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Mr Peter Khalil MP
Chair
Parliamentary Joint Committee on Intelligence and Security
By email: pjcis@aph.gov.au

Review of the amendments made by the *Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023*

Dear Chair,

I thank the committee for the opportunity to make a submission to this inquiry, with particular thanks to the committee secretariat and committee for facilitating a late submission.

1. The immediate background to the Australia Citizenship Amendment (Citizenship Repudiation) Bill 2023

1. The amendments made by the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023 ('the Bill') to the Australian Citizenship Act 2007 (Cth) ('the Act') are responsive to the Australian High Court's decisions in *Alexander's case* and *Benbrika 2*.[1] These decisions invalidated conduct based, and conviction based, ministerial deprivation (contained in ss 36B and 36D of the Act respectively).

2. These decisions held that the citizenship deprivation powers in question were punishment. They confirmed that the Commonwealth cannot impose punishment on any basis other than the breach of the law by past acts.[2] The decisions did not turn on a narrow 'technicality' but constituted a

[1] *Alexander v Minister for Home Affairs* [2022] HCA 19; *Benbrika v Minister for Home Affairs* [2023] HCA 33 ('Benbrika 2').
[2] This section draws on Emily Hammond and Rayner Thwaites 'Citizenship stripping and the conception of punishment as an exclusively judicial function' (8 December 2023), http://www.auspublaw.org/blog/2023/12/citizenship-stripping-and-the-conception-of-punishment-as-an-exclusively-judicial-function

significant vindication of the traditional understanding of the exclusivity of judicial power to punish criminal guilt. The Court rejected Commonwealth arguments that, if accepted, would have jeopardised the substantive values that that exclusivity seeks to protect. Five justices emphasised that the Commonwealth's arguments failed to sufficiently recognise that a core purpose of the Ch III scheme is to entrench and promote structural protection against arbitrary state punishment.[3]

3. It is clear from the judgments that consistency with Ch III, and so the constitutional validity of the measures, requires that Commonwealth punishment be imposed by a court exercising judicial power on the basis of criminal guilt (ie breach of the law by past acts). Compliance with this requirement is to be evaluated as a matter of substance. The basic model adopted by the Bill would seem to meet this requirement by making the deprivation power part of the sentencing process.[4]

2. A brief history of the citizenship deprivation powers

4. While the basic model adopted in the latest amendments is an improvement in terms of legal principle and accountability, the amendments carry over features of the citizenship deprivation regime that have been the subject of sustained, and unanswered, criticism. These features are the focus of this submission.

5. I first served this committee as an expert witness on citizenship deprivation in August 2015, when the powers were first in contemplation, and subsequently in August and October 2019. I also served as an expert witness to the Independent National Security Legislation Monitor's ('INSLM') review of the deprivation powers in June 2019. Most of the points below I have raised on earlier occasions, and in earlier submissions. The need to address these issues - to ensure a more proportionate, defensible and legally robust deprivation regime - remains.

6. The history of the citizenship deprivation powers since their introduction in December 2015 is relevant to an evaluation of its provisions and the need for reform. The basic model of the deprivation measures has changed

[3] See *Benbrika 2*, [35], [45] (Kiefel CJ, Gageler, Gleeson, Jagot JJ); [67], [75] (Gordon J).
[4] Compare *Benbrika 2*, [48].

twice: first, in the shift from 'automatic' deprivation by 'operation of law' to a ministerial model. This shift responded to a growing appreciation of the practical unworkability of the operation of law model, an appreciation that became publicly evident in the course of the INSLM's review of the provisions in 2019. In response to that review, the model was changed by amendments coming into force in September 2020. Unfortunately, many features of a lapsed 2018 amending Bill, features that were not responsive to the INSLM's report and were counter to its recommendations and tenor, were also introduced at the same time as the 2020 change of model.[5]

7. The second shift in the basic model was effected by the December 2023 amendments under review. As noted above, these amendments were in response to High Court of Australia decisions invalidating the key provisions of the ministerial model on the basis that they were contrary to the requirements of Ch III of the Constitution. As registered above, the shift from a ministerial model to one centred in the judicial power to punish criminal guilt is welcomed as a gain for legal accountability and protections, benefitting public accountability more generally. Problematic features contained in the lapsed 2018 Bill, and introduced in the 2020 amendments have been retained, with little or no justification or explanation.

