Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security

10 January 2018

Submission re: *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*

Dear Chair,

The *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* ('the Bill') seeks to lower the threshold for revocation of Australian citizenship (whether acquired by birth or by conferral) for offences relating to terrorism and associated acts.

In doing so, it raises serious concerns.

Many of these concerns are outlined in Scrutiny Digest 15 of 2018 from the Senate Standing Committee for the Scrutiny of Bills.

I restate some of these concerns, add my comments, and identify further concerns:

1.1 In removing the requirement under the current *Australian Citizenship Act 2007* (as amended in 2015) that a convicted Australian citizen must have been sentenced to a minimum of six years' imprisonment before a ministerial determination can be made to revoke that person's citizenship, the Bill would allow for revocation following a short prison sentence or no sentence at all (as the Explanatory Memorandum to the Bill states, this would apply to 'offences in relation to associating with a terrorist organisation for the purpose of supporting the terrorist organisation to expand or continue to exist', an offence carrying a maximum penalty of three years' imprisonment). The Bill, as the Scrutiny of Bills Committee states, would thus give the Minister greatly expanded discretionary powers, potentially trespassing on personal rights and liberties, including those of the person's family.

1.2 Importantly, I add, it would also erode the principle that punishment should be proportionate to the offence, and that the severity of the penalty is the principal indicator of an offence's seriousness. It should be borne in mind that the High Court held (in *Roach v Electoral Commissioner* 2007) that the disenfranchisement of prisoners serving a prison sentence of less than three years was unconstitutional; the severity of

the measure – temporary loss of the right to vote – was disproportionate to the offence and its application was arbitrary. The principle captured in this conclusion would apply equally – indeed, *a fortiori* - to the revocation of citizenship for offences attracting relatively short prison sentences. Albeit in the context of a law for disenfranchisement, Chief Justice Gleeson's statement in *Roach* is apposite:

> 'The adoption of the criterion of serving a sentence of imprisonment as the method of identifying serious criminal conduct for the purpose of satisfying the rationale for treating serious offenders as having severed their link with the community … breaks down at the level of short-term prisoners.'

1.3 Revocation of citizenship constitutes an extremely severe response to criminal conduct. It is intended as a drastic measure. The loss of citizenship creates a cascade of other losses for the person affected: these include political rights, access to diplomatic assistance overseas, security of abode, among many others. There can be no doubt that acts of terrorism deserve the severest response under the law. Citizenship revocation, indeed, is designed to send a message about the egregious and exceptional nature of terrorism. This message, I suggest, will be seriously diluted if it applies to offences that attract relatively short sentences.

2.1 In designating certain offences as amounting to repudiation of allegiance to Australia, the Bill, I suggest, creates further concerns of a constitutional nature. In the absence of an express constitutional head of legislative power over 'citizens' or 'citizenship', the Commonwealth's power to pass laws with respect to citizenship is derived, principally, from its power over 'aliens' (section 51(xix) of the Constitution). Citizens, the High Court has ruled, are persons who owe allegiance to Australia. Aliens are persons who do not. Thus, the power to pass citizenship laws rests upon this distinction in allegiance, and thereby connects citizenship to the aliens power.

2.2 Importantly, the High Court has concluded (in *Pochi v Macphee* 1982) that Parliament 'cannot, simply by giving its own definition of "alien", expand the [aliens] power … to include persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word.' This statement has been reaffirmed by the High Court on a number of occasions. By parity of reasoning, Parliament could not define 'allegiance' to mean anything it chooses; it could not define repudiation of allegiance – and therefore loss of citizenship – to include conduct that had little resemblance to the ordinary understanding of allegiance. It could not, to give an extreme example, define repudiation of allegiance to be evidenced by failure to pay parking fines.

