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REVOCAION OF CITIZENSHIP

EXPERT ROUNDTABLE

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BRIEFING PAPER

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THE ROUNDTABLE

The Australian INSLM is a statutory office established under the *Independent National Security Legislation Monitor Act 2010*.

The INSLM is broadly equivalent to the UK's Independent Reviewer of Terrorism Legislation and is empowered to conduct reviews, on his or her own initiative, and make recommendations with respect to the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation.

The current INSLM, James Renwick SC, is conducting a review of the citizenship cessation provisions contained in the *Australian Citizenship Act 2007*. As part of his work, he is coming to the UK in May to meet with a variety of people to inform his work. To assist him, we have convened this roundtable event in London on 10 May, 2019.

The INSLM is grateful to Dr McNamara and Dr Blackburn, and their institutions - the University of York, Bingham Centre for the Rule of Law, and the Centre for Socio-Legal Studies at the University of Oxford – for assistance in convening this event.

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1. Background

- 1.1 By letter dated 15 February 2019, the Australian Attorney-General, the Hon Christian Porter MP, referred to the INSLM for review the operation, effectiveness and implications of the terrorism-related citizenship loss provisions in the *Australian Citizenship Act 2007*. The Attorney has requested that the review be completed by 15 August 2019. In his referral letter the Attorney noted that the Australian Parliamentary Joint Committee on Intelligence and Security (PJCIS) is required to conduct its own examination of the citizenship loss laws by 1 December 2019.

2. Overview of Provisions

- 2.1 The Australian Citizenship Act provides for the automatic cessation of Australian citizenship of a person who is also a national of or citizen of another country (dual citizen) where the person: fights for or is in the service of a 'declared terrorist organisation' outside of Australia (s35); is taken to have renounced their Australian citizenship by engaging in specified conduct inconsistent with their allegiance to Australia (s33AA); or is convicted of a specified offence under the *Criminal Code* (Cth) or the *Crimes Act 1914* (Cth) (s35A). The Australian government has announced that s 33A has operated to deprive 12 persons of Australian citizenship although, mainly because of Ministerial decisions not to notify the affected persons in almost all cases, the names of the persons are not known. The notable exception is Neil Prakash where the Australian government statements that he had lost Australian citizenship but remained a citizen of Fiji was met with a Fijian government statement that he was not a Fijian citizen.

Operation of law provisions – triggered by certain conduct (Sections 33AA and 35)

- 2.2 ss33AA and 35 provide that citizens of Australia aged 14 years or over, upon engaging in certain specified forms of acts related to terrorism or foreign conflict, are taken by operation of law to have renounced their Australian citizenship (described in the sections as acting 'inconsistently with their allegiance to Australia'). In essence, these sections revoke the person's citizenship automatically upon the person engaging in the relevant acts. In contrast, s 35A uses a more conventional decision making model which empowers a Minister to revoke a person's citizenship where the person has been convicted of an offence related to terrorism and certain other requirements are met or considered.
- 2.3 Assuming dual Australian/foreign citizen of a person over 14, the acts which will trigger a revocation of citizenship under s 33AA are:
- a. engaging in international terrorist activities using explosives or lethal devices;
 - b. engaging in a terrorist act;
 - c. providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
 - d. directing the activities of a terrorist organisation;
 - e. recruiting for a terrorist organisation;

- f. financing terrorism;
- g. financing a terrorist; or
- h. engaging in foreign incursions and recruitment;

in each case, if done with the intention of advancing a political, religious, or ideological cause, and with the intention of coercing, or influencing by intimidation, the Commonwealth/a State or Territory/foreign government, or the public or a section of the public.

2.3.2 Where the conduct listed above is engaged in by a person who is a member of, instructed by or in cooperation with a 'declared terrorist organisation' pursuant to s 35AA the intention is inferred.

2.3.3 For s 33AA to apply, the person must also have been outside Australia when they engaged in the relevant conduct, or left Australia following the conduct and at the time of leaving Australia, not been tried for any offence related to the conduct. It is not necessary for there to have been a conviction anywhere of any such acts.

2.4 The acts which will automatically trigger a revocation of citizenship under s 35 are where an Australian citizen:

2.4.1 serves in the armed forces of a country at war with Australia; or

2.4.2 fights for, or is in the service of, an organisation declared to be a 'declared terrorist organisation' pursuant to s 35AA.

