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Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
By upload and email: pjcis@aph.gov.au

Submission re: *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* ('the Bill')

Dear Chair,

Appreciating that the Committee is familiar the citizenship deprivation provisions in the Australian Citizenship Act 2007 (Cth) and the changes proposed in the Bill, I move to substantive analysis of the Bill.

1. In his report on the citizenship loss provisions of 15 August 2019,[1] the Independent National Security Legislation Monitor (INSLM) recommended an 'Alternate Model' to the 'by operation of law' deprivation provisions, s 33AA and 35 of the Australian Citizenship Act 2007.

Overview

The Bill constitutes a highly selective response to the INSLM's recommendations, ignoring those recommendations going to meaningful review

2. The Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 ('the Bill') constitutes a highly selective response to the Alternate Model recommended by the INSLM. Those aspects of the Alternate Model going to meaningful review of the Minister's powers have been dismissed.

[1] Commonwealth of Australia, Independent National Security Legislation Monitor, Review of Citizenship Loss Provisions, 15 August 2019 ('INSLM Report').

3. In the Executive summary to his report, the INSLM wrote:

> 1.13 For reasons which follow, I have concluded that these provisions [sections 33AA and 35, the 'operation of law' provisions] do not pass muster under the INSLM Act and should, with some urgency, be repealed with retrospective effect, but be simultaneously replaced by a Ministerial decision-making model (and thus with constitutionally entrenched judicial review), coupled with merits review as to the conduct (s 33AA), fighting or service (s 35) by the Security Appeals Division of the Administrative Appeals Tribunal, and using the special advocate model which now exists for control orders. This recommendation reflects the considerable experience of that Division in passport-cancellation cases on security grounds, as well as aspects of the comparable United Kingdom review system in the Special Immigration Appeals Commission (SIAC).

The merits review referenced in the above quote is further detailed and developed in the section headed 'Alternate Model' at paragraph 6.91 and following of the INSLM report.

4. The Bill shifts the mechanisms for deprivation of citizenship currently structured with reference to an 'operation of law' model (namely, sections 33AA and 35) to a 'ministerial decision' model. This is to be welcomed. The Bill, however, decouples this shift from the merits review proposals contained in the INSLM 'Alternate Model'. As it result, the proposed Bill effects the shift to the 'ministerial decision' model without making the deprivation power subject to much needed 'meaningful review'.[2]

5. The Bill ignores the substance and the detail of the INSLM's recommendations on review of the Minister's powers and accountability for the exercise of those powers. This conveys an impatience with, and a

[2] INSLM report, para 6.92.

misunderstanding of the importance of, limits and accountability on executive power.

The dismissal of the INSLM's recommendations going to meaningful review is compounded, in key aspects, by a weakening of legal protections

6. The nature of some of the elements that have been grafted onto the INSLM's recommendations in the current Bill is familiar, being a modified version of the proposals contained in the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 ('the 2018 Bill'). The 2018 Bill lapsed on the dissolution of Parliament in April 2019, in anticipation of the federal election in May 2019. A prominent topic of criticism in submissions and testimony on the 2018 Bill was that it weakened the protections against the creation of statelessness.

7. The form of words that was identified in the 2018 Bill as weakening legal protections against statelessness is used in the current Bill (in s 36B(2) and s 36D(2)).

The proposed Bill grafts an expansion of ministerial power over conviction-based deprivation onto its response to the INSLM report. It seeks to extend conviction-based deprivation to convictions attended by significantly lower sentences of imprisonment.

8. As with the weakening of protections against statelessness, the extension of conviction-based deprivation to less serious convictions was also a feature of the 2018 Bill. The submissions on the 2018 Bill, with the exception of the Department of Home Affairs own submission, were troubled by, and critical of, the attempt to extend deprivation powers to much less serious offences, and with respect to shorter sentences of imprisonment with respect to convictions for the relevant offences. These lower threshold were also inconsistent with the standards for seriousness of the relevant conduct recommended by this Committee in its 2015 Advisory Report on the 2015 Bill that became the Australian Citizenship Amendment (Allegiance to Australia)

Act 2015 (Cth), enacting the citizenship deprivation powers. The concerns generated by the lowering of thresholds for deprivation under the 2018 Bill included: the expansion of largely unchecked governmental power, with adverse implications for rights and legal protections; the loss of focus on more serious conduct and; the consequent increased vulnerability of the measures to legal challenge.

