



FACULTY OF LAW
GEORGE WILLIAMS AO

DEAN
ANTHONY MASON PROFESSOR
SCIENTIA PROFESSOR

14 October 2019

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security

Dear Secretary

Review into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

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

We have also made a submission to this Committee's concurrent review of the Australian citizenship renunciation by conduct and cessation provisions. This submission reiterates and builds upon the recommendations we made there, and in submissions we have made to previous parliamentary inquiries on citizenship stripping laws. It also draws on research we have conducted over several years into the utility of citizenship deprivation as a national security tool in Australia, the United Kingdom and Canada.¹

We make three key points in this submission. First we agree with the Independent National Security Legislation Monitor's (INSLM) recent finding that the urgent, retrospective repeal of the automatic citizenship stripping provisions in ss 33AA and 35 is necessary.

Second, we suggest that the need for discretionary citizenship stripping laws has not been clearly made out, and that the risks of retaining such laws outweigh any benefits. Accordingly, we recommend that the Bill should not be passed, and that s 35A and associated provisions should also be repealed with retrospective effect.

Finally, while we are opposed to the passage of the Bill, in the event that it is passed we suggest changes that would reduce the risk of citizenship stripping undermining the operation of other parts of Australia's national security toolkit.

¹ See eg 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; Sangeetha Pillai and George Williams, 'Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations' (2017) 66(3) *International & Comparative Law Quarterly* 521.

Automatic citizenship loss should be repealed immediately and with retrospective effect

In our submission to the concurrent review, we recommended against the maintenance of automatic citizenship cessation. One of our reasons was that automatic revocation is impractical. It creates confusion and legal uncertainty, obscures judicial review options and creates practical challenges for government agencies.

It has since emerged that these critiques of automatic revocation are echoed within key government departments. In their respective submissions to the concurrent review, the Department of Home Affairs (DHA),² the Department of Foreign Affairs and Trade (DFAT)³ and the Australian Security Intelligence Organisation (ASIO)⁴ all draw attention to the fact that automatic citizenship loss can disrupt the administration of criminal justice processes, intelligence powers and foreign relations. In addition, in his report on the current citizenship loss provisions, the INSLM catalogued a range of difficulties that automatic citizenship loss produces,⁵ and then called for the urgent and retrospective repeal of ss 33AA and 35.⁶

We agree with the INSLM's recommendation that the automatic revocation provisions should be repealed with retrospective effect.

Discretionary citizenship stripping laws should not be retained, as the need for these laws has not been clearly demonstrated and the risks outweigh the benefits

The INSLM recommended that the automatic citizenship revocation provisions be replaced with a ministerial power to deprive a person of citizenship in certain circumstances.⁷ We adopt a different view, and suggest that this opportunity should be taken to repeal the scheme for citizenship revocation on security grounds in its entirety.

National security in Australia is safeguarded through a package of 82 pieces of Commonwealth legislation.⁸ Collectively, this legislation establishes various mechanisms which operate 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.⁹ For example, existing laws:

- confer broad investigatory powers on security agencies,

² Department of Home Affairs, Submission to Parliamentary Joint Committee on Intelligence and Security, *Review of the Australian Citizenship Act renunciation by conduct and cessation provisions*, 8.

³ Department of Foreign Affairs and Trade, Submission to Parliamentary Joint Committee on Intelligence and Security, *Review of the Australian Citizenship Act renunciation by conduct and cessation provisions*, 1.

⁴ Australian Security Intelligence Organisation, Submission to Parliamentary Joint Committee on Intelligence and Security, *Review of the Australian Citizenship Act renunciation by conduct and cessation provisions*, 5.

⁵ Independent National Security Legislation Monitor (2019), *Report to the Attorney-General on the Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007*, xiv-xvi.

⁶ Ibid, xv.

⁷ Ibid, 58-62.

⁸ See Nicola McGarrity and Jessie Blackbourn, 'Australia has enacted 82 anti-terror laws since 2001. But tough laws alone can't eliminate terrorism', *The Conversation*, 30 September 2019 <https://theconversation.com/australia-has-enacted-82-anti-terror-laws-since-2001-but-tough-laws-alone-cant-eliminate-terrorism-123521>.

⁹ See Sangeetha Pillai and George Williams, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia', above n 1, 880-881.

- criminalise and attach 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
- facilitate 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.

