

10 July 2015

Ms Suzanne Ford
Citizenship Policy
Department of Immigration and Border Protection
PO Box 25
BELCONNEN ACT 2616

By email: suzanne.ford@immi.gov.au

Dear Ms Ford,

AUSTRALIAN CITIZENSHIP: YOUR RIGHT, YOUR RESPONSIBILITY

1. Thank you for the opportunity to provide comments to the Department of Immigration and Border Protection's (the Department) inquiry into the *Australian Citizenship: Your Right, Your Responsibility Discussion Paper* (the Discussion Paper).
2. The Law Council acknowledges the assistance of its National Criminal Law Committee, Constitutional Law Committee, Administrative Law Committee, National Human Rights Committee and Migration Law Committee, the Law Society of South Australia, the Law Institute of Victoria, the Queensland Law Society and the Law Society of New South Wales in the preparation of this submission.
3. The Law Council has restricted its comments to the issues of:
 - revocation of citizenship for dual nationals engaged in terrorism; and
 - suspension of privileges for Australian citizens engaged in terrorism.
4. On this basis, the Law Council provides the following comments.

Revocation of citizenship for dual nationals engaged in terrorism

5. The proposals relating to the revocation of citizenship for dual nationals engaged in terrorism have progressed since the time of making the Discussion Paper available. On 24 June 2015 the Government introduced the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Bill) into the House of Representatives. The Bill seeks to introduce three new ways a person may automatically lose their citizenship for involvement in terrorist related activity amongst other things.
6. The Law Council intends to provide a submission to the Parliamentary Joint Committee on Intelligence and Security on the Bill, which will address the following questions raised by the Discussion Paper:

- in what circumstances should a holder of Australian citizenship be regarded as having forfeited citizenship?
 - what limitations and safeguards should apply to laws enabling the revocation of citizenship of Australians engaged in terrorism?
7. In summary, for the Discussion Paper, the Law Council considers that the cessation of a person's citizenship should ideally only occur after a conviction and when there is:
- serious conduct, including serious terrorism, treason, espionage or foreign incursions; and
 - that conduct demonstrates a specific disloyalty to Australia, including by:
 - engaging in acts that harm or are intended to harm Australians or Australian interests; or
 - demonstrating a complete repudiation of Australian values by committing war crimes or crimes against humanity.
8. After a conviction, automatic citizenship cessation should not occur, but require a decision by the Minister to revoke citizenship where s/he is satisfied on reasonable grounds that the person poses a substantial risk to Australia's security and it is not in Australia's interests for the person to remain in Australia. The Minister's decision should then afford procedural fairness and be accompanied by effective judicial review.
9. Laws to revoke citizenship must also comply with the rule of law¹, separation of powers and the Constitution.

Revocation for sole citizens

10. The powers of revocation should only apply to citizens in circumstances where it would not leave that person stateless, that is, where the person has actually acquired a nationality of another country.
11. It may not be within the power of the Commonwealth to revoke the citizenship of sole citizens where they are considered to be 'among the people of the Commonwealth' or 'non-alien'. McHugh J in *Hwang v Commonwealth*² suggested that there may be constitutional limits to the Commonwealth's power to regulate citizenship as the Parliament cannot:
- ... exclude from citizenship, those persons who are undoubtedly among 'the people of the Commonwealth'.³*
12. In addition, Article 8 of the *Convention on the Reduction of Statelessness (the Statelessness Convention)* provides that contracting states shall not deprive persons of nationality if deprivation would render them stateless.⁴

¹ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011.

² [2005] HCA 66 [8]-[18] (McHugh J).

³ *Hwang v Commonwealth* [2005] HCA 66 [18] (McHugh J).

⁴ Australia ratified the *Convention on the Reduction of Statelessness* in December 1973.

13. The Statelessness Convention does not permit contracting states to revoke citizenship on the basis of reasonable grounds to believe that a person is able to become a national of another country or territory under their laws. They are only permitted to do so where it would not leave that person stateless, that is, where the person has actually acquired the nationality of another country. Otherwise, revocation could occur and a person may be rendered stateless for a specific or indefinite period while seeking to acquire citizenship of another country in a manner inconsistent with the Statelessness Convention.
14. Australia has not made any reservations or declarations in regards to the Statelessness Convention to permit the revocation of citizenship, for example, where a person has conducted him/herself in a manner seriously prejudicial to the vital interests of the State, where it would render the person stateless.⁵
15. The 2013 UK Supreme Court decision in *Secretary of State for the Home Department v Al-Jedda*⁶ affirmed that the prohibition on creating statelessness is violated when the Home Secretary issues an order for revocation and the individual does not, at that moment, possess another nationality. The Home Secretary argued unsuccessfully that Al-Jedda (a naturalised UK citizen) was eligible to reclaim his former Iraqi citizenship as of right and that his failure to do so made him the author of his own statelessness. The UK Supreme Court rejected this argument, which prompted the UK Government to amend its citizenship legislation to empower the Home Secretary to render naturalised citizens stateless in certain circumstances. However, the UK, unlike Australia, had made a reservation to the Statelessness Convention.