9. The current Bill again seeks to expand ministerial power, by significantly lowering the seriousness of the sentences of imprisonment with respect to the relevant convictions. If the proposed Bill is enacted, much less serious sentences for the relevant offences will suffice to render an Australian vulnerable to deprivation of citizenship. The proposed Bill resiles from the extremity of the 2018 Bill in this respect, which is to be welcomed. But relief at what was avoided in the 2018 Bill should not be grounds for accepting the significant dilution in the seriousness of sentence that can lead to deprivation under the proposed Bill.

Submissions in further detail

The change from the operation of law model to the Ministerial decision model

10. The citizenship deprivation powers were enacted by the Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth), which received Royal Assent on 11 December 2015. The deprivation mechanisms singled out for particular criticism in submissions and testimony to this Committee and other parliamentary committees down to the present day have been ss 33AA and 35, the provisions purporting to function 'by operation of law'. In his report reviewing the citizenship loss provisions, the INSLM stated:

> 1.31
> …

(b) Ss 33AA and s 35 are neither necessary nor proportionate, nor do they contain appropriate safeguards for the rights of individuals;

(c) 33AA and 35 should urgently be repealed and, especially because of their uncontrolled and uncertain operation, be repealed retrospectively

The INSLM went on to recommend a ministerial decision model that could take the place of the 'operation of law' provisions. The government has taken up that invitation, in part, and the shift from the 'operation of law' model to the ministerial decision model is to be welcomed.

11. In this submission, in light of the short period of notice and time to review, I focus on three aspects of the Bill:

I. First, the absence of appropriate review and accountability mechanisms for citizenship deprivation for conduct under the proposed Bill, contrary to the INSLM's recommendations.
II. Second, the way in which the Bill seeks to dilute the seriousness of sentence which renders an Australian citizen vulnerable to deprivation of citizenship, contrary to earlier recommendations of this Committee.
III. Third, the way in which the Bill seeks to lower the protections against the creation of statelessness, by utilising the same formulation employed in the 2018 Bill, now lapsed, and objected to in submissions on the 2018 Bill.

The fall from favour of the 'operation of law' model

12. Before entering into the detail, there is a general point to be drawn from the experience of the 'operation of law' model between its introduction in December 2015 and the present. The 'operation of law' model was adopted in an attempt to hamper judicial review. It sought to avoid the creation of any 'decision' that could be subject to review.

13. As detailed in the INSLM report, the 'operation of law' mechanisms were of 'uncontrolled and uncertain' operation, automatically depriving Australians of their citizenship without the government's knowledge, complicating prosecutions and intelligence operations and raising operational difficulties. Testimony to the 'uncontrolled and uncertain' working of the 'operation of law' model is found in the drafting of the transitional provisions in the proposed Bill, which seek to unpick the unintended and unknown consequences of the deprivation provisions in s 33AA and 35 of the Citizenship Act 2007 (Cth), introduced in December 2015.[3]

14. I attended and presented at the INSLM hearings in Canberra on 27 June 2019. Hearing the testimony from government agencies and others, it was hard to avoid the impression that the 'operation of law' model had generated a convoluted decision-making structure and led to numerous unintended effects, with adverse consequences for a holistic and effective national security response.

15. The proposed Bill repeats the mistake made in relation to sections 33AA and 35 (which are to be replaced under the proposed Bill) in the following way. It treats legal and other accountabilities as something to be avoided, and seeks to expand executive power and weaken legal protections. Alongside the more direct and obvious adverse consequences of such steps, this is not how one would set out to structure a rigorous and carefully calibrated national security program, alive to its effects and open to ongoing re-evaluation.

16. A more limited and focused set of powers, with clear and meaningful accountabilities is a more promising means of ensuring the efficient, targeted and effective deployment of government resources on national security.

Absence of provision for merits review

[3] See Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) ('the Bill'), Schedule 1, Part 2.

