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Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
By upload and email: pjcis@aph.gov.au

Submission re: *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*

Dear Chair,

The Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 ('the Bill') seeks to amend the Australian Citizenship Act 2007 ('the Act') by:

- altering the current legislative protections against the creation of statelessness;
- making an offence with a maximum sentence of three years ("associating with terrorist organisations") a trigger for deprivation, where currently only offences with a maximum sentence of at least ten years serve as a trigger; and
- removing, with respect to 'terrorism offences', the current requirement that, to trigger deprivation, a conviction or convictions result in a term of imprisonment of at least six years.

If passed the Bill will weaken, rather than strengthen, the legal robustness and defensibility of the current citizenship loss provisions, making them more vulnerable to legal challenge.

The amendments noted above are contrary to the express bipartisan recommendations of this committee as delivered in its Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, issued in September 2015 ('2015 Report').

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As registered by the Senate Standing Committee for the Scrutiny of Bills last month,[1] sufficient justification has not yet been supplied as to the necessity and appropriateness of expanding the minister's discretionary power to determine that a person ceases to be an Australian citizen, as provided for in the Bill.

Background

Under the 2015 amendments to the Australian Citizenship Act 2007, a person can lose their citizenship in two broad ways:

- **Deprivation by conduct (by automatic operation of statute)** The legal fiction attending this mechanism is that a person ceases to be a citizen by 'automatic' operation of the statute, when he engages in the relevant conduct: see s33AA(9).[2] Through ministerial press releases and freedom of information requests we know that determinations as to exercise of the power are made by an extra-statutory body, the Citizenship Loss Board. The mechanism for 'automatic' deprivation is available with respect to conduct engaged in outside Australia (or conduct of a person who left Australia before being tried for an offence related to the conduct). This is the mechanism that has, to the best of the public's knowledge, been used in all cases of deprivation of Australian citizenship to date.

- **Conviction based citizenship deprivation.** The Minister for Home Affairs may determine that a person ceases to be an Australian citizen where he or she is convicted of an offence listed in the Act. This is the only

[1] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 15 of 2018.

[2] The broad theory of the self-executing statute that the 2015 amendments relied upon with respect to deprivation by conduct 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": Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action,* 5th edn (Sydney, Lawbook Co, 2013) [3.40]. As a matter of practical reality, *somebody* needs to reach a determination that the conduct triggering revocation of citizenship has occurred, and that the conditions on valid deprivation, including that the person is the national or citizen of a country other than Australia, have been met.

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mechanism available for deprivation of citizenship with respect to disallegient conduct engaged in in Australia.

The amendments in the Bill all go to this second mechanism for citizenship deprivation. This mechanism has, to the best of the public's knowledge, never been used.

Currently, following a recommendation of this Committee in its 2015 report, all the listed offences carry a maximum sentence of at least ten years. Another recommendation of this Committee, enacted into law, was to require, with respect to the conviction or convictions, that they carry a sentence of imprisonment of at least six years.

In Part 1 I address the proposed amendments in the Bill relevant to the creation of statelessness.

In Part 2 I consider the proposed amendments that significantly expand the minister's powers under conviction based revocation in s 35A of the Act: by adding a new, and more minor, offence as a trigger for deprivation; by removing the requirement that a person be sentenced to a term of imprisonment in respect of the relevant conviction for a 'terrorism offence' and; by significantly expanding the retrospective operation of the provision.

1 - STATELESSNESS

1. Currently, the Act implements Australia's obligations not to create statelessness in the form of a 'statelessness bar' on the deprivation power.[3] Under s 35A of the Act (the provision for conviction based revocation) a person can only be deprived of Australian citizenship if he or she

[3] The statement that the statelessness bar implements Australia's obligations not to create statelessness leaves unaddressed how well it does so. A key issue here is the sufficiency of the safeguards put in place to ensure that a person is in fact a dual citizen before he or she is deprived of citizenship. On this, see the comparison of the Australian extra-statutory Citizenship Loss Board with the British statutory appeals process at paragraphs 7-9 in the text.

