

31 October 2019

Mr Andrew Hastie MP
Chair, Parliamentary Joint Committee on Intelligence and Security
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By email: pjicis@aph.gov.au

Dear Chair

Supplementary Submission to the Inquiry into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

On 18 October 2019, the Law Council of Australia appeared before the Parliamentary Joint Committee on Intelligence and Security (**the Committee**) in relation to its review of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (**the Bill**).

The Law Council has subsequently received 22 supplementary questions on notice from the Committee as set out below. The Law Council understands that the Committee would be assisted if the Law Council could provide ‘yes’ or ‘no’ answers to the questions, however this has not always been possible. Where it has been necessary to qualify a response, the Law Council has endeavoured to do so in brief and concise terms.

The Law Council notes that in providing answers to these questions, the Committee seeks a response based on how the Bill could operate (as a matter of law) rather than offering a prediction about how the Bill would operate in practice. Noting the hypothetical nature of these questions, the Law Council has attempted to respond constructively below.

- Is it the case that, in order for the Minister to make a determination to cancel the Australian citizenship of a person who is aged 14 or older under clause 36B(1):***

<i>it would <u>not</u> be necessary:</i>	<i>it would only be necessary:</i>
<i>for that person to <u>in fact</u> be a national or citizen of another country</i>	<i>for the Minister to be <u>satisfied</u> that the person would not “become a person who is not a national or citizen of any country” if the Minister were to make the determination</i>
<i>for that person to</i>	<i>for the Minister to be</i>
<ul style="list-style-type: none"> <i>have <u>in fact</u> engaged in any of the conduct specified in clause 36B(5) while outside Australia; or</i> <i>to have <u>in fact</u> engaged in any of the conduct specified in clause 36B(5) while in Australia (prior to</i> 	<ul style="list-style-type: none"> <i><u>satisfied</u> that the person engaged in any of the conduct specified in clause 36B(5) while outside Australia; or</i> <i><u>satisfied</u> that the person engaged in any of the conduct specified in</i>

<i>that person leaving Australia without having been tried for any offence in relation to the conduct)</i>	<i>clause 36B(5) while in Australia (prior to that person leaving Australia without having been tried for any offence in relation to the conduct)</i>
<i>for the conduct referred to above to have, <u>in fact</u>, demonstrated that the person has repudiated their allegiance to Australia</i>	<i>for <u>the Minister</u> to be <u>satisfied</u> that the conduct referred above demonstrated that the person has repudiated their allegiance to Australia</i>
<i>for it to be contrary to the public interest for the person to remain an Australian citizen (in the view of any person other than the Minister)</i>	<i>for <u>the Minister</u> to be <u>satisfied</u> that it would be contrary to the public interest for the person to remain an Australian citizen (having regard to the considerations listed in clause 36E of the Bill)?</i>

Answer: Yes, the Bill will operate so that the determination for the cessation of citizenship may be made where the Minister is ‘satisfied’ of certain factors listed in proposed section 36B. However, the Minister ‘must’ have regard to the factual basis of the criteria listed in proposed section 36E in deciding whether such a determination is in the public interest. There is no standard of proof applied to the level of Ministerial satisfaction required or opportunity to challenge that factual basis for the Minister’s belief.

- 2. Under clause 36B of the Bill, would it be necessary for a person to have ever been convicted – or even charged – with a criminal offence in order for the Minister to cancel that person’s citizenship under clause 36B(1)?**

Answer: No.

- 3. Without being exhaustive, is it correct that two common law principles of “natural justice” are that:**
- a. where a decision-maker is proposing to make a decision that would affect a person’s fundamental rights, the decision-maker should inform the person of the case against them and provide them with an opportunity to be heard prior to that decision being made (the so-called “hearing rule”); and**
 - b. a decision-maker should disqualify himself or herself from making a decision if the decision-maker is affected by actual bias or where a fair-minded lay observer might reasonably apprehend that the decision-maker is bias (the so-called “bias rule”)?**

Answer: Yes. As stated by the Administrative Review Council (ARC):

The hearing rule of natural justice is designed to ensure that a person whose interests will be affected by a proposed decision receives a fair hearing...The rule also tends to improve the quality of decision making and reduce errors: as any experienced decision maker knows, something that appears at first to be an ‘open and shut case’ can look very different when the other side of the story is revealed.¹

While in respect of the ‘bias rule’ the ARC stated:

The bias rule of natural justice is not only concerned with conflict of interest: it also requires that a decision maker be impartial and free of actual or apparent bias.