17. The judicial review that is provided for under the Bill does not go beyond what is constitutionally required.

18. Provision for merits review is a central element of the Alternate Model proposed by the INSLM. The prominence given to merits review is a function of the fact that to put decisions to justification, particularly decisions as grave as those to deprive a person of citizenship, there is need to be able to challenge findings of fact as well as questions of law.

19. Merits review is absent from the Bill and the Explanatory Memorandum makes no attempt to justify that absence. This is particularly striking given the centrality of merits review to the Alternate Model recommended by the INSLM.

20. The government has offered no justification for relying on judicial review alone as a means of legal accountability. No reason has been offered as to why Australia could not make provision for a right of appeal from a deprivation decision to a tribunal, and from there through the courts. Provision for an appeals process, appropriately designed, would be more commensurate with the seriousness of the decisions being made than the current exclusive reliance on judicial review.

Inadequate notice of decision to person affected

21. For judicial review to be a real prospect, it is necessary that the person affected know that a decision affecting them has been made. They need to be provided with notice of the decision.

22. The Bill provides that the Minister can withhold notice of a decision from the person affected for 6 (six) years.[4]

[4] The Bill, Schedule 1, Part 1, clause 6, s36G.

23. The INSLM had access to the information available to the Minister and Department. On reviewing that material the INSLM concluded 'In my view, six months is a sufficient maximum period to withhold notice'.[5]

24. The explanatory memorandum does not address or justify why the government's review of the same material led it to seek a twelve-fold extension of the maximum period beyond that recommended by the INSLM, from six months to six years, for withholding notice from the person affected.

Lowering the threshold for citizenship deprivation with respect to the prospective operation of the Bill – halving the requisite sentence of imprisonment from 6, to 3, years

25. Currently, section 35A(1)(b) of the Citizenship Act 2007 (Cth) holds that an Australian dual citizen is vulnerable to citizenship based revocation if they have been convicted of one of the offences nominated in that Act, and have 'in respect of the conviction or convictions, been sentenced to a period of imprisonment of at least 6 years, or to periods of imprisonment that total at least 6 years'.

26. The Bill proposes to halve the period of imprisonment required before an Australian dual citizen is vulnerable to citizenship deprivation. Under the Bill, a period of imprisonment of only 3 years, or periods of imprisonment that total at least 3 years are all that will be required with respect to a conviction or convictions of an offence against one or more of the nominated provisions.[6] By way of explanation for this change, the Explanatory Memorandum simply asserts:

> A sentence of imprisonment for a period of at least 3 years, or periods that total at least 3 years reflects the seriousness of a criminal conviction

[5] INSLM Report, para 6.97 (e).
[6] The Bill, Schedule 1, Part 1, clause 6, s36D(1).

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for one of the terrorism-related offences specified in the new subsection 36D(5).[7]

27. This does no more than describe what the provision, if enacted, would do. It does not explain or justify making the threshold a sentence of 3 years imprisonment, or the decision to lower the threshold for citizenship deprivation from 6 to 3 years.

28. The current requirement of a sentence of at least 6 years was added to the Act on the recommendation of this Committee (Recommendation 7 of the PCJIS 2015 Advisory Report).[8]

29. The reasoning of the Committee on this point is worth setting out in full:

> 6.25 While limiting the provision to more serious offences is an appropriate measure to better define the scope of conduct leading to revocation, the Committee notes that even following a conviction there will still be degrees of seriousness of conduct and degrees to which conduct demonstrates a repudiation of allegiance to Australia. Therefore, the Committee recommends that loss of citizenship under this provision not be triggered unless the person has been given sentences of imprisonment that together total a minimum of six years for offences listed in the Bill.
>
> 6.26 Some members of the Committee were of the view that a lower or higher threshold was preferable; however, on balance it was considered that a six year minimum sentence would clearly limit the application of proposed section 35A [s 36D under the Bill] to more serious conduct. It was noted that three years is the minimum sentence for which a person is

[7] Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 – Explanatory Memorandum, para 101.
[8] Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, September 2015 ('PJCIS 2015 report on citizenship deprivation powers').

