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NEW SOUTH WALES



FACULTY OF LAW

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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear Secretary

Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Thank you for the opportunity to make a submission.

We accept the need for legislation to adapt to new national security threats, and agree that an extension of the existing grounds of citizenship revocation for dual nationals contained in s 35 of the *Australian Citizenship Act 2007* (Cth) may be appropriate. That section currently provides for the automatic revocation of a person's citizenship if they are a dual national and serve in the armed forces of a country at war with Australia. It is reasonable to extend this to people who fight for a body declared a terrorist organisation such as Islamic State ('IS'), or undertake acts of terrorism directed at Australia.

However, we do not believe that Parliament should enact the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015. It represents a flawed, disproportionate attempt to implement this objective. In addition, there are strong reasons to believe that, if enacted, the Bill would be unconstitutional. The Bill needs very substantial re-drafting if it is to be enacted by Parliament.

Primary submission

Our primary submission is that the Bill should be re-drafted to focus only on conduct that should give rise to citizenship revocation for dual nationals. It should achieve this goal in a way that is likely to withstand constitutional challenge. In particular:

- Revocation should only occur in response to conduct that involves disloyalty to Australia of a similar level of seriousness to the conduct covered by the current s 35.
- This disloyalty should be evident as a result of a finding by a fair and independent process. Hence, revocation should only arise when a person has been convicted by a court for committing a relevant offence, such as an act of terrorism.
- The required level of seriousness of the offence should not be dictated only by the nature of the offence, but also by the penalty applied. The possibility of revocation should arise in respect of conduct that has led to a jail sentence of 10 years or more.

Revocation should not apply to less serious convictions, including those that do not give rise to a jail term.

- Once these factors are made out, revocation should not be automatic. A person should lose their citizenship if the Minister is satisfied that revocation is in the public interest and the conduct that led to conviction was directed at Australia or Australians in a manner that suggests disloyalty or lack of allegiance to Australia. The affected person should be given the chance to be heard, and the ministerial determination should be subject to judicial review and merits review.

We believe that revocation modelled upon these lines would amount to an appropriate and workable legal response, and produce legislation likely to withstand constitutional challenge.

We do not believe that such a scheme should operate retrospectively in regard to convictions recorded prior to the commencement of the Act. One of the most important aspects of the rule of law is that a person is entitled to act in accordance with the law at the time that they committed their actions. No penalty, including a loss of citizenship, should apply in respect of conduct that was not subject to a penalty at the time it was committed. This is a long recognised and important principle that lies at the heart of Australian democracy, and the relationship between the state and citizen. Acting retrospectively in this case would be wrong in principle and create a new precedent that might do long term damage to Australia's system of government.

We also identify the following problems with the Bill.

The Bill, if passed, is likely to be unconstitutional

If challenged, the Bill is likely to be found invalid on a number of grounds.

(i) Conflict with the separation of judicial power

The Bill has been drafted to avoid the direct conflict with the separation of judicial power brought about by Chapter III of the Australian Constitution that would arise in the event of a Minister having a unilateral power to revoke a person's citizenship. However, the Bill gives rise to a different problem in regard to that chapter of the Constitution. This is because the Bill enables the automatic revocation of a person's citizenship without a prior finding by a court.

The effect of this is to broaden the operation of the citizenship revocation provisions by removing any discretion as to when they apply. In comparison to foreign legislation, the Bill is exceptional in scope. While a number of countries have introduced citizenship revocation legislation as a national security measure, there is no country in which automatic citizenship revocation is triggered by such a broad range of conduct. Furthermore, the scheme circumvents the role of the judiciary by bringing about a punishment akin to exile as a result of the will of Parliament, rather than by way of a finding of a court. The drafting establishes a scheme that is similar in effect to a Bill of Attainder. While the Bill does not identify specific persons, the parliamentary deeming of particular conduct as non-allegiant, and the sidestepping of any judicial determination that a person has actually engaged in this conduct before they can lose their citizenship, gives rise to a similar set of constitutional problems.

(ii) Infringement of the implied right to vote

The Bill, if passed, may also be impugned on constitutional grounds because of the manner in which it removes the capacity of a person to vote in federal elections. Sections 7 and 24 of the Constitution state that the 'people of the Commonwealth' must directly choose the members of the federal Parliament. The right is held by all the 'people of the

Commonwealth', irrespective of whether they also happen to be a citizen. The *Commonwealth Electoral Act 1918* (Cth) extends a right to vote to Australian citizens, rather than to the 'people of the Commonwealth'. This is not a problem so long as those terms are coextensive, as is currently the case.

