Submission to the The Parliamentary Joint Committee on Intelligence and Security

Inquiry into to review the operation, effectiveness and implications of sections 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007*

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I am grateful to the Committee for the opportunity to make a submission to this review, and I am looking forward to appearing before the Committee in person to elaborate on the written points below.

I am the author of *Australian Citizenship Law* (2nd edition, 2016, Thomson Reuters, 1st edition 2002, Law Book Co).

In addition, as a practitioner on the roll of the High Court of Australia, I have been Counsel in three High Court matters concerning Australian citizenship and have appeared before the Full Federal Court and the Administrative Appeals Tribunal regarding matters involving the interpretation of the Australian Citizenship Act.

Between November 2004 and 30 June 2007, I was a consultant to the Commonwealth of Australia, represented by the then Department of Immigration and Multicultural and Indigenous Affairs, now the Department of Immigration and Border Control (the Department) in relation to its review and restructure of the Australian Citizenship Act 1948 which resulted in the Australian Citizenship Act 2007 (the Citizenship Act) which came into force on 1 July 2007 and which theses provisions amended.

In 2008 I was a member of the Independent Committee established by the then Minister for Immigration and Citizenship, Chris Evans, reviewing the Australian Citizenship Test. I therefore assisted in the drafting of its report *Moving Forward: Improving pathways to Citizenship* http://www.citizenship.gov.au/_pdf/moving-forward-report.pdf and there are aspects of that experience that are relevant to my response to these provisions.

I have *not* been a consultant to the Department and have not been involved in any way with the drafting of the amendments that are the subject of this review.

I am providing this written submission with the hope of expanding upon it in oral evidence before the Committee.

Purpose of the provisions

In the Explanatory Memorandum circulated by the Minister for Immigration and Border Protection, in the outline to the original Bill that gave rise to these sections, he refers back to the Prime Minister's National Security Statement of 23 February 2105 explaining the Government's multi-faceted approach to countering these threats to national security.

This approach included the amendment Act that gave rise to these provisions 'to broaden the powers relating to the cessation of Australian citizenship for those persons engaging in terrorism and who are a serious threat to Australia and Australia's interests.'

In my original submissions to the Committee around the proposed provisions I began by setting out a foundational policy concern I have with the provisions. I support a multi-faceted approach to countering threats to national security but I firmly believe that the approach should ***not*** include using the Citizenship Act.

This is because the status of citizenship in a democratic society should not be treated as a tool of punishment or protection from threats to society. Citizenship, in contrast to the concept of being a 'subject' - a status that Australians held solely until 1949 – reflects a move from being 'subject' to the power of the Executive towards being subject to the rule of law in the same way as members of the Executive are subject to the rule of law – ie it moves to a position of an equality of citizenship or membership in a democratic society.

These provisions in the Act alter that fundamental balance, moving us back to that of being subjects – which counters the inclusive and largely egalitarian trajectory that changes to the Australian Citizenship Act have represented mainly until these amendments were passed.

I also believe this policy move is counter-productive to the very reason for its stated introduction (countering threats to national security) and that it may influence further perceptions of alienation and 'otherness' from and towards dual citizens in Australia.

This is not consistent with the multicultural society that Australia represents. I wrote about this in an Opinion Piece in *The Australian* on the 29 May 2015: http://www.theaustralian.com.au/opinion/abbotts-dual-citizenship-plan-is-bad-policy-even-in-fight-against-terror/story-e6frg6zo-1227373341586

I also believe the terminology of 'allegiance' and the way that term is used in a singular sense in the amending Act, is not a helpful way of conceiving of and understanding membership in Australian society today. It is also not reflective of the globalized world in which we live. I have written about this with my colleagues in the introduction to and in a chapter in a collection that I edited with Dr Fiona Jenkins and Dr Mark Nolan. The book *Allegiance and Identity in a Globalised World* (CUP, 2015) – http://www.cambridge.org/gb/academic/subjects/law/jurisprudence/allegiance-and-identity-globalised-world is a useful source for the Committee's work.

In the book, the contributors identify the ways in which concepts of allegiance and identity have changed and are contested. These provisions being reviewed return us to a singular notion of allegiance that is not reflective of a multicultural Australia in the 21st Century.

I do not agree with the sentiments underpinning the 'Purpose of the Act' as set out in section 4 of the Bill that introduced these provisions -

> This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain *conduct incompatible with the shared values of the Australian community*, demonstrate that they have severed that bond and *repudiated their allegiance to Australia. (my italics)*

I do not believe that the statement 'conduct incompatible with the shared values of the Australian community' is clear and that it necessarily leads to the next sentence of demonstrating that they have 'repudiated their allegiance to Australia' whatever that may actually mean. There are many actions of individuals that do not represent shared values in a western liberal democratic nation and they are generally criminalized – and the criminal law is brought it to manage that activity. Using citizenship, as the tool to manage that aspect of human behaviour is not wise, as set out above. Moreover, as suggested above, defining one's allegiance to Australia is not a clear notion, and attempting to do so is open to abuse on many levels.

Having set out my overall concerns with these provisions, I now turn to the specific provisions that are arguably unconstitutional and still have not been considered by the High Court. They may not survive a High Court challenge if relied upon to revoke a person's Australian citizenship.

Mechanics of the Provisions

The provisions introduced in late 2015 are three new ways in which a person, who is a dual citizen, can cease to be an Australian citizen.

This was a major change to the Citizenship Act, in that the earlier version of the Act only had extremely limited ways in which a person can lose their citizenship. Save for section 35 (as explained next), they are either through the choice of the individual (renunciation, and even then that is very restrictive), or due to fraud in the *obtaining* of citizenship or through failing to fulfill special residence conditions associated with becoming a citizen (s 34A).

