

14 August 2015

Mr James Nelson
Inquiry Secretary
Parliamentary Joint Committee on Intelligence and Security
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CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Mr Nelson,

AUSTRALIAN CITIZENSHIP AMENDMENT (ALLEGIANCE TO AUSTRALIA) BILL 2015

1. Thank you for the opportunity to appear before the Parliamentary Joint Committee on Intelligence and Security's (the Committee) inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Bill) on 4 August 2015.
2. This supplementary submission seeks to address questions on notice raised at the Law Council's appearance regarding the lawfulness of s35A applying retrospectively.
3. In addition, the Law Council has briefly expanded on further issues raised during its appearance before the Committee. In particular, it provides the Committee with:
 - further clarification regarding the intersection of s33AA and s35A; and
 - alternative declaration models.

Retrospectivity

4. The Law Council is opposed in principle to the enactment of legislation with retrospective effect, particularly in cases that create retroactive criminal offences or which impose additional punishment for past offences.
5. The objection can be traced to principles enshrined in the rule of law. Acts by the legislature which are inconsistent with the rule of law have a tendency to undermine the very democratic values upon which the rule of law is based.
6. Such objection has informed the approach of courts to the interpretation of statutes, such that courts will not readily interpret a statute as having retrospective effect unless the intention of the legislature to do so is clear.

7. The High Court has cautioned against retrospective legislation that may interfere with vested rights or make unlawful conduct which was lawful when done.¹ Indeed, the presumption against retrospective statutory construction is based on ‘the presumption that the Legislature does not intend what is unjust’.²
8. As noted in the Law Council’s submission to the Committee of 17 July 2015, retrospective measures generally offend rule of law principles that the must be readily known and available, and certain and clear.³ For example, in *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, French CJ, Crennan and Kiefel JJ stated:

*In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality, which also applies the constructional assumption that Parliament will use clear language if it intends to overthrow fundamental principles, infringe rights, or depart from the general system of law.*⁴

9. In *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, a majority of the High Court emphasised the common law principle that the criminal law ‘should be certain and its reach ascertainable by those who are subject to it’.⁵ This concept is ‘fundamental to criminal responsibility’ and ‘underpins the strength of the presumption against retrospectivity in the interpretation of statutes that impose criminal liability’.⁶ The High Court cited *Bennion on Statutory Interpretation*:

*A person cannot rely on ignorance of the law and is required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly.*⁷

10. Another justification provided for the principle against retrospectivity has been that it protects a public interest. In *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, Toohey J stated:

Prohibition against retroactive laws protects a particular accused against potentially capricious state action. But the principle also represents a protection of a public interest. This is so, first, in the sense that every individual is, by the principle, assured that no future retribution by society can occur except by reference to rules presently known; and secondly, it serves to promote a just society by encouraging a climate of security and humanity.

¹ *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 611-12, 642, 687-9, 718 per Deane, Dawson, Toohey and McHugh JJ respectively.

² *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at [28] (French CJ, Crennan and Kiefel JJ citing Isaacs J and 6th edition of *Maxwell on Statutes*).

³ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), Principle 1.

⁴ *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at [30] (French CJ, Crennan and Kiefel JJ).

⁵ *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ).

⁶ *Ibid* [48] (French CJ, Hayne, Crennan, Kiefel, Bell, and Keane JJ).

⁷ *Ibid*.

In so far as the principle of non-retroactivity protects an individual accused, it is arguably a mutable principle, the right to protection dependent, to some extent, on circumstances. Where, for example, the alleged moral transgression is extremely grave, where evidence of that transgression is particularly cogent or where the moral transgression is closely analogous to, but does not for some technical reason amount to, legal transgression, there is a strong argument that the public interest in seeing the transgressors called to account outweighs the need of society to protect an individual from prosecution on the basis that a law did not exist at the time of the conduct. But it is not only the issue of protection of an individual accused at the point of prosecution which is raised in the enactment of a retroactive criminal law. It is both aspects of the principle - individual and public interests - which require fundamental protection.⁸

11. The High Court has held that there is no absolute prohibition on the Parliament enacting laws that have retrospective effect.⁹ In *R v Kidman* (1915) 20 CLR 42, Higgins J stated:

There are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it sees fit.¹⁰

12. The power of the Australian Parliament to create a criminal offence with retrospective application has also been affirmed by the High Court.¹¹ In *Polyukhovich*, McHugh held that '*Kidman* was correctly decided' and that:

*...numerous Commonwealth statutes, most of them civil statutes, have been enacted on the assumption that the Parliament of the Commonwealth has power to pass laws having a retrospective operation. Since *Kidman*, the validity of their retrospective operation has not been challenged. And I can see no distinction between the retrospective operation of a civil enactment and a criminal enactment.¹²*

13. However, the Commonwealth Parliament is constrained in enacting retrospective laws by reason of the separation of judicial and legislative powers mandated by the Constitution.¹³ The separation of powers doctrine requires that a Commonwealth law must not inflict punishment upon a person or persons without a judicial hearing.¹⁴

⁸ *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at [107]-[108] (Toohey J).

