



THE LAW SOCIETY
OF NEW SOUTH WALES

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14 January 2018

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: natasha.molt@lawcouncil.asn.au

Dear Mr Smithers,

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

Thank you for the opportunity to contribute to a Law Council submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (“the Bill”).

The views of the Law Society have been informed by our Human Rights Committee. Given the short timeframe available for review, we provide brief comments.

The intention of the Bill

The Bill seeks to amend the *Australian Citizenship Act 2007* (“the Act”) with a view to:

- removing the current requirement for “cessation of citizenship on determination by the Minister” under s 35A(1) of the Act that a person has been sentenced to 6 years or more for terrorism offences; and
- allowing the Minister to make a determination if they are satisfied that the person would not, if the Minister were to determine that the person ceases to be an Australian citizen, become a person who is not a national or citizen of any country. This would lower the threshold as it currently stands in the Act, which at s 35A(1)(c) requires that “the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination”.

The UN Convention on the Reduction of Statelessness

The *UN Convention on the Reduction of Statelessness* (“the Convention”), to which Australia has acceded¹, allows for loss of nationality where the Contracting State has specified its right to deny nationality in circumstances where the person, inconsistently with his or her duty of loyalty to the Contracting State, has:

¹ Accession has the same legal effect as ratification: Articles 2(1)(b) and 15, *Vienna Convention on the Law of Treaties 1969*.

- conducted him or herself in a manner seriously prejudicial to the vital interests of the State (Article 8(3)(a)(ii)); or
- taken an oath, or made a formal declaration of allegiance to another State, or given definite evidence of his or her determination to repudiate his or her allegiance to the Contracting State (Article 8(3)(b)).

With respect to the deprivation of citizenship, Article 8(4) of the Convention provides that:

A Contracting State shall not exercise a power of deprivation permitted by... this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

We note that Australia did not specify its right to deny nationality at the time of accession to the Convention.

The power to determine that a person ceases to be a citizen

With regard to the powers provided for in the Bill, we note that the High Court of Australia has determined that Parliament can, within limits, determine the circumstances in which citizenship may be lost. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [2002] HCA 48 Gleeson CJ identified that Parliament has the power to “create and define the concept of Australian citizenship [and] to prescribe the conditions on which it may be acquired and lost”.² In *Hwang v The Commonwealth* [2005] HCA 66 McHugh J identified that while Parliament has power to “define the conditions on which membership of the Australian community – that is to say, citizenship – depends”, that power is not unlimited. The High Court has provided little guidance on what those limits may be.³

Adjusting the threshold for determining dual citizenship

The Explanatory Memorandum to the Bill states that the Bill seeks to:

Adjust the threshold for determining dual citizenship, from the current requirement that the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination that a person ceases to be an Australian citizen, and replace it with a requirement that the Minister is satisfied the person will not become a person who is not a national or citizen of any country.

The Explanatory Memorandum further states that “this [threshold] is consistent with other provisions of the Citizenship Act” and that:

It is well-established under case law that where statute provides a Minister must be ‘satisfied’ of a matter, it is to be understood as requiring the attainment of that satisfaction reasonably.

The Law Society is concerned that, under the Bill, a person could be lose their citizenship on the basis of the Minister’s state of satisfaction as opposed to whether they will, as a matter of fact, be rendered stateless. The threshold could also be lawfully achieved without the Minister initiating inquiries to determine whether the other country recognises the person as a citizen. The recent case of Neil Prakash highlights the potential for the exercise of powers under s 35A of the Act to render a former Australian citizenship stateless, and casts doubt on the assertion in the Explanatory Memorandum that:

² *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [2002] HCA 48, 31.

³ *Hwang v The Commonwealth* [2005] HCA 66, 18.

it is not the intention that new paragraph 35A(1)(b) would allow the Minister to determine that a person ceases to be an Australian citizen in breach of Australia's international obligations regarding statelessness.

It is the view of the Law Society that any decision regarding cessation of citizenship should be subject to merits review before the Administrative Appeals Tribunal. We note that this would require amendments to s 52 of the Act.

Thank you for the opportunity to provide comments on this issue. Questions may be directed to Andrew Small, Policy Lawyer, at (02) 9926 0252 or andrew.small@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Espinosa". The signature is written in a cursive, flowing style with some loops and flourishes.

Elizabeth Espinosa
President