

Conviction-based provisions – proposed section 35A

- 6.1 Proposed section 35A of the Bill provides that a person would automatically cease to be an Australian citizen if convicted for one of the specified offences.
- 6.2 This chapter discusses concerns raised by inquiry participants about the breadth of conduct that could lead to loss of citizenship under the provision. The chapter also discussed the question of whether proposed section 35A should be applied retrospectively to convictions handed down prior to the commencement of the Bill.

Section 35A cessation not limited to most serious conduct

- 6.3 A significant number of submissions argued that the range of convictions that would lead to loss of citizenship under proposed section 35A are too broad and catch conduct that is unrelated to terrorism or a breach of allegiance to Australia.¹ For example, Professor Anne Twomey submitted:

¹ Professor Ben Saul, *Submission 2*, pp. 3, 4, 7; Executive Council of Australian Jewry, *Submission 9*, p. 4; Human Rights Committee, Law Society of NSW, *Submission 11*, p. 4; Federation of Ethnic Communities' Councils of Australia, *Submission 12*, pp. 4-5; Australian Human Rights Commission, *Submission 13*, pp. 5, 7; Professor Helen Irving, *Submission 15*, p. 9; Dr Rayner Thwaites, *Submission 16*, pp. [9-10]; Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams, *Submission 17*, pp. 1, 5; Refugee Council of Australia, *Submission 22*, p. [3]; Dr Alice Hill, *Submission 23*, p. [1]; NSW Society of Labor Lawyers, *Submission 25*, pp. 8, 10; Law Council of Australia, *Submission 26*, pp. 13-14; Pirate Party Australia, *Submission 28*, pp. 4-5; Centre for Comparative Constitutional Studies, *Submission 29*, pp. 3-4; Councils for civil liberties across Australia, *Submission 31*, p. 5; Immigration Advice & Rights Centre Inc., *Submission 36*, p. 4; Human Rights Law Centre,

The issue here, however, is about the breadth of the provisions which go well beyond the traditional notion of terrorism. While this Bill is being sold to the public on the basis that it involves removing the Australian citizenship of people who have come here from other countries and have then gone overseas to fight for terrorist organisations or commit terrorist atrocities, the reality is that it will also strip Australian citizenship from people born here who commit crimes that have nothing to do with ‘terrorism’ in its publicly understood meaning.²

- 6.4 The focus of concern in the written submissions was the reference to section 29 of the *Crimes Act 1914*—‘destroying or damaging Commonwealth property’³—and offences carrying a maximum term of imprisonment of ten years or less.⁴ Another concern raised was the inclusion of convictions where a person is reckless to the connection between a ‘thing’ and the terrorist act, capturing an individual who has not turned their mind to the activities of a family member who may use a joint possession in the commission of the terrorist act.⁵
- 6.5 The inclusion of section 29 of the *Crimes Act* also attracted significant comment in the public hearings.⁶ The Department of Immigration and Border Protection and the Attorney-General’s Department provided evidence that there were 171 instances of people being sentenced for

Submission 39, pp. 6-7; Migration Law Program, ANU College of Law, *Submission 40*, p. 13; Australian Bar Association, *Submission 43*, p. 3.

2 Professor Anne Twomey, *Submission 10*, p. 5.

3 Executive Council of Australian Jewry, *Submission 9*, p. 4; Professor Anne Twomey, *Submission 10*, p. 5; Australian Human Rights Commission, *Submission 13*, pp. 5, 7; Professor Helen Irving, *Submission 15*, p. 9; Dr Rayner Thwaites, *Submission 16*, pp. [9-10]; Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams, *Submission 17*, p. 5; Refugee Council of Australia, *Submission 22*, p. [3]; Dr Alice Hill, *Submission 23*, p. [1]; NSW Society of Labor Lawyers, *Submission 25*, pp. 8, 10; Law Council of Australia, *Submission 26*, pp. 13-14; Pirate Party Australia, *Submission 28*, pp. 4-5; Councils for civil liberties across Australia, *Submission 31*, p. 5.

4 Australian Human Rights Commission, *Submission 13*, p. 5; Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams, *Submission 17*, pp. 1, 5; Law Council of Australia, *Submission 26*, pp. 13-14; Migration Law Program, ANU College of Law, *Submission 40*, p. 13.

5 Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams, *Submission 17*, p. 5.

