The Law Society
OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

27 March 2019

Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719
CANBERRA ACT 2600

Dear Mr Smithers

REVIEW OF CITIZENSHIP REVOCATION PROVISIONS BY INDEPENDENT SECURITY LEGISLATION MONITOR

I refer to your memo from Mr Jonathon Smithers dated 22 February 2019, inviting the Law Society of Western Australia to provide input for the Law Council submission to a review by the Independent National Security Legislation Monitor into some of the Citizenship revocation provisions.

The Law Society has concerns regarding the citizenship revocation provisions, including the potential risk for lack of procedural fairness, the vague and wide ambit of current proposed revocation powers, and the current risk of statelessness when the powers are exercised. The Law Society also has a concern about the potential counterproductive effect of such a regime.

The cancellation of a person's Australian citizenship, where there is a dispute as to whether the person has foreign citizenship, potentially creates a stateless person. This has been the case with Neil Prakash (a Melbourne-born Islamic State member) and Shamima Begum (a young woman whose UK citizenship was cancelled after she left London to join Islamic State, and Bangladesh says she is not a Bangladeshi citizen). As the person is then unable to return to the country where they formerly held citizenship, they are unable to effectively challenge the decision to cancel their citizenship.

The other issue is that, where the person is a genuine threat to Australian security, cancelling their citizenship whilst they are overseas does nothing to protect Australians and Australian interests overseas, or to protect anyone else.

If the person is genuinely a threat, they are still at large to commit any offences or acts of terrorism they might wish to commit anywhere in the world, except Australia. This could include targeting Australian interests, such as Australian shipping or airlines, Australian tourists or Australian diplomatic missions.

If the person is genuinely a threat to Australian security, the most effective solution would be to have the person arrested and returned to Australia for trial (if they deny the allegations) and sanction (if the allegations are admitted or proven). This does not necessarily mean that a person would be subject to an Interpol warrant – the person could simply be arrested at the border on their return to Australia, as is already done in the case of persons with outstanding arrest warrants.

Level 4, 160 St Georges Terrace Perth WA 6000, DX 173 Perth
Telephone: (08) 9324 8600 Facsimile: (08) 9324 8699
Email: info@lawsocietywa.asn.au Website: www.lawsocietywa.asn.au
Please address all correspondence to The Law Society of Western Australia PO Box Z5345, St Georges Terrace Perth WA 6831

This would not prevent the government seeking such a warrant in appropriate cases, where the government would prefer to bring the person back to Australia rather than wait for them to return.

The argument that this would be ineffective due to the need to prove the offence(s) committed overseas cannot be sustained. Given that there is no practical limit on the Commonwealth's legislative powers to create extraterritorial offences (Polyukhovic v Cth (1991) 172 CLR 501), and legislation which has the effect of deeming certain acts done unless the accused proves the contrary (eg The Criminal Code (WA) s. 306, female genital mutilation) is in common use, there is no need for a process outside the criminal law resulting, where such a threat exists, in incarceration, in order to protect the relevant Australian interests.

Of course, where such a prosecution fails, it would not result in any increase risk to the security of relevant Australian interests, as it could only fail in circumstances where the belief which, on the current model, would result in cancellation of citizenship by administrative action, was in fact not well founded.

If you would like to discuss the above further, please do not hesitate to contact Mary Woodford, General Manager Advocacy at mwoodford@lawsocietywa.asn.au or on (08) 9324 8646.

Yours sincerely

Greg McIntyre SC
President