Provisions triggered by a conviction for certain offences (Section 35A)

2.5 The requirements that must be met to empower the Minister to revoke a person's citizenship under s 35A are:

- a. the person has been convicted of a specified offence related to terrorism;
- b. the person has been sentenced to at least six years imprisonment for such offences;
- c. the person is a national or citizen of a country other than Australia;
- d. the Minister is satisfied that the person's conduct demonstrates that they have repudiated their allegiance to Australia; and
- e. the Minister is satisfied that it is in the public interest for the person to no longer be an Australian citizen, having regard to certain factors.

2.6 The Minister's power to revoke a person's citizenship is not limited to persons over 14 years of age, as is the case with the automatic revocation of citizenship under s 33AA or 35. However, as a matter of statutory construction, it appears that this power would not extend to children under 10

years of age (the minimum age of criminal responsibility), or children between 10 and 14 years of age who did not 'know their conduct is wrong', as these children cannot be convicted under the *Crimes Act 1914* (Cth).¹

- 2.7 Upon the Minister becoming aware of citizenship ending under s 33AA, 35, or 35A, the Minister must give (or make reasonable attempts to give) notice to the person (**revokee**) of their citizenship ending, as soon as practicable unless there is a decision made on the grounds of security, international relations etc not to notify in which case the former citizen will not be aware of their loss of citizenship.²
- 2.8 If a revokee triggers the revocation of their citizenship under s 33AA or 35, the Minister may exempt the revokee from their citizenship being revoked.³ While the Minister is under no compulsion to consider exercising this power in any given case,⁴ if the Minister decides to consider exercising this power, he or she must have regard to a number of specified matters, including if the revokee is under 18 years of age, the best interests of the revokee (ie, child) as a primary consideration.⁵ If the Minister decides to exempt the revokee, the Minister must lay before each House of Parliament a statement setting out the decision, and the Minister's reasons for making the decision.⁶
- 2.9 While the rules of natural justice apply to the Minister's active consideration of whether to exempt a revokee under s 33AA or 35,⁷ or a decision to revoke a citizenship under s 35A,⁸ the rules of natural justice do not apply to any other decisions or exercises of power by the Minister under these sections. It appears this means the rules of natural justice do not apply to decisions made by the Minister not to actively consider an exemption for a revokee, not to provide a notice to a revokee, or to publish the names of revokees.
- 2.10 If the Minister makes a determination to revoke a citizenship under s 35A on the basis of a specified conviction, and that conviction is subsequently overturned, then the Minister must reverse the determination to revoke the person's citizenship and the revokee's citizenship is taken to never have ceased.⁹

Sections 33AA, 35, and 35A, explicitly state that they do not displace a person's right to seek judicial review, however it is likely that certain judicial review relief would not be available, given that the Minister is under no duty to consider whether to rescind the revocation of a person's citizenship (and if an error is determined via such review, a person's citizenship will be taken not to have ceased) under either s 75 of the *Constitution* or s 39B of the *Judiciary Act 1903* (Cth).¹⁰

¹ *Crimes Act 1914* (Cth) ss 4M, 4N.

² *Australian Citizenship Act 2007* (Cth) ss 33AA(10), 35(5), 35A(5).

³ *Australian Citizenship Act 2007* (Cth) ss 33AA(14), 35(9).

⁴ *Australian Citizenship Act 2007* (Cth) ss 33AA(15), 35(10).

⁵ *Australian Citizenship Act 2007* (Cth) ss 33AA(17), 35(12).

⁶ *Australian Citizenship Act 2007* (Cth) ss 33AA(18), 35(13).

⁷ *Australian Citizenship Act 2007* (Cth) ss 33AA(22), 35(17).

⁸ *Australian Citizenship Act 2007* (Cth) s 35A(11).

⁹ *Australian Citizenship Act 2007* (Cth) s 35A(8), (9).

¹⁰ *Australian Citizenship Act 2007* (Cth) ss 33AA(24), 35(19), 35A(1)(note).

The combination of a lack of express merits review provisions and the automatic operation of s 33AA and 35, along with the requirement under s 33AA, 35, and 35A that the Minister exercise their powers personally, but is under no obligation to exercise any power, is exclusive of any merits review process.

