

Dr Anne Macduff

Building 5, Fellows Road

ANU College of Law

ANU

Committee Secretary

Parliamentary Joint Committee on Intelligence and Security

PO Box 6021

Parliament House

Canberra ACT 2600

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Written Submission to the Parliamentary Joint Committee on Intelligence and Security

Review of the Australian Citizenship renunciation by conduct and cessation provisions

1. Thank you for the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security's review of the Australian Citizenship renunciation by conduct and cessation provisions. Specifically, the Committee has invited comments on the operation, effectiveness, and implications of sections 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007* (Cth) and any other provision of that Act.
2. I am a senior lecturer at the ANU College of Law, Australian National University. My doctoral thesis examined the relationship between Australian values, national identity, and the *Australian Citizenship Act 2007* (Cth). I make this submission in a personal capacity.
3. I note that many of written submissions to the review have addressed legal and policing issues relating to these sections. This submission evaluates the extent to which the operation of the current provisions are consistent with democratic principles.

Overview of recommendations

4. I recommend the repeal of sections 33AA, 35, 35AA and 35A on the basis that they are inconsistent with the democratic underpinnings of citizenship.
5. Further, I recommend the amendment of s 21(2) so that it is more consistent with the democratic underpinnings of citizenship. Specifically,
 - a. the deletion of sections 21(2) (d) and (e),
 - b. the repeal (or narrowing) of the 'good character' requirement in s21(2)(h),

- c. the amendment of s 21(2)(f) to require only a 'knowledge of the responsibilities and privileges of Australian citizenship', and
- d. the amendment of the pledge and preamble to require only a commitment to 'democratic beliefs' and 'the rights and liberties of others'.

Citizenship Laws and Democratic Principles

6. Historically, nationality was legally determined with reference to certain unalterable characteristics. Under English common law, nationality was determined by place of birth (*jus solis*). In countries influenced by Roman law, nationality was determined according to the nationality of one's parents (*jus sanguinis*), usually the father. As neither the place of birth nor the nationality of a parent can be altered, it was assumed for many centuries that nationality was a fixed identity characteristic. This assumption operated even though throughout history, populations have migrated all over the globe.
7. The rise of liberal and representative democracy prompted reform not only to voting laws, but also nationality laws. It became clear that unless the growing migrant population could be incorporated into the nation and its body politic,¹ the community could not claim that they were governed by people.
8. The problem that naturalization laws sought to address was a 'democratic deficit'.² A democratic deficit occurs when a democracy is unable to live up to its key democratic principles or practices. For instance, if a large minority of a community are excluded from participation in government, that community has a democratic deficit. In the face of substantial waves of permanent migration, nations introduced legal mechanisms through which one's nationality could change to reflect their lived reality arising from education, military service and other civic contributions. This shift included England, and subsequently Australia, where legislative measures for 'naturalisation' were introduced.
9. A democratic deficit will arise in any situation where access to membership is restricted by criteria. Therefore, the criteria for both acquisition and loss of membership can only be justified on the basis that it is *essential* to democracy in other ways. This submission reviews the operation of provisions relating to citizenship by acquisition *and* citizenship loss, because they are two sides of the same democratic coin. It recommends that the provisions for both acquisition of citizenship by conferral (previously naturalisation) and its loss, exceed democratic justification. Each argument is examined more fully below.

Provisions relating to criteria for citizenship by conferral is undemocratic

10. Unless an exception applies, to acquire citizenship by conferral a person must satisfy the criteria in s 21(2) of the *Australian Citizenship Act 2007* (Cth). Those criteria state that a person must;
 - be a 'permanent resident',
 - satisfy the general residence requirement,

¹ Ann Dummett and Andrew Nicol, '*Subjects, Citizens, Aliens and Others*' (Weidenfeld & Nicholson, 1990); Rogers Brubaker, '*Citizenship and nationhood in France and Germany*' (Harvard University Press, 1992).

² Sanford Levinson, 'How the United States Constitution Contributes to the Democratic Deficit in America', 55 *Drake Law Review* 859, 860 (2007).

- understand the nature of the citizenship application,
- possess a basic knowledge of English,
- have an adequate knowledge of Australian and the responsibilities and privileges of Australian citizenship,
- be likely to reside or maintain a close relationship with Australia, and
- be of good character.

