REVIEW OF THE *AUSTRALIAN CITIZENSHIP AMENDMENT (ALLEGIANCE TO AUSTRALIA) BILL 2015*

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY REVIEW

19th July 2015

A combined submission from:
Liberty Victoria
NSW Council for Civil Liberties
Queensland Council for Civil Liberties
South Australian Council for Civil Liberties
Australian Council for Civil Liberties

Australian Council for Civil Liberties

COUNCILS FOR CIVIL LIBERTIES ACROSS AUSTRALIA SUBMISSION ON THE *AUSTRALIAN CITIZENSHIP AMENDMENT (ALLEGIANCE TO AUSTRALIA) BILL* 2015

1. The councils for civil liberties across Australia (Liberty Victoria, New South Wales Council for Civil Liberties, Queensland Council for Civil Liberties, South Australia Council for Civil Liberties and the Australian Council for Civil Liberties) are grateful for the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security on the *Australian Citizenship Amendment (Allegiance to Australia) Bill* 2015 (Cth) ("the Bill").

2. The councils for civil liberties across Australia (CCLs) have collaborated around this submission because the issue of citizen stripping is of great national significance.

3. The CCLs strongly oppose the Bill. In the current political climate, where there has been significant bipartisan support for national security legislation, there is a danger that the Bill will be passed without it being carefully scrutinised.

4. Simply put, if enacted the Bill would amend the *Australian Citizenship Act* 2007 (Cth) ("the Act") in an untested and radical way. It presents a significant threat to the separation of powers and the rule of law. Indeed, the Bill is founded on a significant reconceptualisation of the relationship between the State and the citizen.

5. If enacted the Bill would amend and extend s.35 of Act, which provides a purported power to strip a person's citizenship if he or she serves in the armed forces of a country at war with Australia. However, that provision is untested in Australian courts. Its origin lies in s.19 of the *Nationality and Citizenship Act* 1948 (Cth), which was enacted to address dual Australian and German citizens who had fought for the Axis powers during the Second World War. However, the power was never used. The procedure and the role for the courts in that process has never been clarified at law.

6. That should immediately raise concerns about the nature of that power and how, in practice, it could and should be exercised. In particular, it raises the question as to whether it would be lawful for the legislature and/or the executive to strip a person of citizenship without a central role for the judicial branch of government, and whether such a process may breach Chapter III of the Constitution.

7. The CCLs submits:

   (1) The Bill rests on a belief that citizenship is a privilege and not a right, where the State can and should exile citizens who do not comply with particular standards of conduct. While there are certain restricted circumstances where a person may be stripped of citizenship at present pursuant to ss.33 and 34 of the Act, the Bill would dramatically broaden the circumstances where this would occur. Moreover, it would greatly restrict the role of the courts in providing any oversight of the decisions made by the Minister, with natural justice not applying to the process and no merits review of the decision. The centralisation of such power should immediately raise concern, which becomes even greater when one considers the potential for such decisions to be affected by the political exigencies of the day.

   (2) Australian citizens who allegedly engage in terrorist offences, whether at home or abroad, should be charged, taken to trial and, if found guilty, punished and imprisoned in Australia. That would be a sign of a robust legal system where the Australian Government is confident about the proper role, and strength, of its courts. To strip a person of citizenship and exile them – to expel them from the polis – is to place the person outside the reach of the State's legal system. It is a sign of great weakness and not strength.

   (3) At a pragmatic level, if enacted the Bill would not make Australians safer. To expel a person who has engaged in terrorism related offences and prevent them from re-entering Australia only places Australians and Australian interests in other places at greater risk. Moreover, it merely heaps the burden created by such persons upon other countries which are often theatres of war and are ill equipped to deal with such persons. Australia has a fundamental responsibility

to deal with its own citizens who engage in such conduct. Stripping citizenship and exiling such persons is merely exporting the problem to other nations and makes us a poor global citizen.

(4) The Bill rests on a legal fiction. Pursuant to proposed s.33AA and s.35, at the moment of engaging in particular prohibited conduct a person has renounced his or her citizenship and ceases to be an Australian citizen, with the Minister merely notifying the person of the fact after becoming "aware of conduct". That rests on the fiction that the Minister is not engaged in an active process of fact-finding and decision-making. To then attempt to insulate that decision from merits review and the rules of natural justice fails to afford protections to citizens that are commensurate to the gravity of the decision. It is trite to observe that citizenship is foundational to the relationship between a person and the State – for such a decision to be made without giving reasons, without the decision-maker being bound by the rules of natural justice, and without the key factual findings being made in open Court by the judicial branch of government, reflects that the Bill represents a radical increase in executive power.

(5) The Bill obfuscates the process of fact-finding. Upon what standard of proof will the Minister need to be satisfied or be "made aware" that a person has engaged in particular conduct pursuant to proposed s.33AA and s.35? Will that information be made available to the person affected by the decision or will it be claimed that it is not in the public interest to provide such information for national security reasons? Will citizens be stripped of their citizenship based on secret intelligence without any right to be informed of the information that founded the decision? What recourse does the person have if such information is wrong? And perhaps most fundamentally, why is it thought that such a fundamental reimaging of the relationship between the executive branch of government and the citizen is a proportionate exercise of constitutional power?

