THE UNIVERSITY OF SYDNEY

Dr Rayner Thwaites
Senior Lecturer in Public and Administrative Law

19 July 2019

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6201
Parliament House
CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Parliamentary Joint Committee on Intelligence and Security (the Committee)
Review of sections 33AA, 35, 35AA and 35A of the Australian Citizenship Act 2007: Revocation of Citizenship

Dear Chair,

The above citizenship deprivation powers, introduced by the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 ('the 2015 Bill'), have now had the benefit of review under a number of parliamentary reports and submissions. These reviews have made necessary contributions to the working, legality and limits of the powers. Reports of the Parliamentary Joint Committee on Intelligence and Security (PJCIS), drawing on submissions and augmented by a range of other parliamentary committees and bodies have led to numerous amendments to the 2015 Bill and deferral of the ill-conceived Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 ('the 2018 Bill'), which lapsed on the dissolution of Parliament in April 2019.

It remains the case that, to the detriment of a clear evaluation of the measures in relation to the public interest, legal context and national security, key issues with the provisions, many first raised in 2015, remain substantially unaddressed in relevant explanatory material provided by government.

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

Appreciating that the Committee is familiar with the provisions, I move directly to comment.

S 33AA

1. The following comments go to the scope and operation of the revocation power in s 33AA as can be discerned on the face of the legislation.[1]

Separation of powers issues

2. Separation of powers issues arise in the first instance from the punitive nature of citizenship revocation. The adjudication of guilt or punishment for an offence under the law is an incident of judicial power. The judicial power of the Commonwealth cannot be exercised by other than a Ch III Court. Citizenship revocation is best characterised as having a punitive character. Citizenship revocation terminates a person's right to return to, and/or remain in, their country of citizenship.[2] The termination of these rights to enter or remain is the predominant practical reason for the revocation measures.[3] The consequences of being deprived of the right to remain may

[1] Section 33AA has, we are told, been used 12 times: Peter Dutton MP, Minister for Home Affairs, Media Release, 2 January 2019. The way in which the provision has been applied is unknown to the public. Application has been by an extra-statutory internal government body, the Citizenship Loss Board.

[2] For reference to these rights in the context of current national security inquiries see Hansard, Parliamentary Joint Committee on Intelligence and Security – Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, 30 Jan 2019, p 45, Ms Pip De Veau, General Counsel/First Assistant Secretary, Department of Home Affairs and Mr Mansfield, First Assistant Secretary, Department of Home Affairs. See also Helen Irving, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 and Hansard, Parliamentary Joint Committee on Intelligence and Security – Counter-Terrorism Legislation Amendment Bill 2019, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, 15 March 2019, pp 5-6.

[3] Hansard, Parliamentary Joint Committee on Intelligence and Security – Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, 30 Jan 2019, pp 44 and 45, Ms Pip De Veau, General Counsel/First Assistant Secretary, Department of Home Affairs

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

be severe, even extreme. They encompass deportation to a country which is completely unfamiliar and/or dangerous, and vulnerability to indefinite immigration detention.

3. The characterisation of citizenship revocation as punitive is lent support by the fact that the relevant conduct is defined with reference to criminal offences.

The conduct triggering revocation:

4. The conduct that will trigger revocation is specified in sub-section 33AA (2), which is to be read in the light of sub-section 33AA (6) which provides:

> Words and expressions used in paragraphs (2)(a) to (h) have the same meanings as in Subdivision A of Division 72, sections 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Division 19 of the Criminal Code respectively. However (to avoid doubt) this does not include the fault elements that apply under the Criminal Code in relation to those provisions of the Criminal Code.

5. An initial matter for clarification is fundamental uncertainty as to what conduct is caught by ss 33AA (2) and (6). With the exception of the terms 'terrorist act' and 'terrorist organisation', the words and expressions used in s 33AA(2)(a)-(h) are not defined in the Criminal Code. They instead denote the headings of sections, sub-divisions and whole divisions of the Criminal Code. In their usage in the Criminal Code these terms fall to be understood in the context of a criminal process and principles of criminal responsibility and interpretation that shape their meaning. To adopt the question of my colleague, Professor Gans, "If they [the references in ss 33AA(2) and (6)] are not picking up definitions, what are they picking up?".[4]

---

[4] See the testimony of Professor Gans, Centre for Comparative Constitutional Studies, University of Melbourne, Parliamentary Joint Committee on Intelligence and Security, 5 August 2015, p 39. I adopt and endorse the questions on the practical and legal operation of s 33AA raised in the submission of the Centre for Comparative Constitutional Studies to the Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, submission 29.