11. Looking at each criteria in turn, selecting individuals for citizens for conferral on the basis of residence is consistent with democratic principles. Residence establishes a direct connection with a community, which in turn creates a legitimate interest in participating in the governance of that community. Circumstances other than physical residence may also create a connection, however these circumstances are not discussed in this submission.
12. The requirement in Australian citizenship law that an applicant for citizenship must know the responsibilities and privileges of citizenship is also broadly consistent with democratic values. Requiring citizen applicants to have knowledge of the responsibilities and privileges of citizenship recognises that it is important that members know that equality and tolerance are key concepts. Without this knowledge, a democracy might be compromised. By contrast, a requirement that an applicant for citizenship ought to 'know about Australia' goes too far. For example, an applicant might know much about democracy, without knowing the answer to the Australian citizenship test question that asks 'which animals are on the national coat of arms?'³ Knowledge criteria that goes further than the knowledge of equality and tolerance are unnecessary and operates to deepen the democratic deficit. The pledge of commitment and the preamble should therefore also be amended to reflect that the core meaning of citizenship is reflected only in the democratic values of equality and tolerance, and not wider values.
13. If it is agreed that citizen candidates ought to demonstrate a knowledge of the rights and privileges of citizenship, then this knowledge would need to be assessed. Previously, this knowledge was assessed through the citizen confirming this in a statement during an interview with a government officer. Where such a statement attesting knowledge is the means through which knowledge is determined to exist, then the requirement that the individual is of 'good character' may be relevant. It might be relevant to the extent that 'good character' establishes the genuineness or truthfulness that a person makes that they have this knowledge. This is not, however, the way that 'good character' is currently interpreted in decisions concerning citizenship. The government's citizenship policy and procedure guidelines indicates that the issue is whether a citizen's general behaviour reflects 'Australian values'. 'Australian values' is too vague to assess and goes further than necessary. Indeed, recent decisions in the Administrative Appeals Tribunal suggest that traffic offences have been used to justify the rejection of an application for citizenship by conferral because it indicates

³ Department of Home Affairs 'Australian Citizenship: Our Common Bond' (2018), 14.

that the individual cannot act consistently with the Australian value of 'following the law'.⁴ The good character ought to be reviewed. Furthermore, it is questionable whether the 'good character' criteria is remains relevant, as the knowledge requirement is no longer satisfied by a statement. Instead, it is currently through a citizenship test.

14. The requirement that an applicant possess 'a basic understanding of English language' in section 21(2)(e) is not necessary to participation in a liberal democracy and should be repealed. Understanding the Australian system of governance and processes, and contributing to political debates, can be undertaken in any language. The requirement that an applicant 'understands the nature of the application' in section 21(2)(d) is extraneous, as it is already covered by 'knowledge of ... the responsibilities and privileges of citizenship.'

Summary of recommendations on provisions relating to the acquisition of citizenship by conferral

- a. the deletion of sections 21(2) (d) and (e),
- b. narrowing (or repeal) of the 'good character' requirement in s21(2)(h),
- c. the amendment of s 21(2)(f) to require only a 'knowledge of the responsibilities and privileges of Australian citizenship', and
- d. the amendment of the pledge and preamble to require only a commitment to 'democratic beliefs' and 'the rights and liberties of others'.

Provisions concerning citizenship loss by conduct are undemocratic and illiberal

15. While the provisions concerning citizenship loss in the circumstances where an individual themselves communicates a positive intention to repudiate their own citizenship is consistent with democracy, the provisions concerning citizenship loss through renunciation by deeming provisions and conduct are not.
16. Generally, stripping individuals of their citizenship on the basis of subsequent behaviour is inconsistent with principles of a liberal society. It interferes with the manner in which an individual is permitted to express their understanding of democracy. It is recognised that democracy can take a wide range of forms.⁵ Citizenship stripping is an activity which deepens the democratic deficit by excluding these individuals from participation in the community. Citizenship stripping is also anti-democratic because it polices and punishes individual freedom of thought and speech, including freedom of thought and speech about alternate forms of democracy.

⁴ SBS News 'Menace on the roads': Migrant refused Australian citizenship over traffic offences' 12 December 2018<https://www.sbs.com.au/language/english/menace-on-the-roads-migrant-refused-australian-citizenship-over-traffic-offences_3>; Macduff, A 'Advance Australia Fair? Citizenship Law, Race and National Identity in Contemporary Australia' (2017) <<https://openresearch-repository.anu.edu.au/handle/1885/133589>.

