AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

16 July 2015

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney

alhr@alhr.asn.au
www.alhr.asn.au

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

Dear Secretary

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 **(the 'Bill') amending the *Australian Citizenship Act* (the 'Act')**

Australian Lawyers for Human Rights (ALHR) is pleased to provide this submission in relation to the Committee's terms of reference, which are to consider the provisions of the Bill and to consider whether proposed section 35A of the Bill (the conviction-based cessation) should apply retrospectively with respect to convictions prior to the commencement of the Act. As requested, we previously sent an email to confirm that we would be making a submission.

ALHR

ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

1. Summary

ALHR believes that Australia should deal with its citizens under its own laws and not put terrorists or other criminals beyond the reach of Australian law. Australia has legal obligations pursuant to United Nations Security Council resolutions to apprehend and prosecute terrorists, rather than simply to 'banish' them from Australia and leave them to be prosecuted under the laws of other countries which may not have legal systems which are as effective as Australia's. We therefore recommend that the Bill not be adopted.

At the very least the **termination of citizenship in the Bill should not apply automatically**, but only after the relevant matters have been considered by a court, and the person affected given the opportunity to defend the case against them.

We identify the following problems with the Bill:

1) ALHR submits that under the *Citizenship Act*, a conviction for a (serious) specified offence should be required before citizenship can be revoked. However the Bill greatly expands the notion in existing section 35 of **automatic termination for certain alleged behaviour**, even where no court has established that the behaviour in fact occurred. This is entirely contrary to Australian criminal justice standards which require a fair trial, and to Australia's obligations as a signatory to the *Universal Declaration of Human Rights*.

2) The Bill is **too broadly drafted.** Even where the Bill involves termination of citizenship on the basis of a court conviction, the Bill imposes a disproportionately severe penalty even for many comparatively **minor infringements which do not cause physical harm**. It purports to relate to "persons engaging in terrorism and who are a serious threat to Australia and Australia's interests" but **potentially covers even medical assistance by organisations such as Médecins sans Frontières or the Red Cross,**[1] the threat of serious property damage[2] and whistleblowing in the public interest.[3]

3) The Bill extends the punishment of withdrawal of citizenship to **children under 18 who have committed no crime** solely because of parental offences. While this reflects the existing scope of the Act it is undesirable and a breach of those childrens' human rights.

4) The Bill effectively makes removal of citizenship a matter for Ministerial decision only which is highly undesirable, **breaches the fundamental Australian right to a fair trial**, and undermines the democratic separation of powers. Removal of citizenship should only occur after a court has agreed that the necessary grounds are established and the person concerned has had the opportunity to put their case.

5) The Bill is discriminatory, contrary to the *Universal Declaration of Human Rights,* in that it treats citizens with dual nationality differently from citizens with only one nationality/citizenship. It creates **two classes of Australian citizen** – those who can be stripped of citizenship, and those who cannot.

6) While it is said that judicial review of Ministerial decisions is possible, the fact that no reasons need to be given by the Minister makes **review effectively impossible**. There is **no transparency or accountability.** The provisions overriding existing obligations to give reasons and to abide by the rules of natural justice should be removed.

7) There are **insufficient mechanisms for independent and comprehensive review and insufficient safeguards** in the light of international human rights standards.

8) The provisions should **not be retrospective**.

---

1 At paragraph 56, the Explanatory Memorandum acknowledges that new subsection 35(1) could catch medical assistance. This is also true of the new subsection 35A(3) which references Section 102.7 of the *Criminal Code Act 1995* – 'providing support' to a terrorist organisation.

2 Although there is no longer a reference in the Bill to section 29 of the *Crimes Act 1914* (damage to Commonwealth property), Section 35A of the Bill allows for automatic termination of citizenship on the basis of a number of types of conviction, including breach of Section 101.1 of the *Criminal Code* (prohibiting any '*terrorist act*' - which is defined very broadly to include **a threat of action** that causes serious damage to property carried out with the intention of advancing a political, religious or ideological cause).

3 Paul Farrell, "Whistleblowers could have citizenship revoked under proposed laws", *Guardian Australia*, 25 June 2015, accessed at < http://www.theguardian.com/australia-news/2015/jun/25/whistleblowers-could-have-citizenship-revoked-under-proposed-laws > on 15 July 2015.

