Human Rights Law Centre

Submission to the Parliamentary Joint Committee on Intelligence and Security on the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*

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Freedom. Respect. Equality. Dignity. Action.

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Human Rights Law Centre

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Contents

1. Executive summary

The Human Rights Law Centre (**HRLC**) thanks the Parliamentary Joint Committee on Intelligence and Security (**Committee**) for this opportunity to make a submission on the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (**Bill**) and for granting an extension of time to allow us to prepare this submission.

The HRLC opposes this Bill and strongly urges the Committee to recommend that the Bill not be passed. If passed, this Bill will create an unacceptable risk of arbitrary removal of peoples' citizenship in breach of international law with potentially devastating consequences.

Australia has the right to determine who its nationals are, however that right is not absolute and it cannot arbitrarily strip people of their citizenship. This Bill goes too far, allowing the removal of citizenship where a person is convicted of a less serious offence and doing away with the requirement that a person be sentenced to a minimum of 6 years. The Bill creates a scheme that would allow arbitrary removal of citizenship, without the necessary safeguards to prevent serious human rights violations that could flow from that removal.

The reality is that people who are stripped of their citizenship under the provisions of the Bill will become subject to Australia's immigration law and they are unlikely to be granted the requisite immigration status to remain in Australia. In those circumstances what follows from the removal of citizenship is the loss of civil and political rights that flow from being Australian, such as the right to freely enter the country.

The Bill also reduces the threshold for determining dual citizenship, creating a risk that citizenship is stripped in cases where a person does not have another nationality, leaving them effectively stateless and subject to mandatory and indefinite immigration detention in Australia. In cases where they do have a second nationality, people may be at greater risk of return to persecution or torture (*refoulement*).

These risks are not limited to the person primarily subject to the Bill's provisions; their children are also at risk. In Australia, removing citizenship from a person also subjects their children to removal of citizenship. Another devastating consequence of this Bill could to make innocent children stateless and subject them to mandatory indefinite immigration detention or, if the children maintain their citizenship, subject them to the break up of their family unit.

The Bill poses serious ramifications on the lives of people it directly affects, as well as their family members who are innocent Australians. The Government has not provided any rationale for, or evidence of, the need to broaden its power in the manner proposed by the Bill. There is too much risk and not nearly enough safeguards in the Bill. It should not be passed in its current form.

2. The amendments

The Bill will broaden the current criteria by which the Minister may determine that a person ceases to be an Australian citizen in three ways:

(a) it adds conviction for "associating with a terrorist organization" to the list of "relevant terrorist convictions" which triggers the Minister's discretion;[1]

(b) it removes the requirement that persons who have a "relevant terrorist conviction" also have been sentenced to 6 years in prison;[2] and

(c) it reduces the threshold for determining dual citizenship, from the person needing to be a national or citizen of another country at the time the Minister makes the determination, to the Minister being satisfied that the person would not become a person who is not a national or citizen of any country.[3]

This Bill also retains provisions that make convictions for the offences of sabotage and espionage a basis for revoking citizenship. Sabotage and espionage offences fall within the Bill as "relevant other convictions", in respect of which citizenship can be revoked where sentences of six years or more have been given.[4] In 2018 espionage and sabotage offences were amended and expanded.[5] The offences are themselves are problematic insofar as they are over-broad and oppressive, and they create a real risk of arbitrary removal of citizenship.

3. Stripping citizenship and removing rights

The removal of Australian citizenship from a person is a particularly serious matter, as it strips the person not only of their nationality but of the enjoyment of other fundamental human rights including the right to vote, to run for parliament and, assuming they are not provided a relevant visa, the ability to freely leave and enter Australia. In Australia, removing citizenship from a person also subjects their children to removal of citizenship.[6]

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[1] Proposed subs. 35A(1)(1A)(c) *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018.*

[2] Proposed subs. 35A(1)(1A) *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018.*

[3] Proposed subs. 35A(1)(b) *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018.*

[4] Proposed subs. 35A(1)(1B) *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018.*

[5] Division 82 (sabotage) and Division 91 (espionage) of the *Criminal Code Act 1995* (Cth) were substantially amended by the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018*.

[6] Australian Citizenship Act 2007 (Cth), s 36.

Whilst under international law states have the right to determine who their nationals are, that right is not absolute and cannot be exercised in an arbitrary manner.[7] Under international law to which Australia has agreed to be bound, the removal of citizenship must only be done for a legitimate purpose, being the least intrusive way of achieving the desired result and done in a proportionate matter.[8]

States must also respect the rights of individuals to a nationality and not to be rendered stateless, among other matters. The right to a nationality was articulated in 1948 in the *Universal Declaration of Human Rights* that states that "[e]veryone has the right to a nationality" and that "no one should be arbitrarily denied the right to his nationality". Under international law, Australia has also agreed to guarantee:

- the right to leave and enter one's own country;[9]
- that it will not deprive a person of their nationality if to do so would render them stateless;[10]
- that it will not return a person to risk of persecution on the basis of race, race, religion, nationality, membership of a particular social group or political opinion;[11]
- the preservation of the nationality of children and protection of the family unit;[12] and
- to act in the best interests of the child.[13]

The Bill places all of these rights at an unacceptable and unnecessary level of risk. As this submission sets out, the Bill's impact on human rights is manifestly disproportionate to its aims, in violation of Australia's international law obligations.

