Submission to the The Parliamentary Joint Committee on Intelligence and Security

Inquiry into *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019*

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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. As the Committee is aware, I am the author of *Australian Citizenship Law* (2nd edition, 2017, 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 these 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 with the drafting of the amendments that are the subject of this review.

I am providing this written submission with the intention 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 introduced the 2015 cessation provisions which give rise to these new amendments, the Minister referred 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 gave rise to the provisions now subject to review '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 the Second Reading Speech for this amendment Bill the Minister repeated this purpose and stated this Bill 'continues the coalition government's effort to address the threat of terrorism and to deliver on our commitment to keep the Australian community safe.'

In my original submissions to the Committee around the proposed provisions I began by setting out a foundational policy concern I have that has not been resolved by this amendment Bill. 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 Bill maintain a measure that alters that fundamental balance, that moved us back to that of being subjects – which counters the inclusive and largely egalitarian trajectory that changes to the Australian Citizenship Act have represented until those 2015 amendments were passed.

I also believe this change, enabling citizenship to be stripped, is counter-productive to the very reason for its stated introduction (countering threats to national security) and that the continuation of cessation of citizenship provisions like these may in fact contribute to Australian being *less* safe due to its impact on social cohesion and national identity in Australia. Citizenship loss provisions targeted at criminal behavior associated with dual citizens only, 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 (as it did in the 2015 changes), 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.

In the Minister's second reading speech to this Bill he refers to the INSLM report stating: 'the notion of allegiance by citizens to Australia is thought by some to be outdated: however, there can be no doubt of its current legal relevance in international law, the law of Australia and the law of other countries.' I do not believe this statement is an accurate

representation of the submissions –from my own perspective my submission highlighted that allegiance is a *changed* notion, rather than *outdated.*

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 original 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 mean, which is repeated in the second reading speech of the Minister in relation to this new amendment bill.

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 the best framework 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 continuing cessation provisions, I now turn to the specific provisions of amendment to the current cessation provisions.

Mechanics of the Provisions

I agree with the overall sentiments of the INSLM report (and as submitted before the INSLM and this committee) that the *automatic cessation of citizenship provisions* currently in the Act are not appropriate for a liberal democratic society for multiple reasons. I do not need to repeat those concerns here given these new provisions seek to change that method of cessation of citizenship.

I remind the committee, however, that the 2015 cessation changes represented 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 were 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 could earlier lose Australian citizenship other than those means was through section 35 – 'Service in the Armed Forces of enemy country'. As I explained, 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 wrote 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).

The Explanatory Memorandum for the Bill at paragraph 70 states that the new section 36B (5)(j):

> 'does not include the requirement that appears in some Commonwealth offences that there is a Proclamation in relation to the country at war with Australia or a Declaration in relation to war itself. Accordingly there is no requirement that there be a Proclamation in relation to a country at war with Australia or a declaration of war in order for a person to be regarded as serving in the armed forces of a country at war with Australia for the purpose of this provision.'

While the EM states this, I cannot see it specifically included in the section of the Bill or as a note – nor was the former section 35 specific about that approach to proclamations of war. I query therefore whether the EM is sufficient to *ensure* this is how the statute is interpreted, given it is not explicit in the Act itself.

Moreover, I am concerned about the prospective breadth of the provision if it is interpreted as stated in the EM. The Transitional provisions set out in Item 18 (3) that section 36B(5)(j) applies to conduct *before or after commencement*. This may mean that a larger group of individuals, including refugees to Australia who have been involved in wars through circumstances beyond their control, may be caught by this provision.

Public interest in making or revoking citizenship cessation
If the Committee is not persuaded by my significant concerns around the expanded power given to the Executive to cease citizenship linked to criminal behavior, articulated around being 'in clear opposition to the common bond and shared values that underpin membership of the Australian community' I will turn to the way that power is now set out in this amendment Bill to be exercised by the Minister in the Act.

This is done primarily through sections 36B(1) and 36D(1) and any of the *factual matters* relevant to those section would be *jurisdictional facts* relevant to judicial review by the Court as per 36K (1)(c). This approach of judicial review around a decision by the Minister is more consistent with rule of law principles than the former version of the cessation provisions.

However, each of those provisions also give the Minister a discretion in terms of 'considering the public interest' when making decisions under those provisions.

Section 36E is more specific regarding the criteria relevant in the making of that public interest decision; that is, it is *not* an open discretion, and all the matters listed are relevant and important in such a power.

However, those factors involve judgments, that a Court would be reluctant to review as those matters are not necessarily legal facts.

The INSLM had recommended in his report that these decisions *should be* reviewable by a security division of the Administrative Appeals Tribunal (AAT) and this has *not been adopted* in this Act.

If a public interest provision is to be included, I believe that there needs to be a form of accountability as suggested by the INSLM around the making of such major decisions around the public interest in deciding whether to strip a person of Australian citizenship. A security division of the AAT should be given that power to ensure accountability around these significant and life changing decisions. For instance, under s36L a person who has their citizenship revoked under a determination under 36B or 36D can 'never become an Australian citizen again.'

While the minister's decision must be submitted to the PJCIS as soon as possible in certain circumstances, the PJCIS cannot *change* that decision.

An AAT decision should be able to review that decision and that decision would still be reviewable as a matter of law before the Courts.

Retrospectivity

I am also concerned that the principle against retrospective application of criminal laws is not being followed in this Act. If the aim of terrorist organizations is to undermine western liberal democratic states in their commitment to liberal democracy, then these

changes to enable the stripping of citizenship for past offences represents a significant diminution of the rule of law principles central to a liberal democracy.

Certainty in application

One of the major concerns of the INSLM in relation to the operation of law provisions is the uncertainty of the law in its application. Similarly, in the new transitional proposed provisions, transitional provision 17 around the cessation of citizenship under the former automatic loss provisions (sections 33AA or 35) is not straight forward or clear to follow. As it all relates to the former provisions that were not straight forward or clear, I am not sure how to recommend how best to improve on their articulation.

The Vulnerability of Dual Citizenship

Finally, I would like to remind the Committee of the point made in all my submissions around citizenship cessation provisions, that these provisions highlight the vulnerability of dual citizenship in Australia.

In an article 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 makes 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.

I look forward to elaborating upon this submission in person.

Kim Rubenstein
13 October 2019

*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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