



Blueprint for Free Speech

Submission to:

Parliamentary Joint Committee on Intelligence and Security in respect of the Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

16 July 2015



Parliamentary Joint Committee on Intelligence and Security (the Committee) in respect of the Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Inquiry and the Bill)

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1 Introduction

Thank you for the opportunity to provide comments to the Committee in respect of the Inquiry.

Blueprint for Free Speech (**Blueprint**) is an Australian based, internationally focused not-for-profit concentrating on research into 'freedoms' law. Our areas of research include public interest disclosure (whistleblowing), freedom of speech, defamation, censorship, right to publish, shield laws, media law, Internet freedom (net neutrality), intellectual property and freedom of information. We have significant expertise in whistleblowing legislation around the world, with a database of analyses of more than 20 countries' whistleblowing laws, protections and gaps.

You may be aware that Blueprint is a regular participant in the inquiries conducted by this Committee and we are very pleased to once again be able to provide our expertise and perspective on these matters.

Protecting Australia's interests is a vitally important and equally complicated task. We understand that the Government, at the core of its actions, is seeking to protect the interests and safety of Australians. However, this legislation, in combination with the raft of legislation passed by this government (as has been witnessed by this Committee) tells the story of broad-brush stroke increases in power for the intelligence and national security community. The approach has been deliberate and broad and in each case a piece of the rule of law or protections enshrining personal privacy has been eroded. We are very concerned with these developments, and see that this current proposed Bill is another step in that direction.

Citizenship is an inherent right given to a person that is fundamental to the concept of a modern society. There is no chicken and egg debate here. Before government, before the rule of law, before all other political concepts is the notion and meaning of 'citizen'. To take that away from someone is not the abstract removal of some esoteric right. To use an analogy, it is removing the lowest brick of a brick house. Without it, the house crumbles. This proposal to take away a citizen's (one cannot even discuss how important the concept of a citizen is without using the word itself) is plainly outrageous.

We have outlined our specific concerns with the legislation below. As the Committee requests, we have provided our specific thoughts on the retrospective application of the Clause 35A of the Bill separately to our general contention.

2 Retrospective Application of proposed Section 35A of the Bill

Blueprint is firmly opposed to the introduction of retrospective legislation which would enable the cancellation of Australian citizenship, such as envisaged by proposed Section 35A of the Bill. Retrospective legislation, especially in criminal matters with significant potential impact on the liberty of its subjects should especially aver retrospective application.

The 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers', produced by the Attorney-General for the benefit of the draughtsmen and policy implementation of the public service provides:

*"An offence should be given retrospective effect only in rare circumstances and with strong justification. If legislation is amended with retrospective effect, this should generally be accompanied by a caveat that no retrospective criminal liability is thereby created."*¹

It continues in discussion:

"The Federal Parliament and successive governments have only endorsed retrospective criminal offences in very limited circumstances. People are entitled to regulate their affairs on the assumption that something which is not currently a crime will not be made a crime retrospectively through backdating criminal offences.

Exceptions have normally been made only where there has been a strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity."

Such retrospective application has only been used in very limited circumstances, and strong justification is necessary. Blueprint questions whether there is sufficient justification in these circumstances. First, if those potentially caught in the retrospective application have ceased the allegedly criminal activities, then the legislation will have achieved its stated purpose – to discourage those from participating in such activities. Second, if those caught do not cease the activities which may give rise to that criminal liability then retrospective application will not be necessary as each allegedly criminal action (i.e. continued participation) will attract the ire of the provisions.

Further, Article 15 of the International Covenant on Civil and Political Rights provides:

- *"(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*
- *"(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal*

1

https://www.ag.gov.au/Pub_cat_ons/Documents/GuideToFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Criminal%20Offences.pdf at paragraph 2.13

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*according to the general principles of law recognized by the community of nations.*²

Again, the limitation of the second paragraph of the Article 15 is only to be used in limited circumstances. One example of this was the ability to prosecute perpetrators of war crimes during 1939-1945.

Simply put, retrospective legislation in this context is inconsistent with the rule of law and the exercise of basic personal liberty and individual choice. Even if the Committee sees fit to recommend this legislation and the Government indeed succeeds in its passage, the retrospective element should not be included.

3 Other comments in respect of the Bill / Policy

(a) The stated purpose

We take issue with the stated purpose of the Bill, which is set out in Section 4:

“This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.”

We take issue with it primarily because Australian citizenship is not a right capable of qualification. In some other countries, citizenship may be qualified or predicated on some sort of social contract or bond, formalised in a constitution or Bill of Rights. Australia does not qualify the concept of citizenship, or what it means to be a citizen. Arguably, the only formal obligation on an Australian citizen, in the exercise of its citizenry, is the obligation to vote. Even then, that is an obligation imposed by statute and not the Constitution. Neither the Australian Constitution nor the *Australian Citizenship Act 2007* provides a comprehensive outline of what a citizen's rights or obligations are.