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> is a national or a citizen of a country other than Australia at the time when the Minister makes the determination.[4]

If a person is a national or citizen of another country then deprivation of Australian citizenship will not leave him or her stateless. A similar 'statelessness bar' is contained in s33AA (the provision for 'automatic' revocation), though the timing is linked to a person's conduct, not the ministerial determination.[5]

2. The central source of legal obligation with respect to the creation of statelessness through citizenship deprivation is contained in art 8 of the 1961 Convention on the Reduction of Statelessness ('the 1961 Statelessness Convention'). Article 8(1) relevantly provides:

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

Australia has signed the 1961 Statelessness Convention, ratifying it on 13 December 1975. Australia did not enter any declarations or reservations to its ratification of the 1961 Statelessness Convention.

3. The Explanatory Memorandum to the Bill contains no discussion of the provisions of the 1961 Statelessness Convention, only indirect reference to "Australia's international obligations regarding statelessness".

4. The term "stateless" is defined in art 1.1 of the 1954 Convention Relating to the Status of Stateless Persons ('1954 Stateless Convention'):

> the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.

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[4] Australian Citizenship Act 2007, s 35A(1)(c).
[5] Australian Citizenship Act 2007, s 33AA(1)

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This clearly expresses the fact that it is a matter for each state to determine under its law who are its nationals. This means that, for example, it is a question of Fijian law as to who is a Fijian national. This is an expression of state sovereignty. Further, it is generally accepted that the phrase "operation of its law" refers not only to the letter of the law, but also to its operation in practice.[6]

5. There can be legitimate disputes as to the content of foreign nationality law and its application to a given individual. These are disputes about foreign law, not Australian law. They are relevant, indeed determinative, of the operation of the Australian Act, but remain a matter of foreign nationality law.

6. Foreign nationality law has the potential to be complex, as illustrated by the cases on the eligibility of Matt Canavan and Nick Xenophon, among others, to sit as Senators under s 44(i) of the Australian Constitution.[7] Determining whether Canavan was an Italian citizen involved questions as to the effect of an Italian court decision in the early 1980s. Xenophon's case involved testimony from British legal experts as to the effects of British Imperial law in Cyprus in the 1950s.

7. In the United Kingdom context, the complexity of foreign nationality law, as it arises in the context of citizenship deprivation and statelessness, is in part addressed through statutory provision for a right to appeal a deprivation decision to a tribunal, and from there through the British courts.[8]

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[6] See for example *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [34] per Lord Carnwath.

[7] See for example *Re Canavan* [2017] HCA 45.

[8] British Nationality Act 1981 (UK), s 40A and Special Immigration Appeals Commission Act 1997(UK), s 2B. For an example of a sequence of such appeals, see the Pham litigation, which centred on the question of whether Mr Pham was a Vietnamese national, such that he could be deprived of his British citizenship: B2 v Secretary of State for the Home Department, Appeal No SC/114/2012, 29 June 2012 (The appeal at first instance, to the Special Immigration Appeals

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8. Under the British process, on appeal the person challenging the deprivation decision and the government may lead experts on the relevant questions of foreign nationality law and those experts may be subject to cross-examination. The issues of foreign nationality law relevant to statelessness are fully, and publicly, ventilated.

9. By way of contrast, under the current Australian Act these questions of foreign nationality law are dealt with by an extra-statutory inter-departmental committee, the Citizenship Loss Board ('the Board') whose processes and deliberations are opaque. For example, in the current dispute between Australia and Fiji over the question of whether Mr Prakash is a Fijian citizen we do not currently know the legal basis for the Board's determination that Prakash is a Fijian citizen, the factual assumptions upon which that advice relies, or the government's source of expertise on the operation of Fijian nationality law, where this includes relevant Fijian government practice as well as law.

10. Currently, the question to be asked under the Act with respect to statelessness is clear,[9] namely was the person a national or citizen of a country other than Australia at the time of deprivation? The Bill complicates this question considerably in relation to conviction based revocation. In place of the existing condition on valid exercise of the deprivation power, namely that:

> the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination.[10]

Commission); B2 v Secretary of State for the Home Department [2013] EWCA Civ 616 (Before the Court of Appeal); Pham v Secretary of State for the Home Department [2015] UKSC 19 (Before the United Kingdom Supreme Court).

[9] Though as indicated above, the legal and factual issues determining the answer may be complex.

