and overseas. Revoking citizenship does nothing to remove a personal interest in Australian targets for kinetic attacks or for recruitment of other disenfranchised individuals from minority communities within Australia. It does, however, keep individuals further away from the power of Australian law enforcement agencies, and increase the likelihood that such individuals will spend time in countries more conducive to the training and maintenance of terrorist organisations.

In our view, the legislation allowing the revocation of citizenship is being implemented far too readily. While not all cases have been made public, there have been several cases where the citizenship has been revoked from individuals who should have been investigated, and significant efforts made to prosecute them for genocide and other international crimes, including through the use of gross sexual violence. The first of these cases was Khaled Sharrouf, who the ABC reported to have purchased and kept several Yazidi women as sex slaves.³ It would seem he perpetrated genocide through the killing and causing serious bodily and mental harm to members of a particular ethnic or religious group. Rather than investigate him for these crimes, the Australian government merely revoked his citizenship. His victims remain in dire need of justice, struggling for support and the reparations they are entitled to under *United Nations Security Council Resolution 2467*⁴ and *General Recommendation 30* of the UN Committee on the Elimination of All Forms of Discrimination against Women⁵.

Implications

Prosecute; don't perpetrate is primarily concerned with the unintended impact this legislation has on the prospects for investigation and successful prosecution of Australians who perpetrated sexual violence as war crimes, crimes against humanity and genocide while fighting with Da'esh and other organisations in Syria and Iraq. Both houses of the 45th parliament passed multi-party motions recognising the sexual violence perpetrated by Da'esh as war crimes, crimes against humanity and genocide; and calling on the government to investigate and prosecute.⁶ Under the principle of complementarity of the Rome Statute of the International Criminal Court, Australia is obliged to investigate and prosecute such crimes in our own judicial systems. These crimes are codified in Chapter 8 of the Commonwealth Criminal Code with universal jurisdiction. However, prosecutions cannot be undertaken in absentia. Perpetrators need to be in the custody of the Australian Federal Police.

Revoking the citizenship of perpetrators of these crimes creates an additional barrier to international justice. Indeed, such an institutional barrier could be considered a contributing factor to breaching our obligation to punish the crime of genocide, in accordance with the *Convention on*

³ <https://www.abc.net.au/news/2015-01-22/australian-iihadists-accused-of-enslaving-yazidi-women/6032938>

⁴ [https://undocs.org/S/RES/2467\(2019\)](https://undocs.org/S/RES/2467(2019))

⁵ <https://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>

⁶ Chris Crewther, Gai Brodtmann, Anne Aly, Trent Zimmerman & Mike Kelly; 26 February 2018; Federation Chamber – MOTIONS – Yazidi People

Claire Moore, Linda Reynolds, Nick McKim, Skye Kakoschke-Moore & Jacqui Lambie; 15 November 2017; MOTIONS – War Crimes

the Prevention and Punishment of the Crime of Genocide 1948. This would leave Australia open to a case at the International Court of Justice in accordance with Articles IV and IX of that Convention.

For many years, the Australian Government has championed the Women, Peace and Security agenda.⁷ A key component of the Women, Peace and Security agenda is ending impunity for conflict related sexual violence. Australia's Foreign Minister is a Champion of the UK's Prevention of Sexual Violence Initiative. Many countries who have been the source of foreign fighters are struggling with how to prosecute them for the sexual violence they perpetrated while fighting in Syria and Iraq. But Australia has a sound legislative framework in the Criminal Code Act 1995. We must take the lead. We must invest in the investigation and prosecution of our own nationals who perpetrated these heinous crimes. That means enforcing our own criminal code, and our international obligations, not letting our problems loose on the world to go on training, planning and attacking more people, but locking them up for the international criminals that they are.

Recommendations

- The government should investigate and prosecute Australian foreign fighters for war crimes, crimes against humanity and genocide, instead of revoking their citizenship.
- If these sections of the *Australian Citizenship Act 2007* are to remain in use, the Citizenship Loss Board must prioritise Australia's obligations to investigate and prosecute war crimes, crimes against humanity and genocide in their decisions.

⁷ The second National Action Plan on Women, Peace and Security is expected to be released shortly. As was the first plan, it is a multi-agency policy designed to improve Australia's implementation of the suite of United Nations Security Council resolutions on Women, Peace and Security. In addition to Defence, AFP and Foreign Affairs, this new plan includes the Department of Home Affairs.