8. Over eight years after it was first introduced, the deprivation regime is only now at the starting line as a potentially useable regime. The features that led to the collapse of the first two models were motivated by attempts to minimise legal accountability. If it is decided to maintain powers of citizenship deprivation, there is a need to proactively engage with and embrace legal accountability, for the protections it offers, for its contribution to accountability more generally, and to better ensure a more robust and stable regime. To do this, longstanding objections to current features of the regime need to be addressed.

[5] Conversely, recommendations of the INSLM going to accountability, such as the introduction of merits review, were not adopted by the amendments.

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3. A need for powers of citizenship deprivation?

9. Before considering reforms, there is an anterior question as to whether citizenship deprivation powers are needed or warranted. The security benefits of the measures are far from self-evident. In practice, given the invalidation of orders under the precursors of the current, newly introduced, model, there is a straightforward sense in which they have made little or no productive contribution to national security in the eight years since their introduction, with national security suffering no apparent ill-effects. Bracketing other consequences of their introduction, considerable human resources have been devoted to their operation which could have been devoted to other aspects and measures of national security, or the national interest more broadly. The INSLM, who has access to the information available to the government, put the positive case for the measures no higher than 'In some, possibly rare cases, citizenship cessation reduces the risk of a terrorist act being undertaken by that person in Australia.'[6] The history of the deprivation measures also shows the government has repeatedly underestimated the operational complexities attending powers of citizenship deprivation,[7] with the result that their efficacy and utility has been oversold.

10. An assessment of the measures needs to extend beyond a limited consideration of their utility as a 'tool'. Australian governments have consistently appeared indifferent to the very real apprehensions of the harms to social cohesion posed by the prospect of citizenship deprivation.[8] More generally, there needs to be consideration of how the

[6] Independent National Security Legislation Monitor, *Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007* (15 August 2019) ('INSLM report'), para 6.10.
[7] A prominent example of this was the difficulties the 'automatic' revocation powers were generating for the Federal Police and Foreign Affairs, canvassed in the 2019 hearings before the INSLM and leading to the 2020 amendments.
[8] The issues in this regard have centred on the way citizenship deprivation necessarily introduces different responses to identical conduct, dependant on whether a person is or is not a dual citizen; the formality or unwanted nature of many Australian dual citizens' 'other' citizenship; and the attention given to, and rhetoric directed at, particular Australian communities in the citizenship deprivation context, which can, damagingly and unwarrantedly, shade into imputations that the community is, in some ill-defined way, un-Australian.

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expansion of government power with respect to citizenship status, even if well intentioned, may undermine the security the status provides to all Australians. In addition, the significant negative 'externalities' arising from citizenship deprivation, including a lack of accountability for past crimes, the continuing danger posed by those excluded from Australia, and deprivation as a source of friction with foreign governments, are weighty factors militating against the use of such powers.[9]

11. The above issues appear to have received limited governmental attention to this point, and need to be openly engaged with in any adequate assessment of whether the deprivation powers are in fact in the national interest.

Need for caution in relying on comparative examples

12. The Department of Home Affairs submission to this inquiry states, as a point in support of citizenship deprivation powers, that: 'Other countries, including the United Kingdom, New Zealand, Canada and the United States, have schemes in place where citizenship can be revoked or lost in certain circumstances.'[10] Care needs to be taken with this statement. Any use of comparative examples has to start with careful analysis of what the 'certain circumstances' are, to ensure that the comparison is of like with like and any claimed commonality of approach is not misleading.

13. The remainder of my submission focuses on recommendations for reform of particular features of the Bill.

4. Recommendations for reform

14. As registered above, I have appeared before and made submissions to this committee, and to the INSLM, on citizenship deprivation over the past eight or so years, and my comments draw on that earlier testimony. I have benefitted from reading the initial submissions to this inquiry

[9] On the first and second of the issues in this sentence see the submission of 'Prosecute; Don't Perpetrate' to this inquiry (submission 5). On the first see Professor George Williams submission (submission 1). On the third see Professor Emerita Helen Irving's comments on Neil Prakash in her submission to this inquiry (submission 6).
[10] Submission 3, p 4.

