



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/EEas: 1784270

8 October 2019

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

By email: christopher.brown@lawcouncil.asn.au

Dear Mr Smithers,

Review into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

Thank you for the opportunity to contribute to a Law Council submission to the Parliamentary Joint Committee on Intelligence and Security ("PJCIS") review of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 ("the Bill").

The views of the Law Society have been informed by our Human Rights Committee.

1. The intention of the Bill

The Bill amends existing sections 33AA, 35 and 35A of the *Australian Citizenship Act 2007* ("the Act"). It also introduces a Ministerial decision-making requirement in place of existing provisions in the Act which provide that a person can automatically cease their Australian citizenship through conduct. In this respect, the Bill implements recommendations from the September 2019 review by the Independent National Security Legislation Monitor into the operation, effectiveness and implications of terrorism-related citizenship loss provisions in the Act ("INSLM review"). The INSLM review found that the 'operation of law provisions' in the Act operate in an uncontrolled and uncertain manner, are in breach of Australia's obligations under the *Convention on the Rights of the Child* (CRC), and lack proper review. The INSLM review recommended that these provisions:

...should, with some urgency, be repealed with retrospective effect, but be simultaneously replaced with a Ministerial decision-making model (and thus with constitutionally entrenched judicial review).¹

The Bill retains the three ways in which an Australian citizens can be considered for citizenship cessation under the Act:

- the person has engaged in terrorism-related conduct which demonstrates that the person has repudiated their allegiance to Australia (proposed s 36B(1));
- the person serves in the armed forces of a country at war with Australia or fights for a declared terrorist organisation (proposed s 36B(5)(j) of the Bill);

¹ James Renwick SC, 'Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007' (September 2019) xi.

- the person has been convicted of a specified terrorism-related offence under the *Criminal Code Act 1995* (Cth) which has resulted in a period of imprisonment of at least three years (proposed s 36D). This changes the current threshold in s 35A of the Act, which requires a term of imprisonment of at least six years.

The Minister cannot make a determination to cease citizenship if the Minister “is satisfied that the person would, if the Minister were to make the determination, become a person who is not a national or citizen of any country” (proposed s 36B(2) and s 36D(2)). This differs from the more categorical requirement currently in the Act that the citizenship revocation provisions can only apply to a person “who is a national or citizen of a country other than Australia”. The Bill also introduces a public interest test that the Minister must consider when making a decision under s 36B or s 36D, and provides a mechanism for a person to be notified of the Minister’s determination.

2. The position of the Law Society

2.1. Repeal of the ‘operation of law provisions’ in the Act

In the Law Society’s **enclosed** prior submission on the citizenship revocation provisions dated 24 April 2019 we raised concerns with the self-executing nature of ss 33AA and 35 of the Act, and the lack of judicial review available. We are pleased that the Bill replaces the problematic self-executing provisions of the Act with a Ministerial decision-making model, with decisions reviewable in the High Court of Australia under s 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903* (Cth).

2.2. Merits review of citizenship cessation decisions under the Bill

While the Bill implements certain recommendations of the INSLM review, it fails to implement the recommendation that “there should be merits review in the SAD [Security Appeals Division of the Administrative Appeals Tribunal] as to whether there could have been or is reasonable satisfaction as to the existence of the requisite conduct for citizenship loss”.² Given the severity of the consequence of the exercise of the Minister’s discretion under the Bill, we submit that it should be amended to include provision for merits review in the SAD, per the INSLM recommendation.

2.3. Express limitation on natural justice

Proposed sections 36B(11), 36D(9), 36F(7), 36G(8), and 36J(8) of the Bill provide that natural justice does not apply in relation to the Minister’s exercise of his or her powers under these sections. Proposed section 36H(3) provides that natural justice does apply in circumstances where a person has applied to the minister in writing for a revocation of the determination to cease their citizenship. The Explanatory Memorandum for the Bill states that “[n]atural justice has not been removed, it is to be afforded at a later point in time”.³ Notwithstanding this explanation, the Law Society is concerned that the express limitation on natural justice in the Bill leaves significant scope for arbitrary decision making in relation to the citizenship cessation provisions.

