Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600  

30 September 2019  

Dear Committee,  

We are pleased to make this submission to the Inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into Nationhood, National identity and Democracy.  

As an expert centre at Melbourne Law School that undertakes research, teaching and engagement activities related to statelessness, we wish to focus our submission on the origins and importance of nationality, and how international law shapes the Australian conception of nationality. Furthermore, we are concerned about Australia’s non-compliance with international law obligations for non-citizens and the negative effects of such violations on the rights of citizens.  

In particular our submissions address the following terms of reference:  

- the changing notions of nationhood, citizenship and modern notions of the nation state in the twenty first century;  
- rights and obligations of citizenship, including naturalisation and revocation, and the responsibility of the state to its citizens in both national and international law.  

1. Citizenship/nationality  

Whilst the regulation of nationality traditionally existed within the sole domain of the state, it is now widely acknowledged and understood that the twin concepts of nationality and citizenship are regulated by international law. This is due in large measure to the advent of human rights law, particularly Article 15 of the United Nations Universal Declaration on Human Rights,1 which guarantees all persons the right to a nationality and the right not to be arbitrarily deprived of it. Importantly this has been translated into binding form, with explicit expressions within the widely ratified international human rights treaties of the right to a nationality, the right not to be arbitrarily deprived of nationality and the right not to be discriminated against in relation to  

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the acquisition and retention of nationality. This means that international law has evolved to place clear limits on the prerogative of states in matters of nationality.

First, a note on terminology. In contemporary legal scholarship, nationality and citizenship are used interchangeably. Whilst the two terms were once separated—with nationality viewed as outward-facing, and citizenship perceived as solely a matter of state law and therefore inward-facing—the current view makes no distinction between the two categories. In contemporary scholarship, the terms are broadly viewed as ‘two sides of the same coin’. Since citizenship informs one’s nationality and nationality in turn will define one’s citizenship, the term ‘nationality’ is widely accepted to contain no more normative content than one’s technical, legal citizenship.

2. Why is citizenship important?

The value of citizenship, and the rights which attach to it, cannot be overstated. Research on statelessness clearly indicates that a lack of citizenship leaves individuals vulnerable to egregious breaches of human rights. Whilst citizenship alone cannot guarantee full protection against human rights abuses, it is viewed as a necessary prerequisite for the enjoyment of basic human rights. The International Law Association contends that citizenship is ‘amongst the most important rights a state can assign to individuals’. Stateless persons are often barred from access to basic social and political rights such as education, political participation and medical treatment. In recognition of the extreme vulnerability arising from statelessness, Australia has ratified the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, placing obligations on Australia to afford stateless persons protection and to ensure measures are put in place to prevent statelessness.

In international law, citizenship is defined as ‘a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the


5 There is a voluminous body of literature on this topic, but for a snapshot, see Alice Edwards and Laura Van Waas, eds. *Nationality and statelessness under international law*. Cambridge University Press, 2014.


existence of reciprocal rights and duties. Citizenship therefore provides the link between individuals and international law and allows the individual to invoke the protection of a state. Citizenship is not only a formal legal category but also a status to be determined by reference to substantive ties between a person and the State. The International Covenant on Civil and Political Rights enshrines the right not to be arbitrarily deprived of entering one's 'own country'. The notion of 'own country' expands the class of persons to whom Australia owes obligations beyond citizens to include, in some cases, long-term permanent residents who identify as Australian. In Nystrom v Australia, the Human Rights Committee observed that there are factors 'other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality.'

3. The vulnerability of citizenship and belonging in modern Australia

In Australia, citizenship is left undefined in the Constitution and unprotected by any Bill of Rights. Additionally, given that the High Court has yet to clearly delineate the outer limits of the 'aliens' head of power in the Constitution, the government has considerable, although not absolute, discretion to define the scope of its own legislative power with respect to citizenship. Whilst the definition of who is and is not a citizen is therefore flexible, it is commonly cited in constitutional case law and legal history as having at its core a common bond between state and individual with reciprocal rights and obligations. The vulnerable state of citizenship in Australian law is especially concerning in light of the recent introduction

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8 Nottebohm (Liechtenstein v Guatemala), judgment of 6 Apr 1955, ICJ Rep 1955.


