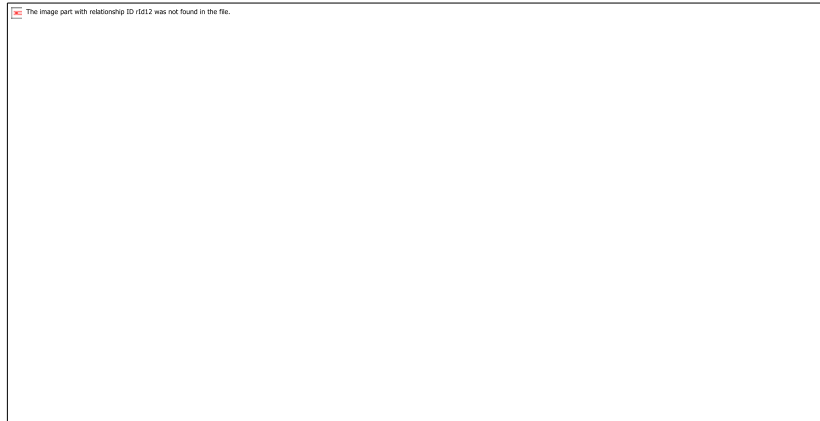


AUSTRALIAN CITIZENSHIP
AMENDMENT
(STRENGTHENING THE
CITIZENSHIP LOSS
PROVISIONS) BILL 2018

A SUBMISSION TO THE PARLIAMENTARY
JOINT COMMITTEE ON INTELLIGENCE AND
SECURITY



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INTRODUCTION

1. The Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (“the Bill”) was introduced to the Parliament on 28 November 2018. The Bill introduces further amendments to legislation introduced by the Commonwealth in 2015 to strip individuals convicted of terrorism, and other offences, of their Australian citizenship.
2. The Parliamentary Joint Committee on Intelligence and Security (the “Committee”) has commenced a review of the Bill and has called for public submissions for its consideration.
3. The principal objective of the Bill is to amend the Australian Citizenship Act 2007 to:
 - remove the requirement that a person be sentenced to 6 or more years of imprisonment, if convicted of a terrorism offence; and
 - adjust the threshold for determining dual citizenship, from the current requirement that the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination that a person ceases to be an Australian citizen, and replace it with a requirement that the Minister is satisfied the person will not become a person who is not a national or citizen of any country; and
 - add a further offence that would trigger the power to withdraw citizenship that has a maximum term of imprisonment of only 3 years, being the offence of associating with terrorist organisations.
4. Both of the first two points above were introduced in the 2015 legislation which was itself the subject of a significant review by the Committee. This submission will make reference to that 2015 review in detail.
5. While AFIC represents the Muslim community, our submission is not based on questions of faith or the impact the proposed legislation may or may not have on members of our faith. Our feedback is submitted from the perspective of a community of Australian citizens that is concerned about the erosion of basic democratic principles that underpin our society without clear and transparent reasoning for why this is needed.
6. Responding to issues such as this is fraught with danger for community groups, and others, who are often accused of being ‘unAustralian’ or supporting terrorism when a counter view is submitted. However, the erosion of civil liberties, and the undermining of basic concepts such as the rule of law, are too important for us to remain silent.

ISSUES

7. This submission will cover three issues:
 - a. The removal of a sentencing threshold to trigger the Minister’s powers to strip citizenship;
 - b. The weakening of the position in relation to an individual’s position from one of being an actual citizen of another State to the Minister only having to be satisfied that they will not become stateless; and
 - c. The addition of offences to trigger this power that goes against the recommendations of this Committee from its 2015 review.

