7

Administrative application of the Bill

Introduction

7.1 This Chapter examines the administrative application of the Bill, specifically:

- Australian Security Intelligence Organisation (ASIO) security assessments,
- the notice issued by the Minister,
- the Minister's discretion to exempt a person from the effects of the proposed sections,
- the avenues of appeal for an affected person,
- the consequences if the grounds for loss of citizenship are overturned on appeal, quashed or otherwise found to be incorrect, and
- a number of other practical considerations.

ASIO security assessments

7.2 The Bill expressly excludes section 39 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).[1]

7.3 Section 39 of the ASIO Act prohibits (subject to limited exceptions of a temporary nature) a Commonwealth Agency from taking, refusing to take or refraining from taking prescribed administrative action on the basis of any communication in relation to a person made by ASIO not amounting to a security assessment.[2] That is, under section 39 of the ASIO Act, the

1 Proposed subsections 33AA(12), 35(11), and 35A(11) of the Bill.

2 Explanatory Memorandum, pp. 13, 17–18, 23–24.

government agency cannot undertake certain administrative action prior to an ASIO security assessment being made.[3]

7.4 A 'security assessment', as defined in the ASIO Act,[4] attracts the operation of Part IV, which provides the subject with rights of notice and review. When citizens receive adverse security assessments from ASIO, they may apply to have the assessment reviewed in the Security Appeals Division of the Administrative Appeals Tribunal (AAT).[5]

7.5 The effect of the Bill excluding section 39 of the ASIO Act would be that a formal ASIO security assessment of the person would not be required in forming the advice and collating the dossier of information to make the Minister aware that certain conduct had occurred, prior to the Minister issuing a notice to put into effect the loss of a person's citizenship.

7.6 A further effect of the exclusion of section 39 would be to limit the ability of a person who has lost their citizenship from commencing an AAT review of the information used in the determination of the conduct.[6]

7.7 The Explanatory Memorandum states that its exclusion

> will enable the Minister to act on the basis of a communication made by ASIO about a person which does not amount to a security assessment to make a decision to excuse the person from the application of [sections 33AA, 35 and 35A] and in relation to the requirement to give notice.[7]

7.8 It further explains that 'this will put beyond doubt that section 39 does not operate to prohibit the Minister from relying upon intelligence derived from an ASIO communication'.[8]

7.9 A large number of submitters questioned these provisions and whether they were necessary to meet the objective of the Bill.[9] Professor Ben Saul

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3 Dr Rayner Thwaites, *Submission 16*, p. 6.

4 Section 35 of the ASIO Act. A 'security assessment' means a statement in writing furnished by the Organisation to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person, and includes any qualification or comment expressed in connection with any such recommendation, opinion or advice, being a qualification or comment that relates or that could relate to that question.

5 Section 54 of the ASIO Act. See also, Australian Human Rights Commission, *Submission 13*, p. 7.

6 Australian Human Rights Commission, *Submission 13*, p. 7.

7 Explanatory Memorandum, pp. 13, 17–18, 23–24.

8 Explanatory Memorandum, pp. 13, 17–18, 23–24.

9 For example: Professor Ben Saul, *Submission 2*, p. 6; Federation of Ethnic Communities' Councils of Australia, *Submission 12*, p. 3; Australian Human Rights Commission,

questioned the 'reliability of evidence or intelligence whose admissibility would ordinarily be subject to challenge in criminal proceedings'.[10] He elaborated:

> The Minister's decision need not be based on a full security assessment from ASIO, but may be based on partial, incomplete and untested intelligence, which may be unreliable, highly prejudicial to the person, and unable to be challenged by the person, all [of which] magnify the chance of error. The Minister is not expert in national security yet may substitute him or herself for the expertise of ASIO.[11]

7.10 Concerned about the impact on fundamental rights to a fair trial and fair hearing,[12] the Federation of Ethnic Communities' Council of Australia stated that 'cessation or revocation of citizenship is a serious consequence which should not be based on intelligence that is ordinarily only used for actions of a temporary nature'.[13]

7.11 Dr Rayner Thwaites similarly commented that excluding section 39 of the ASIO Act

> dispenses with a process that currently protects against the miscommunication of ASIO information and its misapplication by government agencies, by requiring that that information only be conveyed to the relevant government agency once it has been through proper process.[14]

7.12 Dr Thwaites further stated that section 39 not only protects affected persons but also works to protect ASIO in 'helping to ensure that its intelligence is tested and formulated through a proper process, and its permanent decisions are not made in error'.[15] Dr Thwaites cautioned that the removal of this requirement in the Bill leaves ASIO more exposed to the potential misuses of its information and politicisation.[16]

Submission 13, p. 7; Dr Rayner Thwaites, *Submission 16*, p. 6; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 3; Australian Lawyers for Human Rights, *Submission 20*, p. 7; Refugee Council of Australia, *Submission 22*, p. 4; NSW Society of Labor Lawyers, *Submission 25*, p. 11; Law Council of Australia, *Submission 26*, p. 10; Muslim Legal Network (NSW), *Submission 27*, p. 10; Migration Law Program, ANU College of Law, *Submission 40*, p. 8.

10 Professor Ben Saul, *Submission 2*, p. 6.

11 Professor Ben Saul, *Submission 2*, p. 6.

12 Federation of Ethnic Communities' Councils of Australia, *Submission 12*, p. 5.

13 Federation of Ethnic Communities' Councils of Australia, *Submission 12*, p. 3.

14 Dr Rayner Thwaites, *Submission 16*, p. 6.

15 Dr Rayner Thwaites, *Submission 16*, p. 6.

16 Dr Rayner Thwaites, *Submission 16*, p. 6.

7.13 Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams commented that the exclusion of section 39 of the ASIO Act is 'unwarranted and disproportionate'.[17] Professor Williams further commented at a public hearing that section 39 'is not simply a protection for the individual; I see it as an important institutional protection for ASIO'.[18]

7.14 The Migration Law Program of the ANU College of Law argued that

> the preliminary nature of an assessment, the absence of judicial testing of evidence, the lack of transparency and the absence of accountability … are serious defects in the legislation.[19]

7.15 The Law Council of Australia similarly noted the importance of a full security assessment in the absence of a court conviction (in the case of proposed sections 33AA and 35):

> It may be based on untested, inaccurate or incomplete intelligence. This is contrary to fundamental minimum guarantees which should be in place when a person is faced with allegations of criminal and serious offences (such as the right to a fair trial and the presumption of innocence). The Minister's decision to issue a notice or allow an exemption should as a minimum be made on the basis of a full and robust intelligence assessment by ASIO. This is critical if such decisions are not made after a conviction by a court.[20]

7.16 At a public hearing, the Law Council expanded on this point, noting that comparable decisions in relation to the cancellation of passports require full security assessments by ASIO before the Foreign Minister can take action.[21]

7.17 Consequently, the Law Council recommended that the Bill be amended to the effect that 'the Minister's decision to issue a notice or allow an exemption should as a minimum be made on the basis of a full and robust

17 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 3.

