AUSTRALIA DEFENCE ASSOCIATION

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

INQUIRY INTO THE AUSTRALIAN CITIZENSHIP AMENDMENT (ALLEGIANCE TO AUSTRALIA) BILL 2015

Introduction

1. This submission to the Parliamentary Joint Committee on Intelligence and Security, by the Australia Defence Association, relates to the committee's inquiry into the *Citizenship Amendment (Allegiance to Australia) Bill 2015*. The ADA has long been a strong proponent of machinery-of-government oversight and accountability mechanisms such as the PJCIS. We welcome the committee's invitation to offer a submission to the inquiry.

2. Why the ADA is making a submission may be found on pages 1-2.

3. A summary of the background to our submission is on pages 3-5.

4. Detailed discussion may be found from page 5 onwards, with our conclusions and recommendations at pages 9-11.

Relevance of this issue to the ADA

5. The issues addressed in this Bill naturally fall within the ADA's area of interest as the relevant independent, community-based, non-partisan, national public-interest watchdog organisation for strategic security, defence and wider national security issues. Since our foundation in Perth in 1975 the ADA has long advocated that Australia needs an integrated and whole-of-government approach to our strategic and domestic security.

6. The ADA's public-interest guardianship remit and our accountability-advocacy activities have long primarily focused on the Australian Defence Force, Australia's six intelligence and security agencies, and the Australian Federal Police in the exercise of the AFP's national security (as opposed to general crime-fighting) responsibilities.

7. We base our public-interest watchdog activities on three key principles concerning Australia's strategic and domestic security:

- Our strategic security, common defence and sovereign freedom-of-action as a nation-state constitute the first responsibility of any Australian government.

- Ensuring our external and domestic security is a universal civic responsibility of all Australians. All Australians have reciprocal citizenship obligations and responsibilities to this end. This includes those fellow Australians our government lawfully deploys overseas, on behalf of us all, for representational, military, law enforcement or other national-strategic purposes.

- National unity, economic strength, free speech, informed and robust public debate, and capable and adaptable defence and other strategic capabilities, are essential and inter-linked components of Australia's national security, liberal-democratic system and whole way of life.

8. To assist informed public debate the ADA maintains a comprehensive website at www.ada.asn.au and publishes discussion papers, study papers and a national bulletin, *Defence Brief*. We regularly contribute to public, academic and professional debates on strategic security, defence and wider national security matters, and are often consulted by the media seeking background information or other sectionally-neutral commentary across the range of such issues.

9. As a community-based, non-partisan, national public-interest watchdog organisation — with an independent and long-term perspective — the ADA therefore seeks the development and implementation of national security structures, processes and policies encompassing:

a. an accountable, integrated, responsive and flexible structure for making strategic security, defence and wider national security decisions over the long term;

b. a practical and effective balance between potentially competing needs for civil liberties, community security and short-term budgetary priorities;

c. intellectually and professionally robust means of continually assessing Australia's strategic and domestic security situations;

d. the sustained allocation of adequate national resources to all our strategic security, defence and wider national security needs according to such means (rather than tailoring supposed "assessments" to the funding levels, partisan policies or bureaucratic fashions thought to be acceptable politically);

e. integrated and deterrent national security strategies based on the protection and support of our national sovereignty, strategic freedom of action and enduring national interests;

f. the development and maintenance of an adequate defence force and other security and intelligence agencies capable of executing such a national strategy across all aspects of national security; and

g. the development and maintenance of manufacturing and service industries capable of developing and sustaining defence force capabilities and operations.

10. Objectives 9a. 9b and 9e, relating to the constitutional accountability, civil rights balance and the strategic and operational effectiveness of our defence force and other strategic agencies, directly relate to the subject of the *Citizenship Amendment (Allegiance to Australia) Bill 2015*.

BACKGROUND

11. Six relevant points have often been missed or only covered superficially in public discussion of the “Allegiance to Australia” Bill:

a. First, is the general absence of an overall sense of perspective and context. As a national public-interest watchdog organisation the ADA necessarily adopts a long-term view looking forward and has a long and detailed corporate memory concerning the past. This enables us to assess public-policy in general, and policy risk in particular, in their broad historical and philosophical contexts.