2.4. Applicability of the citizenship loss provisions to children

Under the Bill, the Minister can make a determination under s 36B (“citizenship cessation determination for certain conduct”) in relation to any person aged 14 years of over. Section 36D (“Citizenship cessation determination for certain convictions”) could in theory apply to any

² Ibid xv.

³ Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, 20.

person aged 10 years or over, as this is the minimum age of criminal responsibility in the *Criminal Code Act 1995* (Cth). While the Explanatory Memorandum for the Bill states that “the Government must consider the protection of the Australian community alongside the best interests of the child”,⁴ we query whether these provisions comply with the CRC, which protects a child’s right to identity, nationality, and family relations, and provides at Article 3(1) that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2.5. Executive overreach and potential for infringement of Chapter III of the Constitution

Proposed section 36B(1) empowers the Minister to determine in writing that a person aged 14 or older ceases to be an Australian citizen if the Minister is satisfied that the person engaged in certain specified terrorism-related conduct. In contrast to proposed s 36D, there is no requirement under this section that the person has actually been convicted of an offence, either in Australia or any other jurisdiction. The Law Society is concerned that this represents executive overreach. We note that in the case of *Djalil v MIMIA* [2004] FCAFC 151, the Full Court of the Federal Court of Australia affirmed that:

“It is a fundamental principle of the Australian Constitution, flowing from Chapter III, that the adjudication and punishment of criminal guilt for offences against a law of the Commonwealth is exclusively within the province of courts exercising the judicial power of the Commonwealth.”⁵

The Full Court went on to state that Commonwealth legislation will collide with Chapter III of the Constitution if “on its true construction, it authorises the Executive to impose punishment for criminal conduct”.⁶ It is arguable that the cessation of citizenship at the Minister’s discretion under s 36B amounts to a punishment for criminal conduct in the absence of a judicial ruling.

2.6. Adjusting the threshold for determining dual citizenship

The Explanatory Memorandum for the Bill notes that:

The requirement [in the Bill] that the Minister be satisfied that a person would not become a person who is not a national or citizen of any country differs slightly from the formulation in the provision in existing section 35 of [the Act]. Currently, a person’s citizenship can only cease under existing section 35 of [the Act] if, as a matter of fact, they are a national or citizen of another country.⁷

This replicates the change that was proposed by the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018. The Law Society continues to hold concerns about the potential for this proposal to conflict with Australia’s obligations under the *Convention on the Reduction of Statelessness* as summarised in our **enclosed** submission dated 14 January 2019.

2.7. Reduction in the sentence threshold for cessation of citizenship

Proposed section 36D(1) states that the Minister can determine that a person ceases to be an Australian citizenship if they have been convicted of a specified terrorism-related offence

⁴ Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, 12.

⁵ *Djalil v MIMIA* [2004] FCAFC 151, 58.

⁶ *Ibid.* 73.

⁷ Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, 20.

under the *Criminal Code Act 1995* (Cth) which has resulted in a period of imprisonment of at least three years. As noted above, this is a reduction in the current threshold in s 35A of the Act, which requires a term of imprisonment of at least six years. The Bill's Explanatory Memorandum states that "[a] sentence of imprisonment for a period of at least 3 years, or periods that total at least 3 years reflects the seriousness of a criminal conviction for one of the terrorism-related offences specified in new subsection 36D(5)."⁸ We submit that the existing requirement in the Act of a sentence of a least six years is an appropriate threshold and should remain.

2.8 Declaration of declared terrorist organisation

Section 36C empowers the Minister, by legislative instrument, to declare an organisation a "declared terrorist organisation" where the conditions under s 36C(2) are satisfied. The conditions are:

- (2) Before declaring that an organisation is a declared terrorist organisation, the Minister must be satisfied on reasonable grounds that the organisation:
- (a) either:
 - (i) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
 - (ii) advocates the doing of a terrorist act; and
 - (b) is opposed to Australia, or to Australia's interests, values, democratic beliefs, rights or liberties, so that if a person were to fight for or be in the service of such an organisation the person would be repudiating their allegiance to Australia.