(submissions 1-7). I make particular reference to the thorough and careful 30-page submission of the Australian Human Rights Commission ('AHRC'), dated 7 February 2024 (submission 2).

15. This submission is not comprehensive with respect to the remaining legal issues of concern with the Act. It focuses on three issues, each measured against standards previously endorsed by this committee:
    - The lowered threshold for citizenship deprivation, as registered in the term of imprisonment to which a person is sentenced;
    - The expansion and/or dilution of the seriousness of offences that can lead to deprivation; and
    - The weakening of legal protections against statelessness.

4.1 Lowered threshold for citizenship deprivation, as registered in the term of imprisonment to which a person is sentenced.

16. My reasoning on this issue draws on submissions I made to this Committee in 2019, joined with analysis of the High Court's decisions on citizenship deprivation measures in *Alexander* and *Benbrika 2.*

17. When the deprivation powers were introduced in December 2015, the Act stated that an Australian dual citizen was vulnerable to citizenship deprivation if they had been convicted of one of the nominated offences and had 'in respect of the conviction or convictions, been sentenced to a period of imprisonment of at least 6 years, or to periods of imprisonment that total at least 6 years.'.[11]

18. This requirement of a sentence of at least 6 years was added to the Act on the recommendation of this Committee (Recommendation 7 of the PCJIS 2015 Advisory Report on Citizenship Deprivation).[12]

19. The reasoning of the Committee on this point was:

[11] Section 35A(1)(b) of the Citizenship Act 2007 (Cth), as in force immediately prior to the 2020 amendments.
[12] Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, September 2015 (PJCIS 2015 Advisory Report on Citizenship Deprivation).

> 6.25 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.
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> 6.26 Some members of the Committee were of the view that a lower or higher threshold was preferable; however, on balance it was considered that a six year minimum sentence would clearly limit the application of proposed section 35A [s 36D under the Bill] to more serious conduct. It was noted that three years is the minimum sentence for which a person is no longer entitled to vote in Australian elections. Loss of citizenship should be attached to more serious conduct and greater severity of sentence, and it was considered that a six year sentence would appropriately reflect this.[13]

20. In a change introduced by the 2020 amendments, the Act currently provides that a period of imprisonment of only 3 years, or periods of imprisonment that total 3 years, are all that are required with respect to a conviction or convictions for a 'serious offence' as nominated in the Act (see s 36C(1)(b)).

21. No reasoning was or has been offered for halving the period of sentence that defines the scope of the 'more serious conduct' that may warrant deprivation of citizenship, from six to three years.

22. This reduction in the seriousness of the conduct that will expose an Australian to potential deprivation of their citizenship is exacerbated by the allowance for the whole of each concurrent sentence to be counted towards the total period of imprisonment for the purpose of s 36C(1)(b) (see s 36C(8)).

[13] PCJIS 2015 Report on Citizenship Deprivation.

23. Lowering the threshold for deprivation of citizenship expands the reach of the power and negatively impacts on the proportionality of the measures. As a corollary of this, lowering the threshold also renders the measures more vulnerable to successful constitutional challenge.

24. The legal reasoning in *Alexander* and *Benbrika 2* that led to invalidation of the relevant deprivation powers was grounded in Ch III of the Constitution, as outlined above. This is not the only issue on which the constitutional validity of the measures depends. There is the question of whether they are supported by a head of legislative power. The High Court held that the citizenship deprivation provisions considered in *Alexander* and *Benbrika 2* were supported by s 51(xix) of the Constitution, the aliens power.[14] The High Court held that section 36B of the Act (and 36D by parity of reasoning) were supported by s 51(xix) on the basis that that constitutional provision encompassed the question of who does and does not have the legal status of alien,[15] and that it was open to Parliament to classify as an alien a person who has engaged in 'conduct exhibiting such extreme enmity to Australia as to warrant being excluded from membership of the Australian community'.[16] The boundaries of the conduct so described remains a live issue. The lower the threshold set for citizenship deprivation, the more questionable its characterization as conduct warranting deprivation of Australian citizenship, and so its constitutional validity.