⁵ See 'Different forms of Government by Democratic Attribute' <<https://www.worldatlas.com/articles/the-different-forms-of-government-by-democratic-attributes.html>>; Gleeson, M 'The shape of Representative Democracy' (2002) 27(1) *Monash Law Review* 1.

17. Further, the specific grounds in the *Australian Citizenship Act 2007* (Cth) which regulate citizenship loss also operate to create a democratic deficit.
18. Engaging in the armed forces of a country with which Australia is said to be 'at war', has not always been conduct which has led to a loss of nationality. The precursor to section 35 of the *Australian Citizenship Act 2007* was not introduced in Australian law until 1917, during World War 1.⁶ The justification for this provision has been that being in the armed forces of an enemy country demonstrates an individual's intent to challenge or disrupt the nation's government. However, challenging or disrupting the nation's government is within the scope of a citizen's legitimate democratic activity. This is so regardless of whether those challenges are peaceful, include acts of civil disobedience,⁷ or go further. Further, this section risks being misused. Indeed, it was misused to justify the internment of Australians for no other reason that they were had migrated from countries which were at war with Australia.⁸ The provision also potentially includes stripping membership from Australians where they may have little choice to engage in service in the armed forces, for instance through conscription. Rather than these activities resulting in citizenship loss, it would be preferable if any activities are caught by Australia's criminal law, including espionage. Using the criminal law system ensures that there are legal safeguards in place which protect principles of democracy, including due process and the rule of law.
19. Despite 'migration fraud' or 'third party fraud' being accepted as legitimate grounds for citizenship loss, neither are democratically justifiable. The two main arguments that these grounds are relevant are explored and rejected in more detail below.
20. First, it is argued that these grounds are relevant because at the time the individual migrated, the existence of fraud meant that the state was not able to make a fully informed decision about the applicant. However, it is possible that subsequent actions by the migrant means that they have nonetheless demonstrate a connection which may mean that the initial fraud is no longer relevant. Of course, it remains open to the state to prosecute, deter and punish individuals who make misleading statements. However, an instance of migration fraud or third party fraud does not necessarily undermine an individual's democratic principles, and so should not be a factor considered relevant to the acquisition, or loss, of citizenship.
21. Second, fraud is argued to indicate that the individual is not of good character. As argued above, good character is only relevant as to whether a statement that they have knowledge of the responsibilities and privileges of citizenship is genuine. And justification for the good character requirement is eroded by the introduction of the citizenship test. Further, the genuineness of an individual about their state of knowledge is not necessarily undone by a false statement made about another matter. Finally, the provision as it currently operates is potentially unfair because it reaches too far. It may capture an individual whose application is rejected due to the fraud of

⁶ Rubenstein, K *Australian Citizenship Law* (Thomas Reuters, 2nd edition, 2016)

⁷ Macduff, A 'Performing Citizenship, Embodying Disobedience' in Glenn, P and Rubenstein, K *Law and Democracy: Contemporary Questions* (ANU Press, 2014)

⁸ Dunkley, A 'The immigration debate in Australia: World War 1 and its Impact', (Parliamentary Library, Commonwealth of Australia), June 2016,

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/WW1Immigration>.

a migration agent, of which they were unaware.⁹ I would suggest citizenship loss by fraud is only justifiable when the circumstances of fraud relates to a fact concerning citizenship criteria that are central to democratic principles, such as length of residence.

22. Recently, acts of violence have been singled out and labelled as ‘terrorist’, implying that there is something unique about these actions which pose a threat to the national interest. Concerns about the national interest are then linked to citizenship, citizenship status being the mechanism by which a person becomes a member of the national community. However, the link between national interest and citizenship is not a logical one. Although there are different views on this matter, I would argue that the harm arising from the threat of ‘terrorism’ is no different to the harm arising from other motivations such as greed, misogyny etc. Threats work to undermine the physical safety to the people in the community. The criminal law has the tools to assess, deter and even punish all violent behaviour and related threats, including terrorist motivated violence. To make these violent actions amount to a loss of citizenship cannot be justified on democratic principles, and instead erodes democracy in Australia.

Summary of recommendations about provisions relating to citizenship loss

24. I recommend that sections 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007* (Cth) be repealed. Loss of citizenship is only democratically justified where either
- a) at the time of conferral, the core criteria for citizenship was not present at the time of conferral and cannot be reviewed in light of subsequent actions. That is, either that a person had not lived in Australia for the necessary period, and/ or the individual did not make a genuine statement about their knowledge, or
 - b) where the individual themselves communicates to the Australian government through express words their request that their citizenship be repudiated.