(6) The Bill fails to require any nexus between engaging in the prohibited conduct and intending to harm Australia or Australians. For example, a person might

leave Australia to fight against the Assad Regime in Syria, and join a terrorist organisation in order to do so. That person might have no animosity whatsoever towards Australia or Australians and yet would automatically revoke his or her citizenship by conduct. That raises the obvious question of why such a person should be regarded as having renounced his or her citizenship of Australia when the conduct was not intended to affect Australia in any way. The Bill fails to address the intent of the actor and whether the prohibited conduct is in fact aimed at damaging Australian interests.

(7) While there was well-publicised criticism of an initial suggestion that the power to strip citizenship be exercised in the Minister's discretion, the Bill does not remedy the problem. Rather, proposed s.33AA and s.35 of the Act create a presumption that all persons engaged in certain categories of conduct have renounced their citizenship, with the Minister then having a non-compellable discretionary power to exempt a person from the operation of the Act. That merely shifts the discretion from the front end to the back end of the process – it still sees the key decision that affects the person's interests being made in the exercise of the Minister's discretion. Judicial review of such power is notoriously difficult. It is fundamental that there be recourse to independent merits review of such decisions and that the rules of natural justice apply.

(8) On any view the categories of offences that result in automatic revocation of citizenship pursuant to proposed s.35A are far too broad, applying to offences including destroying or damaging Commonwealth property contrary to s.29 of the *Crimes Act* 1914 (Cth) (maximum penalty 10 years' imprisonment) and advocating terrorism contrary to s.80.2C of the *Criminal Code Act* 1995 (Cth) (maximum penalty 5 years' imprisonment). It is worth taking pause to consider what the operation of s.35A would mean in practice – a person who is convicted of an offence of damaging Commonwealth properly (such as scratching a Commonwealth car at a protest) will automatically have their citizenship revoked. It will then be for the Minister to consider granting an exemption. A Bill that would create such a situation, with regard to such a fundamental thing as citizenship, is dangerous.

(9) The Bill is discriminatory because it would treat dual citizens and nationals differently to persons with sole Australian citizenship. It creates a perverse incentive for persons to renounce citizenship or nationality of other counties in order to avoid the operation of the Act. Further, the distinction between "nationality" and "citizenship" is unclear and is likely to see the Bill have very broad application. For many persons who hold dual citizenship and/or nationality, they are unable to renounce their citizenship or nationality of the other country because the other country does not allow it or it is practically impossible because of bureaucratic impediments. For the operation of the Bill to depend on the policies and laws of other countries, often in theatres of war, is fundamentally arbitrary.

(10) The Bill will create a situation where persons will be rendered stateless when they are stripped of their Australian citizenship and the other country of citizenship or nationality refuses to accept their return. It will expose persons to indefinite detention in circumstances where they have not been found guilty of any offence.

(11) The Bill presents a fundamental threat to the rule of law. It is entirely possible that a person may be acquitted by a jury of his or her peers of terrorism offences (and therefore proposed s.35A of the Act would have no work to do), but the Minister may be satisfied – at a lesser standard than the criminal standard of beyond reasonable doubt – that the person has engaged in prohibited conduct pursuant to s.33AA or s.35 of the Act and has renounced his or her citizenship notwithstanding the acquittal. It should be for the courts and not the executive branch of government to make decisions that are so fundamental to a person's rights and freedoms.

(12) The Bill is retrospective in relation to conduct. Proposed s.35A would see a person who was convicted of a relevant offence stripped of his or her citizenship regardless of when they engaged in the conduct. Any legislation that so fundamentally affects the rights and freedoms of persons should only apply to conduct occurring after enactment.

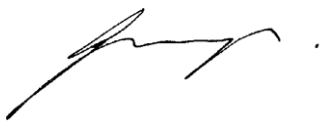
8. For the above reasons, The CCLs oppose the enactment of the Bill. The case has not been made as to how it will make Australians safer. For those persons who are genuinely committed to doing us harm, it will not act as a deterrent.

9. The Bill reflects a fundamental and radical departure from systems of government that have served us so well. It is worth taking pause to ask the question – are we sacrificing our rights and freedoms and very systems of government based on fear, and is that not precisely what those who would do us harm would want?

10. This submission was written by Michael Stanton, Vice-President of Liberty Victoria on behalf of the CCLs. Input was provided by members of the Executives of the Queensland, NSW and South Australian CCLs. The CCLs are available to clarify any aspect of this submission at a public hearing if the Committee so wishes.

11. Contacts in relation to this submission are George Georgiou SC, President of Liberty Victoria, on 0419 541 471 or Michael Stanton, Vice-President of Liberty Victoria on 0409 570 725. This is a public submission and is not confidential.

Yours sincerely



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