We support the existence of national security laws that employ a range of devices to combat current and emerging threats. As the Department of Home Affairs said in its submission to the INSLM's recent inquiry into citizenship stripping laws:

What is without doubt is that Australian authorities need a range of measures that enable nuanced but definitive action to protect Australia. [...] Ultimately, it is the cohesion, resilience, and unity of the Australian community that is our best defence against violent extremism.¹⁰

In order to ensure that Australia's very large suite of national security laws are functioning to achieve this goal, the way in which each piece of national security legislation operates to further the goals of community protection and social cohesion must be clearly and precisely articulated. Overwhelmingly, these justifications have not been supplied with respect to Australia's citizenship revocation laws.

In our submission to the concurrent review, we suggested that the inclusion of citizenship stripping legislation as part of Australia's national security toolkit has been justified in terms that are vague, generalised and lacking in nuance. This remains true of the justifications that have accompanied the introduction of the Citizenship Cessation Bill. The explanatory memorandum, for instance, lists a number of amendments (such as lowering the minimum sentence that would leave a person vulnerable to conviction-based citizenship revocation, and extending the retrospective operation of the conviction-based revocation powers). These amendments are said to 'improve the effectiveness of the citizenship cessation provisions'.¹¹ How they would do so is not explained.

Our submission to the concurrent review noted that our research suggests that "citizenship stripping has the potential to have negative consequences for international relations, and for national security ventures on a broader scale". Government agencies have since acknowledged this. For instance, ASIO submitted that:

In some instances, citizenship cessation will curtail the range of threat mitigation capabilities available to Australian authorities. It may also have unintended or unforeseen adverse security outcomes—potentially including reducing one manifestation of the terrorist threat while exacerbating another. There may be occasions where the better security outcome would be that citizenship is retained, despite a person meeting the legislative criteria for citizenship cessation—for example, where the Australian Federal Police has criminal charges that could be pursued if the person were to remain an Australian citizen.¹²

¹⁰ Department of Home Affairs, Submission to International Security Legislation Monitor, *Review of Terrorism-related Citizenship loss provisions in the Australian Citizenship Act 2007*, 9.

¹¹ Explanatory Memorandum to the Australian Citizenship (Citizenship Cessation) Bill 2019, 2.

¹² Australian Security Intelligence Organisation, above n 4, 5.

Similarly, the Australian Federal Police (AFP) noted that lack of Australian citizenship limits the charges that can be pursued against a person, and that this can create a challenge for law enforcement.¹³

Both ASIO and the AFP note that there is no 'one size fits all' security measure, and that making a range of security options available to the government is the best way to achieve national security outcomes. We strongly agree with this in principle, but suggest that there has been no convincing evidence to suggest that citizenship revocation should be one of the security options available. This view is informed by the research we have done analysing the impact of citizenship stripping laws in Australia and in other common law countries, and by our expertise on the legal operation of Australia's large suite of anti-terror laws.

Submissions from government agencies suggest that Australia's citizenship stripping laws have been designed to target two security risks. The predominant concern at the time these laws were first introduced in 2015 was the threat posed by Australians who travelled to conflict zones overseas to fight for terrorist organisations.¹⁴ Another concern is the security risk posed by extremist individuals within Australia.¹⁵ These threats – and in particular the foreign fighter threat – continue to form the backdrop for the Citizenship Cessation Bill. The opening paragraph of the Bill's explanatory memorandum states that 'around 80 Australians of counter-terrorism interest are believed to be still in Syria and Iraq, some of whom may seek to return to Australia'.¹⁶ The INSLM notes that this cohort 'represents an ongoing and significant threat to Australia's security'.¹⁷ In their submissions to the concurrent review, the AFP and ASIO both observed that the return of a large contingent of people from this cohort would be likely to increase the risk within Australia and increase the resource burden for security and law enforcement organisations.¹⁸

It is our submission that there are other mechanisms within Australia's anti-terror toolkit that allow for the efficient management of these threats, while avoiding the negative security and law enforcement consequences of citizenship stripping. For instance, the recently-passed *Counter Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) would allow the government to control the return of foreign fighters through the imposition of stackable temporary exclusion orders (TEOs). The TEO scheme affords significant flexibility: citizens deemed to present a risk to Australia can be excluded from the country for considerable periods of time. Once they return, any risk they pose can be managed through the imposition of tailored post-entry conditions, as well as through control orders and other mechanisms within the national security toolkit.