18 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 17.

19 Migration Law Program, ANU College of Law, *Submission 40*, p. 8.

20 Law Council of Australia, *Submission 26*, p. 20.

21 Ms Gabrielle Bashir SC, Member, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, Canberra 4 August 2015, p. 7, and Mr Geoffrey Kennett SC, Administrative Law Committee, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 7.

intelligence assessment by ASIO'.[22] This recommendation was also made by a number of other participants.[23]

7.18 The Australian Human Rights Commission noted that the requirement for a formal security assessment does not necessarily impede the ability of agencies to act swiftly in response to matters of national security.[24]

7.19 The Committee sought the Department of Immigration and Border Protection's comment in regard to the reasons for section 39 of the ASIO Act not applying to the Bill, and the kinds of information that would be used in the absence of an ASIO security assessment. The Department provided the following statement in response:

> The exclusion of s.39 reflects the whole of Government information sharing arrangements that will underpin the proposed citizenship amendments to support the Minister and the Department of Immigration and Border Protection. The Minister may consider information derived from various Commonwealth agencies and sources at various times, including intelligence sourced or derived from ASIO product. The exclusion will ensure that the Minister can give due consideration to the intelligence product derived from ASIO reporting without acting contrary to the operation of section 39.[25]

Committee comment

7.20 The Committee notes concerns expressed by submitters about the exclusion of section 39 of the ASIO Act.

7.21 The Committee also notes the response of the Department, but does not consider that the 'whole of Government information sharing arrangements'[26] referred to in any way precludes the requirement for an ASIO security assessment. Similarly the Committee does not consider that the 'exclusion' of an ASIO security assessment in any way limits the Minister's capacity to give 'due consideration to the intelligence product derived from ASIO'.[27]

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22 Law Council of Australia, *Submission 26*, p. 20.

23 For example: Dr Rayner Thwaites, *Submission 16*, p. 7; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 3, 7; Australian Lawyers for Human Rights, *Submission 20*, p. 7.

24 Mr John Howell, Lawyer, Australian Human Rights Commission, *Committee Hansard*, Canberra, 10 August 2015, p. 26 and Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 10 August 2015, p. 26.

25 Department of Immigration and Border Protection, *Submission 37.4*, p. 4.

26 Department of Immigration and Border Protection, *Submission 37.4*, p. 4.

27 Department of Immigration and Border Protection, *Submission 37.4*, p. 4.

7.22 Given the seriousness of the measures under consideration, the Committee is of the view that requiring a formal security assessment is an important protection for agencies and for the person in question.

7.23 Further, the Committee received no evidence to indicate that this requirement would impact on operational responsiveness. The Committee therefore considers that the Bill should be amended to remove the current exemption of section 39 of the ASIO Act.

Recommendation 11

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended such that section 39 of the *Australian Security Intelligence Organisation Act 1979* is not exempted, and consequently a security assessment would be required before the Minister can take prescribed administrative action.

Ministerial notice

7.24 Under the Bill as proposed, if the Minister becomes aware of conduct prescribed in proposed sections 33AA or 35, or becomes aware of a conviction specified in proposed section 35A, then the Minister must give written notice of the loss of citizenship. While the Minister is required to give notice, he or she has discretion about who is notified and when they are notified—that is 'at such time and to such persons as the Minister considers appropriate'.[28]

7.25 The Bill also expressly excludes section 47 of the *Australian Citizenship Act 2007* (the Citizenship Act) to any decision made to issue a notice (including the Minister's decision to exempt a person).[29] The exclusion of section 47 confirms that the Minister is not required to notify a person of his decision or the reasons for that decision.[30]

28 Proposed subsections 33(6), 35(5) and 35A(5) of the Bill.

29 Proposed subsections 33AA(10), 35(9) and 35A(9) of the Bill

30 Section 47 of the Citizenship Act; see also Australian Human Rights Commission, *Submission 13*, p. 6; Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 11.

7.26 Each substantive section of the Bill contains the same notice provision. The notice 'does not affect when the loss of citizenship takes place',[31] but is likely to be the basis on which consequent Government action would be taken.[32]

7.27 General Counsel of the Department stated:

> [I]t is not the notice that gives effect to the loss of citizenship; it is the conduct … What the minister is doing by issuing a notice, having been made aware, is putting in place the consequences of the loss that has already occurred. Once again, there is no discretion to issue it once he has been made aware other than as to whom and when.[33]

7.28 The Explanatory Memorandum does not provide a detailed description of this notice requirement. However, at a public hearing the Secretary of the Department stated that, in an 'integrated approach to counter-terrorism', the Minister

> would not be advised to issue a notice to a person … who might be the subject of certain other resolution action within a week or a month thereafter.[34]

7.29 The Secretary elaborated later:

> I could see a circumstance that was alluded to earlier, when the coordination processes in our counter-terrorism apparatus kick in and the AFP, for instance, advise that an operation is going to go to resolution, say, in four weeks' time. There is no way that Australia Post would turn up with a telegram saying, 'Here is your notice'—because the minister has found the relevant notice—that would be done in such a way as to compromise that AFP operation.[35]

7.30 The Department advised that where the public interest dictates, the delay in issuing a notice may be permanent or temporary: 'the stay or the recision might be permanent for whatever range of reasons, or it might be

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31 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 24 June 2015, p. 7369.

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

33 Ms Philippa De Veau, General Counsel / First Assistant Secretary Legal Division, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 14.

34 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 8.

35 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 13.

temporary'.[36] There would be no ministerial discretion 'not to issue a notice once the Minister has become aware' of conduct, merely a discretion to delay the issuing of a notice.[37]

7.31 The Secretary described the extent of the Minister's discretion with respect to the notice:

> [T]here is discretion in two elements of the issuance of the notice. One is in relation to the person to whom it is issued—it might be issued to the police, or it might be issued to the intelligence agencies or it might be issued to other parties so that they can be seized of that and be aware of what the minister has decided. Or the minister could come to the view, 'I'm not going to issue this at this particular point in time because I've been advised that that would compromise operations,' for instance.[38]

7.32 In response to questions about whether the Minister would be informed about the relevant conduct when there would be clear public interest reasons not to issue the notice, the Secretary stated:

> We would be duty bound, under the legislation, to draw it to the minister's attention because the conduct has occurred. To use the phrase that I have used several times: a person has donned the uniform of the enemy. That is not something that you would keep from a minister. It is a pretty weighty matter.[39]

7.33 The following sections consider matters raised relating to the process of Ministerial notice, namely:

- the timing of notification to the affected person,
- the provision of reasons, and
- the effect of the Minister's notice.