6 Ms Gabrielle Bashir SC, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 2; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, pp. 12, 14; Professor Kim Rubenstein, *Committee Hansard*, Canberra, 4 August 2015, p. 42; Ms Lucy Morgan, Refugee Council of Australia, *Committee Hansard*, Canberra, 5 August 2015, pp. 20, 24; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44; Professor Gillian Triggs, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, pp. 9, 13; Ms Catherine Wood, Amnesty International Australia, *Committee Hansard*, Canberra, 5 August 2015, pp. 29-30; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44; Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, pp. 52-53

offences against section 29 of the Crimes Act between 1 January 1990 and 30 June 2015.⁷ Of these, 141 proceeded summarily after a mode of trial decision was made pursuant to the prosecution policy of the Commonwealth, with the remaining 28 proceeding on indictment.

- 6.6 Of the matters that proceeded on indictment, examples of the conduct leading to conviction included graffiti; damage to immigration detention facilities; damage to defence facilities; cutting through fences and padlocks to enter prohibited areas; damaging phone booths and telephones; destroying tax returns to conceal tax fraud; and cutting down genetically modified wheat crops grown as part of a Commonwealth Scientific and Industrial Research Organisation experiment. While the sentences handed down for these offences varied, no prison sentence was served for the majority of the examples provided.⁸
- 6.7 In the public hearing, it was asked whether section 29 is necessary to cover conduct like blowing up a military base or running a truck loaded with explosives into a Commonwealth building. Dr Rayner Thwaites and Professor Helen Irving gave evidence that such conduct would be caught by one of the terrorist offences already listed in the Bill. Professor Irving stated that it ‘would be hard to imagine ... an action of that nature which would not be defined as or come under the definition of a terrorist offence’.⁹
- 6.8 The total of 171 convictions handed down since 1990 under section 29 of the Crimes Act can be compared to a total of 42 convictions for all other offences included under proposed section 35A combined.¹⁰
- 6.9 In evidence, Professor Irving submitted that the broad sweep of proposed section 35A undermines the purpose of the Bill as a response to the threat to Australia caused by terrorism. She stated:

The message about how serious terrorism is – so serious that the revocation of citizenship is a proportionate measure or a proportionate response – should not become diluted, I suggest, by applying revocation of citizenship to conduct that does not fit the definition of terrorism, and that definition of a ‘terrorist act’ is found in the Criminal Code. So if terrorism is a national security threat, a major national security threat of a new kind, even a sovereignty-threatening phenomenon, it needs to be identified clearly and the message needs to get across clearly that it is such. If

7 Department of Immigration and Border Protection, *Submission 37.3*, p. 22.

8 Department of Immigration and Border Protection, *Submission 37.3*, pp. 22–24.

9 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 52.

10 Department of Immigration and Border Protection, *Submission 37.3*, p. 22.

the law makes it appear that citizenship revocation is possible for conduct that is not confined to terrorism and that revocation could potentially apply to lesser offences or to conduct of innocent persons or to persons who are protesting against government policy, for example, then the message that the law is designed to deal with terrorism will be diluted or confused.¹¹

- 6.10 The NSW Society of Labor Lawyers identified the potential impact on the criminal justice system as an unintended consequence of including a broad range of offences. It submitted:

The proposed s 35A(3) will also have broader consequences for the criminal justice system as persons charged with the listed offences are less likely to plead guilty as they will automatically lose their citizenship upon being convicted. It is submitted that charges for these offences are likely to be defended by dual citizens even if their defence has no or few prospects of success, because of the savagery of the ultimate penalty of citizenship removal.¹²

- 6.11 Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams submitted that the required level of seriousness for an offence to justify loss of citizenship under proposed section 35A should be determined by the penalty applied, not just the nature of the offence. They suggested that the 'possibility of revocation should arise in respect of conduct that has led to a jail sentence of 10 years or more. Revocation should not apply to less serious convictions, including those that do not give rise to a jail term'.¹³
- 6.12 The concept of a minimum sentence was supported by Amnesty International Australia.¹⁴
- 6.13 The Australian Human Rights Commission submitted that a minimum threshold would be better than no protection, but that the key safeguard should be the inclusion of a ministerial discretion following conviction to enable the circumstances of the individual case to be taken into account.¹⁵
- 6.14 Professor Jeremy Gans, of the Centre for Comparative Constitutional Studies, was asked whether the proposed approach may result in an Australian court taking loss of citizenship into account when deciding upon sentencing. He responded:

11 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p.43.

12 NSW Society of Labor Lawyers, *Submission 25*, p. 10. Or or

13 Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams, *Submission 17*, pp. 1-2.

14 Ms Catherine Wood, Amnesty International Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 30.

15 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 10 August 2015, p. 28.