13 Michelle Foster, ‘An Alien by the Barest of Threads - The Legality of the Deportation of Long-Term Residents from Australia,’ Melbourne University Law Review 33 (2009) 483, 540; Re Patterson. In Ex Parte Taylor (2001) 207 CLR 391, 409 Gaudron J states that there is no 'specific criterion for membership of the Australian body politic or for the withdrawal of that membership.'

14 Singh v Commonwealth [2004] HCA 43. Gummow, Hayne and Heydon JJ state The central characteristic of that status is, and always has been, owing obligations (“allegiance”) to a sovereign power other than the sovereign power in question. That definition of the status of alienage focuses on what it is that gives a person the status: owing obligations to another sovereign power.'
of citizenship deprivation powers on the basis of conduct,\textsuperscript{15} and the general trend of expanding deprivation powers.\textsuperscript{16}

Given the severity of citizenship revocation and the associated statelessness implications, the widening of the deprivation power is deeply worrying and vastly disproportionate to the alleged aim of any such expansion. The use of citizenship as a political or punitive tool is troubling, especially where there is so little transparency and a questionable right of judicial review. These concerns, in addition to its discriminatory application for dual-citizens, exposes the deepening fragility of citizenship in Australia.\textsuperscript{17} The recently released report from the Independent National Security Legislation Monitor strongly recommends retroactively repealing ss 33AA and 35 of the \textit{Australian Citizenship Act 2007} (Cth) ‘with some urgency’.\textsuperscript{18} Dr James Renwick concludes that the provisions have disproportionate consequences, and are unnecessary to the purported aim of improving national security and lack of appropriate safeguards to protect the rights of individuals.\textsuperscript{19} In support of the contention that citizenship cessation is an unjustifiably severe response, the report states that there is a ‘clear breach of the \textit{Convention on the Rights of a Child}, risk of de facto or temporary statelessness, and there is a denial of due process.’\textsuperscript{20}

While the government has recently introduced the \textit{Australian Citizenship Amendment (Citizenship Cessation) Bill 2019}, in direct response to Dr Renwick’s report, this Bill has many problematic elements including its retrospective operation, the fact that it lowers the bar for citizenship loss in some cases, and a lack of proportionately between the alleged conduct and citizenship loss.

Further, the current \textit{Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2019}, reviewed by this Committee, would broaden the grounds for removal of non-citizens (including long-term permanent residents) on the basis of the maximum term attached to the conviction, irrespective of the actual sentence imposed.\textsuperscript{21} The proposal

\textsuperscript{15} \textit{Australian Citizenship Amendment (Allegiance to Australia) Act 2015} (Cth).

\textsuperscript{16} As reflected in the attempt to introduce the \textit{Australian Citizenship Amendment (Strengthening the Citizenship Loss provisions) Bill 2018} (Cth) now lapsed; and the \textit{Migration Amendment (Strengthening the Character Test) Bill 2019} (Cth).

\textsuperscript{17} See further Matthew J Gibney, ‘Should Citizenship Be Conditional? The Ethics of Denationalisation’ (2013) \textit{75 Journal of Politics} 646.


\textsuperscript{19} Ibid.

\textsuperscript{20} Ibid [6.87].

\textsuperscript{21} \textit{Migration Amendment (Strengthening the Character Test) Bill 2019} (Cth).
represents a form of double jeopardy and is likely to violate Australia’s international human rights obligations on several grounds, including the right to family unity and the right to liberty.\textsuperscript{22}

These proposed amendments, and the government’s incremental expansion of its citizenship deprivation powers more broadly, suggest a political willingness to disregard the human rights of citizens and those for whom Australia has become ‘one’s own country’, thus decaying the very category of citizenship.

