AUSTRALIAN BAR ASSOCIATION

MEDIA RELEASE

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Bill to revoke citizenship could be unconstitutional

The Australian Bar Association has raised concerns regarding the Australian government's radical bill to strip individuals of their citizenship.

The president of the ABA, Fiona McLeod SC, has warned that the 'Allegiance to Australia' Bill will erode cherished freedoms. The bill is far too broad in its application and is likely to be unconstitutional.

'People who remain loyal to Australia and who pose no threat, such as those who work with humanitarian organisations, may be caught by this law and lose their Australian citizenship' said Ms McLeod.

Currently, a person can be stripped of their citizenship under section 35 of the *Australian Citizenship Act* if they serve in the armed forces of an enemy country. The government's new anti-terrorism law seeks to broaden the scope of that offence to include, among other things, service with a declared terrorist organisation.

'The government's bill uses a legal sleight of hand. It proposes that citizenship is renounced (or ceases) automatically by the conduct of the citizen, but clearly a government official must still make a determination that an offence has actually occurred', said Ms McLeod.

The Australian Constitution clearly states that such a determination can only be made by a court of law after a trial in which a defendant is accorded the usual protections of the rule of law including a presumption of innocence, the presentation of charges, an opportunity to defend those charges and a right to appeal.

'A person should only lose citizenship if they have been convicted by a court of law of a relevant offence, such as an act of terrorism directed at Australians', said Ms McLeod.

The ABA, in its submission to the Parliamentary Joint Committee on Intelligence and Security, warned that Australian citizenship should not be treated as a tool of punishment or as protection against threats to society. This approach is counter-productive to social inclusion and de-radicalization.

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Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Submission

The Australian Bar Association (**ABA**) represents approximately 6,000 barrister members of the independent bars of Australia and each of the State and Territory constituent bar associations.

The ABA makes this submission to the Parliamentary Joint Committee on Intelligence and Security. It recognises that the time for submissions has now closed and asks the Committee to consider this submission out of time in light of issues of public importance aired at Committee hearings last week.

The ABA has considered the *Australian Citizenship Amendment (Allegiance to Australia) Bill* 2015 (**the Bill)** and has a number of concerns with the Bill.

The Bill seeks to address circumstances in which a person with dual nationality or citizenship is said to have 'repudiated their allegiance to Australia' by introducing, in haste, radical new provisions stripping citizenship from individuals:

1) Where a person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct (new s.33AA);
2) Where a person fights for, or is in the service of, a declared terrorist organisation (amended s.35);
3) Where a person is convicted of a specified terrorism offence as prescribed in the Criminal Code (new s35A).

Conduct said to evince a loss of loyalty is thus used as the trigger for the renunciation or cessation of citizenship. This mechanism fails to reflect settled legal concepts of

citizenship and international humanitarian law creating great uncertainty for those Commonwealth agencies required to implement the proposed provisions.

Constitutional validity

While the Commonwealth has power to make laws concerning citizenship under s51(xix) of the Constitution, the existing limited trigger for the loss of citizenship under s35 of the *Australian Citizenship Act*, (and its predecessor) by reason of service in the armed forces of an enemy country has never been tested and its constitutional validity is uncertain. The defence power under s51(vi) may provide support for some of the provisions, but is similarly uncertain.

The judicial power of the Commonwealth is exclusively vested in Courts established under or recognised by Chapter III of the Constitution. In significant respects, the new provisions introduced by the Bill seek to avoid the prohibition on the executive exercise of judicial power by means of a legal fiction – namely that citizenship is renounced (or ceases) automatically without an intervening executive act, by the conduct of the citizen: ss33AA and 35.

This attempt to create a self-executing renunciation (or cessation) of citizenship, on the basis of contestable facts, may readily be seen as a device to circumscribe the safeguards provided by Chapter III of the Constitution. An assessment will be required to give practical effect to the renunciation, empowering an officer of the Commonwealth to make a determination that renunciation has occurred and thus triggering a decision, for example, to refuse re-entry to Australia or to detain a person within Australia, on the basis of that determination.

A determination that an offence has occurred, can only be made by a court of law after a trial in which a defendant is accorded the usual protections of the rule of law including a presumption of innocence, the presentation of charges, an opportunity to defend those charges and a right to appeal. It cannot be deemed to have occurred, or determined retrospectively to have occurred, by an executive officer. Yet this is, in effect, what the proposed s33AA and s35 purport to do. The Minister remains vested with an extraordinary power to give practical effect to the revocation and may act unilaterally, without regard to the quality of the initial assessment and without requiring evidence of disloyalty or adverse security threat.

The Bill, if passed, might also be impugned because it offends ss. 7 and 24 of the Constitution. The right to vote in federal election is currently coextensive with citizenship. The removal of citizenship will have the effect of removing the democratic right to vote contemplated by the Constitution. The High Court in *Roach v Electoral Commissioner* struck down a provision that temporarily denied federal voting rights to a person serving a sentence of imprisonment of less than three years as disproportionate. As drafted the scope of the provisions are too broad and are likely to offend this principle.

Scope

The draft provisions are too broad and will have a disproportionate impact. The conduct capable of triggering renunciation can include unproven conduct, unintentional acts and omissions and minor offences that pose no serious threat to security, as explained by the learned submission of Professor Anne Twomey.

People who have committed minor offences are potentially caught up in the new provisions, as are those who have inadvertently, unintentionally or against their will had contact with terrorist organisations.

The new ss.33AA and 35 make no provision for any means of fact-finding or standard of satisfaction creating legal uncertainty for government agencies acting upon the loss of citizenship, irrespective of whether the Minister has provided notice of this, including ASIO, the Department of Immigration and Border Protection and the Australian Electoral Commission.

Finally, section 35A, proposes the cessation of citizenship following conviction and in some cases will capture conduct occurring before the Bill was introduced, thus offending against the fundamental protection against retrospectivity.

People who remain loyal to Australia, who are not a threat or have done no harm, such as those who work with humanitarian organisations may potentially be caught up in these broad provisions and lose their Australian citizenship.

The Bill expressly provides that the rules of natural justice do not apply in relation to the exercise of ministerial powers and make no provision for merits review. The judicial review model is inadequate given the seriousness of the consequences and proposed self-executing mechanism for revocation.

Conclusion

The ABA endorses the learned submission of Professor Rubenstein and other eminent academics that the status of citizenship in a democratic society should not be treated as a tool of punishment or protection against threats to society and cautions that this approach is counter-productive to attempts to address radicalization.

Insofar as the proposed changes seek to curtail the judicial power of the courts to determine and provide punishment for criminal offences, or curtail the right to vote, they are likely to be unconstitutional.

The new provisions contemplate provisions that erode cherished freedoms without a demonstrated need, are unfair and too broad in application.

The ABA does not support the amendments as drafted and considers that the objective of the Act would be best addressed by limited changes to the existing s.35.

Revocation should only arise when a person has been convicted by a court of law of a

relevant offence, such as an act of terrorism directed at Australians, and where the required level of seriousness of the offence should not be dictated only by the nature of the offence, but also by the penalty applied.

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