[10] Australian Citizenship Act 2007 (Cth), s 35A(1)(c).

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the Bill substitutes:

> 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.[11]

If enacted, this amendment would take Australia several steps backward in terms of legal clarity.

(a) The statelessness bar is intended to implement Australia's international obligations with respect to statelessness, as outlined in paragraph 2 above. The substitution of the Minister's 'satisfaction' for the factual requirement that a person does or does not hold another citizenship departs from these obligations. The Minister's view on this point is, from both the perspective of international law and the foreign state concerned, legally irrelevant. Australia's obligations hinge on whether the person has another citizenship as a matter of fact and law, independent of the Minister's opinion.

(b) Further, under the proposed amendment the timeframe within which a person is not to become a person who is not a citizen or national of any other country (the double negative is in the drafting of the Bill) is not specified. This may be intended to leave open the prospect of allowing someone to be rendered stateless in circumstances where the Minister is satisfied they have another citizenship available to them such that they can, after some unspecified elapse of time, "become a person who is [not] not a national or citizen of any country". Again, this would not be consistent with Australia's obligations with respect to statelessness under international law. Australia would be rendering a person stateless by depriving him of Australian citizenship.

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[11] Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, Schedule 1, Item 1 (s 35A(1)(b)).

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(c) As a practical matter, the proposed amendment would add further issues and complications to the existing operation of the statelessness bar in the Act. Use of the deprivation power in circumstances where these complications are not satisfactorily resolved between the relevant countries has the potential to create international friction, as illustrated by the current dispute with Fiji over the question of Mr Prakash's Fijian citizenship.

Statelessness - No support can be drawn from the United Kingdom's amendments to the British 'statelessness bar'

11. It is possible that the Bill's proposed change to the wording of the 'statelessness bar' has been influenced by British amendments in 2014. In 2014 the statelessness bar in the British Nationality Act 1981 was weakened by providing that deprivation could proceed in certain cases (among other limitations, the provision is only applicable to naturalised citizens) where:

> the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.[12]

12. If the example of British developments has influenced the Bill, it is important to realise that the British government's central justification for the legality of the 2014 British amendments is unavailable to Australia.

13. When it signed and ratified the 1961 Statelessness Convention in the mid-1960s, the United Kingdom entered a declaration ('the British Declaration of 1966'):

[12] British Nationality Act 1981 (UK), s 40(4A), in part, as inserted by s 66 of the Immigration Act 2014 (UK).

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> [The Government of the United Kingdom declares that], in accordance with paragraph 3 (a) of Article 8 of the Convention, notwithstanding the provisions of paragraph 1 of Article 8, the United Kingdom retains the right to deprive a naturalised person of his nationality on the following grounds, being grounds existing in United Kingdom law at the present time: that, inconsistently with his duty of loyalty to Her Britannic Majesty, the person
>
> > (i) Has, in disregard of an express prohibition of Her Britannic Majesty, rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
> > (ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty.[13]

In simple terms, the British Declaration of 1966 was intended to qualify the United Kingdom's obligations under the 1961 Convention, allowing the United Kingdom to retain existing provisions that allowed for deprivation even when it would result in statelessness. The retained powers were applicable only to naturalised citizens.[14]

14. The power to deprive a person of British citizenship where it would result in statelessness was relinquished on 1 April 2003.

15. With respect to the British amendments of 2014, quoted in paragraph 11 above, the United Kingdom Home Office stated that the new clause would

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[13] See United Nations Treaty Collection, 'Status of Treaties: 1961 Convention on the Reduction of Statelessness'.

[14] The purpose of the British Declaration was to retain its existing powers to deprive a person of British nationality even if this would result in statelessness. These powers were limited to persons who had acquired British citizenship by naturalization.