2. Compliance with Human Rights

ALHR's primary concern is that the Bill should adhere to international human rights law and standards. The Bill (1) should not on its face breach Australians' human, civil or political rights; and (2) should not be capable of being applied so as to infringe Australians' rights.

We acknowledge, with the Law Council of Australia, the need to safeguard Australia's national security, but at the same time stress with them how important it is that those measures are a tailored and proportionate response and do not:

- detract from established principles of the Australian criminal justice system,
- fail to comply with international human rights standards, nor
- abrogate rule of law principles.[4]

We endorse the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014[5] as to the nature of Australia's human, civil and political rights obligations, and agree that the inclusion of human rights 'safeguards' in Commonwealth legislation is directly relevant to Australia's compliance with those obligations.

As noted by the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism in their 2010 Report:

> *Compliance with human rights while countering terrorism represents a best practice because not only is this a legal obligation of States, but it is also an indispensible part of a successful medium and long-term strategy to combat terrorism.*[6]

The provisions of the *Universal Declaration of Human Rights* which are clearly breached by the Bill are as follows (arguably the Bill also breaches other rights, including as provided in the *International Covenant On Civil And Political Rights* (ICCPR)).

> *Article 7:All are **equal before the law and are entitled without any discrimination to equal protection of the law**. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*
>
> *Article 8: Everyone has **the right to an effective remedy** by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*
>
> *Article 10: Everyone is entitled in full equality to **a fair and public hearing** by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*
>
> *Article 11: (1) Everyone charged with a penal offence has the right to be **presumed innocent until proved guilty according to law in a public trial** at which he has had all the guarantees necessary for his defence. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the*

---

4 See generally Law Council of Australia, *"Anti-Terrorism Reform Project"* October 2013, <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf> accessed 2 October 2014.

5 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1*: *Drafting Statements of Compatability*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note* 1 which was replaced by the Guidance Note, available at< https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>, accessed 16 January 2015.

6 Quoted in Australian Lawyers for Human Rights, *Submission to the Independent National Security Legislation Monitor*, 25 September 2012, par 8.

one that was applicable at the time the penal offence was committed.

Article 15: (1) ***Everyone has the right to a nationality****. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.*

A number of provisions in the Bill are also inconsistent with the undertakings in Article 2(3) of the ICCPR:

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Good legislation is proportionate to the problem to be addressed. It is stated in the EM that the legislative provisions are "reasonable, necessary and proportionate", but no examination is made of alternatives which are not so far-reaching (eg retain full judicial review). This is contrary to Article 4(1) of the ICCPR which contemplates that a State will take measures derogating from its obligations under the ICCPR only 'in time of public emergency which threatens the life of the nation' and only 'to the extent strictly required by the exigencies of the situation' and only for so long as that emergency lasts.

3. Restrictions on civil liberties and common law rights

Ironically, the Bill severely limits a number of common law rights which the Attorney General has promoted as fundamental, including:

- the presumption of innocence
- the prosecution carrying the burden of proof
- the presumption against construing laws so as to allow for arbitrary or unrestricted power
- the tradition of independent judicial review of law and executive action.

The Attorney General has asked the Australian Law Reform Commission to examine how such common law rights could be preserved, including through **identifying statutes that unreasonably impact on common law rights. The Bill is such a statute**.

4. Bill is counterproductive

Australia needs to deal with its own criminals under its own laws because, as a practical matter, to put alleged criminals beyond Australian law is counterproductive. The Bill not only deprives alleged criminals of Australian citizenship rights but also removes them from the reach of Australian laws. As a practical matter, if we want to regulate these peoples' behaviour, we cannot do it by excluding them from Australian law. To refuse to do so is to admit failure. In the words of Dr. Binoy Kampmark:

It is no exaggeration to suggest that the current swathe of proposed laws risk placing Australia, not merely on a police state footing, but a garrisoned footing. Terrorism, for all its fearful properties, remains an idea, a tactic and a method. The consequences of

responding to it are quite something else. Shredding civil liberties is the first step to admitting a failure in dealing with the very problem a society should resist.[7]

5. Serious questions about how the Bill works

The Bill expands the ways in which a person who is a "national or citizen" of a country other than Australia can cease to be an Australian citizen. The Bill purports to terminate citizenship **automatically**:

(1) when a person is convicted of certain offences (draft section 35A); and

(2) when certain conduct occurs ('terminating events') (draft sections 33A and 35).