Section 36C is relevant to s 36B of the Bill, which states that the Minister can cease a person's Australian citizenship if that person has engaged in conduct including "fighting for, or being in the service of, a declared terrorist organisation." Section 36C in the Bill replicates the wording in s 35AA of the Act; in this regard, we support the proposal contained in the Law Council's submission to the Parliamentary Joint Committee on Intelligence and Security dated 16 July 2019 that would amend the criteria for "declared terrorist organisation" to provide a tractable legal benchmark, enhancing the provision's clarity and – thereby – its utility to a reviewing court or tribunal.⁹

3. Additional comments

The Law Society reiterates the concern raised in our **enclosed** submission dated 24 April 2019 that the operation of the citizenship cessation provisions does not allow for consideration of a person's prospects of rehabilitation or their demonstrated rehabilitation and remorse. We also note, once again, the observation of Pillai and Williams that "singling out dual citizens for citizenship revocation is 'counter-productive' to domestic national security objectives" as it "undermines key counter-radicalisation measures aimed at building community cohesion and social harmony".¹⁰ While the amendments in the Bill represent an improvement on certain aspects of the Act, they do not address these concerns.

The Law Society also notes that as a party to the Rome Statute of the International Criminal Court, Australia has a duty to exercise its criminal jurisdiction over those responsible for international crimes and prosecute perpetrators of genocide, crimes against humanity, war

⁸ Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, 18.

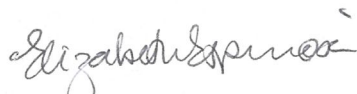
⁹ Submission from the Law Council of Australia to the Parliamentary Joint Committee on Intelligence and Security, 'Review of the Australian Citizenship renunciation by conduct and cessation provisions of the *Australian Citizenship Act 2007* (Cth)' (16 July 2019) 4.

¹⁰ Sangeetha Pillai and George William, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia' (2017) 41 *Melbourne University Law Review* 845.

crimes, and the crime of aggression. By revoking the citizenship of alleged foreign fighters under s 36B of the Bill, Australia cannot discharge these duties in our domestic court system.¹¹ This gives rise to so-called 'risk exportation', whereby a problem is simply shifted to the responsibility of another State, potentially compromising the international solidarity and cooperation needed to combat terrorism.¹²

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

Yours sincerely,



Elizabeth Espinosa
President

Enc.

¹¹ Shiva Jayaraman, 'International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters' (2016) 17 *Chicago Journal of International Law* 178, 212; Susan Hutchinson, *The Debate over Australia Stripping Citizenship from Terrorists*, Lowy Institute (21 December 2018).

¹² Dr Christophe Paulussen, 'Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive' (17 October 2018). International Centre for Counter-Terrorism: The Hague.



THE LAW SOCIETY
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Our ref: HRC/EEas: 1680470

24 April 2019

Mr Jonathan Smithers
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Dear Mr Smithers,

Review of the Citizenship Revocation Provisions by the Independent National Security Legislation Monitor

Thank you for the opportunity to contribute to a Law Council submission to the Independent National Security Legislation Monitor ("INSLM") review into the citizenship revocation provisions in the *Australian Citizenship Act 2007* (Cth).

The views of the Law Society have been informed by our Public Law and Human Rights Committees.

1. Provisions of the *Australian Citizenship Act 2007* (Cth) under review

The referral to the INSLM concerns the following sections of the *Australian Citizenship Act 2007* (Cth) ("the Act"):

- Section 33AA (renunciation by conduct);
- Section 35 (service outside Australia in armed forces of an enemy country of a declared terrorist organisation); and
- Section 35A (conviction for terrorism offences and certain other offences).