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[7] Report of the Secretary-General, 13th sess, Agenda item 3, UN Doc A/HRC/13/34, (14 December 2009) 5–6 [19–22]

[8] Report of the Secretary General, 25th sess, Agenda items 2 and 3, UN Doc A/HRC/25/28, (19 December 2013), 4 [4-5].

[9] *International Covenant on Civil and Political Rights,* 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), article 12.

[10] *Convention on the Reduction of Statelessness*, 30 August 1961, UNTS 989 (entered into force 13 December 1975), article 8(1).

[11] Australia has a number of obligations to ensure that a person is not returned or *refouled*, including under the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS (entered into force 22 April 1954), article 33; *International Covenant on Civil and Political Rights,* 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), articles 6 and7; *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 4 February 1985, 1465 UNTS (entered into force 26 June 1987), article 3.

[12] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS (entered into force 2 September 1990), article 8(1).

[13] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS (entered into force 2 September 1990), article 3.

4. Expanding the underlying offences

4.1 Associating with a terrorist organisation

The Bill expands the list of offences that can the trigger removal of citizenship to include the offence of "associating with a terrorist organisation".[14] This offence, already problematic in the *Criminal Code Act 1995* (Cth) (**Criminal Code**), should not form the basis of revoking Australian citizenship.[15]

We share the Law Council of Australia's concern about the inclusion of this offence in the Bill, which as an offence in the Criminal Code criminalises a person's associations as opposed to conduct. As it stands in the Criminal Code, the offence of associating with a terrorist organisation is too broad and imprecise and criminalises association and free speech that underpins Australian democracy. For example, there is a real risk that innocuous conversations or assistance provided at social gatherings or festivals could be criminalised.[16]

This issue is compounded by the broad statutory criteria for listing an organisation as a "terrorist organisation", which has been described as "inescapably political [in] nature".[17] For instance, the Kurdish Worker's Party (**PKK**) was listed as a terrorist organisation in December 2005, despite concerns raised at the lack of evidence that the PKK posed a threat to Australians or Australia's national security.[18] As recognised by this Committee late last year, the PKK is "intertwined with complex notions of Kurdish identity, culture and political aspirations", and "engaging in general discourse in support of Kurdish autonomy and cultural rights could fall within the ambit of criminal

[14] Section 102.8 of the *Criminal Code Act 1995* (Cth).

[15] It is an offence if, on 2 or more occasions, a person "intentionally associates" with another person who is a member of or "promotes" a terrorist organisation, the person intends that "the support assist the organisation expand or continue to exist" and the association in fact provides "support" to the organisation: *Criminal Code Act 1995* (Cth) s 102.8.

[16] Law Council of Australia, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*, Submission 14, 16 January 2019, [36].

[17] Golder, Ben; Williams, George --- "What is 'Terrorism'? Problems of Legal Definition" (2004) 27(2) UNSW Law Journal 270; see also Lister, C, quotes in T Shelton, "What is terrorism? The controversial label that is used and abused around the world" *ABC News*, 3 August 2018, available at <https://www.abc.net.au/news/2018-07-21/how-the-word-terrorism-is-used-and-misused-across-the-globe/9862124>.

[18] See 2006 minority report responding to this Committee's review of the Governor-General's decision to list the PKK as a terrorist organisation on 15 December 2005, where Duncan Kerr SC MP (a former Federal Court judge) and Senator John Faulkner noted that the previous acts of violence attributed to the PKK by ASIO (protest leading to damage to foreign consulates) did not "remotely resemble acts of terrorism". The singling out of the PKK was, in their view, inconsistent with the treatment of other overseas political dissident groups.

offences".[19] According to the Committee's report, the law currently limits the freedom of political communication of an estimated 15,000 to 20,000 Australians of Kurdish origin.[20]

The consequences of this Bill could mean an Australian of Kurdish origin who loses their citizenship is deported to Turkey, Syria or Iran, where Kurdish people face varying levels of persecution,[21] in violation of Australia's obligation of non-refoulement under the *Refugee Convention*, *International Covenant on Civil and Political Rights* and the *Convention Against Torture*. Or, if they were unable to return because of the real threat of persecution, they would instead face indefinite immigration detention which has been found to be arbitrary detention.[22]

The Government has not provided any evidence for the need to broaden section 35A to include the association offence. In the circumstances, its inclusion is oppressive and goes well beyond what could reasonably be required to achieve the Government's stated purpose of protecting the community from emerging terrorist threats and upholding the integrity of Australian citizenship.