3. Use of the powers

- 3.1 When announcing the fact that the Australian Government had notified Neil Prakash that his Australian citizenship has ceased, the Minister for Home Affairs indicated that altogether **12** dual citizens have had their Australian citizenship ceased for actions contrary to their allegiance to Australia.¹¹
- 3.2 A June 2015 Australian National Audit Office (ANAO) report states that Australian Citizenship had been revoked in 16 cases over the 66 years in which Australia has offered citizenship. As at the date of the report, s 35 has never been used.¹²

4. Discourse

- 4.1 To date discourse on s 33AA, 35 and 35A appears mostly limited to the parliamentary reviews (eg, the PJCIS review), and materials contributing to those reviews.
- 4.2 The Committee tabled its report including a minority report from non-government members on 14 February 2019. The majority report recommended passage of the Bill as introduced, subject to the PJCIS's existing statutory review of the citizenship loss provisions being delayed by 12 months to December 2020. The minority report recommended that the Bill not be passed in its current form and the provisions introduced by the 2015 Allegiance Bill be immediately referred to the INSLM.
- 4.3 World- wide attention has focused on the citizenship of the 800 ISIS fighters captured by the US in Syria. President Trump has demanded that the EU take them back and put them on trial, thus:

The United States is asking Britain France Germany and other European allies to take back over 800 ISIS fighters that we captured in Syria and put them on trial. The alternative is not a good one in that we will be forced to release them. The US does not want to watch as these ISIS fighters permeate Europe, which is where they are expected to go. We do so much and spend so much –time for others to step up and do the job that they are capable of doing. We are pulling out back after 100% Caliphate victory!¹³

- 4.4 This has sparked a fresh debate in the UK (expected to have many citizens caught up with the fall of ISIS) and highlighted in particular the case of Shamima Begum, 19, who travelled to Syria in

¹¹ Department of Home Affairs (Cth), 'Neil Prakash stripped of Australian citizenship' (Media Release, 29 December 2018).

¹² The provision under which a person's citizenship ceases due to service in a foreign armed force has never been used. Australian National Audit Office, *Verifying Identity in the Citizenship Program*, Report No 47 (2014-2015) 32.

¹³ President Donald Trump, *Tweet* (18 February 2019) *Twitter Post* <<https://twitter.com/realDonaldTrump/status/1096980408401625088>>.

2014. With some prominent people calling for her to be reabsorbed into UK society¹⁴ and others saying she should be brought to justice, the Home Secretary Sajid Javid has indicated he will use all available powers to prevent her return, including revoking her citizenship. In mid-April it was reported that Ms Begum would challenge the revocation in SIAC.

- 4.5 An overview of the main points of contention regarding the operation of s 33AA, 35, 35A and 35AA are set out below.

Constitutional validity

- 4.6 Originally the provisions empowered the Minister alone to revoke the Australian citizenship of an Australian dual citizen. There was widespread concern that this would be contrary to the constitutional separation of powers doctrine as it would involve the exercise of the judicial power of the Commonwealth.
- 4.7 Professor Greg Craven was also critical of the original form of the provisions stating they were '*irredeemably unconstitutional by conferring judicial power on a Minister*'. He went to say '*the new automatic nature of the three proposed cessation provisions included in the Bill was much less likely to fall foul of the High Court*'.¹⁵
- 4.8 Apart from the self-executing aspects there was concern about the extent to which the provisions rely on the aliens power in s 51 (xix) of the Constitution. While the High Court of Australia has affirmed that citizenship is a matter for Parliament, Parliament's power is qualified

The qualification is that Parliament cannot simply by giving its own definition of 'alien' expand the power under s 51 (xix) to include persons who could not possibly answer the description of 'alien's' in the ordinary understanding of that term.¹⁶

- 4.9 In its submission to the PJCIS, the Law Council of Australia highlighted that 'even if the term alien for constitutional purposes is understood to mean 'a person lacking allegiance to Australia' Parliament does not have an unfettered discretion to determine when such allegiance is lacking'.
- 4.10 In the end, the Committee was satisfied by the Government's assurances that the Solicitor-General advised that there were good prospects that a majority of the High Court would reject a constitutional challenge.¹⁷

The Committee also notes the Government's view, based on advice, that the Bill is 'constitutionally sound' and constructed in the best way possible that has regard to

¹⁴ Esther Addley & Vikram Dodd 'Former M16 director says schoolgirl who joined ISIS should be given a chance', *The Guardian* (online), 15 February 2019 < <https://www.theguardian.com/world/2019/feb/14/former-mi6-director-says-schoolgirl-shamima-begum-who-joined-isis-should-be-given-a-chance>>.

¹⁵ Greg Craven 'Stripping Citizenship from a traitor is plain dumb', *The Australian* (online), 4 June 2015 < <https://www.theaustralian.com.au/opinion/columnists/greg-craven/stripping-australian-citizenship-from-a-traitor-is-plain-dumb/news-story/5bbc1e84f92d4728ad5fb8ad093069d8>>.

¹⁶ *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162.

