



Law Council
OF AUSTRALIA

Office of the President

20 August 2019

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: pjicis@aph.gov.au

Dear Chair

Supplementary submission: Review of the Australian Citizenship renunciation by conduct and cessation provisions of the *Australian Citizenship Act 2007* (Cth)

On 2 August 2019, the Law Council appeared before the Parliamentary Joint Committee on Intelligence and Security (**the Committee**) as part of its review of the Australian Citizenship renunciation by conduct and cessation provisions contained in the *Australian Citizenship Act 2007* (Cth) (**the Act**).

This supplementary submission addresses two issues that were raised by the Committee during the Law Council's appearance. The first relates to the Law Council's views on an alternate model to the current Citizenship Loss Board, and the second provides the Committee with the details of a specific case referred to in the course of the Law Council's evidence regarding procedures for control order applications.

Citizenship Loss Board

At the time of the Committee hearing, Senator Keneally raised the issue of the current operation of the Citizenship Loss Board. Senator Keneally posed the following question, to which the Law Council agreed to provide additional information on:

... is there some type of model that operates in other jurisdictions that have similar provisions, or some other type of decision-making body here in Australia, that would provide a template or a model for how this board should operate most fairly and effectively, in your view?

The Law Council reiterates its primary position that if citizenship is to be removed, this should only occur when an individual has been convicted by an independent, impartial and competent court of a serious terrorism related offence.

Acknowledging that there may be instances where it is not possible to secure a conviction, the Law Council again proposes that consideration should be given to a judicial determination model. This would require a court, on the application of the Minister, to make

an order for the revocation of citizenship upon making findings of fact as to the conduct that justifies the order being made.

As a further alternative to a judicial determination model, the Law Council draws the Committee's attention to procedures adopted in the United Kingdom (**UK**) in relation to the deprivation of British citizenship. The Law Council regards this approach as undesirable, however, acknowledges that it may provide the basis for a scheme that is an improvement on the current mechanisms.

In the UK context, while there is no judicial involvement in an initial decision of the Secretary of State (**Secretary**) to 'deprive a person of citizenship status',¹ there is a statutory requirement that before making such an order, the Secretary must give the person written notice specifying that the Secretary has decided to make the order, the reasons for the order and the person's right of appeal.²

Under this model, notice of the proposed deprivation of citizenship is required to be effected either personally or by fax, email, courier, document exchange, post (whether or not receipt is recorded) or by any of these means to the person's representative, or in the case of a child, the person's parent or guardian.³ In the event the person's whereabouts are not known, there is a procedure by which service is 'deemed' to be effected.⁴

Importantly, the person then has the right to appeal the decision of the Secretary, whether they are inside or outside the UK to the 'first tier tribunal' being the Immigration and Asylum Chamber, unless the Secretary issues a certificate that information should not be disclosed in public on the grounds of national security.⁵ If this is the case, the appeal is to be heard by the Special Immigration Appeals Commission (**SIAC**). It is important to note that unlike the Administrative Appeals Tribunal in Australia, the SIAC is a superior court of record⁶ capable of conducting both public and closed hearings as necessary.⁷

The SIAC operates within provisions that enable sensitive security information to be managed so that the appellant can still have the opportunity to challenge the evidence without it being fully disclosed to the appellant. The SIAC does this through the use of special advocates.⁸ The appellant is also entitled to have their own legal representation in addition to the special advocate, although, like the appellant, they are also restricted from accessing material where necessary in the interests of national security.

In the UK there is also a further right to appeal for the person deprived of citizenship against the decision of the 'first tier tribunal' or the SIAC to the relevant court of appeal.⁹ It is not settled in the UK whether the appeal process is limited to judicial as opposed to merits review. However, there is authority for the proposition it is a judicial function to determine as a matter of fact whether a person would be 'stateless' for the purpose of determining whether the Secretary's order for the deprivation of citizenship is valid.¹⁰

¹ *British Nationality Act 1981* (UK) s 2.

² *British Nationality Act 1981* (UK) sub s 4A(5).

³ *British Nationality (General) (Amendment) Regulations 1982* (UK), reg 10(1).

⁴ *Ibid*, reg 10(4).

⁵ *Special Immigration Appeals Commission Act 1997* (UK) subparagraph 2D(1)(b).

⁶ *Ibid*, subsection 1(3).

⁷ There is a right of appeal from the decision of 'first tier tribunal' of the Immigration and Asylum Chamber, to the 'Upper Tribunal' of the Immigration and Asylum Chamber which is a court of superior record in accordance with the *Tribunals, Courts and Enforcement Act 2007* (UK) subsection 3(5).

⁸ *Ibid*, section 6.

⁹ *Ibid*, section 7.

¹⁰ *Abu Hamza al-Masri v Secretary of State for the Home Department*, SIAC, SC/23/2003 (5 November 2010).

The Law Council maintains its position that loss of citizenship should only follow upon conviction and a subsequent court order for the deprivation of citizenship. Alternatively, the Law Council endorses an approach whereby a judicial determination model is implemented.

Control orders

In giving evidence at the public hearing, Dr David Neal SC provided the Committee with an analogy between the existing citizenship revocation scheme and procedures relating to control orders.

Dr Neal SC identified an example of a control order case that demonstrated that a judicial process provides important safeguards in relation to the application of protective counter-terrorism measures. To further assist the Committee, the case to which Dr Neal SC was referencing is *Gaughan v Causevic* (No. 2) [2016] FCCA 1693, a matter that highlights the critical role of judicial oversight in relation to the provisions relating to control orders in Division 104 of the *Criminal Code Act 1995* (Cth).

We thank you once again for the opportunity to provide this supplementary submission to the Committee. If you have any further inquiries, please contact Dr Natasha Molt, Director of Policy, at natasha.molt@lawcouncil.asn.au or on (02) 6246 3754.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Moses'.

Arthur Moses SC
President