Notifying the affected person

7.34 A number of submissions raised concerns that the Minister would not be required under the Bill to notify the affected person of the loss of

36 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 14.

37 Ms Philippa De Veau, General Counsel / First Assistant Secretary Legal Division, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 15.

38 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 15.

39 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 13.

citizenship.[40] For example, Dr Rayner Thwaites was of the view that the 'legal requirements for notification are extremely weak':

> The only notice requirement contained in the legislation relates to notice 'after the fact', requiring that unspecified persons be notified that a person has ceased to be a citizen. Even this requirement is expressed so as to make the Minister's obligations as minimal as possible ... [The Bill] does not require that the person affected ever be notified that he or she has lost their citizenship. It is offensive to the rule of law that a fundamental change can be made to a person's legal status, with serious consequences for his or her right to remain in, or re-enter Australia, without any legal requirement that he or she be notified.[41]

7.35 At a public hearing, the Department of Immigration and Border Protection noted that

> administrative consequences have to flow, and until the minister has issued the … notification, it is not available to us, as officials, to act in relation to an Australian citizen, in that manner.[42]

7.36 It was presumed by submitters that the Minister would notify other government ministers and office holders to trigger various other administrative steps to be taken by executive agencies. The Australian Human Rights Commission speculated that 'such steps would conceivably include cancellation of passports and welfare benefits and removal from the electoral roll'.[43]

7.37 Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams (Chordia et al) similarly commented that 'an agency, such as the Australian Electoral Commission, would be obliged to act on the basis of a person's loss of citizenship irrespective of whether a Minister has notified this'.[44]

7.38 The Committee was advised that, in practice, a person within Australia may first learn that they have lost their citizenship when they are detained

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40 Australian Human Rights Commission, *Submission 13*, pp. 4, 6; Australian Lawyers Alliance, *Submission 14*, p. 4; Dr Rayner Thwaites, *Submission 16*, p. 5; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 6–7; Law Council of Australia, *Submission 26*, pp. 16-20; Muslim Legal Network (NSW), *Submission 27*, p. 15; Migration Law Program, ANU College of Law, *Submission 40*, p. 6; Mr Paul McMahon, *Submission 7*, p. 1;

41 Dr Rayner Thwaites, *Submission 16*, p. 5.

42 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 21.

43 Australian Human Rights Commission, *Submission 13*, p. 6.

44 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 4.

as an unlawful non-citizen by the Department (their ex-citizen visa having been cancelled under section 501 of the *Migration Act 1958*).[45] A person outside Australia may first discover the loss of their citizenship when they attempt to return to Australia.[46]

7.39 Also concerned by the absence of notification to the affected person, the Migration Law Program of the ANU College of Law explained that the automatic loss of citizenship, by operation of law, would not provide for prior notice and there would be 'no ability of the person accused of engaging in the relevant conduct to know the case against them and to respond'.[47]

7.40 The Law Council of Australia also commented that such notice should be timely, as the absence of timely notice to a person

> may compromise that person's ability to obtain the necessary evidence to show that he or she did not engage in relevant conduct and so did not cease to be an Australian citizen.[48]

7.41 Consequently, the Law Council recommended that an amendment be made that would require the Minister to attempt to notify the person affected by the operation of the Bill, and that 'the duty should be to attempt to notify the person forthwith'.[49]

7.42 Such a recommendation was supported by a number of other submitters.[50] Chordia et al noted that if such a recommendation were to be made by the Committee, section 47 of the Citizenship Act should logically be applied to the Bill's provisions.[51]

7.43 The Department of Immigration and Border Protection did not address the specific proposal by submitters that notice be provided to the affected person, however it commented that:

> It is expected that the Minister would notify the person who has lost their citizenship, where it is reasonably practicable to do so (and subject to operational considerations affecting timing) except

45 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 20.

46 Migration Law Program, ANU College of Law, *Submission 40*, pp. 6–7.

47 Migration Law Program, ANU College of Law, *Submission 40*, pp. 6–7.

48 Law Council of Australia, *Submission 26*, p. 19.

49 Law Council of Australia, *Submission 26*, p. 19.

50 For example: Dr Rayner Thwaites, *Submission 16*, p. 5; Muslim Legal Network (NSW), *Submission 27*, p. 15. Migration Law Program, ANU College of Law, *Submission 40*, pp. 6–7; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 18.

51 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 6.

> where the Minister had already decided to rescind the notice and exempt the person from the effect of the cessation provision.[52]

Provision of reasons

7.44 A number of submitters were of the view that notice to the affected person should detail the specific conduct, or reasons for loss, identified by the Minister as giving rise to the loss of citizenship.[53] Chordia et al commented:

> The Bill, if passed, would create a system in which a person could automatically lose their citizenship, and be subjected to the consequences of this loss, without having any access to information about the basis upon which their citizenship was lost, or even the fact that it was lost at all.[54]

7.45 The absence of notice and reason for the loss of citizenship may also impact the ability to appeal a decision. According to the Law Council of Australia, the absence of any requirement to inform the person of the grounds upon which a notice was issued 'impedes' the right of appeal.[55]

7.46 Similarly, the Muslim Legal Network (NSW) commented:

> A dual national whose citizenship has been revoked might be able to appeal the Minister's decision to the court. However … a practical difficulty that such a person would face is not being privy to the reasons behind the Minister's decision to revoke citizenship in cases where the decision is classified as privileged material. It compels the individual to contest the deprivation of his fundamental right and prove the case for his identity, effectively reversing the onus in circumstances where he or she may not be privy to the reasons for revocation.[56]

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52 Department of Immigration and Border Protection, *Submission 37.4*, p. 1.

53 Migration Law Program, ANU College of Law, *Submission 40*, pp. 6–7; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 6–7; Law Council of Australia, *Submission 26*, p. 18; Australian Human Rights Commission, *Submission 13*, p. 4; Australian Lawyers for Human Rights, *Submission 20*, p. 2; Muslim Legal Network (NSW), *Submission 27*, p. 7; UNICEF Australia, *Submission 24*, p. 4; Law Council of Australia, *Submission 26*, p. 18; Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 29; Laureate Professor Cheryl Saunders, Foundation Director, Centre for Comparative Constitutional Studies, *Committee Hansard*, Canberra, 5 August 2015, p. 39.

54 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 6-7.

