The Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT

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

This submission responds to the Committee's invitation to comment on the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth).

In summary –

- The Bill reflects an underlying weakness in Australian citizenship law since establishment of the *Australian Citizenship Legislation Amendment Act 2002* (Cth), ie scope for dual citizenship
- Retrospective application of the proposed 2015 law is legally repugnant and has not been justified on the basis that Australia faces a substantive existential threat and can only address terrorist activity/affiliations on an extraordinary basis, ie through retrospectivity
- The proposed law is unlikely to have a substantive deterrent effect and the stated rationale for enactment of the Bill is therefore problematical
- Given politicisation of national security questions it would be desirable for decisionmaking to be undertaken by an independent statutory entity reporting directly to Parliament rather than by the Minister.

Basis

The submission is made on a personal basis. It does not present what would be reasonably construed as a conflict of interest. It reflects my doctoral work on the construction of citizenship and other legal identities. It also reflects teaching in pertinent fields such as national security, crime and privacy.

Conflicted Allegiances

The Bill, along with the Government's *Australian Citizenship: Your Right, Your Responsibility* document, appropriately highlights the significance of citizenship (a matter of rights and responsibilities) and the expectation that individuals will give their allegiance to Australia as a liberal democratic state and thence to the Australian community.

The Bill is in essence a mechanism for the removal of citizenship from individuals whose allegiances are in conflict, ie people with dual citizenship who have placed membership of another state or community above their allegiance to Australia. The proposed legislation correctly does not seek to remove the citizenship of people who are solely Australian citizens, irrespective of whether those individuals are located within Australia and thus within the reach of Australian law enforcement and national security officers or located outside Australia. Such a removal would render the individual stateless and thus be contrary to international law. (It would, in practice, tend to foster radicalisation and terrorist activity centred on martyrdom.) The Bill instead seeks to formally and quickly strip Australian citizenship from those

people with dual citizenship who are deemed to have renounced their membership of the Australian community by engaging in terrorist activity. (That activity is broader than taking up arms or engaging in crimes within/outside Australia.)

The Bill reflects an underlying weakness in Australian citizenship law since establishment of the *Australian Citizenship Legislation Amendment Act 2002* (Cth), ie scope for dual citizenship. There is no inherent requirement for dual citizenship. I suggest that the Committee, in noting the Government's statements about the primacy of allegiance to Australia, should ask whether dual citizenship *per se* – rather than dual citizenship of people with terrorist affiliations – is appropriate.

Dual citizenship represents an inherent conflict in allegiances. It has been justified as a 'convenience', eg allows a fortunate cohort to work within a particular jurisdiction or to bypass conventional border restrictions. Citizenship should, however, be about responsibilities rather than about convenience as a manifestation of rights. If as a society we are serious about allegiance our law should be predicated on a sole allegiance – allegiance exclusively to Australia rather than to Australia plus one or more nations (given that some nations are now actively marketing citizenship as a revenue-raising mechanism).

In that respect I draw the Committee's attention to the June 2014 report by the Independent National Security Legislation Monitor, which notes

> It is possible to hold citizenship of two or more countries if the laws of those countries allow this – there is nothing in the *Australian Citizenship Act 2007* (Cth) ("Citizenship Act") prohibiting this. Since 2002, Australia has allowed its citizens to hold dual, or multiple, citizenship. Prior to 4 April 2002, under sec 17 of the *Australian Citizenship Act 1948* (Cth), an Australian citizen 18 years or over who did an act or thing whose sole or dominant purpose was to acquire a foreign citizenship lost their Australian citizenship. Section 17 was repealed by the *Australian Citizenship Legislation Amendment Act 2002* (Cth).
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> In hindsight, the INSLM does not regard that repeal as very wise. The arguments in favour of retaining sec 17 included that a person holding more than one citizenship has pledged allegiance to more than one country and so has questionable loyalty to Australia, and possession of more than one citizenship may lead to difficulties where Australian citizens are also citizens of a country with which Australia is at war. The INSLM considers these to be sound arguments. They resonate in relation to the INSLM's inquiry into Australia's *Foreign Incursions Act*, as reported in Chapter III.
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> … The INSLM is concerned with the implications dual, or multiple, citizenship has for Australia's counter-terrorism effort. The INSLM is concerned that the concept of dual citizenship raises issues of divided loyalties and does not see why, as a matter of policy, an Australian citizen should also be able to be a citizen of another country. With great respect, the INSLM agrees with the views of a former Chief of the Army, now Prof Peter Leahy AC, Director of the National Security Institute at the University of Canberra:-
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> > As a retired soldier I have a view that citizenship brings rights and responsibilities. One of these is that, in the extreme, a citizen may be called upon to fight to defend his nation. I do not see that this responsibility is divisible. Thus dual citizenship, while it may be convenient for the individual, should not be allowed. I offer the