25. Recent years have seen the constitutional invalidation of citizenship deprivation measures on Ch III grounds. It is not clear how it assists national security to persist with a feature of the legislation that heightens the prospect of it being held to be constitutionally invalid on other grounds.

26. For the reasons given in this section I endorse the AHRC's recommendation 3 and 4, namely that:

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[14] This paragraph draws on Hammond and Thwaites, above n **Error! Bookmark not defined.**. A related ruling was made in *Jones v Commonwealth of Australia* [2023] HCA 34, though in that case reliant on the naturalisation limb of the 'naturalization and aliens' power in s 51(xix) of the Constitution.
[15] *Alexander,* [33].
[16] *Alexander,* [35]. See also [46] and [63].

- *Section 36C(1) of the Citizenship Act be amended, with the result that loss of citizenship is only possible in respect of relevant convictions where a person has been sentenced to a period of imprisonment of at least six years, or to periods of imprisonment that total at least six years.* [AHRC recommendation 3]

- *Section 36C(8) of the Citizenship Act be amended so that when the total period of imprisonment is calculated, concurrent sentences are counted only once. For example, if a person is convicted of two serious offences and the court imposes two period of two years imprisonment to be served concurrently, the total period of imprisonment is two years.* [AHRC recommendation 4]

27. I understand that the Committee will be reviewing amendments to the Act that were introduced into Parliament but did not pass. In addition to my endorsement of the above two recommendations of the AHRC, and for the same reasons, I adopt the statement of the AHRC with respect to Senator Thorpe's proposed amendment of the Citizenship Repudiation Bill[17] (para 80 of the AHRC submission).

4.2 Expansion and/or dilution of the serious offences

4.2.1 Senator Cash's proposed amendments

28. Prior to the passage of the Bill, Senator Cash introduced amendments that, if passed, would have significantly expanded the list of serious offences as defined by s 36C(3) to include non-terrorism related offences. The proposed amendments included offences such as slavery and slavery-like offences, harm to Australian citizens or residents outside Australia, and use of carriage services for child sex offences.[18]

29. The proposed expansion was surprising, in that it was at odds with the legal rationale that the government has relied on to justify the deprivation

[17] Amendment 2323 to the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023 to be moved by Senator Thorpe, 6 December 2023.
[18] Amendment 2282 to the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023 to be moved by Senator Cash, 30 November 2023.

measures since their introduction in December 2015. The legal theory relied on to support the deprivation powers centres on disallegient conduct; conduct held to demonstrate that the person has repudiated their allegiance to Australia.[19] The offences Senator Cash's amendments sought to add are serious, but it is not the case that anyone who commits a heinous crime (and is a dual citizen) can potentially be banished from Australia, becoming the responsibility of their other country of nationality. The legal rationale for the inclusion of such offences in the citizenship deprivation regime is not apparent. An aspect of this is that the potential legal limits or boundaries on the category of offences that would justify deprivation of citizenship, if the proposed offences were added, are not evident. This is neither desirable, nor conducive to a legally robust and defensible regime. It is recommended that the Committee reject any future proposals for such an expansion.

4.2.2 Reduction in the seriousness of offences as registered in the maximum penalty of imprisonment

30. The concern to ensure that the threshold of conduct serving as a precondition for deprivation is not lowered, outlined in section 4.1 of this submission in relation to the sentencing with respect to an offence, also applies to the seriousness of the offence as registered in the maximum penalty of imprisonment.

