

Opening Statement



Wednesday, 30 January 2019

Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

Opening Statement to the Parliamentary Joint Committee on Intelligence and Security

Dr David Neal SC, Co-Chair of the Law Council's National Criminal Law Committee

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1. My name is Dr David Neal SC and I am the Co-Chair of the Law Council's National Criminal Law Committee. As the Committee would be aware, the Law Council is the peak national body representing the legal profession in Australia.
2. I would like to thank the Committee for the opportunity to provide evidence to its inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018.
3. If enacted, the Bill would significantly expand the power of the Minister for Home Affairs (**the Minister**) to strip a person of their Australian citizenship in certain circumstances. That is, it would significantly lower the existing threshold for when the Executive can revoke the Australian citizenship of a dual citizen who has been convicted of a 'relevant terrorism offence'.
4. The Law Council acknowledges the necessity of laws which are enacted to maintain the security of Australia and the safety of Australian citizens. However, it is important that such laws are proportionate and be demonstrated by evidence to meet that objective. Measures to remove citizenship challenge key legal principles on which our democracy was founded, and therefore demand very careful consideration by the Commonwealth Parliament.
5. The Law Council does not support the current Bill.

(Removal of six-year sentence threshold)

6. The Law Council notes that the current thresholds to strip dual citizens of their Australian citizenship was the subject of extensive inquiry by the Committee in 2015 in relation to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (**the 2015 Bill**). The Committee at that time recommended that the 2015 Bill be amended to give the Minister discretion to revoke a person's citizenship following conviction for a relevant offence with a sentence applied of at least six years imprisonment, or multiple sentences totalling at least six years' imprisonment.
7. By separating 'relevant terrorism convictions' from other convictions, the Bill would remove the threshold of a six-year penalty for terrorist offences, meaning that the Minister may strip a dual citizen of their Australian citizenship if convicted with a 'relevant terrorism offence', regardless of the sentence, if any, that is actually imposed.
8. Low-level offending, which is dealt with to finality in a local court, could be captured by laws that lead to citizenship cessation.

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9. Furthermore, the Bill seeks to include the offence of ‘associating with a terrorist organisation’ as an offence under ‘relevant terrorism convictions’. This would give rise to the risk that a person could lose their citizenship for an offence which potentially captures a range of legitimate activities, such as participation in some social and religious festivals and gatherings.
10. The Law Council considers that it is important that the type of offence required to trigger loss of citizenship is such that it demonstrates a repudiation of allegiance to Australia *and* that it is of a considerable level of seriousness. Removing the six-year sentencing limit does not appear to meet this standard.
11. It is not clear why removing the six-year threshold is now considered to be justified by the Department of Home Affairs. Since the initial laws were passed in 2015, the national threat level has not changed. The conviction-based citizenship loss powers also appear to have not been, or to have rarely been, used. This makes it difficult to assess the extent to which the powers may be regarded as effective while ensuring consistency in their practical operation with the rule of law and Australia’s international law obligations. It is therefore unclear why the proposed measures are needed and why the bipartisan recommendation of the Committee in 2015 no longer represents what is a necessary and proportionate response to the terrorism threat.
12. For these reasons, the Law Council considers that the requirement that a person be sentenced to six or more years of imprisonment for a relevant terrorism offence to be eligible to lose their Australian citizenship should be maintained, and the offence of associating with a terrorist organisation should not be considered a ‘relevant terrorism conviction’ for the purposes of the legislation.

(Change in threshold for citizenship of a person)

13. Further, the Bill lowers the threshold of the level of ministerial satisfaction required for determining dual citizenship.
14. The existing provision (s35A(1)(c)) requires that the person is a national or citizen of another country at the time the Minister makes the determination.
15. The proposed test – which repeals s35A(1)(c) - would only require the Minister to be satisfied that the person would not *become* stateless and means that the Minister does not have to be satisfied that the person is a national or citizen of a foreign country at the time of determination. It allows the determination to revoke citizenship to be based on a prediction about future circumstances, the ability to acquire foreign citizenship.
16. The proposed test is significantly lower and vaguer than the current threshold. It would mean that there would no longer be recourse to a court to challenge the correctness of the Minister’s belief that the person held other citizenship. The proposed provision would mean that a person may have their citizenship removed while possessing no other citizenship, potentially subjecting them to indefinite immigration detention. This potential outcome which would be permitted under the proposed laws appears to be inconsistent with Australia’s international law obligations.
17. As the recent history demonstrates – in both the case of members of Parliament and the Prakash case – determining *existing* foreign citizenship can be extremely difficult. Determinations based on predictions about *future* foreign citizenship – which may include decisions by foreign governments – are obviously fraught.
18. The Law Council does not support this proposed change.
19. If the Committee determines that the Bill should proceed the Law Council recommends that there should be positive provision in the legislation requiring the verification of citizenship or immediate eligibility for citizenship, of another country by that other country. The Minister should

be required to be satisfied through such verification that the person will not be rendered stateless by a determination that the person has lost Australian citizenship.

20. The other concerns of the Law Council regarding the Bill are that the retrospective application of the Bill would contravene fundamental notions of justice, fairness and the rule of law; a review of the Minister's decision to revoke citizenship would be limited to the question of legal reasonableness, as merits review would be unavailable; and the basis and scope for the Commonwealth's constitutional power to enact the Bill is uncertain.
21. My colleagues and I are happy to answer any questions the Committee may have. Thank you.

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