

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY
INQUIRY INTO THE AUSTRALIAN CITIZENSHIP AMENDMENT (ALLEGIANCE TO
AUSTRALIA) BILL 2015

Questions on Notice

1. Senator the Hon Katy Gallagher asked the following question at the hearing on 5 August 2015:

- a) **Senator GALLAGHER:** Indeed. I go back to some earlier questioning around the potential expansion of the current section 35, I think it is. Professor George Williams appeared yesterday. In his evidence he supported the expansion of the current Citizenship Act to take into consideration current and emerging threats around international terrorism. Is that something the Commission could come back to us on? I think you both said in your evidence today that you have not really looked at the current provisions. You focused your submission on the bill—as you were asked to, I might say. Is that something you could provide further advice on, to the committee, about the appropriateness of looking genuinely at how you deal with the fact that people engaging in terrorist behaviour might not be—and most likely are not going to be—fighting for a nation at war with Australia but might reflect the current activity in the international space?

The answer to the honourable Senator's question is:

- a) As the honourable Senator notes, the Commission did not, in its written submission to the Committee, address the question of whether the current section 35 of the *Australian Citizenship Act 2007* is consistent with Australia's international human rights obligations.
- b) The Commission considers that the automatic nature of the loss of citizenship under the current s 35 may not be entirely consistent with international human rights norms. That automatic mechanism does not allow for individual circumstances to be taken into account, and does not allow for merits review. By way of example, on its face the provision could apply to a person forcibly conscripted to serve in the armed forces of another nation in a non-combat role. The circumstances in which human rights such as the right to enter one's own country may legitimately be limited are discussed in the Commission's written submission at paragraphs [27]-[28].
- c) The Commission considers that the proposed mechanisms in the Bill to strip citizenship from Australians who engage in terrorist activity is more likely to limit the human rights of Australians in an arbitrary way than the current s 35 for a number of reasons, including:
- a. There is likely to be significantly less doubt about whether a person has served in the armed forces of another country than there is about whether they have fought for or been in the service of a terrorist group (proposed s 35(1)(b)(ii)), or whether they have engaged in conduct of the type specified in proposed s 33AA (in circumstances where they have not been convicted of that conduct).

- b. The content of the phrase 'is in the service of... a terrorist organisation' (in proposed s 35(1)(b)(ii)) is less clear than that of 'serves in the armed forces of a country at war with Australia'. As other submitters to the Committee have pointed out, the new provision in relation to terrorist organisations might capture the conduct of humanitarian organisations providing medical relief in conflict zones. That is particularly so in light of the discussion of the phrase in the Explanatory Memorandum (eg at paragraph [56]).
 - c. The connection between serving in the armed forces of country at war with Australia and a person's allegiance to Australia is clear. The connection between being in the service of a terrorist organisation and a person's allegiance to Australia is less clear – while there may be a connection in some cases, there does not appear to be a necessary connection.
 - d. Under the *Australian Citizenship Act* as it currently stands, a person who loses citizenship under s 35 *may* be eligible at a later date to become an Australian citizen again. If the Bill were to pass, that would cease to be the case (see proposed s 36A).
- d) The Commission recognises the vital importance of taking appropriate steps to protect the human rights of Australian citizens against the activities of those engaged in terrorism. To the extent it is necessary to revoke the citizenship of persons engaged in terrorism to achieve this objective, the Commission submits that such revocation must not be arbitrary, and must be lawful, necessary and proportionate. The Commission is not in a position to formulate a model of citizenship revocation. However, the recommendations contained in paragraph [11] of the Commission's written submission are intended to offer guidance about how any impermissible infringement of human rights may be minimized.

2. Senator the Hon David Bushby and the Hon Mark Dreyfus MP asked the following question at the hearing on 5 August 2015:

- a) **Senator BUSHBY:** Just while I have the floor, don't the Federal Court and the High Court have original jurisdiction when it comes to considering a declaration, made by the minister, in this regard?

Prof. Triggs: They may have original jurisdiction but it is the extent of that power that is the concern. In other words, if there is no right to a merits review of the minister's exercise of discretion to exempt someone from the provision it is merely a power to look at whether the minister has followed the terms of the legislation. That is going to be almost impossible to overturn.

