



11 January 2019

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney

www.alhr.org.au

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email: pjcis@aph.gov.au

Dear Committee Secretary

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

Australian Lawyers for Human Rights (**ALHR**) welcomes the opportunity to make this submission in relation to the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (the **Bill**).

Summary

1. The effect of the Bill is to further expand the powers of the Minister to determine the cessation of a person's Australian citizenship by expanding the types of criminal convictions which trigger cessation, as well as expanding the cohort of people who may have their citizenship revoked.
2. ALHR is concerned that the Bill seeks to use citizenship for a purpose more properly pursued through the criminal law and will lower the threshold for stripping a person of their Australian citizenship with insufficient justification. Further, ALHR is concerned about how the Bill's proposed amendments create inequality between Australian citizens and give rise to the risk of other serious human rights violations, including making people stateless.
3. ALHR recommends that the Bill not be passed and should be withdrawn. In the event that this recommendation is not adopted, ALHR makes the alternative recommendation that the retrospective element of the proposed measures is removed from the Bill.

Background

4. In his Second Reading Speech the Attorney-General, Mr Porter, stated that the purpose of the Bill is to 'keep Australians safe from evolving terrorist threats, and to uphold the integrity of

Australian citizenship and the privileges that attach to it¹ and to strip the privileges of citizenship from people who have, through their conduct which has resulted in a conviction for a terrorism offence, 'repudiated their allegiance to Australia.'² ALHR does not wish to downplay the complexity of the policy challenges posed by terrorism or the importance of implementing measures to protect people in Australia from harm. However, ALHR is concerned that the measures proposed by the Bill are not reasonable, necessary or proportionate to achieve the stated objectives.

5. The Bill expands the powers of the Minister to make a determination that a person ceases to be an Australian citizen under section 35A of the *Australian Citizenship Act 2007* (Cth) in the following ways:
 - removing the current sentencing threshold which requires that a person who has a 'relevant terrorism conviction'³ must *also* have been sentenced to six or more years of imprisonment;
 - including the power to remove a person's citizenship if they have a 'relevant other conviction'⁴ and they have been sentenced to one or more terms of imprisonment where the total of these terms is six years or more;
 - lowering the threshold for dual citizenship so that the Minister must simply be 'satisfied that the person would not ... become a person who is not a national or citizen of any country';⁵ and
 - allowing these measures to operate retrospectively to 'relevant terrorism convictions' and 'relevant other convictions' where the conviction was on or after 12 December 2015 and, in relation to the qualification for 'relevant other convictions,' if a person was convicted before 12 December 2015, and was also sentenced to 10 or more years' imprisonment.
6. The removal of the current sentencing threshold for 'relevant terrorism convictions' fails to take into account the role of the criminal law system and judicial discretion in Australia in considering the material facts of an offence and imposing a sentence, including a sentence of imprisonment which is appropriate in all the circumstances of the case and which therefore reflects the seriousness of the crime and the risk the person poses to the Australian community. It is noted that in relation to 'other relevant convictions', the additional requirement of a sentence of six years or more is still, in the view of ALHR, a more appropriate reflection of the seriousness of the conduct which gave rise to the conviction.

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2018, 11762 (Christian Porter, Attorney-General).

² Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2018, 11763 (Christian Porter, Attorney-General).

³ 'Relevant terrorism conviction' is defined as being convicted of an offence relating to international terrorist activities using explosive or lethal weapons, treason, terrorism and incursions into foreign countries to engage in hostile activities, including preparation and recruitment for incursions: Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) sch 1 item 1 (1A).

⁴ 'Relevant other conviction' is defined as being convicted of any offence relating to sabotage (other than preparing for or planning sabotage), espionage or foreign interference: Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) sch 1 item 1 (1B).

⁵ Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) sch 1 item 1 (1).

7. ALHR acknowledges that the Bill seeks to ensure that the Minister takes into consideration a number of relevant factors, including the severity of the conduct which gave rise to the conviction(s) and sentence(s), the degree of threat posed by the person and the person's age.⁶ However, the removal of the prerequisite relating to a minimum sentence and term of imprisonment before a person is considered for loss of citizenship undermines judicial discretion and the determinations of the criminal justice system, for example in circumstances where the criminal law system has already found a person to be of minimal risk to the Australian community and therefore has imposed a very short sentence, or no sentence or term of imprisonment. Removing the prerequisite which demonstrates the seriousness of the relevant crime or crimes means that the legislation is no longer clearly proportionate to the offence.

Human rights implications of the Bill

8. ALHR notes that the Bill's *Statement of Compatibility with Human Rights* states that the Bill is compatible with the human rights and freedoms set out in the international human rights instruments ratified by Australia. However, ALHR has serious concerns about the human rights implications of the Bill, in particular that it:
- undermines the right to be equal before the courts and tribunals;
 - exposes people to the risk of statelessness without putting into place adequate safeguards; and
 - applies retrospectively.