That is a hard question. Courts typically take into account consequences when they look at sentencing, including unexpected consequences on a person. So sometimes that leads them to, for example, reduce the sentence for someone who would suffer additional hardship from the conviction that goes beyond other people. So, within that principle, that could be covered. But it is a slightly difficult principle to be sure of its application because courts at times say that it is not their role to consider certain consequences of a conviction in their sentencing discretion. They have to interpret the scheme to work out whether they should have that role under the system. It is easy for them to take account of a surprising thing, such as the person is HIV positive and therefore will perhaps suffer in prison. But here we have a consequence which is a legislative consequence and so it would be a question of interpretation of the Australian parliament's intention as to whether that consequence should have an effect of that sort on the sentencing discretion.¹⁶

6.15 The NSW Society of Labor Lawyers noted that in the matter of *Roach v Electoral Commissioner* (2007), the High Court found that the Commonwealth Parliament cannot remove the right to vote from a prisoner who is serving a sentence of less than three years. It submitted that

it would therefore be surprising if the Court would allow the more fundamental right of citizenship (on which the right to vote is based) to be removed for conduct which had not resulted in a lengthy prison sentence.¹⁷

6.16 As discussed in the previous chapter, Canada has recently amended its citizenship laws to allow a ministerial discretion to revoke citizenship following a conviction for terrorism, high treason, treason or spying when a certain minimum sentence is imposed.¹⁸ The Australian Human Rights Commission supported the Canadian model as responding to human rights concerns.¹⁹

6.17 Proposed section 35A(6) would give the Minister a discretionary power to rescind a notice of loss of citizenship and to exempt the person from the effect of the section giving rise to the loss if the Minister considered that it

16 Professor Jeremy Gans, Centre for Comparative Constitutional Studies, *Committee Hansard*, Canberra, 5 August 2015, p. 42.

17 NSW Society of Labor Lawyers, *Submission 25*, p. 5.

18 Department of Immigration and Border Protection, *Submission 37.3*, 5 August 2015.

19 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 10 August 2015, p. 29

is in the public interest to do so. However, it was submitted that this exemption power would not be sufficient to cure the problems arising from the broad range of offences listed in section 35A(3) because the power is non-compellable, rendering a person's loss of citizenship 'highly unpredictable and dependent on the unknowable intentions of the Minister'.²⁰

- 6.18 In evidence, the Secretary of the Department of Immigration and Border Protection discussed the 'serious conduct' that should give rise to loss of citizenship under this Bill, noting that conduct was intended to be the modern equivalent of a person having 'donned the uniform of an enemy'.²¹ He submitted that it may well be 'a matter of common sense' that automatic cessation of citizenship should not flow from minor offences under section 29 of the Crimes Act. He invited the Committee to consider potential rectification of the provision.²²
- 6.19 The Department was asked in a supplementary question whether the offence of damaging Commonwealth property could be removed without undermining policy intent. It did not answer this question, simply responding that
- the government has included a wide range of provisions in the Bill. The Bill includes section 29 of the Crimes Act, which relates to intentionally destroying or damaging Commonwealth property and carries a maximum sentence of 10 years.²³
- 6.20 The Department was also asked whether the provision could be limited to persons sentenced to a minimum number of years of imprisonment. It did not identify any legal impediments or unintended consequences. It responded that this 'is a policy question and a matter for government'.²⁴

Committee comment

- 6.21 The Committee considers that revocation of citizenship under proposed section 35A should only follow appropriately serious conduct that demonstrates a breach of allegiance to Australia. This is consistent with the intent of the Bill.

20 Professor Ben Saul, *Submission 2*, p. 7. See also Centre for Comparative Constitutional Studies, *Submission 29*, p. 4.

21 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, pp. 4, 11, 13, 14.

22 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 5 August 2015, p. 62.

23 Department of Immigration and Border Protection, *Submission 37.4*, p. 6.

24 Department of Immigration and Border Protection, *Submission 37.4*, p. 6.

- 6.22 The Committee acknowledges the widespread concern about the inclusion of section 29 of the Crimes Act and recommends that this offence be removed from section 35A.
- 6.23 Further, the Committee considers that the provision should more appropriately target the most serious conduct that is closely linked to a terrorist threat. Accordingly, the Committee recommends removal of offences with a maximum penalty of less than 10 years imprisonment and certain *Crimes Act* offences that have never been used. This would result in excluding the following offences:
- section 80.2, *Criminal Code Act 1995*, urging violence against the Constitution, the Government, a lawful authority of the Government, an election, or a referendum,
 - section 80.2A(1) *Criminal Code Act 1995*, Urging violence against groups,
 - section 80.2B(1) *Criminal Code Act 1995*, Urging violence against members of groups,
 - section 80.2C, *Criminal Code Act 1995*, Advocating terrorism,
 - section 25 *Crimes Act 1914*, Inciting mutiny against the Queen’s Forces,
 - section 26 *Crimes Act 1914*, Assisting prisoners of war to escape, and
 - section 27(1) *Crimes Act 1914*, Unlawful drilling.
- 6.24 The Committee notes that the Department of Immigration and Border Protection’s supplementary submission indicated that no one has been convicted for any of these offences in the past.²⁵
- 6.25 While limiting the provision to more serious offences is an appropriate measure to better define the scope of conduct leading to revocation, the Committee notes that even following a conviction there will still be degrees of seriousness of conduct and degrees to which conduct demonstrates a repudiation of allegiance to Australia. Therefore, the Committee recommends that loss of citizenship under this provision not be triggered unless the person has been given sentences of imprisonment that together total a minimum of six years for offences listed in the Bill.
- 6.26 Some members of the Committee were of the view that a lower or higher threshold was preferable; however, on balance it was considered that a six year minimum sentence would clearly limit the application of proposed section 35A to more serious conduct. It was noted that three years is the minimum sentence for which a person is no longer entitled to vote in Australian elections.²⁶ Loss of citizenship should be attached to more

