The Parliament of the Commonwealth of Australia

Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Parliamentary Joint Committee on Intelligence and Security

September 2015
Canberra

ISBN 978-1-74366-374-5 (Printed version)

ISBN 978-1-74366-375-2 (HTML version)

Contents

APPENDICES

Membership of the Committee

Chair Mr Dan Tehan MP

Deputy Chair Hon Anthony Byrne MP

Members

Hon Mark Dreyfus QC, MP
Mr Andrew Nikolic AM, CSC, MP
Hon Philip Ruddock MP
Hon Bruce Scott MP

Senator David Bushby
Senator the Hon Stephen Conroy
Senator David Fawcett
Senator Katy Gallagher
Senator the Hon Penny Wong

Terms of reference

On 24 June 2015, the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 was referred to the Committee by the Attorney-General.

The Attorney-General asked the Committee to also consider whether proposed section 35A of the Bill (the conviction-based cessation) should apply retrospectively to convictions prior to the commencement of the Act.

List of abbreviations

AAT	Administrative Appeals Tribunal
AFP	Australian Federal Police
ANU	Australian National University
ASIO	Australian Security Intelligence Organisation
ASIO Act	*Australian Security Intelligence Organisation Act 1979*
Citizenship Act	*Australian Citizenship Act 2007*
CRC	*Convention on the Rights of the Child*
Criminal Code	*Criminal Code Act 1995*
FECCA	Federation of Ethnic Communities' Councils of Australia
ICCPR	International Covenant on Civil and Political Rights
IS Act	*Intelligence Services Act 2001*
Migration Act	*Migration Act 1958*
Optional Protocol	*Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*
PJCHR	Parliamentary Joint Committee on Human Rights
UNICEF	United Nations Children's Fund

List of recommendations

5 Conduct-based provisions – proposed sections 33AA and 35

Recommendation 1

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to limit the operation of proposed section 33AA to individuals who have:

- engaged in relevant conduct offshore; or
- engaged in relevant conduct onshore and left Australia before being charged and brought to trial in respect of that conduct.

Recommendation 2

The Committee recommends that changes be made to clarify that the conduct leading to loss of citizenship listed in proposed section 33AA of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 is intended to be considered in light of the meaning of the equivalent provisions in the *Criminal Code Act 1995*, and is not intended to be restricted to the physical elements.

The Committee recommends that, if possible, these amendments be made in the Bill, with additional amendments to the Explanatory Memorandum where necessary.

Recommendation 3

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to include explicit criteria that the Minister must be satisfied of before declaring a terrorist organisation for the purpose of proposed section 35. The criteria should make clear the connection between proposed section 35 and the purpose of the Bill.

Recommendation 4

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to make the Minister's declaration of a 'declared terrorist organisation' for the purpose of proposed section 35 a disallowable instrument.

Further, the Committee recommends that the Bill be amended to enable the Parliamentary Joint Committee of Intelligence and Security to conduct a review of each declaration and report to the Parliament within the 15 sitting day disallowance period.

Recommendation 5

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and the Explanatory Memorandum be amended to clarify the intended scope of the term 'in the service of' a declared terrorist organisation.

In particular, the Bill should be amended to make explicit that the provision of neutral and independent humanitarian assistance, and acts done unintentionally or under duress, are not considered to be 'in the service of' a declared terrorist organisation for the purposes of proposed section 35.

Recommendation 6

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and the Explanatory Memorandum be amended to provide that staff members or agents of Australian law enforcement or intelligence agencies are exempted from sections 33AA and 35 of the Bill when carrying out actions as part of the proper and legitimate performance of their duties.

6 Conviction-based provisions – proposed section 35A

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.

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.

7 Administrative application of the Bill

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.

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.

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.

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.

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.

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.

8 Children

Recommendation 20

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to limit the extent of its application to children. The amendments should provide:

- that no part of the Bill applies to conduct by a child aged less than 10 years, and

- that proposed sections 33AA and 35 do not apply to conduct by a child aged under 14 years.

The amendments should make the Bill's application to children explicit on the face of the legislation.

The Committee notes that in relation to proposed section 35A, section 7.2 of the *Criminal Code Act 1995* or section 4N of the *Crimes Act 1914* will apply to a child aged 10 to 14 years.