55 Law Council of Australia, *Submission 26*, p. 18.

56 Muslim Legal Network (NSW), *Submission 27*, p. 7.

7.47 This impact on the ability to seek judicial review was also commented on by the Australian Human Rights Commission,[57] Australian Lawyers for Human Rights,[58] the Migration Law Program of the ANU College of Law,[59] and UNICEF Australia.[60]

7.48 UNICEF Australia was concerned that, when viewed as a cumulative whole, the absence of notice and reasons risked offending fundamental principles including the rule of law, separation of powers and procedural fairness (including the right to a fair trial).[61] UNICEF further stated:

> [I]t is alarming and of considerable concern that the rules of natural justice have been excluded. Reasons do not need to be provided, which in effect limits the ability of an affected person to respond to or challenge the revocation … In these circumstances, it is difficult to see how it would even be known if an error of law or fact has been made, let alone challenge that error.[62]

7.49 Dr Rayner Thwaites similarly commented:

> The exclusion of the right to reasons, under section 47, in relation to the exercise of ministerial powers, is indefensible for an administrative action as serious as revocation of citizenship. It is in keeping with the idea that there is no administrative action to give reasons for, but that is a legal fiction, and when we confront the fact that there will be administrative action, and administrative decisions will be made, there should be reasons provided.[63]

7.50 Professor George Williams also noted possible constitutional concerns arising from this:

> [An affected] person need be given no reason for [the loss of citizenship]. Indeed, it may be that the key information underlying that is not something they can get access to. So even though clearly they might attempt to bring it into a court, it is questionable whether that [judicial review] would be effective. And that again throws up a range of constitutional concerns. In the Communist [Party] Case … the High Court said that, if you have got a decision

57 Australian Human Rights Commission, *Submission 13*, p. 4.

58 Australian Lawyers for Human Rights, *Submission 20*, p. 2.

59 Migration Law Program, ANU College of Law, *Submission 40*, p. 7.

60 UNICEF Australia, *Submission 24*, pp. 4, 23.

61 UNICEF Australia, *Submission 24*, p. 4.

62 UNICEF Australia, *Submission 24*, p. 23.

63 Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, pp. 45-46.

> that is not effectively reviewable, that can be a basis for striking down legislation.[64]

7.51 To address these concerns, the Australian Human Rights Commission and the Law Council of Australia recommended the Bill be amended to require the Minister's notice to the affected person to include the grounds on which the Minister believes the law has operated to rescind that person's citizenship.[65]

Effect of the Minister's notice

7.52 The Bill as proposed intends that the Ministerial notice has no legal effect, rather it is a recognition that the Minister is aware that the Bill has operated to cease a person's Australian citizenship. The Minister for Immigration and Border Protection, the Hon Peter Dutton MP, stated that the ministerial notice 'does not affect when the loss of citizenship takes place'.[66]

7.53 However, some submitters questioned the lack of legal effect and suggested that if the notice has no legal force and merely records the Minister's conclusion that citizenship has ceased, then the affected person may be limited from seeking judicial review under section 75(v) of the Constitution. The Law Council of Australia explained:

> An attempt to commence proceedings in the High Court under section 75(v) of the Constitution may encounter difficulty, in that none of the constitutional writs (one or more of which must be sought in order to engage the jurisdiction) seems apt to deal with a notice which (apparently) has no purported legal force and merely records the Minister's conclusion.[67]

7.54 The Centre for Comparative Constitutional Studies speculated that the Minister's notice may in fact have some legal effect:

> The character of this [notice] by the Minister is unclear … As the term is used … a 'notice' is purely informational. On the other hand … it may be something more, authorising the Minister to 'rescind' a notice if he or she decide to exercise the discretion to exempt.[68]

64 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 14; citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

65 Australian Human Rights Commission, *Submission 13*, p. 4; Law Council of Australia, *Submission 26*, p. 19.

66 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 24 June 2015, p. 7369.

67 Law Council of Australia, *Submission 26*, p. 16.

68 Centre for Comparative Constitutional Studies, *Submission 29*, p. 2.

7.55 At a public hearing, Laureate Professor Cheryl Saunders, Foundation Director at the Centre for Comparative Constitutional Studies elaborated:

> There is real ambiguity in the legislation about what the minister is doing when he is giving a notice because the legislation is drafted so as to make the notice just a mere informational thing for the purpose of the now ex-citizen. There would be a question about whether that was a substantive action that could be challenged at all.[69]

7.56 The Law Council of Australia similarly noted that the purpose and effect of the notice is 'somewhat unclear':

> No particular legal consequences are given to the notice … [and] the notice is presumably intended to inform decision-making by other arms of the executive government … But its lack of clear legal status creates uncertainties as to whether and how it may be challenged'.[70]

7.57 The Law Council concluded that, although there are no legal consequences that flow from the issue of the notice itself, it is nonetheless likely to have 'some legal effect' as the Minister's notice would need to be 'rescinded' in order for the discretionary exemption to apply.[71]

Minister's discretion to exempt

7.58 Where a person has lost their citizenship by operation of law, and the Minister has issued a notice to that effect, the Bill as currently proposed provides the Minister with the power to rescind the notice and exempt the person from the Bill's provisions if the Minister considers it in the 'public interest' to do so.[72] If the person is exempted by the Minister, the Explanatory Memorandum states that 'it will be as if the person's citizenship never ceased'.[73] Each substantive section of the Bill contains the same provision for the Minister to exercise discretion to exempt the affected person.

7.59 Under the Bill, the Minister could not be compelled to exercise their discretion and they do not have a duty to consider whether to exercise

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69 Laureate Professor Cheryl Saunders, Foundation Director, Centre for Comparative Constitutional Studies, *Committee Hansard*, Canberra, 5 August 2015, p. 37.

70 Law Council of Australia, *Submission 26*, p. 17.

71 Law Council of Australia, *Submission 26*, p. 20.

72 Subsections 33AA(7), 35(6) and 35A(6) of the Bill.

73 Explanatory Memorandum, pp. 12, 16 and 22.

their discretion.[74] The Bill also states that the rules of natural justice would not apply, and that the Minister would not have to provide notice or give reasons to an affected person of any decision relating to the discretion.

7.60 The Explanatory Memorandum states that these proposed sections are aimed at ensuring 'that the public interest is taken into consideration when a decision [is taken] to excuse a person'. The Explanatory Memorandum further notes:

> The assessment of public interest is by reference to the purpose of the statutory scheme. The application of the public interest test will require a balancing of competing interests and be a question of fact and degree (*Hogan v Hinch (2011) 243 CLR 506*). Public interest consideration in this statutory scheme may include matters such as public confidence in the safety of the Australian community, actual public safety, the extremely serious nature of the conduct, the need for deterrence, the impact on the person, national security and international relations. It may also include matters relating to minors, including the best interests of the child, any impact that cessation may have on the child and Australia's obligations to children.[75]

7.61 The Explanatory Memorandum comments that the Minister is 'well placed to make an assessment of public interest as an elected member of the Parliament', and as such 'represents the Australian community and has a particular insight into … community standards and values'.[76]

7.62 Submitters to the inquiry raised concerns that the Minister's discretionary powers to exempt were non-compellable, and the Bill was silent on the public interest factors that may be engaged in any decision to exempt.

