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Parliament House
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Submission to the Parliamentary Joint Committee on Intelligence and Security's Review of the Australian Citizenship Renunciation by Conduct and Cessation Provisions in the Australian Citizenship Act 2007

Liberty Victoria is a peak civil liberties organisation in Australia that has worked to defend and extend human rights and freedoms in the State of Victoria since 1936. For more than eighty years we have advocated for civil liberties and human rights. These are spelled out in the United Nations' international human rights treaties, agreed to by Australia. We speak out when such rights and freedoms are threatened by governments or other organisations.

We welcome the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's review of the operation, effectiveness and implications of sections 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007* (**Citizenship Act**).

The Joint Councils for Civil Liberties expressed strong opposition to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 prior to its passage.¹ Liberty Victoria continues to oppose the provisions in light of their subsequent operation. While limited public information is available about the application of the provisions, we understand that a number of individuals

¹ Joint Councils for Civil Liberties, *Letter to the Australian Parliament, Citizenship Stripping Bill Should be Abandoned* (20 November 2015), available at: <https://libertyvictoria.org.au/sites/default/files/Jnt%20CCLs%20statement%20Citizenship%20Bill151120.pdf>.

have had citizenship stripped under section 35 of the Citizenship Act. We express particular concern over the establishment and operation of the Citizenship Loss Board, which represents a threat to the rule of law and basic civil liberties.

In view of extensive foregoing submissions on the provisions, the present submission briefly outlines key concerns. In summary, we address the following terms of reference of the PJCS review:

Effectiveness:

- (i) The citizenship loss provisions are not an effective response to the threat of terrorism, and to the contrary risk undermine efforts to combat radicalisation and terrorism.

Operation:

- (ii) The 'automatic' provisions and the establishment and operation of the Citizenship Loss Board represent a threat to the rule of law and basic civil liberties.
- (iii) The legal threshold for a Ministerial decision under section 35A of the Citizenship Act risks manifestly disproportionate consequences.
- (iv) The provisions risk rendering Australian citizens stateless, in violation of international law.

Liberty Victoria recommends that the terrorism-related citizenship loss provisions be repealed. We note that the Canadian Parliament repealed similar provisions from Canadian law in June 2017, in response to similar concerns about the implications of stripping citizenship.

1. The citizenship loss provisions make for a second-class of citizenship and do not make Australia safer

Experts have argued that stripping citizenship does not assist Australian security, but rather risks undermining it.² The citizenship loss provisions reflect an abrogation of Australia's international responsibility as a global citizen. Australian nationals alleged to have engaged in terrorist related activities outside or inside Australia should be charged and tried in accordance with the law.

Liberty Victoria notes that some of the offences that purport to trigger the citizenship loss provisions require the person to have been an Australian citizen at the time of the alleged offence.³ In these circumstances, the automatic stripping of citizenship may have the undesired effect of rendering the person immune from prosecution for serious offences.

By abdicating responsibility for Australian citizens involved in terrorist activities, the burden of countering terrorism is cast on other countries. Often those countries may be affected by conflict and lack the legal frameworks and capacity to effectively monitor and/or prosecute

² See: Law Council of Australia, *Submission to the Independent National Security Legislation Monitor Review of the terrorism related citizenship loss provisions in the Australian Citizenship Act 2007 (Cth)*, 14 June 2019, available at: <https://www.inslm.gov.au/sites/default/files/submissions/2019-06-14-inslm-review-of-the-citizenship-revocation-provisions.pdf>; and Professor Ben Saul, *Submission to the Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (20 June 2015), available at: <https://www.aph.gov.au/DocumentStore.ashx?id=1da2d555-a309-45cd-b0dc-4450a853de2f&subId=353366>.

³ For example, the foreign incursions offences under Part 5.5. of the *Criminal Code Act 1995* (Cth).

such persons. Leaving such people adrift abroad allows them to remain a security threat to Australia, to other countries, and to Australian nationals abroad.