(1) We note that the first, second and third tranches of counter-terrorist legislation enacted by Parliament since the major Islamist terrorist attacks in New York and Bali in 2001-02 each caused some critics to allege that such reforms threatened the rule-of-law, our civil liberties and very community life as a successful liberal democracy. We note that few, if any, of these concerns have been subsequently borne out by subsequent community experience.

(2) The general trend, such as criminal prosecutions and convictions of those plotting terrorist attacks within Australia, has justified such temporary and permanent legislative measures — both in practice and, as is often overlooked, as a deterrent. Even the only significant miscarriage of justice that has occurred, in the case of Dr Mohamed Haneef, was as much caused by the haste engendered by the short period of detention possible as by other causes. If he could have been detained longer while initial enquiries were being made he would have ended up being cleared and released sooner.

(3) The ADA continues to believe that as long as realistic accountability measures continue and sunset clauses are instituted in relevant cases — and that both are reviewed regularly as a matter of course — the temporary risks to civil liberties remain negligible in theory, and on balance justifiable and minimal to non-existent in practice.

b. Second, the nature and social consequences of any crime always need to be discussed before deciding how guilt and punishment is to be determined. Revocation of citizenship as part of a potential punishment, and as a deterrent measure, should not be discussed without prior and comprehensive consideration of the relevant crime involved and its context.

(1) Where Australians choose to serve overseas with any armed group fighting our defence force in a war the crime involved is clearly treachery — the deliberate betrayal by an Australian of their citizenship obligations to their fellow Australians, and the

conscious betrayal of their allegiance to Australia as a whole as a liberal-democratic state ruled by law.

(2) Unfortunately much public discussion has instead fixated on the means or even at times the propriety of revocation as a punishment without due, and often any, consideration of the very serious nature of the crime involved.

(3) Moreover, treachery undoubtedly occurs whenever an Australian chooses to fight our defence force when it is deployed overseas, regardless of whether the traitor is serving with an enemy nation-state, a proscribed terrorist organisation or any other type of armed group. The Bill fails to account for situations where the armed group may not be a terrorist one, and is thus inconsistent with the long overdue reforms finally enacted in the *Security Legislation Amendment (Terrorism) Act, 2002* (paragraphs 30-38 refer).

c. Third, the relevant and enduring constitutional principle involved is being largely ignored in most discussion of this Bill. Particularly where rule-of-law concerns have been raised without mentioning the most relevant historical and legal precedents. Numerous High Court rulings over the last century have reaffirmed that the defence and security heads of power in the Australian Constitution wax and wane according to the strategic or domestic security risks Australia faces at particular times. The historical and extant application of this constitutional principle is discussed at paragraphs 16-29.

d. Fourth, Australia now fights its modern wars differently to those in the past but few discussing this Bill seem aware of this or the implications.

(1) Whereas the World Wars required broad participation across the whole national community, and even the Vietnam War involved considerable community participation through selective military conscription, our modern wars are now fought by a very small, all-volunteer, professional defence force.

(2) One byproduct of this trend is that most Australians, even across extended families, are or feel uninvolved with the prosecution of these wars in their day-to-day lives. Our modern wars are now fought by only a very small part of the national community.

(3) This results in many Australians no longer understanding that when Australia commits its defence force to war then it is still Australia as a whole that is at war, not just our defence force.

e. Fifth, such public misconceptions continue to sidetrack much public debate on the treachery issue in general and the *Citizenship Amendment (Allegiance to Australia) Bill 2015* in particular.

(1) Where the treachery involves Australians choosing to serve overseas with the so-called "Islamic State", or indeed any other group similarly engaged in armed conflict with Australia and the rest of the international community, this is unequivocally more of a wartime crime than a peacetime one.

(2) Due to the now prevalent lack of understanding or knowledge about military matters, and the general lack of recognition about Australia being at war, many and perhaps most Australians look at this Bill without recognising or properly acknowledging its actual context.

(3) Even those conceding the key issued concerned is the crime of treachery often seem to remain subjectively trapped in unduly "peacetime" mindsets that ignore or downplay that it remains wartime treachery that is the nub of the issue.