BROADENING THE BASIS OF THE POWER FROM PRISON TERMS OF 10 YEARS TO CONVICTION ONLY

8. The Explanatory Memorandum (EMM) notes that the provisions of the Bill seek to “remove the requirement that a person be sentenced to 6 or more years of imprisonment, if convicted of a terrorism offence”.¹
9. It is important to note that the Bill does maintain the distinction between terrorism and other related offences. The change in the sentencing requirement only relates to terrorism offences and the six year minimum sentence has been maintained for other offences. These other offences include such things as treason, sabotage and foreign interference. A review of the EM and the Minister’s Speech in Parliament does not reveal any specific reason as to why this distinction has been created.
10. In the Minister’s second reading speech, he notes that the purpose of the Bill is:

“The purpose of this bill is twofold: to keep Australians safe from evolving terrorist threats, and to uphold the integrity of Australian citizenship and the privileges that attach to it.”

And

“Australian citizenship is a privilege—one that carries expectations of those who hold it. One such expectation is that Australian citizens uphold Australian values and beliefs.”²

¹ Australian Citizenship Amendment (Strengthening The Citizenship Loss Provisions) Bill 2018 Explanatory Memorandum, p 2
²<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/1693529d-40ba-43e3-9ae0-8bed5691ff37/0021%22>

11. A valid question is, how is an Australian Citizen who is actively involved in espionage, and potential sabotage, against Australia and/or the Australian Government any more entitled to retain Australian citizenship than one who commits an act of terrorism. Without diminishing the risk to individuals, it is not too difficult to envision acts of espionage or sabotage that would in fact have far more severe consequences on Australia as a whole than some acts of terrorism or acts relating to terrorism. Why does the first retain the 'privilege' of citizenship, in the words of the Minister, but not the latter?
12. With respect to the stated purpose of meeting evolving threats of terrorism, this will be addressed in latter parts of this submission.
13. In relation to this specific issue this Committee, in its review into the 2015 Legislation³ stated:

Accordingly, the Committee recommends removal of offences with a maximum penalty of less than 10 years imprisonment and certain Crimes Act offences that have never been used.

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.

14. It is important to note that since the 2015 review the security level for Australia has not been changed. There has been no additional information, to our knowledge, mentioned in either the EM, the Minister's Reading speech or by the Department itself, that supports a position that there has been any specific increase in the threat to Australian security in the intervening period.
15. The last time that the security level was changed was in fact in late 2014 and which was used as a part of the justification for the 2015 legislation. This was part of the context in which this Committee conducted its review in 2015 and having regard to that situation still reached the conclusion it did above that there should be a minimum sentence requirement before the Minister's power could be invoked.

³ Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 Parliamentary Joint Committee on Intelligence and Security September 2015, p 115

16. Clearly this was because the removal of a person's citizenship is an extreme measure and should not be undertaken either lightly or without access to genuine channels of review. We would respectfully submit that the terrorism threat has not significantly changed, or changed enough, in the intervening period to justify the introduction of measures that go directly against the previous recommendations of this Committee.
17. We further note that there were multiple submissions made to this Committee in 2015 which raised serious concerns about the constitutional validity of the then proposed laws. One of the central points in that regard was the right of the Parliament to deprive someone of citizenship based on questions of their 'allegiance' to the country while it itself determined what was or was not consistent with that very allegiance.
18. Many submissions referred to the comparison with the High Court's previous decisions in relation to the Government's ability to deny voting rights to prisoners and the decision that this could not be done with someone sentenced to a term of less than 3 years. The analogy being that deprivation of citizenship is a far more severe action than just withdrawing the right to vote and if the court determined that anything less than a 3-year term for the latter then it must follow that the former would require something more than this.
19. As this was part of the basis for rejecting this very position in 2015 then it remains a fundamental point now. The proposed change, in our view, would only add to the potential constitutional threat to overall legislation without their being sufficient justification for taking such a step. While no challenge has been made, yet, to the current legislation the likelihood of this occurring increases significantly if the proposed Bill proceeds in its current form. This would run directly counter to the stated purpose of the Bill itself.
20. It is our submission that the position in relation to this point has not significantly changed since the Committee's review in to the 2015 legislation and that the proposed change in relation to removal of the minimum jail term should be rejected.