The provisions only apply to persons who are dual nationals, casting citizenship for these people as a privilege contingent on good behaviour. As such, the provisions operate to create two classes of citizenship. For those who hold only Australian citizenship their citizenship is inalienable; for dual nationals, it may be removed. The provisions are discriminatory and risk reinforcing the identity issues that can lead to radicalisation.⁴

The provisions add little of practical utility to existing counter-terrorism tools, and are not necessary as a means of preventing travel to Australia.⁵ The lack of practical rationale is highly concerning, given the risks of the scheme and the undermining of the rule of law outlined below.

In response to these same issues, in December 2017 the Canadian Parliament repealed its citizenship revocation provisions. The repeal was justified as protecting the principles of secure and equal citizenship.⁶

2. The ‘automatic’ provisions are a legal fiction and undermine the rule of law

The consequences for individuals of being stripped of their citizenship are grave and permanent. It is essential that the legal framework governing this process under the Citizenship Act operates with these extreme consequences in mind. It demands that persons affected be afforded a fair hearing of their case to mitigate the otherwise very real risk of them being unjustly subject to these profound consequences.

Sections 33AA and 35 of the Citizenship Act provide for the ‘automatic’ loss of citizenship where a person aged 14 years or over has engaged in specified conduct. The notion that the person renounces their citizenship automatically and the Minister merely ‘notifies’ them is a pernicious legal fiction. It obfuscates the logically necessary decision-making process, and denies basic principles of due process and legal certainty on a matter affecting a person’s fundamental rights and freedoms.

The creation and operation of the Citizenship Loss Board (**the Board**) embodies these issues. The Board is an executive creation lacking transparency and operating in the absence of a clear legal framework. The Board’s existence undermines the notion that the citizenship loss provisions operate automatically—they evidently require a deliberative process involving complex matters of fact and law. The assertion that the Board is an ‘interdepartmental committee providing advice, not a decision-making body’⁷ is again a legal fiction as it purports to exercise de facto decision-making power.

⁴ The Sydney Morning Herald, ‘Stripping Dual Citizenship “Completely Counter-Productive” to Fighting Terrorism: UK Expert’ (21 July 2015), available at: <http://www.smh.com.au/nsw/stripping-dual-citizenship-completely-counterproductive-tofighting-terrorism-uk-expert-20150721-giha2k.html>.

⁵ See: Sangeetha Pillai and George Williams, ‘The Utility of Citizenship Stripping Laws in the UK, Canada and Australia’ (2017) 41(2) University of Melbourne Law Review 845.

⁶ Ibid p 870.

⁷ The Guardian, ‘Government officials of secretive Citizenship Loss Board named’ (21 Jul 2016), available at: <https://www.theguardian.com/australia-news/2016/jul/22/government-members-of-secretive-citizenship-loss-board-named>.

The government's secrecy as to the composition and operation of the Board is deeply concerning. The Board is making decisions of serious consequence to individuals—without an apparent legal framework, rules of evidence, procedural fairness, openness or accountability. The existence of the Board offends basic principles of administrative justice and the rule of law that are fundamental to Australian democracy. It represents a troubling expansion of executive power, eroding basic liberties to an unacceptable degree in the name of protecting them.

The High Court has held that an essential element of any legal or administrative process in Australia that adversely affects a person's rights or interests is a real and meaningful opportunity for that person to present his or her case, be told the substance of the case to be answered and be given an opportunity of replying to it.⁸ The citizenship stripping provisions in question prohibit persons affected from being afforded procedural fairness and due process.

Persons who have their Australian citizenship stripped in these circumstances are denied access to merits review of the decision. Access to merits review is absolutely critical in ensuring that in practice persons access a fair hearing of their case, and that an unjust decision is not made. Although it may be theoretically possible for an affected person to seek judicial review of such a decision, that process would be unlikely to provide a meaningful opportunity for review given the statutory framework and nature of the process.⁹

The Minister's discretionary powers to rescind a notice and exempt a person from the provisions¹⁰ does not provide any meaningful safeguard, and is a troubling grant of unaccountable executive power. There is no duty on the Minister to consider exercising the power, and no natural justice attending the decision whether to consider doing so.¹¹ The personal powers of the Minister are liable to being exercised by the Minister according to his or her personal or political whim. These decisions lack ordinary standards of transparency and accountability under the rule of law.

