

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

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

Introduction

Prosecute; don't perpetrate is glad to provide a second submission to the Joint Parliamentary Committee on Intelligence and Security (JPCIS) for their review of renunciation by conduct and cessation provisions of the Australian Citizenship Act. This submission is being made after the report of the Independent National Security Legislation Monitor (INSLM) on the same subject. Given his remit, the criminal justice measures discussed in INSLM's report focussed solely on terrorism offences. However, in so doing, the overall analysis lacked policy and legal breadth required to address the issue of foreign fighters.

In addition to terrorism offences, these individuals should be investigated and, where appropriate, prosecuted for sexual violence as war crimes, crimes against humanity, genocide and human trafficking that appear in chapter 8 of the *Commonwealth Criminal Code 1995*. Unlike s119 crimes, these offences do not require the perpetrator to be a citizen. However, they are required to be in custody. As with both s16 and s119 offences, the Attorney-General's approval is required for prosecution to go ahead. As INSLM noted from the Law Council of Australia's submission, "it is preferable for people who are suspected of engaging in terrorism related offences to be arrested overseas and extradited here or arrested upon their entry to Australia and subjected to the process and sanction of the criminal justice system." If a person ceases to be a citizen of Australia, "this may provide the person with a technical defence in any extradition proceeding".

This submission will address changes to the threat environment; INSLM's recommendation to repeal ss33AA and 35; and the proposed Ministerial decision-making model.

Changes to the threat environment

The threat environment has indeed changed since passing the *Australian Citizenship (Allegiance to Australia) Act 2015*. However, since the INSLM report was published, the US withdrawal and subsequent Turkish incursion into north eastern Syria in early October have significant ramifications for the threat environment. Below is a brief analysis of how *prosecute; don't perpetrate* sees these changes. Although these are paramount to the JPCIS review, they do not in fact affect the conclusions we would have made to the committee.

Overall, an immediate rise of ISIS is now much more likely than when the INSLM report was published. There were reports of ISIS fighters escaping prison during the first days of the Turkish incursion. Kurdish forces control prisons holding thousands of ISIS fighters, including foreigners, in north eastern Syria. Now they are facing ethnic cleansing and a possible genocide at the hands of Turkish forces and their Syrian allies, Kurdish forces have stated that guarding ISIS prisoners can no longer be their top priority. Furthermore, thousands of refugees, including families of foreign

fighters, who had been refused assistance or repatriation and were trapped in camps in al-Hawl that were breeding ground for extremism, will now be caught up renewed conflict.

Meanwhile, in Iraq, there has been increasing dissatisfaction with how the government has governed since the fall of ISIS. Corruption remains rife. In recent weeks, in Baghdad and the south of the country, thousands of young Shi'a men protested political corruption, inequality and lack of services. Over 100 protestors were killed, including by sniper fire. Some reports have 6000 injured. In the north of the country, human rights groups have long reported dissatisfaction with the governments approach to justice for ISIS.¹ There's been no disaggregation for extremists or people who fixed generators for example, everyone has the harshest of possible penalties and many in the community feel isolated by the justice process, which hasn't allowed for witness statements or victim testimony. Ongoing insecurity fuels dissatisfaction at inequality and lack of services as well as the same political corruption despised by those in the south.

Retrospective repeal of ss33AA and 35

We support INSLM's recommendation to retrospective repeal ss33AA and 35. However, in line with paragraph 2.36 of INSLM's report, consideration will need to be given to the consequences for this in cases such as Khaled Sharrouf where, although he is presumed dead, his citizenship status may have ongoing consequences for his victims currently seeking access to victims of crime support for acts of violence he perpetrated against them.²

Ministerial decision-making model

In our view, the proposed Ministerial decision-making model is unsatisfactory on two accounts.

First of all, the model doesn't include consideration of Australia's obligation to investigate and prosecute war crimes, crimes against humanity and genocide. At the very least, this would need to be a stand-alone factor in paragraph 6.97 b) of INSLM's report. We are obliged to undertake such prosecutions within our own court systems as a State Party to the *Rome Statute of the International Criminal Court 1998* as well as the *Convention on the Prevention and Punishment of the Crime of Genocide 1948*. Both of these treaties have been incorporated into Division 268 of the *Commonwealth Criminal Code 1995*, the offences for which can have been perpetrated anywhere in the world. The punishment for most of these crimes is life imprisonment. At present, the relevant departments require some adjustments to the manner in which they cooperate and share information so they could support criminal accountability through investigations that would need to be led by an appropriately resourced team within the Australian Federal Police. A draft business process map that we intend to use as the basis for discussion at a multi-agency workshop to overcome the barriers to investigation and prosecution of these crimes has been attached to this submission to provide some further explanation of what would be required.