DUAL CITIZENSHIP AND STATELESSNESS

21. In the Minister's second reading speech, he stated:

"The bill also amends subsection 35A(1) of the Citizenship Act to adjust the threshold for determining dual citizenship, to remove the effective requirement that the convicted person is a national or citizen of a country other than Australia at the time when the minister makes the determination that a person ceases to be an Australian citizen, and replace it with a requirement that the minister is satisfied the person will not become stateless."

*"The bill provides the minister need only be satisfied that the person will not become stateless if their Australian citizenship ceases. It is well established under case law that where statute provides a minister must be 'satisfied' of a matter, it is to be understood as requiring the attainment of that satisfaction reasonably."*⁴

22. In elaborating on this issue, the EM states the following:⁵

New paragraph 35A(1)(b) provides that the Minister must be satisfied that the person would not become a person who is not a national or citizen of any country if their Australian citizenship were to cease. Currently, paragraph 35A(1)(c) permits the Minister to determine that a person ceases to be an Australian citizen if the person is a national or citizen of a country other than Australia.

19. New paragraph 35A(1)(b) adjusts the threshold for dual citizenship to capture Australian citizens who the Minister is satisfied will not become a person who is not a national or citizen of any country as a result of cessation of citizenship.

Consistent with the operation of the current provisions of the Citizenship Act, including current paragraph 34(3)(b), it is not the intention that new paragraph 35A(1)(b) would allow the Minister to determine that a person ceases to be an Australian citizen in breach of Australia's international obligations regarding statelessness.

23. The proposed change is subtle but important and has been clearly highlighted very recently in relation to the Prakash case. The current requirement is that the individual must be a citizen of another state before the Minister may revoke their Australian citizenship. The proposal would mean that the Minister must only be 'satisfied' that they would not become stateless.

24. Clearly the proposed position has to be something that is less proscriptive on the Minister than the current one otherwise it would be a pointless amendment. In that regard the current issue in relation to Prakash highlights very clearly how problematic this provision is. Without knowing the process that has been undertaken to determine that Mr Prakash is in fact a citizen of Fiji one assumes that the Minister must have been provided with sufficient evidence to satisfy himself on this point. Yet, the Fiji authorities are clear in their position that Prakash is not in fact a citizen of that country. Based on the Minister's current position

⁴ <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/1693529d-40ba-43e3-9ae0-8bed5691ff37/0021%22>

⁵ Australian Citizenship Amendment (Strengthening The Citizenship Loss Provisions) Bill 2018 Explanatory Memorandum p 5

of maintaining his decision this will clearly lead to the situation that Mr Prakash will become stateless.

25. The risk of this occurring was highlighted strongly and repeatedly in the lead up to the 2015 legislation. The proposed changes will only increase the likelihood of more people being made stateless. The language used in the EM, with all due respect, is a series of generalities stating that the intention of this provision is not for Australia to breach its international obligations without any substantive analysis of how the provision will not do this.
26. As with the current position the public is not aware of the process undertaken by the various departments in determining the factual situations in these cases; what review mechanisms are in place; what consultation occurs with States who the individual may have an allegiance to etc. Essentially the process is opaque and hidden from scrutiny. It is not sufficient for the government to simply state that they don't intend on contravening international obligations without detailed clarification when the, now realised, possibility of this occurring has manifested itself.
27. Given that the Prakash case has arisen under the current legislative regime we can only assume that determinations made by the Minister under the proposed legislation would in fact require a lower level of certainty as to the individual's citizenship status with any other State and that this will in fact lead to an increased risk of people becoming stateless.
28. We would seek to address one final point on this issue that is raised in the EM. This relates to the assertion that revocation of citizenship will not automatically lead to statelessness. The EM states:⁶

The amendments will not on their own alter a person's liberty of movement and freedom to choose their residence. Cessation of citizenship does not automatically result in a person's removal from Australia. A person in Australia whose citizenship ceases under the provisions would hold an 'ex-citizen visa', which would be subject to mandatory cancellation under the Migration Act if the person has a 'substantial criminal record' and is serving a sentence of imprisonment for an offence against the law of the Commonwealth.

