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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security

Dear Secretary

Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

Thank you for inviting us to make a submission to this inquiry. We do so in a private capacity.

Our submission draws on several years of research on citizenship deprivation as a national security tool in Australia, the United Kingdom and Canada. Our work on this subject can be found in the following publications:

- 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; and
- Sangeetha Pillai and George Williams, 'Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations' (2017) 66(3) *International & Comparative Law Quarterly* 1.

We have five concerns with the Strengthening the Citizenship Loss Provisions Bill ('the Bill'):

1. the amendments lack adequate justification;
2. the amendments are not likely to be a useful addition to Australia's national security toolkit;
3. the amendments create a risk of extreme and unjustified outcomes;
4. the amendments increase the risk that Australia's statutory regime for citizenship revocation on security grounds falls foul of the *Constitution*; and
5. the amendments create a risk of rendering people stateless in contravention of Australia's international law obligations.

Our concerns are set out in detail below. We recommend that the Bill not be passed.

1. The amendments lack adequate justification

This Bill seeks to relax the criteria for conviction-based citizenship revocation under s 35A of the *Australian Citizenship Act 2007*. The current criteria under s 35A reflect a number of recommendations made by this Committee in its Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015.

In its 2015 report, the Committee noted that revocation of the Australian citizenship of dual citizens 'should only follow appropriately serious conduct that demonstrates a breach of allegiance to Australia'.¹ It recommended that the possibility of citizenship revocation should only arise where a person is convicted of a terrorism-related offence that carries a maximum penalty of at least 10 years imprisonment, and where they have been sentenced to at least six years imprisonment.² In the case of convictions recorded prior to the commencement of s 35A, the Committee recommended that a higher minimum sentence of 10 years imprisonment should apply.

These recommendations broadly reflect our view that citizenship revocation on national security grounds should only be considered where revocation occurs via the exercise of ministerial discretion, where no risk of statelessness arises, and where a person only becomes a candidate for revocation if they have been convicted by a court of an offence with disloyalty to Australia as a core element, and subjected to a sentence indicating that their conduct was very serious.³

The amendments proposed in the Bill fall well short of these criteria and the standard set by this Committee in 2015. They do so without adequate justification for why this is necessary, or how it would help to safeguard Australia's national security. While the Statement of Compatibility for the Bill states that the Bill's two purposes are 'to keep Australians safe from evolving terrorist threats, and to uphold the integrity of Australian citizenship and the privileges that attach to it',⁴ the national threat level has remained unchanged since 2014, and no explanation is provided for why the *Australian Citizenship Act 2007* in its current form does not uphold the integrity of Australian citizenship.

In addition to the lack of justification for why the Bill is necessary, the rationale for the design of each of the Bill's key amendments is unclear and inadequate. It is not clear why the convictions designated by the Bill as 'relevant terrorism convictions' warrant a lower minimum sentence threshold than those designated as 'relevant other convictions'. The removal of the minimum sentence threshold for 'relevant terrorism convictions' recorded prior to December 2015 is particularly troubling, given this Committee's acknowledgement in its 2015 report that these offences should only be included 'with great caution and following careful deliberation, with regard to the nation as a whole',⁵ and its recommendation of a significantly higher minimum threshold in recognition of this.⁶ Nothing has happened, and indeed nothing could have happened, between December 2015 and December 2018 to justify the removal of a minimum sentencing threshold for citizenship revocation with respect to past convictions handed down as long as 13 years ago.

¹ Parliamentary Joint Committee on Intelligence and Security, 'Advisory report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015', 114.

² Ibid, 115.

³ See Shipra Chordia, Sangeetha Pillai and George Williams, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, 1-2.

⁴ Statement of Compatibility with Human Rights, Attachment A to Explanatory Memorandum to the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, 7.

⁵ Parliamentary Joint Committee on Intelligence and Security, above n 1, 127-128.

⁶ Ibid, 128 (Recommendation 10).