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

6. The offences referenced in 33AA(2) and (6) would be nonsensical and radically overbroad if simply stripped of their fault elements as stated in s 33AA(6). Accordingly, in place of the fault elements stripped out by s 33AA(6), s 33AA(3) supplies a new generic fault element, namely an intention that is framed to replicate the requirements of intention to commit a terrorist act. It is unclear how what might be called the new 'Frankenstein' offences, resulting from the removal (by s33AA(6)) and restitching (by s33AA(3)) of the fault element will work, in terms of their requirements. For some offences, for example that of 'terrorist act', this device seems to simply change the formal source of the fault element. In others, due to uncertainty about what exactly s 33AA(6) removes, and how supplying a new fault element will affect matters, the change effected by this device is more uncertain.

7. From the relevant Explanatory Memorandum (EM) to the 2015 Bill, it appears that the motivation for the above arrangement is separation of powers concerns. The EM states:

> 37. The purpose of this provision [s33AA(6)] is to clarify that, when considering the meanings of the specified terrorist conduct in new subsection 33AA(2), a consideration of the fault element that apply under the Criminal Code is not required. The amendment recognises that new section 33AA is not concerned with whether a person has committed a criminal offence since that is a matter for a court to determine. It will ultimately be for a court to determine whether an individual has engaged in conduct prescribed by new section 33AA in contravention of the Criminal Code. That is, whether the terrorist related conduct engaged in by the person is an infringement of the relevant provision of the Criminal Code is a matter for a criminal code to determine.[5]

---

[5] Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, Revised Explanatory Memorandum

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

8. In context, this reasoning treats separation of powers concerns as a matter of mere form, without underlying substance. To determine whether conduct triggering revocation has occurred, the decision-maker (there is a decision-maker, see paragraph 11 and following below) will have to determine the physical elements and fault elements, the latter either identical to, or altered from, those contained in the corresponding Criminal Code offence, leading to a punitive consequence.

9. Section 33AA makes available a means to circumvent issues attending the fault element of the offences, in the form of s 33AA(4). It provides

> (4) A person is taken to have engaged in conduct with an intention referred to in subsection (3) if, when the person engaged in the conduct, the person was:
>
> (a) a member of a declared terrorist organisation (see section 35AA); or
>
> (b) acting on instruction of, or in cooperation with, a declared terrorist organisation.

10. Section 33AA(4) raises large questions, effectively establishing a strict liability regime for those found to be members of declared terrorist organisations. To state the obvious, the fact that someone is a member does not mean that every time they perform an action corresponding to the physical element of one of the offences it is done with the requisite intent. The additional concern is that here strict liability is attended by severe, potentially extreme, punitive consequences.

<u>The legal fiction of a self-executing statute</u>

11. As currently drafted, s 33AA rests on the legal fiction that it operates "by operation of law", without any need for a decision by an official. It is a legal fiction, as difficult questions of human judgment are required to determine if the statutory preconditions for deprivation are met.[6]

---

[6] Here, the ongoing uncertainty about what constitutes 'conduct' triggering citizenship revocation under s 33AA, at paragraphs 4-10 in the main text is pertinent.

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

12. We now know that there is an extra-statutory body, the Citizenship Loss Board, tasked with making the necessary determinations under the provision. The administrative process that has been used to deprive Australians of their citizenship exists outside the statute. A primary rationale for this is presumably to place an obstacle in the way of judicial review, in the form of an argument that there is no decision under statute to review.

13. Placing this complication in the path of judicial review does not sit well with the government's repeated invocation of amenability to judicial review as an answer to concerns about legal accountability. The government cannot, in good faith, rely on the availability of judicial review as meeting demands for legal accountability at the same time as it actively seeks to forestall or minimise judicial review.

