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SUBMISSION TO THE INQUIRY INTO TRADITIONAL RIGHTS AND FREEDOMS – ENCROACHMENT BY COMMONWEALTH LAWS

Introduction

The ANU Migration Law Program, within the Legal Workshop of the ANU College of Law, specialises in developing and providing programs to further develop expertise in Australian migration law. These include the Graduate Certificate in Australian Migration Law and Practice, which provides people with the necessary knowledge, skills and qualifications to register as Migration Agents, and the Master of Laws in Migration Law.

The Migration Law Program has also been engaged in developing research into the practical operation of migration law and administration in Australia, and has

previously provided submissions and presented evidence to a number of Parliamentary Committee inquiries, conferences and seminars.

We thank the ALRC for the opportunity to present our thoughts during the consultation on Friday 28 August and the opportunity to provide a further submission to the interim report. We were pleased to see a range of migration/refugee issues covered in the interim report.

In this submission, we do not intend to revisit the range of issues that were canvassed in our previous submissions. Rather, we wish to reiterate some key principles that we think should guide any future reforms in the refugee/migration law areas. In addition, our submission addresses the Interim Report's call to identify further laws that warrant review.

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Overarching comments

We note that the terms of reference are wide in scope. While our submission works within the confines of the terms of reference, we note that the absence of international human rights law within the terms has the potential to distort the assessment of how Commonwealth laws may impact on rights and freedoms. As such, we agree with the Refugee Casework and Advice Service and the Refugee Law Council of Australia that the limitations of the terms of reference should be recognised in the final report.

The interim report canvasses a wide of migration and refugee laws that may encroach on traditional rights and freedoms. We reiterate that a proper assessment of whether these laws unnecessarily encroach on, or unjustifiably interfere with, traditional rights and freedoms must properly consider Australia's international human rights obligations.

The importance of Australia's international human rights obligations is especially important in the migration and refugee law space. In a dualist system – such as Australia's – international obligations do not form part of domestic law unless they are specifically incorporated into domestic legislation. However, this does not mean that there is no relationship between the two systems. Nor does it mean that domestic legislation should be used to abrogate binding international obligations. As a party to the UN Convention Relating to the Status of Refugees¹ and other international human rights instruments,² Australia remains bound by its international obligations. Where possible, those obligations should be given full effect in domestic legislation.

Consistent with international human rights law principles, to the extent that domestic legislation seeks to limit rights and freedoms, the Government bears the onus of proving that such limitations are proportionate and necessary to achieve a legitimate objective. Limitations that are not proportionate are likely to result in unintended

¹ *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954).

² These include *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Opened for Signature 10 December 1984, 1465 UNTS 85 ; (entered into Force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990).

consequences with significant implications for asylum seekers, Australian permanent residents and Australian citizens.

As we expressed in our earlier submission, many of the laws in the migration and refugee area are disproportionate and unnecessary to achieve the objectives claimed by the legislature. For this reason, many of these laws require review.

In this submission, we focus on issues arising from the *Migration Amendment (Protection and Other Measures) Act 2014 (Cth)* and the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)*. These issues have been brought to the fore since the interim report and warrant further scrutiny by the Commission.

The importance of proportionality

An example of the disproportionate and unnecessary laws that encroach on traditional rights and freedoms can be found in the legislative changes arising from the *Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth)*. In our previous submission, we have highlighted our concerns in relation to new character cancellation powers.

What we are now seeing is an increasing number of visa cancellations, including of protection visa applicants, arising from the new mandatory character cancellation powers under s 501(3A) of the *Migration Act*. This has resulted in increasing numbers of persons being held in immigration detention after having served time for relatively minor crimes. Because of the mandatory nature of the cancellation power, there is no discretion in the decision and therefore no ability for the Minister (or delegate) to consider whether visa cancellation is a proportionate response. As the rules of natural justice do not apply, the person is not made aware of the reasons why their visa is being cancelled and given no chance to provide reasons why their visa should not be cancelled. The affected person can only seek revocation of the mandatory cancellation after the fact. The strict operation of the law will lead, in our view, to cancellations that are unjustified and have a disproportionate effect on Australian permanent residents and their families.

A recent example can be seen in the case of Michael McFadden, a Vietnam war veteran who had his permanent visa mandatorily cancelled after committing minor

criminal offences.³ Mr McFadden was reported to be suffering from PTSD following his war service and had been in Australia since he was 10 years old. He has three children and six grandchildren in Australia. The decision to deport Mr McFadden was overturned by the Minister for Immigration but only after intense lobbying from Australia's RSLs. The case highlights glaring deficiencies in the operation of the new laws which provide no safeguards to ensure procedural fairness.