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revert the domestic legislation to the position prior to 1 April 2003 in accordance with the position set out in the British Declaration of 1966.[15]

16. When it has been challenged as to the legality of the 2014 amendments, the British government has referred to the 1966 British Declaration made under Art 8(3) of the 1961 Convention.[16] The argument has been that instead of breaching the 1961 Convention, the UK government is only giving effect to its initial declaration.[17] As stated by the then British Home Secretary, Therese May:

> we put a declaration into the original UN convention, and we are taking the position back to what was set out in that declaration.[18]

17. The argument that the United Kingdom is only 'giving effect' to its initial declaration, the primary argument relied on by the British Government in defending the legality of its 2014 amendments, is not available to Australia. As noted in paragraph 2, when Australia signed and ratified the 1961 Convention in the mid-1970s it did not enter any reservation or declaration to art 8. The Australian position in this regard cannot be altered by entering a declaration now or in the future. The power to make such a declaration went to the 'retention' of a State's position at the time of its signature or ratification of the 1961 Statelessness Convention.[19]

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[15] United Kingdom Home Office, *Immigration Bill – European Convention on Human Rights - Supplementary Memorandum to Address Issues Arising from Government Amendments tabled on 28 January 2014 for Commons* (January 2014).
[16] See for example, HC Deb 30 January 2014, vol 574, cols 1041-1047.
[17] HC Deb 30 January 2014, vol 574, cols 1041-1047. This argument has not been without controversy. One issue is whether the United Kingdom can revive a declaration on which it had previously ceased to rely (for the factual background see paragraphs 13 and 14 in the text).
[18] HC Deb 30 January 2014, vol 574, col 1047.
[19] 1961 Statelessness Convention, art 8(3). For an elaboration of this point by the United Nations High Commissioner for Refugees (UNHCR) in response to a Canadian citizenship deprivation proposal see UNHCR Statement Relating to Bill C-425 An Act to Amend the Citizenship Act (honouring the Canadian Armed Forces), Canadian Standing Committee on Citizenship and

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Statelessness – the analogy with respect to the statelessness bar for fraud in the Act is misconceived

18. The Explanatory Memorandum to the Bill advances an analogy between the proposed change to the statelessness bar for conviction based deprivation and the current statelessness bar for deprivation on grounds of fraud in s 34(3)(b) of the Act.[20] It is suggested that, "consistent with the operation of the current provisions of the Citizenship Act, including current paragraph 34(3)(b)", it is not the government's intention that the proposed new statelessness bar for conviction based deprivation breach Australia's international obligations regarding statelessness.[21]

19. The analogy drawn in the Explanatory Memorandum between the proposed provision and existing provisions is misconceived. The obligations of Contracting Parties to the 1961 Statelessness Convention with respect to deprivation for fraud are distinct from their obligations with respect to other grounds of deprivation. As noted in paragraph 2 above, art 8(1) of the 1961 Statelessness Convention states:

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

Article 8(2) then continues, in part:

> Notwithstanding the provisions of paragraph 1 of this Article, a person may be deprived of the nationality of a Contracting State:
> ...

Immigration (26 March 2013) ('UNHCR, Canadian Statement') para 10. The UNHCR is the relevant treaty body under the statelessness conventions. Canada amended its legislation to conform with its international obligations with respect to statelessness as outlined by the UNHCR.

[20] Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 – Explanatory Memorandum ('Explanatory Memorandum'), para 19.

[21] Explanatory Memorandum, para 20.

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(b) where the nationality has been obtained by misrepresentation or fraud.

20. The formulation of the statelessness bar in s 34(3)(b) of the Act, relating to fraud, might comply with Australia's international obligations at the same time as the adoption of the same wording with respect to deprivation on the grounds of disallegient conduct would not. That is because Australia's international obligations with respect to the creation of statelessness through deprivation differ as between fraud and other grounds of deprivation.

21. In these circumstances, even on the assumption that the existing law is fully compliant with Australia's obligations, reliance on the statutory statelessness bar with respect to deprivation for fraud to justify the adoption of similar wording with respect to disallegient conduct is misconceived.

Statelessness - Conclusion

22. The Explanatory Memorandum to the Bill states that

> It is not the intention that new paragraph 35A(1)(b) [which amends the 'statelessness bar'] would allow the Minister to determine that a person ceases to be an Australian citizen in breach of Australia's international obligations regarding statelessness.[22]

If that is not the government's intention, then the best course would be to leave the statelessness bar currently in s35A of the Act unamended. Compliance with Australia's international obligations regarding statelessness is not served by the proposed new section 35A(1)(b).