14. Government reliance on the device of a 'self-executing' statute is unlikely to be effective in minimising judicial review. The courts are likely to be impatient with arguments that there is no decision. Whatever the statutory form, the determination that someone has engaged in conduct said to trigger deprivation requires the interposition of human judgment; ie a decision.[7] In addition, the device of a 'self-executing' statute does not prevent review of numerous other decisions that rely on the determination of whether a person is an Australian citizen. If, for example, an application for an Australian passport is refused on the basis that a person is no longer an Australian citizen, a challenge to the passport decision will ventilate the same issues.

<u>The absence of any provision for appeal</u>

15. The government has offered no justification for relying on judicial review alone as a means of legal accountability. No reason has been offered as to why Australia could not make statutory provision for a right of appeal from

---

[7] See for example the reasoning in *Australian Postal Corporation v Forgie* [2003] FCAFC 223; (2003) 130 FCR 279.

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

a revocation decision to a tribunal, and from there through the courts, as is available for British citizenship revocation decisions.[8] The British system is in effect an appeal to a merits review system designed to grapple with national security matters, with further appeals through the courts on questions of law. Provision for an appeals process, appropriately designed, would be more commensurate with the seriousness of the decisions being made than the current reliance on judicial review.

16. The provision made for appeal of deprivation decisions under the British Nationality Act 1981 (potentially also involving the Special Immigration Appeals Commission Act 1997), is not offered as a general model for emulation. Nonetheless, one issue on which the British appeals mechanism is instructive is precisely the issue which has given rise to the most publicised difficulties under the Australian regime, namely the question of whether an individual possesses a foreign nationality, such that depriving them of Australian citizenship will not leave them stateless, contrary to Australia's obligations under international law. This is addressed in paragraphs 17-20 following.

Statelessness determination

17. The aspect of s 33AA's operation that has garnered the most public attention is the statelessness determination procedure. This came to prominence through the public dispute between Australia and Fiji over whether Mr Neil Prakash was in fact a Fijian citizen, such that his Australian citizenship could be revoked. If he was not a Fijian citizen, then the purported revocation of his citizenship was beyond power.

18. The dispute between Australia and Fiji over Mr Prakash's legal position was intractable. As far as the Australian public is aware, the question of whether Mr Prakash is or is not a Fijian citizen has not been resolved. This means

[8] See British Nationality Act 1981 (UK), s 40A and Special Immigration Appeals Commission Act 1997 (UK), s 2B.

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

that the question of whether the revocation power was effectively employed remains unresolved. Whatever the underlying merits of the different positions adopted by the Australian and Fijian governments as to Mr Prakash's nationality status under Fijian law, this uncertainty on the part of the public is amplified by the lack of transparency attending Australia's determination of his Fijian citizenship status. This in turn undermines public trust that the legal limits on the revocation powers are being observed.

19. The policy justification for the Australian government's non-disclosure of its reasoning on the question of Mr Prakash's Fijian nationality under Fijian law is unclear. It is not evident that his foreign citizenship status, and the reasoning used to determine that status, is a question of national security warranting non-disclosure.

20. A national security rationale for non-disclosure of the reasoning in relation to a person's foreign citizenship is called into question by comparison with current arrangements in the United Kingdom. Under the British appeals process, provided for under statute, both sides - the person challenging the revocation decision and the government - may lead experts on the relevant questions of foreign nationality law and those experts may be subject to cross-examination. Judgments containing the reasoning of the relevant tribunal, and if further appealed, the courts, on issues of foreign nationality law are publicly available. In the British context, issues of foreign nationality law relevant to statelessness are fully, and publicly, ventilated, in stark contrast with current opacity attending Australian reasoning on foreign nationality, conducted through the extra-statutory Citizenship Loss Board process.

Section 35A

21. In relation to section 35A, the government's awareness of key legal parameters on the provision's operation has been called into question by the changes that were proposed in the Australian Citizenship Amendment

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

(Strengthening the Citizenship Loss Provisions Bill) ('the 2018 Bill').[9] In this submission, two issues generated by the proposals contained in the 2018 Bill are addressed:

a. The inconsistency of proposals in the 2018 Bill with Australia's obligations with respect to statelessness at international law; and
b. The fact that diluting the seriousness of the conduct that may lead to revocation, as proposed in the 2018 Bill, weakens the case for the constitutionality of the measures, where the relevant issue of constitutionality arises in relation to characterisation with respect to the alien's power.