Non-compellable power

7.63 A number of submitters expressed concern that the Minister would not be under any obligation to consider exercising the discretionary power under the current wording of the Bill.[77] To address this concern, some participants expressly recommended that the Bill be amended to require

74 Subsections 33AA(8), 35(7) and 35A(7) of the Bill.

75 Explanatory Memorandum, pp. 12, 16 and 22.

76 Explanatory Memorandum, pp. 13, 17 and 22.

77 Professor Ben Saul, *Submission 2*, p. 7; Federation of Ethnic Communities' Councils of Australia, *Submission 12*, p. 3; Australian Human Rights Commission, *Submission 13*, p. 6; Refugee Council of Australia, *Submission 22*, p. 4; Law Council of Australia, *Submission 26*, pp. 20–21; Muslim Legal Network (NSW), *Submission 27*, pp. 13, 15–18; Human Rights Law Centre, *Submission 39*, pp. 7–8; Migration Law Program, ANU College of Law, *Submission 40*, p. 7.

the Minister to consider exercising the discretion to exempt on the issue of a notice or when requested by the person affected.[78]

7.64 For example, the Law Council of Australia commented that 'it is a matter for concern that the Minister is not to be under any obligation to consider exercising the relevant dispensing powers'. The Law Council argued that, given the importance of citizenship and the 'variety of exculpatory factors that might be raised'

> it is desirable that the Minister be required to give reasoned consideration to requests for the exercise of his dispensing powers, and to provide procedural fairness to persons who seek that exercise.[79]

7.65 Similarly, the Muslim Legal Network (NSW) stated:

> [I]t may very well be in the public interest for the Minister to rescind a notice, but [he] is under no compulsion by law to rescind or to even consider whether he should rescind. The Muslim Legal Network (NSW) considers this to be a particularly egregious infringement of due process given that the operation of the provisions may result in a case where although the renouncement of an affected person's citizenship is strongly against the public interest, a Minister cannot be brought into account for not considering rescission, since the law places only a discretion and not an obligation to take the public interest and resulting rescission of a notice into account.[80]

7.66 At a public hearing, the Australian Human Rights Commission commented that it too was 'troubled' by the Minister's non-compellable discretion:

> While the Minister for Immigration and Border Protection does have the power under this bill to exempt a person from operation of the provisions, the minister would not be required to consider exercising that power and, if he chose to do so, would not have to afford natural justice to a person who has lost their citizenship.[81]

7.67 Similarly, the Refugee Council of Australia stated:

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78 Federation of Ethnic Communities' Councils of Australia, *Submission 12*, p. 3; Australian Human Rights Commission, *Submission 13*, p. 4; Law Council of Australia, *Submission 26*, pp. 20–21.

79 Law Council of Australia, *Submission 26*, p. 21.

80 Muslim Legal Network (NSW), *Submission 27*, p. 16.

81 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 9.

> We simply do not view the checks and balances as adequate. We do not think a discretionary non-compellable process is adequate to ensure that no mistake will be made in these sorts of determinations.[82]

Public interest factors

7.68 The Bill provides that the Minister may rescind the loss of citizenship, and exempt the person if the Minister considers it in the 'public interest' to do so.[83] However, some participants were of the view that the Bill should be more specific in the factors that the Minister should be required to consider.

7.69 Professor George Williams commented on the breadth of the discretionary power, stating that it is 'an unconstrained, unbounded discretion' and the Minister would not be required to engage with considerations about the public interest at all.[84] A number of other participants also expressed concern that the Minister's discretionary power lacked due process and accountability.[85]

7.70 The Muslim Legal Network (NSW) commented:

> [T]he legislation is silent on the matters that are to be taken into consideration when the Minister makes an assessment of 'public interest'… The 'public interest' is subject to change, and in harsh political times, could mean the abuse of ministerial power to forward adverse objectives. Since natural justice does not apply, this can truly place individuals at risk, without means for holding the Minister accountable.[86]

7.71 Similarly Dr Rayner Thwaites commented that, given the automatic operation of loss of citizenship that is proposed, there should be more capacity to consider special circumstances and more transparency. Dr Thwaites continued:

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82 Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 23.

83 Subsections 33AA(7), 35(6) and 35A(6) of the Bill.

84 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 19.

85 Australian Human Rights Commission, *Submission 13*, p. 10; Human Rights Law Centre, *Submission 39*, p. 7; Migration Law Program, ANU College of Law, *Submission 40*, p. 7; Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 22; Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, p. 45.

86 Muslim Legal Network (NSW), *Submission 27*, p. 17.

> The matters which would authorise waiver should be clearly stated at the outset and in the legislation.[87]

7.72 Given the lack of defining public interest factors, Professor Ben Saul raised concerns of accountability, consistency and rule of law:

> Further, the public at large can have no confidence that loss of citizenship will only operate in the most serious cases warranting its loss; whether the Minister will utilize the power in a consistent and defensible way, treating like cases alike; or whether it will be approached randomly, arbitrarily, selectively, partially, subjectively, politically, or capriciously, or relying on irrelevant factors.[88]

7.73 The Committee sought comment from the Department of Immigration and Border Protection regarding the types of public interest factors that the Minister may consider. The Department advised that 'that is a policy question and a matter for Government'[89] and did not identify any unintended consequences or legal impediments to the inclusion of public interest factors in the Bill.

Rights of review

7.74 In his second reading speech, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, stated that the review rights of an individual under the Bill could be engaged automatically, without a decision from the Minister. The Minister explained:

> A person who loses their citizenship under these provisions would be able to seek a declaration from a court that they have not in fact lost their citizenship. Members would be aware that there is no need to mention this explicitly in the bill because the Federal Court and High Court both have original jurisdiction over such matters.[90]

7.75 The Statement of Compatibility with Human Rights states:

> The Government considers that the right to a fair trial and fair hearing are not limited by the proposal. The proposal does not limit the application of judicial review of decisions that might be

87 Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, p. 45.

88 Professor Ben Saul, *Submission 2*, p. 7.

89 Department of Immigration and Border Protection, *Submission 37.4*, p. 2.

90 Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard,* 24 June 2015, p. 7371.

> made as a result of the cessation or renunciation of citizenship. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been exercised according to law. A person also has a right to seek declaratory relief as to whether the conditions giving rise to the cessation have been met.[91]

7.76 While inquiry participants recognised that an individual's right to seek judicial review was available within the operation of the Bill, the Committee heard evidence to suggest that in practice, a person's right to seek review of the loss of their citizenship may be limited in scope and potentially difficult to engage.