[22] Explanatory Memorandum, para 20.

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2 - EXPANDING THE CONVICTIONS THAT WILL GROUND DEPRIVATION of CITIZENSHIP

23. The Bill significantly expands the scope of the convictions that will serve as a ground for deprivation of citizenship under s35A of the Australian Citizenship Act. These changes greatly dilute the seriousness of the conduct that serves as a ground for deprivation of citizenship.

24. This dilution will make the citizenship deprivation provisions more vulnerable to successful legal challenge than they are at present. The Bill weakens, rather than strengthens, the citizenship loss provisions in terms of their ability to withstand legal challenge.

Introducing an offence with a maximum sentence of three years as a ground for deprivation of citizenship

25. The Bill seeks to add a new offence to the list of offences that will trigger deprivation, namely that of "associating with terrorist organisations" under s 102.8 of the Criminal Code. This offence carries a maximum sentence of three years.

26. This amendment is directly contrary to the position taken by this Committee in its 2015 Report. Recommendation 9 of that report states:

> The Committee recommends that the list of relevant offences in proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to exclude offences that carry a maximum penalty of less than 10 years' imprisonment...

This recommendation was adopted in the 2015 amendments to the Australian Citizenship Act 2007.

27. The reasoning of the Committee behind this recommendation was that

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> the provision should more appropriately target the most serious conduct that is closely linked to a terrorist threat. Accordingly, the committee recommends removal of offences with a maximum penalty of less than 10 years imprisonment.[23]

28. Before outlining other proposals contained in the Bill I note that in 2006 the Security Legislation Review Committee ('SLRC') of the Commonwealth Parliament recommended that the offence of "associating with terrorist organisations" in s 102.8 of the Criminal Code be repealed.[24] In chapter 10 of its report the SLRC outlined the reasons why it was not convinced of the need for an association offence distinct from the offences of membership of a terrorist organisation and providing support to a terrorist organisation. It continued:

> The breadth of the offence, its lack of detail and certainty, along with the narrowness of its exemptions, has led the SLRC to conclude that considerable difficulties surround its practical application. Some of these difficulties include the offences' potential capture of a wide range of legitimate activities, such as some social and religious festivals and gatherings and the provision of legal advice and legal representation. Further, the section is likely to result in significant prosecutorial complications.[25]

This is the offence that the Bill proposes to introduce as a ground for deprivation of citizenship. If enacted as a ground it is likely to bring considerable legal and practical difficulties in its wake. Its "potential capture of a wide range of legitimate activities" can be predicted to be counterproductive in securing widespread community engagement with counter-terrorism measures. As outlined below, the offence is proposed as a ground of deprivation regardless of the leniency of the sentence with respect to the conviction, and retrospectively to 12 December 2005.

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[23] See 2015 Report, para 6.23.
[24] Report of the Security Legislation Review Committee, June 2006, Recommendation 15.
[25] Ibid, p 132-133.

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Removing the requirement that the person, in respect of the relevant conviction or convictions, have been sentenced to periods of imprisonment totalling at least 6 years

29. The Bill seeks to remove, with respect to those offences that the Bill defines as 'terrorist offences', the existing requirement that:

> the person has, in respect of the conviction or convictions [that enable the Minister's determination that a person ceases to be an Australian citizen], been sentenced to a period of imprisonment of at least 6 years, or to periods of imprisonment that total at least 6 years.[26]

This current condition on the exercise of the power is simply omitted from relevant replacement provision in the Bill.

30. The current requirement of a sentence of at least 6 years was added to the Act on the recommendation of this Committee (Recommendation 7).

31. The reasoning of the Committee on this point is worth setting out in full

> 6.25 While limiting the provision to more serious offences is an appropriate measure to better define the scope of conduct leading to revocation, the Committee notes that even following a conviction there will still be degrees of seriousness of conduct and degrees to which conduct demonstrates a repudiation of allegiance to Australia. Therefore, the Committee recommends that loss of citizenship under this provision not be triggered unless the person has been given sentences of imprisonment that together total a minimum of six years for offences listed in the Bill.

[26] Australian Citizenship Act 2007 (Cth), s 35A(1)(b).

