



THE LAW SOCIETY
OF NEW SOUTH WALES

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14 July 2015

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email: pjicis@aph.gov.au

Dear Committee Secretary,

The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee") which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee thanks the Parliamentary Joint Committee on Intelligence and Security for the opportunity to comment on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the "Bill"). Given the short timeframe available for review and despite the complexity of the issues, the Committee provides brief comments.

1. Three new ways a person might cease to be an Australian citizen

In the Committee's analysis, the Bill introduces three new ways in which a person, who is a national or citizen of a country other than Australia, can cease to be an Australian citizen. They are:

1) Renunciation by conduct

Proposed s 33AA provides that a person who is also a national or citizen of another country renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in certain conduct, including:

- Engaging in international terrorist activities using explosive or lethal devices;
- Engaging in a terrorist act;
- Providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
- Directing the activities of a terrorist organisation;
- Recruiting for a terrorist organisation;
- Financing terrorism;
- Financing terrorists;
- Engaging in foreign incursions and recruitment.

New subsection 33AA(5) provides that the renunciation takes effect and the Australian citizenship of the person ceases immediately upon the person engaging in the conduct. There is no requirement for a conviction, and it is not clear what standard of proof for any such allegation is required.

2) Service outside Australia

Proposed s 35 provides that a person who is also a national or citizen of another country ceases to be an Australian citizen if the person serves in the armed forces of a country other than Australia or fights for, or is in the service of, a declared terrorist organisation and the service or the fighting occurs outside Australia. The Committee notes that what amounts to "service" is not defined.

3) Conviction for terrorism offences and certain other offences

Proposed s 35A provides that a person, who is a national or citizen of another country, ceases to be an Australian citizen if the person is convicted of certain offences under the *Criminal Code Act 1995* or the *Crimes Act 1914*.

2. Convention on the Reduction of Statelessness

The *Convention on the Reduction of Statelessness*, to which Australia has acceded¹, allows for loss of nationality where the Contracting State has, at the time of signature, ratification or accession, specified its retention of such a right to deny nationality, where the person, inconsistently with his or her duty of loyalty to the Contracting State, has:

- conducted him or herself in a manner seriously prejudicial to the vital interests of the State (Article 8(3)(a)(ii)); or
- taken an oath, or made a formal declaration of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State (Article 8(3)(b)).

The Committee notes that Australia had not made the required reservations or declarations with respect to the Convention at the time of accession.

With respect to deprivation of citizenship the Committee notes that Article 8(4) provides:

A Contracting State shall not exercise a power of deprivation permitted by paragraph 2 or 3 of this Article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

3. Obligations under the International Covenant on Civil and Political Rights

The Committee's view is that the Bill is likely to breach a number of Australia's international human rights obligations under the *International Covenant on Civil and Political Rights* ("ICCPR"), a treaty which a Coalition Government ratified in 1980. By doing so, it adopted for Australia an obligation to implement its terms into our domestic laws. The Committee identifies the following problems arising from provisions of that treaty:

(a) Article 12(4) of the ICCPR is as follows:

No one shall be arbitrarily deprived of the right to enter his own country

¹ Accession has the same legal effect as ratification: Articles 2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969.

It is submitted that in relation to the proposed ss 33AA and 35, reliance on the following matters without regard to individual circumstances is likely to result in the arbitrary deprivation of the right to enter one's country within the meaning of Article 12(4):

- Alleged conduct rather than convictions,
- The lack of a Court hearing on the merits and
- The nature of the penalty, which is effectively banishment from the country.

The same objections could be taken to the proposed s 35A, although to a lesser extent. The fact that there is at least a Court process may lessen the possibility of the action being "arbitrary", but the possibility of trivial conduct (such as a threat of damage to property) or admirable conduct (such as providing medical assistance) grounding these offences, together with the same mandatory penalty applying, means that the objections in respect of arbitrariness remain.

(b) Article 14(7) of the ICCPR is relevantly as follows:

No one shall be liable to be...punished again for an offence for which he has already been finally... acquitted in accordance with the law and penal procedure of each country.

The possibility exists under this Bill that a person could be acquitted of a criminal offence, but the Minister could still, on the balance of probabilities, come to the conclusion that the conduct concerned had occurred. Under those circumstances the citizenship could still be removed and be regarded as a "punishment" within the meaning of Article 14(7).

(c) Article 15 of the ICCPR is relevantly as follows:

Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

Under proposed s 35A citizenship can be removed based on commission of one or more of a long list of criminal convictions. The provision also applies to conduct occurring before its commencement. As such, it is likely to be regarded as a "heavier penalty" than that "applicable when the criminal offence was committed" within the meaning of Article 15.

4. The Committee's observations about the power to legislate on citizenship

The Committee notes that currently, Parliament has the power to "create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode."²

The Committee further notes that while Parliament is authorised to "define the conditions on which membership of the Australian community – that is to say, citizenship – depends", that power is not unlimited.³

5. The Committee's submissions

The Committee does not support the introduction of proposed s 33AA. Proposed s 33AA seeks to deny a dual citizen of their Australian citizenship for criminal conduct. This revocation would be automatic and without the requirement that guilt be determined by a

² Re Minister for Immigration and Multicultural Affairs; Ex parte Te (2002) 212 CLR 162 per Gleeson CJ at [173]

³ *Hwang v Commonwealth* (2005) ALR 83

court. That is to say, the new provision would in effect deny citizenship to a person on the basis of no more than an allegation of criminal conduct that has yet to be adequately tested. This approach is inconsistent with the presumption of innocence and the *Convention on the Reduction of Statelessness*. That Convention requires that deprivation of citizenship only occur in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

The Committee considers that any proposed amendment to the Act which seeks to deprive a person of their citizenship on the basis of criminal conduct should only do so following a determination of guilt by a court and only once the person concerned has had a fair opportunity to be heard against the reasons for revocation.

The Committee further considers that proposed s 35 should only operate to deny a person of their Australian citizenship where that person has conducted him or herself in a manner seriously prejudicial to the vital interests of Australia or has taken an oath, or made a formal declaration, of allegiance to another State (or terrorist organisation), or given definite evidence of his determination to repudiate his allegiance to Australia. To this end, the Committee considers that the term "service" requires clarification.

In respect of proposed s 35A, the Committee queries whether some of the named offences would be sufficient to demonstrate a person's determination to repudiate his or her allegiance to Australia.

The Committee queries also whether Parliament has the power to legislate to deny a child of citizenship because of the conduct of a parent.⁴ As noted above, the power to legislate is not unlimited. It may well be the case that a child would not cease to be a "member of the Australia community" simply because of the conduct of a third party (albeit a parent).

Thank you for the opportunity to provide comments. Any questions may be directed to Vicky Kuek, policy lawyer for the Committee, on _____ or _____

Yours sincerely,

John F Eades
President

⁴ See notes to proposed ss 33AA, 35 and 35A referring to s 36 of the *Australian Citizenship Act 2007*.