25 Department of Immigration and Border Protection, *Submission 37.3*, pp. [9ff].

26 Subsection 93(8AA) of the *Commonwealth Electoral Act 1918*.

serious conduct and a greater severity of sentence, and it was considered that a six year sentence would appropriately reflect this.

6.27 In addition to public interest considerations, there is the need to take into account circumstances related to each affected individual – such as their age and the degree of threat represented.

6.28 Accordingly, while the Committee supports the proposal that revocation of citizenship should follow conviction for some offences, it considers this should be subject to Ministerial discretion. The exercise of this discretion would be safeguarded by an allegiance and public interest test. To give effect to this approach, the Committee considers it desirable for the Bill to list the factors that should be taken into account in the public interest consideration.

6.29 The introduction of the discretion would allow the Minister to consider the seriousness of the conduct and the severity of any sentence handed down by the Court. This would also address the concerns raised about automatic loss of citizenship occurring with a sentence of less than three years, which the High Court has previously found should not lead to loss of the right to vote.

6.30 The introduction of discretion to revoke citizenship would mean that there would be no need for the Minister's power to exempt a person from the loss of citizenship to remain in the Bill. The relevant public interest factors would have been taken into account before the revocation decision was made. There would be no need for the rules of natural justice to be excluded from a ministerial discretion because the criminal conviction that would trigger the revocation power would be on the public record.

Recommendation 7

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to give the Minister discretion to revoke a person's citizenship following conviction for a relevant offence with a sentence applied of at least six years imprisonment, or multiple sentences totalling at least six years' imprisonment.

In exercising this discretion, the Minister should be satisfied that:

- the person's conviction demonstrates that they have repudiated their allegiance to Australia, and
- it is not in the public interest for the person to remain an Australian citizen, taking into account the following factors:
 - ⇒ the seriousness of the conduct that was the basis of the conviction and the severity of the sentence/s,
 - ⇒ the degree of threat to the Australian community,
 - ⇒ the age of the person and, for a person under 18, the best interests of the child as a primary consideration,
 - ⇒ whether the affected person would be able to access citizenship rights in their other country of citizenship or nationality, and the extent of their connection to that country,
 - ⇒ Australia international obligations and relations, and
 - ⇒ any other factors in the public interest.

The rules of natural justice should apply to the Minister's discretion under section 35A.

Recommendation 8

The Committee recommends that the list of relevant offences in proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to remove reference to section 29 of the *Crimes Act 1914*.

Recommendation 9

The Committee recommends that the list of relevant offences in proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to exclude offences that carry a maximum penalty of less than 10 years' imprisonment and certain *Crimes Act* offences that have never been used.

The Committee notes that the following offences would be removed:

- Section 80.2, *Criminal Code Act 1995*, Urging violence against the Constitution, the Government, a lawful authority of the Government, an election, or a referendum,
- Section 80.2A(1) *Criminal Code Act 1995*, Urging violence against groups,
- Section 80.2B(1) *Criminal Code Act 1995*, Urging violence against members of groups,
- Section 80.2C, *Criminal Code Act 1995*, Advocating terrorism,
- Section 25 *Crimes Act 1914*, Inciting mutiny against the Queen's Forces,
- Section 26 *Crimes Act 1914*, Assisting prisoners of war to escape, and
- Section 27(1) *Crimes Act 1914*, Unlawful drilling.

Retrospectivity

- 6.31 In referring the Bill to the Committee for inquiry and report, the Attorney-General asked the Committee to consider whether proposed section 35A (the conviction-based cessation) should apply retrospectively with respect to convictions prior to the commencement of the Act.
- 6.32 In considering the issue of retrospectivity, the Committee heard from a range of legal experts and interest groups, who outlined the long-held principle of Australia's legal system that laws should not be applied retrospectively. This basic rule of law principle is enshrined in international law and has been affirmed by the High Court. However there are instances where the Parliament has sought to apply laws retrospectively, and these laws have been declared to be legally and constitutionally valid.
- 6.33 Therefore the Committee considered whether applying proposed section 35A retrospectively would be an appropriate and proportionate deviation

from the rule of law for the purpose of ensuring the safety and security of Australia and its people.