7.77 Merits review is not provided for under the Bill. The Attorney-General's Department explains the difference between merits review and judicial review as follows:

> In a merits review, the whole decision is made again on the facts. This is different to judicial review, where only the legality of the decision making process is considered. Judicial review usually consists only of a review of the procedures followed in making the decision.[92]

7.78 The Law Council of Australia submitted that to improve rights of review under the Bill, the Minister's discretionary power to exempt a person from the operation of the provisions should be the subject of merits review.[93]

7.79 The Department of Immigration and Border Protection explained why merits review was not provided for in relation to the Minister's exemption powers:

> In common with similar provisions in portfolio legislation giving the Minister a personal and non-compellable power, exercisable in the public interest, to exempt persons from the operation of various requirements, it is not considered appropriate to make the exercise of the 'rescinding' power subject to merits review.
>
> The availability of judicial review that includes the ability to seek declaratory relief that the conduct was not in fact engaged in, provides the person with a broad and effective opportunity to

91 Explanatory Memorandum, p. 27.

92 Attorney-General's Department, *Australian Administrative Law Policy Guide,* 2011, p. 12.

93 Law Council of Australia, *Submission 26*, p. 21. See also, Laureate Professor Cheryl Saunders, Foundation Director, Centre for Comparative Constitutional Studies, *Committee Hansard*, 5 August 2015, p. 37.

> have the facts of the issue canvassed before a court, and have a court make a declaration in relation to those facts.[94]

7.80 The Department outlined the rights of judicial review that were available in the operation of the Bill:

> There is an ability for a person who the executive says has engaged in conduct such that their citizenship has been lost to seek declaratory relief before the court to say that the conduct did not occur. The court reviews the material and makes a determination as to whether the conduct did or did not occur.[95]

7.81 Professor Gillian Triggs, President of the Human Rights Commission, told the Committee there was very little in the legislation that could actually be reviewed in practice:

> The difficulty, however, is that as the legislation gives the minister non-compellable power and the minister can make the decision—I think the language is 'as he or she thinks is appropriate'—there is very little for a court to review, in fact, because it would be very unlikely for a court to overrule that exercise in ministerial discretion. Technically, there is a right of review at the judicial level, in relation to that power of exemption, but it is unlikely to be effective. It is reviewing the unreviewable, for practical purposes.[96]

7.82 The Law Council of Australia noted the impact of omitting merits review from the operation of the Bill and limiting a person's rights to judicial review:

> Judicial review would only enable an examination of the lawfulness of the exercise of the Minister's powers under the legislation; it would not allow an examination of whether the exercise of the powers was preferable—in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.[97]

7.83 Professor Adrienne Stone of the Centre for Comparative Constitutional Studies submitted that there was a very narrow scope for judicial review available in the Bill:

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94 Department of Immigration and Border Protection, *Submission 37.4*, pp. 2–3.

95 Ms Phillipa De Veau, General Counsel/First Assistant Secretary Legal Division, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 23.

96 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 18.

97 Law Council of Australia, *Submission 26*, p. 21.

> [B]y limiting the grounds of review to the question of jurisdictional error, which is a narrow kind of concept, it is not possible just simply to impugn the minister's decision on the basis that there was no evidence for it or that the person had no chance to put evidence or to get a fair hearing; you have to show a very particular, narrow kind of legal error … that the minister had addressed himself to the wrong question.[98]

7.84 Ms Lucy Morgan, of the Refugee Council of Australia, argued that the judicial review available under the Bill was not an adequate safeguard to prevent people being unfairly penalised:

> The courts will not be reviewing whether or not the minister was right or wrong in making the decision that they did or whether the person actually should have had their citizenship revoked because they committed a serious offence. All the courts will be doing is determining whether the decision was made in accordance with the law. They cannot actually determine whether or not a person is or is not guilty of the offence with which they are charged.[99]

7.85 Dr Rayner Thwaites submitted that the possibility of judicial review was further undermined by other aspects of the Bill, such as the exclusion of the right to reasons under section 47 of the Citizenship Act and the fact a person was not required to be notified that their citizenship had been revoked.[100]

7.86 A number of submissions discussed practical barriers to a person seeking judicial review in an Australian court if their citizenship is lost while they are offshore.[101] It was argued that judicial review is not a genuine option if the person cannot get back into Australia to bring the action.[102]

7.87 However, it was conceded by Laureate Professor Cheryl Saunders during the hearings that, although it may complicate matters, absence from

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98 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, *Committee Hansard,* 5 August 2015, p. 37.

99 Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 23. See also, Laureate Professor Cheryl Saunders, Foundation Director, Centre for Comparative Constitutional Studies, *Committee Hansard*, 5 August 2015, p. 37.

100 Dr Rayner Thwaites, *Committee Hansard*, 5 August 2015, pp. 45–46. See also, Australian Human Rights Commission, *Submission 13.1*, p. 3.

101 Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams, *Submission 17,* p. 7; Muslim Legal Network (NSW), *Submission 27*, p. 7; Centre for Comparative Constitutional Studies, *Submission 29*, p. 5; Amnesty International Australia, *Submission 41*, p. 8. See also Parliamentary Joint Committee on Human Rights, *Twenty-Fifth report of the 44th Parliament*, Chapter 1, para 1.164.

102 Laureate Professor Cheryl Saunders, *Committee Hansard*, Canberra, 5 August 2015, p. 36.

Australia does not preclude a person from seeking a legal remedy by instructing a legal representative to bring an action on their behalf.[103]

7.88 The Department of Immigration and Border Protection submitted that:

> Judicial review is available to a person affected by the provisions for loss of citizenship in the Bill, whether the person is onshore or offshore. A person who is offshore could seek local legal assistance to apply for judicial review.[104]

Consequences if grounds for loss of citizenship are overturned

7.89 Professor Anne Twomey submitted that the Bill does not address what would happen if a conviction that was grounds for loss of citizenship under proposed subsection 35A(2) is overturned on appeal. She queried whether it is

> possible in the meantime for a person to be deported or otherwise affected by the loss of citizenship? Does the overturning of a conviction have the consequence that the loss of citizenship never occurred?[105]

7.90 The Migration Law Program of the ANU College of Law queried what would happen if the Minister became aware that the alleged conduct on which the notice of loss of citizenship was based had never in fact occurred (under proposed sections 33AA and 35) or if a conviction under proposed section 35A was quashed. It suggested that the Minister's power to exempt may not be sufficient to overcome these difficulties because, in these circumstances, the provision should never have been triggered.[106]

7.91 The Executive Council of Australian Jewry and the Australian Lawyers for Human Rights suggested that the Minister's discretionary power to exempt is not sufficient to address these issues because there is no provision for restitution and no process for a person to request the exercise of discretion and to prove that they had not in fact lost their citizenship.[107]

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103 Laureate Professor Cheryl Saunders, *Committee Hansard*, Canberra, 5 August 2015, p. 38. See also Law Council of Australia, *Submission 26*, p. 17.