Recommendation 21

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended so that section 36 of the *Australian Citizenship Act 2007* (which enables the Minister to revoke a child's citizenship following revocation of a parent's citizenship) does not apply to proposed sections 33AA, 35 and 35A.

9 Concluding comments

Recommendation 22

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to require the Government to publicly report, every six months, the number of times a notice for loss or revocation of citizenship has been issued under each of the grounds contained in Bill, and provide a brief statement of reasons.

Recommendation 23

The Committee recommends that *Intelligence Services Act 2001* (IS Act) be amended to extend the functions of the Parliamentary Joint Committee on Intelligence and Security to include monitoring and reviewing the performance by the Department of Immigration and Border Protection of its functions under the provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015. The extended functions should be consistent with the Committee's current remit under the IS Act.

The IS Act should also be amended to enable relevant agency heads to brief the Committee for the purpose of this new function.

Recommendation 24

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to require the Minister to advise the Parliamentary Joint Committee on Intelligence and Security upon issuing a notice for the loss of citizenship under the Bill. A

subsequent briefing should be offered to the Committee within 20 sitting days of the initial notice being issued. The advice given to the Committee should detail whether notice has been provided to the person, the conduct that engaged the Bill's provisions and whether an exemption has been given by the Minister.

Recommendation 25

The Committee recommends that the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor to finalise a review of the revocation of citizenship provisions in the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 by 1 December 2018.

Recommendation 26

The Committee recommends that the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to complete a review of the revocation of citizenship provisions in the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 by 1 December 2019.

Recommendation 27

The Committee recommends that, following implementation of the recommendations in this report, the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be passed.

1

Introduction

The Bill and its referral

1.1 On 24 June 2015, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, introduced the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Bill) into the House of Representatives.

1.2 In his second reading speech, the Minister stated that the Bill proposes three mechanisms for automatic loss of Australian citizenship. As such, the Bill

> implements the commitment made by the Prime Minister, myself and the Australian Government to address the challenges posed by dual citizens who betray Australia by participating in serious terrorism related activities.[1]

1.3 The Minister added that the Bill 'emphasises the central importance of allegiance to Australia in the concept of citizenship'.[2]

1.4 The Minister explained that:

> The concept of allegiance is central to the constitutional term 'alien' and to this bill's reliance upon the aliens power in the Constitution. The High Court has found that an alien is a person who does not owe allegiance to Australia. By acting in a manner

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

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

> contrary to their allegiance, the person has chosen to step outside of the formal Australian community.[3]

1.5 On 24 June 2015, the Attorney-General, Senator the Hon George Brandis QC, wrote to the Committee to refer the provisions of the Bill for inquiry. In addition, the Attorney-General asked the Committee to consider whether proposed section 35A of the Bill should apply retrospectively with respect to convictions prior to the commencement of the Act. The Committee was requested, as far as possible, to conduct its inquiry in public.

1.6 In his letter, the Attorney-General noted that the Prime Minister, the Hon Tony Abbott MP, had announced on 26 February 2015 that the Australian Government would look at options for dealing with Australian citizens who are involved in terrorism. The Attorney-General informed the Committee that the Bill implements the Government's response to the threat of dual national Australian citizens engaged in terrorism.

1.7 The Attorney-General also noted that a discussion paper entitled *Australian Citizenship, Your Right, Your Responsibility* was launched on 26 May 2015.[4] The discussion paper forms the basis for current public consultations led by the Hon Philip Ruddock MP and Senator the Hon Concetta Fierravanti-Wells.

1.8 The purpose of the consultations is to enable a national conversation about citizenship. The website explaining the consultation states that

> Australian citizens enjoy privileges, rights and fundamental responsibilities. We need to ask ourselves whether the responsibilities of Australian citizenship are well enough known and understood. Do we do enough to promote the value of citizenship, particularly among our young people? Have we got the balance right between the safety of our community and the rights of the individual? How should we deal with citizens who act against the best interests of our country?[5]

1.9 A report is to be tabled following these consultations.

---

3 Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard,* 24 June 2015, p. 7370.

