



THE UNIVERSITY OF  
NEW SOUTH WALES



FACULTY OF LAW

GILBERT + TOBIN CENTRE  
OF PUBLIC LAW

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

Dear Sir/Madam

### **Discussion paper on citizenship rights and responsibilities**

Thank you for the opportunity to make a submission addressing the questions posed in this discussion paper. We do so in our capacity as members of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, UNSW. We are solely responsible for the views and content in this submission.

In our submission, we focus on questions pertaining to the legal aspects of Australian citizenship and, in particular, the proposal to introduce amendments to the *Australian Citizenship Act 2007* expanding the grounds for citizenship revocation. We conclude that:

- any campaign to improve public understanding about the rights and responsibilities of citizenship should be done in a manner that accurately represents the legal differences between the legal rights of citizens and non-citizens;
- the grounds for citizenship revocation in Australia should not be extended to terrorism or foreign fighter related offences; and
- if ministerial powers in this area are nonetheless expanded, a number of safeguards should be included. Most significantly, there should not be a ministerial power to revoke a person's citizenship on national security grounds in the absence of a criminal conviction.

#### **1. The responsibilities and privileges of Australian citizenship**

The first two sections of the discussion paper focus on the need to improve the understanding that Australian citizens have of the meaning and value of their citizenship. The majority of the questions posed in this section focus on strategies to foster participation in civic life. The discussion paper also asks for suggestions on what more the Commonwealth government and the community can do to 'ensure Australian citizens understand and respect the privileges and obligations of citizenship'.

In order to foster a better public understanding of the privileges and responsibilities of Australian citizenship, citizens need to be made aware of the instances in which these privileges and

SYDNEY 2052 AUSTRALIA  
Telephone: +61 (2) 9385 9654  
Facsimile: +61 (2) 9385 1175  
[www.gtcentre.unsw.edu.au](http://www.gtcentre.unsw.edu.au)

responsibilities place citizens in a different legal position from non-citizens.<sup>1</sup> Such an understanding is crucial because it identifies what is particular and special about being a citizen.

The discussion paper states that:

Australian citizens have an obligation to:

- obey the law
- defend Australia should the need arise; and
- vote in federal and state or territory elections, and in referenda.

While this is true, none of these obligations is held exclusively by Australian citizens. The obligation to obey the law extends to all persons within Australia, whether they hold Australian citizenship or not. The obligation to defend Australia should the need arise also extends beyond the citizenry. In a time of war, any person between the ages of 18 and 60 who has resided in Australia for 6 months or more can be called on by the Governor-General to serve in the Defence Force for the duration of the war.<sup>2</sup> While voting is an obligation that extends primarily to Australian citizens, this too is not exclusive, as the obligation extends to certain non-citizen British subjects.<sup>3</sup>

The discussion paper further states that:

Australian citizens have privileges, including but not limited to being able to:

- apply for an Australian passport and re-enter Australia freely;
- receive help from an Australian official while overseas;
- access Medicare and Centrelink payments where applicable.

The privilege of accessing Medicare and Centrelink benefits is not reserved for citizens. Permanent residents are also eligible to access these services.<sup>4</sup> The privilege of being eligible to receive help from an Australian official while overseas does not amount to a legal right at all; however, as a matter of policy, consular services are provided to both Australian citizens and permanent residents whose welfare is at risk abroad.<sup>5</sup> Of the three privileges listed in the discussion paper, the right to apply for an Australian passport is the only privilege that amounts to a legal right that is held exclusively by citizens. Citizens should be aware, however, that the right is not unqualified, as broad ministerial passport suspension and cancellation powers exist.<sup>6</sup> Where a citizen's passport is suspended or cancelled, that citizen will not have the capacity, in practice, to travel to and freely re-enter Australia.