3. The legal threshold for a decision under section 35A risks extreme and disproportionate consequences

Citizenship is also one of the most fundamental human rights, as many other entitlements flow from it. The scope of offences which provide the basis for citizenship to be stripped under section 35A of the Citizenship Act risks manifestly disproportionate consequences.

The offences listed in s 35A(1)(a) include terrorist and foreign incursion offences. The scope of these offences has been criticised as vague and overly broad, holding potential to encompass legitimate, defensible, or minor acts.¹² It is not limited to conduct that is targeting the Australian government or people.

The decision to strip citizenship after such convictions is then subject to broad Ministerial discretion, lacking adequate constraints and safeguards. The matters of whether the

⁸ *Kioa v West* [1985] HCA 159 CLR 550 per Mason J at 582.

⁹ See Saul, above n 1, p 6.

¹⁰ Citizenship Act s 33AA(14), 35(9).

¹¹ Citizenship Act ss 33AA(15), (22), 35(10), (17).

¹² Saul, above n 1, p 3-4; UN Human Rights Committee, *Concluding Observations: Australia*, CCPR/C/AUS/CO/5 (7 May 2009) [11].

conviction demonstrates a repudiation of allegiance to Australia, and whether it would not be in the public interest for the person to remain an Australian citizen, are vague and lacking in certainty. The provision places an unjustified amount of power in the hands of the Minister, without adequate safeguards and rights of review.

Liberty Victoria further notes the attempted expansion of the provisions proposed in the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*. We oppose the measures in that Bill, including the proposal to remove the requirement of a 6-year minimum sentence presently in section 35A(1)(b). The Bill would allow for citizenship to be stripped in even more disproportionate circumstances. We hold deep concern that the Bill reflects an attempted gradual erosion of the stability of citizenship.

4. The provisions risk rendering Australians stateless

The limiting of the provisions to dual nationals reflects Australia's international obligations not to make a person stateless. However, the application of the provisions indicates that they risk leaving Australians stateless, *de jure* or *de facto*.

Following the stripping of Neil Prakash's citizenship, relying on his purported Fijian citizenship, Fiji indicated that Prakash was not a citizen of that country.¹³ Reports that the government did not obtain legal advice on Fijian citizenship law nor take steps to verify Prakash's citizenship status with Fijian authorities¹⁴ raise serious concerns about the process. Minister Dutton's statement in response that neither he nor the Board made the decision to strip citizenship and the 'provisions operate automatically' reinforce the above-raised concerns about the provisions' incompatibility with the rule of law and executive accountability.

5. Retrospective application

Liberty Victoria notes that s 35A of the Citizenship Act applies retrospectively to conduct that occurred before commencement of the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*.¹⁵ This effect offends the longstanding legal principle of the presumption against retrospectivity. Retrospective laws are commonly considered inconsistent with the rule of law as they make the law less certain and reliable. A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints "justified expectations".¹⁶

Conclusion

The citizenship loss provisions lack adequate justification, and represent a threat to the rule of law and individual rights and liberties. In countering extremism and terrorism it is essential we strengthen these basic tenets of our liberal democracy, not erode them. For the above

¹³ ABC News, 'Fiji casts fresh doubt on decision to strip terrorist Neil Prakash of Australian citizenship' (7 Jan 2019), available at: <https://www.abc.net.au/news/2019-01-08/neil-prakash-definitely-not-fijian-argue-officials/10698462>.

¹⁴ ABC News, 'Home Affairs did not seek legal advice from experts in Fijian law before cancelling terrorist's Australian citizenship' (29 Jan 2019), available at: <https://www.abc.net.au/news/2019-01-30/home-affairs-didnt-see-fijian-advice-on-prakash/10763394>.

¹⁵ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*, Schedule 1, Item 8(4).

¹⁶ HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276.

reasons, Liberty Victoria is of the view that the provisions should be repealed.

Jessie Taylor

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