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Mr Dan Tehan MP
Chair
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA, ACT, 2600

Dear Mr Tehan,

Inquiry into the *Australian Citizenship Amendment (Allegiance to Australia) Bill* 2015 (Cth)

Please find below my observations upon aspects of the *Australian Citizenship Amendment (Allegiance to Australia) Bill* 2015 (Cth).

Proposed s 33AA – Lack of clarity regarding intention and knowledge

Proposed s 33AA(2) provides that a person who is also a national or citizen of a foreign country renounces his or her Australian citizenship if the person engages in various forms of conduct such as a 'terrorist act' or 'providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act' or directing the activities of a 'terrorist organisation'. Proposed subsection 33AA(3) provides that words and expressions used in subsection (2) have the same meaning as in certain provisions of the *Criminal Code.* This is a sensible device to connect terminology used in the proposed law with existing terminology in the *Criminal Code.*

I note, however, that the sections of the *Criminal Code* that define critical terms, such as 'terrorist act' (s 100.1) and 'terrorist organisation' (s 102.1) are not expressly picked up by proposed s 33AA(3). Instead, proposed s 33AA(3) refers to certain sections of the *Criminal Code* (eg ss 101.1 and 102.2) that deal with equivalent offences to those actions specified in proposed s 33AA(2). While these provisions employ the terms 'terrorist act' or 'terrorist organisation', they do not define them. Instead, one must then look to the relevant definition sections.

This approach has presumably been taken to ensure that all aspects of meaning of these terms, wherever found in provisions of the *Criminal Code,* are picked up. What is not clear, however, is whether this is intended to go further, picking up qualifications imposed upon equivalent offences in the *Criminal Code*.

For example, proposed s 33AA(2)(c) provides that a person who also is a citizen of a foreign country renounces his or her Australian citizenship if he or she

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engages in the conduct of 'providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act'. The equivalent provision concerning preparation for a terrorist act in s 101.2 of the *Criminal Code* states that the person who provides or receives the training must know that it is connected with preparation for, engagement in or assistance in a terrorist act. In other words, no offence is committed if the person giving training (eg a person who trains pilots) is unaware that the training is being engaged in for the purpose of committing a terrorist act (eg deliberately crashing the plane into a building). Yet, this qualification is not stated in proposed s 33AA and it does not appear, on its face, to form part of the definition of the term 'terrorist act'.

Does this mean that a person 'renounces' his or her citizenship by simply doing his or her job (eg training pilots) while being completely unaware that this is training being undertaken in preparation for committing a terrorist act? This is particularly important, because unlike a criminal offence, renunciation of citizenship is automatic and there is no issue of discretion to prosecute and no determination by a court – hence there is no requirement to prove guilty intent. It would seem unlikely that the Parliament intends to strip citizenship from people, automatically and without any legal process, for acting in a completely innocent manner in doing their ordinary job. Nonetheless, on the face of proposed s 33AA, this is what it does, unless somehow s 33AA(3) picks up the qualification in the *Criminal Code* that the person must have knowledge that his or her actions amounted to training someone to undertake a terrorist act. If so, this is most unclear on the face of the Bill and needs to be clarified as a matter of urgency.

Similarly, the offence in s 102.4 of the *Criminal Code* of recruiting for a terrorist organisation requires that the person 'intentionally' recruits a person to join the organisation and that he or she 'knows the organisation is a terrorist organisation'. In contrast proposed s 33AA(2)(e) appears to provide that a person renounces his or her Australian citizenship if he or she engages in 'recruiting for a terrorist organisation', but without specifying that he or she must be doing so 'intentionally' and with knowledge that it is a terrorist organisation. Again, the issues of knowledge and intention need to be clarified.

The same issues arise in relation to financing terrorism and financing a terrorist, where ss 103.1 and 103.2 of the *Criminal Code* require intention and recklessness as to whether the funds will be used to facilitate or engage in a terrorist act, but this is not stipulated in proposed paragraphs 33AA(2)(f) or (g).

The one indication that the triggers for loss of citizenship under proposed s 33AA are intended to be qualified by all the conditions that apply in the *Criminal Code* is to be found in para 28 of the Explanatory Memorandum. It asserts that the

restrictions upon the application of offences under the *Criminal Code* to children under the age of 14 'will apply to the application of new section 33AA'. It is not clear on the face of the legislation, however, that this is so. No express application of these restrictions is made. The most one can rely upon is the statement in proposed s 33AA(3) that 'words and expressions' in s 33AA(2) have the same meaning as in certain provisions of the *Criminal Code.* It is not at all clear that this imports a restriction on the application of proposed s 33AA to minors.