¹⁷ Attorney-General George Brandis, Letter to Mark Dreyfus QC, (Canberra), 27 August 2015.

both the separation of powers concerns and other matters. The Committee reiterates that it is not its role to determine the matters of constitutionality.¹⁸

Lack of Safeguards

- 4.11 Apart from constitutional concerns, there was considerable debate about the manner in which the legislation arguably either performs itself, or seemingly empowers the Minister to perform, a role which is better performed by the judiciary. This argument dovetails with arguments that the process established by the provisions fails to provide sufficient procedural fairness to revokees. As the Senate Standing Committee for the Scrutiny of Bills (SSCSB) stated:

Indeed, the deprivation of citizenship based on alleged or suspected criminal conduct may (like the deprivation of liberty based on a determination of criminal guilt) be an inherently judicial function, such that it can only be achieved if it is specified as a penalty that may be imposed if a person is convicted of a criminal offence. Regardless of any potential constitutional objections, however, serious issues of fairness arise given that a person may lose their citizenship on the basis of criminal conduct *without any of the protections associated with a criminal trial* [at least in relation to ss 33AA and 35].

- 4.12 In its submission to the PJCIS the Law Council of Australia highlighted a related concern noting that:

Effectively the Bill supplants what would ordinarily be criminal court processes in determining whether a person has engaged in certain conduct with an administrative law process to make the same determination.¹⁹ [see Administrative Processes section]

- 4.13 Other commentators have criticised the sections for creating a two-tiered legal system, on the basis that they treat terrorist suspects with multiple citizenships one way (ie, revoke their citizenship and deport them), and terrorist suspects with a single citizenship another way (ie, subject them to prosecution and incarceration under normal Australian criminal laws).

- 4.14 The Bills Digest to the Allegiance to Australia Bill also summarised the issue as follows:

As noted above, the new citizenship cessation provisions would be limited to dual nationals so as to comply with international obligations concerning statelessness. While recognising that this is the case, a number of stakeholders have indicated concern that this will create a two-tiered system of Australian citizenship.

- 4.15 The United Kingdom (**UK**) has similar laws in place, allowing for the revocation of citizenship from both dual nationals and single nationals (the UK's ability to strip citizenship from single nationals is

¹⁸ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) 86-87 [5.102].

¹⁹ Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament House, Canberra, 4 August 2015, Submission 26 (Law Council of Australia).

a power unavailable to the Australian government, due to a technicality of relevant international laws²⁰). While unlike most of Australia's laws, the UK's laws are based on a ministerial discretion, certain points of discourse and criticism levied against the UK's laws may still be useful in considering the Australian laws.

- 4.16 In particular, there has been speculation that these laws have been used strategically by the UK government to remove undesirable persons from the UK, and also enable attacks against them by foreign militaries (namely, through drone strikes by the United States military) without diplomatic consequences.²¹ While the automatic operation of the Australian laws largely safeguard against this, there is still some scope for this to occur in Australia, with the revocation of citizenship under s 35A still being the result of an (albeit limited) ministerial discretion.
- 4.17 Another issue raised in relation to the UK laws is the fact that citizenship stripping generally fails to presume the innocence of individuals, with suspicion of terrorist activities often being enough to trigger a revocation.²² Again, the applicability of this criticism to the Australian context appears more limited, with stripping of citizenship by the minister requiring a prior conviction, and other citizenship stripping being a result of conduct. However, as noted by the SSCSB in para 5.3 above, in practice, the automatic stripping of citizenship is still somewhat subject to a determination being made by an official, meaning absent the requirement of a conviction or judicial determination for citizenship to be revoked under the automatic laws, suspicion may in effect also be sufficient to result in the stripping of citizenship in Australia also.

Necessity and Proportionality of the Measures

- 4.18 Given that pursuant to s 36, if a person's citizenship is revoked under ss 33AA, 35, or 35A, they may never become an Australian citizen again, further questions have arisen in relation to whether revoking citizenship from those engaging in terrorist acts is a disproportionate response to current national security and counter-terrorism threats.
- 4.19 Related to this, commentators have also challenged the philosophy underpinning the legislation, arguing that it does not represent a sensible means of addressing the issue of terrorism, and that other measures such as conventional prosecution and incarceration are more appropriate.
- 4.20 Apart from international obligations to combat terrorism, concern has been expressed about international law considerations arising from the deprivation of nationality of those who travelled overseas on Australian passports. According to Professor Good-Gill²³ in certain circumstances it

²⁰ Australia acceded to the Convention on the Reduction of Statelessness 1961 in 1973. Under the Convention, States can deprive nationality where a person has committed acts seriously prejudicial to the vital interests of the state even if it leads to statelessness, providing the state's law already provided for such revocation at the time of accession to the Convention. Australia unlike the UK made no reservation to the Convention.