Migration Amendment (Protection and Other Measures) Act 2015 (Cth)

Since the Issues Paper and the Interim Report, the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) has come into force. This Act amends the *Migration Act 1958* (Cth) to effectively reverse the 'onus of proof' on refugee claimants in protection cases in ways that are disproportionate and unreasonable. We suggest that these laws need further review.

We briefly noted some of our concerns in relation to this relation legislation in our previous submission, when it was in the form of a Bill. However, given its passage into legislation we reiterate those concerns here as well as adding other concerns about this Act.

Reversing the 'burden of proof' in refugee status determination

Burden of proof principles will apply differently in different contexts. As the Interim Report notes, in criminal trials the prosecution bears the burden of proof. In refugee status determinations, a person must prove that they have a 'well-founded' fear of persecution. That is, there is 'a standard of proof' to which the applicant must satisfy the decision-maker that he or she is genuine refugee. This should be differentiated from the question of who bears the 'burden of proof' (i.e. establishing the facts). As we argue below, in order to ensure that the principle of *non-refoulement* is not breached, the burden of proof cannot lie solely with the person seeking protection. Rather, it must be a shared duty between the state and asylum seeker.

³ The Guardian, *Peter Dutton overturns deportation order for Vietnam war veteran*, Wednesday 12 August 2015 < <http://www.theguardian.com/australia-news/2015/aug/12/peter-dutton-overturns-deportation-order-for-vietnam-war-veteran> >

In this context, it should be noted that *non-refoulement* is the principal obligation owed by state parties to the Refugees Convention. To the extent that there is any reversal or shift in burden of proof on an asylum seeker, the obligation is on the Government to ensure that such changes would not result in a breach of *non-refoulement*.

Inconsistent with the duty of shared fact finding

The *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) inserts s 5AAA into the *Migration Act 1958* (Cth) (the Act) to provide that it is the responsibility of the non-citizen 'to specify all particulars of his or her claim to be such a person [ie a person in respect of whom Australia has protection obligations] and to provide sufficient evidence to establish the claim'. In addition, s 5AAA(4) expressly states that the Minister does not have the responsibility or obligation to specify any particulars of the non-citizen's claim, or assist an applicant in establishing their protection visa claim.

This is a significant amendment that effectively shifts the onus for establishing a claim solely with the person seeking protection, where none previously existed.⁴ While at first glance the proposed amendment may appear reasonable, deeper consideration reveals that imposing such an onus is not justified and in fact is contrary to well-founded conventional approaches to determining refugee status. The *UN Convention Relating to the Status of Refugees* does not prescribe minimum requirements or procedures for refugee status determination.⁵ However, there is a well-understood principle that a shared duty of fact-finding exists between the decision-maker and the applicant. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR Handbook) provides that:

While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared

⁴ The *Migration Act 1958* (Cth) does not explicitly provide that an applicant has the onus of proof in relation to an application for a protection visa, or a visa of any other kind. The general position is that an applicant puts information before a decision-maker, who must have regard to all relevant information in assessing the criteria for the grant of the visa.

⁵ *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954).

*between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.*⁶

The principle of a shared duty between the applicant and the decision-maker flows from purely 'pragmatic reasons', recognizing the power imbalance between the asylum seeker and the state.⁷ That is, while the applicant is best placed to provide testimonial and other evidence, government officials often have greater access to resources that allow access to critical information not available to the applicant. More fundamentally, the duty on states to engage in fact-finding flows from the obligation to provide protection, as encompassing doing whatever is 'within their ability to ensure the recognition of genuine refugees'.⁸ In short, states cannot simply 'adopt a passive posture, responding only to what is adduced by the applicant'.⁹

This principle of a shared duty of fact-finding has also been endorsed by the Australian courts in the context of giving proper consideration to an applicant's claim. In *W396/01*, the Full court of the Federal Court opined that:

*The scope of Tribunal's review task is not limited by the case articulated by an applicant. The Tribunal should look at all the evidence and material that it has not rejected and give consideration to a case which it might reasonably raise, notwithstanding that such a case might not have been contended for by the applicant.*¹⁰

Placing the burden of proof solely on the applicant essentially imports elements of an adversarial process into an inquisitorial process.¹¹ The existence of an onus will have profound implications for certain groups – such as unaccompanied minors,

⁶ UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status' (Geneva, re-edited 1992 1979) [196].