Rule of Law

- 6.34 Retrospective laws are generally considered to be inconsistent with the rule of law. The majority of submitters opposed the retrospective application of proposed section 35A on this basis.²⁷
- 6.35 The common law on retrospective laws is reflected in clause 39 of the *Magna Carta*, which prohibits the imprisonment or persecution of a person ‘except by the lawful judgement of his peers and by the law of the land’.²⁸
- 6.36 Outlining the rule of law principle, ‘no punishment without law’, Lord Bingham stated:

Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.²⁹

- 6.37 Dr Rayner Thwaites conveyed the basis of the objection to retrospectivity, explaining that it was a ‘basic rule of law concern that someone should be able to organise their affairs with an understanding of the legal position that obtains at the time they engage in the conduct’.³⁰
- 6.38 Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams reflected on how the retrospective application of this proposed law might impact on Australia’s system of government:

One of the most important aspects of the rule of law is that a person is entitled to act in accordance with the law at the time that they committed their actions. No penalty, including a loss of citizenship, should apply in respect of conduct that was not subject to a penalty at the time it was committed. This is a long

27 See, for example, Law Council of Australia, *Submission 26*, pp. 28–29; Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 9; Australian Human Rights Commission, *Submission 13*, p. 13; Professor Ben Saul, *Submission 2*, p. 8; Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams, *Submission 17*, p. 2.

28 See *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Interim Report 127), 3 August 2015, p. 250.

29 T Bingham, *The Rule of Law*, Penguin, UK, 2010, p. 74. See also, Law Council of Australia, *Submission 26*, p. 28; *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Interim Report 127), 3 August 2015, p. 249.

30 Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, p. 53.

recognised and important principle that lies at the heart of Australian democracy, and the relationship between the state and citizen. Acting retrospectively in this case would be wrong in principle and create a new precedent that might do long term damage to Australia's system of government.³¹

6.39 Professor Anne Twomey submitted:

Given that the termination of citizenship upon conviction is a serious act akin to punishment, it should not, in my view, be applied with retrospective effect. Such action, while not necessarily being unconstitutional, would be contrary to strongly held principles concerning the application of the rule of law.³²

6.40 The Law Council of Australia conveyed its in-principle objection to the enactment of legislation with retrospective effect, particularly in cases that created retroactive criminal offences or which imposed additional punishment for past offences. The Law Council submitted:

The objection can be traced to principles enshrined in the rule of law. Acts by the legislature which are inconsistent with the rule of law have the tendency to undermine the very democratic values upon which the rule of law is based.³³

6.41 Article 15 of the International Covenant on Civil and Political Rights (ICCPR) specifically prohibits retrospective criminal laws:

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.³⁴

6.42 An exception to this prohibition is provided for in circumstances where the act in question is considered a criminal action according to the 'general principles of law recognized by the community of nations'.³⁵

6.43 In *Polyukhovich v Commonwealth* (1991), Justice Toohey said:

31 Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams, *Submission 17*, p. 2.

32 Professor Anne Twomey, *Submission 10*, p. 6.

33 Law Council of Australia, *Submission 26.1*, p. 1.

34 Law Council of Australia, *Submission 26*, p. 28; Law Council of Australia, *Submission 26.1*, p. 1. See also Attorney-General's Department, 'Prohibition on Retrospective Criminal Laws', <www.ag.gov.au> viewed 24 July 2015.

35 International Covenant on Civil and Political Rights, Article 15(2).

All these general objections to retrospectively applied criminal liability had their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future.³⁶

Use of retrospective laws in Australia

- 6.44 Despite rule of law objections to the retrospective application of laws, there is no express or implied prohibition against implementing retrospective laws in the Australian Constitution. The High Court found that the Commonwealth Parliament had the power to make laws with retrospective effect in *R v Kidman (1915)*, despite noting the objections to doing so.³⁷
- 6.45 This decision was affirmed in subsequent cases such as *Polyukhovich v Commonwealth (1991)*, where the Commonwealth Parliament's power to create a criminal offence with retrospective application was discussed.³⁸
- 6.46 The case of *Polyukhovich* considered the constitutionality of the *War Crimes (Amendment) Act 1988 (Cth)*, which created an offence of committing a war crime in Europe between 1 September 1939 and 8 May 1945. The validity of the provision was upheld by the High Court, with Justice Dawson commenting:
- The wrongful nature of the conduct ought to have been apparent to those who engaged in it even if, because of the circumstances in which the conduct took place, there was no offence against domestic law.³⁹
- 6.47 On this basis, the law was consistent with Article 15(2) of the ICCPR, as outlined above.
- 6.48 Professor Helen Irving submitted that there were a number of different perspectives on the question of retrospectivity in *Polyukhovich*:

36 *Polyukhovich v Commonwealth* (1991) 172 CLR 501. See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127)*, 3 August 2015, p. 251.