We elaborate on this conceptualisation fault, and some resultant ethical confusion, in paragraphs 30-50.

f. Finally, whether the “Allegiance to Australia” Bill might offer real or supposed electoral advantage to one side of politics or not is irrelevant. There is, in our view, no doubt that serious inconsistencies remain in our existing laws covering the crimes of treachery and treason. The “Allegiance to Australia” Bill is a legitimate and necessary vehicle for reforming the citizenship aspects of how Australia treats treachery as a crime. We therefore welcome the bipartisan co-operation and support for the measure across the governing party and the alternative-government party.

DETAILED DISCUSSION

Introduction

12. As noted above, much public discussion about reform of our citizenship laws continues to be largely sidetracked by a significant categorisation error hampering informed debate.

13. Whether Australian citizenship should, or even can, continue to be held by traitors remains the heart of the matter. The nub of the issue is how to deal with treachery, rather than how we define or might revoke citizenship.

14. The revocation of Australian citizenship due to treachery even if considered only as a matter of punishment — and not active deterrence as well — can surely only be discussed properly by first addressing the nature, gravity and consequences of the crime involved.

15. However, because treason and treachery are not commonplace crimes much debate instead begins and ends, illogically, by only discussing modes of determining punishment.

Context and lessons

16. As also outlined above, public discussion has been further confused by a commonplace contextual misunderstanding.

17. Particularly by those who ignore or misunderstand the relevant, but complex, constitutional and legal history involved with how our laws deterred, countered and punished treachery when Australia was previously at war.

18. Many protagonists on all sides of rule-of-law questions, for example, fall into the trap of not acknowledging the, at least partly, wartime circumstances often applying to treachery and to its most serious consequences as a crime.

19. Most public discussion has not mentioned — let alone begun by being properly based on — the highly relevant High Court rulings from both World Wars and the Korean War that firmly established the key constitutional principle involved.

20. This key principle is that the defence and security heads of power in the Constitution wax and wane according to the seriousness of the national threat.

21. For example, at one end of the threat spectrum, by regulations under the *National Security Act, 1939*, ministers were lawfully authorised, subject to judicial appeal, to:

a. ban extremist political parties sympathetic to enemy countries and their allies (including the communist party during 1939-41 due to the 1939 Nazi-Soviet Pact);

b. intern enemy citizens, other foreign aliens and naturalised Australians with perceived enemy sympathies; and

c. intern Australian citizens by birth (and even long ancestry) who were considered likely to pose a domestic security threat, such as members of the Australia First Movement as potential enemy collaborators.

22. But the principle is also why, towards the other end of the spectrum, the High Court struck down the Act dissolving the Communist Party of Australia (CPA) in 1951.

23. Even though Australia was directly fighting international communist aggression in the Korean War, the High Court judged the nature of the overall threat at that stage did not alone justify banning the CPA. Even when the CPA was strongly aligned to such an international movement, the party was then

under significant foreign control by the Communist Party of the Soviet Union, and the party was actively subverting Australian participation in the UN's collective-security action in Korea.

24. The ensuing referendum to expand the defence and security heads of power to cover such a ban, under such conditions, was not approved by the electorate. Indeed the referendum result consolidated the High Court's reaffirmation of the extant principle.

25. The historical record clearly shows that the rule-of-law was preserved throughout, even when some relatively draconian measures were temporarily necessary in times of increased national threat.

26. In the current situation, the dual international and domestic threats posed by Islamist terrorism are likely to be long-term ones. These dual threats are not existential or even at other World War-type levels, but this could change over the long timescales likely to be involved.

27. In constitutional, practical and moral terms, however, the nature and seriousness of these dual threats on the national security threat spectrum surely justifies more than traditional "peacetime" counter-treachery and counter-terrorism measures.

28. But most public discussion ignores this context. In particular it ignores the tried and tested constitutional principle concerning the waxing and waning heads of power underlying application of the rule-of-law as our national security circumstances change.

29. As the High Court emphasised in numerous cases establishing the principle, stricter measures at any one time — when duly balanced against the degree of threat then applying — are not somehow unconstitutional, beyond the exercise of legal power or authority, arbitrary, or otherwise contrary to the rule-of-law as some are currently prone to claim inaccurately.

Relevant precedents in recent reforms

30. Most public debate on the Bill, even if making cursory references to wartime and Cold-War legal precedents, also ignores or misinterprets the obvious relevance of more recent reforms.