¹ Administrative Review Council, *Decision Making: Natural Justice – Best-practice guide 2*, (August 2007), 6.

'Actual bias' means that the decision maker has a predisposition to decide the matter otherwise than with an impartial and unprejudiced mind. 'Apparent bias' means that in the circumstances a fair-minded observer might reasonably suspect that the decision maker is not impartial. In most cases, apparent bias is enough to disqualify a person from making a decision.²

4. Do the rules of natural justice apply in relation to the Minister's decision to cancel a person's citizenship under clause 36B(1) of the Bill?

Answer: No, they are expressly excluded by proposed subsection 36B(11). The rules of natural justice are only permitted to apply when the Minister considers an application for revocation of the determination under proposed section 36H.

5. Under clause 36B(1), is the Minister required to inform a person of the case against them or provide them with an opportunity to be heard prior to making a decision to cancel their Australian citizenship?

Answer: No.

6. Provided he was satisfied of the various matters set out in clause 36B(1), does the Bill prohibit the Minister from cancelling the citizenship of a person in circumstances where the Minister is affected by actual bias (or where a fair-minded observer might reasonably apprehend that the Minister is affected by bias)?

Answer: No, because the rules of natural justice are excluded from applying by proposed subsection 36B(11).

7. If the Minister cancels a person's Australian citizenship under clause 36B(1), does the person cease to be an Australian citizen with immediate effect?

Answer: Yes, under proposed subsection 36B(3) the person ceases to be an Australian citizen 'at the time the determination is made'.

8. Is it correct that a person whose citizenship is cancelled under clause 36B would only receive an "ex-citizen visa" under section 35 of the Migration Act if the person was in the "the migration zone" at the time his or her citizenship was cancelled?

Answer: Yes. If a person was overseas at the time the determination was made by the Minister for the cessation of citizenship, and therefore outside of the migration zone, the person is outside of the jurisdiction of the *Migration Act 1958* (Cth) (**Migration Act**) and would therefore not be eligible for an ex-citizen visa.

9. Is it correct that the "migration zone" is the area consisting of the States and Territories of Australia (as well as Australian resource and sea installations)?

Answer: Yes, noting that sections 5 and 9A of the Migration Act provides a complete definition of the 'migration zone' which 'does not include sea within the limits of a State or Territory but not in a port'.

² Ibid, 3.

10. If the Minister cancelled a person's Australian citizenship under clause 36B, and the person was on an overseas holiday at the relevant time, would that person automatically receive an ex-citizen visa under the Migration Act?

Answer: No, only if the person was within the migration zone at the time the determination for the cessation of citizenship occurs, otherwise the person would not automatically be granted an ex-citizen visa.

11. Does the Minister have a personal power to cancel a person's ex-citizen visa if the Minister (i) reasonably suspects that the person does not pass the "character test" (as defined in the Migration Act) and (ii) is satisfied that the cancellation is in the national interest?

Answer: Yes, subject to the Minister being reasonably satisfied of one or more of the criteria listed in subsection 501(6) of the Migration Act.

12. If Australian officials know or reasonably suspect that a person does not (i) have a valid visa and (ii) the person is in "the migration zone", officials must detain the person. Is that correct?

Answer: Yes, as long as the person is also reasonably suspected of not being a citizen.

13. If the Minister cancelled a person's Australian citizenship under clause 36B of the Bill while that person was in the migration zone, and the Minister cancelled the person's "ex-citizen visa", would officials from the Minister's Department be required by law to detain that person?

Answer: Yes.

14. If the Minister cancels a person's citizenship under clause 36B, does the Bill allow that person to seek merits review of the Minister's decision from an independent third party?

Answer: No, merits review is not provided for in the Bill. There is a 'note' after proposed subsection 36B(1) which states the person may seek review (being judicial as opposed to merits review) of the Ministerial determination to either the High Court under section 75 of the Constitution or the Federal Court under section 39B of the *Judiciary Act 1903* (Cth). The same rights of review apply in relation to the Minister's decision to grant or refuse a revocation application made under proposed section 36H.

