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The Chair
The Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra

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Submission
Australian Citizenship Amendment (Allegiance to Australia) Bill

Dear Chair,

I am pleased to make this submission to the inquiry by the Parliamentary Joint Committee on Intelligence and Security into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 ("The Bill").

I address three questions regarding the Bill:

1. Is the Bill constitutionally sound?
2. Does the Bill raise concerns of a non-constitutional nature?
3. Should citizenship revocation for certain criminal convictions apply retrospectively?

1 Is the Bill constitutionally sound?

1.1 Background

Australians were British subjects until 1949; thereafter they were simultaneously British subjects and Australian citizens until 1987; from that year, they have been exclusively Australian citizens.

The status of British subject rested upon an imputed relationship of allegiance to the sovereign, with protection offered in return. This relationship has continued to characterise the status of Australian citizen.

The acquisition of British nationality by birth was governed by the common law until the passage of the British Nationality and Status of Aliens Act (1914).

Australia followed the provisions of the British Act of 1914 and adopted them in the first Commonwealth Nationality Act in 1920.

The operation of the Commonwealth Constitution made no difference to the legal landscape governing the legal membership status in Australia.

The Constitution does not define Australian citizenship, or make any direct reference to powers over citizenship law. The "Naturalization and aliens" power, section 51 (xix), has always extended to laws governing the acquisition and loss of Australian citizenship.

This history indicates that:

- Australian nationality has not always been governed by legislation. However, from the early years of the Commonwealth, Australian citizenship has been a matter for legislation.
- Citizenship has always been defined by a relationship of allegiance and protection.
- The Constitution, on its face, does not define citizenship or expressly limit the Parliament's power with respect to citizenship law.

1.2 The scope of legislative power

Over the years since 1920, there have been many versions of Australian nationality or citizenship legislation. There have also been many challenges in the High Court to the application of citizenship law to individual persons, and at least one major challenge to the constitutional validity of the current citizenship law (*Singh v Cth* (2004)). However, the High Court has consistently confirmed that citizenship in Australia is a matter for legislation, and its acquisition or loss follow from what the legislation determines.

At least one Justice of the High Court, Justice McHugh, has hinted that the powers of the Commonwealth Parliament to define citizenship as it pleases might be subject to some implied constitutional limitations (*Hwang v Cth* (2005)). This view, however, has not been subject to judicial determination.

The High Court has held that Australian citizens have a right to enter or return to Australia. This right was confirmed in *Air Caledonie International v Cth* (1988), where the Court unanimously

stated that "the right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence of 'clearance' from the Executive."

The right to return is inherent to citizenship. It is not a contingent or conditional right (such as the right to vote is). Legislation that purported to deprive citizens of the right to return and reside in Australia would likely be held unconstitutional.

The Commonwealth parliament is otherwise limited in its powers over citizenship law by the general limitations on legislative power found in the Constitution.

1.3 The separation of powers

One of the most important limitations on legislative power lies in the Constitution's separation of powers. Section 71 of the Constitution provides that "the judicial power of the Commonwealth" is exclusively to be exercised by Federal Courts, including the High Court, and courts invested with federal jurisdiction.

This provision means that the Executive cannot exercise judicial power. If citizenship legislation purported to empower a Minister to determine guilt as a condition for the revocation of a person's citizenship that legislation would not be valid.

It is clear that, in framing the Bill, an attempt has been made to avoid conferring judicial power on the relevant Minister.

This is most apparent in section 33AA, which lists conduct that is said to give rise automatically to loss of citizenship, described in the Bill as "renunciation by conduct". The provision, it appears, is intended to be self-executing. It appears to have been designed in this way to avoid the Minister's determination that a person has engaged in certain conduct for which revocation of citizenship is the consequence, a determination that would amount to an unconstitutional exercise of judicial power.

The thinking behind this provision appears to be to respect the separation of powers.

The section, however, raises multiple legal problems.

1.4 Can the law be self-executing?

The idea that a provision of an Act, attaching consequences to certain conduct, may be self-executing is problematic.

It should be noted, first, that certain comparable provisions have been found in Australian citizenship legislation in the past and have not been subject to legal challenge.