4 See Department of Immigration and Border Protection, 'Australian Citizenship – Your Right, Your Responsibility', <http://www.border.gov.au/about/reports-publications/discussion-papers-submissions/australian-citizenship-your-right-your-responsibility> viewed 2 July 2015.

5 See Department of Immigration and Border Protection, 'Australian Citizenship – Your Right, Your Responsibility', <http://www.border.gov.au/about/reports-publications/discussion-papers-submissions/australian-citizenship-your-right-your-responsibility> viewed 2 July 2015.

1.10 On 18 August 2015, the Committee wrote to the Attorney-General to advise that, given the significance of the Bill and the need to give further consideration to matters raised during the inquiry, the Committee intended to report to the Parliament on Friday, 28 August 2015.This was then extended to Friday 4 September.

Conduct of the inquiry

1.11 The Chair of the Committee, Mr Dan Tehan MP, announced the inquiry by media release on 26 June 2015 and invited submissions from interested members of the public.

1.12 The Committee received 43 submissions and 7 supplementary submissions from sources including government agencies, legal, community and civil liberties groups, academics and members of the public. A list of submissions received by the Committee is at Appendix A.

1.13 The Committee held three public hearings on 4, 5 and 10 August 2015. It received one private briefing and conducted one classified hearing. A list of hearings and the witnesses who appeared before the Committee is included at Appendix B.

1.14 Copies of submissions received and transcripts of public hearings can be accessed on the Committee's website at www.aph.gov.au/pjcis. Links to the Bill and the Explanatory Memorandum are also available on the Committee's website.

1.15 In its previous bill inquiries, the Committee was assisted by secondees from relevant agencies. In this instance, the Committee again benefited from the provision of a secondee with technical expertise from the Department of Immigration and Border Protection (the Department).

1.16 It has also been the practice in previous bill inquiries for the lead government agency to provide the Committee with written responses to issues raised in submissions both before and after the hearing process. This has helped to clarify the operation of a bill, ensured informed debate at hearings, and has aided the Committee in its consideration of proposed measures.

Report structure

1.17 This report consists of nine chapters:

- This chapter sets out the context, scope and conduct of the inquiry.
- Chapter 2 provides an overview of key provisions of the Bill and a brief international comparison of provisions for loss or revocation of citizenship in Canada, New Zealand, the United Kingdom, the United States and France
- Chapter 3 sets out a number of constitutional issues raised in evidence to the Committee.
- Chapter 4 includes discussion of a number of matters of principle and effectiveness, including:
  - ⇒ different conceptions of the meaning and value of Australian citizenship,
  - ⇒ the effectiveness of the measures in the Bill in combating terrorism and protecting the Australian community, and possible unintended consequences, and
  - ⇒ Australia's international obligations relating to statelessness, human rights, combatting terrorism, children and humanitarian assistance.
- Chapters 5 to 7 examine the main issues raised in evidence to the inquiry relating to operation of the Bill, and the Committee's comments and recommendations on these issues.
  - ⇒ Chapter 5 examines the conduct based provisions of the Bill (proposed sections 33AA and 35).
  - ⇒ Chapter 6 examines the conviction based provisions of the Bill (proposed section 35A), and includes discussion of the question of whether proposed section 35A should be applied retrospectively.
  - ⇒ Chapter 7 discusses how the Bill would operate in practice, including the Minister's notice and exemption, avenues of appeal, consequences if the grounds for citizenship loss are overturned, and practical considerations relating to the Bill's implementation.
- Chapter 8 discusses the application of the Bill to children and issues raised in evidence about the Bill's compatibility with Australia's international obligations relating to children.
- Chapter 9 includes the Committee's concluding comments and recommendations about ongoing oversight and accountability.

Delegation to United Kingdom, France and United States

1.18 In association with the inquiry into the Bill, a delegation of the Committee travelled to the United Kingdom, France and the United States from 18 July to 1 August 2015. The Committee sought approval for a delegation in order to inform its inquiry into citizenship revocation and also to engage more broadly in discussions on international counter terrorism measures.

1.19 Approval was granted for the Chair, the Deputy Chair and a Government member to attend the delegation. Due to other commitments, the Deputy Chair was unable to attend and the Committee agreed the attendance of Mr Dan Tehan MP, the Hon Philip Ruddock MP and Senator David Fawcett on the delegation.