Recommendation

- **The powers of revocation should only apply to citizens in circumstances where it would not leave that person stateless, that is, where the person has actually acquired a nationality of another country.**

Suspension of privileges for Australian citizens engaged in terrorism

16. The Law Council has limited its comments to the two privileges specifically referred to in the Discussion Paper: the right to vote and the ability to receive consular assistance.

Right to vote

17. The right to vote is protected by Australia's system of democracy and the implied meaning of ss 7 and 24 of the Constitution.⁷
18. In *Roach v Electoral Commissioner*,⁸ a majority of the High Court held that Parliament has the power to prevent certain citizens from voting, but that it must

⁵ *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175: See Article 8(3) which permits such revocation where a contracting State has entered a reservation to this effect under the Convention.

⁶ [2013] UKSC 62.

⁷ *Roach v Electoral Commissioner* [2007] HCA 43.

⁸ *Ibid.*

have a 'substantial reason'. This reason must represent 'such a form of civic irresponsibility that it is appropriate for Parliament to mark such behaviour as anti-social and to direct... [the]...loss of a fundamental political right'.⁹

19. In *Roach* the court found that serious criminal offending after a person had been convicted of an offence may warrant such a substantial reason to prevent a person's right to vote.
20. Accordingly, a person who has been convicted of a terrorism offence which carries high penalties of imprisonment may potentially have their right to vote validly suspended under the Constitution. In the absence of a court conviction, the evidence to demonstrate the severance of civic responsibility may be inadequate to suspend the fundamental right to vote.

Recommendation:

- **Rights, such as the right to vote, which are protected under the Australian Constitution should only be limited in a way that is within the power of the Commonwealth Parliament.**
- **Any such a suspension should be demonstrated to meet the test of being a 'substantial reason' and within the power of the Commonwealth Parliament to enact.**

Consular assistance

21. The Discussion Paper suggests that consular assistance should not be provided to individuals who are fighting or training with terrorist groups.
22. However, it is unclear from the Discussion Paper how the suspension of consular assistance would benefit the security of the Australian community and society's general welfare in circumstances where:
 - an individual has not been convicted of an Australian terrorism offence and therefore may potentially be innocent and deserving of consular assistance; or
 - an individual who has potentially been engaged in terrorist activities but then renounces extremism, demonstrates remorse and de-radicalisation.
23. In these circumstances, an Australian citizen's welfare may be at risk abroad, particularly in areas of high terrorist conflict. The *Australian Consular Operations Handbook* governs the provision of consular services to Australians overseas. Chapter 4 of Part 2 provides that the Department of Foreign Affairs and Trade 'aims to give humanitarian assistance to Australian citizens and permanent residents whose welfare is at risk abroad'.¹⁰

⁹ Ibid, [12] (Gleeson CJ).

¹⁰ Department of Foreign Affairs and Trade, [Australian Consular Operations Handbook](#) (2014).

24. The 'right of consular assistance' is not enshrined in Australian law and accordingly there are no minimum standards that government are required to meet under domestic law when providing assistance to Australians overseas.
25. However, the right to consular access is guaranteed under the *Vienna Convention on Consular Relations*,¹¹ a multilateral treaty ratified by over 100 countries, including Australia. The Convention does not appear to distinguish the right to consular access based on the type of alleged offence a person is believed to have committed.
26. The *Australian Consular Operations Handbook* also currently recognises that consular officials should show a continuing interest in the welfare of Australians imprisoned overseas, and that 'the crimes which prisoners have committed, or have allegedly committed, have no bearing on the responsibility to provide a sensible humanitarian response to their basic needs'.¹²
27. Further, where a person has been arrested, charged or convicted of an offence in a foreign country it may not be on the basis of fair trial principles and the rule of law that pertain to Australia's system of democracy. This may increase the likelihood of innocent person's being convicted of offences overseas or being convicted for offences for conduct not considered criminally culpable under Australian law.
28. Accordingly, the Law Council considers that it is not reasonable to suspend a citizen's consular assistance based on the nature of a crime allegedly committed.

Recommendation

- **The provision of consular assistance should accord with the *Australian Consular Operations Handbook*. That is, the crimes which Australian citizens have committed, or have allegedly committed, should have no bearing on Australia's responsibility to provide a sensible and practicable humanitarian response to their basic needs.**

29. Thank you again for the opportunity to provide these observations.

Yours sincerely,



MARTYN HAGAN
SECRETARY-GENERAL

¹¹ United Nations, *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 487 (entered into force on 19 March 1967). Australia ratified the treaty on 12 February 1973.

¹² Department of Foreign Affairs and Trade, [Australian Consular Operations Handbook](#) (2014).