⁷ James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed) 119.

⁸ *Ibid.*

⁹ *Ibid.* 120.

¹⁰ *W396/01 v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 103 (2002) [35] per Black CJ, Wilcox and Moore JJ.

¹¹ See eg, The Andrew and Renata Kaldor Centre for International Refugee Law, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Protection and Other Measures Bill) 2014* (Cth), Submission No 6; Law

Council of Australia, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Protection and Other Measures Bill) 2014* (Cth), Submission No 9, 9–10; Ms Linda Kirk, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Protection and Other Measures Bill) 2014* (Cth), Submission 12, 4.

victims of torture, or victims of domestic violence – who need assistance in asserting their claims. The vulnerable position of such asylum seekers is exacerbated by the Australian Government's move to remove access to free legal/immigration assistance to those who have arrived in Australia as an irregular maritime arrival.

Given the inquisitorial nature of refugee status determination — to ascertain from the facts whether a person has a well-founded fear of persecution — an incomplete exploration of the facts risks an incorrect refugee assessment, and potential return of a person to a place where they will be persecuted - in breach of Australia's *non-refoulement* obligations.¹²

Refusal of protection visas on identity grounds

Another concerning provision is the new s 91WA of the *Migration Act*. This section requires that the Minister refuse to grant a protection visa to an applicant if the applicant provides a bogus document as evidence of their identity, nationality or citizenship, or the applicant has destroyed or disposed of such evidence, or has caused such evidence to be destroyed or disposed of. The visa must be refused unless the Minister is satisfied that the applicant has a 'reasonable explanation' for providing the bogus document or for destruction or disposal of such documents *and* the applicant has either provided documentary evidence of his or her nationality or identity or has taken reasonable steps to provide such evidence.

The effect of this provision is that, in these circumstances, the Minister *must* refuse the visa application *before* assessing whether Australia owes *non-refoulement* obligations to a person. We submit that this provision is dangerous and will result in breaches of Australia's *non-refoulement* obligations. In addition, the provision is neither a reasonable or proportionate response to perceived problems.

First, the provision is patently at odds with the realities of forced migration, including:

¹² See *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954) art 33. The principle of non-refoulement – not to send a person back to frontiers where they may be persecuted - is the bedrock of international refugee law: Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003).

- that applicants may not be able to obtain official documentation from the Government, which may be their persecutor;
- the impossibility of a stateless person obtaining official identity documents;
- the need to flee quickly to avoid persecution without obtaining identity documents; and
- that documents are often confiscated or destroyed by people smugglers in order to protect their networks.

Indeed, the *Refugee Convention* envisages that asylum seekers will present at borders without authorization and that they may use fraudulent or false documentation. Article 31 prohibits States from penalising refugees on account of their illegal entry or presence.¹³ Arguably, mandatory refusal of a protection claim on the basis of arriving without documentation or with false documentation, without assessing the merits of a person's claim, amounts to a penalty.¹⁴ In Australia, the credibility guidelines of the Migration and Refugee Division of the AAT recognises, quite correctly, that 'the use of false documents does not necessarily mean that the applicant's claims are not true'.¹⁵

The provision makes an erroneous link between the provision of false documentation and the falsity or otherwise of a person's claim to protection. International jurisprudence – including in the United States, Canada, and New Zealand – has reaffirmed that an adverse credibility finding solely on the basis of using a false document is unjustified.¹⁶

We say that the provision is not a proportionate response for two reasons. First, the issue of identity is better considered within the context of credibility assessment as a

¹³ *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954) art 31. The obligation not to impose penalties applies to those who have come to the territory directly, and who present themselves without delay to the authorities and show good cause for their entry or presence.

¹⁴ James Hathaway and Michelle Foster, above n 10, 152 referring to the principle that illegal entry has no bearing on a person's entitlement to Convention refugee Status: 'Efforts to indirectly circumvent this principle by impugning the credibility of an unlawfully arriving refugee are in substance, a form of penalty, mistakenly equating the need of a refugee to reach a state's jurisdiction with an obligation to arrive lawfully in that jurisdiction'.

¹⁵ Administrative Appeals Tribunal, Migration and Refugee Division, Guidelines on the Assessment of Credibility (2015), 8.