These included a section of the Commonwealth Nationality Act of 1920 that provided for the automatic loss of the citizenship of any Australian woman upon her marriage to a foreign man. That provision (which operated until 1949) was intended to be self-executing. However, unlike with respect to section 33AA of the Bill, its application applied in principle to conduct that was readily proven without the need for judicial determination; namely, the fact of marriage, for which a legal certificate was available.

In practice, however, problems of legal proof arose even regarding such apparently incontestable conduct: for example, where the husband's nationality was uncertain, or where conflicts of laws arose over the recognition of a valid marriage.

- Uncertainties about whether conduct comes under the "renunciation by conduct" provisions in section 33AA of the Bill will inevitably arise.
- Even with respect to conduct that appears to give rise to "self-executing" consequences, legal determinations will still need to be made.

The specific forms of conduct listed in section 33AA are described by reference to particular provisions of the Commonwealth Criminal Code. It appears that this reference is intended to be definitional, "borrowing" the definitions of conduct found in the Criminal Code.

However, it is implausible that the conduct in section 33AA which is defined by reference to particular offences in the Commonwealth Code, attracting very serious penalties (but also subject to defences), can be treated as distinct from the relevant offences in the Code.

For example, if "engaging in international terrorist activities using explosive or lethal devices" (Division 72, Subdivision A, of the Criminal Code) is an offence, it is impossible to imagine that such conduct could be separated from the offence, which section 33AA(2)(a) of the Bill purports to do in making a distinction between the definition of conduct and the same conduct that amounts (in the Code) to an offence.

If so, a determination that such conduct has occurred must be made by a court of law. It cannot be made by no-one. It cannot be made by Executive decision.

- This provision is highly troubling from a constitutional law perspective. It appears impossible to apply, in its own terms (that is, making reference to the offences in the Commonwealth Code), without a judicial determination of criminal guilt.
- A judicial determination cannot be made in the absence of a trial, incorporating the presumption of innocence, the opportunity to present a defence, and the right to apply for appeal.
- Alternatively, if the reference in section 33AA to provisions of the Commonwealth Code is merely definitional, the effect will be to remove the defences, as well as the need for

intention to be demonstrated, that apply to the Code offences, and that protect a suspect from punishment for unproven conduct.

An alternative construction to section 33AA is that its application will target conduct committed outside Australia, but beyond the reach of section 35A of the Act, which provides for revocation of citizenship following conviction in an Australian court of law.

If so, Australian citizens engaging in certain defined conduct overseas will be deemed to have automatically "renounced" their citizenship and will, as a consequence, be denied re-entry to Australia.

This is the most reasonable interpretation of the purpose of section 33AA, which would otherwise be in conflict with, or superfluous to, section 35A.

- If it is the intention that section 33AA applies to overseas conduct, this needs to be made clear in the legislation.
- If the section is retained as it is currently drafted, the constitutional objection that it will invariably engage a non-judicial determination of guilt will arise. So, too, will concerns about breaching the rule of law, discussed below.

2 Does the Bill raise concerns of a non-constitutional nature?

2.1 The rule of law

Insofar as the "self-executing" conduct provisions of the Bill are intended to operate without judicial determination, the Bill raises serious concerns.

- These concerns are, in particular, about the rule of law, which requires that the law be knowable in advance, in order for individuals to be able to conduct themselves accordingly.

A person, not legally trained, cannot be expected to understand the definitions and details in the Commonwealth Criminal Code as against the conduct listed in section 33AA of the Bill, to determine, for example, if sending money to a relative in a foreign country amounts to "financing a terrorist". That person may not know how that money will be spent, or know of the relative's particular conduct.

While it might be reassuring to learn that section 103.2 of the Criminal Code requires an element of intention for the offence to be proven, the proof of intention needs to be made. It may, for example, lie in recklessness with regard to how the money is spent (section 103.2

(1)(b) of the Criminal Code). How is recklessness determined? Recklessness has a legal meaning, beyond the meaning in ordinary conversation.

In the absence of a judicial determination, is a person supposed to contemplate their own behaviour, and rule that they have, by their own conduct, "renounced" their citizenship? Or, do they wait to be notified, which may not happen (the Bill does not require notification to the person in question, but simply "to such persons as the Minister considers appropriate")? What if the notification includes errors of fact or detail about the person in question? As the Bill is currently drafted, there is no opportunity for these to be corrected.

