Submission to the The Parliamentary Joint Committee on Intelligence and Security Review of the amendments made by the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023

Professor Kim Rubenstein, University of Canberra, 19 February 2024

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

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 these provisions amend.

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 in advance of the opportunity to expand upon it in oral evidence before the Committee on 19 February 2024.

Purpose of the citizenship stripping provisions:

In my original submissions to the Committee around the changes to the Act in 2015 introducing citizenship stripping, I began by setting out a foundational policy concern I have with the provisions which is ongoing with these proposed amendments. 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.

The status of 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 do not address the problem that was created in 2015 which 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.

The most recent census in Australia indicates that over 50% of Australians are either born outside of Australia or their parents were, and so the consequence of the inequality that these provisions underpin (only dual citizens can have their Australian citizenship stripped) impacts a significant proportion of Australian society and is not consistent with encouraging a socially cohesive community, nor is it consistent with the multicultural society that Australia represents and promotes.

Australian Values:

In commenting on the amendments in 2019 to the 2015 changes, when this Committee reviewed the operation, effectiveness, and implications of sections 33AA, 35, 35AA and 35A of the Australian Citizenship Act 2007 I also raised concerns, that remain continuing concerns around the terminology of the principles underpinning these changes.

The terminology of 'allegiance' and the way that term is used in a singular sense in the 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 did not agree with the sentiments underpinning the 'Purpose of the Act' when the changes occurred in 2019 where it stated that Act was:

> 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.

These terms are repeated in the new amendments in section 36(C):

> (4) For the purposes of paragraph (1)(d), the matters are the following:
> (a) the person is aged 14 or over;
> (b) the person is an Australian citizen;
> (c) the person's conduct to which the conviction or convictions relate is so serious and significant that *it demonstrates that the person has repudiated their allegiance to Australia*. (my italics)

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.

These concerns are further amplified in the sections of the Act which have responded to the High Court decisions finding aspects of the Act unconstitutional.

In providing the Courts the power to strip a person of their citizenship (as opposed to the earlier power vested in the Minister) the Act is placing judges with powers to determine, matters that are unclear and indeterminate and in doing so, this is inconsistent with the fundamentals of the rule of law.

For instance, section 36(C) also states:

> (5) In deciding whether the court is satisfied of the matter referred to in paragraph (4)(c) in relation to the person's conduct, the court must have regard to the following matters:

> (a) **whether the conduct to which the conviction or convictions relate demonstrates a repudiation of the values, democratic beliefs, rights and liberties that underpin Australian society**;
> …

What are the 'values, democratic beliefs, rights and liberties that underpin Australian society'? In my view, this Act in itself, goes against those very values – by treating two people, conducting the same acts, differently – that hardly goes to the value of equality before the law. Denying people their access to democracy, such as the right to vote, by stripping them of their citizenship, is not consistent with Australian values.

Most importantly, as stated above, it provides judges with powers that are not clear, and this goes against fundamental principles of clarity and guidance in the law.

I wrote about these concerns in two recent opinion pieces that I include in conclusion:

https://www.afr.com/politics/federal/high-court-sends-citizenship-laws-back-to-the-drawing-board-20231105-p5ehmy

And more recently when examining citizenship testing in Australia, which is provided for under the same Act, and in which we expect new citizens to affirm their knowledge of Australian values (even though they are not defined in the Act and so this aspect of the testing may be unlawful), these new provisions regarding Australian values, in my view, illustrates our Parliamentary representatives are not clear about those fundamental democratic limitation on any Parliament.

It is not enough to say the Parliament represents the will of the people – there are anti-majoritarian concepts that underpin western liberal democratic systems, and citizenship should be valued in a way that it is not used for political ends.

See further
https://www.kimrubenstein.com.au/newsfeed/k1p89i6ksigpduqdyzwepa3zl0042o

For these reasons I am highly concerned about the stripping of citizenship provisions in the Act and the expectations placed on judges, as set out in the most recent amendments being reviewed by this Committee.

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19 February 2024

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