104 Department of Immigration and Border Protection, *Submission 37.4*, p. 3.

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

106 Migration Law Program, ANU College of Law, *Submission 40*, p. 13.

107 Executive Council of Australian Jewry, *Submission 9*, p. 4; Australian Lawyers for Human Rights, *Submission 20*, p. 7.

7.92 When asked to clarify what would happen if grounds for loss of citizenship were overturned, the Department of Immigration and Border Protection submitted that:

> The effect of any court order will depend upon the nature of that order or determination. In the event that the Minister considers it in the public interest to rescind a notice and exempts the person from the effect of the provisions, the provisions are intended to be taken to have had no effect. In the event that a court declared the conduct was not engaged in, it is intended that the provisions would be taken to have had no effect.[108]

Committee comment

7.93 Many submitters raised concerns regarding the operation of the ministerial notice, in particular the lack of a requirement to notify the affected person of a loss of citizenship notice or to provide reasons. The Committee considers these concerns are reasonable and valid given the seriousness of the measures. However there are instances where providing immediate notice to a person may compromise ongoing operations or national security.

7.94 Instead the Committee is of the view the Minister should be required to provide timely notice to the affected person *unless* there are countering operational or national security concerns.

7.95 Where, due to ongoing operations or national security concerns, the Minister has determined that the person is not to be notified at that time, then the expectation remains that the person is to be notified as soon as possible. Consequently the decision not to notify must be regularly reviewed by the Minister, and the Committee considers every six months would be an appropriate period.

7.96 The Committee considers that, at the time that notice is given, reasons for the loss of citizenship should also be provided.

7.97 Further, concerns were expressed at the lack of clarity surrounding an individual's rights of review under the Bill. A full explanation of a person's review rights should be provided to the person at the time of notice that citizenship has been lost or revoked. This notice should include information on the person's rights of appeal that relate to the loss of citizenship, including any rights of appeal that arise from consequential administrative actions taken as a result of the loss.

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

7.98 The Bill should also be amended to explicitly detail the rights of review available to a person who has lost their citizenship.

7.99 The Committee considers that the addition of these requirements will greatly enhance the procedural fairness of the Bill and provide a greater measure of transparency regarding the operation of the Bill.

Recommendation 12

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to provide that, if citizenship is lost (under proposed sections 33AA or 35) or revoked (under proposed section 35A), then the Minister must provide, or make reasonable attempts to provide, the affected person with written notice that citizenship has been lost or revoked.

Such notice should be given as soon as possible, except in cases where notification would compromise ongoing operations or otherwise compromise national security.

If the Minister has determined not to notify the affected person, this decision should be reviewed within six months and every six months thereafter.

Recommendation 13

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to provide that, where the Minister issues a notice to the affected person advising that their citizenship has been lost or revoked, the notice must include:

- **the reasons for the loss of citizenship, and**
- **an explanation of the person's review rights.**

Recommendation 14

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to include the rights of review available to a person who has lost their citizenship pursuant to proposed sections 33AA, 35 or 35A.

7.100 The Committee considers that the Minister's discretionary power to exempt the loss of citizenship is a vital safeguard in the operation of the Bill. However the Committee considers that, to strengthen the operation of the Bill and public confidence in the exercise of its provisions, the range of factors that the Minister is required to consider should be made explicit.

7.101 In Chapter 6, the Committee has recommended that the Bill be amended to provide for a Ministerial decision to revoke citizenship upon a court conviction, and taking into account a range of specified factors. The Committee is of the view that an exempting power should similarly specify the range of public interest factors to be taken into account. These public interest factors are intended as a significant safeguard for persons affected by self-executing loss of citizenship provisions.

7.102 To ensure the appropriate operation of these safeguards, and given the seriousness of the loss of citizenship, the Committee considers that the Minister should be required to consider exercising the discretion to exempt and to take into account a specified range of factors.

Recommendation 15

The Committee recommends that proposed sections 33AA(7) and 35(6) of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to require the Minister,

- **to give consideration to exercising the discretion to exempt a person from the effects of the relevant provisions upon signing the relevant notice, and**
- **when considering whether to exercise the discretion to exempt, to take into account the following factors:**
  - ⇒ **the severity of the conduct that was the basis for the notice to be issued,**
  - ⇒ **the degree of the threat posed by the person to the Australian community,**
  - ⇒ **the age of the person, and for persons under 18 years of age, the best interests of the child as a primary consideration,**
  - ⇒ **whether a prosecution is underway, or whether the person is likely to face prosecution for the relevant conduct,**
  - ⇒ **whether the affected person would be able to access the citizenship rights in their other country of citizenship or nationality, and the extent of their connection to that country,**
  - ⇒ **Australia's international obligations and relations, and**
  - ⇒ **any other factors in the public interest.**

7.103 The Committee considers that it is appropriate for the Bill to clarify the consequences if the conduct leading to loss of citizenship is found to be incorrect or if the conviction is overturned on appeal or quashed after the revocation decision has been made. This is relevant for both the operation of law provisions in proposed sections 33AA and 35, and the recommended ministerial discretion to revoke citizenship in proposed section 35A.

7.104 In relation to sections 33AA or 35, the Committee considers that the Bill should be amended to clarify that citizenship is taken never to have been lost if the facts said to ground a finding of fact concerning loss of citizenship are subsequently found to have been incorrect.

7.105 In relation to section 35A, while it is intended that the Minister not make a revocation decision until the person has had the chance to appeal the relevant conviction, the Committee notes that it is possible for criminal

convictions to be overturned on appeal, or quashed, many years after the event. Therefore, the Committee considers that the Bill should be amended to give the Minister power to annul the revocation decision if the relevant conviction is later overturned on appeal or quashed, without requiring the person to bring a separate legal proceeding to have the revocation decision overturned.

Recommendation 16

The Committee recommends that proposed sections 33AA and 35 of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to clarify that citizenship is taken never to have been lost if the facts said to ground a finding of fact concerning loss of citizenship are subsequently found to have been incorrect.

Recommendation 17

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to give the Minister power to annul a revocation decision if the relevant conviction is later overturned on appeal or quashed, such that the person's citizenship is taken never to have been lost.

Practical considerations

Determining a person's status as a dual citizen

7.106 Many submissions recognised the policy intent in the Bill to comply with Australia's international obligations to not render a person stateless. However, Amnesty International Australia, Professor Helen Irving and the Muslim Legal Network (NSW) submitted that there could be difficulties in ascertaining whether a person actually holds another citizenship. They drew attention to the Smartraveller website, run by the Department of Foreign Affairs and Trade, which notes that people might be unaware of the fact that they hold another citizenship if it was acquired automatically through operation of a foreign law.[109]

109 Amnesty International Australia, *Submission 41*, p. 6; Prof Helen Irving, *Submission 15*, p. 7; Muslim Legal Network (NSW), *Submission 27*, p. 11.

