



16 July 2019

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
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By email: pjicis@aph.gov.au

Dear Chair

Supplementary submission: Review of the Australian Citizenship renunciation by conduct and cessation provisions of the *Australian Citizenship Act 2007* (Cth)

I write further to the Law Council of Australia (**Law Council**) submission, dated 1 July 2019, to the Parliamentary Joint Committee on Intelligence and Security's review of the Australian citizenship renunciation by conduct and cessation provisions contained in the *Australian Citizenship Act 2007* (Cth) (**the Citizenship Act**).

The Law Council wishes to make the following supplementary submission and, in doing so, acknowledges the contribution of its National Criminal Law Committee, Constitutional Law Committee of the Federal Litigation and Dispute Resolution Section and the Law Society of New South Wales. The Law Council is also grateful for the opportunity to have consulted with Dr Rayner Thwaites from the University of Sydney in the preparation of this submission.

Section 35AA of the *Australian Citizenship Act 2007* (Cth)

The Law Council notes that section 35AA of the Citizenship Act allows the Minister for Home Affairs (**Minister**), by way of legislative instrument, to declare an organisation a 'declared terrorist organisation' where the conditions under subsection 35AA(2) are satisfied. This subsection provides that before such a declaration can be made, the Minister must be satisfied on reasonable grounds that the organisation:

(a) *either:*

- i. is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or*
- ii. advocates the doing of a terrorist act; and*

(b) *is opposed to Australia, or to Australia's interests, values, democratic beliefs, rights or liberties, so that if a person were to fight for or be in the service of such an organisation the person would be acting inconsistently with their allegiance to Australia.*

Section 35AA is relevant to both sections 33AA and 35 of the Citizenship Act. Under subsection 33AA(4), a person is deemed to have engaged in conduct with an intention of advancing a political or ideological cause if they are a member of, or acting on instructions of, or in cooperation with, a 'declared terrorist organisation'. Section 35 provides for the cessation of citizenship where, *inter alia*, a person fights for, or is in the service of, a 'declared terrorist organisation'.

The Constitutional basis for the terrorism-related citizenship revocation provisions of the Citizenship Act is the 'naturalisation and aliens' power in section 51(xix) of the Constitution. This is relied on to ground the concept of allegiance to Australia and the extent to which a person involved in terrorism related activities can be said to have repudiated their allegiance to Australia.

Wording of paragraph 35AA(2)(b)

The effect of the current section 35AA of the Citizenship Act is to enable the Minister to declare, by legislative instrument, a subset of listed terrorist organisations under the *Criminal Code Act 1995* (Cth) that if a person were to 'fight for or be in the service of such an organisation the person would be acting inconsistently with their allegiance to Australia'.¹ For the purpose of section 35AA, the Minister may only list terrorist organisations that are opposed to Australia or are opposed to any of Australia's interests, values, democratic beliefs, rights or liberties, as stated in paragraph 35AA(2)(b).

The subsection is in effect a deeming provision which operates so that where a person fights with a terrorist organisation that is opposed to Australia or to any of Australia's values, interests, democratic beliefs, rights or liberties, the person is deemed to be 'acting inconsistently with their allegiance to Australia'.

The wording in the first limb of paragraph 35AA(2)(b), namely 'Australia's interests, values, democratic beliefs, rights or liberties' is not common in Australian law. The wording in paragraph 35AA(2)(b) may have sought to reflect the wording of the Australian citizenship pledge. The Explanatory Memorandum to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) provides that the characteristics stated in the first limb of paragraph 35AA(2)(b) are included in the pledge of commitment as a citizen of Australia. It is stated in the Explanatory Memorandum that:

*Australia's values, democratic beliefs, rights or liberties are the uniting characteristics for Australian citizenship. These characteristics are expressly included in the pledge of commitment as citizen of Australia. Therefore, where a person fights with a terrorist organisation that is opposed to Australia or to any of Australia's values, democratic beliefs, rights or liberties, the person has evidently repudiated their allegiance to Australia.*²

The Australian citizenship pledge also includes pledging loyalty to Australia and its peoples 'whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey'.³

Further, the preamble of the Citizenship Act includes similar wording to the pledge:

¹ *Australian Citizenship Act 2007* (Cth) s 35AA(2)(b).

² Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), 71.

³ This version of the citizenship pledge has existed since 1993: Department of Home Affairs, 'Citizenship Ceremony: Australian Citizenship Pledge', *Immigration and Citizenship* (Web Page, 6 September 2018) <<https://immi.homeaffairs.gov.au/citizenship/ceremony/what-is-the-pledge>>.

The Parliament recognises that persons conferred Australian citizenship enjoy these rights and undertake to accept these obligations:

- (a) by pledging loyalty to Australia and its people; and*
- (b) by sharing their democratic beliefs; and*
- (c) by respecting their rights and liberties; and*
- (d) by upholding and obeying the laws of Australia.⁴*

There does not appear to be any common law consideration or interpretation given to the phrase 'Australia's interests, values, democratic beliefs, rights or liberties'. Furthermore, the wording 'interests, values, democratic beliefs, rights or liberties' does not appear to be found in international instruments or in the domestic policies of comparable jurisdictions.

The *UN Convention on the Reduction of Statelessness*⁵ (**the UN Convention**) allows for loss of nationality where the 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;⁶ or
- has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of their determination to repudiate their allegiance to the Contracting State.⁷

The *British Nationality Act 1981* (UK) has a number of provisions that deal with terrorism related deprivation of citizenship. One of those provisions adopts the wording 'conduct seriously prejudicial to the vital interests of the United Kingdom'.⁸ It has been argued that this wording can in effect prescribe a 'qualitative standard tied to the effect on the nation, rather than an enumerative standard focused on the individual's specific act'.⁹ It is noteworthy that this wording adopts the phrasing of the UN Convention in terms of conduct that is 'seriously prejudicial to the vital interests' of the state.

Proposed amendment to paragraph 35AA(2)(b)

The Law Council considers that any amendment to paragraph 35AA(2)(b) should focus on the phrase 'is opposed to Australia, or to Australia's interests, values, democratic beliefs, rights or liberties', which is ambiguous in its application and is lacking in relevant guidance and authority.

In order to provide greater clarity that a person's allegiance to Australia has been repudiated, the Law Council considers that the statute should be explicit that the declared terrorist organisation for the purpose of section 35AA must be an organisation which is clearly against Australia. To this end, the Law Council considers that paragraph 35AA(2)(b)

⁴ *Australian Citizenship Act 2007* (Cth) preamble.

⁵ *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975). Australia ratified the Convention in December 1973.

⁶ *Ibid* art 8(3)(a)(ii).

⁷ *Ibid* art 8(3)(b).

⁸ *British Nationality Act 1981* (UK) s 40(4A)(b).

⁹ James H Martin, *Terrorism-Related Loss of Citizenship: A Policy Review* (Technical Report, Naval Post Graduate School, 1 September 2016) 42.

should be amended to include the phrase, 'seriously prejudicial to the vital interests of Australia' so that it reads:

(b) is seriously prejudicial to the vital interests of Australia, so that if a person were to fight for or be in the service of such an organisation the person would be acting inconsistently with their allegiance to Australia.

The current wording of paragraph 35AA(2)(b) can be interpreted broadly and lacks sufficient clarity. The difficulties with such a provision were identified in the unanimous judgment of the High Court in *Wilkie v The Commonwealth; Australian Marriage Equality Ltd v Cormann*.¹⁰

The merit of the proposal to substitute the first part of paragraph 35AA(2)(b) with the phrase 'seriously prejudicial to the vital interests of Australia' is that it is a phrase around which considerable legal commentary has developed, including in relation to Article 8 of the UN Convention and in relation to the *European Convention on Nationality*.¹¹ The existing analysis and development of the law in relation to the phrase increases the likelihood of a reviewing court finding that the phrase supplies a tractable legal benchmark or limit against which the Minister's 'satisfaction on reasonable grounds' can be assessed. It would bring some clarity to the current broad and uncertain scope of paragraph 35AA(2)(b).

The Law Council therefore recommends that subsection 35AA(2) of the Citizenship Act be amended in the above terms.

Thank you for the opportunity to provide this supplementary submission.

Yours sincerely

Arthur Moses SC
President

¹⁰ [2017] HCA 40, [101]-[109].

¹¹ *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000).