If intention and knowledge are required before citizenship is 'renounced' (and it would seem to be logically difficult to 'renounce' one's citizenship if one had no idea that one's conduct had anything to do with actions inconsistent with allegiance to Australia and had any effect upon one's citizenship status) then this gives rise to difficulties with the automatic application of the termination of citizenship.

When the concept of renunciation or loss of citizenship was first formalised in Australian legislation, citizenship was automatically lost as a consequence of: a 'voluntary and formal act' of acquiring citizenship of another country (*Nationality and Citizenship Act* 1948 (Cth), s 17); making a formal declaration renouncing Australian citizenship (*Nationality and Citizenship Act* 1948 (Cth), s 18); serving in the armed forces of a country at war with Australia (*Nationality and Citizenship Act* 1948 (Cth), s 19); and residing outside of Australia for a certain period of time (*Nationality and Citizenship Act* 1948 (Cth), s 20). Each of these acts was readily proved by objective facts, usually in the possession of governments. However, when it comes to questions of personal intention and knowledge as to matters such as what any training might be used for or what money might be used for, then these would normally be matters that need to be proved before any action could be taken, and could therefore not be triggers for automatic termination of citizenship – at least not without a procedure for determining the facts.[1]

Hence the renunciation by conduct provision is not suitable in relation to actions that may be completely innocent in nature and not inconsistent with Australian allegiance, unless undertaken with the relevant knowledge and intention to achieve an end such as terrorism or support for it.

[1] It is worth noting that in the original 1948 Act, where more uncertain grounds were used for the stripping of citizenship (eg disloyalty, trading with the enemy, naturalisation by means of fraud, lack of good character and the like), the Minister had to first give the affected person notice of the grounds for making such an order and the affected person could then request that the matter be referred to a committee of inquiry headed by a judge or senior barrister, in which case the commission would determine the facts and whether such an order should be made (*Nationality and Citizenship Act* 1948 (Cth), s 21).

If, on the other hand, Parliament wants to avoid issues of intention and knowledge and does intend that innocent people will be automatically stripped of their citizenship for undertaking ordinary acts involved in employment or hobbies (eg flight trainers, gym instructors, computer science teachers, martial arts instructors, chemistry teachers, members of shooting clubs, charitable fundraisers and the like) with no knowledge or suspicion at all that they are helping someone prepare for a terrorist act or providing finance for it, then this needs to be made clear to the Parliament and the public.

Moreover, a better procedure for dealing with such a serious consequence as loss of citizenship status, would be needed. Under the Bill, loss of citizenship is automatic and will have occurred, even though the affected person may have been completely unaware that his or her act had any relationship at all with terrorism. If discovered much later, this might have significant ramifications, such as an obligation to repay years of Medicare or welfare benefits that are only available to Australian citizens, loss of a public service position or disqualification from being a Member of Parliament.

The only recourse for an affected innocent person would be to request the Minister to 'give notice' under proposed s 33AA(5) that he or she has become aware of the conduct that caused the person to cease to be an Australian citizen and a further act on the part of the Minister to 'rescind the notice' and to 'exempt the person from the effect of the section', although there is no obligation on the Minister to even consider whether to do so when requested. Would such an 'exemption' have the effect of retrospectively removing the loss of Australian citizenship? Is it appropriate that a Minister have a seemingly arbitrary power to exempt or decline to exempt a person from the application of the law?

Proposed s 35

This provision terminates the Australian citizenship of a person if he or she serves in the armed forces of a country at war with Australia. These days it is rare for countries to declare war. Australian forces may be involved in armed conflicts without any declaration of war. Section 80.1AA of Criminal Code accommodates this problem by referring to circumstances where the 'Commonwealth is at war with an enemy (whether or not the existence of a state of war has been declared)' and provides for the enemy to be specified by Proclamation as an enemy at war with the Commonwealth. It may be helpful to pick up such an approach (if it is not done elsewhere).