With respect to the threat posed by foreign fighters, the only thing that citizenship cessation achieves that the TEO scheme does not is the capacity to *permanently* exclude foreign fighters from returning to Australia. As ASIO has acknowledged, this 'will not eliminate any direct threat [that these citizens] pose to Australian (or other) interests overseas, and it will not prevent their reach-back into Australia to inspire, encourage or direct onshore activities that are prejudicial to security—including onshore attacks'.¹⁹ However, as we noted in our submission to the concurrent review, it may exacerbate global security risks, for instance by leaving Australians

¹³ Australian Federal Police, Submission to Parliamentary Joint Committee on Intelligence and Security, *Review of the Australian Citizenship Act renunciation by conduct and cessation provisions*, 5.

¹⁴ Department of Home Affairs, above n 2, 8.

¹⁵ Australian Security Information Organisation, above n 4, 3.

¹⁶ Explanatory Memorandum, 1.

¹⁷ Independent National Security Legislation Monitor, above n 5, 3.

¹⁸ Australian Security Information Organisation, above n 4, 5; Australian Federal Police, above n 13, 4.

¹⁹ Australian Security Information Organisation, above n 4, 5.

who could return home to face prosecution stranded in foreign countries with fewer anti-terror resources, and potentially with no connections beyond terrorist organisations.²⁰

Citizenship stripping is of even less utility when it comes to managing the risk posed by citizens within Australia. The power to revoke citizenship in this case, both under the current law and under the measures proposed in the Citizenship Cessation Bill, only arises once a person has been convicted of a prescribed offence. This means that it affords no protection against unidentified security risks. Identified security risks are already protected against through an extensive criminal law apparatus, which attaches heavy penalties to conduct prejudicial to security from the most preliminary stages, and through the control order scheme, which allows for the monitoring of people who are deemed to pose a security risk but who have not been convicted of an offence. These measures provide a better tailored and more appropriate response to the threat posed by citizens within Australia than citizenship revocation.

For these reasons, we do not support the passage of the Bill. We recommend the repeal of ss 33AA, 35-35B and 36A, with retrospective effect.

Improvements to the Citizenship Cessation Bill

While we do not support the existence of citizenship stripping laws, for the reasons above, we suggest that if such laws are retained, they should at a minimum contain the following features:

- Prior to revoking a person's citizenship, the Minister should be required to consult with ASIO and DFAT, to ensure that a fully informed assessment is made with respect to any threat mitigation role that citizenship revocation may play and the impact that revocation may have on foreign relations. The degree of threat posed by the person to the Australian community should be elevated to a primary consideration.
- Citizenship loss should only be possible where a person has been convicted of an offence that demonstrates clear disloyalty to Australia, and where the conviction was recorded after the entry into force of the *Allegiance to Australia Act 2015*. The existing minimum sentence threshold of six years should not be lowered, as proposed in the Bill.
- The Act, or regulations made under the Act, should set out a clear process that must be followed to determine that a person is a dual citizen before citizenship cessation takes place. In the absence of such a process, the threshold of ministerial satisfaction, proposed in the Bill, is insufficient. Providing for the invalidation of citizenship cessation if a court subsequently finds that the individual concerned was not a dual citizen is insufficient. There are a number of reasons why a person who is stripped of their Australian citizenship may not have the any practical means via which to exercise their judicial review rights.

Finally, we note that it is possible that there may be questions about the constitutional validity of s 36B of the Bill, which allows the Minister to revoke a person's citizenship on the basis of conduct defined by reference to criminal offences, in the absence of any conviction. As we noted in our submission to this Committee's 2015 inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill, there is a risk that such a construction may fall foul of the constitutional separation of judicial power.²¹

²⁰ Sangeetha Pillai and George Williams, Submission to Parliamentary Joint Committee on Intelligence and Security, *Review of the Australian Citizenship Act renunciation by conduct and cessation provisions*, 3.

²¹ 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*, 2.

If we are able to assist the Committee further in any way, please do not hesitate to contact us.

Yours sincerely

Dr Sangeetha Pillai

Senior Research Associate, Andrew & Renata Kaldor Centre for International Refugee Law,
UNSW Law

Professor George Williams AO

Dean, Anthony Mason Professor and Scientia Professor, UNSW Law