¹⁶ Ibid 153. Foster and Hathaway refer to cases such as *Akinmade v. Immigration and Naturalization Service*, (1999) 196 F.3d 951 (USCA, 9th Cir., Nov 5, 1999) (USA); *Attokora* (Can. FCA, 1989) (Canada); *X (CA746/2009) v. The Queen*, [2010] (NZCA, Nov 18, 2010).

whole. Documentary evidence is only one method of corroborating an applicant's claim to identity or nationality. While evidence of a passport or other identity documents makes such findings easier, it should remain open to the decision maker to determine a claim based on the applicant's own assertions as to his nationality or identity. This can be done taking into account the applicant's overall credibility and other relevant factors such as the applicant's language or local knowledge.¹⁷ This is a preferable way to approach credibility assessment, since it ensures that the merits of the claim are properly considered.

Second, there are already existing and adequate cancellation powers to deal with the provision of false documents in visa applications. These powers allow the Minister to cancel a person's visa, if it is found that the visa application was accompanied by false evidence. Importantly, these cancellation powers are discretionary, and allow the Minister to take into account a wide range of circumstances in deciding whether to cancel a visa, including that the person is a person to whom Australia owes protection obligations. The existing framework is not only adequate but it better ensures that Australia is not in breach of its international obligations. A recent example of this can be found in 1412533 (Refugee) [2015] AATA 3258 (7 August 2015), where the holder of a protection visa had the visa cancelled for purposefully lying on her protection visa application as to her identity and legal status. The AAT was able to weigh up the indiscretion with other factors in order to come to the conclusion that the person should be deported. The cancellation mechanism therefore achieves the aim of removing from Australia certain undesirable persons, but does allow for other factors, including *non-refoulement* obligations to be considered.

¹⁷ For example, the Department's Procedures Advice Manual 3 provides that: 'However, some applicants arrive without any form of documentation or with fraudulent documents. Hence their real nationality might be difficult to determine. In such circumstances, a decision maker may need to consider other aspects of the applicant's claims and other available information. Local knowledge may be used to establish the appropriate country of reference, and decision makers may give weight to linguistic analysis. The amount of weight given is a matter for a decision maker': Department of Immigration and Border Protection, *Procedures Advice Manual 3*.

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)

We are also concerned about the potential passing of the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)*, which was before Parliament at the time of writing this submission. We consider that the Bill, which strips citizenship from Australian citizens in three new circumstances, unjustifiably limits citizens' fundamental rights and freedoms including by interfering with freedom of movement, denying procedural fairness, and imposing a form of punishment without recourse to a criminal trial. We submit that the Bill therefore requires further review.

The Bill introduces three new circumstances into the Citizenship Act under which a person, who is a national or citizen of a country other than Australia ('dual national'), will cease to be an Australian citizen:

- Section 33AA - a person renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct; - renunciation of citizenship;
- Section 35 – a person ceases to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation; — cessation of citizenship;
- Section 35A – a person ceases to be an Australian citizen if the person is convicted of a specified terrorism offence as prescribed in the Criminal Code. — cessation of citizenship.

The operation of the provisions are "by operation of law" and as such do not involve the Minister making a decision.

Interference with freedom of movement

As noted in Chapter 6 of the Interim Report (para 6.94), 'a citizen's freedom of movement may be interfered with following revocation of citizenship under the *Australian Citizenship Act 2007 (Cth)*.' Removing citizenship from a person, by definition, removes their freedom to leave and return to their own country. It is a form of banishment from the land of one's birth or one's adopted homeland. It will very often mean separation from one's family. As such, by expanding the grounds and

methods for losing citizenship, the Bill also impacts on citizens' freedom of association, and in particular on their right to remain united with family.

Procedural fairness

Loss of citizenship under each of the new provisions is automatic and immediate upon the triggering conduct/conviction occurring (or allegedly occurring). There is no prior independent judicial determination of whether or not the alleged conduct has occurred. Nor is there even rudimentary administrative natural justice afforded the citizen to know the case against them and to respond. Specifically:

- because of the automatic nature of the cessation/revocation, there is no prior notice given to the citizen and no opportunity to be heard;
- the Bill does not require the Minister to notify the ex-citizen of the fact that their citizenship has ceased nor to provide reasons¹⁸;
- there is no administrative procedure for attempting to satisfy the Minister that the triggering event has not occurred;
- there is no right to apply to the Minister to exercise his or her discretionary power to 'exempt' the person from the effect of the revocation/ceasing provision and no obligation on the Minister to consider doing so¹⁹;
- the rules of natural justice are explicitly stated to not apply in relation to the exercise of the Minister's power.²⁰

Principles of criminal justice and fair trial

18 Proposed section 33AA(6); section 35(5); section 35A(5).

19 Proposed section 33AA(7); section 35(6); section 35A(6). The Minister does not have a duty to consider whether to exercise this power: section 33AA(8); section 35(7); section 35A(7). The powers under section 33AA, section 35 and section 35A may only be exercised by the Minister personally: section 33AA(9); section 35(8); section 35A(8).