31. In its 2015 Advisory Report on the Allegiance to Australia Bill that introduced the deprivation powers this Committee stated that the list of offences should 'more appropriately target the most serious conduct that is closely linked to a terrorist threat' and recommended 'removal of offences with a maximum penalty of less than 10 years imprisonment'.[20]

32. The December 2023 amendments introduce an offence that attracts a maximum penalty of 7 years imprisonment ('advocating mutiny'). This departure from this Committee's earlier agreed benchmark of a maximum

[19] See the Act, s 36A. For an early discussion of this rationale in the Australian citizenship deprivation context see Helen Irving and Rayner Thwaites 'Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)' (2015) 26 *Public Law Review* 143-149.
[20] PJCIS 2015 Advisory Report on Citizenship Deprivation, above n 12, 115.

penalty of 10 years imprisonment or more has not been explained or justified. Departure from that benchmark adversely impacts the proportionality of the measures, contributing to the negative consequences noted in section 4.1 of this submission.

33. It is recommended that the Committee maintain its earlier position and remove offences with a maximum penalty of less than 10 years imprisonment.

4.3 Weakening the legal protections against statelessness

34. My submissions on this point draw on earlier testimony and submissions to this Committee in 2019.

35. Australia has international obligations to avoid the creation of statelessness. Art 8(1) of the 1961 Convention on the Reduction of Statelessness relevantly provides:

> A Contracting state shall not deprive a person of his nationality if such deprivation would render him stateless.

Statelessness is defined in the 1954 Convention Relating to the Status of Stateless Persons, in Article 1.1: 'For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any state under the operation of its law'.[21] Accordingly, when introduced in 2015, the deprivation powers under the Act were limited to a person:

> 'who is national or citizen of a country other than Australia.'[22]

[21] This means that the question of whether a person would be rendered stateless by deprivation turns on questions of foreign law. On the issues this introduces see Professor Emerita Helen Irving's submission to this inquiry (submission 6). See also Rayner Thwaites, 'Proof of Foreign Nationality and Citizenship Deprivation: Pham and Competing Approaches to Proof in the British Courts' (2022) 85 *The Modern Law Review* 1301-1328 ('Thwaites, 'Proof of Foreign Nationality').
[22] Australian Citizenship Act 2007 (Cth) prior to the 2020 amendments, ss 33AA, 35(1), 35A(1).

A key issue is the sufficiency of safeguards to ensure that the person does in fact possess a foreign citizenship.[23]

36. The lapsed 2018 Bill sought to substitute the following:

> 'However, the Minister must not make a determination *if the Minister is satisfied that* the person would, if the Minister were to make the determination, *become a person who is not* a national or citizen of any country.' [emphasis added].

This substitution was effected in the 2020 amendments. Transposed from Ministerial determination to court order, this formulation is maintained in the 2023 amendments under review.

37. International law requires that, at the moment a person is deprived of citizenship, they are not rendered stateless. It does not allow for the looser temporal requirement, provided in the current provision, that a person not 'become', after some unspecified interval of time, stateless. Further, whether a person is rendered stateless by a deprivation order is a matter of fact and law determined by whether they are, on deprivation, 'considered as a national by any state under the operation of its law',[24] The question of whether someone *is* a foreign national is distinct from whether a judge or official *is satisfied that* they are a foreign national. Australia's obligations under the Statelessness Conventions hinge on the first of these questions.

38. The formulation of the 'statelessness bar' introduced in 2020 and maintained in the current Act has been a consistent object of criticism in submissions and testimony before this Committee since first proposed in the 2018 Bill. No serious defence of the changed formulation has been mounted.

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[23] The issue of how Australian officials and courts should go about determining foreign citizenship is addressed in Professor Emerita Helen Irving's submission to this inquiry (submission 6). Issues attending the determination of foreign citizenship, as motivated by the need to avoid statelessness in the context of citizenship deprivation, are the subject of Thwaites, 'Proof of Foreign Nationality', above n 20.
[24] 1954 Convention Relating to the Status of Stateless Persons, Art 1.1.

39. Australia's obligations under the Statelessness Conventions are better served by reinstatement of the language in place prior to the 2020 amendments with respect to the 'statelessness bar'.

40. Since writing the above, I have had the benefit of reading the submission of the Peter McMullin Centre on Statelessness to this inquiry (submission 8). It provides a more developed account of the objections made above (as well as raising additional concerns).

Yours sincerely,

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