15. Is it correct that a person whose citizenship is cancelled under clause 36B has only two options for having the Minister's decision reviewed:

- a. he or she could apply to the original decision-maker, the Minister, to have the decision revoked under clause 36H ("ministerial review"); or**
- b. he or she could seek review of the Minister's decision in the federal court or in the high court ("judicial review")?**

Answer: Yes.

16. **Is it the case that, in order for the Minister to re-affirm his decision to cancel the Australian citizenship of a person who is aged 14 or older under clause 36B:**

<i>it would <u>not</u> be necessary:</i>	<i>it would <u>only</u> be necessary:</i>
<i>for that person to <u>in fact</u> be a national or citizen of another country</i>	<i>for <u>the Minister</u> to be <u>satisfied</u> that the person would not “become a person who is not a national or citizen of any country” if the Minister were to re-affirm his determination</i>
<i>for that person to</i>	<i>for <u>the Minister</u> to be</i>
<ul style="list-style-type: none"> • <i>have <u>in fact</u> engaged in any of the conduct specified in clause 36B(5) while outside Australia; or</i> • <i>to have <u>in fact</u> engaged in any of the conduct specified in clause 36B(5) while in Australia (prior to that person leaving Australia without having been tried for any offence in relation to the conduct)</i> 	<ul style="list-style-type: none"> • <i><u>satisfied</u> that the person engaged in any of the conduct specified in clause 36B(5) while outside Australia; or</i> • <i><u>satisfied</u> that the person engaged in any of the conduct specified in clause 36B(5) while in Australia (prior to that person leaving Australia without having been tried for any offence in relation to the conduct)</i>
<i>for the conduct referred to above to have, <u>in fact</u>, demonstrated that the person has repudiated their allegiance to Australia</i>	<i>for <u>the Minister</u> to be <u>satisfied</u> that the conduct referred above demonstrated that the person has repudiated their allegiance to Australia</i>
<i>for it to be contrary to the public interest for the person to remain an Australian citizen (in the view of any person other than the Minister)</i>	<i>for <u>the Minister</u> to be <u>satisfied</u> that it would be contrary to the public interest for the person to remain an Australian citizen (having regard to the considerations listed in clause 36E of the Bill)?</i>

Answer: Yes.

17. **The Minister would always be reviewing his own decision under clause 36H. Is it arguable that, as a matter of law, the Minister would have a bias – or that a fair-minded observer might reasonably apprehend that the Minister has a bias – in relation to every review the Minister conducts under clause 36H?**

Answer: As noted in the Law Council’s initial submission to the Committee dated 17 October 2019, the Law Council considers that it is preferable for these decisions to be court based. Failing that, there should be an independent form of merits review, as was recommended by the Independent National Security Legislation Monitor (INSLM) in relation to limited merits review as to ‘conduct’, or the more comprehensive form of merits review, as advocated by the Australian Human Rights Commission, to the Security Appeals Division of the Administrative Appeals Tribunal. This would assist in addressing any perceptions of ministerial bias in favour of the Minister’s initial decision.

18. Is it the case that, where a person seeks judicial review of the Minister’s decision to revoke his or her citizenship:

<i>the court would <u>not</u> be required:</i>	<i>the court would be required to:</i>
<i>to consider whether the person is <u>in fact</u> a national or citizen of another country</i>	<i>consider whether <u>the Minister</u> was satisfied that the person would not “become a person who is not a national or citizen of any country” if the person’s Australian citizenship was cancelled</i>
<i>to consider whether the person:</i>	<i>consider whether <u>the Minister</u> was:</i>
<ul style="list-style-type: none"> • <i><u>in fact</u> engaged in any of the conduct specified in clause 36B(5) while outside Australia; or</i> • <i><u>in fact</u> engaged in any of the conduct specified in clause 36B(5) while in Australia (prior to that person leaving Australia without having been tried for any offence in relation to the conduct)</i> 	<ul style="list-style-type: none"> • <i>satisfied that the person engaged in any of the conduct specified in clause 36B(5) while outside Australia; or</i> • <i>satisfied that the person engaged in any of the conduct specified in clause 36B(5) while in Australia (prior to that person leaving Australia without having been tried for any offence in relation to the conduct)</i>
<i>to consider whether the conduct referred above had, <u>in fact</u>, demonstrated that the person had repudiated their allegiance to Australia</i>	<i>consider whether <u>the Minister</u> was satisfied that the conduct referred above had demonstrated that the person had repudiated their allegiance to Australia</i>
<i>to consider whether it would be contrary to the public interest for the person to remain an Australian citizen</i>	<i>consider whether <u>the Minister</u> was satisfied that it would be contrary to the public interest for the person to remain an Australian citizen (having regard to the considerations listed in clause 36B of the Bill)?</i>

Answer: Yes.