As Ben Saul of the University of Sydney so adequately put recently:

*“The citizenry is above government, not vice versa. Once citizenship is granted, the die is cast. All citizens are equal and must be accepted for all time, warts and all.”*³

Although we understand the irony of an organisation such as ours asserting that citizens are not attached with formal rights and obligations, if this logic is followed then it is difficult to understand a policy that trades non-existent obligations for the citizenship itself. In other words, citizenship can't be used as a bargaining chip, at least not in “Casino Australia”.

We understand that such measures have been taken for some time in respect of those who fight with the formal armies of some other nations, but this does not justify a further extension of these measures. It is a blunt solution to a complex problem.

Further we take note of other countries' approaches to citizenship more generally. For example in the United States, Australia's close ally, it is very difficult indeed to lose one's US citizenship. It

² Article 15 of the International Covenant on Civil and Political Rights

³ <http://www.abc.net.au/news/2015-05-27/sau-p-an-to-str-p-c-t-zensh-p-s-s-mp-st-c-and-dangerous/6499710>

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requires full intent to do so, along with forms and swearing such intent in statements before witnesses.

The above matters are covered in 8 USC 1481 – ‘Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions’.⁴ One of the important aspects of this provision is that the government asserting the loss of citizenship has the burden of proof. This should be contrasted with the position of this Bill, which is that the power lies in ministerial discretion. This safeguard mitigates against any abuse of power, and ensures that there is some sort of oversight on the exercise of this extremely powerful instrument. In Australia, no such safeguard will exist. In light of this point, we also keep in mind that during the preparation of this Bill, the Magna Carta (upon which so many of our common law principles derive) celebrated its 800^h anniversary this year. Relevantly, we turn the committee’s attention to Clause 39 of the document (as translated into English):

“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.”⁵

(b) Sole citizenship

Cancelling the citizenship of a person who holds dual-citizenship is universally bad. Cancelling the citizenship of someone who only has Australian citizenship is in violation of the Statelessness Convention (to which Australia is a party). Not only will it violate this international treaty, but surely it would put that person in a more volatile and aggressive position, where they feel they have nothing to lose. One foresees that it makes worse the problem that it purports to fix. This is alienation by policy one-o-one.

(c) There are better ways to do this

Consider the approach of Denmark, who has faced similar problems to Australia in the recruitment of extremist elements to places like Syria. For the sake of brevity, let’s call them ‘ISIS Recruits’. Denmark, in fact, has produced more foreign fighters than any other country in Europe except for Belgium.⁶

Instead of cancelling their citizenship, Denmark has opted for a complex and multi-tiered approach to engagement with the communities that produce the ‘ISIS Recruits’.⁷ Moreover, upon their return to Denmark, those that have fought with extremist forces are repatriated in a manner that seeks rehabilitation and not punishment, including psychological support to reenter society and safe avenues for debriefing any horrors they may have seen.⁸ Hopefully this short-circuits any acting out of those horrors in the society to which they return. That principle is consistent with the Australian approach to criminal law, which seeks above all else to rehabilitate criminals such that they do not become recidivists.

⁴ <https://www.awcorne.edu/uscode/text/8/1481>

⁵ <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation#sthash.ZTWWDAew.dpuf>

⁶ <http://www.theguardian.com/world/2014/nov/12/deradicate-s-s-fighters-jihadists-denmark-syria>

⁷ <http://www.btmes.co.uk/denmark-s-s-fighters-warm-y-we-come-home-by-psychiatrists-1470546>

⁸ <http://www.newsweek.com/returning-s-s-fighters-forgiveness-or-punishment-294497>
<http://www.theoceandk/20150324/denmark-send-nq-fewer-foreign-fighters-to-s-s>



It is too early to determine whether or not this approach will be successful. However, the rash response that gives rise to this legislation seems on the face of it to exacerbate rather than fix the current problem. We know that extremism is fuelled by disassociation, disempowerment, disenfranchisement and poverty. That is an uncontroversial view. To remove citizenship from someone only seeks to increase each of these factors. It's feeding the beast, rather than taming it.

4 Conclusion

The legislation is brief, to the point and fairly blunt. This fits well with the policy - blunt. In 2015 we are faced with extremely complex geo-political problems. Our consistent response thus far (at least in the last 14 years) has been reactionary and without proper analysis. There are no case studies or strong arguments that assert that this Bill will fix extremism, or reduce the number of Australian citizens leaving to fight on foreign shores. On the contrary, we do know the dangers of further ostracising an angry and disempowered youth. This is even before we examine the implications for the personal liberties and rights this Bill seeks to take away.

The scariest thing about this legislation is that one wonders what might be next – or even scarier, that there isn't anything worse. Citizenship is the basic building block of any government – whether democratic or authoritarian. It is one half of the relationship between the governor and the governed. In a democratic society, where the mandate of government vests in the citizen himself or herself, the removal of that right by extension removes the mandate of a democratically elected government. This is an extreme move, completely disproportionate to the problem it seeks to address, and indeed not evidentially supported at all for its effectiveness.

We strongly urge this committee to recommend against this Bill.

Blueprint would like to take the opportunity again to thank the Committee for its time in considering our submission and reiterate its enthusiasm in assisting the Committee further in whatever way it might deem us to be helpful.

Please contact us about this submission or any other matter.

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