These sections ("the Citizenship Revocation Provisions") were inserted into the Act by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth). The Explanatory Memorandum accompanying the *Australian Citizenship Amendment (Allegiance To Australia) Bill 2015* (Cth) ("the Bill") stated that the desired outcome of the Bill was to "ensure the safety and security of Australia and its people and to ensure the Australian community is limited to those persons who continue to retain an allegiance to Australia."¹ The Bill, as passed by both Houses of Parliament, includes the following purpose clause:

This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian

¹ The Parliament of the Commonwealth of Australia, '*Australian Citizenship Amendment (Allegiance to Australia) Act 2015: Revised Explanatory Memorandum*'.

community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.²

The Law Society has previously made submissions on the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) and the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (Cth). We attach those submissions, dated 14 July 2015 and 14 January 2019 respectively, to this letter.

2. Operation, effectiveness and implications of the Citizenship Revocation Provisions

2.1 Section 33AA of the Act

a) Operation of self-executing clauses

Sections 33AA(1) and 33AA(2) of the Act operate automatically, so that if a person aged 14 or older undertakes the conduct specified at s 33AA(2) and meets the intent specified at ss 33AA(3) to (5) they automatically cease to be an Australian citizen. Section 33AA(10) of the Act requires the Minister to provide written notice to a person informing them that they have breached the Act and their citizenship has ceased – however the Act specifies that it is the person's action, not the Minister's notice that results in the revocation. The basis of the notice can be reviewed either in the High Court of Australia under s 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903* (Cth).

As the Law Council noted in its submission on the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth), s 33AA of the Act does not include a mechanism for determining whether the conduct that led to citizenship revocation occurred, or any standard of proof, and does not require a finding of guilt, either by a Court in Australia or any other jurisdiction. In addition, it is unclear how judicial review of actions taken under the Act would operate given that, as Bret Walker SC has observed, "the provision [s 33AA(1)] does not involve any exercise of discretion of a kind that can be judicially reviewed".³ The Parliamentary Joint Committee on Human Rights, in considering the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), also queried whether "judicial review, likely restricted to errors of law, will constitute effective review for the purposes of international law."⁴

We also note that s 33AA(3) of the Act requires the conduct specified at s 33AA(2) to be paired with the requisite intention. However, pursuant to s 33AA(4), a person is deemed to have the intention referred to in s 33AA(3) by virtue of being a member of or cooperating with a declared terrorist organisation. Foster, McAdam and Wadley have argued in the *Melbourne University Law review* that:

In light of these deeming provisions, it is difficult to ascertain how any meaningful assessment of the potentially exculpatory (mens rea) factors listed [in s 33AA(3)] could be undertaken.⁵

Although s 33AA of the Act is drafted so as to be 'self-executing', Pillai and Williams have argued that "[in] practice, it appears that such determinations [regarding the Citizenship

² *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), [4].

³ Bret Walker SC, 'Reflections of a Former Independent National Security Legislation Monitor', AIAL Forum No. 84, 76.

⁴ Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Thirty-Sixth Report of the 44th Parliament* (2016), 62 [2.177]

⁵ Michelle Foster, Jane McAdam and Davina Wadley, 'The Prevention and Reduction of Statelessness in Australia: an Ongoing Challenge' (2017) 40(2) *Melbourne University Law Review* 456, 491.

Revocation Provisions] will be made by the Citizenship Loss Board, an executive body created in early 2016".⁶ Pillai and Williams have further raised concerns that the Citizenship Loss Board is not mentioned in Australian legislation and "operates according to its own rules, free from typical administrative law constraints such as the requirement to make decisions reasonably and without bias".⁷

The operation of the Citizenship Loss Board was illuminated somewhat through the recent case of Neil Prakash. In comments following the cessation of Mr Prakash's citizenship, the Minister for Home Affairs stated that:

Mr Prakash's case was brought to my attention after careful consideration by the Citizenship Loss Board that Mr Prakash's Australian citizenship had ceased by virtue of his actions in fighting for Islamic State from May 2016.

Neither the Citizenship Loss Board nor I make decisions on whether an individual ceases to be an Australian citizen, as the provisions operate automatically by virtue of a person's conduct.⁸

The Minister also confirmed that the Citizenship Loss Board is comprised of senior officials from several government departments, law enforcement and security agencies.