## **2. Revocation of citizenship for dual nationals engaged in terrorism**

*a. In what circumstances should a holder of Australian citizenship be regarded as having forfeited citizenship?*

In our view there are no circumstances in which an Australian citizen should be deemed to have forfeited their citizenship. The involuntary loss of Australian citizenship should only occur in narrowly confined circumstances, and should require both a judicial determination that the citizen concerned has committed conduct rendering them liable to citizenship loss as well as a subsequent ministerial determination that revoking the person's citizenship would be in the public interest.

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<sup>1</sup> For a recent discussion on this point, see Sangeetha Pillai 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37(3) *Melbourne University Law Review* 736.

<sup>2</sup> *Defence Act 1983* (Cth) ss 59-60.

<sup>3</sup> Commonwealth Electoral Act 1918 (Cth) s 93(1)(b)(ii).

<sup>4</sup> See *Health Insurance Act 1973* (Cth) ss 10, 3(1). Department of Human Services, 'Payments for visa holders' <<http://www.humanservices.gov.au/customer/subjects/payments-for-visa-holders#a5>>.

<sup>5</sup> Department of Foreign Affairs and Trade, *Australian Consular Operations Handbook* (December 2014), [4.1].

<sup>6</sup> *Australian Passports Act 2005* (Cth) ss 22, 22A.

The current grounds for involuntary citizenship loss under the *Australian Citizenship Act 2007* (Cth) broadly reflect this approach, with some exceptions. One such exception is s 35 of the Act, which provides that an Australian citizen who possesses dual citizenship will lose their citizenship automatically if they serve in the armed forces of a country at war with Australia.

Although we take the view that the involuntary loss of citizenship should not flow automatically from the fulfilment of statutory criteria, to the extent that a statutory provision along these lines does exist, it is most appropriate in circumstances such as those applicable in s 35, where the conduct triggering a loss of citizenship amounts to a direct act of violence against Australia, and where it can be easily proved that the citizen in question has engaged in this conduct. Both the question of whether a person has served in the armed forces of a state, and the question of whether the state in question is at war with Australia are facts which may be determined without substantial difficulty.

We do not believe that it is necessary to expand the grounds for citizenship loss beyond the grounds that currently exist under the *Australian Citizenship Act 2007*.<sup>7</sup> This is because Australia has already enacted a broad suite of anti-terror laws, designed to mitigate the heightened terror threat. These laws already allow for comprehensive, pre-emptive protection against threats to national security posed by citizens both within Australia and abroad. For instance, in addition to the offence of engaging in a terrorist act, which is punishable by life imprisonment,<sup>8</sup> a person may be sentenced to life imprisonment for committing ‘any act in preparation for, or planning, a terrorist act’.<sup>9</sup> A range of more specific preparatory offences carry maximum penalties of between 10 and 25 years imprisonment.<sup>10</sup> In the case of a citizen who has taken up arms with a non-government organisation overseas, the Minister for Foreign Affairs possesses broad passport cancellation powers, which can be exercised to prevent a citizen from returning to Australia where their return would pose a national security risk.<sup>11</sup> The Minister’s cancellation power may be exercised where a competent authority suggests on reasonable grounds that the citizen in question would be likely to engage in harmful conduct,<sup>12</sup> including conduct prejudicial to the security of Australia or a foreign country.<sup>13</sup> It is difficult to see what expanding the grounds for citizenship revocation would add to these very substantial powers.

While there is some logic to the suggestion that taking up arms with a terrorist or extremist group is similar to serving in the armed forces of a country at war with Australia, the two circumstances are not analogous. If nothing else, a person may undertake a terrorist act or hostile activity that is in no way directed at Australia, and perhaps even at a body opposed by Australia, such as IS. This is because Australia’s anti-terrorism and foreign fighter laws apply irrespective of the target of the action.