20 Proposed section 33AA(10); section 35(9); section 35A(9). Section 47 of the Citizenship Act (notification of decision made under the Act) also does not apply in relation to the exercise of the powers.

The provisions of the Bill clearly raise issues normally associated with the principles and practices of the criminal justice system. We consider that the Bill represents a blurring of the boundaries between criminal law and citizenship law and, in particular, represents an undesirable 'increase in Executive and administrative decision-making at the expense of criminal justice due process.'²¹

Proposed sections 33AA and 35 in effect create new offences punishable by loss of citizenship. However, the penalty is imposed by operation of law — based on an assessment of whether the triggering conduct has occurred. It is expected that this determination will frequently be in the hands of the security services, such as ASIO.²² Further, the Bill allows for a merely preliminary ASIO assessment to be sufficient.²³ In practice Australian citizens will be punished with loss of citizenship through an administrative action in circumstances where they have not been tried or convicted of a crime nor even charged with an offence. This amounts to a very real inroad on the principles of criminal justice and an individual's right to a fair trial. We argue that the principles underpinning the criminal law justice system should apply to such cases. This requires the presumption of innocence and the standard of proof of beyond a reasonable doubt be applied, as well as ensuring that the penalty is proportionate to the crime.

Justification and proportionality

The objective of the Bill is to 'address the challenges posed by dual citizens who betray Australia by participating in serious terrorism related activities' by stripping them of their Australian citizenship. This is presumed to assist in protecting the Australian community from those who might seek to harm it by removing their citizenship rights and deporting them from Australia or preventing them from returning to Australia.

We submit that the Bill goes much further than what is necessary to achieve this purpose and as such is disproportionate and unjustified. The Minister has stated that 'Australian citizenship is something to be treasured' and 'should not be taken lightly'. We contend that legislation which uses the device of automatically stripping

²¹ See Michael Grewcock, "Re-inventing the Stain – Bad character and criminal deportation in contemporary Australia", in S.Pickering and J.Ham (eds) *The Routledge Handbook of Migration and Crime*, 2014, pp.121-138).

²² See, for example, EM paras 85-87, and the Minister's second reading speech, p2.

²³ Ibid.

citizenship from persons accused of certain types of conduct does not strengthen but rather weakens and devalues the status of Australian citizenship.

Some of the offences, conviction for which will result in automatic cessation of citizenship, have maximum penalties of just 5 or 7 years (while others have penalties of 15 years, 25 years and even life). We are concerned that the breadth of the offences contained in s35A, ranging from extremely serious offences to less serious will result in some people facing one of the most serious punishments known to human society (permanent exile) for conduct that Parliament has assessed as warranting a penalty of a maximum of 5 or 7 years in prison. The 'penalty' is thus disproportionate to the conduct and the level of threat posed. In this regard we note that recommendations of the Parliamentary Joint Committee on Security and Intelligence in its Advisory Report on the Bill, if adopted, would ameliorate the worst excesses of this provision.²⁴

We contend that the criminal justice system is the appropriate and competent framework for dealing with citizens who commit (terrorism related) crimes. We consider that security is better served by holding citizens to account for their actions through a court of law, and by strengthening our democratic society through upholding the rule of law.

We refer the Commission to our submission to the Parliamentary Joint Committee on Intelligence and Security where we go into further detail about these and other concerning aspects of the Bill.

We note that the Parliamentary Joint Committee on Security and Intelligence has since issued its Advisory Report on the Bill.²⁵ We support the Committee's recommendations that seek to further clarify the operation of the proposed sections and to improve transparency in their operation.

However, even if the Bill were to be passed with the Committee's recommendations, we remain of the view, as expressed by our submission to the Committee, that the Bill represents an unjustified encroachment on freedom of movement, freedom of association and common law procedural fairness. We urge the Commission to

²⁴ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (September 2015 Canberra), Recommendations 7, 8 and 9.

²⁵ Ibid.

carefully consider the implications of this Bill and the need for future reform, especially if it is passed before the final report.