> potential that an Australian military or police force if it were to be deployed on a mission to Syria may find itself directly opposed by an Australian citizen with dual Australian-Syrian passports on the field of battle. This is an intolerable situation, which requires strong preventive and retrospective action.
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> As discussed at length in Chapter III, the INSLM does not see why Australian law should not regulate the service of an Australian citizen with any armed force not at war with Australia. And sec 35 of the Citizenship Act provides that an Australian dual national ceases to be an Australian citizen if the person serves in the armed forces of a country at war with Australia (which apparently has been understood, perhaps incorrectly, to require a declaration of a formal state of war). That is, their citizenship is revoked and they can be removed from Australia. This provision does not apply to Australian citizens who do not hold any other citizenship or nationality, in light of Australia's international obligations under the Statelessness Convention. ...
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> Dual citizenship is not a human right. Its permission in Australia since 2002 does not render it anything like traditional. Migrants from non-British origins became citizens for generations before it became available. Its invidious legal qualities in relation to Australia's CT Laws and the associated Foreign Incursions Act have been discussed above. Obviously, the withdrawal of this boon (from the perspective of individuals presently enjoying it) will be as difficult as any governmental reduction of what people have come to regard as an entitlement. However, in its nature dual citizenship is deeply problematic, unlike a pension.

We should address that problem – inherently conflicted allegiances – by requiring sole allegiance to Australia.

Retrospective application

It is axiomatic in liberal democratic states that law not be applied retrospectively. Retrospective application is legally repugnant.

In considering the current Bill it is important to note that there has been no demonstration that retrospective application is imperative. In disregarding more than a century's caution about retrospectivity the onus is on the Government to provide a clear persuasive case for why circumstances are so exceptional and existing mechanisms are so inadequate that extraordinary measures should be used. The Government has failed to publicly do so.

It is insufficient to claim that Australia faces an existential threat or that, as in the Explanatory Memorandum for the Bill, that "the number of foreign fighters is increasing, the number of known sympathisers ... is increasing and the number of potential terrorists is rising". Reliance on rhetoric about terrorism and on bureaucratic overreach may indeed result in increases in "the number of potential terrorists" (a concept so broad as to be of dubious utility other than to speechwriters and agencies competing for funding).

Ineffective Deterrence

The Bill is promoted as aimed at the "protection of the Australian communication" [sic] (Explanatory Memo, p 4) and as demonstrating that "citizenship is a privilege not a right" (Explanatory Memo, p 14), with

renunciation of citizenship through terrorist action/support meant to "reduce the possibility of a person engaging in acts or further acts that harm" and have "a deterrent effect".

The Government has not demonstrated that deterrence is likely to be effective. Indeed, most of the official and scholarly literature regarding radicalisation within Australia and overseas indicates that deterrence through deemed abandonment of citizenship will be ineffective. On the contrary, it is likely to foster radicalisation of people within and outside Australia, for example through perceptions in some ethno-religious communities in Australia that revocation of a dual national terrorist advocates Australian citizenship is a manifestation of a persecution that validates claims by the advocate and justifies an act or martyrdom.

Decisionmaking

The Bill enshrines a weakly accountable Minister on the basis that the Minister "has a particular insight into community standards".

As a member of the executive and member of the legislature the Minister does indeed have a special status, one that should be respected by the community at large and – where enshrined in statute law – through the legal system. The Committee may however note that there is increasing and substantive disquiet about executive decisionmaking (irrespective of party political affiliation) in relation to national security. Many people – including much of the legal community – would question a particular Minister's insights regarding law and community standards, for example regarding egregiously inappropriate bullying of Human Rights Commissioner Gillian Triggs and the suppression of information about human rights abuses involving people in Nauru and other locations.

One potential mechanism to address concerns and thereby depoliticise what will necessarily be difficult decisions is for decisionmaking to be undertaken by an independent statutory body that reports direct to Parliament (and is of course not vitiated by systemic underfunding evident in the Office of the Australian Information Commissioner and Australian Law Reform Commissioner under the current and preceding Governments over the past five years.)

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