29. With all due respect this is mere rhetoric and nothing more. It is inconceivable that an individual would have their citizenship revoked but retain an ex-citizen visa. There is no question in our view that any visa that comes into force automatically on the revocation of a person's citizenship would be cancelled in the quickest procedural time allowable. There should be no illusion that where citizenship is cancelled an individual will have no right to remain in the country and will become immediately subject to detention. In the situation

⁶ Australian Citizenship Amendment (Strengthening The Citizenship Loss Provisions) Bill 2018 Explanatory Memorandum, p 9

where that individual then is unable to secure any other citizenship then this detention will potentially become indefinite.

30. This is in direct contravention of Australia's obligations under international laws and conventions.

RETROSPECTIVITY & NEW OFFENCES

31. The retrospective aspect of these provisions was also a part of the 2015 legislation and the subject of extensive submissions and discussion. While this aspect remained in the legislative regime it is evident that this was in the context of maintaining the seriousness of the offences committed as evidenced through the minimum terms of for those offences and the actual sentences imposed on convicted individuals. The present Bill simply seeks to drop these requirements and give retrospective effect to the legislation going back to 12 December 2015 being the date of the original legislation.
32. Effectively this means that an individual who was convicted of an offence more than 13 years ago will not be subject to the risk of cancellation of their citizenship regardless of the actual sentence they received or the circumstances of their case or current situation.
33. The Senate Standing Committee for the Scrutiny of Bills stated, in relation to this proposal:

The committee notes that this explanation focuses on the general threat of terrorism, without explaining how applying the amendments to persons convicted up to 13 years ago who received a penalty of less than six years imprisonment would 'protect the Australian community'. The committee does not consider that this explanation, without more, to be sufficient to justify the retrospective application of a provision such as this (i.e. a provision which means the serious consequence of loss of citizenship can arise based on convictions that occurred before commencement).⁷

And

In this regard, the committee notes that it is a fundamental principle of the rule of law that the existence of an offence and penalty be established prospectively. In this context, it cannot be concluded that a person could have reasonably expected the loss of citizenship (in addition to any penalty that may lawfully be imposed if their conduct constitutes a crime) prior to the enactment of this bill. The committee emphasises that it will consistently raise scrutiny concerns in circumstances where the law is applied retrospectively, particularly when the consequences for affected individuals are significant (as in this case). In general, individuals should be entitled to rely on the current law to determine their rights and⁸ obligations. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for the rule of law and its underlying values.

⁷ Standing Committee for the Scrutiny of Bills Scrutiny Digest 15 of 2018, p 5

⁸ Ibid p,6

34. Essentially the current position is that the provisions will only apply to an individual convicted of offences that carry a maximum term of more than 10 years and an actual cumulative sentence of at least 10 years. This is proposed to be changed to apply to offences that will have a maximum term of 3 years with no reference to any actual sentence imposed.
35. If the proposed Bill is passed it is theoretically possible for an individual to have already completed a term of imprisonment and have not come under the attention of authorities for any reason post their release who will now find themselves subject to deprivation of their citizenship.
36. The introduction of retrospective laws is a serious matter and while it is valid in certain circumstances it should be subject to careful review and scrutiny. This Committee ultimately determined that it was satisfied with the need for retrospectivity of the 2015 legislation but, we would submit, this was in the context of the overall scheme including reference to the maximum terms of the relevant offences as well as the cumulative sentence in fact imposed on an individual. Given the drastic changes to both of these criteria in the proposed Bill we would invite the Committee to refer to its 2015 deliberations and revisit its support for such a change.
37. We note that the Bill seeks to introduce new offences that would trigger the powers of the Minister to revoke citizenship. In particular it adds in the offence of Associating with a Terrorist organisation. This offence carries a maximum term of imprisonment of 3 years which is contrary to the position taken by this Committee in 2015. Further the need for the actual offence has been questioned given the scope of other terrorism offences. In this regard we have had the benefit of access to the submission of Dr Rayner Thwaites of the University of Sydney to the current review and support his views, generally, and on this matter specifically.