1.20 The delegation provided members with the opportunity to discuss policy and operational challenges to combatting terrorism, and to investigate actions other governments are undertaking both domestically and abroad to counter terrorist activity. The delegation also sought to engage with other intelligence oversight bodies to discuss their roles and the interaction of oversight powers.

1.21 In the United Kingdom, the Committee held detailed discussions with intelligence and enforcement agencies on the scope of their citizenship revocation provisions, and the operation and effectiveness of these provisions in reducing risk to the community. The delegation discussed the effectiveness of these measures, the practical and operational requirements, and the critical review and oversight mechanisms needed. The United Kingdom faces a high threat from returning fighters in addition to domestic radicalisation of youth from online sources. The delegation heard that citizenship revocation measures have provided a further tool to respond to the threat represented by some individuals.

1.22 The Chair, Mr Dan Tehan MP, reported to the House on the findings of the delegation commenting that

> All those we spoke to in each nation agreed that a range of tools and approaches are needed to combat terrorism on different fronts and that citizenship revocation is a much needed and effective mechanism, in particular, to address the threat of returning fighters.[6]

1.23 An overview of citizenship revocation measures in other countries is provided in Chapter 2.

6 House Hansard 17 August 2015 p. 8.

1.24 Other delegation discussions centred on combating the radicalisation of individuals, particularly through social media where the quantity and reach of extremist propaganda is growing. The delegation noted that extremism, not just violent extremism, was considered a threat. The UK, France and the US are well advanced in working with communities to counter online extremist propaganda which is contributing to domestic radicalisation.

1.25 Cultural identification, ethnic differences, social cohesion and integration within communities, and access to contact with disaffected persons varied between nations and determined the degree of threat each nation perceived from domestic or returning fighters. France and the US identified different types of threats posed by violent extremism. The delegation heard that understanding the drivers of extremism and the recruitment methodology of these organisations enables more targeted counter narrative and intervention responses to be developed.

1.26 Another critical issue discussed during the delegation was the protection of classified intelligence information in warrants, affidavits and other court proceedings. The UK has an advanced system of special advocates who represent the interests of clients but also have access to certain classified information which may not be able to be presented in other circumstances. This system attempts to balance security needs with ensuring fair representation during judicial proceedings.

1.27 Across the three nations, the delegation met with a range of oversight authorities, government officials, intelligence and enforcement agencies and counter terrorism experts.

1.28 In the United Kingdom, meetings were conducted with:

- Scotland Yard,
- former Chief of the Secret Intelligence Service,
- the Office for Security and Counter-Terrorism,
- the Office of Surveillance Commissioners,
- the Home Office,
- the Independent Reviewer of Terrorism Legislation,
- the Interception of Communications Commissioner's Office,
- the National Security Directorate,
- a former Special Advocate to the courts, and

- countering radicalisation and extremism experts from the International Centre for the Study of Radicalisation and the Royal United Services Institute.

1.29 In France the delegation met with representatives from:

- the Anti-Terrorist Coordination Unit,
- the Directorate-General for Internal Security,
- the Inter-Ministerial Committee for the Prevention of Crime,
- the Parliamentary Committee for Intelligence,
- the Ministry of Justice, and
- the National Intelligence Coordinator.

1.30 In Washington the delegation met with:

- the Central Intelligence Agency,
- the Federal Bureau of Investigation,
- the National Counterterrorism Centre,
- the House Permanent Select Committee on Intelligence,
- the Senate Select Committee on Intelligence,
- the House Committee on Homeland Security,
- the State Department,
- the Department of Homeland Security,
- Office of the Director of National Intelligence, and
- Counter-terrorism experts from the American Enterprise Institute and political analysts.

1.31 The delegation concluded in San Francisco where meetings took place with Twitter, Google and Facebook, and cybersecurity experts. A copy of the delegation program is at Appendix C.

2

The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

2.1 This chapter provides an outline of the Bill as drafted, including the following provisions:

- the purpose of the Bill,
- proposed section 33AA – renunciation by conduct,
- proposed section 35 – service outside Australia in armed forces of an enemy country or a declared terrorist organisation,
- proposed section 35A – conviction for terrorism offences and certain other offences,
- proposed amendment to section 36 – children of responsible parents who cease to be citizens, and
- proposed section 36A – no resumption of citizenship if ceases under section 33AA, 35, or 35A.