The Law Society is concerned that the activities of the Citizenship Loss Board, and the processes it follows, are not defined within the *Australian Citizenship Act 2007* (Cth), and do not appear to be subject to judicial review. Furthermore, the significant role that the Citizenship Loss Board appears to play in the operation of the Citizenship Revocation Provisions raises questions over whether the provisions are indeed 'self-executing'.

b) Unintended consequences

The Law Society supports arguments made by the Law Council in its 2015 submission on the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) with respect to the difficulties that the operation of the Citizenship Revocation Provisions may cause for subsequent criminal trials. We note that if a person loses their citizenship, this may limit the ability of the Crown to prosecute the same person under Australian law in the future. One relevant provision is s 119.1 of the *Criminal Code Act 1995* (Cth) (entering foreign countries with the intention of engaging in hostile activities) which applies only to Australian citizens, residents and visa holders.

c) Express limitation on natural justice

Sections 33AA(22) and 35(17) of the Act state that natural justice applies only when the Minister decides whether or not to grant an exemption. Natural justice does not apply for any other of the Minister's powers under these sections, and does not apply to the Minister's consideration of whether or not to exercise its exemption power. The Law Society is concerned that this leaves significant scope for arbitrary decision making in relation to the Citizenship Revocation Provisions.

d) Australia's compliance with international human rights law

The Law Society has previously raised significant concerns regarding the impact of the Citizenship Revocation Provisions on Australia's compliance with our obligations under

⁶ Sangeetha Pillai and George Williams, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia' (2017) 41 *Melbourne University Law Review* 845.

⁷ *Ibid.*

⁸ The Minister for Home Affairs, 'Media Release: Prakash citizenship' (2 January 2019).

international human rights law. Please see our **enclosed** previous submissions for an articulation of these concerns.

In addition to the concerns raised previously, the Law Society also notes that as a party to the Rome Statute of the International Criminal Court, Australia has a duty to exercise its criminal jurisdiction over those responsible for international crimes and prosecute perpetrators of genocide, crimes against humanity, war crimes, and the crime of aggression. By excluding alleged foreign fighters from re-entry, Australia cannot discharge these duties in our Court system.⁹ This gives rise to so-called 'risk exportation', whereby a problem is simply shifted to the responsibility of another State, potentially compromising the international solidarity and cooperation needed to combat terrorism.¹⁰

2.2 Section 35 of the Act

a) Operation of self-executing clauses

Similarly to s 33AA, s 35 is purportedly self-executing. A person aged 14 or older automatically loses their Australian citizenship if they either: serve in the armed forces of a country at war with Australia; fight for, or are in the service of, a declared terrorist organisation (defined at s 35AA); and the person's service or fighting occurs outside Australia. The concerns of the Law Society regarding self-executing clauses outlined above also apply to the operation of s 35 of the Act.

Section 35(4) of the Act provides a defence for a person who is deemed to be in the service of a declared terrorist organisation if: the person's actions are unintentional; the person is acting under duress or force; or if the person is providing neutral and independent humanitarian assistance. As Foster et al have argued, however, "given the lack of a clear procedure to make such determinations... it is unclear how effective these potential defences could be in practice".¹¹

b) Australia's compliance with international human rights law

The concerns of the Law Society with regarding to Australia's compliance with the *UN Convention on the Reduction of Statelessness*, the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*, outlined in the attached prior submissions, also apply with respect to s 33AA.

2.3 Section 35A of the Act

a) Procedural fairness

Section 35A of the Act differs from ss 33AA and s 35 as it is not self-executing, and requires the Minister to make a determination in writing in order to revoke citizenship. The Minister may make such a determination if a person has been convicted of certain offences in the Criminal Code including treason, international terrorist activities using explosives or lethal devices, espionage, foreign interference and recruitment for terrorism. The person must have been sentenced to imprisonment for that conduct for at least six years, and the Minister

⁹ Shiva Jayaraman, 'International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters' (2016) 17 *Chicago Journal of International Law* 178, 212; Susan Hutchinson, *The Debate over Australia Stripping Citizenship from Terrorists*, Lowy Institute (21 December 2018).

