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

Submission to the Inquiry into the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*

I am writing to oppose the passage of the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*. Section 4, concerning the Purpose of the Bill, speaks of "*conduct incompatible with the shared values of the Australian community*". Ironically, the remedy proposed threatens core Australian values, such as the Rule of Law and the doctrine of the Separation of Powers.

In this submission, I will expand on the following points:

- Giving the Minister sole power to determine the validity of accusations presented to him effectively gives him a discretion concerning the imposition of the penalty of loss of citizenship.
  - The Minister's absolute discretion to rescind any 'automatic renunciation' is itself equivalent to an absolute discretion to impose it in the first instance.
- The Bill incorrectly characterises a Ministerially-imposed penalty as an implied renunciation of citizenship.
  - This would allow the imposition of the penalty without a conviction, effectively usurping a judicial function.
- The standard of proof to be used by the Minister in judging the accuracy of evidence presented to him is not specified.
  - The conduct described would constitute prosecutable offences, but conviction would not be necessary for cessation of citizenship to occur. The implication is that a lesser standard of proof might be accepted by the Minister than would be required by a court.
  - The traditional presumption of *innocent until proven guilty* would be placed in serious jeopardy.
- The Explanatory Memorandum incorrectly asserts that citizenship is <u>not</u> a right, but merely a privilege.
  - The assertion is clearly an attempt to reduce the seriousness of giving the Minister the power to decree when citizenship has been terminated.
  - The assertion would also reduce the <u>right to vote</u>, which flows from citizenship, to a mere privilege. That moves into very dangerous territory for the safety of our democracy.
- In an attempt to help justify giving the Minister an extraordinary power, the Explanatory Memorandum asserts the present Minister's "particular insight into Australian community standards and values".
  - The accuracy of the assertion is open to question; but, in any case, it would be unjustified and dangerous to assume all future holders of his office would necessarily share his sterling qualities.

Cessation of citizenship, allegedly automatic - actually at the Minister's discretion

The Bill is drafted in such a way that it presents the loss of citizenship as a renunciation implicit in certain conduct, rather than a revocation involving a Ministerial decision. The Explanatory Memorandum asserts in the OUTLINE section:

> "*The operation of these provisions* [is] *by operation of law and* [does] *not necessitate the Minister making a decision*."

This is clearly incorrect. The Minister has to make a decision concerning questions of fact and law before he issues his written notice:

- *are the accusations made concerning the person accurate?*
- *are the accusations relevant to the new proposed sections of the Act?* and
- *are the accusations of sufficient gravity to trigger the operation of a Section of the Act?*

The Minister cannot become "*aware of conduct*", as the Bill puts it, without consideration of the evidence presented. This is the vital difference between him becoming "*aware of conduct*" rather than just becoming *aware of allegations of conduct*. He must receive accusations in the form of a brief and he must make decisions on the three points listed above. To suggest the Minister does not have to make a decision about those central questions is to suggest he would accept every brief on these matters as unquestionable. That is either completely unbelievable or totally unacceptable.

The decisions would be at the Minister's sole discretion (S. 33AA(9) and S. 35(8)):

> "*The powers of the Minister under this section may only be exercised by the Minister personally*".

The Minister would also be given an absolute power to rescind any notice of '*renunciation by conduct*' and reverse cessation of citizenship whenever he considers it appropriate. Explanatory Memorandum para 40:

> "*If the person is exempt by the Minister their citizenship will not cease … it will be as if the person's citizenship never ceased …*"

Para 38 of the Explanatory Memorandum also amply demonstrates the extent of the Minister's discretion concerning the rescission and exemption power:

> "*The Minister does not have a duty to consider whether to exercise the power under subsection (7), whether he or she is requested to do so by any person, or in any other circumstances.*"

In practice, having the ***discretion to rescind*** is equivalent to having the ***discretion to impose***. There would be no difference in outcomes. Framing the amendments in such a way that they claim the conduct, by itself, automatically results in cessation, is to create a smoke-screen to hide the reality about what is proposed. In truth, this is an attempted usurpation of the judicial function by the executive arm of government.