4.2 Removal of the six year sentence threshold

Section 35A of the *Australian Citizenship Act 2007* (Cth) currently states that the Minister may only determine that a person ceases to be an Australian citizen if that person has been given sentences of imprisonment that together total a minimum of six years. This six year threshold was an important safeguard introduced following a recommendation by this Committee made only three years ago, which recognised that loss of citizenship should only attach to serious conduct.[23]

The Bill would remove this threshold for relevant terrorist convictions, such that persons may be stripped of their citizenship despite having received very short sentences, or no sentence at all. It would mean that less serious instances of offending now carry the added penalty of loss of citizenship. For example, under the Criminal Code it is an offence simply to be in a "declared area" of a foreign country – that is, an area in which the Home Affairs Minister is satisfied that a listed terrorist organisation is engaging in hostile activity[24] – without a defence. Less serious offending under this provision may include, for example, unwittingly entering a declared area to attend a religious

[19] *Review of the Re-Listing of Five Organisations and the Listing of Two Organisations as Terrorist Organisations under the Criminal Code*, tabled 20 September 2018.

[20] *Review of the Re-Listing of Five Organisations and the Listing of Two Organisations as Terrorist Organisations under the Criminal Code*, tabled 20 September 2018, [3.56].

[21] Department of Foreign Affairs and Trade, *Country Information Report: Turkey*, 9 October 2018, [3.48]; *Country Information Report: Iran*, 7 June 2018, [3.12]*; Thematic Report on Conditions in Syria*, 23 October 2017, [3.5].

[22] Human Rights Committee, *Concluding observations on the sixth periodic report of Australia,* CCPR/C/AUS/CO/6 (1 December 2017), [37].

[23] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, recommendation 7 and [6.21].

[24] See section 119.2 of the *Criminal Code Act 1995* (Cth).

pilgrimage or visit friends.[25] The Government has provided no explanation as to why it now regards less serious conduct such as this to be a sufficient basis for taking the extraordinary step of revoking citizenship.

The Senate Standing Committee for the Scrutiny of Bills recognised that the removal of this minimum sentencing may "unduly trespass on personal rights and liberties".[26]

By removing the requirement for a 6 year sentence, the Bill exposes people to removal of their citizenship for disproportionately minor offences, making people subject to arbitrary removal of their nationality. The six year threshold should not be removed.

4.3 Retaining offences of sabotage and espionage

In 2018, the offences of espionage and sabotage were amended in the Criminal Code.[27] The new offences of espionage and sabotage are extremely broad[28] and undermine the implied freedom of political communication.[29] This Bill exacerbates these problems. It makes conviction for these offences a basis upon which a Minister can revoke a person's citizenship provided they are sentenced to six or more years for either offence.

It may be valid in human rights law for states to deprive citizens of nationality where they commit acts that are seriously prejudicial to the vital interests of the state, including possibly some instances of espionage and sabotage.[30] However, the acts should (a) be seriously prejudicial to the vital interests of the state and (b) removal of citizenship in these circumstances should not be allowed if it would render a person stateless.[31] The Bill is problematic on both fronts.

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[25] G Williams, P Sangeetha, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*, Submission 1, 20 December 2018, 4.

[26] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 15 of 2018* (2018) 3 [1.8].

[27] Division 91 of the Criminal Code. Espionage now includes "dealing" with information that concerns Australia's "national security" with an intent to or being reckless as to whether the conduct will "prejudice Australia's national security" or "advantage the national security of a foreign country", where the information will be made available to a foreign principal. "National security" extends to Australia's political or economic relations with another country (section 90.4(1)(e)) and "prejudice" includes "harm" which is greater than "embarrassment" (section 90.1). Further, the Attorney-General's Department has confirmed that, for the purposes of the offence, information can be made available to a foreign principal by publishing it as news to the public at large: PJCIS, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, [6.21].

[28] C O'Rourke, P Oosting, D Ritter, S Bose and H Ryan, "Trusting the government to protect civil liberties? That's a sick joke" *The Guardian*, 13 June 2018.

[29] G Williams, "National security isn't served by convenient bipartisanship", *The Australian*, 11 June 2018.

[30] Report of the Secretary General, 25th sess, Agenda items 2 and 3, UN Doc A/HRC/25/28, (19 December 2013), 4 [12-13].

[31] Report of the Secretary General, 25th sess, Agenda items 2 and 3, UN Doc A/HRC/25/28, (19 December 2013), 4 [12-13].

