THE UNIVERSITY OF SYDNEY

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8 February 2024

The Committee Secretary
Parliamentary Joint Committee on Intelligence and Security

Dear Secretary,

I thank the Committee for the opportunity to make a submission to its review of the *Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023* ('the Bill').

The Committee is likely to receive submissions that oppose the passage of the Bill in its entirety. I too consider the revocation of citizenship to be normatively objectionable, and its potential utility in reducing Australia's susceptibility to terrorism to be questionable. However, I acknowledge that citizenship revocation (or 'cessation') by legislation is not, as such, unconstitutional (indeed, it has a long history in Australia[1]). I also acknowledge that the Bill addresses the primary ground upon which provisions of the *Australian Citizenship Act 2007* (as amended) were found by the High Court in the cases of *Alexander v Minister for Home Affairs* (2022) and *Benbrika v Minister for Home Affairs* (2023) to be unconstitutional. In these cases, the High Court found that the conferral on the Executive of the power to revoke citizenship amounted to the conferral of a power that, under the Australian Constitution (Ch III), is exclusively that of the judiciary, thus breaching the constitutional separation of powers. The Bill, in responding appropriately, gives the power to make an order of cessation of citizenship to a court in its role in sentencing.

Submissions may also object to the Bill's distinction between mono-Australian citizens whose citizenship cannot be 'ceased' under the terms of the Bill, as this would render such persons stateless, and Australian citizens who also hold the citizenship of another country and whose Australian citizenship can be 'ceased,' since statelessness would not thereby be produced. It is true that the Bill draws a distinction between mono- and dual-Australian citizens, to the disadvantage of the latter. This distinction is regrettable, but not, in itself (at least not in this context) unconstitutional. It is also unavoidable if Australia is to have a scheme for citizenship revocation at the same time as meeting its obligations under international law (specifically, the *Convention on the Reduction of Statelessness* 1961) to avoid producing statelessness in its laws. While, in my view, it would be preferable for

[1] Including, in the past for an Australian's naturalization in a foreign nationality (repealed in 2002) and for an Australian woman's marriage to an alien (repealed in 1948).

Australia to have no law for citizenship revocation (as opposed to renunciation), it is to be accepted that the Australian Government, elected by the Australian people, supports such a law.

The focus of my submission is specifically on the matter of determining a person's foreign citizenship. My comments apply both to the original Bill under which a cessation order can be made regardless of how a person's Australian citizenship was acquired (whether by birth or conferral) and the amendments passed by the Senate which would exclude the application of a cessation order to Australian citizens by birth.

The determination of a person's foreign citizenship is referenced in several sections of the Bill. Section 36C(2) provides that a court must not make an order for the cessation of a person's Australian citizenship if 'the court is satisfied that the person would, if the court were to make the order, become a person who is not a national or citizen of any country.' Section 36D(4) provides that the Minister's application to the court for the person's Australian citizenship to cease must include, among other matters: ... (c) 'information about the person's nationality or citizenship of other countries.'

The threshold for determining the citizenship status of a person is thus, under the Bill, the court's 'satisfaction'. How is the court's 'satisfaction' to be achieved? Certainly, foreign citizenship should be determined as a matter of 'fact' (rather than conjecture), and the Bill might at least be amended here to tighten the reference to the court's satisfaction as being satisfaction 'of the fact' of foreign citizenship.

However, ascertaining the foreign citizenship status of an Australian citizen as a matter of *fact* is not the easy, straightforward matter that many people might believe and that the Bill's provisions might suggest, even with regard to countries with similar legal systems to Australia's, including Britain. The Bill's provisions, I submit, assume a level of certainty about the citizenship status of an Australian dual citizen that is greater than currently available under relevant Australian law.

The difficulty in ascertaining foreign citizenship was starkly illustrated in the case of *Re Canavan* (and others) (2017) which concerned the eligibility for election to the Commonwealth Parliament under s41(i) of the Constitution under which a person who is a 'subject or citizen... of a foreign power' is ineligible to be chosen for, or to sit in, Parliament.[2] Here the question of whether six Senators and one Member of the House of Representatives held foreign citizenship was answered by the High Court principally on the basis of the Court's hearing of the opinion of legal experts. Making it clear that, having heard this opinion (including conflicting opinion) the Court's own determination of a person's foreign citizenship would be treated as dispositive, the Court did not seek an official decision about the citizenship status of such persons from the government of the countries in question. The Court did not acknowledge that, under international law (specifically the Hague Convention on Certain

[2] These difficulties are discussed in detail in Rayner Thwaites and Helen Irving, 'Allegiance, Foreign Citizenship and the Constitutional Right to Stand for Parliament' (2020) 48 *Federal Law Review* 299-323.

Questions Relating to the Conflict of Nationality Laws (1930) – a Convention ratified by Australia), '[i]t is for each State to determine under its own law who are its nationals' [and] '[t]his law shall be recognised by other States ... [and] Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.' If a State does not accept a decision of an Australian Government or court that a person is one of its citizens, the person whose Australian citizenship is revoked will become stateless, contrary to the Bill and contrary to Australia's international obligations.

Such a 'stand-off' between Australia and a foreign state regarding the citizenship status of a dual Australian/foreign citizen has been demonstrated in recent years in the case of Neil Prakash, an Australian citizen who was convicted in a Turkish court of membership of a terrorist organisation and extradited to Australia where his Australian citizenship was revoked. The Australian Government claimed that Prakash held dual Australian-Fijian citizenship, a claim that was denied by Fiji. The Australian decision had the effect of rendering Prakash stateless. Prakash was also effectively made non-deportable, contrary to the intention of the Australian Government and the relevant provisions of the *Australian Citizenship Act*. It is well recognised that a country that denies the citizenship of a person is unlikely to admit that person and is under no obligation to do so. The likelihood of Australia's finding a third country to take its ex-citizen is also low, especially where the person's Australian citizenship has been revoked for terrorism or terrorism-related offence(s). Further, following the recent ruling by the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023), a person cannot be held in non-punitive detention indefinitely and, where there is no realistic prospect of finding a country to take that person, they must be released from detention into the community.

I note that under s 36D(3) of the Bill, before the Minister makes an application to a court for a person's Australian citizenship to cease, the Minister must consult Australia's Foreign Affairs Minister. This, as explained in the Bill's Explanatory Memorandum, is 'intended to ensure that the Minister for Home Affairs is appropriately informed of any potential impacts on Australia's international relations.' The consultation, I suggest, should also be with regard to the citizenship status of the person in question, and, specifically, should include reference to the government of the foreign country in question. No determination of a person's foreign citizenship (and, thereby, the person's status as a dual citizen) should be made without the agreement of the relevant country. (We may imagine how the Australian government and the Australian people might respond, were another country to rule unilaterally that one of its citizens – a convicted terrorist – was also an Australian citizen under Australian law, contrary to Australia's insistence that the person was not.)

The revocation of a person's citizenship is an extremely serious act, its impact going well beyond the individual person. The Bill's provisions commendably include several matters to which the court, in deciding whether to make a citizenship cessation order, must have regard, including 'the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person.' These are vital considerations. They are, however,

pointless in the absence of a factual acceptance on the part of that country that the person is one of its citizens who has (at least under international law) the right to enter and remain in that country.

Yours sincerely,

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