The counter-argument presumably would be: *the Minister is not imposing the penalty, he is merely 'discovering' that the penalty was already self-imposed*, when the person in question engaged in the prohibited conduct. This is an exercise in sophistry. However, if one were to accept the argument, that the amendment is not a usurpation by the executive of a judicial function, then one is led to the conclusion that it is a proposed usurpation of a judicial function by the legislature. Neither should be acceptable if key 'Australian values' are to be upheld.

The characterisation of a penalty or punishment as a renunciation

A fundamental problem with the Bill is that it tries to disguise what is actually a penalty or punishment as something else. The question of *penalty imposed* versus *implied renunciation* is linked with the attempt to redefine citizenship as *merely a privilege and not a right*. Presumably, the argument would be that removal of citizenship is not a penalty, or is an insignificant penalty, if it is not a right to begin with. I will return to this later in my submission.

Section 4 of the Bill states:

> *"…citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that* ***they have severed*** [the common bond of Australian citizenship] *and repudiated their allegiance to Australia."*

Section 33 of the *Australian Citizenship Act 2007* provides a process of **intentional renunciation** for Australian citizens who hold dual citizenship, or who would acquire citizenship of another country on their renunciation. It is a rigorous process involving a series of steps and the production and certification of vital documentation.

To create an alternative process of **implied renunciation** – *involving who knows what degree of rigour* - is a dangerous step if the right of citizenship and the doctrine of the separation of powers are to be respected. The Explanatory Memorandum, (paras 48, 83 and 119) states that under new subsections 33AA(10), 35(9), and 35A(9):

> *"…the Minister is not required to … notify the persons of the reasons for the decision…".*

Apparently, a person could be deemed to have renounced their citizenship without even having the right to be told how they managed to do it.

If conduct is so odious that it deserves cessation of Australian citizenship, then it should be prosecuted as a criminal offence. The person should be charged and brought to trial. In effect, if a conviction results, then cessation could be made a possible consequence. It might form part of the penalty that could be imposed – provided they have citizenship of another country.

The new proposed Section 35A follows the proper path of conviction first, then punishment. New Sections 33AA and 35 should follow the same path, but they don't.

Section 35A refers to a range of offences under either the *Criminal Code* or the *Crimes Act 1914*. **If** an Australian citizen is convicted of one of those offences and "the person is a national or citizen of a country other than Australia", **then** the Minister would be empowered to give notice of cessation of citizenship. The cessation would be dated at the time of conviction. The link between conviction and cessation is central to the operation of Section 35A.

Unfortunately, the proposed new Sections 33AA and 35 do not require an initial conviction for any offence.

Oddly, para 75 of the Explanatory Memorandum, referring to proposed new Section 35, says:

> *"…**the revocation happens** by force of the statute **upon the conviction**…"*

but new Section 35 makes no mention of the need for conviction for cessation to occur and nor does new Section 33AA.

It is not made clear in the Explanatory Memorandum what criminal offences relate to the activities described in new Section 35. I assume they must be criminal offences given the nature of the activities. If this Bill were to proceed, this should be clarified and new Section 35 should be redrafted to make clear revocation could only occur "upon the conviction", as the Explanatory Memorandum says it does.

All the activities, or "conduct", under new Section 33AA are of a terrorist or terrorism-related nature. The Explanatory Memorandum makes clear that the activities would constitute offences under the *Criminal Code.* The question is:

> **Why should those who could be prosecuted for alleged activities described under Ss. 33AA or 35 be treated differently from those who could be prosecuted for alleged activities described under S. 35A?**

Alarmingly, the most likely answer would appear to be:

> **Because the evidence might not be sufficient to achieve a conviction.**

The Bill is therefore an attempt to allow cessation of a person's Australian citizenship for the commission of offences when there is doubt the person's guilt could be proved in an Australian court. The cessation would occur following the Minister becoming "*aware of*" the person having engaged in the conduct.

- The process by which the Minister becomes "*aware*" is not described.
- The standard of proof the Minister would use to satisfy him/herself concerning the accuracy of the information presented is not described.

The cessation cannot be turned into something other than a penalty or punishment simply by skirting around the need for a conviction.