ADDITIONAL MATTERS

38. Further to the above we would bring a number of additional matters to the attention of the Committee. Firstly, the stated purpose of this Bill is purportedly to address threats of terrorism and safety, however, we have seen no information from the government of the actual way in which they assert this will take place. There is no evidence to our knowledge that the threat of stripping citizenship in any way reduces the threat of terrorism.

39. We note that similar provisions, though in different contexts and legislative frameworks, exist in other jurisdictions such as the UK. However, there is no evidence that those provisions have in any reduced the threat of terrorism. As the Australian context differs in fundamental ways to that of the UK, here we refer to Dr Rayner’s submission on this point, it may very well be the case that the situation is made worse because the whole legislative framework is potentially at the risk of constitutional challenge without evidence of any practical benefit. Logically it is hard to understand how the threat of having their citizenship cancelled will in any way deter an individual from committing an act of terror.
40. It is likely that individuals at the lower end of the spectrum may be influenced to a certain extent, but this raises the important issue of at what point does criminal behaviour become sufficient for such a level of punishment and how does this compare to other acts. Here we refer to our earlier points in relation to espionage, treason and sabotage.
41. Secondly, we draw the attention to the Committee in relation to the potential impact of the proposed Bill on Children and Minors. Once again this was the subject of extensive consideration in the 2015 review and those matters are still relevant, or in fact more so, today. In particular:
- What protections exist for the children of an individual who has their citizenship stripped?
 - What consideration will there be for the safety and security of such children who may find themselves deported to a place where they could be in significant danger?
 - Will such children be forced into indefinite detention due to the actions of their parent?

CONCLUSION

42. In the words of the Minister the stated objective of the proposed Bill was twofold:

“The purpose of this bill is twofold: to keep Australians safe from evolving terrorist threats, and to uphold the integrity of Australian citizenship and the privileges that attach to it.”

And

“Australian citizenship is a privilege—one that carries expectations of those who hold it. One such expectation is that Australian citizens uphold Australian values and beliefs.”⁹

⁹<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/1693529d-40ba-43e3-9ae0-8bed5691ff37/0021%22>

We do not believe that the Government has presented sufficient evidence of how such a proposal will in fact meet the first objective of making Australia safer.

43. On one view it may in fact have the very opposite effect if the whole legislative scheme becomes at risk of constitutional challenge because of how broad and widespread the provisions are and the way they operate.
44. It is a contentious issue as to whether 'Citizenship' is a right or a privilege and what either term in fact entails. What is not contentious is that, in the context of the modern world, having access to citizenship is a fundamental issue and so the withdrawing of such citizenship should only occur in the most serious of cases and in ways that afford protections for individuals.
45. It is for this reason that international laws and conventions exist to prevent States from doing things which may lead to individuals becoming stateless. We submit that the risks of this occurring under the proposed Bill are increased significantly to the point of probability if not certainty. Given the other matters raised in relation to the proposal we would urge the Committee to recommend that this Bill not proceed.

Muslims Australia – The Australian Federation of Islamic Councils

Incorporating:

- The Islamic Council of the ACT
- The Islamic Council of the Christmas and Cocos Islands
- The United Muslim Council of New South Wales
- The Islamic Council of the Northern Territory
- The Islamic Council of Queensland
- The Islamic Council of South Australia
- The Islamic Council of Tasmania
- The Islamic Council of Victoria
- The Islamic Council of Western Australia