²¹ See, David Anderson QC, Independent Review of Terrorism Legislation, 'Citizenship Removal Resulting in Statelessness: First Report of the Independent Reviewer on the Operation of the Power to Remove Citizenship Obtained by Naturalisation from Persons who have no Other Citizenship', April 2016, 13 [3.8].

²² See, Alicia Ross and Patrick Galey, 'Stripping UK Citizenship by Stealth', *Open Democracy* <https://www.opendemocracy.net/opensecurity/alice-ross-patrick-galey/stripping-uk-citizenship-by-stealth>.

²³ Guy Goodwin-Gill, 'Mr Al-Jedda, Deprivation of Citizenship, and International Law' (Paper presented at Middlesex University, Middlesex UK, 14 February 2014).

might be considered as a violation of territorial sovereignty of the other state to deny readmission of that individual especially where they are considered a security threat, effectively transferring responsibility for them to a state of which they are not a national.

Human Rights Considerations

4.21 The Parliamentary Joint Committee on Human Rights (**PJCHR**) conducted an extensive review of the human rights implications of the Allegiance to Australia Bill. Some of the issues flagged in the PJCHR's report were:

- if a person's citizenship is revoked while they are overseas in a country in which they do not hold nationality, this may make it difficult for them to move around in the absence of any valid travel documents, impacting their right to freedom of movement under art 12 of the International Covenant on Civil and Political Rights (ICCPR);
- article 12 of the ICCPR protects a person's ability to enter their 'own country', with the notion of a person's 'own country' extending beyond mere citizenship — ss 33AA, 35, and 35A, and their consequential effects, may likely inhibit the exercise of this right under art 12;
- the revocation of citizenship may disproportionately limit the right to a private life provided by art 17 of the ICCPR;
- sections 33AA, 35, and 35A, have the capacity to result in direct discrimination, by treating those of dual citizenship engaging in terrorist acts differently to those of singular citizenship, as well as indirect discrimination on the basis of race or religion, potentially contrary to arts 2, 16 and 26 of the ICCPR. Citizenship revocation provisions targeting possible dual nationals may also have the capacity to be classified as a form of 'discrimination based on national origin,' which is prohibited under the Racial Discrimination Act 1975 (Cth).
- if a person's citizenship is revoked, then they may be subject to immigration detention pending their deportation, thereby impeding their right to liberty under art 9 of the ICCPR (particularly if the person seeks to challenge the bases upon which their citizenship has purportedly been revoked);
- the automatic operation of the legislation in revoking a person's citizenship has the potential to impede their right to a fair trial under art 14 of the ICCPR;
- sections 33AA, 35, and 35A apply sanctions which may be considered 'criminal' under international human rights law (despite being considered 'civil' under Australian law), without providing the safeguards usually afforded as part of criminal law procedures, thereby potentially undermining the rights afforded by arts 14 and 15 of the ICCPR;
- making people subject to a loss of citizenship following a criminal conviction and punishment may constitute double punishment, thereby being inconsistent with the prohibition against double punishment established by art 14 of the ICCPR;

- the automatic revocation of citizenship under ss 33AA and 35 does not appear to give any consideration to the best interests of minors caught by the provision, potentially rendering them inconsistent with art 3 of the Convention on the Rights of the Child (CRC).
- whether the scope of the Minister's powers and responsibilities in relation to these provisions is appropriate;
- the consistency of the provisions with fundamental legal principles such as the rule of law (eg, whether the provisions create a two-tiered legal system).

5. Potential Issues for consideration

Below is a summary of some of the potential issues Dr Renwick is exploring in the course of considering the operation, effectiveness, and implications of ss 33AA, 35, and 35A:

- whether revocation of citizenship is a necessary, effective and proportionate measure to respond to the threat of terrorism;
- whether the provisions are required by Australia's international obligations to combat terrorism;
 - Are World War 2 comparisons useful?
- whether the provisions are consistent with Australia's human rights obligations especially in relation to statelessness (including in relation to their application to children);
 - where a dual citizen has a closer relationship with Australia, eg because they are domiciled there, does that affect the content of Australia's human rights obligations?
- whether citizenship should be revokable by automatic operation of legislation, rather than through or following the decision of a judicial body or a Minister:
 - presently it cannot be said with certainty how often ss 33AA or 35 have operated.
- whether the provisions currently provide adequate procedural fairness and/or safeguards for revokees.
 - The failure to notify a person they have lost citizenship may have many consequences for them, eg a woman might decide to have a child under the misapprehension her child will be Australian.
 - If notification cannot be given for the time being what safeguards could be created?
- what scrutiny processes are appropriate and effective for revocation laws?