For further articulation of our concerns in relation to these matters, we refer the committee to the Peter McMullin Centre on Statelessness’ submission to this Committee in relation to the \textit{Migration Amendment (Strengthening the Character Test) Bill 2019}, View PDF as well our submission to the Parliamentary Joint Committee on Intelligence and Security in relation to its \textit{Review of the Australian Citizenship renunciation by conduct and cessation provisions August 2019} View PDF, our submission to the Parliamentary Joint Committee on Intelligence and Security in relation to the \textit{Counter-Terrorism (Temporary Exclusion Orders Bill), March 2019}, View PDF, and our submission to the Parliamentary Joint Committee on Intelligence and Security, in relation to the Australian Citizenship Amendment [Strengthening the Citizenship Loss Provisions] Bill 2018. View PDF

4. Australia’s reluctance to engage international law

In important ways, Australia has continued to isolate itself from the international community. Australia’s harsh immigration and citizenship policies are widely viewed as among the least compassionate globally, particularly with respect to the offshore processing of asylum seekers.\textsuperscript{23} As noted by Gillian Triggs, former President of the Australian Human Rights Commission, Australia is significantly out of step with the international community and our close neighbours New Zealand, Canada and the UK.\textsuperscript{24} In considering the broad matters of nationhood, national identity and democracy, it is crucial for the Government to bear in mind that ‘just as individuals in a society are not completely free to act in whatever way they like, so states as members of the international community of nations are constrained by international law in the way they can behave.’\textsuperscript{25}

\textsuperscript{22} Peter McMullin Centre on Statelessness submission to the Legal and Constitutional Affairs Legislation Committee in relation to the \textit{Migration Amendment (Strengthening the Character Test) Bill 2019} (August 2019).


\textsuperscript{24} Triggs speech at Victoria University Michael Kirby Oration 2017.

The Australian government does not exist segregated from the international order and cannot ignore the inevitable impact of its policies beyond its own borders. When Australia, as a state that is heard but rarely listens, voices its ideas about an international law issue, it can generate an outward ripple effect. Australia’s offshoring policies have a destabilising effect on the ‘international marketplace of ideas’, as Australia’s austere offshoring policies continue to be exported internationally.26

Our concerns in relation to current policies and proposed amendments to Australia’s regime of refugee protection are further articulated in the Peter McMullin Centre submission to this Committee in relation to the Migration Amendment (Repairing Medical Transfers) Bill 2019 August 2019 View PDF and the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions] August 2019 View PDF.

More broadly, the ‘chronic non-compliance’27 of the Australian government in adhering to international obligations may have internal effects, contributing to the disengagement, apathy and lack of trust many Australians feel toward Australian government.28 American Professor David D. Cole contends that ‘what we are willing to allow our government to do to immigrants creates precedents for how it treats citizens.’29 This is recognised by the research of Professor Mary Crock, who finds that ‘political and legal responses to immigration have distorted and continued to distort notions of human rights in this country.’30 Crock argues there is a clear link between the government’s disregard for human rights in the immigration space and the perception of human rights generally by Australian citizens.31 Australia’s (mis)treatment of asylum seeking individuals, and its noncompliance with international human rights norms, threatens to undermine rights discourse in Australia, for Australians.


Whilst undoubtedly fundamental to the enjoyment of any human rights, the concept of ‘nationality’ is fragile in Australia since neither nationality nor the rights which attach to it are enshrined in the Constitution. The recent weakening of these rights by proposed amendments demonstrates a worrying disdain for the gravity of citizenship. Furthermore, it may be dangerous to continue Australia’s insular pattern of failing to recognise international obligations, and apparent habit of dismissing the rights of non-citizens. The consequences of such practices are potentially profound. We risk eroding the rights of those within Australia and, more broadly, eroding public trust in Australian institutions.

Please do not hesitate to be in touch should you require further information.

Yours sincerely,

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