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> 6.26 Some members of the Committee were of the view that a lower or higher threshold was preferable; however, on balance it was considered that a six year minimum sentence would clearly limit the application of proposed section 35A to more serious conduct. It was noted that three years is the minimum sentence for which a person is no longer entitled to vote in Australian elections. Loss of citizenship should be attached to more serious conduct and greater severity of sentence, and it was considered that a six year sentence would appropriately reflect this.[27]

32. The distinction made in the Bill between convictions for 'terrorism offences', where the simple fact of conviction is sufficient, and 'other offences', where the existing requirement is retained (that a person have been sentenced to periods of imprisonment totalling at least 6 years with respect to a relevant conviction), is not explained. The other offences are sabotage, espionage and foreign interference.

Broadening the scope of the retrospective operation of the citizenship deprivation powers – from convictions carrying a sentence of imprisonment of at least 10 years to any conviction, regardless of sentence

33. The 2015 amendments provided for the retrospective operation of conviction based deprivation in s35A.[28] In its retrospective operation, s 35A was limited to offences in respect of which

> The person was sentenced to a period of imprisonment of at least 10 years in respect of that conviction.[29]

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[27] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015,* September 2015.
[28] This again followed a recommendation of the Committee. As acknowledged by the Committee in its 2015 report "The majority of inquiry participants opposed the retrospective application of the proposed section 35A": 2015 Report, 6.83.
[29] Australian Citizenship Amendment (Allegiance to Australia) Act 2015, Sch 1, item 8.

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The Bill drops this current requirement with respect to 'terrorism offences', in its place simply stating

> Section 35A of the Australian Citizenship Act 2007 (as amended by this Schedule) applies in relation to a relevant terrorism conviction occurring on or after 12 December 2005.

34. To summarise the proposed change with respect to the retrospective effect of conviction for one of the listed terrorism offences:

> Currently – a person can only be retrospectively deprived of Australian citizenship for conviction for an offence which carries a maximum sentence of at least 10 years, and in respect of which they have been sentenced to a period of imprisonment of at least 10 years.
>
> Under the Bill – a person can be retrospectively deprived of Australian citizenship for conviction for an offence that carries a maximum sentence of 3 years. And there is no attempt to gauge the seriousness of the conduct with reference to the sentence.

This amounts to a significant expansion of the convictions that will ground deprivation, and a radical dilution of the seriousness of the conduct that will trigger deprivation, as measured by both the maximum sentence for an offence, and the sentence given with respect to a conviction.

Legal consequences of the Bill's dilution of the seriousness of conduct triggering deprivation[30]

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

[30] The discussion under this heading draws on Helen Irving and Rayner Thwaites "Comment: Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)" (2015) 26 Public Law Review 137-149.

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"inconsistent with allegiance to Australia" and therefore triggering deprivation.[31]

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."[32] 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.

39. This is a point at which the dilution of the seriousness of the conduct triggering deprivation becomes a legal and constitutional issue for the Bill.

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[31] Australian Citizenship Act 2007, s 32A, s33AA(1), s35A(1)(d).

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

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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 rendered characterisable as a law with respect to citizenship.

41. The significant dilution in the seriousness of the conduct triggering deprivation effected by the Bill increases the likelihood that there will be a finding of constitutional invalidity with respect to the deprivation provisions on the basis that they go beyond the constitutional head of power on which they rely.

42. There are other constitutional issues generated by the Bill's dilution of the seriousness of conduct grounding deprivation which I do not develop in this submission. One such issue arises from the right to vote under s 24 of the Constitution, and the argument that disenfranchisement may not apply for arbitrary reasons. The disproportionality of a measure goes to the question of its arbitrariness.

Proper, critical, scrutiny of the Bill is consistent with, and indeed in service of, best ensuring the safety of Australians from evolving terrorist threats, and other threats to national security. It ensures that resources, attention and energy are not devoted to ineffective or counterproductive measures, and attends to the potential harms accompanying those measures.

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Scrutiny of the Bill is also needed to better ensure the integrity of Australian citizenship as a legal status. There needs to be proper consideration of how the expansion of government power and discretion with respect to the status, even if well intentioned, may undermine the stability and security the status provides to all Australians.

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

Yours sincerely

[redacted]

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