However, it is not likely that a person would cease to be one of the 'people of the Commonwealth' merely for committing a minor crime that does not demonstrate any lack of allegiance to Australia. Many of the convictions referred to in s 35A of the Bill fit into this category. As a result, the effect of depriving these people of citizenship, and consequentially denying them the right to vote when they remain one of the 'people of the Commonwealth' would contravene ss 7 and 24 of the Constitution.

The High Court held in *Roach v Electoral Commissioner* (2007) 233 CLR 162 that it is within Parliament's power to temporarily suspend the right to vote for citizens or 'people of the Commonwealth'. However, in order to be constitutionally permissible, any such suspension must be for a legitimate purpose, and be legislated for in a manner proportionate to this purpose. In *Roach*, the High Court struck down a provision that denied federal voting rights to a person serving a sentence of imprisonment of less than three years. Such a sentence, in the view of the majority, did not represent sufficient seriousness of criminal conduct to justify even a temporary suspension of voting rights.

The Bill's goal of fostering national security may qualify as a legitimate purpose. However, the manner in which it pursues this purpose is not likely to be proportionate to this goal. There are several reasons for this. The first is that the range of conduct that triggers citizenship loss is far wider than is necessary. Automatic citizenship loss flows from conviction for a broad range of offences, many of which have little or nothing to do with terrorism, and do not demonstrate any disloyalty or lack of allegiance to Australia. For example, the Bill provides for the automatic stripping of citizenship for a person convicted of a minor property crime, with no connection to terrorism. The same result would follow for a person convicted of possessing a 'thing', such as a book or downloaded file from the Internet, which is in some way connected with terrorism. The Bill also provides for the automatic loss of citizenship for citizens convicted of offences without imprisonment, or with imprisonment for only a short period of time, or for conduct that has not led to a conviction at all. This opens up the consequent possibility of exile from Australia, with a lower threshold than that which applies to the deportation of *non-citizens* under Division 9 of the *Migration Act 1958* (Cth). This is inconsistent with the High Court's finding in *Roach* that even temporary suspension of the right to vote could not apply to persons serving sentences of less than three years imprisonment.

A second reason that the Bill's removal of citizenship and voting rights is unlikely to amount to a proportionate pursuit of a national security purpose is that the Bill establishes processes for citizenship stripping that are inappropriate, unfair and inconsistent with the standards that apply in other national security legislation. For instance, the citizenship is purported to occur automatically, without the need for a decision by a Minister. Furthermore, the rules of natural justice are excluded for all the exercises of ministerial power in the Bill. These rules routinely apply to other exercises of ministerial power that have a similarly onerous impact on the person affected, including decisions to deport non-citizens on the basis of national security or engagement in criminal conduct under Division 9 of the *Migration Act*. Accordingly, the express and implied exclusion of natural justice in the Bill is unwarranted and disproportionate. The same arguments apply with respect to the Bill's exclusion of s 39 of the *ASIO Act*, which also applies in the case of non-citizens facing deportation under Division 9 of the *Migration Act*.

For the Bill to constitute a proportionate response to the goal of promoting national security, the class of convictions to which revocation should occur should be narrow, and strictly

limited to those offences that demonstrably involve actions that are inconsistent with allegiance to Australia. Furthermore, the possibility of citizenship revocation should only arise where a person has been convicted of a serious offence and sentenced to at least 10 years imprisonment.

(iii) Lack of power

It is also possible that parts of the Bill may lack the support of a constitutional head of power. The Explanatory Memorandum for the Bill states that the primary source of constitutional support for its enactment is the aliens power in s 51(xix) of the Constitution, relying on the idea that an alien is 'a person lacking allegiance to Australia'. However, there has not yet been a High Court case in which it has been necessary for the Court to decide the constitutional meaning of 'alienage', or for it to determine the outer limits of Parliament's power under s 51(xix).