7.107 It was queried how a person could be aware that their Australian citizenship might be at risk by their conduct if they did not know that they were in a class of people affected by the provisions of the Bill because they did not know that they had another citizenship.

7.108 The Department was asked how it will be determined whether a person has another citizenship. It responded:

> The Department of Immigration and Border Protection will work closely with the Attorney-General's Department, the Department of Foreign Affairs and Trade and other relevant agencies to determine whether an Australia citizen is also a citizen of another country under their citizenship laws.[110]

7.109 The Department agreed that the Bill would apply to dual citizens who are not aware of their dual citizenship or who have never been to the other country of citizenship.[111]

Possibility of indefinite detention

7.110 A number of submissions suggested that loss of citizenship under the provisions of the Bill could lead to indefinite migration detention.

7.111 The Statement of Compatibility with Human Rights, attached to the Explanatory Memorandum, advises that a person who is in Australia when their citizenship ceases acquires an ex-citizen visa by operation of law under section 35 of the *Migration Act 1958* (the Migration Act). This visa is a permanent visa allowing the holder to remain in, but not enter or re-enter Australia.[112]

7.112 The Law Council of Australia submitted that if a person lost their citizenship under the provisions proposed in the Bill, it is likely that the Minister would have grounds to cancel the ex-citizen visa under the character provisions of the Migration Act. The person would then become an unlawful non-citizen subject to mandatory immigration detention and removal from Australia.

7.113 The Law Council expressed concern that it might not be possible to remove the person, either because their other country of citizenship will not accept them back (possibly because that country has also revoked their citizenship) or because the person may be subject to torture or the death penalty.[113]

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110 Department of Immigration and Border Protection, *Submission 37.4*, p. 8.

111 Department of Immigration and Border Protection, *Submission 37.4*, p. 8.

112 Explanatory Memorandum, p. 28.

113 Law Council of Australia, *Submission 26*, p. 25–27.

7.114 Similar concerns were expressed by the Commonwealth Ombudsman, Refugee Council of Australia, councils for civil liberties across Australia and the Human Rights Law Centre.[114]

7.115 In particular, the Refugee Council of Australia submitted that 'the proposed laws may heighten the risk of *refoulement*', contrary to Australia's international obligations. It noted that the Bill is limited to dual citizens but that this assumes that people who lose their citizenship under the Bill would be able to reside in another country. They expressed concern that former refugees may not be able to return to their country of origin because of a well-founded fear of persecution.[115]

7.116 In evidence, the General Counsel of the Department of Immigration and Border Protection stated that cancellation of an ex-citizen visa fell under the Migration Act and would not be an automatic legal consequence following loss of citizenship under the provisions of the Bill. Questions about whether a person would have their ex-citizen visa cancelled on character grounds, enter into migration detention or be removed from Australia would be dealt with under the provisions of the Migration Act, including the review processes built into that Act.[116]

7.117 In its supplementary submission, the Department stated that the risk of indefinite detention could be mitigated in the following manner:

> Where the citizenship of a person present in Australia ceases by operation of the proposed provisions within the Bill, they will automatically be granted an ex citizen visa in accordance with section 35 of the *Migration Act 1958*. If this visa is subsequently cancelled under the Migration Act, the person would become an unlawful non-citizen and be placed into immigration detention. The Government's position is that people who have no legal authority to remain in Australia are expected to depart. An unlawful non-citizen can bring their removal-related detention to an end by departing voluntarily or co-operating with departure arrangements. People who are not willing to depart voluntarily are liable for detention and removal from Australia as soon as reasonably practicable. The Government will continue to act in

114 Commonwealth Ombudsman, *Submission 34*, p. 3; Refugee Council of Australia, *Submission 22*, p.[5]; Councils for civil liberties across Australia, *Submission 31*, p. 4; Human Rights Law Centre, *Submission 39*, p. 9.

115 Refugee Council of Australia, *Submission 22*, p. [5]. See also Eugenia Grammatikakis, Acting Chair, Federation of Ethnic Communities' Councils of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 30.

116 Ms Philippa De Veau, General Counsel, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, pp. 21–23.

> accordance with its obligations under domestic and international law.[117]

Period between loss of citizenship and notification

7.118 Participants in the inquiry raised questions about whether a person would be liable for any conduct that they may have undertaken or benefits they may have received in the period between automatic loss of citizenship and the time at which they receive notification from their Minister about the loss of citizenship.

7.119 Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams jointly submitted that the Bill creates legal uncertainty. One concern they noted is that 'an agency, such as the Australian Electoral Commission, would be obliged to act on the basis of a person's loss of citizenship irrespective of whether a Minister has notified this'.[118]

7.120 The Law Council of Australia suggested that an agency may be able to seek relief against a person involving an allegation that the person has ceased to be a citizen, such as recovering money for a benefit that was only payable to citizens.[119]

7.121 The Department of Immigration and Border Protection submitted that:

> Giving of a notice is intended to constitute official recognition that a person's citizenship has ceased by operation of one of the provisions and it is the notice that is likely to be the basis on which consequent action would be taken by relevant Government agencies.[120]

Committee comment

7.122 The Committee notes the policy intention that any action by Government agencies following the loss of citizenship will only take place after a notice is issued. The Committee considers that it would assist clarity if this were to be made explicit in the Explanatory Memorandum.

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117 Department of Immigration and Border Protection, *Submission 37.4*, pp. 7–8.

118 Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams, *Submission 17,* p. 4.

119 Law Council of Australia, *Submission 26*, p. 10 (footnote 27).

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

Recommendation 18

The Committee recommends that the Explanatory Memorandum to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to clarify that:

- **the giving of notice under proposed sections 33AA and 35 is intended to constitute official recognition that a person's citizenship has ceased by operation of one of the provisions, and**
- **any consequential action by Government agencies will only take place after the notice has been issued pursuant to the Bill's provisions.**

Status of person who benefits from Minister's exemption power

7.123 The Law Council of Australia submitted that there was uncertainty about the status of a person who benefits from the Minister's power to exempt them from the effects of the relevant loss of citizenship provision. It queried whether citizenship would be taken never to have been lost or would be restored from the date of the exemption.[121]

7.124 The Explanatory Memorandum states that if the Minister exempted a person from the effects of a section, they would be taken never to have lost their citizenship.[122]

Committee comment

7.125 The Committee notes the policy intention, expressed in the Explanatory Memorandum, that if a person benefited from the Minister's exemption power under proposed sections 33AA or 35 then they would be taken never to have ceased being a citizen. The Committee considers that it would assist clarity if this was made explicit in the Bill.

121 Law Council of Australia, *Submission 26*, p. 19.

122 Explanatory Memorandum, pp. 12, 16 and 22.

Recommendation 19

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to clarify that if the Minister exempts a person from the effect of proposed sections 33AA or 35, the person is taken never to have lost their citizenship.