31. In particular, where the *Security Legislation Amendment (Terrorism) Act, 2002* finally closed the 1945-2001 Burchett loophole in our previous treason and treachery laws, but the reform was not carried through fully by also amending Section 35 of the *Citizenship Act, 2007*.

32. After the David Hicks case during the early part of the Afghanistan War, the 2002 reforms ended the archaic requirement — prohibited in effect by the UN Charter half a century previously — that wars had to be "declared" before alleged traitors could be prosecuted.

33. Armed conflict (war) now exists as a material fact alone according to international law.

34. Just as importantly, the reforms also rightly made it a crime to serve with any armed group fighting our defence force, not just with an enemy nation-state.

35. While fighting for the so-called “Islamic State” is therefore an unlawful act, the continuing flaw in the Citizenship Act (Section 35) is that citizenship is only revoked automatically for such treachery when the traitor is fighting for a nation-state and only if a dual citizen or dual national anyway.

36. While Section 35 of the 2007 Act is often cited in public debate by both sides of the argument, it is rarely noted that the section has never been used. Nor why similar provisions in previous legislation (back to the first Citizenship Act in 1948) were never used, only because of the Burchett loophole, not because automatic revocation of a traitor's citizenship somehow contradicts the rule-of-law.

37. As a result of most references to this section of the Citizenship Act incorrectly describing the historical exercise of this provision, some have been tempted to dispute the need for such a legal power on spurious grounds centred in ideological stances rather than the law and the facts.

38. All Australians need to acknowledge that for 56 years (from 1945 to 2001) we badly let down generations of men and women serving us as fellow citizens in our defence forces. We must now act so as to not let them down so disgracefully again. On both moral and practical grounds the Citizenship Act should be reformed to close the last loophole that might enable Australians serving with an enemy fighting our diggers to escape prosecution or requisite punishment for their treachery to Australia.

Other conceptual misunderstandings

39. Some Australians oddly seem to ignore or even doubt their reciprocal citizenship obligation to those fellow Australians we deploy to war and peacekeeping on our behalf. Especially by prohibiting all acts that intentionally or recklessly assist an enemy fighting them.

40. Moreover, this is not just a case where dealing with a crime ends with only issues of prosecution or punishment.

41. Treachery as a crime embodies an unequivocal rejection of the mutual responsibilities and shared values of Australian citizenship. Our treachery laws must therefore also pro-actively deter and pre-emptively counter commission of the crime in the first place, not just thoroughly punish those offenders who we are able to bring to trial.

42. In the case of traitors actually serving overseas with "Islamic State", leaving them undeterred, un-countered or unpunished also contradicts Australia's obligations as a UN member and a responsible international citizen.

43. Due to peacetime mindsets, however, discussion about revoking the citizenship of Australian traitors serving with “Islamic State” tends to excuse or downplay treachery as the crime involved.

44. Discussion is instead often diverted into what are actually consequential matters about how to revoke the citizenship of traitors, rather than why it is still necessary.

Ethical contradictions

45. Much public discussion also features some really odd ethical contradictions and skewed perspectives.

46. Few Australians, for example, seem to bat an eyelid at the battlefield killing, by us or our allies, of an Australian traitor who has chosen to switch his or her allegiance to “Islamic State”, and actively carried this out by going overseas and serving it in a war.

47. Yet there is quibbling about whether such traitors should, or even can, have their Australian citizenship revoked for such treachery. Even when they openly renounce their citizenship and boast about doing so as part of their internationally-proscribed terrorist cause.

48. Such ethical or contextual confusion also causes significant moral and practical problems on the ground, both with law enforcement and with military action. Particularly where it means Australian law enforcement agencies and our defence force are hindered in exchanging intelligence with Coalition partners fighting alongside us. Even in the case of traitorous citizens.

49. These restrictions contradict the purpose of UN-endorsed operations to combat terrorism. They also contradict international attempts to restore the rule of law by preventing further, and often even worse, violations of international humanitarian law by such traitors and the cause to which they have switched their allegiance.

50. Our obligations under international law must be accorded due weight, not somehow be considered universally subordinate to any rights traitors might seek to retain undeservedly in such grave circumstances.