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> no longer entitled to vote in Australian elections. Loss of citizenship should be attached to more serious conduct and greater severity of sentence, and it was considered that a six year sentence would appropriately reflect this.[9]

No reason has been offered for halving the period of sentence recommended by this Committee, previously treated by this Committee as demarcating 'more serious conduct'.

30. In diluting the seriousness, as measured by sentence of imprisonment, of the conviction that renders a person vulnerable to deprivation of citizenship, the Bill weakens the case for such a conviction constituting demonstrable and intentional disallegience. This increases the likelihood that a court will hold that the sufficiency of connection between the law and the constitutional head of power is lacking. That is, it increases the likelihood that the law cannot be brought under the aliens power and thereby be characterised as a law with respect to citizenship.[10]

31. This dilution in the seriousness of the conduct triggering deprivation effected by the Bill increases the likelihood that there will be a finding of constitutional invalidity with respect to the deprivation provisions on the basis that they go beyond the constitutional head of power on which they rely.

Lowering the threshold for citizenship deprivation with respect to the retrospective operation of the Bill – reducing the requisite sentence of imprisonment by more than two-thirds, from 10 to 3 years

32. Item 8(4) of Schedule 1 to Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth), the amending legislation that enacted the

[9] PCJIS 2015 report on citizenship deprivation powers.
[10] On the question of reliance on alternative heads of power see Helen Irving, 'Can we come home now? Temporary Exclusion Orders Act raises serious constitutional concerns' (2019) 59 *Law Society of NSW Journal* 68, 70.

citizenship deprivation powers,[11] provided that the conviction-based deprivation power under s 35A of the Act

> (b) does not apply in relation to a conviction of a person before the commencement of this item unless:
>
> (i) the conviction occurred no more than 10 years before the commencement of this item [ie not before 12 December 2005]; and
>
> (ii) the person was sentenced to a period of imprisonment of at least 10 years in respect of that conviction.

33. The Bill seeks to extend the retrospective reach of the deprivation powers further into the past, to 29 May 2003.[12] It is stated in the Explanatory Memorandum that this 'is the date of commencement of the *Criminal Code Amendment (Terrorism) Act 2003*.'

34. Secondly, the Bill removes the requirement that, in its retrospective operation, the Bill only apply to conduct of a high level of seriousness, as registered by a sentence with respect to the nominated conviction of at least 10 years imprisonment. The Bill reduces the level of seriousness required for the retrospective application of the deprivation powers by more than two thirds, dropping it to 3 years.

35. This is contrary to the Recommendation of this Committee, contained in Recommendation 10 of your Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015. Recommendation 10 states:

> The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be applied retrospectively to convictions for relevant offences where sentences of ten years or more have been handed down by a court.

[11] Amending the Australian Citizenship Act 2007 (Cth).
[12] The Bill, Schedule 1, Part 2 – Application and transitional provisions, item 19.

36. In its consideration of the retrospective operation of the amendments in the 2015 Bill, the Committee recorded the almost uniform opposition by submitters on the 2015 bill to the proposed retrospective operation of the deprivation power.[13]

37. In a single paragraph, this Committee justified the proposed retrospective operation of conviction-based on the basis that the conduct 'is conduct that all members of the Australian community would view as repugnant and a deliberate step outside the values that define our society'.[14] This Committee defined the boundary of that conduct with reference to a sentence of imprisonment of ten years with respect to the relevant offences.

38. The significant lowering of the sentencing threshold contained in the proposed Bill, diluting the seriousness of conduct justifying retrospective operation, exacerbates the legal issues with retrospectivity first raised by submitters in 2015 and increases the vulnerability of the measures to legal challenge. The proposal weakens lines of legal reasoning and argument commonly relied on, including by this Committee, in support of a retrospective punitive measure.

Weakening of the protections against the creation of statelessness, contrary to Australia's obligations under international law

39. In relation to both conduct-based deprivation,[15] and conviction based deprivation,[16] the Bill weakens existing protections against the creation of statelessness.

[13] PJCIS 2015 report on citizenship deprivation, chapter 6, in particular para 6.31 – 6.88.
[14] There are real issues as to whether the test for retrospectivity offered by the PJCIS provides a useable standard for assessing what criminal convictions would *not* justify deprivation.
[15] Pursuant to what would become s 36B of the Australian Citizenship Act 2007 under the proposed Bill
[16] In what would become s 36D under the proposed Bill.