Senator BUSHBY: As I understand it, a person who has been affected by this has the power to seek a declaration as to whether they have lost their citizenship. That is a self-executing thing based on facts, not a minister's discretion, so the facts would be examined by the court.

Prof. Triggs: I think I would like to go back and see whether that is how that declaration could work. If so, it would give the High Court the jurisdiction to examine how this has occurred. As far as I am aware, we have not done any work on the question of the power of the High Court. We would be very happy to come back to you in a few days, if we may, with a note on that.

Senator BUSHBY: I would appreciate that. Thank you.

Mr DREYFUS: That would be of assistance because one of the submitters yesterday and some of the written submissions have suggested the same thing—that the declaration that Senator Bushby has just referred to would probably not be open because it would be seeking an advisory opinion of the court. So if the Human Rights Commission is in a position to assist this committee with a bit more consideration of the point that led off from me asking about the limited avenues to challenge the loss of citizenship, that would be of assistance.

The answer to the question of the honourable Senator and the honourable Member is:

- a) The Commission is not in a position to provide comprehensive legal advice to the Committee about the original jurisdiction of the High Court. However we offer the following remarks.
- b) The Commission understands the reference to a 'declaration' in the passage quoted above to be a reference to a notice issued by the Minister under proposed ss 33AA(6), 35(5) or 35A(5).
- c) The Commission has reviewed the draft transcript of the Committee hearings on 4 and 5 August 2015, and understands that the reference made by Mr Dreyfus to earlier testimony is a reference to evidence given on behalf of the Law Council of Australia by Mr Geoffrey Kennett SC.
- d) Under s 75(v) of the Australian Constitution, the High Court has jurisdiction 'in all matters... in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. The Federal Court has an equivalent jurisdiction under s 39B(1) of the *Judiciary Act 1903*. In order for these jurisdictions to be engaged, it is necessary for there to be a 'matter'. In general, for there to be a 'matter' for the purposes of s 75(v), there must be a party claiming that he or she 'has a legal remedy in the court in which the proceedings are commenced to enforce [a] right, duty or liability...' (*Abebe v Commonwealth* (1999) 197 CLR 510, 528 (Gleeson CJ and McHugh J)).
- e) A notice issued by the Minister under proposed ss 33AA(6), 35(5) or 35A(5) would have no legal effect. That is, it would not of itself alter any legal rights or obligations. It would not lead to the loss of citizenship, or record a decision made by the Minister (or any other administrative official) to cancel citizenship. It would not of itself require any recipient of that notice to do or refrain from doing anything.
- f) For this reason, the Commission respectfully agrees with the view expressed by Mr Kennett SC on behalf of the Law Council of Australia that there is some doubt about whether judicial review could be sought under s 75(v) of the Constitution, or s 39B of the *Judiciary Act*, in relation to the issue of a notice by the Minister under proposed ss 33AA(6), 35(5) or 35A(5).
- g) A further practical problem in bringing judicial review proceedings against the decision of the Minister to issue a notice is that the Minister would not be required to issue a notice to a person whose citizenship has been lost. The person might not become aware of the fact that the notice had been issued and therefore not be in a position to challenge it.

- h) Following the issue of a notice by the Minister, it is likely that further administrative actions would be taken by the executive. For example, these might include a decision to remove a person from the electoral roll or to cancel their passport. Decisions such as these would directly affect the legal rights and obligations of an affected person, and it is likely that judicial review could be sought in relation to these subsequent decisions. However that might involve an affected person being unable to seek any form of relief until after adverse executive action had been taken against them.
- i) As the Commission noted during the hearing on 5 August 2015, the potential availability of judicial review will not resolve all of the human rights concerns posed by the Bill. Judicial review would allow the legality but not the merits of a decision to be reviewed. It would not allow the particular circumstances of affected individuals to be taken into account. In addition, the denial of natural justice, and the non-applicability of s 39 of the *Australian Security Intelligence Organisation Act 1979*, would limit the ability of an affected person to challenge any finding by an administrative decision maker that their citizenship had been lost.