22. The matters contained in paragraphs 23-42 below go the 2018 Bill, which lapsed before the last election. They provide substantive legal reasons as to why the proposals contained in the 2018 Bill should not be revived.

Australia's international obligations with respect to statelessness.

23. Australia has international obligations to avoid the creation of statelessness. Of central relevance to the current discussion, Art 8(1) of the 1961 Convention on the Reduction of Statelessness (the 1961 Statelessness Convention) relevantly provides:

> A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.

24. Accordingly, the power to revoke citizenship under 33AA is restricted to a person "who is a national or citizen of a country other than Australia".[10] A key issue raised in this respect is the sufficiency of safeguards to ensure that a person does in fact possess another citizenship.

25. The current formulation, under which the person has to be a citizen of another country at the time revocation occurs, is necessary to comply with

[9] This Bill lapsed on the dissolution of Parliament in April 2019.
[10] Australian Citizenship Act 2007 (Cth), s 33AA(1).

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

Australia's obligations under international law. This does not appear to have been appreciated by the promoters of the 2018 Bill.

26. At this point it is appropriate to address two misunderstandings with respect to Australia's obligations with respect to statelessness at international law. It is important to address these misunderstandings, as they create the impression that it is open to Australia, consistently with its international obligations, to adopt measures that would allow it to render a person stateless provided that the Minister is 'satisfied' that the person could (later) 'become' the citizen of another country.[11] This is not the case. Australia's obligations under international law do not permit such a measure.

It is not open to Australia to follow the United Kingdom's 2014 modification of the statelessness bar

27. First, the 2018 Bill sought to make changes to the statelessness bar contained in s 35A so as to allow a person to be rendered stateless if the Minister was satisfied that the person could (later) become the citizen of another country. The United Kingdom amended the statelessness bar in its corresponding citizenship revocation provision to this general effect in 2014.

28. Australia's obligations under international law are different from those of the United Kingdom, and do not allow for such a measure. When the UK signed and ratified the 1961 Statelessness Convention in the mid-1960s, it entered a declaration under Art 8 that in terms sought to retain the right to deprive a naturalised British citizen of that status when he or she had conducted him or herself "in a manner seriously prejudicial to the vital interests of her Britannic majesty"(the 1966 declaration).[12] The UK government has consistently relied on the 1966 declaration as the primary

[11] See Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, Schedule 1, item 1 – subsection 35A(1), subsection 35A(1)(b).
[12] See United Nations Treaty Collection, 'Status of Treaties: 1961 Convention on the Reduction of Statelessness'.

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

legal justification for its ability to render a naturalized citizen stateless for conduct seriously prejudicial to the vital interests of the UK.[13]

29. When Australia signed and ratified the 1961 Statelessness Convention in the mid-1970s it did not enter any declaration to Art 8. Accordingly, the justification relied on by the United Kingdom for the legality of the 2014 British amendments (which allow for deprivation where the Minister has reasonable grounds for believing the person is able to become a national of another country) is not available to Australia.[14]

<u>An analogy cannot be drawn between Australia's international law obligations regarding revocation for fraud and revocation for reasons of national security</u>

30. A second misunderstanding as to Australia's obligations with respect to statelessness under international law is contained in the explanatory memorandum to the 2018 Bill, which advanced an analogy between the change proposed in the Bill with respect to the statelessness bar (see para 22 above) and current s 34(3)(b) of the Australian Citizenship Act 2007 (Cth). Section 34(3)(b) provides for a statelessness bar, in cases where a person has committed a serious offence between application for, and grant of, Australian citizenship in the following form:

> The Minister must not decide to revoke a person's Australian citizenship if…(b) the Minister is satisfied that the person would… become a person who is not a national or citizen of any country.

---

[13] HC Deb 30 January 2014, vol 574, cols 1041-1047, in particular the quote from the then Home Secretary, Theresa May 'we put a declaration into the original UN convention, and we are taking the position back to what was set out in that convention', col 1047. This argument on the part of the British government has not been without controversy. One issue is whether the United Kingdom can revive a declaration (in 2014) on which it previously ceased to rely (in 2003).
[14] See further Rayner Thwaites, Submission to the Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, Parliamentary Joint Committee on Intelligence and Security, 11 January 2019, para 1-17.