⁹ *R v Kidman* (1915) 20 CLR 425 at 442-3 per Isaacs J, at 451-4 per Higgins J, at 462 per Powers J; *Knight v Corrections Victoria* [2009] VSC 607 per Vickery J at [33]; *Bellemore v State of Tasmania* (2006) 16 Tas R 364 at [10] per Crawford J; *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 at 86 per Isaacs J, at 124-5 per Higgins J; *Millner v Raith* (1942) 66 CLR 1 at 9; *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1 at 172 per Latham CJ; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 461, 484 per Mason and Dawson JJ; *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 538-40 per Mason CJ, at 644-5 per Dawson J, at 718-21 per McHugh J. See, for example, *R v Snow* (1917) 23 CLR 256 at 265 per Barton ACJ.

¹⁰ *R v Kidman* (1915) 20 CLR 425 at 451.

¹¹ *Polyukhovich v Commonwealth* (1991) 172 CLR 501. See also *Millner v Raith* (1942) 66 CLR 1.

¹² *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 718 [23] (McHugh J).

¹³ Sections 1, 61 and 71 of the *Australian Constitution* give effect to this doctrine by separately vesting the legislative, executive and judicial powers of the Commonwealth. See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at [10]-[11] per Brennan CJ, Dawson, Toohey, McHugh and

14. A bill of attainder is a statute that finds 'a specific person or specific persons guilty of an offence constituted by past conduct and impos[es] punishment in respect of that offence'.¹⁵ In *Polyukhovich*, the High Court held that a bill of attainder would contravene Ch III of the *Constitution* which requires judicial powers to be exercised by courts, and not the legislature. An ex post facto law includes one that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.¹⁶ It may also be considered in certain circumstances to contravene Ch III of the *Constitution*. For example, in *Polyukhovich*, Mason CJ, held:

*The application of the [separation of powers] doctrine depends upon the legislature adjudging the guilt of a specific individual or specific individuals or imposing punishment upon them. If, for some reason, an ex post facto law did not amount to a bill of attainder, yet adjudged persons guilty of a crime or imposed punishment upon them, it could amount to trial by legislature and a usurpation of judicial power. But if the law, though retrospective in operation, leaves it to the courts to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the rule prescribed, there is no interference with the exercise of judicial power.*¹⁷

15. It is clear from the above passage, that legislation which retrospectively *punishes* past behaviour may breach the doctrine of the separation of powers if it does so in a manner which does not provide for judicial determination of whether the punishment should apply.
16. Similarly, the following extract from Justice Deane's judgment in *Polyukhovich* discusses the difficulty of bills of attainder and certain ex post facto laws:

At least since the time of Bentham and Mill, however, ex post facto criminal legislation has been generally seen in common law countries as inconsistent with fundamental principle under our system of government. The point was well made by a very strong Court of Exchequer Chamber (Kelly C.B., Martin, Channell, Pigott and Cleasby BB., Willes and Brett JJ.) in a judgment delivered by Willes J. in Phillips v. Eyre (1870) LR 6 QB 1. Having recognized that some retrospective legislation was "beneficial and just", their Lordships wrote (at p 25):

"The retrospective Attainder Acts of earlier times, when the principles of law were not so well understood or so closely regarded as in the present day, and which are now looked upon as barbarous and loosely spoken of as ex post facto laws, were of a substantially different character. They did not confirm irregular acts, but voided and punished what had been lawful when done. Mr. Justice Blackstone (1 Bla. Com. 46) describes laws ex post facto of this objectionable class as those by which 'after an action indifferent in itself is committed, the legislature (Blackstone wrote "legislator") then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it'" (emphasis added).

Gummow JJ; *R v Kirby; Ex Parte Boilermakers Society of Australia* (1956) 94 CLR 254. See also MJC Vile, *Constitutionalism and the Separation of Powers* (2nd ed, 1998) at 14.

¹⁴ *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 536 per Mason CJ, at 613-14 per Deane J, at 648 per Dawson J, at 686-90 per Toohey J, at 706-7 per Gaudron J, at 721 per McHugh J.

¹⁵ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 721 [30] (McHugh J).