Equality before the courts and tribunals

9. Australia has obligations under the *International Covenant on Civil and Political Rights* to ensure that all people are equal before the courts and tribunals.⁷ As set out above, the practical impact of the Bill undermines this right because it undermines judicial direction and the determinations the criminal justice system makes during sentencing as to whether a person poses a risk to the community and therefore whether the court should impose a sentence of imprisonment or not. The Bill reinforces a discriminatory regime where two people who have committed the same crime are treated very differently depending on whether or not they are a dual citizen, or whether the Minister is otherwise satisfied that they would not become a national or citizen of any other country.

Risk of statelessness

10. As noted in the Explanatory Memorandum, Australia has international obligations regarding statelessness.⁸ In particular, article 8 of the the *1961 Convention on the Reduction of Statelessness* provides that a State must not deprive a person of nationality if such deprivation would render that person stateless. However, this treaty, and other international instruments which give rise to these obligations in relation to statelessness, are not included in the the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). As a result, the ordinary parliamentary processes risk overlooking legislative amendments which

⁶ Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) sch 1 item 1 (1).

⁷ *International Covenant on Civil and Political Rights* art 14.

⁸ Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) sch 1 item 1 [20].

may give rise to the possibility that a person becomes stateless. Further, the practical impact of the Bill is that it expands the scope for inaccurate Ministerial determinations in relation to dual nationality.

11. ALHR's concerns in relation to the proposed amendment to the threshold for determining that a person would not become stateless are two-fold. Firstly, the practical effect of the proposed threshold for satisfaction creates the possibility that an incorrectly formed view of the Minister, leading to a decision rendering a person stateless, would be permissible under Australian law. Although the Explanatory Memorandum states that it is not the intention of this new measure to allow the Minister to remove a person's Australian citizenship in violation of Australia's international obligations regarding statelessness,⁹ this intention is not articulated in the Bill, which instead proposes to weaken the protections against statelessness in the existing section 35A. The risk of such a measure is demonstrated by the recent circumstances of Australian-born Neil Prakash, whom Australia has determined holds dual Australian and Fijian citizenship, but whom Fiji contends does not hold Fijian citizenship. Although the decision to remove Mr Prakash's Australian citizenship was made under a different provision of the *Citizenship Act 2007* (Cth), the case shows how determinations about whether a person is a national or citizen of another country require rigorous safeguards.
12. Secondly, the proposed change to paragraph 35A(1)(b) would operate to reduce the courts' ability to review the accuracy of the Minister's view as to a person's second nationality. Although the Minister would be required to be satisfied to a level of legal reasonableness when making the determination to remove a person's citizenship, a court would no longer be able to consider whether the Minister's view was in fact accurate. This is an unwarranted shift of authority from the courts. It is not appropriate for decisions of this gravity and complexity to be immune from detailed judicial scrutiny.

Retrospectivity

13. Australia has obligations under the *International Covenant on Civil and Political Rights* to ensure that where a person is convicted of a criminal offence, they are not subject to a heavier penalty than that which was applicable at the time when the criminal offence was committed. Given the seriousness of the removal of a person's citizenship, the retrospective application of the proposed measures clearly impose a heavier penalty than applicable at the time of the offence. In particular, ALHR has concerns with the expansion of the definition of 'relevant terrorism conviction' to include convictions from up to 13 years ago where the person received a penalty of less than six years imprisonment. Although the *Statement of Compatibility with Human Rights* for the Bill states that the retrospective element of the measures is required to 'respond to the evolving threat environment,'¹⁰ in ALHR's view this broad statement does not satisfactorily explain how a person who was convicted 13 years ago, was sentenced to less than six years imprisonment and potentially has not received any further convictions since that time, would necessarily pose such a risk to the Australian community that their citizenship should be revoked.

Conclusion

In ALHR's view, the measures proposed by the Bill would have the effect of using citizenship law for a purpose more appropriately achieved through criminal law. The measures are inconsistent with

⁹ Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) sch 1 item 1 [20].

¹⁰ Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) Attachment A [31].

Australia's international human rights law obligations and the Australian government has not demonstrated that the measures are reasonable, necessary or proportionate to achieve the stated objectives. To expose a larger cohort of Australians to the cessation of their citizenship in the manner proposed by the Bill will do little to provide any further substantive protection for the Australian community and will involve Australia breaching its international law obligations.

Recommendation

- The Bill should not be passed and should be withdrawn.
- At a minimum, the Bill should be amended to remove the retrospective element of the proposed measures.

If you would like to discuss any aspect of this submission, please email me at: [REDACTED]

Yours faithfully



Kerry Weste
President
Australian Lawyers for Human Rights

ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.