Immigration Advice and Rights Centre

11 January 2019

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
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Parliament House
Canberra ACT 2600

BY EMAIL: picis@aph.gov.au.

Re: *Review into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*

The Immigration Advice and Rights Centre (**IARC**), established in 1986, is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training and law and policy reform in Australian immigration and citizenship law. IARC provides free and independent advice. IARC also produces client information sheets and conducts education/information seminars for members of the public.

We welcomes the opportunity to comment on the Committee's review into the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill* 2018 (***Bill***). For the reasons set out below, it is our view that the Bill should not be passed in its current form.

Subsection 35A(1) of the *Australian Citizenship Act* 2007

Subsection 35A(1) of the *Australian Citizenship Act* 2007 (**Act**) allows the Minister to determine that a person ceases to be an Australian citizen if, *inter alia*, the person has been convicted of certain offences and sentenced to a period of imprisonment of at least 6 years. The offences that engage the subsection include:

(i) an offence against a provision of Subdivision A of Division 72 of the *Criminal Code* – being offences related to international terrorist activities using explosive or legal devices;

(ii) an offence against a provision of Subdivision B of Division 80 of the *Criminal Code* – being offences related to treason, assisting enemy to engage in armed conflict and treachery;

(iii) an offence against a provisions of Division 82 of the *Criminal Code* (other than section 82.9) – being offences related to sabotage including where a person has been reckless as to whether their conduct will prejudice Australia's national security;

(iv) an offence against a provision of Division 91 of the *Criminal Code* – being offences related to espionage or dealing with information in a manner that causes prejudice to Australia's national security (including by acting in a reckless manner);

(v) an offence against a provision of Division 92 of the *Criminal Code* – being offences related to foreign interference;

(vi) an offence against a provision of Part 5.3 of the Criminal Code (except section 102.8 or Division 104 or 105) – being terrorism related offences excluding the offence of associating with terrorist organisations;

(vii) an offence against a provision of 5.5 of the *Criminal Code* – being offences related to foreign incursion and recruitment; and

(viii) an offence against section 6 or 7 of the repealed *Crimes (foreign Incursions and Recruitment) Act* 1978.

To make a determination under the *Act* the Minister must also be satisfied that the person's conduct demonstrates that they have repudiated their allegiance to Australia and that it is not in the public interest for them to remain an Australian citizen. The public interest is to be determined by consideration being given to the severity of the conduct, the threat posed to the Australian community, the age of the person, their connection to the other country of nationality/citizenship, Australia's international relations and any other matters of public interest. There is, relevantly, a further requirement that the person must be a national or citizen of a country other Australia at the time when the Minister makes the determination.

The Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

The Bill seeks to amend the existing provisions with view to:

- removing the requirement that a person be sentenced to 6 or more years of imprisonment if convicted of a terrorism offence (see offences identified in items (i), (ii), (vi), (vii) and (viii) above);
- introducing convictions under section 102.8 of Part 5.3 of the *Criminal Code* (associating with terrorist organisations) as a 'relevant terrorism conviction'; and

- allowing the Minister to make a determination that a person ceases to be an Australian citizen if 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.

Our submission on the Bill

The consequence of a determination by the Minister that a person has ceased to be an Australian citizen is that they can then become subject to the cancellation, detention and removal powers under the *Migration Act* 1958 (Cth). This view, of course, assumes that in losing their status as an Australian citizen the individual also cease their membership of the "*people of the commonwealth*" and adopts the status of an "alien" under the Constitution. The law with respect to this is less than clear.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) CLR 162 Gleeson CJ identified that parliament has the power to "*create and define the concept of Australian citizenship and to prescribe the conditions on which it may be acquired and lost*". In *Singh v Commonwealth* (2004) 222 CLR 322 his Honour, referring to *Pochi v Macphee* (1982) CLR 101, clarified that *"[t]he qualification is that parliament cannot, simply by giving its own definition of "alien", expand the power under s51(xix) to include persons who could not possibly answer the description of "aliens" in the Constitution*". Likewise in *Hwang v Commonwealth* [2005] HCA 66 McHugh J at [18] identified that while Parliament has power to "*define the conditions on which membership of the Australian community – that is to say, citizenship – depends",* that power is not unlimited.

It may also be observed that the UN Convention on the Reduction of Statelessness allows for loss of nationality where a Contracting State has, at the time of signature, ratification or accession, specified its retention of such a right to deny nationality, where the person, inconsistently with his or her duty of loyalty to the Contracting State, has conducted him or herself in a manner seriously prejudicial to the vital interests of the State (Article 8(3)(a)(ii)), or has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State (Article 8(3)(b)).

With respect to the deprivation of citizenship the Article 8(4) provides:

> "*A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body."*

In our submission to this Committee on the *Australian Citizenship Amendment (Allegiance to Australia) Bill* 2015 dated 20 July 2015 we expressed doubt as to whether conduct which was not seriously prejudicial to the vital interests of Australia (or sufficiently clear and serious to demonstrate a withdrawal of allegiance to Australia) would be sufficient to exclude a person from his or her membership of the "*people of the commonwealth*". Removing the requirement for a custodial sentence for certain offences, including the offence of association, only goes to heighten our concern that proposed section 35A may be extending beyond its lawful limits. It would be surprising, in our view, if a conviction resulting from conduct that is relatively minor, reckless or resulting from naivety could give rise to the cessation of Australian citizenship. While it is true that a discretion would remain in the exercise of power under section 35A of *Act* – the *Bill* nevertheless allows the Minister to determine that a person ceases to be a citizen where no custodial sentence has been imposed. It is also problematic, in our view, that the *Bill* allows for two different Ministers to form contrary views about cessation of Australian citizenship having regard to the same set of facts.

Concern is also expressed at the proposal to "*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*"[1]. The explanatory memorandum to the Bill seeks to justify the appropriateness of the amendment by stating 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*". The argument offers little comfort.

While it is true that the Minister would need to reach a state of satisfaction reasonably, it is also true that a state of satisfaction could lawfully be achieved about the existence of a person's nationality that, in fact, leaves them with no more than theoretical nationality that is not formally recognised and affords no rights. This could arise, for example, where the Minister makes a finding as to the foreign nationality of an Australian citizen having regard only to known facts about the person and to the text of the relevant nationality laws. The decision could be lawful even if the Minister fails to initiate inquiries with nationality law experts or officials from the other State as to the status of the citizen. See for example *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39 at [24] where French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ stated:

> *"Mason CJ and Deane J in Teoh also rejected the proposition that failure by a decision-maker to initiate inquiries could constitute a departure from common law standards of natural justice*

[1] See outline to the explanatory memorandum to the Bill

or procedural fairness[34]. It is difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of procedural fairness at common law…"

We further note the desirability that a determination resulting in the cessation of Australian citizenship under section 35A of the *Act* should be subject to review before the Administrative Appeals Tribunal. Amendments to section 52 of the *Act* would be required to allow for this.

The Bill is problematic and should not be passed. We would welcome the opportunity to expand on any aspect of our submission.

Kind regards,

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Principal Solicitor