37 *R v Kidman* (1915) 20 CLR 425. See also Law Council of Australia, *Submission 26.1*, p. 3; Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127)*, 3 August 2015, p. 252.

38 *Polyukhovich v Commonwealth* 172 CLR 501. See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127)*, 3 August 2015, p. 251.

39 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 [18]. See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127)*, 3 August 2015, p. 256.

The court came to the conclusion that retrospectivity was not ruled out, but some of the justices of the court also pointed out that the crimes in question – war crimes of the nature of which Mr Polyukhovich had been charged – were so egregious that they were universal crimes; they were part of international customary law that you do not commit war crimes. It was also reasoned, by extension of that principle, that the war crimes at issue were part of Australian law at the relevant time.

There are a number of different ways in which that could relate to terrorism acts.⁴⁰

6.49 Justice Toohey stated in that case:

Where, for example, the alleged transgression is particularly cogent or where the moral transgression is closely analogous to, but does not for some technical reason amount to, legal transgression, there is a strong argument that the public interest in seeing the transgressors called to account outweighs the need of society to protect an individual from prosecution on the basis that a law did not exist at the time of the conduct. But it is not only the issue of protection of an individual accused at the point of prosecution which is raised in the enactment of a retroactive criminal law. It is both aspects of the principle – individual and public interests – which require fundamental protection.⁴¹

6.50 In Australia, retrospective laws have only been made in very limited circumstances, usually where ‘there has been a strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity’.⁴²

6.51 In its drafting advice on framing Commonwealth offences, the Attorney-General’s Department considers that retrospective laws should only be made in rare circumstances and with strong justification.⁴³

40 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 53.

41 *Polyukhovich v Commonwealth* 172 CLR 501 at [107]– [108] (Toohey J); See Law Council of Australia, *Submission 26.1*, p. 3.

42 Attorney-General’s Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, pp. 15–17; *Prohibition on retrospective criminal laws*, viewed on 24 July 2015, www.ag.gov.au. See also, *Blueprint for Free Speech, Submission 18*. For examples of retrospective laws made in Australia, see Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127): Chapter 9 – Retrospective laws*, 3 August 2015.

43 Attorney-General’s Department, ‘Prohibition on Retrospective Criminal Laws’, <www.ag.gov.au> viewed 24 July 2015.

Should proposed section 35A apply retrospectively?

- 6.52 The Committee considered a number of issues raised by submitters, when examining whether proposed section 35A should be applied retrospectively. These issues included:
- whether the cessation of citizenship would amount to a ‘penalty’,
 - whether the Bill already had retrospective application, and
 - whether any limits could be applied to the application of retrospectivity.

The cessation of citizenship as a ‘penalty’

- 6.53 The question of whether the cessation of citizenship would amount to a ‘penalty’ is relevant in considering whether proposed section 35A, if passed, should apply retrospectively.
- 6.54 If considered a penalty, the proposed law would likely contravene Article 15(1) of the ICCPR.
- 6.55 The Parliamentary Joint Committee on Human Rights (PJCHR) noted that any changes made to the Bill to apply the cessation of citizenship retrospectively would ‘raise serious concerns about the compatibility of the measures with the prohibition on retrospective criminal law’, under Article 15 of the ICCPR, which the Committee noted is an absolute right.⁴⁴
- 6.56 The Law Council of Australia considered that if the loss of citizenship was regarded as punishment, it should be considered whether, in the case of past convictions, the judicial function was satisfied in circumstances where loss of citizenship was not contemplated as part of the sentence.⁴⁵
- 6.57 In determining whether a measure constituted a penalty, the Australian Human Rights Commission submitted that relevant factors would include whether the measure attached to criminal conduct, the severity of the measure and its purpose (including retribution and/or deterrence).⁴⁶
- 6.58 The purpose of proposed new section 35A is stated as follows:
- Cessation of citizenship is a very serious outcome of very serious conduct that demonstrates a person has repudiated their allegiance to Australia. Removing a person’s formal membership of the Australian community is appropriate to reduce the possibility of a person engaging in acts or further acts that harm Australians or Australian interests. The automatic cessation of

44 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament*, August 2015, p. 35.

