Immigration Advice
and Rights Centre

14 January 2019

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

BY EMAIL: pjcis@aph.gov.au.

Re: *Review into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019*

The Immigration Advice and Rights Centre (**IARC**), established in 1986, is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training and law and policy reform in Australian immigration and citizenship law. IARC provides free and independent advice. IARC also produces client information sheets and conducts education/information seminars for members of the public.

We welcomes the opportunity to comment on the Committee's review into the *Australian Citizenship Amendment (Citizenship Cessation) Bill* 2019 (***Bill***). The Bill relevantly seeks to make a number of amendments to the *Australian Citizenship Act* 2007 (Cth) (**Act**) including:

- repealing sections 33AA, 35 to 35B and 36A of the *Act*;
- introducing section 36B which allows for the cessation of a person's Australian citizenship where the Minister is satisfied that, *inter alia*, the person has engaged in certain conduct;
- introducing section 36C which provides for the declaration of the terrorist organisation;
- introducing section 36D which allows for the cessation of Australian citizenship for certain convictions.

IARC supports the repeal of ss33AA, 35 to35B and 36A of the *Act*, however, does not otherwise support the Bill in in its current form. Our concerns are addressed below.

OFFICE Suite 3, Level 8, 377-383 Sussex Street, Sydney NSW 2000 POSTAL PO Box Q1283, QVB NSW 1230
INFORMATION LINE (02) 8234 0700 EMAIL iarcadmin@iarc.asn.au FAX (02) 9299 8467
WEBSITE www.iarc.asn.au ABN 45 808 320 822

Citizenship cessation determination for certain conduct

Proposed section 36B allows the Minister to determine that a person aged 14 or older ceases to be an Australian citizen if the Minister is **satisfied** that:

- the person has engaged in terrorism related conduct or fought in the armed forces of a country at war with Australia (s36B(1)(a)); and
- the conduct demonstrates that the person has repudiated their allegiance to Australia (s36B(1)(b)); and
- it would be contrary to the public interest for the person to remain an Australian citizen (s36B(1)(c)).

The Bill further provides, *inter alia*, that the Minister must not make a determination if the Minister is **satisfied** that the person would, if the Minister made the determination, become a person who is not a national or citizen of any country and also states that the rules of natural justice do not apply to the determination.

The immediate concern with the proposed amendment is that it permits the Minister to make a finding about conduct which, short of the fault element, amounts to an offence under the *Criminal Code*. Such a finding, which in our view should be reserved for a court, could be made on the basis of information that is unreliable, untested and where the Australian citizen has not had an opportunity to be heard or respond to the allegations labelled against them. The finding by the Minister about conduct may be lawful so long as it is reasonable and open on the material that is available. This is a most unacceptable basis for a citizen to be excluded from their membership of the Australian community.

There is further concern about whether proposed section 36B amounts to an unacceptable interference with judicial power. In *Djalic v MIMIA*, the Full Court of the Federal Court of Australia stated:

> "*It is a fundamental principle of the Australian Constitution, flowing from Chapter III that the adjudication and punishment of criminal guilt for offences against a law of the Commonwealth is exclusively within the province of courts exercising the judicial power of the Commonwealth*."[1]

The Full Court went on to state that Commonwealth legislation will collide with Chapter III of the Constitution if:

> "*on its true construction, it authorises the Executive to impose punishment for criminal conduct".*[2]

[1] *Djalic v MIMIA* [2004] FCAFC 151 at [58].
[2] Ibid at [73].

Likewise, the High Court in *Polyukhovich v The Commonwealth* expressed the view that any interference with what would ordinarily be an exercise of judicial power would contravene Ch III of the Constitution. Chief Justice Mason, referring to the separation of powers doctrine, stated:

> *The application of the doctrine depends upon the legislature adjudging the guilt of a specific individual or specific individuals or imposing punishment upon them. If, for some reason, an ex post facto law did not amount to a bill of attainder, yet adjudged persons guilty of a crime or imposed punishment upon them, it could amount to trial by legislature and a usurpation of judicial power. But if the law, though retrospective in operation, leaves it to the courts to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the rule prescribed, there is no interference with the exercise of judicial power.*[3]

The committee may be minded to consider whether legislation permitting the Minister to make findings of fact about conduct which constitutes an offence under the *Criminal Code* is not only inappropriate but arguably unlawful.