2.2 This chapter also provides a brief international comparison of provisions for loss or revocation of citizenship in Canada, New Zealand, the United Kingdom, the United States and France.

2.3 Issues arising during the inquiry in relation to these provisions are examined in subsequent chapters.

The purpose of the Bill

2.4 The Bill includes the following purpose clause:

> This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian

> community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.

2.5 The purpose clause is intended to provide clarity to the intention of the changes proposed in the Bill.[1]

2.6 The purpose clause itself will not form part of the amended *Australian Citizenship Act 2007* (Citizenship Act). However, the Explanatory Memorandum states that the 'purpose of the statutory scheme' would be referred to in the Minister's assessment of public interest should he or she choose to consider an exemption under proposed subsections 33AA(6), 35(5) or 35A(5) (discussed in subsequent chapters).[2] The purpose would also be able to be referred to by courts in any statutory interpretation.

2.7 In the context of the purpose clause, the Explanatory Memorandum states that the intention of the Bill is

> the protection of the community and the upholding of its values, by providing for the cessation of citizenship of persons who have, through their conduct, repudiated their allegiance to Australia. The aim of the Bill is the protection of the Australian communi[ty], rather than punishing terrorist or hostile acts.[3]

2.8 The Explanatory Memorandum describes the concept of 'allegiance' as 'the obligation of a subject or citizen to their sovereign or government', and 'the concept of a duty that is imposed by law on citizens, which is the same for all citizens'. It notes that the 'principle source of power for a person's Australian citizenship ceasing is the alien's power in section 51(xix) of the Constitution', and that the term 'alien' has been found by the High Court to be a person who does not owe allegiance to Australia.[4]

2.9 Elsewhere, the Explanatory Memorandum states the purpose of the amendments in the Bill as being 'to broaden the powers relating to the cessation of Australian citizenship for those persons engaging in terrorism and who are a serious threat to Australia and Australia's interests'. It elaborates on this as follows:

> Those who are citizens owe their loyalty to Australia and its people. This applies to those who acquire citizenship automatically through birth in Australia and to those who acquire it through application. Where a person is no longer loyal to Australia and its people, and engages in acts that harm

1 Explanatory Memorandum, p. 4; The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 24 June 2015, p. 7369.

2 Explanatory Memorandum, pp. 12, 16, 22.

3 Explanatory Memorandum, p. 4.

4 Explanatory Memorandum, pp. 4–5.

> Australians or Australian interests, or engages in acts that are intending to harm Australian[s] or Australia's interest[s], they have severed that bond and repudiated their allegiance to Australia.
>
> Currently under the Citizenship Act, a conviction for a specified offence is required before citizenship can be revoked. In addition, the power to revoke only arises if the offence was committed prior to the Minister giving approval for the citizenship application, or the offence was committed in relation to the person's application to become an Australian citizen. These existing revocation powers are inadequate to address the Government's concerns in relation to persons who have acted contrary to their allegiance to Australia by engaging in terrorist-related conduct.
>
> The amendments … are therefore necessary to provide explicit powers for the cessation of Australian citizenship in specified circumstances where a dual citizen repudiates their allegiance to Australia by engaging in terrorism-related conduct. The desired outcome of this Bill 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.[5]

Proposed section 33AA – Renunciation by conduct

2.10 Under the current Citizenship Act, a dual national may only renounce their citizenship by written application to the Minister and following the approval of the Minister.[6]

2.11 Proposed new section 33AA would provide that a person automatically renounces their Australian citizenship if they act 'inconsistently with their allegiance to Australia' by engaging in any of the following conduct:

> (a) engaging in international terrorist activities using explosive or lethal devices;
>
> (b) engaging in a terrorist act;
>
> (c) providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
>
> (d) directing the activities of a terrorist organisation;
>
> (e) recruiting for a terrorist organisation;

5 Explanatory Memorandum, p. 1.

6 *Australian Citizenship Act 2007*, section 33.