Overall, it is expected that these and other matters of international law would also be considered under INSLM's subparagraph vi. 'Australia's international relations' given the implementation of international humanitarian law is a substantial component of the rules based global order. Ending impunity for conflict related sexual violence is also a key component of the women, peace and security agenda for which Australia has a whole-of-government National Action Plan. Successive governments have championed this agenda at various United Nations fora and our Foreign Minister

¹ https://www.hrw.org/sites/default/files/report_pdf/iraq1217web.pdf

² DRJ v Commissioner of Victims Rights; DRK v Commissioner of Victims Rights; DRL v Commissioner of Victims Rights; DRM v Commissioner of Victims Rights; DRN v Commissioner of Victims Rights [2019] NSWCATAD 195

is a champion of the UK's Prevention of Sexual Violence Initiative, for which there is an international summit in London in November

Our second reason for disagreeing with INSLM's recommendation for a Ministerial decision-making model is because it remains our view that citizenship loss is not a suitable response to the threat of foreign fighters in general. This remains the case for a range of administrative, natural justice, preventative and hard security reasons.

Recommendations

- The government investigate and prosecute Australian foreign fighters for war crimes, crimes against humanity and genocide.
- 'Whether the person can be prosecuted in Australia in relation to Chapter 8 offences of the *Criminal Code Act 1995*' needs to be included the factors preventing the Minister deciding to deprive a person of their citizenship

Attachment

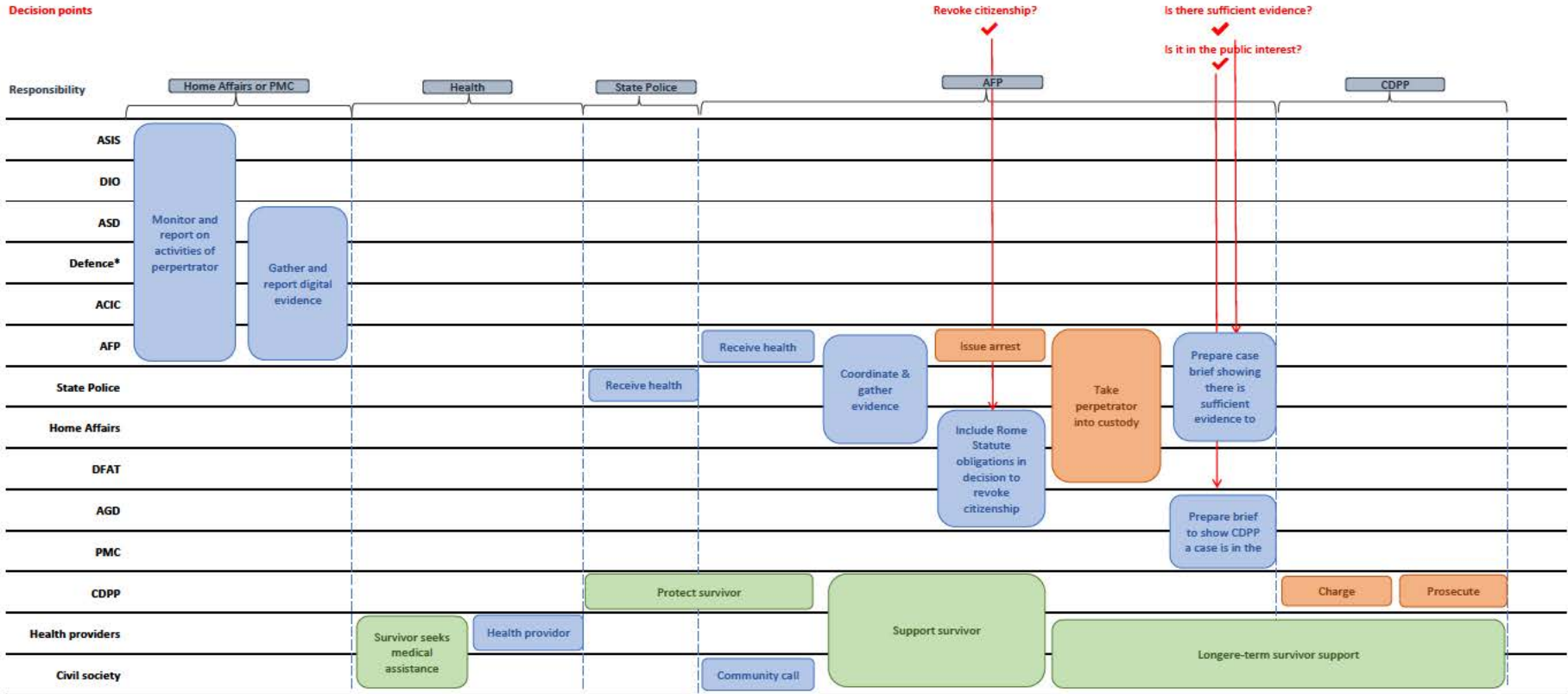
1. Draft business process map

PROCESS MAP FOR INVESTIGATING AND PROSECUTING CONFLICT RELATED SEXUAL VIOLENCE

START STATE:
Australian citizen perpetrates conflict related sexual violence

END STATE:
Perpetrator is prosecuted

Decision points



* Operations & policy: JOC, ADFIS, Joint Health Command

- Government
- Survivor
- Perpetrator