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Mr Dan Tehan MP
Chair
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra, ACT, 2600
By E-mail: citizenship.reps@aph.gov.au

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

Dear Chair,

I am pleased to make this submission to the Inquiry by the Parliamentary Joint Committee on Intelligence and Security into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 ("The Bill").

I identify legal and operational issues raised by the three provisions for revocation of citizenship introduced by the Bill, in the proposed ss 33AA, 35 and 35A. I then address the overall scheme of the Bill.

Section 33AA

Section 33AA in summary

1. Section 33AA fails to specify *who* is to make the necessary determination that conduct triggering revocation of citizenship has occurred and *how* that decision-maker is to go about his or her task. The government response that the statute is 'self-executing' is either dissembling or confused. *Somebody* has to determine that the conduct has occurred. Further, the means chosen to define the scope of the conduct triggering revocation – namely the use of 'words and expressions' that have the 'same meaning' as in enumerated provisions of the Criminal Code - either

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requires a person and process for determining questions of knowledge and intent, incompatible with a 'self-executing' law, or it allows for citizenship stripping for innocent conduct.

The Bill says nothing about critical issues going to its legal and practical operation

2. The Explanatory Memorandum states that s 33AA will operate "by operation of law", without any need for a Ministerial determination. Similarly, the government has spoken of the citizenship revocation provisions as "self-executing", as if the statute can operate to automatically remove citizenship without the need for human judgment. This presentation of s 33AA at best avoids the key operational and legal questions that the public and parliament need addressed to properly understand and evaluate the Bill.

3. The theory of the self-executing statute the statute and explanatory memorandum rely upon has been subjected to significant criticism in the Australian courts. The essence of this criticism is the common-sense observation that "No law is entirely self-executing; it needs the interposition of human judgment".[1] As a matter of practical reality, *somebody* needs to reach a determination that the conduct triggering revocation of citizenship has occurred.[2]

4. As currently drafted, the Bill is silent on key issues going to its operation and legal viability:

    a. **Exactly what conduct triggers revocation? Do all the elements of the offences listed in the Bill as defining conduct have to be addressed? Or only some of those elements?**

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[1] Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action*, 5th edn (Sydney, Lawbook Co, 2013) [3.40].
[2] Applying *Australian Postal Corporation v Forgie* [2003] FCAFC 223; (2003) 130 FCR 279, [26].

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b. Who is to make the critical determination that the conduct has occurred?

c. By what process is he or she to arrive at that determination?

If the Bill does not address these questions, how is the Australian public to know what is proposed?

What conduct triggers revocation under s 33AA?

5. The scope of the revocation power in s 33AA is defined with reference to a list of 'words and expressions' in subs (2). These words and expressions are stated to have the 'same meanings' as in the provisions of the Criminal Code that are enumerated in subs (3). It is unclear whether the 'words and expressions' listed in s 33AA(2) include the qualifications in the corresponding offences. Critically, is there any element of knowledge or intent? If there is, this raises questions of evidence and proof and problems with the separation of judicial power. If not, then the Bill attaches a draconian penalty to innocent conduct.

6. For example, s 33AA(2)(c) specifies that 'providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act' constitutes conduct that will trigger revocation. These 'words and expressions' are stated to have the same meaning as in s 101.2 of the Criminal Code.

7. Section 101.2 of the Criminal Code contains qualifications, including the requirements that the person either knows the training 'is connected with preparation for, the engagement of a person in, or assistance in a terrorist act', or is reckless as to that fact. The explanatory memorandum certainly suggests that the qualifications contained in the criminal provisions are elements of the requisite conduct for revocation. It repeatedly quotes those qualifications. The immediate issue is the complete lack of

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specification in the Bill as to how it will be determined whether those qualifications are established.

Either there needs to be a process to determine the person's knowledge and/or intent...

8. If s 33AA(2)(c) includes the qualifications contained in the Criminal Code, namely that the person knows of the connection between the training provided and a terrorist act, how is this knowledge requirement to be determined? There has to be a process for determining such matters. Whatever the nature of the process provided for, if this is how the provision is intended to operate it will raise serious constitutional issues arising from the requirements of the separation of judicial power.