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

31. The analogy relied on in the 2018 EM, between s 34(3)(b) and the new statelessness bar for s 35A proposed in the 2018 Bill, does not work. The provisions relate to different grounds of revocation, which are attended by different obligations under international law.

32. Section 34(3)(b) speaks to revocation on grounds of misrepresentation or fraud (and if it did not, it would be contrary to Australia's international obligations). Article 8(2)(b) of the 1961 Statelessness Convention allows for an exception to the prohibition on the creation of statelessness through deprivation of citizenship 'where nationality has been obtained by misrepresentation or fraud'. That being the case, a state has greater latitude with respect to the creation of statelessness in cases of misrepresentation and fraud. That latitude does not extend to the revocation powers in s 35A.

The parameters imposed on conduct leading to revocation by the aliens power

33. For the purposes of this submission, I refer to the comments contained in my submission to the PJCIS' Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 under the heading "Expanding the Convictions That Will Ground Deprivation of Citizenship" at paragraph 23 and following. In summary, key amendments proposed in the 2018 Bill would have diluted the seriousness of the conduct that can trigger deprivation, where seriousness is assessed both with respect to the maximum sentence carried by the offence for which a person is convicted, and the term of imprisonment to which a person is sentenced with respect to the relevant conviction.

34. The attempt, in the 2018 Bill, to dilute the seriousness of the conduct triggering revocation suggests a lack of appreciation, or indifference, to the constitutional parameters attending the head of power relied on.

35. The concept of "allegiance" is central to the legal justification of the current citizenship deprivation powers. Certain forms of conduct are defined as

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

"inconsistent with allegiance to Australia" and therefore triggering deprivation.[15]

36. One of the functions that reliance on allegiance is intended to serve is to align the statutory provisions with the relevant constitutional head of legislative power: the "naturalization and aliens" power in s 51(xix) of the Australian Constitution. In the absence of a constitutional power over citizenship, the High Court has consistently treated this power as the source for citizenship legislation and, as the Minister noted at the time of the 2015 amendments, "has found that an alien is a person who does not owe allegiance to Australia."[16] The government has sought to build on this formal definition. A person who has engaged in the relevant conduct, following the logic of the provisions, has demonstrably repudiated his or her allegiance to Australia and, ipso facto, cannot be a citizen.

37. The concept of allegiance relied on by the government is a substantive one, new to Australian law, and as yet legally untested. It is substantive in that it does not rest on whether the person is eligible for citizenship under the formal rules found in the current legislation. It introduces an additional requirement into the determination of whether someone is an Australian citizen: if formally eligible, is he or she otherwise disqualified for having committed prescribed conduct?

38. If this more substantive conception of allegiance is endorsed, then presumably only conduct that represents demonstrable and intentional disallegiance could lead to citizenship deprivation.

---

[15] Australian Citizenship Act 2007, s 32A, s33AA(1), s35A(1)(d). The following paragraph are taken from my submission to the Parliamentary Joint Committee on Intelligence and Security's Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018.

[16] Commonwealth, Parliamentary Debates, House of Representatives, 24 June 2015, 7369 (Second reading speech of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015).

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

39. This is a point at which attempts to dilute the seriousness of the conduct triggering deprivation becomes a legal and constitutional issue. Disallegiance on the part of a citizen cannot be ascribed to just any form of conduct. If a citizen is defined, for constitutional purposes, as a non-alien, and an alien lacks allegiance, that lack cannot be ascribed to just anything that the Parliament deems to be disallegiance. To take a clear, and extreme, example, Parliament could not treat failure to pay a speeding fine as conduct constituting demonstrable and intentional disallegience.

40. The more the Bill dilutes the seriousness of the conduct that triggers deprivation, the weaker the argument becomes that that conduct constitutes demonstrable and intentional disallegiance. This increases the likelihood that a court will hold that the sufficiency of connection between the law and the constitutional head of power is lacking. That is, it increases the likelihood that the law cannot be brought under the aliens power and thereby characterised as a law with respect to citizenship.

41. The significant dilution in the seriousness of the conduct triggering deprivation that would have resulted if the 2018 Bill had become law would have increased the likelihood of a finding of constitutional invalidity with respect to the deprivation provisions on the basis that they went beyond the constitutional head of power on which they rely.

