CITIZENSHIP STRIPPING BILL SHOULD BE ABANDONED

Joint Councils for Civil Liberties Letter to the Australian Parliament

A Public Statement from:
NSW Council for Civil Liberties
Liberty Victoria
Queensland Council for Civil Liberties
South Australian Council for Civil Liberties
Australian Council for Civil Liberties

20/11/2015

Australian Council for Civil Liberties

CITIZENSHIP STRIPPING BILL SHOULD BE ABANDONED

STATEMENT BY JOINT COUNCILS FOR CIVIL LIBERTIES

1. The Bill should be abandoned

The joint councils for civil liberties across Australia[1] are disappointed and alarmed that the Government and the Labor Party Opposition are proceeding with the radical proposal to strip citizenship from Australians who are dual nationals. We remain strongly opposed to this Bill which proposes a fundamental shift in the relationship between citizen and the State.

The recent brutal terrorist attacks in Paris, Lebanon and other places are a tragic reminder of the shared threat of terrorism. We accept the need for effective laws to deal with this situation: laws which are necessary to meet the terrorist threat, which will help keep us safe and which do not unjustifiably encroach on our rights and liberties.

The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 is not necessary. The Government, with its very extensive suite of counter-terrorism/national security laws and criminal laws, already has more than adequate powers to deal with the specified conduct in the Bill. It is not clear that the Bill's enactment will make Australia or the world safer. Arguably, it is more likely to make the world less safe.

The Bill unjustifiably encroaches on our rights.

Amendments commendable but peripheral- the issue is citizen-stripping

We recognize that the amended Bill is significantly improved and less dangerous than the very poorly drafted initial Bill. Professor George Williams has correctly described that Bill as "one of the most poorly drafted and ill-conceived pieces of legislation ever introduced into the Federal Parliament." (SMH 15/11/15) The Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Government have remedied many -but certainly not all- of the widely criticized and serious flaws in the Bill.

[1] NSW Council for Civil Liberties, Liberty Victoria, Queensland Council for Civil Liberties, South Australian Council for Civil Liberties, and Australian Council for Civil Liberties

We welcome the changes that have been made, but they are peripheral to the core issue. The core issue is not how, or on what grounds, the Government proposed to revoke citizenship, but the citizenship-stripping proposal itself. The CCLs reject this proposal.

Tiers of Citizenship

If enacted the Bill would create two tiers of citizenship – those who are dual citizens and/or dual nationals and can have their Australian citizenship revoked, and those who have only Australian citizenship and cannot have their citizenship revoked.

It is a fundamental error to expressly legislate for two classes of Australian citizenship – it emboldens the rhetoric of extremists who would assert that there are "true" Australians and then there are "others". It will support those who want to divide us rather than to unite us.

Our citizens, our responsibility

Australian citizens who are alleged to have engaged in terrorist related activities outside or inside Australia should be charged, taken to trial and, if found guilty, punished by imprisonment in Australia. There should be no withdrawal of citizenship as punishment: whether by 'renunciation by conduct' or by Ministerial determination post-conviction for designated 'terrorism and other offences'.

In exile such persons can still be a threat to other countries and indeed to Australian interests at home and abroad. It is not likely to make us or the world safer. The Bill merely transfers the potential threat posed by such persons to other countries, and often those countries will be theatres of war and incapable of properly monitoring such persons and protecting potential victims from harm, including Australians.

The Bill does nothing to bring such alleged terrorists to justice and reflects a fundamental abrogation of our responsibility as a global citizen. In short, it sees us willing to render our citizens as another nation's problem.

If more countries proceed in this way- as France has now signalled it will in the aftermath of 13th November- we are collectively creating a global problem of de facto stateless persons surely more likely to promote unrest and terrorism than contain it.

Constitutional challenge

The Bill may well be unconstitutional, but this not the basis of our strong opposition. We would, of course, welcome the legislation being struck down as unconstitutional as a way of blocking its implementation. But it is preferable to not pass the Bill.

Existing law - s35 of the Citizenship Act 2007

Australian law provides for the revocation of citizenship of persons fighting with the armed forces of a country at war with Australia. This provision is very limited in the scope of conduct required for loss of citizenship and has not been used since its enactment in 1948. Its constitutionality has therefore never been tested.

Once the door is opened to extending the grounds for loss of citizenship by this Bill, recent history with 'exceptional' counter-terrorism legislation suggests we should expect flow-on legislation. If terrorist-related and other conducts specified in this Bill are grounds for loss of citizenship, what is the logic against extension for other serious crimes?

The CCLs argue that citizenship is a core right and should not be treated as a gift to be withdrawn by politicians or as a punishment for criminal conduct.

In summary

Citizenship-stripping is not a sound policy response to criminal activity whether it is terrorist related or not. It is not good law.

2. Problems to be addressed should the Bill proceed

Retrospectivity

The CCLs strongly oppose the inclusion of a retrospectivity provision in the Bill. Although this is a limited provision which will only apply to a small number of persons who will attract little public sympathy, it is a serious breach of the rule of law and natural justice principles.