- The law should, at a minimum, be clear to those who are trained to understand it, but even lawyers are finding the Bill (especially section 33AA) difficult to interpret. Its relationship to the provisions of the Commonwealth Code is particularly opaque.

For non-lawyers, the uncertainty surrounding this "renunciation by conduct" provision may be deeply disturbing. It may be "chilling" of otherwise lawful conduct: meaning that persons will restrict their own otherwise lawful conduct for fear that it may be construed as an element of an offence.

For example, a person may make a donation to an international charity, the purpose of which is to aid victims of conflict in other countries. How can he or she know with any certainty how this money is spent, or what the aid will lead to? The response might be simply to stop making donations, for fear that they may be used unlawfully.

- It is also of major concern that, under section 35(1) of the Bill, "in the service of, a declared terrorist organisation" includes, as explained in the Explanatory Memorandum, activities such as providing medical support.

The prospect that a medically-trained person, a member of Médecins Sans Frontières, for example, may be expected to withhold medical assistance from a severely wounded or dying person (whatever that person's character), in order to be certain of retaining their citizenship, is abhorrent.

2.2 Dual citizens

The provisions of the Bill apply only to persons who hold dual nationality. This represents a commendable attempt on the part of the government to observe the international law rule that revocation of citizenship should not apply in cases where statelessness follows.

A very large number of Australian citizens also hold another nationality.

We have only to note the statement on the Department of Foreign Affairs and Trade "Smartraveller" website http://www.smartraveller.gov.au/tips/dual-nationals.html

> "Many Australians are migrants, children of migrants or were born overseas. This means that many Australians are dual nationals or could be regarded as dual nationals by another country. You may not even know that you're a dual national … Whether you're a dual national depends on the laws of the country involved. You could be considered and treated as a national by another country even if you don't accept that nationality."

Given the vast and uncertain scope of the forms of conduct identified in the Bill as giving rise to loss of Australian citizenship for dual nationals, the fact that a person holding a second nationality may not even know of this, creates further profound uncertainties.

The fact that the provisions of the Bill apply only to dual nationals also has the potential to create a "two-class" system of law in Australia, since the consequences of prescribed conduct for dual nationals are different from the consequences of the same conduct performed by sole-nationals.

The Explanatory Memorandum to the Bill explains that citizenship is a "common bond" and all citizens "owe their loyalty to Australia and its people". It goes on to say: "Where a person is no longer loyal to Australia and its people, and engages in acts that harm [or intend to harm] Australians or Australian interests … they have severed that bond and repudiated their allegiance to Australia."

This is incorrect with respect to the provisions of the Bill. Dual nationals who engage in certain conduct are held to have repudiated their allegiance to Australia. Sole nationals who engage in the same conduct are not.

It might be thought that the law applies differentially in this manner because dual nationals have engaged in conduct that expresses loyalty to their other country contrary to Australia's interests; that is to say, that a choice of hostile allegiance has actively been made. However, the citizenship revocation provisions of the Bill apply to persons who hold the nationality of any other country and who engage in proscribed conduct in another country.

For example, a dual Australian-Swiss national fighting with Islamic State in Syria could not be said to have sided with the country of his or her non-Australian citizenship against Australia. This diminishes the suggestion that revocation of Australian citizenship is a response to an active choice between Australia and an alternative sovereign.

- This distinction between dual national and sole national with respect to the consequences of certain conduct is troubling, as citizenship equality is an important element in a country' social cohesion.
- It is also troubling from the point of view of the rule of law, which requires that the law should apply equally to all.

3 Should citizenship revocation for certain criminal convictions apply retrospectively?

Retrospective laws are not unconstitutional in Australia (*Polyukhovich v Cth* (1999)). They are, however, generally contrary to the rule of law, in particular with respect to criminal laws.

A key rule of law principle is *prospectivity*: the law should be knowable in advance, so that persons can shape their conduct accordingly, and in the knowledge of the penalties for failing to do so.

Section 35A of the Bill proposes revocation of citizenship following conviction for certain terrorist offences, where conviction occurs after the Bill becomes law. The conduct may have occurred beforehand; it is the timing of the conviction that counts.