45 Law Council of Australia, *Submission 26.1*, p. 6.

46 Australian Human Rights Commission, *Submission 13*, p. 13.

Australian citizenship may also have a deterrent effect by putting radicalised persons on notice that their citizenship is in jeopardy if they engage in terrorist-related conduct contrary to their allegiance to Australia.⁴⁷

- 6.59 The Australian Human Rights Commission considered that losing one's citizenship pursuant to proposed section 35A would be an extremely severe consequence flowing from a criminal conviction that has already finally been disposed of.⁴⁸
- 6.60 In the Commission's view, the retrospective application of proposed section 35A would contravene the ICCPR, as this would have the effect of imposing a heavier penalty for criminal conduct than was applicable at the time the crime was committed (and indeed, at the time the affected persons were convicted and sentenced).⁴⁹
- 6.61 The Executive Council of Australian Jewry agreed, arguing that although the cessation or loss of citizenship may not form a punishment under a criminal statute, it would likely form a severe penalty to which the principle of legal certainty should apply.⁵⁰
- 6.62 The Law Council of Australia submitted that the gravity of removing a person's citizenship retrospectively would be a substantive alteration of a person's legal rights and obligations and would be fundamentally unjust.⁵¹
- 6.63 The Law Council further argued that there was no evidence to suggest that making the laws retrospective would act as a deterrent to someone contemplating radicalisation.⁵²
- 6.64 Laureate Professor Cheryl Saunders, of the Centre for Comparative Constitutional Studies, argued that it would be unusual to apply a law retrospectively where this could result in a person having 'voluntarily surrendered' their citizenship for something that could not have led to that consequence at the time.⁵³

47 Explanatory Memorandum, p. 21.

48 Australian Human Rights Commission, *Submission 13*, p. 13.

49 Australian Human Rights Commission, *Submission 13*, p. 13.

50 Executive Council of Australian Jewry Inc, *Submission 9*, p. 5. See also, Human Rights Committee, Law Society of NSW, *Submission 11*, p. 3.

51 Australian Law Council, *Submission 26*, p. 29.

52 Australian Law Council, *Submission 26*, p. 29. See also, Refugee Council of Australia, *Submission 22*, p. 4.

53 Laureate Professor Cheryl Saunders, Foundation Director, Centre for Comparative Constitutional Studies, *Committee Hansard*, Canberra, 5 August 2015, pp. 41–42.

Possible limits

- 6.65 Inquiry participants noted there may be constitutional limits on the application of retrospective laws.⁵⁴ Evidence from legal and constitutional experts considered what limits might be placed on any retrospective application of proposed section 35A to avoid any potential constitutional issues.
- 6.66 Mr Duncan McConnel, President of the Law Council of Australia, explained that while there was capacity for the legislature to pass legislation with retrospective application, there were limits to this application, depending on the subject matter and the degree.⁵⁵
- 6.67 The Committee heard evidence that the Parliament was constrained in enacting retrospective laws by reason of the separation of judicial and legislative powers established by Chapter III of the Constitution. The separation of powers doctrine requires that a Commonwealth law must not inflict punishment upon a person or persons without a judicial hearing.⁵⁶
- 6.68 Professor Helen Irving considered that retrospectivity would be less troubling and may avoid constitutional issues if the relevant offences contained in the provisions were tightly confined to terrorism offences and acts, as defined in the Criminal Code.⁵⁷
- 6.69 Professor George Williams agreed it may be possible to enact such a law with retrospective application that would not amount to an unconstitutional action, provided the law was not narrowed to apply clearly to a specific class of people.⁵⁸
- 6.70 The Committee was told there was a danger in enacting retrospective legislation that would automatically apply to a narrow group of convictions, where only a small class of persons would be affected. This could be seen to amount to a ‘bill of attainder’, which would likely be held to be unconstitutional.⁵⁹

54 See Law Council of Australia, *Submission 26.1*, p. 3.

55 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 9.

56 See Law Council of Australia, *Submission 26.1*, pp. 3–4. See also, Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 17; Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127)*, 3 August 2015, p. 253.

57 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 53.

58 See Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 17; Law Council of Australia, *Submission 26.1*, p. 4; Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127)*, 3 August 2015, p. 253.