19. If this Bill were to become law, could the following scenario play out in Australia:

- *Peter works in IT and lives in Melbourne. He has never been convicted of a crime – or even charged with one. In fact, he has never even received a parking ticket.*
- *The Minister is satisfied that Peter sought to recruit people for a terrorist organisation in 2004.*
- *It’s not true – the Minister has made a terrible mistake. But the Minister is very confident and does not bother to make basic inquiries that would alert him to his mistake.*
- *The Minister is also satisfied – for reasons that are secret to him – that:*
 - *if Peter lost his Australian citizenship, he would not become a person who is not a national or citizen of any country;*
 - *by engaging in the conduct that the Minister thought Peter had engaged in (albeit mistakenly), Peter had repudiated his allegiance to Australia; and*

- *it would be contrary to the public interest for Peter to remain an Australian citizen (having regard to the considerations listed in clause 36B of the Bill).*
- *The Minister cancels Peter’s Australian citizenship and notifies Peter by letter.*
- *Because Peter is in Australia, he is automatically given an ex-citizen visa. But the Minister revokes that visa immediately in accordance with the Migration Act.*
- *Peter, who is now an unlawful non-citizen, is detained by Border Force and placed in immigration detention. He is confused – and has to tell his family, friends or his employer that he has had his Australian citizenship cancelled because, according to the Minister for Home Affairs, he is a terrorist. He loses his job and friends distance themselves from Peter.*
- *Peter asks the Minister to change his decision and provides the Minister with evidence that the Minister is making a terrible mistake. After one month, the Minister rejects Peter’s application.*
- *Peter applies to the federal court for judicial review. After reviewing the application, the court is appalled – the Minister has clearly made a terrible mistake. Worse, the Minister failed to make basic inquiries and ignored key evidence that would have alerted him to his mistake.*
- *The court orders that the Minister’s decision to revoke Peter’s citizenship be quashed.*
- *Peter gets his citizenship back but, by this time, he has lost his job and his mental and physical health has seriously deteriorated.*

Answer: Yes, this can potentially occur because Peter must argue his case *after* the determination is made. While the Minister’s decision in the presented scenario would be unlawful, it would remain operative until such time as it is set aside by the Federal Court. In the circumstances of this scenario, this would only occur after Peter had contended for this after the cessation of citizenship comes into effect.

Further, if for any reason Peter did not receive the reasons for the Minister’s decision or was otherwise unable to bring proceedings in the Federal Court or High Court, the Bill does not provide any other way to overturn the Minister’s decision.

20. *Under the Bill, the Minister must not make a determination to cancel a person’s Australian citizenship under either clause 36B or clause 36D if “the Minister is satisfied that the person would, if the Minister were to make the determination, become a person who is not a national or citizen of any country”. Is that formulation contrary to Australia’s obligations under the Convention on the Reduction of Statelessness?*

Answer: Potentially. The *Convention on the Reduction of Statelessness* sets out that a contracting state shall not deprive a person of his or her nationality if such deprivation would render the person stateless.³ The Convention does permit, however, renunciation of citizenship in circumstances where the person concerned possesses or acquires another nationality.⁴

The proposed change in threshold increases the possibility for a person, on revocation, to be left stateless as the Minister is only required to be ‘satisfied’ that the person would not

³ *Convention on the Reduction of Statelessness*, 989 UNTS 176 (entered into force 13 December 1975), art 8.

⁴ *Ibid* art 7.

become stateless. At present the Minister has no power to revoke a person's Australian citizenship if that would, as a matter of fact and law, leave the person stateless.

21. If this Bill were to become law, would it be possible for the Minister to lawfully render a person stateless?

Answer: Yes.

22. Do you agree with the following propositions?

- ***all Ministers in the Australian Government are human beings;***
- ***all human beings are fallible;***
- ***Peter Dutton is a human being;***
- ***Peter Dutton is a Minister in the Australian Government; and***
- ***Peter Dutton is fallible?***

Answer: The Law Council does not wish to comment on this question.

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', is written over a thin red horizontal line.

**Arthur Moses SC
President**