Under section 36A, citizenship cannot then be regained except at Ministerial discretion.

It is submitted that in none of these cases should termination be automatic. Termination of citizenship should only occur through the court system.

5.1 Is a National a Citizen?

The first problem is the use of the phrase 'national or citizen' (which is already used in the Act).

While the Explanatory Memorandum says that "The proposed amendments are intended to capture … dual citizens," and paragraph 30 of the **Statement of Compatibility with Human Rights** in **Attachment A** says that: "The amendments also differentiate on the basis that they apply only to those persons who hold dual citizenship," actually draft Sections 33AA (1), 35 (1) and 35A (1)(b) apply not only to 'dual citizens' but also to persons who are both Australian citizens and "a national … of a country other than Australia."

The word 'national' is not defined in the Act or the Bill. "Nationality" is sometimes used as a synonym for 'citizenship' but the two words do not always mean the same thing (contrary to comments in the Explanatory Memorandum including at page 2).

Under the legislation of some other countries (for example - as the Explanatory Memorandum concedes at paragraphs 30 and 95 - the United States[8]), a person may be regarded a national but not a citizen. This would mean in such cases that the Bill could remove Australian citizenship without leaving a person with any other citizenship.

The Explanatory Memorandum argues that such non-citizens 'may' nonetheless "obtain US passports and owe allegiance to the United States." However this result is by no means a certainty. That is, if being a US national necessarily resulted in full citizenship rights, then there would be no reason for there to be a terminological distinction between a US national and a US citizen, nor would there be a need for a piece of legislation (8 U.S.C. §1408) to define the differences.

The Explanatory Memorandum therefore implicitly acknowledges that the use of the phrase 'national or citizen' does not prevent the Bill potentially rendering a person stateless. That is a result which is both outside the purported scope of the legislation and undesirable for other reasons (which are beyond the scope of this submission).

It is therefore recommended that the words 'national or' be removed both from the Bill and from the Act.

---

7 "Winding back the Liberties: The New Anti-Terror Laws in Australia,"25 September 2014, Rule of Law Institute website <http://www.ruleoflaw.org.au/anti-terror-laws-in-australia/> accessed 28 September 2014.

8 According to 8 U.S.C. §1408, "Nationals but not citizens of the United States at birth" it is possible to be a U.S. national without being a U.S. citizen. A person whose only connection to the U.S. is through birth in an outlying possession (which as of 2005 is limited to American Samoa and Swains Island), or through descent from a person so born acquires U.S. nationality but not U.S. citizenship. Accessed at https://www.law.cornell.edu/uscode/text/8/1408 on 14 July 2015

This wording already appears in other sections of the existing Act and it is recommended that here too the words 'national or' be removed to avoid the unintended consequences referred to above.

5.2 Bill is too broad in relation to convictions

Under section 35A, termination of citizenship is automatically imposed for a range of offences, some of which could be minor or trivial in nature (damaging Commonwealth property) and some of which require no *mens rea* at all. Many of these offences which require no *mens rea* - like being present in a 'declared area' in breach of Section 119.2 of the *Criminal Code Act 1995* – are themselves vaguely and too broadly drafted. "Terrorist" and "terrorist organisation" are so broadly defined in existing legislation that 'providing support to a terrorist organisation' under Section 102.7 of the *Criminal Code Act 1995* could potentially cover doctors and nurses working for Médecins sans Frontières, the Red Cross, or similar.

The list of offences in section 35A should be considerably reduced. Termination should not be automatic. It should only apply to the most serious offences after the issue of termination has itself been considered by a court.

It is undesirable for further penalties to be imposed when a person has already been tried at law for an offence and punished for it. Further penalties should not be applied automatically, even if this is constitutionally possible.