...Or the provisions can be used to strip the citizenship of Australians who are innocent.

9. Alternatively, if the qualifications in the Criminal Code, notably knowledge of a connection between the training provided and a terrorist act, do not qualify the reference to providing training in s 33AA(2)(c), then any Australian can have his or her citizenship revoked for the innocent provision of training. This revocation will automatically take effect despite the absence of any requirement that he or she knew that the training he or she provided was connected with preparation for a terrorist act, or was reckless as to whether it was. On this interpretation Australians' will have their citizenship revoked for doing their job as a computer trainer, shooting range employee or flight instructor, if it so happens that the training provided is later used in a terrorist act.

10. The same analysis can be replicated for the other provisions in subs 33AA (2). For example, does 'financing terrorism' or 'financing a terrorist' in s 33AA (2)(f) and (g) include the qualifications contained in sections 103.1 and 103.2 of the Criminal Code, namely that the person providing the funds is reckless as to whether those funds will be used to facilitate or engage in a terrorist act? If so, how is recklessness determined? If

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recklessness is not a requirement, can any Australian donating to charity or providing funds be stripped of citizenship if it turns out those funds were used to facilitate a terrorist act?

The legal requirements for notification are extremely weak

11. There is no requirement that the affected person be notified before his or her citizenship is revoked.

12. The only notice requirement contained in the legislation relates to notice 'after the fact', requiring that unspecified persons be notified that a person has ceased to be a citizen. Even this requirement is expressed so as to make the Minister's obligations as minimal as possible. The Minister is required to "give written notice...at such times and to such persons as the Minister considers appropriate".

13. This does not require that the person affected ever be notified that he or she has lost their citizenship. It is offensive to the rule of law that a fundamental change can be made to a person's legal status, with serious consequences for his or her right to remain in, or re-enter Australia, without any legal requirement that he or she be notified.

14. The legal uncertainties attending the notification provision are exacerbated by the continuing uncertainties about the nature of the conduct that will trigger revocation, and the process for determining whether that conduct has occurred, mentioned above.

To rectify wrongful revocation, exclusive reliance is placed on ministerial exemption

15. The sole means of rectifying any wrongful revocation of citizenship is the non-compellable Ministerial power contained in s 33AA(7) to 'exempt' a person from the operation of s 33AA where the Minister 'considers it in public interest to do so'. This non-compellable ministerial discretion is manifestly inadequate as a legal protection against the prospect that a

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person wrongly has conduct under s 33AA(2) and (3) attributed to him or her.

16. Conversely, a ministerial power to exempt someone from the operation of a law 'if he or she considers it in the public interest to do so' raises troubling issues for the equal application of the law, whether or not these issues go to the provision's validity.

Procedures protecting against misuse of ASIO information are dispensed with and citizens left with lower procedural protections than non-citizens

17. The only provision in the Bill on the process for determining conduct under s 33AA is contained in subsection (12). Subsection (12) states that s 39 of the ASIO Act does not apply. Section 39 precludes a Commonwealth agency from taking permanent action on the basis of a preliminary assessment from ASIO. Under section 39, the government agency relying on ASIO's information has to wait for an ASIO security assessment.

18. Subsection (12) dispenses with the need for an ASIO security assessment. In so doing, it dispenses with a process that currently protects against the miscommunication of ASIO information and its misapplication by government agencies, by requiring that that information only be conveyed to the relevant government agency once it has been through proper process.[3] This requirement is not only protective of the person affected, but protective of ASIO, in helping to ensure that its intelligence is tested and formulated through a proper process, and permanent decisions are not made in error. The removal of this requirement leaves ASIO more exposed to the potential misuse of its information and consequent politicisation.

[3] For a description of the adverse security assessment process see the Open Affidavit of David Taylor Irvine dated 9 April 2014 in Jaffarie v Director General of Security, Federal Court of Australia, No NSD 2374 of 2013.

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19. Currently, ASIO security assessments provide the basis, amongst other matters, for visa cancellation decisions. In removing the application of s 39 of the ASIO Act, the Bill provides Australians targeted for revocation with lesser procedural protections than non-citizens in visa cancellation matters.