3. The Hon Mark Dreyfus MP asked the following question at the hearing on 10 August 2015:

- a) In what manner may the loss of Australian citizenship change the manner in which intelligence organisations such as ASIS and the ASD may undertake activities with respect to a person?

The answer to the honourable Member's question is:

- a) The activities of a number of Australian intelligence agencies, including ASIS and the ASD, are regulated by the *Intelligence Services Act 2001* (ISA).
- b) The ISA contains a number of provisions which are designed to offer increased protections for persons who are Australian citizens or permanent residents of Australia, compared with persons who are not. These include:
 - a. ASIS, the AGO and the ASD must (subject to special provisions dealing with emergency situations) seek Ministerial approval before they undertake activities which have or include the specific purpose of producing intelligence on Australian citizens or permanent residents.
 - b. ASIS must seek Ministerial approval before undertaking activities in the course of providing assistance to the Defence Force in support of military operations that are likely to have a direct effect on Australian citizens or permanent residents.
 - c. ASIS must seek Ministerial approval before undertaking other activities they are directed to undertake, if those activities are likely to have a direct effect on an Australian citizen or permanent resident.
 - d. Relevant Ministers must issue directions regulating applications for these authorisations. Ministers must not authorise activities affecting Australian citizens or permanent residents unless certain criteria are met. These criteria include that the relevant Minister be satisfied that the relevant activity is necessary, that arrangements are in place to

ensure that nothing will be done under an authorisation that is not necessary, and that satisfactory arrangements are in place to ensure that activities under an authorisation are reasonable. (There are certain provisions which alter these requirements in emergency situations.) These provisions are contained in ss 8-9C of the ISA.

- e. ASIS may undertake certain activities in relation to Australian citizens or permanent residents in support of ASIO; however there are limitations on this power: in general ASIS must be authorised in writing to conduct these activities; ASIS may not undertake activities for which ASIO would require a warrant; ASIS must not communicate intelligence it gathers without consulting ASIO; and ASIS must report to its responsible Minister about any such activities (see ISA, ss 13B-13G).
- f. The Ministers responsible for ASIS, AGO and ASD are required to make written rules regulating the communication and retention by those agencies of intelligence information concerning Australian citizens and permanent residents. These agencies must not communicate intelligence information concerning Australian citizens and permanent residents except in accordance with these rules (see ISA, s 15).
- g. This Committee (that is, the Parliamentary Joint Committee on Intelligence and Security) is given functions under s 29 of the ISA, including:
 - i. reviewing the administration and expenditure of ASIO, ASIS, AGO, DIO, ASD and ONA; and
 - ii. reviewing any matter in relation to ASIO, ASIS, AGO, DIO, ASD or ONA referred to the Committee by the responsible Minister or by a resolution of either House of the Parliament;
 - iii. monitoring and reviewing the performance by the AFP of its functions under Part 5.3 of the *Criminal Code* (part 5.3 of the Criminal Code deals with 'terrorism');

However, the Committee's functions expressly **do not** include 'reviewing an aspect of the activities of ASIO, ASIS, AGO, DIO, ASD or ONA that does not affect an Australian person' (ie an Australian citizen or permanent resident): ISA, s 29(3)(e).

- c) In the event an Australian citizen who was ordinarily resident outside Australia had their citizenship revoked, the protections and restrictions outlined above would no longer apply to them or to intelligence information concerning them.
- d) Further, as noted in the Commission's written submission, an Australian whose citizenship was revoked while within Australia would be automatically granted a visa; however it is likely that visa would be subject to cancellation (see the Commission's submission, paragraph [25]). In that event they would become an unlawful non-citizen: *Migration Act 1958* ss 13, 14); and consequently cease to be a permanent resident for the purposes of the ISA (see ISA s 3 and *Australian Security Intelligence Organisation Act 1979* s 4). Again, in that circumstance, the protections and restrictions under the ISA referred to above would no longer apply to them.

- e) These are potentially serious consequences. As noted in the Commission's written submission, they are given by way of example of the potential consequences the Bill may have that are not apparent on the face of the Bill. The Commission is not in a position to advise of all the potential consequences that may flow from a person's loss of Australian citizenship but they are likely to be wide-ranging.