There seems little to gain from making the operation of section 35A retrospective. Past terrorist conduct may be prosecuted under the Bill as it stands. What is at issue is whether the section should apply in cases where the conviction has occurred prior to the passage of the Bill.

In Australia, persons who have already been convicted for terrorism offences are few in number (26 convictions). Some may be sole nationals; if so, they will not lose their Australian citizenship under the law, even if it is made retrospective. For this reason, the numbers to which the provision would retrospectively apply may be even smaller than the current number of convictions.

The advantages of applying citizenship revocation to a very small number of extra persons if retrospectivity were adopted would not be proportionate to the disadvantages that would be likely to follow.

3.1 Retrospectivity and non-terrorist acts

These disadvantages would include a dramatic increase in uncertainty about the status and consequences of past conduct, not itself defined, or defined at the time, as terrorism-related. Uncertainty already lies in the application of section 35A, since it applies to conduct in the past, as well as ongoing conduct, so long as the conviction occurs after the passage of the Bill. But such uncertainty would increase with retrospectivity.

For example, section 35A(3)(b) of the Bill as attached to section 29 of the Crimes Act (1914) makes it an offence for a person to intentionally damage any property belonging to the Commonwealth.

To give one hypothetical example: a person holding dual nationality who, in his or her youth in the 1960s took part in a demonstration protesting against Australia's involvement in the Vietnam war, and who was convicted at that time of, let's say, breaking a window in a Commonwealth office during the demonstration, might find him or herself subject to citizenship revocation in 2015, decades after becoming a mature, law-abiding citizen.

Section 29 of the Crimes Act, it should be noted, is not associated with the definition of terrorism or a terrorist act.

So, if the operation of section 35A is made retrospective, a person who holds dual nationality and has been convicted in the past of an offence unrelated to terrorism, but who has since that time behaved in exemplary fashion, may be deprived of Australian citizenship, and subject to deportation to another country, the citizenship of which they hold, but with which they have no other connection.

A second person, convicted of the same offence, but a sole national, will not face the same consequences.

- The reach of section 35A is already highly troubling, given that the offences for which revocation of citizenship applies are not confined to terrorism offences.
- Retrospectivity would be less troubling if the relevant offences were confined to terrorism offences, and were subject to the definition of terrorism in the Criminal Code.

Summary

- The Citizenship Amendment (Allegiance to Australia) Bill does not appear to be unconstitutional on its face, but it may be unconstitutional in its operation for breach of the separation of powers.

- The Bill is deeply troubling with regard to principles of the rule of law, in particular in its failure to make the relevant law knowable.

- The application of the provisions of the Bill exclusively to dual nationals follows from Australia's international law obligations. However, this creates injustice or the perception of injustice, in its differential non-application to sole nationals.

- The uncertainties in the Bill regarding the way in which conduct giving rise to revocation of citizenship is to be determined may have a chilling effect on otherwise lawful conduct.

- Retrospective operation of section 35A (or any provision of the Bill) is likely to have a negative social and individual impact.

- The application of citizenship revocation to offences that are not terrorism offences is extremely troubling.

Conclusion

The revocation of citizenship is a drastic act, having profound consequences, both existential and practical in the life of person. It makes a person vulnerable to deportation to a country that may be entirely unknown, or that may be in a state of deprivation or conflict. The person may lose their property, their livelihood, their security, even their life. Additionally, the person's family may be profoundly affected; innocent family members may find themselves uprooted to an unfamiliar country, or permanently separated from that family member, or deprived of essential financial and other support.

None of this is to suggest that persons who commit terrorist offences should not be punished to the full extent of the law. Nor is it to suggest that there are no circumstances in which such persons should lose their Australian citizenship. Whether revocation of citizenship is an effective way to respond to terrorism is another question. But, there can be no doubt that acts of terrorism merit exclusion from the Australian community in one way or another. Imprisonment is one way. Revocation of citizenship is another.

However, given the severity of citizenship revocation, it should be done in ways that are respectful of the Constitution and the rule of law, legally clear, recognizably just, judicially reviewable, and where the consequences both for innocent individuals and society as a whole are not damaging.

The Bill is deeply troubling in the light of these principles.

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