The proposal that a person should be a candidate for citizenship loss under s 35A where the Minister is satisfied that they would not 'become a person who is not a national or citizen of any country' as a consequence is explained only by statements that this would make s 35A 'consistent with other provisions of the *Citizenship Act*', such as s 34(3)(b).⁷ In our view, the analogy to s 34(3)(b) is a poor comparison and an inadequate justification for this proposed change. We discuss this further in below.

2. The amendments are not likely to be a useful addition to Australia's national security toolkit

If the amendments proposed in the Bill are passed, it is not likely that they will form a meaningful addition to Australia's existing arsenal of national security laws. In part, this is because citizenship revocation itself does not form a key part of Australia's national security toolkit. We have conducted a cross-country analysis, published in 2017, of the utility of citizenship revocation laws in Australia, Canada and the United Kingdom.⁸ In this, we concluded that in all three jurisdictions, citizenship revocation laws appeared to be of minimal utility as a national security device due to a range of factors, including overlap with other national security powers and difficulty guaranteeing that revocation will have its desired effect. Indeed, in June 2017, prior to the publication of our analysis, Canada repealed its citizenship revocation legislation.

In Australia, national security is safeguarded through a package of some 70 pieces of Commonwealth legislation. Collectively, this legislation confers broad investigatory powers on security agencies, criminalises and attaches high maximum sentences to a broad range of conduct, including conduct at the earliest stages of planning or preparing for terrorist or hostile activity and conduct that involves no hostile or violent intent, and facilitates the imposition of executive control orders and preventative detention orders in circumstances where a threat to national security exists but no criminal conduct has yet been committed. The utility of this legislation collectively is underlined by the statement in the Statement of Compatibility that:

Between September 2014 and November 2018, Australian agencies led 15 major disruption operations in response to potential attack planning, and charged 93 individuals with terrorism-related offences.⁹

As we note in our 2017 article, the broad suite of national security devices in Australian law operates to 'circumvent the risk of terrorist attacks and to reduce the risk to national security posed by citizens and non-citizens who seek to harm Australia, irrespective of whether or not a conviction has been secured,' and that in this context 'it is difficult to see how Australia's...citizenship revocation laws [are] of more than marginal practical utility from a security perspective.'¹⁰

This assessment remains true for the proposed amendments outlined in the Bill. Removing the minimum sentencing threshold for citizenship revocation on the grounds of a 'relevant terrorism conviction' is unlikely to improve the utility of citizenship revocation as a protective device against identified threats, because identified threats are already able to be dealt with via a range of other national security devices.

⁷ Explanatory Memorandum, 5.

⁸ 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.

⁹ Statement of Compatibility with Human Rights, Attachment A to Explanatory Memorandum, 7, 13.

¹⁰ Pillai and Williams, above n 8, 880-881.

Removing the minimum sentencing threshold is also unlikely to provide meaningful protection against unidentified threats, such as the threat posed by the perpetrator of the November 2018 Bourke Street attack, which is referred to in the Statement of Compatibility.¹¹ Although the perpetrator of that attack, Hassan Khalif Shire, had a list of prior offences, none of them would be captured by the proposed amendments. The amendments proposed in the Bill would have provided no basis for the removal of his citizenship and his deportation.

Relaxing the dual citizenship criterion for revocation under s 35A is also unlikely to improve in-practice protection against national security threats. As we have noted in our cross-country analysis of the utility of citizenship revocation laws, 'efforts to permanently offload unwanted or high-risk citizens onto foreign states is likely to produce tensions between governments, as well as undermine the cohesion needed to tackle cross-jurisdictional security issues'.¹² This is likely to be particularly so under the proposed changes, which would allow citizens who are regarded as unwanted in Australia to be deemed the responsibility of another state by an executive decision-maker.

3. The amendments create a risk of extreme and unjustified outcomes

The proposed removal of a minimum sentencing threshold for 'relevant terrorism convictions' would open up the possibility of citizenship revocation on the basis of minor convictions that do not necessarily involve any disloyalty to Australia or intent to cause harm.

