



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: HRC/PuLC:CBsb241123

24 November 2023

Dr James Popple  
Chief Executive Officer  
Law Council of Australia  
PO Box 5350  
Braddon ACT 2612

By email: [Janina.Richert@lawcouncil.asn.au](mailto:Janina.Richert@lawcouncil.asn.au)

Dear Dr Popple,

**Review of Subdivision C of Division 3 of Part 2 of the Australian Citizenship Act 2007 (Citizenship Cessation Determinations)**

The Law Society appreciates the opportunity to contribute to the Law Council's submission to the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) review of Subdivision C of Division 3 of Part 2 of the *Australian Citizenship Act 2007 (Act)*. The Law Society's Human Rights and Public Law Committees have contributed to this submission.

In the context of this review, we note recent media reports that new laws to deprive terrorists of their Australian citizenship are planned to be introduced.<sup>1</sup> The PJCIS' deadline for submissions is 8 February 2024. However, given recent legislative developments, including the *Migration Amendment (Bridging Visa Conditions) Act 2023 (Cth)*, which was rapidly through Parliament recently, it appears some additional urgency may now be introduced into this process, given the implications of the decision of the High Court in *Benbrika v Minister for Home Affairs* [2023] HCA 33 (**Benbrika**) outlined below.

As recorded in the High Court's decision of *Alexander v Minister for Home Affairs* [2022] HCA 19 (**Alexander**), the so-called "cessation of citizenship" provisions were introduced into the Act in 2020 to replace the legislative scheme previously enacted by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth)*.<sup>2</sup>

Section 36B of the Act is directed to citizenship cessation for terrorism-related conduct, and s 36D of the Act deals with citizenship cessation for certain convictions. The reasons of the plurality (Kiefel CJ, Gageler, Gleeson and Jagot JJ) of the High Court in *Benbrika* summarise the power expressed to be conferred by these provisions at [13] as follows:

Like s 36B(1), s 36D(1) is expressed to confer a power on the Minister administering the Citizenship Act which can be exercised only by the Minister personally and

---

<sup>1</sup> Angus Thompson., "New laws coming after terror cell leader Benbrika wins High Court citizenship case," *Sydney Morning Herald*, 1 November 2023, <https://www.smh.com.au/politics/federal/infamous-terror-cell-leader-benbrika-wins-high-court-citizenship-case-20231101-p5egnf.html>.

<sup>2</sup> See *Australian Citizenship Amendment (Citizenship Cessation) Act 2020 (Cth)*.

without need for the Minister to observe any requirement of natural justice. The power expressed to be conferred by each provision is the power to determine in writing that a person ceases to be an Australian citizen, with the consequence that the person ceases to be an Australian citizen at the time the determination is made. The power expressed to be conferred by each provision is applicable regardless of how the person became an Australian citizen but cannot be exercised if the Minister is satisfied that the person would thereby cease to be a national or citizen of any country.

The effect of the High Court's decisions in *Alexander* and *Benbrika* is that ss 36B and 36D of the Act are invalid as these sections confer on the Minister the exclusively judicial function of adjudicating and punishing criminal guilt, contrary to Chapter III of the Constitution, and the principle enunciated by the Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

At the time this legislative regime was introduced, both the Law Society and the Law Council raised concerns about its constitutional validity. Now that ss 36B and 36D of the Act have been held to be invalid, it is possible that the Commonwealth Government will seek other avenues to enact a legislative scheme which may result in cessation of citizenship. In *Benbrika*, the plurality stated at [48], for example, that the problem could be overcome by giving a court power to determine that an offender should cease to be a citizen, with a precondition to the exercise of that judicial discretion being certification by the executive that it is appropriate.<sup>3</sup>

In the context of this legislative possibility, the Law Society reiterates its concerns about citizenship deprivation, which has profound and far-reaching consequences for the individual who may be subject to this punishment and their family. The human rights implications were considered by Edelman J in *Benbrika* at [101]:

...citizenship "is the source from which ... additional rights flow, and is itself essential to protecting th[o]se rights", the statutory revocation of the citizenship of a person of the Commonwealth, where valid, results in the removal of many of the civil, political and social rights of one of the people of the Commonwealth. The revocation of citizenship, and (as was assumed to be the case here) the associated denationalisation, as a sanction for an offence is one of the harshest forms of punishment that could be imposed upon a person. One of its consequences, a potential liability to be banished, has been described, when given effect, as "tantamount to civil death". And it has been observed that, until recently, the revocation of citizenship was generally eschewed by contemporary democracies because it was considered "so fundamentally harmful [that it is] 'no longer considered an acceptable form of punishment for citizens, even heinous criminals'".

In their analysis of what was then the Australian Citizenship Amendment (Citizenship Cessation) Bill 2020, the Parliamentary Joint Committee on Human Rights identified the proposed legislation engaged and limited the rights to freedom of movement and liberty, and the rights of the child and the protection of the family. That Committee concluded that the proposed measures were not sufficiently certain, nor strictly necessary, to pursue a legitimate objective, particularly given the Government indicated it could deal adequately with those persons who are not dual citizens.<sup>4</sup> It is probable that these human rights concerns will remain,

---

<sup>3</sup> In this context, we also note the standards being set by the UN High Commissioner for Refugees in the 'Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness' which address at [104]-[105] the issue of a State seeking to deprive a person of nationality in absentia (which is what had occurred in *Alexander*). It provides that even if this is done for a national security purpose, it should "seek a court's endorsement that deprivation of nationality in absentia is strictly necessary" and that if the individual then seeks to challenge the deprivation, this should be done by fresh administrative proceedings.

<sup>4</sup> See Parliamentary Joint Committee on Human Rights, [Human Rights Scrutiny Report \(Report 1 of 20\)](#) 5 February 2020.

even if it is a judge who is exercising discretion as to whether to deprive a person of their citizenship in the manner described at [48] in *Benbrika*.

The Law Society notes that the language of national security is often used to justify an ever-expanding suite of legislation in this area, without focused and nuanced justification as to the benefit of each individual measure. Since the introduction of citizenship cessation legislation in 2015, there has been limited articulation of why it is a necessary and proportionate way of addressing national security or terrorism threats.<sup>5</sup> A range of other tools already exist in legislation, for example the expansive investigative powers of security agencies; the existence of executive control orders and preventive detention orders, passport cancellation; prosecution within the criminal law system and deradicalisation programs.

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or [sophie.bathurst@lawsociety.com.au](mailto:sophie.bathurst@lawsociety.com.au).

Yours sincerely,

A handwritten signature in black ink that reads "CBanks". The signature is written in a cursive, flowing style.

Cassandra Banks  
**President**

---

<sup>5</sup> As Associate Professor Rebecca Ananian-Welsh recently commented in an article responding to the High Court's decision in *Benbrika*: "When it comes to actually protecting security, the evidence shows that citizenship-stripping comes up short.... In a globalised world, people stripped of citizenship can still serve a pivotal role in recruitment and radicalisation, especially on the internet. Kept in Australia, as an Australian, the full weight of our vast security laws can be brought to bear on *Benbrika*". See Rebecca Ananian-Welsh, '[Is a terrorist's win in the High Court bad for national security? Not necessarily](#)', *The Conversation* (2 November 2023).