40. Australia has international obligations to avoid the creation of statelessness. Of central relevance to the current discussion, Art 8(1) of the 1961 Convention on the Reduction of Statelessness relevantly provides:

> A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.

41. Accordingly, the deprivation powers under the *Australian Citizenship Act 2007* (Cth) are currently limited to a person 'who is national or a citizen of a country other than Australia'.[17] A key issue in this respect is the sufficiency of safeguards to ensure that a person does in fact possess another citizenship.

42. The current formulation, under which the person has to be a citizen of another country at the time deprivation occurs, is necessary to comply with Australia's obligations under international law.

43. The Bill seeks to substitute, for the current formulation, the following:

> However, the Minister must not make a determination *if the Minister is satisfied that* the person would, if the Minister were to make the determination, *become a person who is not* a national or citizen of any country.[18] [emphasis added]

44. This substitution was attempted in the 2018 Bill, now lapsed. The above formulation was objected to by the submitters who addressed the statelessness issue with respect to the 2018 Bill, on the basis that it is contrary to Australia's obligations under international law. The submissions identified legal errors in the government reasoning in support of the above formulation, outlined why the international law position on this point is deserving of support, and why it is in Australia's interests to support it.

[17] Australian Citizenship Act 2007 (Cth), ss 33AA(1), 35(1), s35A(1).
[18] The Bill, Schedule 1, Part 1, clause 6, s 36B(2) and 36D(2)

45. International law requires that, at the moment of deprivation of citizenship, a person is not rendered stateless. It does not allow for the much looser requirement, contemplated by the proposed Bill, that a person not 'become', after some unspecified interval of time, stateless. Further, whether a person is rendered stateless is a matter of fact and law, independent of the Minister's opinion or 'satisfaction'.

46. The explanatory memorandum states that 'The purpose of this amendment is to ensure that the application of this provision will not result in a person becoming stateless.' The stated purpose would be best served by shelving the amendment with respect to the 'statelessness bar' (the provision that conditions the power on the fact that it does not render the person stateless) and retaining the current formulation with respect to statelessness, presently found in sections 33AA(1), 35(1), and 35A(1) of the Australian Citizenship Act 2007 (Cth).

Reasons for repealing citizenship deprivation powers

47. Even on a narrow approach, confined to an assessment of the immediate localized security benefits of citizenship deprivation without regard to any wider, pervasive adverse consequences, it needs to be kept firmly in mind that the security benefits of the measures are not self-evident. The INSLM, who has access to the information available to the government, put it no higher than 'In some, possibly rare cases, citizenship cessation reduces the risk of a terrorist act being undertaken by that person in Australia.'[19]

48. Proper, critical, scrutiny of the proposed Bill, and the deprivation measures more generally, is consistent with, and in service of, best ensuring the safety of Australians from evolving terrorist threats, and other threats to national security. It ensures that resources, attention and energy are not devoted to ineffective or counterproductive measures and attends to the potential harms accompanying those measures.

[19] INSLM report, para 6.10.

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49. The deprivation measures raise a broader set of problems and concerns, additional to those set out in the above submission, that warrant their repeal.

50. In the international context, I am in agreement with Professor Walker, in his submission to the INSLM, that 'the policy of deprivation of citizenship appears irresponsible to allies, creates an unfair and unmanageable burden for weaker states, and disregards the interests of victims.'[20]

51. Most fundamentally, the current citizenship deprivation powers, and repeated attempts at their expansion, pose serious dangers to principles of secure and equal citizenship, and to the integrity of Australian citizenship as a legal status. There needs to be proper consideration of how the expansion of government power and discretion with respect to the status, even if well intentioned, may undermine the stability and security the status provides to all Australians. There has been little, if any, acknowledgement or public governmental consideration of the issues attending this point since the citizenship deprivation powers were proposed.

I thank the Committee for this opportunity to make a submission.

Yours sincerely,

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[20] Professor Clive Walker, University of Leeds, Submission 2, 21 May 2019, Submissions – Terrorism-related Citizenship loss provisions in the Australian Citizenship Act 2007 (Cth).