Under the Australian Constitution, only a court may exercise the judicial power of the Commonwealth. The way the Bill has been drafted appears to be an attempt to ensure the Ministerial notification of cessation of citizenship cannot be interpreted as an exercise of judicial power. The person, rather than the Minister, is characterised as solely responsible for the cessation of citizenship.

This attempted reversal of responsibility is transparently a 'legal fiction', designed to achieve an otherwise potentially unobtainable outcome. To provide a protective camouflage for this legal fiction, the Minister and the Bill have attempted a number of contortions. One of the most objectionable is to seek to demote citizenship from a right to a privilege.

Australian citizenship is a right

Commenting on the proposed new Section 35, the Explanatory Memorandum asserts in para 59:

"Citizenship is a privilege not a right."

That is an outrageous statement. The comment is clearly an attempt to undermine the fundamental nature of citizenship and to make it easier to argue that, in effect, a Government Minister should be able to determine who is worthy of the 'privilege' of citizenship, without recourse to the judicial system.

Australia came into existence as a nation following the choice of the people of its constituent parts (those with the right to vote). We, as citizens, are the bedrock of the State. We are not simply those to whom the State has granted the *privilege* of citizenship.

Our citizenship is what gives us the right to vote in our democratic society. If citizenship is to be reduced to a mere privilege, then by logical extension our right to vote could also be reduced to a mere privilege – removable by Ministerial decree, with no obligation to inform us concerning the reasons for the Minister's decision.

In the Explanatory Memorandum and in the Minister's Second Reading Speech there are many references to the need to uphold *Australian values*. It is precisely the presumed rejection of Australian values that is said to provide the justification for automatic cessation of citizenship. 'Australian values' can be a very difficult term to define, but there would be very few Australians who do not consider the right to vote, flowing from citizenship, as central to who we are as a society.

Minister Dutton referred in his Second Reading Speech to there being "*no concept of 'constitutional citizenship' in Australia*". It may be the case that citizenship is not specifically mentioned in the Australian Constitution, but a fundamental principle underlying the Constitution is the notion of representative government. Representative government depends on the right of the adult citizens of Australia to choose their representatives. The concept of citizenship is therefore clearly an implied Constitutional right.

For many of us, Australian citizenship occurred automatically, being born in Australia to Australian citizens. We regard it as our ***birth right***. For all citizens, whether born with it or receiving it by other means, the right of citizenship must be strongly protected.

What is the burden of proof that would operate under this new system?

The presumption of 'renunciation of citizenship', under the proposed Sections 33AA and 35, removes the protections that would apply in a judicial process concerning the rules of evidence.

When the consequence of an accusation concerning the conduct of a person is as severe as '*identifying*' the loss of citizenship, the determination of the accuracy, or otherwise, of the accusation must not be left to the judgement of a Minister alone. The establishment of the truth about alleged conduct, concerning which the Minister has received some information, should be subject to the rules of evidence that operate in the judicial system and subject to the possibility of cross-examination by counsel for the accused.

The apparent intention of the proposed legislation is that the Minister has only to satisfy himself, according to whatever standard of proof he considers necessary, that the accusations made against the accused person are correct in order to issue written notice that the person has "automatically" forfeited their citizenship.

Will the burden of proof to be applied by the Minister, when he receives information about a person's alleged conduct, be:

- *beyond reasonable doubt*;
- *on the balance of probabilities*; or
- something else – possibly even less onerous than the balance of probability, and possibly varying from occasion to occasion?

The Minister believing he has become "*aware of*" something does not, by itself, establish the truth of what he believes.

The principle of 'Equality before the Law'

Article 26 of the *International Covenant on Civil and Political Rights*, to which Australia is a signatory, proclaims that "*All persons are equal before the law*". Discrimination on grounds such as race, sex, religion, or national origin is prohibited. The Government's *Statement of Compatibility with Human Rights* says the Bill is compatible. The Statement acknowledges that:

> "*The amendments … differentiate on the basis that they apply only to those persons who hold dual citizenship*".

The differentiation is said to be justified because it

> "*represents a measure of* ***extra protection*** *for those* ***without*** *dual nationality, rather than* ***a means of possibly selecting those who may be subject to the new provisions***".

If the amendments applied only to the range of penalties that might be imposed following conviction, then it could be said that the exemption of those without access to dual nationality is a necessary "extra protection" from the additional penalty of termination of Australian citizenship. There is an obligation, after all, not to make a person 'Stateless'.