It is not necessary as the Government already has a suite of powers to ensure that persons who have served their sentences of imprisonment for such offences are monitored.

Retrospective application of punitive legislation is never acceptable. It is particularly so when, as in this context, it retrospectively imposes such a significant penalty as loss of citizenship.

Every time a retrospectivity provision becomes law in 'exceptional' circumstances, it makes such provisions more 'normal' and more likely to become commonplace legislative provisions.

Protection of Children

The initial Bill's provisions in relation to children were appalling.

The CCLs welcome the removal of the provision which allowed for the loss of citizenship of children if a parent has their citizenship revoked. It is never just to punish the child for a parent's actions.

We welcome the inclusion of a minimum age for persons caught by the Bill's other provisions. We are however concerned that the minimum age ranges from 10 to 14. In our view children should not be subject to loss of citizenship under this Bill. The minimum age provision should be 18.

We are currently seeing an emerging trend to remove protections from children in numbers of laws. The pending Bill on Control Orders is a case in point where the Government proposal is for a minimum age of 14 and others are proposing 12. Where will we draw the line?

This is a disturbing trend and we oppose it. The Bill should be amended to exempt children under the age of 18.

Ministerial discretionary power remains inappropriate

Under the amended Bill, one way in which a person can be found to have his or her citizenship revoked is by being found to have engaged in terrorist related conduct overseas, or in circumstances where the relevant conduct occurred in Australia but the person has then left the jurisdiction.

For those who are regarded as having renounced their citizenship by such conduct, the Bill still rests upon a legal fiction that the Minister does not make a decision to revoke citizenship, rather he or she merely becomes "aware" of such conduct having occurred which results in the automatic revocation of citizenship.

This is a thinly veiled attempt to insulate the Minister from judicial review. It obfuscates how such decisions are inevitably made based on the interpretation of evidence.

The Bill then grants the Minister a non-compellable power to "exempt" persons from the operation of the Bill, which would see the Minister have precisely the kind of wide-ranging discretionary power that was so heavily criticised when the Bill was first proposed. (This is so notwithstanding the inclusion of provisions requiring the Minister to consider rescinding a notice of revocation and providing a list of matters the Minister must consider in making this decision.)

Lack of merit review

While allowing a 'review of a determination' in the High Court or the Federal Court of Australia, the Bill fails to protect those who might be subject to erroneous decision-making by not providing for any kind of merits review.

Rules of Natural Justice excluded

Notwithstanding the exception made for the Minister's power in s35A(1), it is deplorable that the Bill explicitly provides that for decisions made pursuant to proposed ss.33AA, 35 and 35AA the Minister is not bound by the rules of natural justice.

The rules of natural justice have evolved to protect the citizen from abuses of power committed by decision-makers. For such a fundamental matter as revoking citizenship, the Minister should be held to account by the highest standards of procedural fairness and natural justice. As the case of Dr Mohamed Haneef demonstrates, that is especially important in circumstances where there is always the danger that decisions based on national security considerations can be influenced by political pressures.

The rules of natural justice should apply fully to ss.33AA, 35 and 35AA.

Role and Composition of PJCIS

NSWCCL notes the increased role of the PJCIS -along with the INSLM- in scrutiny and oversight of the operation of the legislation. We support this strengthening of oversight and scrutiny as very necessary and are hopeful it will be effective.

However, we are concerned at the lack of any cross bench or Australian Greens Party membership of the PJCIS. The consistent bi-partisanship of the Labor Opposition and the Government on counter-terrorism and national security legislation means that more critical and dissenting views of a considerable minority within the Parliament are excluded from the highly influential Committee's deliberations. The PJCIS membership should be amended to be more fully representative of the Parliament.

The current Parliamentary profile indicates the inclusion of a member of the Greens Party on the PJCIS would be appropriate.

Conclusion

It is our responsibility to deal with our citizens who have violated our laws. Such persons should be brought to justice in Australia. To attempt to exile such persons is a sign of weakness, not strength, and only reflects an attempt to shift the burden created by such persons to other nations.

The CCLs urges members of Parliament to refuse Parliament's approval for this Bill on the grounds that it is unnecessary, is not likely to make us safer, fails to protect fundamental principles of natural justice and the rule of law and radically destabilises the important relationship between the citizen and the State.

The joint councils for civil liberties hope that this statement will be of assistance to our Parliamentarians in their decision making on this Bill. The Executive members of the councils are very willing to discuss these issues further.

Stephen Blanks
President NSW Council for Civil liberties

George Georgiou SC
President Liberty Victoria

Michael Cope
President Queensland Council for Civil Liberties

Claire O'Connor SC
President SA Council For Civil Liberties

Terry O'Gorman SC
President Australian Council for Civil Liberties

Contacts in relation to this statement
Dr Lesley Lynch NSWCCL: 0416497508
Michael Stanton Liberty Victoria: 0409570725
Michael Cope Queensland CCL 0432847154