Conclusion

51. The *Citizenship Amendment (Allegiance to Australia) Bill* 2015 Bill needs to buttress Australia’s continuing ability to take legitimate military action in order to meet our obligations to support the rule-of-law both domestically and

as the basis for a workable international system. The Bill also has to strike an effective and just balance between the measures necessary to handle new national security threats with preservation of the rule-of-law. Finally, the Bill has to strike a balance between wartime and peacetime contexts.

52. This latter aspect is complicated by the mistaken assumption that wholly peacetime contexts apply when considering the necessity for the Bill. Such assumptions chiefly stem from the predominantly peacetime mindsets that three generations of Australians have adopted since we fought the last war requiring active mass participation across the whole community.

53. This latter aspect previously resulted in it taking 56 years to reform a serious loophole in our treachery laws from 1945 to 2001. There must be no more inconsistencies or loopholes that might be exploited by Australians who deliberately take up arms with any group that fights our defence force when the ADF is lawfully deployed overseas in the national interest

54. Freely switching your allegiance to a terrorist group such as “Islamic State” and going overseas to join it in a war is not just a normal type of crime, either in peacetime or wartime or some state in between.

55. Nor does it have only domestic consequences. Australia has both national and international responsibilities to deter and counter such serious crimes globally, not just punish those traitors we might eventually be able to capture and put on trial in an Australian court.

56. Ideally every traitor would be punished by convicting them in an Australian court. But where revocation of citizenship is involved making conviction a universal precondition causes insuperable moral and practical difficulties.

57. First, you have to be able to capture them and then bring them back to Australia for trial. When you cannot, the traitor escapes the consequences of his or her treachery, further treachery is undeterred or not actively countered, every Australian faces increased risks of attack, and the international reputation of Australia as a whole suffers.

58. Second, even when we are able to put them on trial in an Australian court, the facts establishing their treachery must be admissible as evidence beyond reasonable doubt. Despite obvious difficulties in undertaking an Australia-standard investigation in war zones, especially behind enemy lines or in countries where the rule-of-law does not exist.

59. Third, the impractical precedent of the Victorian Court of Criminal Appeal in the Jack Thomas case must also be overcome. This effectively gives a “get-out-of-gaol-free" card to any Australian terrorist arrested or captured in the relatively lawless countries where terrorists tend to get detained and can subsequently be brought to trial in Australia. Even when evidence is gathered in-country by the Australian Federal Police to domestic Australian standards, including the suspect being advised of their rights and freely admitting the facts.

60. Fourth, requiring conviction by an Australian court in all circumstances is unfair, at best, to the men and women we lawfully deploy to confront such "Australian" traitors on the battlefield. Especially before any capture of the traitor for trial in Australia is even remotely, if at all, possible. Members of our defence force have civic rights too, and we should not let Australian traitors fighting them to retain the Australian citizenship they have so seriously betrayed.

61. Finally, we must be able to deter and actively counter treachery in practice by revocation of citizenship, not just punish it afterwards. Unless we also deter and counter it by such revocation, battlefield killing is left as the only alternative where capture and trial is unlikely, impractical or impossible.

Proposed amendments

In order to refine the Bill, remove inconsistencies with reforms to previous treachery legislation and prevent further loopholes, the ADA proposes the following additions and re-titling.

62. Section 33AA (Renunciation by Conduct). The proposed new Section 33AA is too narrowly focused on terrorism offences and fails to be consistent with the long-delayed reform finally enacted in the *Security Legislation Amendment (Terrorism) Act, 2002*. To fix this Section 33AA(2) should be amended by the addition of an additional subsection as follows:

> "(i) serving under arms with any armed group fighting the Australian Defence Force."

63. **Section 35.** The proposed replacement Section 35 is also too narrowly focused on terrorism offences and also fails to be consistent with the reform enacted in the *Security Legislation Amendment (Terrorism) Act, 2002*. To fix this:

a. The title of the section should be amended to read:

> "Service outside Australia in the armed forces of an enemy country, any armed group fighting the Australian Defence Force or with a declared terrorist organisation".

b. The new subsection 35(1)(b) should be amended by the addition of an additional subsection as follows:

> "(iii) fights for, or is in the service of, any armed group fighting the Australian Defence Force; and"

64. Application Provisions. The application provisions under Clause 8 of the Bill should be amended accordingly.