59 Law Council of Australia, *Submission 26.1*, p. 6.

- 6.71 A 'bill of attainder' is described as a statute that 'finds a specific person or specific persons guilty of an offence constituted by past conduct and imposes punishment in respect of that offence'. Such a statute would interfere with the exercise of judicial power by Chapter III courts.⁶⁰
- 6.72 The Law Council of Australia referred the Committee to the case of *Polyukhovich*, where Chief Justice Mason held:
- If, for some reason, an ex post facto law did not amount to a bill of attainder, yet adjudged persons guilty of a crime or imposed punishment upon them, it could amount to trial by legislature and a usurpation of judicial power.⁶¹
- 6.73 The Law Council submitted that laws that punished a person or persons for past behaviour may breach the doctrine of the separation of powers if they do so in a manner that does not provide for judicial determination of whether the punishment should apply.⁶²

Retrospective application of the Bill as drafted

- 6.74 The Parliamentary Joint Committee on Human Rights noted in its report on the Bill that the automatic loss of citizenship provisions would apply to individuals who were convicted following enactment of the Bill, even if the relevant conduct occurred prior to the enactment.⁶³
- 6.75 Inquiry participants also took the view that proposed section 35A would have partial retrospective effect, by capturing conduct that occurred prior to the commencement of the section.⁶⁴
- 6.76 Professor Jeremy Gans, of the Centre for Comparative Constitutional Studies, considered that proposed section 35A could also apply to people who have been convicted of a relevant offence, but not yet sentenced. These people would then be faced with the automatic cessation of citizenship – a consequence they would not have been aware of at the time of making their plea.⁶⁵

60 Law Council of Australia, *Submission 26.1*, p. 4; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 17.

61 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 [32] (Mason CJ); See Law Council of Australia, *Submission 26.1*, p. 4.

62 Law Council of Australia, *Submission 26.1*, p. 4.

63 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament*, August 2015, p. 35.

64 See, for example, Australian Human Rights Commission, *Submission 13*, p. 13; Law Council of Australia, *Submission 26*, p. 28; Human Rights Committee, Law Society of NSW, *Submission 11*, p. 3.

65 Professor Jeremy Gans, member, Centre for Comparative Constitutional Law, *Committee Hansard*, Canberra, 5 August 2015, p. 42.

Response from the Department of Immigration and Border Protection

- 6.77 The Committee sought advice from the Department of Immigration and Border Protection regarding how many cases would be affected if the Committee recommended the Government consider applying proposed 35A retrospectively.
- 6.78 The Department responded that it was not possible to specify the number of cases to which the Bill would then apply without a ‘thorough consideration of the facts of each potential case’.⁶⁶
- 6.79 The Committee further sought advice as to how the application of retrospectivity might be narrowed, or what constraints might be placed on any potential application of retrospectivity.
- 6.80 The Department responded that ‘the Government would consider any recommendation the Committee may wish to make in relation to retrospectivity’.⁶⁷
- 6.81 In relation to the Bill’s relationship to the ICCPR, the Department stated:
The Government’s position is that the Bill is compatible with human rights. To the extent that the Bill may limit certain human rights, any limitations are reasonable, necessary and proportionate in light of the Bill’s objective and purpose.⁶⁸

Committee comment

- 6.82 The Committee has been asked to consider whether proposed section 35A (the conviction-based cessation) should be applied retrospectively with respect to convictions prior to the commencement of the Act.
- 6.83 The majority of inquiry participants opposed the retrospective application of proposed section 35A on the basis that it would be contrary to the rule of law. However, the Parliament has introduced legislation with retrospective effect in special circumstances, and these laws have been held to be legally valid.
- 6.84 The Committee notes the Bill’s purpose is to ensure the safety and security of Australia and its people and to ensure the community of Australian citizens is limited to those who continue to retain an allegiance to Australia.
- 6.85 The Committee acknowledges the concerns raised by stakeholders. The Committee acknowledges that retrospectivity should only be applied with

66 Department of Immigration and Border Protection, *Submission 37.4*, p. 6.

67 Department of Immigration and Border Protection, *Submission 37.4*, p. 7.

68 Department of Immigration and Border Protection, *Submission 37.4*, p. 7.

great caution and following careful deliberation, with regard to the nation as a whole.

- 6.86 While some members of the Committee expressed concern regarding the principle of retrospective application, on balance the Committee determined these to be special circumstances. The Committee formed the view that past terrorist-related conduct, to which persons have been convicted under Australian law, is conduct that all members of the Australian community would view as repugnant and a deliberate step outside of the values that define our society.
- 6.87 Under Recommendation 7, retrospective operation of proposed section 35A would enable the Minister to make a current decision to deprive somebody of their citizenship, based on a previous conviction, rather than the provision operating to automatically deprive somebody of their citizenship in the past. In addition, the Minister's decision would include a current assessment of whether the person's past conviction reveals that they have breached their allegiance to Australia and whether it is contrary to the public interest for them to remain a citizen.
- 6.88 The Committee recommends that proposed section 35A be applied retrospectively to ensure the loss of citizenship is applied in keeping with the Bill's purpose.

Recommendation 10

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be applied retrospectively to convictions for relevant offences where sentences of ten years or more have been handed down by a court.

The Ministerial discretion to revoke citizenship must not apply to convictions that have been handed down more than ten years before the Bill receives Royal Assent.