¹⁰ Dr Christophe Paulussen, 'Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive' (17 October 2018). International Centre for Counter-Terrorism: The Hague.

¹¹ Michelle Foster, Jane McAdam and Davina Wadley, 'The Prevention and Reduction of Statelessness in Australia: an Ongoing Challenge' (2017) 40(2) *Melbourne University Law Review* 456, 491.

must be satisfied that it is not in the public interest for the person to remain a citizen, having regard to the factors outlined at s 35A(e).

Section 35A of the Act provides a higher degree of procedural fairness than the two other Citizenship Revocation Provisions under review. The section requires a determination of guilt by a Court, a custodial sentence, does not deny natural justice to the Minister's determination, and requires consideration of the best interests of the child as a primary consideration at the stage of revocation.

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

With regard to the powers in s 35A of the Act – and the Citizenship Revocation Provisions as a whole – 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”.¹² 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.¹³

3. Additional comments on the Citizenships Revocation Provisions

3.1 The risk of marginalisation and further radicalisation

The Law Society is concerned that the operation of the Citizenship Revocation Provisions does not allow for consideration of a person's prospects of rehabilitation, or indeed their demonstrated rehabilitation and remorse. As the Law Council noted in its 2015 submission on the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), this is inconsistent with Australia's justice system, which recognises the potential for offenders to be reformed.

We further note the observations of Dr Christophe Paulussen, a Research Fellow at the International Centre for Counter-Terrorism, who has argued that provisions allowing for deprivation of nationality are more likely to affect people from minority groups because they more often hold two nationalities, whereas states cannot deprive citizens that have only one nationality, to avoid statelessness.¹⁴

In this regard one needs to be mindful that exclusion, marginalisation and (perceived) discrimination can be one of the many factors that can play a role in people radicalising and joining extremist groups in the first place.¹⁵

In a similar vein, Pillai and Williams have argued that “singling out dual citizens for citizenship revocation is ‘counter-productive’ to domestic national security objectives” as it “undermines key counter-radicalisation measures aimed at building community cohesion and social harmony”.¹⁶

¹² *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [2002] HCA 48, 31.

¹³ *Hwang v The Commonwealth* [2005] HCA 66, 18.

¹⁴ Dr Christophe Paulussen, ‘Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive’ (17 October 2018). International Centre for Counter-Terrorism: The Hague.

¹⁵ *Ibid.*

¹⁶ Sangeetha Pillai and George William, ‘The Utility of Citizenship Stripping Laws in the UK, Canada and Australia’ (2017) 41 *Melbourne University Law Review* 845.

3.2 Suitability of other legislation

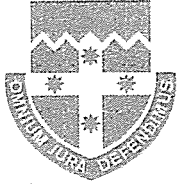
Prior to the Citizenship Revocation Provisions coming into effect, Australia had stringent legislation to address terrorism-related activities performed in other countries. Part 5.5 of the *Criminal Code Act 1995* (Cth) contains offences relating to foreign incursions and recruitment, with a maximum penalty of imprisonment for life. In cases where sufficient admissible evidence cannot be obtained to secure a conviction Under Part 5.5, Divisions 104 and 105 of the *Criminal Code Act 1995* (Cth) allow considerable obligations, prohibitions and restrictions to be imposed on a person in the form of a Control Order or Preventative Detention Order to achieve the purpose of protecting the public from a terrorist act or preventing the provision of support for a terrorist 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 blue ink that reads "Elizabeth Espinosa". The signature is written in a cursive style with a small flourish at the end.

Elizabeth Espinosa
President



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/EEas: 1629295

14 January 2019

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
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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*.

THE LAW SOCIETY OF NEW SOUTH WALES

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- 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 fluid and cursive, with a large initial "E" and a long, sweeping underline.

Elizabeth Espinosa
President