



13 December 2023

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security

Dear Secretary

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

Thank you for the opportunity to make a submission, which I do in a personal capacity. I have examined citizenship revocation as a means of combating terrorism in Australia, the United Kingdom and other nations in the following publications with Sangeetha Pillai that may assist the committee:

- ‘The Utility of Citizenship Stripping Laws in the UK, Canada and Australia’ (2017) 41 *Melbourne University Law Review* 845.
- ‘Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations’ (2017) 66 *International & Comparative Law Quarterly* 521.

I make the following points about the enactment of the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023.

First, inadequacies with the law-making process, including to properly consider constitutional constraints, led to the striking down of key aspects of the prior legislation in *Alexander v Minister for Home Affairs* [2022] HCA 19 and *Benbrika v Minister for Home Affairs* [2023] HCA 33. The law as originally enacted in 2015 provoked deep disagreement, including because of the likelihood it would be struck down by the High Court for transgressing the role of the judiciary. The government at the time nonetheless adopted the reckless course of pressing forward with the laws in the face of an almost certain, and likely successful, constitutional challenge.

Given this background, it is unfortunate that the response to what was a rushed, poorly thought-out scheme for citizenship revocation is a new scheme that has also been rushed and would have benefited from greater deliberation. This Committee process is a visible example of this. The law requires careful examination by this Committee, but it is highly problematic that this is occurring after the legislation has been enacted and without proper consideration of proposed amendments.

The result is legislation enacted without adequate consideration of key policy aspects. For example:

- why are some of the offences included as triggering citizenship revocation? Should speech in the form of advocating mutiny be sufficient to lead to loss of citizenship? The crimes listed are all serious but why are they, and not

others, fixed upon for this consequence? And is there a risk of normalising citizenship revocation such that arguments will be made to extend it generally to other crimes, such as sexual offences involving children, or to serious crimes more generally?

- Why is it appropriate to permit the revocation of citizenship of a child as young as 14? This seems highly problematic, even given the requirement that any decision involving a child take into account their best interests. Given it is hard to see that the revocation of citizenship of a child will ever be in their best interests, what is the point in extending the regime to this age group?
- What does it mean that someone has undertaken conduct that is so serious that they have repudiated their allegiance to Australia? This terminology has no clear legal meaning, even when read in light of the factors a court must consider in applying the criteria.

There was insufficient cause for rushing this legislation through Parliament, especially given the bill deals with complex and difficult matters of national security and constitutional law, as well as fundamental questions about membership of the Australian community. This Committee ought to make clear that this course of action should not be repeated for future legislation. National security legislation in particular, given its significance and impact upon individuals and democratic values, should be subject to proper scrutiny and deliberation by Parliament.

Second, the legislation reflects the constitutional parameters established by the separation of powers in Australia, particularly the strict separation of federal judicial power. It does so by recognising that citizenship revocation is a punishment, which, according to well-established High Court doctrine, falls exclusively within the judicial function of adjudging and punishing criminal guilt.

This legislation corrects the error identified by the High Court in the prior scheme. It does so by vesting power to revoke citizenship in a court as part of the process of sentencing a person to imprisonment.

A separate constitutional issue is how this legislation will intersect with the decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37. The High Court unanimously determined that the Constitution invalidated legislation which permitted a non-citizen to be detained indefinitely even though there was ‘no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future’.

This decision has significant implications for citizenship revocation. If, as can be the case because nations generally do not want to admit convicted terrorists, a country refuses to take back their citizen who has been stripped of citizenship in Australia, this removes the possibility the person can be deported. That person, in conformity with the *NZYQ* decision, will then need to be released into the community. The result is to undermine the effectiveness of the removal of citizenship and to bring into question the utility of the scheme.

Third, citizenship revocation is not an appropriate or effective means of combating terrorism in the first place. Stripping a person of their citizenship is more about symbolism and gesture politics than preventing terrorism. The tactic is ineffective and potentially counter-productive, and should be abandoned.

There is a good reason why very few countries revoke the citizenship of terrorists. They have recognised that cancelling citizenship does not deter terrorism, nor does it make the world safer. In fact, it can increase the global threat by placing dangerous people outside of the reach of monitoring and control by domestic law enforcement and intelligence agencies.

ASIO warned of this in an earlier submission, saying: ‘In a globally interconnected world, the location of an individual offshore as a result of citizenship cessation will not eliminate any direct threat they pose to Australian (or other) interests overseas.’ The agency made clear that depriving a person of their citizenship ‘will not prevent their reach-back into Australia to inspire, encourage or direct onshore activities that are prejudicial to security — including onshore attacks.’ The threat to Australia may actually increase because: ‘In some instances, citizenship cessation will curtail the range of threat mitigation capabilities available to Australian authorities.’

In the case of Adul Benbrika, the loss of his citizenship could have meant his deportation to Algeria. Australian authorities would be left with very little capability to monitor him and seek to prevent any action he might take against our people or interests. It could also increase the risk of terrorism in Algeria, which lacks the same resources to manage the threat. The net effect may have been to increase the risk of terrorism worldwide.

Citizenship stripping also risks a tit-for-tat response. Foreign nations have responded to like laws by acting first to strip a person of that nation’s citizenship to frustrate use of the law. Other nations might also follow Australia’s lead by revoking the citizenship of their own dual nationals who have been convicted of terrorism. This could see dangerous offenders deported to Australia, just as we are seeking to do to other nations. The result could be an increasing number of countries exporting terrorist offenders and a souring of relations between nations.

The High Court did Australia a favour by striking down laws that represent a serious misstep in the fight against terrorism. Rather than being reinvented as a court-based process to strip citizenship, we should combat terrorism with strong measures that are more effective and less harmful to international co-operation. Successive Australian governments have championed policies and laws that arm our agencies with extraordinary powers to combat terrorism, including control orders, warrantless searches and covert surveillance. These should be the focus of the fight, rather than a symbolic and counter-productive gesture to strip Australians of their citizenship.

Yours sincerely

Professor George Williams AO