Victorian Council for Civil Liberties Inc
Reg No: A0026497L
GPO Box 3161
Me bourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

15 October 2019

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

By email: pjcis@aph.gov.au

Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

Liberty Victoria

1. Liberty Victoria is a peak civil liberties organisation in Australia that has worked to defend and extend human rights and freedoms in 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.
2. We welcome the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the provisions of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (**the Bill**). The focus of our submissions and recommendations reflect our experience and expertise as outlined above.
3. Liberty Victoria also continues to rely on its earlier submission to the Committee's concurrent review of the Australian citizenship renunciation by conduct and cessation provisions.[1]

[1] Parliamentary Joint Committee on Intelligence and Security Review of the Australian Citizenship renunciation by conduct and cessation provisions, Submission No.2 (dated.1 July 2019).

Outline

4. For the following reasons, Liberty Victoria recommends the Bill not be passed, and the current automatic citizenship loss provisions be repealed.
    a. Citizenship loss provisions, both discretionary and automatic, are not an effective response to the threat of terrorism and also risk undermining efforts to combat radicalisation.
    b. The citizenship loss current and proposed provisions and the operation of the Citizenship Loss Board represent a threat to the rule of law and basic civil liberties.
    c. The legal threshold for Ministerial decision risks manifestly disproportionate consequences.
    d. The provisions risk rendering Australian citizens stateless.

Ineffective and undermining

5. 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.
6. 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.
7. 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 such persons. Leaving such people adrift abroad allows them to remain a security threat to Australia, to other countries, and to Australian nationals abroad.
8. 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]

---

[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).

[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.

9. 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.

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

Rule of law and basic civil liberties.

11. The consequences for individuals of being stripped of their citizenship are grave, permanent and relate to fundamental rights and freedoms. 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 such profound consequences.

12. The personal discretionary citizenship stripping Ministerial powers proposed by the Bill lack critical safeguards ensuring people affected are given a fair hearing of their case, including the obligation to accord procedural fairness[7] and access to merits review.

13. 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.

14. Persons who have their Australian citizenship stripped under the existing laws are denied access to merits review of the decision. The same applies to the discretionary mechanisms proposed by the Bill. 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]

15. The creation and operation of the Citizenship Loss Board (**the Board**) further exacerbates the denial of a fair hearing for people affected 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

[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] 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, p 870.
[7] Each citizenship stripping discretion expressly states "[t]he rules of natural justice do not apply in relation to making a decision or exercising a power under this section": ss 36B(11), 36D(9), 36F(7), 36G(8) and 36J(7).
[8] *Kioa v West* [1985] HCA 159 CLR 550 per Mason J at 582.
[9] Professor Ben Saul, Submission to the Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (20 June 2015), Submission 2.

committee providing advice, not a decision-making body'[10] is a legal fiction as it purports to exercise de facto decision-making power.

16. 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.

17. Liberty Victoria also notes that current s 35A of the Citizenship Act applies, and the amendments proposed by the Bill purport to apply, retrospectively to past conduct.[11] 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".[12]

18. Finally, we also refer to concerns raised by highly respected legal commentators that there is a risk that proposed s 36B may be inconsistent with the constitutional separation of judicial power.[13]

Disproportionate consequences

19. The legal threshold for a decision under the current and proposed citizenship loss provisions risk 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 the Citizenship Act risk manifestly disproportionate consequences.

20. The proposed offences listed in proposed s 36D(1) include terrorist and foreign incursion offences. The scope of these same offences has previously been criticised as vague and overly broad, holding potential to encompass legitimate, defensible, or minor acts.[14] It is not limited to conduct that is targeting the Australian government or people.

21. Liberty Victoria also has significant concerns with the Bill's proposed lowering of the sentence term threshold for which a person convicted of a specified terrorism offence, from 6 years to 3 years.[15] In this regard, 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.

---

[10] 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.
[11] *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*, Schedule 1, Item 8(4); and Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, Schedule 1, Part 2.
[12] HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276.
[13] Shipra Chordia, Sangeetha Pillai and George Williams, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, p 2.
14 Saul, above n 1, p 3-4; UN Human Rights Committee, *Concluding Observations: Australia*, CCPR/C/AUS/CO/5 (7 May 2009) [11].
[15] s 36D(1)(b).

22. 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 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.

23. The exercise of personal Ministerial powers lacks transparency and certainty. The High Court has consistently acknowledged the wide range of subject matters that may be taken into account in making decisions "in the public interest"'[16] and has stated: "[w]hen we reach the area of ministerial policy giving effect to the general public interest, we enter the political field. In that field a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints".[17] The High Court has held also that "national interest", which is largely analogous in this context with "public interest", cannot be given a confined meaning and "what is in the national interest is largely a political question".[18]

24. In this regard, the personal powers of the Minister are liable to being exercised by the Minister according to his or her personal or political whim. As detailed in Liberty Victoria's Rights Advocacy Project's report *Playing God: The Immigration Minister's Unrestrained Power*[19], these personal powers are often characterised by arbitrary, inconsistent and unpredictable outcomes. These decisions lack ordinary standards of transparency and accountability under the rule of law.

Statelessness

25. 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.* The Bill's proposed replacement of automatic operation-of-law provisions with discretionary personal powers of the Minister does not alleviate these concerns, including because people affected may still find themselves *de facto* stateless and encounter the same barriers. We also note that the proposed discretionary power may still lead to a person being *de jure* stateless in circumstances where the Minister erroneously believes the individual to be a dual national when in fact they are not.

Conclusion

26. 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.

---

[16] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 502 [331]. See also *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ at 216–17.
[17] *O'Shea* (1987) 163 CLR 378 per Brennan J at 411.
[18] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at 46 [40].
[19] Liberty Victoria, Rights Advocacy Project, Playing God: The Immigration Minister's Unrestrained Power, 4 May 2017, available at: http://libertyvic.rightsadvocacy.org.au/wp-content/uploads/2017/05/YLLR_PlayingGod_Report2017_FINAL2.1-1.pdf [accessed 13 October 2019].

27. For the above reasons, Liberty Victoria is of the view that the Bill not be passed and the existing automatic citizenship loss provisions be repealed.

Jessie Taylor
President, Liberty Victoria