¹⁶ *Ibid*, [109] (Toohey J citing Chase J in *Calder v Bull*).

¹⁷ *Ibid*, [32] (Mason CJ).

Obviously, their Lordships were not - any more than was Blackstone - suggesting that ex post facto criminal legislation was beyond the legislative competence of the Imperial Parliament whose powers have never been confined by an entrenched doctrine of the separation of judicial from legislative and executive powers. Nonetheless, their Lordships' comments - like those of Blackstone - are directly relevant to the determination of what lies beyond the limits of the legislative function under a constitution which, like ours, entrenches the doctrine and subjects legislative power to it. In that regard, it is important to note that their Lordships identified the central vice of a Bill of Attainder not as lying in its specific naming of an individual but as lying in its ex post facto operation as a legislative decree that an act which was not criminal when done was "voided and punished" as a crime. A statute which decreed that "any person" who had supported the unsuccessful party in some past period of civil disturbance was, notwithstanding that he had contravened no then existing law, guilty of treason and subject to a death penalty would not be a Bill of Attainder in the strict sense in that a trial would be necessary to determine whether a particular accused had in fact supported the unsuccessful party and the actual sentencing would be by a court. It would, nonetheless, fall squarely within the category of laws which their Lordships condemned as inconsistent with a proper understanding of "the principles of law". So also does any statute which, like s.9(1) of the Act, declares that a person is guilty of a crime against the law of the Commonwealth if he has committed a past act which did not, when committed, contravene any then existing and applicable law of the Commonwealth and was therefore not such a crime.

The perception that ex post facto criminal legislation lies outside the proper limits of the legislative function is not confined to countries whose legal traditions can be traced to the British system of government. It is shared by all the nations of the European Economic Community (see Case 63/83 Reg. v. Kirk (1984) EC.R. 2689, at p 2718). It is reinforced by the provisions of international conventions concerned with the recognition and protection of fundamental human rights (see, e.g., Universal Declaration of Human Rights, (1948), Art.11(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950), Art.7; American Convention on Human Rights, (1969), Art.9). In some international conventions and national declarations of fundamental rights, a disavowal of retrospective criminal legislation is made subject to a qualification in respect of an act which was, at the time it was committed, a crime against international law. Such a qualification is not in point in the present case where the conduct made criminal by the Act is not made punishable as, and need not necessarily have been, a crime against international law at the time it occurred.

A statutory provision, such as s.9 of the Act, that a "person who" in the past "committed" a specified act "is guilty of" a punishable crime prescribes no rule of conduct. It prohibits nothing. It trespasses upon the exclusively judicial field of determining whether past conduct was a crime, that is to say, whether it was in fact an act or omission which the law "prohibited with penal consequences". Within that field, it negates the ordinary curial process by enacting, and requiring a finding of, criminal guilt regardless of whether there was in fact any contravention of any relevant law. If the specified act was not prohibited by such a law when done, such a statutory provision is a retroactive legislative declaration of past criminal guilt when in fact there was none. If it nominates, either individually or by reference to an identifiable group, the person or persons who have committed the specified act, it constitutes a Bill of Attainder or a Bill of Pains and Penalties, depending upon the punishment. In such a case, the statutory provision constitutes a legislative

declaration of guilt without any trial at all. Plainly, it involves a usurpation of judicial power. As Murphy J. wrote in Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation [1982] HCA 31; (1982) 152 CLR 25, at p 107:

"For centuries the finding that a person has broken the criminal law has been regarded as within the judicial sphere, and outside the sphere of the Parliament and the executive. Bills of attainder by which Parliament entered the sphere of criminal justice are inconsistent with this basic constitutional scheme" (emphasis added).¹⁸

17. In addition, a retrospective law that interferes with the functions of the judiciary by altering the laws of evidence or removing judicial discretion regarding sentencing of certain offenders, may be unconstitutional on the basis that it offends Ch III.¹⁹
18. In the context of the Bill in question, this raises questions of whether the loss of citizenship would be regarded as punishment, and if so whether:
 - (a) in the case of past convictions, the judicial function is satisfied in circumstances where loss of citizenship was not contemplated as part of the sentence;
 - (b) in the case of conduct without a conviction, the judicial function has been usurped by the legislature in an impermissible way.
19. In the case of convictions for offences referred to in s 35A, the class of persons who were convicted of such an offence prior to the commencement of the enactment is definite. The class of persons who are dual nationals must necessarily be a smaller subset of the former class. If the retrospective application of the legislation were narrowed to a smaller class of offences, the class of affected persons would reduce again, until it might be said that the exact identity of the persons affected by any retrospective operation of the legislation was known at the time of the enactment.
20. The danger, therefore, of enacting retrospective legislation to automatically apply to past convictions is that (on the assumption that loss of citizenship is a punishment) it amounts to a form of bill of attainder and therefore lies beyond the competence of the Parliament.