Further, the new espionage offence provisions extend to possibly criminalising reporting on matters of serious misconduct by the Government if it harms Australia's political or economic relationship with another country or countries. For instance, if the journalists at the ABC and The Guardian reported on Australian intelligence services' extraordinary decision to tap Indonesian President Susilo Bambang Yudhoyono's phone now, they could face charges for espionage and up to life in prison.

The new sabotage offences are similarly overbroad.[32]

On the face of these provisions, it is possible that limiting or preventing access to any Commonwealth building or road, or access to virtually any commercial building or store, with the intent to expose an issue that will cause harm to Australia's international reputation, is a criminal offence. When asked whether sabotage captures otherwise lawful dissent and protest, such as blockades, sit-ins or picketing outside public infrastructure, the Attorney-General's Department did not deny it, but implied this would be unlikely as the prosecution must prove beyond reasonable doubt that the person accused intended to prejudice Australia's national security.[33] However, it is conceivable that blockading a road to an export coal mine with an intent to disrupt the sale of coal overseas could potentially fall foul of the new provisions and attract a penalty of 20 years imprisonment.[34]

If passed, this Bill would further undermine the freedom of political communication in Australia and make the situation for journalists and activists much worse: they would not only face heavy prison sentences, but could have their citizenship revoked. Insofar as the Bill makes espionage and sabotage a basis for citizenship removal, it should not apply to offences in which the underlying conduct is comprised of otherwise lawful reporting, dissent and protest that does not amount to an act seriously prejudicial to the interests of the State. Such conduct should clearly be excluded from proposed subsection 35A(1)(1B) of the Bill.

4.4 Reducing the threshold for determining dual citizenships

The Bill would reduce the threshold for determining dual citizenship, which currently requires that the person be a national or citizen of a country other than Australia at the time when the Minister makes the determination. Proposed section 35A(1)(b) would change this assessment to a subjective fact, whereby the Minister must be "satisfied" that the person would not become a person who is not a

[32] Sections 82.3 to 82.6 of the *Criminal Code* criminalises conduct that results in "damage to public infrastructure" where the person intended that, or is reckless as to whether, the conduct will prejudice Australia's national security, or advantage the national security of a foreign country. "Damage to public infrastructure" includes conduct that "limits or prevents access to it or any part of it by persons who are ordinarily entitled to access it or that part of it". "Public infrastructure" is defined to include "any infrastructure, facility, premises, network or electronic system that belongs to the Commonwealth" *or that* "belongs to or is operated by a constitutional corporation or is used to facilitate constitutional trade and commerce".

[33] Attorney-General's Department, *Review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, Submission 6.1, [87]-[88].

[34] P Karp, "Espionage Bill could make some protests criminal acts, says GetUp" *The Guardian*, 26 June 2018.

national or citizen of any country. Questions of subjective fact are harder to challenge in the courts, as the Minister's assessment of dual nationality or citizenship need not be correct, but only reasonably open on the evidence, made according to law, and not irrational, illogical, or affected by bias.[35]

As recognised in the Australian Human Rights Commission's submission, a person's foreign citizenship status involves technical considerations of foreign law and can be difficult to resolve.[36] The current Act applies in situations where people are not aware of their dual citizenship and have never been to the other country of citizenship.[37]

So much was made evident by the 2017/2018 parliamentary eligibility crisis after questions were raised about the citizenship status of sitting members and the validity of their election given section 44 of the Constitution. The complications of determining citizenship status under foreign law, particularly for Australian-born citizens, are well illustrated by the cases of Senator Matthew Canavan,[38] MP Barnaby Joyce[39] and former MP John Alexander.[40]

Under this Bill, it is entirely possible that the Minister would make an incorrect but reasonable assessment that a person is a national of another country, a decision that could not be challenged in the courts. Thus, and as noted by the Scrutiny of Bills Committee, this amendment makes it more likely that a person will end up stateless.[41] As recognised by this Committee in its 2015 Report, Australia is a party to the *1961 Convention on the Reduction of Statelessness*, article 8 of which requires that states not "deprive a person of his nationality if such deprivation would render him stateless". This article gives effect to article 15 of the *Universal Declaration of Human Rights*.

Further, if the Australian Government is then unable to return a person to their country of citizenship, the person would be at risk of arbitrary and indefinite detention under the *Migration Act 1958*. This, too, is contrary to international law, under article 9 of the ICCPR.

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[35] Australian Commission for Human Rights, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*, Submission 4, 10 January 2019, [44],

[36] Australian Commission for Human Rights, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*, Submission 4, 10 January 2019, [47].

[37] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, [7.109].

[38] *Re Canavan* [2017] HCA 45, [74]-[87].

[39] *Re Canavan* [2017] HCA 45, [105].

[40] A Gartrell, B Shields, "Citizenship crisis: Turnbull Government MP John Alexander may be a dual citizen", *The Sydney Morning Herald*, 7 November 2017.

[41] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 15 of 2018* (2018), 4.