42. An additional matter of concern was raised in the testimony of Home Affairs officials to the PJCIS on 30 January 2019, in the course of the PJCIS Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018. In addressing concerns about how the amendments proposed in the 2018 Bill would dilute the seriousness of the conduct triggering revocation under s 35A, the General Counsel/First Assistant Secretary, Department of Home Affairs stated:

> Its probably also sensible to add at this point that there are a set of mandatory factors that the minister will need to take into account in any decision, and they include the severity of the conduct that's the

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

> basis for the conviction. So, quite apart from whether the sentence qualifies the person for the provisions to apply, once they apply, there are a series of factors for which natural justice is also applicable, including the severity of the conduct. So, once that's engaged, then the conduct itself is considered, and the factors, for instance, that may have mitigated a court giving a particular sentence would be as relevant to that mandatory consideration by the minister – which of course, if not given appropriate weight, would lead to problems with judicial review.[17]

In the context of discussion on the 2018 Bill, the suggestion here appears to be that we should be more sanguine about the removal, and lowering, of legislative requirements conditioning the exercise of the minister's revocation power under s 35A (as proposed in the 2018 Bill), by reason of the mandatory relevant considerations attending the exercise of that power set out in s 35A(1)(d) and (e). This is not reassuring. The gulf between a statutory requirement (especially one which incorporates determinations as to conviction and sentence arrived at following a court process) and a mandatory relevant consideration on the part of the Minister is considerable. The procedural requirements generated by inclusion of a matter as a mandatory relevant consideration are a poor substitute for a legislated limit on the scope of the Minister's power.

The Department of Home Affairs submissions on comparative provisions

43. The Department of Home Affairs submission to the PJCIS inquiry into the 2018 Bill,[18] was misleading with regards to the United States' use of citizenship revocation on grounds of national security. It gives the impression of far greater recourse by the United States to citizenship revocation on grounds of national security than is in fact the case. The

[17] Hansard, Parliamentary Joint Committee on Intelligence and Security – Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, 30 Jan 2019, p 32, Ms Pip De Veau, General Counsel/First Assistant Secretary, Department of Home Affairs

[18] Australian Government – Department of Home Affairs, Submission to the review of the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018.

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

figure of 305 denaturalization cases between 1990 and 2017, provided by the Department with reference to an NGO fact sheet, relates to denaturalization for misrepresentation or fraud.[19] The best Australian comparator would be s 34 of the Australian Citizenship Act 2019, not s 35A, which was the provision the subject of the inquiry.

For the purposes of this submission, I have confined myself to identifying issues going to the legal operation and effect of the revocation provisions.

The revocation measures raise a broader set of problems and concerns, additional to those set in the above submission, that warrant the measures' repeal.[20]

If I can be of assistance in talking to the above points in the context of the public hearing on this review, or by other means, please do not hesitate to contact me.

Yours sincerely,

[redacted]

Dr Rayner Thwaites
Senior Lecturer in Public and Administrative Law

---

[19] That is to say, neither of the provisions of the United States Code cited by the Department in its submission in "Table 1: Comparison of Five Eyes citizenship cessation provisions".

[20] See for example - issues counselling against citizenship revocation found in the Submission by Dr John Coyne and Dr Isaac Kfir of the Australian Strategic Policy Institute to the parallel review of the relevant provisions of the Australian Citizenship Act 2007 conducted by the Office of the Independent National Security Legislation Monitor, available at: https://www.inslm.gov.au/submissions/citizenship-loss. For a further useful indication of the issues to be considered in a proper evaluation of the operation, effectiveness and implications of the relevant citizenship revocation provisions see J Blackbourn, L McNamara & T Brunton-Douglas, 'Summary Report of Revocation of Citizenship Expert Roundtable, London 10 May 2019' (Bingham Centre for the Rule of Law, 2019), available at: https://www.inslm.gov.au/sites/default/files/files/summary-report-citizenship-revocation-roundtable.pdf

Faculty of Law
New Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 8627 8546
F +61 2 9351 0200
E rayner.thwaites@sydney.edu.au
http://sydney.edu.au/law

ABN 15 211 513 464
CRICOS 00026A