The very limited context in which a person can lose their citizenship other than those means was through section 35 – 'Service in the Armed Forces of enemy country'. It is important to recognize that section 35 and its predecessor had never been relied upon by the Executive to determine someone has lost their citizenship, and indeed, the Department's view has been that the section has never operated because Australia has not been formally 'at war'.

I write about this in my 2002 book at pages 146-147, referring to the predecessor to section 35, the former s 19 of the 1948 version of the Act. When the Australian Citizenship Council reviewed s 19 in its report in February 2000 (*Australian citizenship for a new century* (February 2000) after there were comments that a person who is not a

dual citizen should also be subject to the provision, the Council felt that this was unduly harsh and recommended that s 19 remain unchanged (at p 67 of the report).

These provisions are therefore very harsh measures, and I shall make comments about them individually.

1. Renunciation by Conduct

Renunciation in the earlier version of the Act was restricted – just because a person applies to renounce their citizenship does not mean that they can. The section places limits on the Minister's power to accept the application, including if the person seeks to renounce their Australian citizenship and the application is made during a war in which Australia is engaged (s 33 (5)).

This restriction seems at odds with the principles underpinning the 33 AA Renunciation by Conduct, whereby the aim is to force upon someone renunciation if they are conducting activity, not unlike being at war with Australia.

The timing of loss of citizenship is also odd, in its practical application, and inconsistent with rule of law principles of being aware of the legal framework in which you live. A person can as a matter of law as set out in the Act, lose their citizenship without knowing it and there may be many people who are subject to this section that the Executive is not even aware of - this goes against western liberal democratic principles and the rule of law.

2. Expanding section 35

As discussed above, it is unclear whether section 35 was it stood before these amendments, constitutional, let alone whether the current version of that section would also survive a constitutional challenge.

This section also enables a person to ostensibly lose their citizenship without knowing it and this goes against western liberal democratic principles and the rule of law.

3. Conviction for terrorism offences and certain other offences

This third new way of revoking a person's citizenship specifically links to the criminal law system and establishes that if a person is convicted of the offences included in s 35A (3) they then cease to be an Australian citizen on conviction.

As I have already written, I do not think that these convictions necessarily represent a change in one's commitment to Australia.

While I agree that the criminal law, on the whole, is an appropriate frame for dealing with the behavior in this list, I do not think that these are grounds for removing a person's citizenship.

Constitutional restrictions on revoking citizenship

All these provisions give rise to serious questions about the limits on the Executive and the Parliament to take away a person's citizenship. The Constitutional power to make laws regarding citizenship is drawn from various sections under section 51 of the Constitution and the breadth of these section may be in issue with these amendments. Moreover, there are also constitutional restrictions on how governments make laws within those parameters. Both aspects will give rise to issues that a High Court will need to grapple with if the someone with standing is able to bring these provisions for review before the High Court.

Analogies with the former s 17 – loss of citizenship on becoming a citizen of another country.

Under the 1948 there had been one other way a person could lose their citizenship – under the former s 17 of the 1948, discussed in my book at pages 136-144. In that discussion I include at page 141:

> 'Section 17 operated in law, so that as soon as people satisfied s 17, they were no longer Australian citizens. Section 17 was repealed by the *Australian Citizenship Legislation Amendment Act 2002*, which commenced on 4 April 2002. When the amendment legislation was debated in the Senate on 14 March 2002, Senator Bolkus tabled a memorandum of advice, dated 27 June 1995, prepared by the late A R Castan QC, (See Australia, Senate, *Parliamentary Debates* (14 March 2002), proof version, pp 552-557)'
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> 'In that advice it was argued that s 17 fell beyond the limit of constitutional power because it sought to exclude from "the people of the Commonwealth", in its constitutional sense, persons who in truth have not ceased to be such people, but who nevertheless wish to take out dual citizenship. Some of Castan QC's reasoning relied upon the constitutional concept of "equality" under the law. While this concept has not been well-developed by the High Court since the date of that advice, the decision of the High Court in *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1430 lends support to some of the concepts raised by Castan QC in his memorandum.'

I am happy to expand further in person about my concerns about the constitutional strength of these provisions and their impact on a conception of the rule of law in a democratic society.

The Vulnerability of Dual Citizenship

Finally, I would like to raise the point that these provisions identify the the vulnerability of dual citizenship. In the article I wrote with Niamh Lenagh Maguire, (see reference to

below to its details), we argue that the trend to move to strip dual nationals of their citizenship effectively make dual citizens more vulnerable – and gives them a second class citizenship that is always suspect – always insecure.

I do not think this is consistent with the democratic principles of a multicultural country where most members have links to other nation-states.

In addition, I do not think that making all individuals vulnerable to loss of citizenship, ie including the idea that a sole citizen, with an entitlement to apply for another citizenship, would be appropriate. This would not be consistent with our multicultural make up (given the majority of people in the country, save for the Indigenous population) have some links in their family history to another country. Moreover, making someone vulnerable to statelessness in international law is not appropriate for a democratic state that is proud of its commitment to the rule of law, both nationally and internationally.

I look forward to elaborating upon this submission in person.

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23 July 2019

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*Note – in my submission to this Committee in 2015 around the *proposed* provisions now being reviewed, I attached the following two articles that I would refer the Committee to again. If the Committee does not have access to that earlier material submitted I would be happy to resend the material.
1. Fiona Jenkins, Mark Nolan and Kim Rubenstein, 'Introduction' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds) *Allegiance and Identity in a Globalised World* (CUP, 2014)
2. Niamh Lenagh Maguire and Kim Rubenstein, 'More of Less Secure? Nationality questions, deportation and dual nationality' in Alice Edwards and Laura van Waas (eds) *Nationality and Statelessness under International Law* (CUP, 2014).

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