20. **If the Bill proceeds, section 33AA should be removed. It is the most legally and practically problematic provision in a highly problematic Bill.**

21. If s 33AA is retained, the issues raised above need to be addressed, as well as the relation between s 33AA and s 35A (see para 26 below).

Section 35

'In the service of' is overbroad and requires clarification

22. The Bill extends the operation of s 35 to a dual national who "fights for, or is in the service of, a declared terrorist organisation". The phase 'is in the service of' is an incredibly broad and vague formulation, potentially encompassing for example, the medical services of the Red Cross and related humanitarian agencies, as flagged by the reference to 'medical support' in the Explanatory Memorandum.

23. Paragraph 56 of the Explanatory Memorandum makes a number of statements about what the phrase is intended to cover. At a minimum, these intentions should be made express in the text of the Bill.

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Section 35A

The need for a criminal conviction in s 35A can be circumvented by using s 33AA

24. The key legal protection provided by s 35A is the requirement of a conviction by a criminal court. This requirement imports the procedural protections attending a criminal trial. This protection is undermined by the overlap between s 35A and s 33AA. More particularly, conduct that could ground revocation under s 35A(3)(a), (c) and (d) will also ground revocation under s 33AA. Conduct that could be used to ground prosecution for an offence, conviction for which would trigger s 35A, can instead be used to trigger revocation under s 33AA, so dispensing with the requirement of a criminal trial. It can be expected that, if the government has two options available for revocation based on the same conduct, one requiring a successful criminal conviction and the other dispensing with any need for a criminal trial, it will choose the latter.

If s 33AA is intended to cover conduct that occurred outside Australia, this needs to be made express in the Bill

25. A possible reason for the introduction of s 33AA, a provision that covers a subset of the conduct covered by s 35A, is that s 33AA is intended to apply to conduct that occurred in countries other than Australia and/or to relate to Australian citizens currently in another country. That is, s 33AA may be intended to circumvent anticipated practical and legal difficulties that might attend an attempt to convict an Australian in another country of conduct that occurred in a country other than Australia. If s 33AA is intended to cover conduct that occurred outside Australia, this needs to be made express in the Bill. In the absence of such clarification, s 33AA has the effect of substantially undermining the protection provided by the requirement of a criminal conviction contained in s 35A, for those in Australia and/or alleged to have committed one of the offences nominated in s 35A(3).

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Many offences triggering revocation under s 35A(3) do not involve terrorism, contrary to the stated rationale and intent of the Bill

26. The Explanatory Memorandum argues that the expanded revocation powers are needed 'to address government concerns' in relation to those 'engaged in terrorist related conduct'. It states that the 'policy intention' behind the offences listed in s 35A is that they 'must be a terrorism related offence'. But many of the offences listed in s 35A(3), conviction for which will trigger revocation of Australian citizenship, do not involve terrorism at all. For example:
    a. The disturbing inclusion of conviction for 'destroying or damaging Commonwealth property' as a revocation trigger has already received adverse publicity, and rightly so. Student protesters engaged in a sit-in that turned unruly could be stripped of their citizenship on this basis.
    b. Similarly, most, if not all, of the other offences drawn from the Crimes Act 1914 give the appearance of having been included with little or no consideration for how they relate to terrorism. For example, whatever we may think of the offence of 'assisting a prisoner of war to escape', it is not a terrorism offence.

Problems raised by the assortment of offences listed in s 35A

27. The extension of the list of offences beyond terrorism offences also heightens a basic problem of justification and scope. The looser the conceptual unity of the offences selected, the more pressing becomes the question – why these offences? More worryingly, the inclusion of an assortment of offences that do not relate to terrorism make it more difficult to resist the later addition of others offences as grounds for revocation.

28. The purpose provision of the Bill is radically overbroad, going far beyond the concerns about terrorism stated as motivating the Bill. The Bill refers to 'certain conduct incompatible with the shared values of the Australian community' that demonstrates that a person has 'severed that bond and repudiated their allegiance to Australia'. Why does damaging

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Commonwealth property lead to a loss of Australian citizenship, while a conviction for most very serious crimes on the Australian statute book does not? If we accept the additional penalty of citizenship revocation for the medley of offences listed in s 35A(3), it becomes harder to resist the extension of citizenship revocation to other offences that may capture the public and/or government's imagination at any given time.

