THE LAW SOCIETY
OF NEW SOUTH WALES

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22 December 2023

Dr James Popple
Chief Executive Officer
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By email: Janina.Richert@lawcouncil.asn.au

Dear Dr Popple,

Review of Subdivision C of Division 3 of Part 2 of the *Australian Citizenship Act 2007* (Citizenship Cessation Determinations) – Additional Submission

The Law Society is grateful to the Law Council for the opportunity to provide further comment in relation to the citizenship cessation provisions contained within Subdivision C of Division 3 of Part 2 of the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**). Our remarks are made in light of the *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (Cth) (**Act**). We note that the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023 (Cth) was introduced into Parliament on 29 November 2023, and became law on 7 December 2023. The Law Society's Human Rights and Public Law Committees have contributed to this submission.

The Act amended the Citizenship Act by repealing those provisions found to be invalid by the High Court in *Alexander v Minister for Home Affairs* [2022] HCA 19 (***Alexander***) and *Benbrika v Minister for Home Affairs* [2023] HCA 33 (***Benbrika***) as they purported to vest in the executive branch what is the exclusively judicial function of adjudicating and punishing criminal guilt, and were therefore held to be contrary to Chapter III of the Constitution. The Act introduced revised provisions, which allow for a Court to make an order to cease a dual citizen's Australian citizenship in circumstances where the person has been convicted of certain 'serious offences', as defined under s 36C(3) of the Act.

At the outset, the Law Society reiterates the concerns expressed by the Law Council in its media release dated 30 November 2023 that the passage of the Bill through both houses without prior review by the Parliamentary Joint Committee on Intelligence and Security is concerning. As noted in our submission to the Law Council on 24 November 2023, the repudiation of citizenship has profound and far-reaching consequences for the human rights of the individual concerned. It is unclear, other than for reasons of political expediency, why these reforms were considered urgent. Instead, the harsh and unusual form of punishment provided for should have signalled the need for additional scrutiny in terms of the necessity, proportionality and effectiveness of the legislation.

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We note that the Act addresses the implications of the High Court's judgments in *Alexander* and *Benbrika*. However, the Law Society is of the view that, irrespective of the constitutional validity of the legislation, and notwithstanding the fact that it is to be administered by a Court having regard to certain defined criteria, it is undesirable that a person should be deprived of their citizenship, particularly if they acquired it at birth. As a matter of principle, there seems to be no reason why a person who has dual nationality should be subject to the prospect of additional punishment merely by virtue of that fact.

We raise the following concerns in relation to the provisions of the Act.

Discretion of the Court

In deciding whether the Court is satisfied that the person's conduct to which the convictions relate is so serious and significant that it demonstrates that the person has repudiated their allegiance to Australia, the Court must have regard to certain matters set out in s 36C(5).

In our view, s 36C(5)(a) should be repealed, or amended to reflect a requirement that can be determined with certainty, and consistently applied. It will be a difficult, if not impossible, exercise, for the Court to determine, as a legal matter, whether the conduct 'demonstrates a repudiation of the values, democratic beliefs, rights and liberties that underpin Australian society'.

The Explanatory Memorandum to the Act states that the criteria in s 36C(5) are 'not intended to limit…the other matters to which the court may also have regard in sentencing'.[1] However, s 36C(11) provides that Part IB of the *Crimes Act 1914* (Cth), which deals with sentencing for federal offences, does not apply to an order made under s 36C. We consider it desirable that those mandatory criteria that a Court must typically consider in federal sentencing should equally apply to an order for citizenship cessation, for example regard to contrition, prospects of rehabilitation and the defendant's character, antecedents, cultural background, age, means and physical or mental condition. It is arguable that mandatory consideration of such mitigating factors is even more important, given the consequences that flow from citizenship repudiation.

'Serious offences'

Although the legislation is limited to specific, so-called 'serious offences', those offences cover a wide range of criminal conduct e.g., Foreign Interference Provisions contained in Division 92 of the *Criminal Code*. The only requirements in addition to conviction for those offences are that the person has been sentenced to a period of imprisonment that is at least 3 years or periods of imprisonment that total at least 3 years, and the Court is satisfied of the matters specified in subsection 36C(4).

A sentence of three years is not generally imposed for cases with a high degree of objective seriousness or moral culpability. While the Law Society disagrees with citizenship cessation as an appropriate response to combatting national security threats generally, if these provisions are to be maintained, we support the Law Council's position that citizenship cessation should be available only where a person has been sentenced to six or more years of imprisonment for a serious terrorism offence.

Concurrent sentences

The provisions concerning concurrent sentences are particularly anomalous. The example inserted under s 36C(8) explains the operation of the section:

> A person is convicted of 2 serious offences and a court has decided to impose on the person in respect of the convictions 2 periods of 2 years imprisonment to be served

[1] Explanatory Memorandum, *Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023* (Cth) 5.

concurrently. For the purposes of subsection (1), the total period of imprisonment is 4 years.

In criminal law, a concurrent sentence is imposed to reflect the principle of totality i.e, that a person's total sentence is "just and appropriate" to the totality of the offending behaviour.[2] Section 36C(8) ignores this principle by allowing the revocation of citizenship of persons convicted of relevant offences for a combined total of three years, even where the sentence was to be served concurrently, and thus for a period of less than three years.

Application of the legislation to persons 14 years and over

Under Australia's obligations under Article 3(1) of the *Convention on the Rights of the Child* (**CRC**), the Court must have regard to the best interests of the child in considering whether to make an order. However, the Law Society maintains serious concerns that the regime applies to minors at all.

The CRC sets out principles governing the sentencing process of children. In particular, we draw attention to the commentary in Rule 17 of the Beijing Rules that 'strictly punitive approaches are not appropriate' and retributive sanctions 'should always be outweighed by the interest of safeguarding the well-being and the future of the young person'.[3] In our view, the punishment of minors through citizenship repudiation is an inappropriate form of punishment that fails to reflect this principle.

We note also that, under this scheme, dependent minors will effectively be punished for the acts of another if their parents or guardians lose their citizenship. Requiring the Court to have regard to the best interests of dependent children (s 36C(6)(b)) may be inadequate protection against this outcome.

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or sophie.bathurst@lawsociety.com.au.

Yours sincerely,

Cassandra Banks
President

[2] See *Mill v The Queen* (1988) 166 CLR 59 at 63 per Wilson, Deane, Dawson, Toohey and Gaudron JJ.
[3] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Adopted by General Assembly resolution 40/33 of 29 November 1985, 10.