

Our ref:

22 July 2015

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

Dear Committee Secretary

Thank you for the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security's inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015.

I acknowledge that the Committee has been asked to consider the Bill as a whole and also whether proposed s35A should apply retrospectively.

I do not wish to make any comments about the proposal for the Bill to operate retrospectively. However, I have concerns about the Bill as currently drafted that I would like to bring to the Committee's attention.

Scheme established by the Bill

The Explanatory Memorandum to the Bill explains that the purpose of the Bill is to provide explicit powers for the cessation of Australian citizenship where dual citizens engage in terrorism-related conduct.

The Bill introduces three new ways in which an Australian citizen who also enjoys citizenship in another country can cease to be an Australian citizen:

- **Renunciation by conduct** – a dual citizen is taken to have renounced their Australian citizenship if they engage in terrorism-related conduct (s33AA). The Bill envisages the cessation of citizenship to occur immediately upon the person engaging in the relevant conduct by operation of law.
- **Service outside Australia in a declared terrorist organisation** – a dual citizen ceases to be an Australian citizen when he or she fights for, or is in the service of, a declared terrorist organisation outside of Australia (s35(1)).
- **Conviction for terrorism offences** – a dual citizen ceases to be an Australian citizen at the time he or she is convicted of any of a number of terrorism related offences (s35A).

In each instance, the Bill purports to make the cessation of citizenship self-executing. That is, it is intended that a dual citizen's Australian citizenship is lost by operation of law when the person engages in the relevant conduct or is convicted of the relevant offence.

The Bill does not envisage a Ministerial decision in relation to the loss of citizenship, but only a mechanism for the Minister to notify the individual when he or she becomes aware that the individual's conduct or conviction has resulted in the loss of citizenship.

The Minister may rescind a notice or exempt a person from the effect of the new provisions, but is not obliged to afford procedural fairness in relation to the exercise of those powers.

Section 39 of the *Australian Security Intelligence Organisation Act 1979* does not apply to the new provisions meaning that the prohibition on agencies acting on information provided by ASIO otherwise than as part of a formal security assessment is removed.

Concerns about the Bill

I have two concerns about the Bill that relate particularly to the responsibilities of my office that I wish to raise:

- The legal fiction that the cessation of citizenship occurs by operation of the statute conceals administrative decision making that must logically occur for the Bill to operate.
- The practical effects of the loss of Australian citizenship on individuals and the immigration detention system do not appear to have been considered.

Loss of citizenship 'by operation of law'

While it may be true on the scheme of the Bill that the Minister does not decide whether a person has engaged in the relevant conduct, there must be a decision by someone to that effect. That is, in order for the Minister to 'become aware' that a person has engaged in particular conduct or been subject to a relevant conviction someone, presumably an official, must form the view that the relevant conduct has been engaged in or a relevant conviction recorded.

It is not clear on the face of the Bill, but it is reasonable to assume, that the source of advice to the Minister to enable him or her to 'become aware' of conduct will be his or her department, law enforcement and intelligence agencies.

For an official to come to a view that a person has been convicted of a particular offence is relatively straight forward and capable of external verification. However, to come to a view that a person has engaged in a particular activity will require an official to make assessments of facts and law.

The Bill does not indicate to what standard (for example, reasonable suspicion; balance of probabilities; or beyond reasonable doubt) the official must be satisfied in order to provide advice to the Minister. Nor does the Bill indicate by what means the advice is to be provided to the Minister.

I also note that, if the source of advice is the Minister's own department or a Commonwealth law enforcement agency, the matters of administration associated with the provision of that advice fall within the jurisdiction of my office. If the source of advice is an intelligence agency, the relevant administration will fall within the jurisdiction of the Inspector-General of

Intelligence and Security. It is reasonable to assume that complaints about these matters will be made to my office and the Inspector-General of Security.

It is a question for the Parliament whether, given the significant consequences for the individual that flow from these administrative actions, it is appropriate for the actions to be the responsibility of officials. If Parliament decides that it is appropriate, it would be desirable for the Bill to more clearly acknowledge the reality that administrative actions will underlie the operation of the new provisions, and more clearly spell out the standards by which officials should undertake them.

Practical effects on the immigration detention network

It appears to be assumed that a dual citizen who loses their Australian citizenship will have immediate access to travel documentation associated with their other citizenship and will readily travel to that country either from Australia or elsewhere. Experience from the broader immigration detention context would suggest that this is unlikely to be so in all cases.

An individual physically located in Australia who loses their Australian citizenship would be entitled to an ex-citizen visa under s35 of the *Migration Act 1958*. It is reasonable to expect, however, that a person who loses their Australian citizenship because of terrorist related activities would be liable to have their visa cancelled under the character provisions of the Migration Act. If that were the case, the Migration Act would require that person be placed in immigration detention pending voluntary departure or removal to the person's other country of citizenship. If the individual or the other country fail to cooperate with efforts to arrange appropriate travel documentation and removal, it is highly likely the individual will spend an extended (and possibly indefinite) period in immigration detention in Australia.

The effects of this on the individual, other detainees and the immigration detention network do not appear to have been considered. These are significant issues that will require further work if the policy intention expressed in the Bill is to be effectively implemented.

I would be happy to expand on these issues if that would assist the Committee.

Yours sincerely

Colin Neave
Commonwealth Ombudsman