A person whose conviction is overturned has no right to regain his or her Australian citizenship

29. The only means by which a person stripped of Australian citizenship under s 35A may regain it is via a non-compellable ministerial discretion, provided for under s 35(6). It is extraordinary that the Bill makes no express provision for reinstatement of citizenship in circumstances where the statutory precondition for its removal, namely conviction for one of the nominated criminal offences, is set aside. This oversight should be addressed.

The Bill evidences signs of hasty composition

30. The drafting of s 35A(6) is decidedly odd and almost certainly in error. Its operation is triggered by the giving of a notice under s 33AA, s35 or s 35A, but it can only exempt a person from the operation of s 35A. So you could have a situation where a person is stripped of citizenship under s 33AA (or s 35), provided with notice under s 33AA, and can then apparently apply under s 35A(6) to rescind the notice under s 33AA, but not to exempt the effect of s 33AA. In drawing attention to this slipshod drafting, I do not intend any criticism of the professional parliamentary draftspersons working on the legislation. Rather, it is indicative of the Bill being drafted in rushed circumstances and with shifting instructions. This is of concern given the seriousness of the subject matter.

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Should s 35A apply retrospectively?

31. The Attorney-General has asked the Committee to consider whether proposed section 35A of the Bill should apply retrospectively with respect to convictions prior to the commencement of the Act.

32. It should not. An additional punishment or consequence as grave and far reaching as revocation of citizenship should not be applied with retrospective effect. To do so would be contrary to the rule of law principle that the law should be knowable in advance, so that people can conduct their affairs accordingly, knowing the consequences of failing to do so. Why should an Australian who was convicted for damaging Commonwealth property in 2011 or 1974 (to choose arbitrary years) suddenly have the consequence that they are to be stripped of Australian citizenship visited upon him or her?

Overarching problems with the Bill

The Bill clearly establishes dual citizens as second class citizens

33. The Bill has been argued for as a means of expressing our displeasure at certain behaviour, defined with reference to a selection of criminal offences. But the fact that only dual citizens are vulnerable to revocation makes citizenship revocation morally arbitrary in a way that use of the criminal law is not. Two Australians could be convicted in identical terms for an identical offence. If one held only Australian citizenship, while the other was a dual national, only the second could be stripped of citizenship and then either deported or blocked from entering Australia. The Bill clearly establishes dual citizens as 'second-class' citizens, liable to suffer additional penalties and vulnerable to detrimental measures not suffered by those holding Australian citizenship alone. Whether or not this affects the legal validity of the Bill, it is corrosive of equality between citizens and the existence of a 'common bond' between all Australians, whether they are mono or dual nationals.

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The Bill will leave many blameless Australians feeling less safe and secure

34. My submission details a variety of ways in which the Bill is silent or obscure on critical features of its practical and legal operation. This lack of clarity, attending a significant expansion of government power, is of concern for reasons additional to any impact the Bill will have on those whose citizenship is revoked. The Bill as introduced destabilises Australian citizenship, introducing a dynamic whereby a dual citizen's legal status as an Australian citizen is vulnerable to removal for ill-specified conduct, via a non-specified process, attended by non-specified legal protections. To ignore, or be dismissive of, the very real sense in which this is likely to leave many Australians feeling less safe and secure would be irresponsible and to our lasting detriment as a country.

The Bill deepens rather than addresses concerns about the extent of executive power over citizenship

35. The current Bill deepens, rather than addresses, concerns about the extent of executive power over citizenship status that were publicly voiced in the lead-up to introduction of the Bill. I recommend that the Bill not proceed.

36. This is not to say that those who have committed terrorist offences should not be punished. They should be, under the criminal law. The damage to community cohesion, the legal status of Australian citizenship and the rule of law that would be caused by the enactment of this Bill outweigh any perceived gains.

37. If it does proceed, the Bill needs to be radically amended. As currently drafted it is unlikely to be of much practical use in addressing the terrorist threat as it will quickly become embroiled in problems of practical and legal operation. The surest means of addressing these problems would

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to introduce clear and robust processes that meet the letter and the spirit of the rule of law.

If the Committee seeks further information, please do not hesitate to contact me.

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