However, proposed Sections 33AA and 35 do not involve any mention of conviction, or even of any charge being brought – merely of something being brought to the Minister's attention. A non-dual national in the same circumstances as a dual national (with no conviction being obtained) is not faced with the penalties flowing from a conviction. They therefore do not receive any "extra protection" as a result of the proposed amendments.

Both proposed Sections are directed specifically and solely at those with dual nationality. Those with dual nationality are selected by the proposed amendments for special adverse treatment, without the necessity of conviction, in a way they were not previously selected. It is not a case of providing extra protection to non-dual nationals; rather it is a case of special treatment for those who are. That puts the amendments in breach of Article 26.

The assertion of exceptional Ministerial virtue

Paras 42, 78 and 113 of the Explanatory Memorandum assert:

> *"The Minister is well placed to make an assessment of public interest as an elected member of the Parliament. The Minister represents the Australian community and has* ***a particular insight into community standards and values*** *and if it would be contrary to the public interest for the person to remain an Australian citizen."*

I reject any suggestion that Minister Dutton's opinion of community standards and values is any more worthy than those held by the rest of us. In any case, what might or might not be true for Minister Dutton cannot be guaranteed to be true of all Ministers who might hold his portfolio in the future. Laws creating extraordinary Ministerial discretion should not be framed on the assumption that exceptional insight and wisdom will always be vested in the incumbent.

Why is this Amendment Bill required?

The Explanatory Memorandum states in the OUTLINE section:

> *"Currently under the Citizenship Act, a conviction for a specific offence is required before citizenship can be revoked … These existing revocation powers are* ***inadequate to address the Government's concerns*** *in relation to persons who have acted contrary to their allegiance to Australia by engaging in terrorist-related conduct."*

The nature of the inadequacies about which the Government is concerned is not spelt out, but clearly the Government is determined that Australian citizenship should cease for some people who have not been convicted of any offence.

If the fear is that some offenders might go unpunished (or perhaps 'un-banished') because of insufficient evidence to secure a conviction, then I would point out this is possible in relation to any criminal offence. The answer might be more resources for police and security forces, but it most definitely is not to authorise the Executive to by-pass the judicial system. That would constitute a highly dangerous precedent.

The Minister said in his Second Reading Speech that the Bill was to:

> *"…address* ***the challenges posed by dual citizens*** *who betray Australia by participating in serious terrorism related activities. …*
> *The intention of the changes is* ***the protection of the community*** *and the upholding of its values,* ***rather than punishing people*** *for terrorist or hostile acts."*

Are the "challenges posed by dual citizens who betray Australia" greater than, or different from, the challenges posed by non-dual citizens who betray Australia?

If "yes", then the Bill, or at least the Explanatory Memorandum, should have explained how. If not, why is different treatment being proposed? Betraying Australia "*by participating in serious terrorism related offences*" would be equally criminal no matter whether the perpetrator had access to another nationality or not. In both cases, conviction should be sought and punishment should depend on conviction.

Would the proposed changes actually make Australia safer from those who are contemplating serious criminal activity of a terrorist nature?

The activities with which the amendments deal, which would be committed in Australia, are already liable to substantial punishment upon conviction. Those who have travelled overseas to carry out proscribed conduct (new Section 35) would know they risk criminal prosecution and substantial punishment if they ever return to Australia. Presumably, their Australian passports would already have been cancelled and they would be on a watch list making an unnoticed return quite unlikely. It is not clear that a significant beneficial effect would be gained by terminating their citizenship prior to their return and conviction.

A termination of citizenship by Ministerial notice prior to conviction **– *and that is the reality of what the Bill proposes*** - is to greatly overstep the boundary between the functions of the Executive and the Judiciary, for a quite uncertain gain. The threat of it might even further accelerate radicalisation of a small disaffected minority.

More importantly, does any possible additional deterrence effect, resulting from the prospect of the loss of Australian citizenship, warrant the substantial trampling of the *Rule of Law* and the doctrine of the *Separation of Powers* involved in the passage of this Bill? My answer is an emphatic "NO".

Paul McMahon