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<sup>7</sup> In addition to the provision in s 35 for automatic loss of citizenship where an Australian citizen with dual citizenship serves in the armed forces of a country at war with Australia, involuntary loss of citizenship is possible in prescribed circumstances relating to fraud or misrepresentation in the application process, failure to observe residence requirements, or conviction of a serious offence after applying for but before obtaining Australian citizenship: see *Australian Citizenship Act 2007* (Cth) ss 34, 34A. A child may also have their citizenship revoked by the Minister if their responsible parents cease to hold Australian citizenship: s 36. Some express protections against statelessness apply: ss 34(3), 34A(2), 36(3). For an analysis of the statutory regime for citizenship loss in Australia relative to the UK, Canada and New Zealand, see Sangeetha Pillai ‘The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis’ (2014) 37(3) *Melbourne University Law Review* 736, 752-8.

<sup>8</sup> *Criminal Code Act 1995* (Cth) s 101.1.

<sup>9</sup> *Criminal Code Act 1995* (Cth) s 101.6.

<sup>10</sup> *Criminal Code Act 1995* (Cth) ss 101.2, 101.4, 101.5. For a detailed commentary on the criminalisation of terrorist acts and acts preparatory to terrorism in the Commonwealth *Criminal Code*, see Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia’s Anti-Terrorism Laws and Trials* (NewSouth, 2015) ch 2.

<sup>11</sup> *Australian Passports Act 2005* (Cth), s 22.

<sup>12</sup> *Australian Passports Act 2005* (Cth), s 14.

<sup>13</sup> *Australian Passports Act 2005* (Cth), s 14(1)(a)(i).

In addition, it can be more difficult to objectively determine that a person has taken up arms with a non-state actor than it is to determine that they have served in the official armed forces of a foreign state. Moreover, while the question of whether a foreign country is at war with Australia may be determined, the question of when a particular non-state actor poses a national security risk to Australia is a question that can only be ascertained via the exercise of executive discretion.<sup>14</sup> These distinctions are significant, and further suggest that the grounds for the automatic loss of Australian citizenship should not be broadened.

If, as the discussion paper suggests, legislation conferring a ministerial power to revoke the citizenship of dual citizens who ‘engage in terrorism’ is introduced, this power should only be triggered after a citizen has been convicted and sentenced by a court of the most serious terrorism offences (for example, where the citizen has engaged in a terrorist act). This approach would be most consistent with the approach taken by the majority of foreign countries that provide for citizenship revocation in their municipal law. Moreover, legislation conferring a ministerial discretion to revoke citizenship where the minister (rather than a court) has determined that a citizen has engaged in terrorism offences would likely be unconstitutional.

*b. Should the powers of revocation apply to citizens when the Minister has reasonable grounds to believe that the person is able to become a national of another country or territory under their laws and where it would not leave that person stateless?*

It is not possible to provide for the citizenship revocation of sole Australian citizens without creating a risk of rendering people stateless. Even where an individual is eligible to for a foreign citizenship, there is no way to ensure that they will be granted citizenship by that country. The risk of an individual being denied citizenship by a foreign country is heightened where they have been previously considered to pose a national security risk.<sup>15</sup> Legislation along the lines suggested by this question would, therefore, amount to a contravention of Australia’s international law obligations under Article 8 of the *Convention on the Reduction of Statelessness*.

Creating a ministerial discretion to revoke the citizenship of sole Australian citizens would also be out of step with the approach taken by many countries which allow for citizenship revocation on disloyalty or national security grounds, including Canada, France and New Zealand, all of which do not allow a person to lose their citizenship where this may render them stateless.<sup>16</sup> While the UK has legislation which allows for citizenship revocation along the lines suggested in this question, it is unusual in this regard, and its model has attracted substantial criticism.<sup>17</sup> For instance, Professor Guy Goodwin-Gill has argued that ‘no country can unilaterally dispose of its unwanted population by dumping them on other states’, and has suggested that where a sole UK citizen is stripped of their citizenship while in a foreign country, that country would be well within its rights under international law to deport the individual to the UK.<sup>18</sup> It is also worth noting that the UK has different international

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<sup>14</sup> See *Criminal Code Act 2005* (Cth) s 102.1(1)(b).