Proposed s 35A

Proposed s 35A provides for the cessation of citizenship upon conviction for terrorism offences and certain other offences. In this case it is necessary that there be a conviction before a court, so problems concerning intention and the like will be dealt with by a fair procedure.

The issue here, however, is about the breadth of the provisions which go well beyond the traditional notion of terrorism. While this Bill is being sold to the public on the basis that it involves removing the Australian citizenship of people who have come here from other countries and have then gone overseas to fight for terrorist organisations or commit terrorist atrocities, the reality is that it will also strip Australian citizenship from people born here who commit crimes that have nothing to do with 'terrorism' in its publicly understood meaning. Hence, an Australian-born youth who wrapped himself in an Australian flag during the Cronulla riots and urged people to use violence against the members of another racial or ethnic group with the intention that such violence would occur, could not only be convicted of an offence under s 80.2A(1) of the *Criminal Code* but would also be automatically stripped of his Australian citizenship by virtue of this Bill if he also had citizenship of another country. While it is hard to muster any sympathy at all for such a person, it is still unlikely to fall within the public perception of terrorism and what this Bill is aimed at achieving. Similarly, an Aboriginal person who intentionally damaged Commonwealth property during a political protest and was convicted under s 29 of the *Crimes Act* 1914 (Cth) would be stripped of his or her Australian citizenship if he or she also held citizenship of another country. Neither case would appear to fall within the purpose of the Bill, as set out in clause 4 of the Bill, which refers to citizens severing their common bond of citizenship and repudiating their allegiance to Australia. If, on the other hand, such crimes were regarded as falling within this purpose, it would mean that *any* criminal act could be regarded in future as a ground for the automatic loss of Australian citizenship.

Proposed s 35A(2) provides that a person ceases to be an Australian citizen at the time of conviction. It does not address what happens if that conviction is later overturned on appeal. Is it possible in the meantime for a person to be deported or otherwise affected by the loss of citizenship? Does the overturning of a conviction have the consequence that the loss of citizenship never occurred? This ought to be clarified on the face of the legislation.[2]

[2] See, eg, s 13A(2) of the *Constitution Act* 1902 (NSW) which provides that a Member of Parliament is only disqualified as a result of a criminal conviction after all appeals have been concluded or withdrawn or lapsed.

The Committee has also been asked whether proposed s 35A should apply with retrospective effect to convictions that occurred before its enactment. Given that the termination of citizenship upon conviction of an offence is a serious act akin to punishment, it should not, in my view, be applied with retrospective effect. Such action, while not necessarily being unconstitutional, would be contrary to strongly held principles concerning the application of the rule of law.

Inadequacy of preparation of the Bill and Explanatory Memorandum

It is obvious from the inconsistencies and the inadequacies of the Explanatory Memorandum and the Bill that they were prepared in great haste without proper time for careful deliberation and drafting. This is not a criticism of the relevant public servants, who were obviously acting under enormous time pressure and stress. It is, however, a criticism of the political process that this Bill was rushed into Parliament without adequate care and scrutiny. It is a consequence of making policy on the run and pursuing thought bubbles and sound bites without having first sought and received considered legal advice and without taking adequate time to work through the complexities and consequences of the proposed law. Examples of errors include the following:

- EM para 8 states that the 'aim of the Bill is the protection of the Australian communication, rather than punishing terrorist or hostile acts'. Presumably what is meant is the Australian community.
- EM para 39 states that the revocation of citizenship under s 33AA 'will still operate by law, that is, the revocation happens by force of the statute upon the conviction but there is scope thereafter for the Minister to consider exempting the person from the operation of section 33AA'. No conviction is required for the operation of revocation of citizenship under s 33AA. (Para 75 contains the same error, as no 'conviction' is required for the revocation of citizenship under proposed s 35.)
- EM paras 98 and 101 fail to refer to s 29 of the *Crimes Act* 1914 (Cth).
- EM para 98 refers to s 80.2B(2), whereas proposed s 35A(3)(b) actually refers to s 80.2B(1) which is a different offence.

There are good reasons to follow proper Cabinet and governmental processes and this Bill is a textbook example of the sort of fiasco that occurs when those processes are not followed. When the consequences of the Bill are so serious, both for affected individuals and the protection of the Australian community, it is especially important that the appropriate levels of care and deliberation are applied.

If the Committee seeks further information, please do not hesitate to contact me.

Yours sincerely,

Anne Twomey
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