Even if the term 'alien', for constitutional purposes, is understood to mean 'a person lacking allegiance to Australia', Parliament does not have an unfettered discretion to determine when such allegiance is lacking, and it is likely that certain provisions of the Bill exceed any power that Parliament does have to determine this question. This is particularly so given that much of the conduct that triggers the automatic loss of citizenship in the Bill does not include a necessary element of disloyalty to Australia. It is highly doubtful that a statutory citizen who damages Commonwealth property in the course of protest, or a person that provides humanitarian support to an organisation such as the Kurdistan Workers Party that is actively seeking to resist the activities and expansion of IS, would constitutionally qualify as an alien who lacks allegiance to Australia.

While other heads of power, such as the defence power in s 51(vi) of the Constitution, may provide supplementary support for parts of the Bill, it is similarly doubtful that such provisions would support the Bill in its entirety.

The procedures set out in the Bill create legal uncertainty

The Bill provides three grounds upon which a dual national will have their Australian citizenship revoked. These grounds are expressed to be self-executing, and so no decision by a minister or court would be required before citizenship is lost. The only safeguard is an awkward procedure by which a person can be exempted if the minister believes this is in the public interest.

In each category of revocation, the Bill establishes first that a person ceases to be an Australian citizen at a particular time, or when particular conduct has occurred. This automatic revocation occurs irrespective of whether a Minister has given notice in respect of that person ceasing to be an Australian citizen. Once, and only once, the Minister has given notice, does the Minister has the power to exempt a person from the operation of the provision giving rise to the revocation.

An agency, such as the Australian Electoral Commission, would be obliged to act on the basis of a person's loss of citizenship irrespective of whether a Minister has notified this. Indeed, it is possible that a person may lose their citizenship, and thereby the right to vote, only to have this loss subsequently notified and an exemption provided. It is not clear how this automatic loss of citizenship can be reconciled with a subsequent exemption. It is also not clear how a person can be exempted from the operation of a provision that has already taken effect.

Another problem relates to ss 33AA and 35 of the Bill. These give rise to the automatic loss of citizenship due to the conduct of the person. However, neither section provides for any

means of fact-finding or otherwise of determining whether such conduct has occurred. This problem also applies to the existing s 35 the *Australian Citizenship Act*, but at the least in that case the provision applies only to a very limited class of persons. The effect in the Bill is to create legal uncertainty, and a difficult position not only for individuals, but for the range of government agencies that need to act on the basis of a person losing their citizenship due to such conduct, irrespective of whether the Minister has provided notice of this.

The Bill is overbroad in extending to conduct not suggesting disloyalty to Australia

In our submission on the constitutional issues above, we note that the Bill enables the automatic loss of citizenship in cases where a person has engaged in conduct that does not suggest disloyalty or a lack of allegiance to Australia. Irrespective of the Bill's constitutionality, the loss of citizenship should not apply in such circumstances.

A person will cease to be a citizen if they are convicted of any of a large number of offences. The breadth of this category is enormous and troubling. People may lose their citizenship for actions that have little or nothing to do with terrorism, and indeed for actions that do not in any way suggest they are disloyal to Australia. For example, the current Bill would permit a person guilty of a minor property crime with no connection to terrorism, such as damaging Commonwealth property, to be exiled from Australia. Citizenship might be stripped from a 15-year-old who graffiti's a Commonwealth building, or a person who vandalises federal property in the midst of a protest. The Bill would result in citizenship being automatically stripped from a person convicted of entering an area declared to be a no-go zone by the Australian government. This would occur even if the person has entered that area for innocent purposes, such as to do business, visit friends or undertake a religious pilgrimage.

In addition, the Bill applies to revoke citizenship automatically due to a person's speech. This includes where a person has been convicted of advocacy in relation to terrorism or where they have urged violence against certain groups. For example, an individual may lose their citizenship for encouraging a violent protest or riot, the target of which is a particular person or group distinguished by their political opinion. This could include protests by social and animal welfare activists. While such behaviour can be considered criminal and punished accordingly, it ought not to trigger the automatic loss of citizenship, with the disproportionate consequence of permanent exclusion from Australian territory.

Automatic revocation of citizenship would also follow if a person is convicted of possessing a 'thing' that is used in a terrorist act and is reckless to the connection between that 'thing' and the terrorist act. 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, a can of paint or even a sim card – in the preparation or commission of a terrorist act. The connection between the individual and the terrorist act in such circumstances could be limited, and loss of citizenship would be an overreaching punishment even in the case of a conviction.