<sup>15</sup> Foreign states may demonstrate a reluctance to accept the return of individuals who have had their citizenship revoked by their country of residence on national security grounds, even where citizenship of the foreign state is present. For instance, the recent case of *Pham v Secretary of State for the Home Department* [2015] UKSC 19 involved circumstances where a naturalised British citizen, who had never renounced his Vietnamese nationality, was stripped of his UK citizenship, and advised that he would be deported to Vietnam. The Vietnamese government responded by contending that the individual in question was not a Vietnamese citizen.

<sup>16</sup> See *Citizenship Act* (Canada), s 10.4(1); *French Civil Code* article 25; *Citizenship Act 1977* (NZ) s 16.

<sup>17</sup> For a detailed summary of such criticisms, see Christophe Paulussen and Laura Van Waas, ‘UK Measures Rendering Terror Suspects Stateless: A Punishment More Primitive Than Torture’, International Centre for Counter-Terrorism: The Hague <<http://icct.nl/publication/uk-measures-rendering-terror-suspects-stateless-a-punishment-more-primitive-than-torture/>>.

<sup>18</sup> Fran Kelly, Interview with Guy Goodwin-Gill (Radio National Breakfast, 17 February 2015), 4.05 <[http://mpegmedia.abc.net.au/rn/podcast/2015/02/bst\\_20150217\\_0651.mp3](http://mpegmedia.abc.net.au/rn/podcast/2015/02/bst_20150217_0651.mp3)>.

law obligations in regards to statelessness than Australia does, in light of the fact that it has entered a reservation to Article 8 of the *Convention on the Reduction of Statelessness*.

c. *What limitations and safeguards should apply to laws enabling the revocation of the citizenship of Australians engaged in terrorism?*

As noted in our response in part 2(a) above, we do not believe that expanded grounds for citizenship revocation are justified in Australia. However, if laws enabling the revocation of the citizenship of Australians involved in terrorism are introduced, various safeguards should be included.

First, the possibility of citizenship loss should only arise where a person has engaged in terrorist activity of the most serious kind, such as where a person has committed a terrorist act, or taken up arms against Australian forces, on behalf of a proscribed terrorist organisation.

Whether particular conduct qualifies as ‘serious’ should not be a matter for ministerial discretion, but should be determined by reference to particular offences under the criminal law. The maximum penalty attached to a criminal offence should not be the sole factor drawn upon in determining its severity. This is because very high penalties attach to a number of preparatory or non-violent offences, where the conduct can be far removed from the actual commission of a terrorist act.<sup>19</sup> Some offences are drafted extremely broadly. For instance, s 101.6 of the *Criminal Code Act 1995* (Cth) creates an offence of committing ‘any act in preparation for, or planning, a terrorist act’, with a maximum penalty of life imprisonment. However, there are a number of relatively minor preparatory acts, which would fall within the scope of s 101.6, but which would not warrant the imposition of the maximum sentence. Such offences should not attract the consequence of citizenship revocation. Nor should other non-violent conduct, such as the reckless provision of funds to an individual terrorist or proscribed terrorist organisation, despite the fact that such conduct may constitute a criminal offence with a very high maximum penalty.<sup>20</sup>

Secondly the possibility of citizenship revocation should only arise where a person has been convicted by a court of a qualifying ‘serious offence’. The Minister for Immigration and Border Protection should not be given a discretion to determine whether a person has engaged in terrorism, and a revocation power conferred in such terms would very likely raise constitutional problems, even if the exercise of the ministerial power were made subject to subsequent judicial review.

Thirdly, where a person has been convicted of a serious offence, the possibility of revocation should only arise where they have also been sentenced by a court to a custodial term of 20 years or more. This requirement would help to ensure that committing an act that falls towards the less serious end of a broadly drafted offence with a high maximum penalty will not lead to a loss of citizenship.

Fourthly, time restrictions should apply to the offences that trigger the possibility of citizenship revocation. In France, for instance, a person may only have their citizenship revoked where they committed a triggering offence within ten years of acquiring French citizenship, and any decision to revoke citizenship can only be made up to 15 years after the offence was committed.<sup>21</sup> Similar safeguards should be adopted if expanded revocation is introduced in Australia.