5.3 How is it established that the 'terminating event' has occurred?

While it can be established that the situation in section 35A exists, the other sections are more problematic. Currently under the Citizenship Act, a conviction for a specified offence is required before citizenship can be revoked, and ALHR submits that this is the situation that should continue. ALHR therefore submits that **draft sections 33A and 35 should not be included** in the final version of the Bill.

Section 33AA(5) provides that "the renunciation takes effect, and the Australian citizenship of the person ceases, immediately upon the person engaging in the conduct referred to" and draft section 35(2) is in similar terms.

Given that those terminating events involve conduct which is argued to be in breach of other pieces of legislation which are often themselves vague and overbroad, and which often require proof of specific intention or *mens rea*, one would presume that a court would need to determine whether or not, and when, those 'terminating events' have occurred. However there is no provision for this.

5.4 How does Minister establish essential elements of offence?

In relation to section 35A (person convicted of offence), the Minister must give written notice "If the Minister becomes aware of a conviction because of which a person has, under this section, ceased to be an Australian citizen." It is not difficult to establish whether a conviction has occurred.

However the relevant Minister must also under sections 33AA(6) and 35(5) notify "such persons as the Minister considers appropriate" that a terminating event has occurred for the purposes of those sections (that is, that the Minister takes the view or has formed the decision that the event has occurred).

It is unclear how, under the proposed legislation, the Minister can 'become aware' that a terminating event within the scope of the relevant legislation has occurred. It is not necessarily self-evident that the particular conduct has occurred, particularly where the conduct is not overt.

How can the Minister personally 'know' - for example - that a 'terrorist act' for the purposes of the *Crimes Act* has occurred (which is one of the terminating events), when an essential element of establishing that offence is proving that the action or threat was done with two separate specific intentions, being:

(1) the intention of advancing a political, religious or ideological cause; and

(2) the intention of either:

a. coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign Country, or

b. intimidating the public or a section of the public?

In addition, many of the terminating events relate to breaches of laws which are themselves not reviewable by courts, because of the continuing government practice of removing all terrorism-related matters from the ambit of the *Administrative Decisions (Judicial Review) Act.*

Exactly how it is to be determined whether or not a terminating event has occurred is therefore unclear. The Minister appears to be given the power to act as both judge and jury on the basis of whatever untested information is to hand. That view may of course not be correct – but cannot, it would appear, effectively be challenged (as described further below).

5.5 Ministerial decision can be unjust

The legislation does not even require that the Minister's view be formed on reasonable grounds or that the rules of natural justice will apply. The Bill specifically says in draft sections 33AA (10), 35(9) and 35A(9) that the rules of natural justice will not apply to the Minister's role.

One of the rules of natural justice is that a person be notified of the nature of the allegations against them, so that they have an opportunity to refute those allegations. But under the Bill, Sections 33AA (10), 35(9) and 35A (9) specifically provide that section 47 of the Act (which requires the Minister to notify a person of any decision made about them under the Act, and the reasons for that decision) will not apply.

Similarly, Sections 33AA (12), 35(11) and 35A(11) exempt the Minister from those provisions of the ASIO Act which would otherwise require a person be notified of the allegations against them and allow their case to be reviewed.

We strongly submit that if the Bill is to go ahead, sections 33AA (10) and (12), 35(9) and (11) and 35A(9) and (11) should be deleted from the final version of the Bill.

5.6 Lack of judicial oversight and safeguards

There is apparently no right to appeal against the notice from the Minister. The Minister has absolute discretion to revoke the notification and exempt the person from the effects of the relevant provisions.

It is not clear how these procedures sit within the normal judicial structure or whether they are intended to be entirely outside that structure. From government comments, it would appear that these procedures are intended to be entirely free from judicial scrutiny. If that is correct, it is a situation which we strongly condemn. We query whether such legislation is constitutional. Certainly it attacks the fundamental democratic notion of the separation of judicial and executive powers, and in leaving significant decisions to executive discretion is an invitation to corruption.

The explanatory memorandum says that "there would be safeguards - including judicial review - to ensure there are appropriate checks and balances on their operation". However given that the Minister does not have to give any reasons for forming his view, it is difficult to tell how the decision could be reviewed by a court.