Citizenship cessation determination for certain convictions

Subsection 35A(1) of the *Act* allows the Minister to determine that a person ceases to be an Australian citizen if, *inter alia*, the person has been convicted of certain offences and sentenced to a period of imprisonment of at least 6 years. The offences that engage the subsection include:

(i) an offence against a provision of Subdivision A of Division 72 of the *Criminal Code* – being offences related to international terrorist activities using explosive or legal devices;

(ii) an offence against a provision of Subdivision B of Division 80 of the *Criminal Code* – being offences related to treason, assisting enemy to engage in armed conflict and treachery;

(iii) an offence against a provisions of Division 82 of the *Criminal Code* (other than section 82.9) – being offences related to sabotage including where a person has been reckless as to whether their conduct will prejudice Australia's national security;

(iv) an offence against a provision of Division 91 of the *Criminal Code* – being offences related to espionage or dealing with information in a manner that causes prejudice to Australia's national security (including by acting in a reckless manner);

(v) an offence against a provision of Division 92 of the *Criminal Code* – being offences related to foreign interference;

[3] *Polyukhovich v The Commonwealth [1991] HCA 32 at [32].*

(vi) an offence against a provision of Part 5.3 of the Criminal Code (except section 102.8 or Division 104 or 105) – being terrorism related offences excluding the offence of associating with terrorist organisations;

(vii) an offence against a provision of 5.5 of the *Criminal Code* – being offences related to foreign incursion and recruitment; and

(viii) an offence against section 6 or 7 of the repealed *Crimes (foreign Incursions and Recruitment) Act* 1978.

To make a determination under the *Act* the Minister must also be satisfied that the person's conduct demonstrates that they have repudiated their allegiance to Australia and that it is not in the public interest for them to remain an Australian citizen. The public interest is to be determined by consideration being given to the severity of the conduct, the threat posed to the Australian community, the age of the person, their connection to the other country of nationality/citizenship, Australia's international relations and any other matters of public interest. There is, relevantly, a further requirement that the person must be a national or citizen of a country other Australia at the time when the Minister makes the determination.

The Bill, through proposed s36D, seeks to amend the existing regime with view to:

- reducing the requirement for a custodial sentence from 6 years to at least 3 years (or periods of imprisonment that total at least 3 years); and
- allowing the Minister to make a determination that a person ceases to be an Australian citizen if the Minister is satisfied that the person would not, if the Minister were to determine that the person ceases to be an Australian citizen, become a person who is not a national or citizen of any country.

The consequence of a determination by the Minister that a person has ceased to be an Australian citizen is that they can then become subject to the cancellation, detention and removal powers under the *Migration Act* 1958 (Cth). This view, of course, assumes that in losing their status as an Australian citizen the individual also cease their membership of the "*people of the commonwealth*" and adopts the status of an "alien" under the Constitution.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) CLR 162 Gleeson CJ identified that parliament has the power to "*create and define the concept of Australian citizenship and to prescribe the conditions on which it may be acquired and lost*". In *Singh v Commonwealth* (2004) 222 CLR 322 his Honour, referring to *Pochi v Macphee* (1982) CLR 101, clarified that *"[t]he qualification is that parliament cannot, simply by giving its own definition of "alien", expand the power under s51(xix) to include persons who could not possibly answer the description of "aliens" in the*

Constitution". Likewise in *Hwang v Commonwealth* [2005] HCA 66 McHugh J at [18] identified that while Parliament has power to "*define the conditions on which membership of the Australian community – that is to say, citizenship – depends",* that power is not unlimited.

It may also be observed that the UN Convention on the Reduction of Statelessness allows for loss of nationality where a Contracting State has, at the time of signature, ratification or accession, specified its retention of such a right to deny nationality, where the person, inconsistently with his or her duty of loyalty to the Contracting State, has conducted him or herself in a manner seriously prejudicial to the vital interests of the State (Article 8(3)(a)(ii)), or has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State (Article 8(3)(b)).