For example, one of the things deemed by the Bill to be a 'relevant terrorism conviction' is conviction of the offence of 'entering or remaining in a declared area' in s 119.2 of the *Criminal Code Act 1995* (Cth). In order to be convicted of this offence, a person need do nothing more than enter an area declared by the government to be a no-go zone. It is not necessary that the person enter the area with any intent to cause harm, or that they cause any actual harm. A narrow set of defences apply, but these exclude a variety of innocent purposes, including visiting friends, undertaking a religious pilgrimage or conducting business dealings.

Another 'relevant terrorism conviction' is conviction of possessing a 'thing' that is used in a terrorist act, where the person in possession of the thing was reckless to the connection between that 'thing' and the terrorist act.¹³ Arguably, this could capture an individual who has not turned his or her mind to the activities of a family member, for example, where that family member subsequently uses a joint possession – such as a car or sim card – in the preparation or commission of a terrorist act. Similarly, a person would have a 'relevant terrorism conviction' if they were convicted of an offence under 102.6 of the *Criminal Code Act*. As the Scrutiny of Bills Committee has noted, this could occur where a person donates money to an overseas organisation and is found to be reckless as to whether the organisation was a terrorist organisation.¹⁴

In the above examples, conviction of an offence does not necessarily require any disloyalty to Australia or intent to cause harm. Currently, the risk of citizenship revocation in such circumstances is mitigated against by the minimum sentence thresholds prescribed in s 35A. It is unlikely that a person will be sentenced to six or more years imprisonment in circumstances where they are technically guilty of an offence but their conduct has been trivial and engaged in without hostile intent. The removal of a minimum sentencing threshold erodes this safeguard.

¹¹ Statement of Compatibility with Human Rights, Attachment A to Explanatory Memorandum, 8.

¹² Pillai and Williams, above n 8, 887.

¹³ See *Criminal Code Act 1995* (Cth), s 101.4(2).

¹⁴ Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 15 of 2018, 3.

It is true that, as the Attorney-General noted in his second reading speech, before the Minister reaches a determination that a person has ceased to be an Australian citizen by virtue of s 35A, he or she must be satisfied that the conduct that the conviction relates to demonstrates a repudiation of allegiance to Australia,¹⁵ and that it would not be in the public interest for the person to remain an Australian citizen.¹⁶ However, as the Scrutiny of Bills Committee has noted, the fact that the Bill leaves these matters to broad ministerial discretion 'may inappropriately expand administrative power and may unduly trespass on personal rights and liberties'.¹⁷

4. The amendments increase the risk that Australia's statutory regime for citizenship revocation on security grounds falls foul of the *Constitution*

Australian constitutional law on citizenship is evolving, and presently leaves many matters unclear. The constitutional limits on the Commonwealth Parliament's power over Australian citizenship have not yet been clearly defined by the High Court. As we have argued elsewhere, it is possible, but not certain, that aspects of the current citizenship revocation scheme would be found unconstitutional if the question came before the Court.¹⁸

In our view, if the Bill is passed, the risk that the Court would find constitutional problems with the citizenship revocation scheme would increase. We say this for three reasons:

- Removing the minimum sentencing threshold for citizenship loss on the ground of a 'relevant terrorism conviction' would increase the risk that the scheme would infringe the principle established in *Roach v Electoral Commissioner*. This is because passage of the Bill would mean that the manner in which the scheme pursues its purpose of fostering national security is less likely to be considered proportionate.
- Removing the minimum sentencing threshold decreases the likelihood that s 35A will be found to be 'with respect to' one of the Commonwealth's heads of power. This is because extending the Minister's citizenship revocation powers to apply in cases where a person has committed more minor conduct with no necessary disloyalty element is likely to weaken s 35A's connection with both the aliens power in s 51(xxix) and the defence power in s 51(vi).
- Extending the Minister's citizenship revocation powers to cases where the Minister is satisfied that the citizen concerned would not, through revocation, 'become a person who is not a national or citizen of any country' would increase the likelihood of s 35A overstepping constitutional boundaries. This would weaken s 35A's connection with the aliens power.