The problem is further exacerbated by the new Section 36A, which provides that citizenship cannot be returned, once terminated under sections 33A, 35 or 35A, except by discretion of the Minister. There is no provision for restitution, other than by the Minister, if it were to be subsequently discovered that the decision as to whether terminating events had occurred was in fact incorrect.

There can be no justification for restricting full judicial review of the effects of the Bill. Without full judicial review there is no accountability and no transparency. A government that places its executive or its administrative officials above the courts is not properly or fully democratic.

Full judicial review is fundamental to the structure of a democratic society and it is arguably a subversion of Australian society for Parliament to remove that safeguard and that balance of powers. In the words of Dr. Binoy Kampmark:

> *Terrorism, for all its fearful properties, remains an idea, a tactic and a method. The consequences of responding to it are quite something else. Shredding civil liberties is the first step to admitting a failure in dealing with the very problem a society should resist*.[9]

6. Retrospectivity

ALHR is of the view that penalties, particularly criminal penalties and severe penalties such as termination of citizenship, should not be imposed on persons for actions that may not have been illegal or had that particular consequence at the time of they occurred, such that the person is effectively being punished retrospectively contrary to Article 15(1) ICCPR (freedom from retrospective guilt).

Section 8(3) of the Bill effectively applies retrospectivity to the operation of clause 35, as it allows clause 35 (termination of citizenship on grounds of fighting for an enemy or terrorist organisation) to operate immediately the Bill comes into effect if the person was previously fighting or serving, even if they have ceased to do so as at the date of commencement of the Bill, and even though such fighting or service did not, at the time (subject to the effect of the existing section 35), have the consequence of automatically stripping them of Australian citizenship.

7. Effect upon Children

The Act and the Bill apply directly to children who have been convicted of relevant offences or who have allegedly been involved in terminating events. In addition, Section 36 of the Citizenship Act already allows the Minister to revoke a child's citizenship solely on the basis that their responsible parent's citizenship has terminated, unless to do so would result in the child ceasing to be a 'national or citizen' of any country. The Bill cross references the new grounds on which parental citizenship could be revoked.

While the EM states that the Minister would take the best interests of a child into account in exercising their powers in relation to termination of a child's citizenship, there is no such requirement in the legislation. **We recommend that such a requirement be included in section 36.** For children to be penalised for crimes committed by their parents is, we submit, a form of collective punishment. Collective punishment is an intimidatory measure which penalises both the guilty and the innocent. In the context of armed conflict or occupation, it would be **in breach of Article 33 of the Fourth Geneva Convention** which reads as follows:

> *No persons may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.*

8. Limitations of Submission

Please note that this Submission is not exhaustive and that there may be additional issues which are of concern from a civil liberties and human rights point of view.

---

[9] "Winding back the Liberties: The New Anti-Terror Laws in Australia,"25 September 2014, Rule of Law Institute website <http://www.ruleoflaw.org.au/anti-terror-laws-in-australia/> accessed 28 September 2014.

9. Conclusion

We are concerned that the Bill's provisions:

(1) are vague and overbroad (particularly because it inter-relates with other laws which also have those same faults),

(2) are disproportionate in effect,

(3) reduce the oversight of the courts (which oversight is essential to the balance of powers in a democracy), and

(4) are inconsistent with accepted international human rights standards and Australia's international treaty obligations.

ALHR acknowledges that it is vital to achieve a proportionate and effective balance between the government's domestic and international obligations to protect its citizens from terrorism and its international obligations to preserve and promote its citizens' fundamental human rights.

However it is also essential that anti-terrorism laws adhere to the Australian government's international legal obligations under various binding instruments and accord with agreed norms of human rights, civil liberties and fundamental democratic freedoms. If legislative provisions do not accord with these standards they should not be adopted. In particular, laws which remove full judicial review are a direct affront to Australia's international legal obligations, the separation of powers and the rule of law and have no place on the law books of a democratic nation State.[10]

ALHR believes that a human rights framework will strengthen counter-terrorism and national security laws in Australia by appropriately balancing the various obligations. This Bill does not reflect an appropriate balance.

If you would like to discuss any aspect of this submission, please email me

Yours faithfully

Nathan Kennedy
President
Australian Lawyers for Human Rights

[10] See generally Australian Lawyers for Human Rights (2012), *op cit*, particularly paragraphs 4 and 5.