A second class citizenship regime arising from the citizenship loss provisions

25. A liberal democracy not only needs to be mindful that its laws do not create a democratic deficit, but it also needs to deliver legal equality. The citizenship loss provisions fail to deliver legal equality as they create different legal consequences for the same actions, depending on one’s legal status. In other words, as s33AA only applies to dual citizens, a dual citizen may be subject to the penalty of loss of citizenship for engaging in terrorist activities, whereas a non-dual citizenship cannot be similarly punished.
26. The psychological impact of the existence of two classes of citizenship is significant. Dual citizens in Australia are likely to feel targeted by the loss provisions, with their conduct and daily activities under extra scrutiny merely because they have another citizenship. This sense of vulnerability is exacerbated by the loose and ambiguous language of allegiance to Australia and Australian values. The uncertainty of the scope of these tests leading to citizenship loss create a real risk

⁹ Shamsher Kainth ‘Migration Agent’s ‘widespread fraud’ has Indian woman’s visa in limbo for 8 years’ SBS News, 22 June 2019 < <https://www.sbs.com.au/language/english/migration-agent-s-widespread-fraud-has-indian-woman-s-visa-in-limbo-for-8-years>>

that the political engagement and participation of dual citizens will be eroded in the face of fear. A study was undertaken which demonstrated that Australians citizens by conferral were, even before these citizenship loss provisions, less likely to be politically engaged through activities such as demonstrations, petitions etc.¹⁰ Subjecting dual citizens to additional vulnerability is likely to chill participation by dual citizens in political debate, and undermine Australian democracy.

27. A regime of second-class citizenship rights for dual citizens created by s33A is also inconsistent with government policy. Legislative amendments to Australia's citizenship laws in 2002 lifted the ban on dual citizenship for those born in Australia. In doing so, the government recognised that a person may legally be a citizen of other countries and remain an Australian citizen. Creating a legal regime which places dual citizens under ongoing threat of citizenship loss by virtue of the fact that are dual citizens, is contrary to this policy.

Bolstering protections where provisions relating to citizenship loss remain

28. Should the Committee decide not to repeal sections 33AA, 35, 35AA and 35A, then reforms must occur in order to mitigate the democratic deficit that they create. The government ought to acknowledge that citizenship loss is an extreme form of punishment. Citizenship loss enacted on the initiative of the state, if it is to be permitted at all, ought only to be permitted in circumstances where due process and natural justice have taken place.

29. Written submissions to this review by the Law Council of Australia, Professor Williams and Dr Pillai, Professor Rubenstein, and the LRSJ hub of the ANU College of Law have all outlined legal concerns about the current provisions. I agree with those legal concerns and urge that reforms be passed immediately.¹¹ Specifically, loss of citizenship should only occur where;

- there is a court determination that the individual concerned has engaged in serious terrorist activity, particularly where such conduct occurs in Australia,
- the court determination then leads to the Minister making a positive decision about whether citizenship loss is appropriate (or not) in the individual circumstances,
- the provisions are not applied retrospectively, and
- if the Minister makes the decision that citizenship loss is appropriate, there must be
 - expert evidence led about the factual existence of the individual's other citizenship by those qualified to comment on the laws of the other nationality,
 - procedural fairness offered to the individual, and
 - the decision can be challenged through an effective means of both merits and judicial review.

30. It is easy to overstate the claim that terrorism is a distinctly modern phenomenon. There have been internal risks to nations and its governments ever since the concept of nations emerged. Liberal democracies have developed a variety of robust mechanisms to deal with these

¹⁰ Antoine Bilodeau, 'Immigrants' Voice Through Protect Politics in Canada and Australia: Assessing the Impact of Pre-Migration Political Repression' (2008 34(6) *Journal of Ethnic and Migration Studies* 975

¹¹ Law Council of Australia, Submission to the Review of Renunciation of Citizenship by cessation and conduct 2019' (no 3).

challenges. If the Australian democracy is in serious danger due to the risk of terrorism, then it is critical that the practices and principles which ensure democracy are preserved and respected, particularly as they relate to the laws regulating membership in the Australian community.

Yours sincerely

Dr Anne Macduff

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ANU College of Law

Building 5, Fellows Road

Australian National University