2.3 Under the Bill's provisions, as noted, offences that attract relatively short prison sentences would be identified as examples of a person's repudiation of allegiance to Australia. There is a possibility that the High Court would find such provisions to be

unconstitutional, lacking a sufficient connection with the constitutional power over aliens and (thereby) citizens, which rests upon the principle of allegiance. This is not merely a technical point, but goes to the heart of what the law identifies as true citizenship, and raises fundamental questions about the constitutional limits of parliamentary power in determining who is and who is not an Australian citizen.

3.1 The Bill would also remove the current requirement that an Australian citizen must hold the citizenship of another country before they could be deprived of Australian citizenship (in order to guard against creating statelessness, contrary to Australia's international obligations) and would replace it with the requirement that the Minister be 'satisfied' that the person would not become stateless as a consequence of loss of Australian citizenship.

3.2 Under the current Act a person cannot have their citizenship revoked unless the person is 'a national or citizen of a country other than Australia'. This current provision requires certainty that the person holds an alternative citizenship. The Minister's 'satisfaction' does not mandate a similar level of certainty.

3.3 The Explanatory Memorandum to the Bill points out that the test of ministerial 'satisfaction' that revocation of citizenship would not render a person stateless is already found in section 34 of the current Act. This section, however, concerns the revocation of citizenship acquired by conferral, and applies to persons who commit offences or fraud in relation to or during the process of applying for citizenship. It indicates that the Australian citizenship of such persons was not obtained or held validly. Their situation is importantly different from cases where a person holds Australian citizenship that has been acquired legitimately under Australian law.

3.4 It should also be noted that revocation of citizenship under section 34 is subject to merits review through the Administrative Appeals Tribunal. Merits review is, however, not available with regard to a ministerial decision to revoke citizenship for terrorism or associated offences. Factual error in deciding that a person holds foreign citizenship and will not be rendered stateless by revocation of their Australian citizenship may, thus, remain uncorrected.

3.5 Under rules of international law, the grant of citizenship is a core sovereign power of each country. In the absence of proof of an official grant or confirmation of citizenship from the relevant country, the determination of a person's foreign citizenship or even eligibility for foreign citizenship cannot be certain. It cannot be made by another country. Australia's Minister may be 'satisfied' that a person holds foreign citizenship, but the foreign country in question may not. (At the time of making this submission, such a clash has been well illustrated in the case of the Australian-born terrorist Neil Prakash.)

3.6 The Bill's potential to allow for mistakes about a person's foreign citizenship, and thus to create statelessness, is high, notwithstanding the statement in the Bill's Explanatory Memorandum that the new provision is not intended to 'allow the Minister to determine that a person ceases to be an Australian citizen in breach of Australia's international obligations regarding statelessness.' As the Scrutiny of Bills Committee also notes, the Bill has the potential to render an ex-citizen subject to indefinite detention while awaiting the decision of another country to accept that person as one of their own.

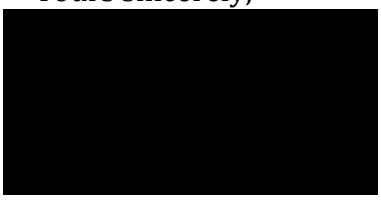
3.7 The provision under the current Act – requiring a citizen to be 'a national or citizen of a country other than Australia' before their Australian citizenship can be revoked – should be retained and strengthened. The Minister's decision concerning a person's foreign citizenship, as the Scrutiny of Bills Committee suggests, should be reviewable for factual correctness. As noted above, merits review of the Minister's decision is not available (regarding revocation for terrorist offences). To avoid factual error, merits review should be available before revocation of Australian citizenship takes effect.

The protection of Australians from terrorism is a vital and legitimate goal. None of these concerns suggests otherwise. But so, too, is the protection of the integrity of Australian citizenship from erosion by legislation that overlooks or seeks to set aside core legal and constitutional principles.

For these reasons, I submit that the Bill should not be passed.

I thank the Committee for the opportunity to make this submission.

Yours sincerely,



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