With respect to the deprivation of citizenship the Article 8(4) provides:

> "*A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body."*

In our submission to this Committee on the *Australian Citizenship Amendment (Allegiance to Australia) Bill* 2015 dated 20 July 2015 and the review into the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill* 2018 dated 11 January 2019 we expressed doubt as to whether conduct that is not seriously prejudicial to the vital interests of Australia (or sufficiently clear and serious to demonstrate a withdrawal of allegiance to Australia) would be sufficient to exclude a person from his or her membership of the "*people of the commonwealth*". Reducing the requirement for a custodial sentence for offences from 6 years to 3 years only goes to heighten our concern that proposed section 36D may be extending beyond lawful limits. It would be surprising, in our view, if a conviction resulting from conduct that is relatively minor, reckless or resulting from naivety could give rise to the cessation of Australian citizenship. While a discretion would remain in the exercise of power under section 36D – the *Bill* nevertheless allows the Minister to determine that a person ceases to be an Australian citizen.

<u>The threshold for determining dual nationality</u>

Concern is also expressed at the proposal to adjust the threshold for determining dual citizenship from the current requirement that the person is a national or citizen of a country other than Australia at the time when a determination is made and replacing it with a requirement that the "*Minister must not make a determination if the Minister is satisfied that the person would, if the Minister were to make the determination, become a person who is not a national or citizen of any country*". The explanatory memorandum to the Bill seeks to justify the appropriateness of the amendment by referring to the

safeguards in proposed ss36H(3)(a)(i) and 36K(1)(c). The safeguards offer little comfort as they assume that the ex-citizen will have the means, ability or capacity to either approach an Australian court seeking a declaration or be able to obtain persuasive evidence to satisfy the Minister that they were not a national of another country when the determination was made.

In the event that the Committee is minded to recommend that the *Bill* be passed we would support a recommendation to amend the *Bill* so as to impose a requirement on the Minister to obtain verification of nationality/citizenship before a state of satisfaction can be achieved. The requirement could be drafted in the following terms:

> "*The Minister, having received verification from a country that the person is considered to be a national or citizen by it under the operation of its laws, is satisfied that the person would not, if the Minister were to determine that the person ceases to be an Australian citizen, become a person who is not a national or citizen of any country"*

This approach would be more closely aligned with Article 1 of the 1954 *Convention Relating to the Status of Stateless Persons* and Article 8 of the 1961 *Convention on the Reduction of Statelessness*.

IARC would not, however, support an approach allowing the Minister to determine that a person ceases to be an Australian citizen on the basis that the Minister has received verification that the person is *eligible* to acquire the nationality or citizenship of another country. Being eligible to acquire nationality/citizenship does not offer an acceptable assurance that it will, in fact, be granted. This is particularly so where a State retains a discretion to grant citizenship and, as part of the exercise of its discretion, will have regard to matters going to national security, public interest and/or the character of the person.

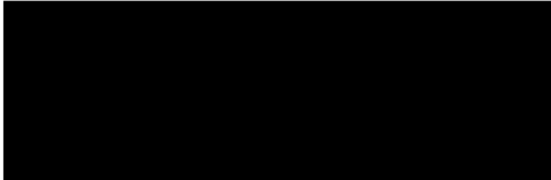
It would also be appropriate, in our view, that as part of a citizenship cessation determination, whether it be under s36B or 36D, that the Minister be required by legislation to have regard to the consequences of his or her determination. These consequences could include whether:

- the person could be subject to removal or indefinite detention in Australia;
- the person could be subject to removal from Australia in breach of our international non-refoulement obligations (including to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture);
- the person, if removed from Australia, could be subject to double jeopardy in breach of Article 14(7) of the *International Covenant on Civil and Political Rights;* and
- the other verified country of nationality is also giving consideration to revoking the citizenship of the person.

We further note the desirability that a determination resulting in the cessation of Australian citizenship under the *Act* should be subject to review before the Security Appeals Division of the Administrative Appeals Tribunal.

We would welcome the opportunity to expand on any aspect of our submission.

Kind regards,



Ali Mojtahedi
Principal Solicitor