Additional comments

Relationship between ss33AA and 35A

21. At the Law Council's appearance before the Committee on 4 August 2015, Ms Gabrielle Bashir SC raised a potential difficulty with the self-executing renunciation by conduct model in s33AA. Section 33AA would have the effect that a person would cease to be an Australian citizen upon engaging in the relevant prescribed conduct. A person may engage in further conduct which the Crown may wish to bring to trial and obtain a conviction for (such as a different offence prescribed by section 35A or another offence under Commonwealth legislation). It may be that, unwittingly, because the person is not a citizen, they cannot be tried for the further offence either

¹⁸ Ibid, [28]-[30] (Deane J).

¹⁹ *Liyanage v The Queen* [1967] AC 259; approved in *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96.

because the fact of not being a citizen either provides a defence to the criminal offence or attracts some kind of constitutional argument or generally creates difficulties with jurisdiction in trying the person for the further and potentially more serious offence.

22. For example, offences relating to cluster munitions under s72.38 of the Criminal Code have a category B jurisdiction (s72.38(3) of the Criminal Code). Category B jurisdiction requires that the person who engaged in the relevant conduct was an Australian citizen, Australian resident or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory. Under the self-executing scheme proposed by the Bill, a person who ceases to be an Australian citizen under s33AA may evade prosecution under an offence such as s 72.38(3), which is currently proposed to be captured by s35A.

A workable model

Application to court for declaration

23. For the reasons outlined in its initial written submission of 17 July 2015 and in oral testimony before the Committee, the Law Council considers that a judicial decision model requiring a conviction may ameliorate many of the concerns relating to the Constitutional validity of ss33AA and 35.
24. Should the Committee not accept a judicial decision model on the basis of evidentiary concerns, an alternative that may be worth exploring, would be for the Minister to seek for a court to make a declaration on application by the Minister that a person has, on the balance of probabilities, engaged in certain conduct. As noted at the Law Council's appearance before the Committee, such an approach – if carefully drafted – may be worth considering in terms of Constitutional validity and avoiding the very real difficulties of the proposed self-executing model. A declaration model, in addition to the conviction based model in s35A would also have the merit of providing an independent up-front determination of whether the individual engaged in the prescribed conduct.
25. A declaration model currently exists, for example, in Canada. Under subsection 10.1(2) of the *Canadian Citizenship Act 1985* where the Minister has reasonable grounds to believe that a person, while a citizen, served as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada, s/he may seek a declaration of revocation from a Federal Court. The Minister refers to a Federal Court judge the question of whether the person, while a Canadian citizen, 'served as a member of an armed force of a country or as a member of an organised armed group and that country or group was engaged in an armed conflict with Canada'²⁰. That declaration has the effect of revoking citizenship²¹. The consequence of revocation under s10.1(2) is to render the person a foreign national. The revocation proceeding may not render an individual stateless²². An individual who claims s/he would be rendered stateless must prove, on the balance of probabilities, that s/he is not a citizen of another country of the country which the Minister has reasonable grounds to believe the person is a citizen.

²⁰ *Canadian Citizenship Act 1985*, s10.1(2).

²¹ *Ibid*, s10.1(3).

²² *Ibid*, s10.4(1).

26. Such a process does not create a criminal offence and does not engage a criminal standard of proof, although it allows judicial participation and importantly review prior to revocation.
27. In the Australian context, it might be considered appropriate to allow the court to determine on the balance of probabilities whether an individual engaged in the prescribed conduct. A court determination could then be combined with a Ministerial discretion to revoke where it is in Australia's interests.
28. Should a declaration model be explored, it would be important to allow the court sufficient discretion in making an order and to allow the appropriate testing of evidence.²³ That is, the Constitutional integrity of the court would need to be maintained. The court cannot be used to rubber stamp the objectives of the executive.²⁴
29. There are existing measures in place in Australia where sensitive security intelligence information can be protected from disclosure (for example, through the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)). Ex parte hearings may also be available where necessary.
30. Thank you for the opportunity to provide these observations.
31. Please contact Dr Natasha Molt (02 6246 3754 or natasha.molt@lawcouncil.asn.au) should you require further information.

Yours sincerely,

Duncan McConnel
President

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²³ See for example *South Australia v Totani* (2010) 242 CLR 1.

²⁴ *Ibid.*