Fifthly, as noted above, loss of citizenship should not be an automatic consequence where a person has engaged in terrorist activity. Accordingly, where the requirements of conviction of a serious offence, within the prescribed time periods, and with a custodial sentence of 20 years or more have been met, the question of whether citizenship revocation should occur should be subject to a

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<sup>19</sup> See Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia’s Anti-Terrorism Laws and Trials* (NewSouth, 2015) 58.

<sup>20</sup> There are two financing offences in Division 103 of the *Criminal Code Act 1995* (Cth). Both carry maximum penalties of life imprisonment: see ss 103.1, 103.2.

<sup>21</sup> See *French Civil Code*, article 25-1.

ministerial discretion. This discretion should only allow the minister to revoke a person's citizenship where he or she reasonably believes that revocation would be in the public interest.

### **3. Suspension of privileges for Australian citizens engaged in terrorism**

- a. *Should certain privileges of citizenship—such as the right to vote in elections and receive consular assistance—be able to be suspended for Australian citizens engaged in terrorism?*

We believe that expansion of the grounds on which citizenship privileges can be suspended is neither necessary nor desirable. Existing laws already allow for the effective suspension of a number of privileges, where a citizen has engaged in terrorism. There is a strong likelihood that further expansions of these suspensions would be open to constitutional challenge.

The right to vote, for instance, is currently suspended for all prisoners serving a custodial sentence of three years or more. All the terrorism and treason offences in Australia carry maximum penalties of at least three years imprisonment, and usually far in excess of this.<sup>22</sup> Consequently, suspension of the right to vote will commonly arise as a consequence where a person is convicted and sentenced for a terrorism offence. The current temporary suspension of voting rights for prisoners serving custodial sentences of three years or more was upheld by the High Court as constitutionally valid in *Roach v Electoral Commissioner*.<sup>23</sup> However, in this case, the High Court also emphasised that Parliament's capacity to suspend voting rights is not unlimited, and invalidated a provision seeking to extend suspension to all prisoners serving a custodial sentence of any duration. It is highly likely that legislation that suspends voting rights for citizens in the absence of criminal conviction, on the grounds of a ministerial determination that the person has engaged in terrorist activity, would face constitutional challenge

Similarly, the right of a citizen to enter Australia may already be effectively suspended via use of the Minister for Foreign Affairs' substantial passport suspension and cancellation powers. Through these powers, the Minister can effectively prevent a citizen who is outside Australia and who is considered to pose a national security risk, from travelling to and re-entering Australia. In light of this, additional legislation expressly authorising the suspension of a citizen's right to enter Australia on the grounds that they have engaged in a terrorism offence would be of limited practical utility. There is also a high likelihood that such legislation would also face constitutional challenge.

As noted in part 1 of this submission, the right to receive consular assistance is not a legal right. The Consular Services Charter, which sets out the policy position on the provision of consular services, states that the provision of such services may be limited where consular services determines that this is warranted in the circumstances, such as where a traveller commits illegal activity, or where they deliberately or repeatedly act recklessly or negligently in a manner that places themselves or others at risk.<sup>24</sup> No further expansion of these limitations is required.

Yours sincerely,

**Ms Sangeetha Pillai**

Research Fellow, Gilbert + Tobin Centre of Public Law, University of New South Wales

**Professor George Williams AO**

Anthony Mason Professor, Scientia Professor and Foundation Director, Gilbert + Tobin Centre of Public Law, University of New South Wales

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<sup>22</sup> See *Criminal Code Act 1995* (Cth), divs 80, 101, 102.

<sup>23</sup> (2007) 233 CLR 162.

<sup>24</sup> Department of Foreign Affairs and Trade, *Consular Services Charter*, 5 <<https://www.smarttraveller.gov.au/services/consular-services-charter.pdf>>.