Under section 35 of the Bill, a person will lose their citizenship if, outside of Australia, they fight for or are in the service of a declared terrorist organisation. This represents the most sensible extension of the existing law, although there are still concerns. Australia has declared 20 terrorist organisations, including the Kurdistan Workers Party, Boko Haram and Palestinian Islamic Jihad. Some of these organisations lack a link to or do not pose a direct threat to Australian interests. It is therefore difficult to see how being in service of these organisations would constitute disloyalty to Australia. Furthermore, being in the service of these organisations could cover activities that go well beyond military action. A person might be deprived of their Australian citizenship because they provide medical or humanitarian aid to people connected with the organisation. Indeed, a person could automatically lose their citizenship in this way for providing humanitarian support to an organisation such as the

Kurdistan Workers Party that is actively seeking to resist the activities and expansion of organisations that *do* represent a direct threat to Australian interests, such as IS.

The effect of the Bill is to cause people to be exiled from the Australian community where their connection to terrorism is minor, or even non-existent. This outcome is automatic, without even the need for a Minister to determine whether this is in the public interest. This is disproportionate and inappropriate.

The class of convictions to which revocation applies should be narrow, and strictly limited to those offences that demonstrably involve actions that are inconsistent with allegiance to Australia. Appropriate offences of this kind include committing a terrorist act that is directed towards Australia or Australian citizens, or directing activities of a declared terrorist organisation that is harmful to Australia or Australians.

The procedures set out in the Bill are unfair, and do not include appropriate safeguards

As we have noted above, the Bill expressly excludes key procedural safeguards that typically apply to the exercise of administrative decisions, including where national security threats are concerned. In particular:

- The Bill expressly provides that neither the rules of natural justice nor s 47 of the *Australian Citizenship Act* apply in relation to the exercise of ministerial powers under ss 33AA, 35 and 35A.
- The Bill expressly excludes the operation of s 39 of the *ASIO Act* in relation to ss 33AA, 35 and 35A.

Furthermore, under s 33AA of the Bill, revocation occurs where a person engages in a range of terrorism related activities, including committing a terrorist act, financing terrorism or directing a terrorist organisation, without any requirement of conviction before a court. Indeed, a person could lose their citizenship even though they are acquitted of the offence by a jury.

We found above that these procedural mechanisms are likely to render the Bill unconstitutional, on the grounds that it infringes the separation of judicial power, and that it denies the vote to 'people of the Commonwealth' in a manner that does not qualify as a proportionate pursuit of a legitimate end. However, even if the Bill is constitutional in its current form, the procedures it sets out are inappropriate. Being stripped of citizenship opens up consequences of detention and deportation, and as such has an onerous impact upon a person. While we accept that citizenship revocation may be warranted in some circumstances on national security grounds, this is not something that should occur in the absence of the normal safeguards.

Moreover, the Bill's exclusion of such safeguards is not supported by any compelling rationale. Given that s 39 of the *ASIO Act* and the rules of natural justice apply to non-citizens who are subject to deportation orders under Division 9 of the *Migration Act*, there is no reason to deny these protections to citizens who are subject to citizenship revocation and consequent detention or deportation.

Similarly, there is no compelling justification for the Bill's exclusion of s 47 of the *Australian Citizenship Act*, which requires the Minister to provide a person with notice of any decision reached in relation to the person, and with reasons where the decision is adverse in nature. The Bill, if passed, would create a system in which a person could automatically lose their citizenship, and be subjected to the consequences of this loss, without having any access to

information about the basis upon which their citizenship was lost, or even the fact that it was lost at all.

While the Bill does not exclude a right to judicial review, these factors make it unrealistic for an individual who loses their citizenship to exercise such review. It would, for instance, be practically impossible for a person who has been deported from Australia, and subsequently denied a re-entry visa, to represent themselves in person in any judicial review proceedings. To the extent that a person who loses their citizenship pursuant to the Bill is able to access the court system, their ability to lodge a successful judicial review challenge will in any event be severely hampered by the absence of any information as to the reasons for their citizenship loss.

We believe that the judicial review model allowed for by the Bill is ineffectual and insufficient. Natural justice, s 47 of the *Australian Citizenship Act* and s 39 of the *ASIO Act* should not be excluded. Additionally, the loss of citizenship in the absence of a serious criminal conviction should not be provided for.

Yours sincerely

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