5. The amendments create a risk of rendering people stateless in contravention of Australia's international law obligations

Article 8 of the 1961 Convention on the Reduction of Statelessness, to which Australia is a party, requires that states refrain from 'depriv[ing] a person of his nationality if such deprivation would render him stateless.' Extending the Minister's powers under s 35A to allow for citizenship deprivation in cases where the Minister is satisfied that the citizen concerned would not, through revocation, 'become a person who is not a national or citizen

¹⁵ Proposed s 35A(1)(c).

¹⁶ Proposed s 35A(1)(d).

¹⁷ Senate Standing Committee for the Scrutiny of Bills, above n 14, 3.

¹⁸ See eg Sangeetha Pillai, 'Citizenship-stripping reforms open to challenge in spite of safeguards', 19 Law Society Journal (February 2016), 74; Sangeetha Pillai, 'The Allegiance to Australia Bill and the Constitution: Legislative Power and Membership of the Constitutional Community' on AUSPUBLAW (21 July 2015) <https://auspublaw.org/2015/07/the-allegiance-to-australia-and-the-constitution/>.

of any country' runs a risk of contravening Australia's obligations under Article 8. This is because amending s 35A in this way would allow a person to lose their Australian citizenship in circumstances where the Minister believes that they have a foreign citizenship, but they in fact do not. As the Scrutiny of Bills Committee has noted, this runs the risk of rendering people stateless.¹⁹

The Explanatory Memorandum states that this change would make s 35A 'consistent with other provisions of the Citizenship Act', such as s 34(3)(b).²⁰ In our view, s 34(3)(b) is a poor comparator for two reasons.

First, s 34 deals with the revocation of Australian citizenship that has been obtained by fraud or misrepresentation. In such circumstances, the person losing their Australian citizenship never had a right to hold it in the first place. Despite this, s 34(3)(b) imposes a requirement on the Minister to refrain from revoking a person's citizenship where he or she is satisfied that doing so would render the person stateless. This seeks to *uphold* Australia's obligation to refrain from citizenship deprivation where it would produce statelessness. By contrast, the proposed change to s 35A would *expand* the Minister's power to revoke the citizenship of persons who currently hold Australian citizenship as of right, and who may be rendered stateless as a result of the change. This *undermines* Australia's obligations under Article 8.

Secondly, ministerial decisions under s 34 are subject to merits review in the Administrative Appeals Tribunal, whereas decisions under s 35A are not. Additionally, as the Scrutiny of Bills Committee has noted, the proposed change to the dual citizenship threshold in s 35A would operate to minimise the judicial reviewability of a ministerial decision to revoke citizenship under s 35A where revocation produces a risk of statelessness.²¹ Currently, the question of whether a person who has lost their Australian citizenship holds citizenship of a foreign country can be reviewed by a court as a question of jurisdictional fact. Under the proposed change, the only judicial review ground available will be the more limited reasonableness ground.²²

Where a person inside Australia is deprived of Australian citizenship they become vulnerable to removal from Australia, and immigration detention until removal is possible. Where it is not clear that the person has citizenship in a foreign country, there is a likelihood of such detention being lengthy, or even indefinite. As our cross-country analysis of the utility of citizenship revocation laws in the UK, Canada and Australia shows, this has led to considerable inconvenience in the UK context.²³ The Bill's proposed weakening of the judicial review available when it is not clear that a person who has lost their citizenship under s 35A has a foreign citizenship is likely to have the effect of increasing the length of detention as well as protracted disputes with foreign governments. Both these consequences are undesirable.

For the reasons outlined above, we recommend that the Bill not be passed.

Yours sincerely

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¹⁹ Senate Standing Committee for the Scrutiny of Bills, above n 14, 4.

²⁰ Explanatory Memorandum, 5. See also Statement of Compatibility with Human Rights, Attachment A to Explanatory Memorandum, 9.

²¹ Senate Standing Committee for the Scrutiny of Bills, above n 14, 5.

²² See *ibid.*

²³ Pillai & Williams, above n 8, 863.

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