(f) financing terrorism;

(g) financing a terrorist;

(h) engaging in foreign incursions and recruitment.[7]

2.12 The proposed section is limited to persons who are nationals or citizens of another country, regardless of how they obtained their Australian citizenship (by birth or conferral).[8]

2.13 The Explanatory Memorandum states that the offences specified in the proposed section

> reflect the policy intention that an offence declared for the purpose of cessation … must be a terrorism related offence where a maximum penalty of imprisonment is considerable and the offence is of a type that evidently tends to indicate that a person has acted contrary to his or her allegiance to Australia.[9]

2.14 The Bill provides that the 'words and expressions' used to describe the conduct in the proposed section are to 'have the same meanings' as in specified parts of the *Criminal Code Act 1995* (the Criminal Code).[10] However, a criminal conviction under one of the equivalent offences in the Criminal Code would not be a requirement and the loss of citizenship would take effect immediately from the time the conduct took place.[11]

2.15 The Explanatory Memorandum makes clear that the use of the words 'acting inconsistently with their allegiance to Australia' in the section is not intended to be an additional requirement on top of the requirement for the person to have engaged in the specified conduct. Rather, the words are intended to assert that 'if the person engages in the terrorist-related conduct specified in subsection 33AA(2) the person has, by their conduct, acted inconsistently with their allegiance to Australia'.[12]

2.16 Proposed subsection 33AA(6) provides that if the Minister 'becomes aware' that a person has engaged in the conduct resulting in loss of citizenship, he or she must give written notice to that effect 'at such a time and to such persons as the Minister considers appropriate'. Due to the proposed exception to section 39 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), there would be no requirement for the Minister to receive a formal security assessment from Australian Security

7 Proposed subsections 33AA(1)–(2).

8 Proposed subsections 33AA(1) and 33AA(4).

9 Explanatory Memorandum, p. 10.

10 Proposed subsection 33AA(3). The relevant Criminal Code offences are included in Table 2.1.

11 Proposed subsection 33AA(5).

12 Explanatory Memorandum, p. 7.

Intelligence Organisation (ASIO) as the basis of such a notice being issued.[13]

2.17 The Minister would have the discretion to rescind notices and exempt persons from the effect of the proposed section 'if he or she considers it to be in the public interest to do so'.[14] However, the Bill makes clear that there would be no duty for the Minister to consider such an exemption.[15] The exercise of the Minister's powers to give notice of the loss of citizenship or to rescind/exempt a person would not be delegable,[16] would not be subject to natural justice, would not require notice or reasons to be given to the person affected,[17] and would not be a legislative instrument.[18]

2.18 The Bill's application provisions indicate that proposed section 33AA would apply to Australian citizens regardless of when they became citizens, and in regard to conduct engaged in on or after the Act commenced (the day after Royal Assent).[19]

Proposed section 35 – Service outside Australia in armed forces of an enemy county or a declared terrorist organisation

2.19 The Bill proposes to replace and expand on the existing section 35 of the Citizenship Act, which currently states that a person ceases to be an Australian citizen if they are a foreign national or citizen and they serve in the armed forces of a country at war with Australia.

2.20 The proposed new section would expand this automatic ground for cessation of citizenship to any person who 'fights for, or is in the service of, a declared terrorist organisation'.[20]

2.21 The proposed new section would also limit the conduct to fighting or service that occurs outside Australia, a limitation that does not exist in the existing section 35.

2.22 The Explanatory Memorandum states that the proposed new section 'builds on, adapts and modernises loss of citizenship provisions for those

13 Proposed subsection 33AA(12).
14 Proposed subsection 33AA(7).
15 Proposed subsection 33AA(8).
16 Proposed subsection 33AA(9).
17 Proposed subsection 33AA(10).
18 Proposed subsection 33AA(11).
19 Item 8(1).
20 Proposed subparagraph 35(1)(b)(ii)

fighting in a war against Australia which have been in place since 1949'. The purpose of the provisions is

> to deal with the threat caused by those who have acted in a manner contrary to their allegiance to Australia by removing them from formal membership of the Australian community.[21]

2.23 The Explanatory Memorandum further notes:

> Cessation of citizenship is a very serious outcome of very serious conduct that demonstrates a person has repudiated their allegiance to Australia. Citizenship is a privilege not a right. The cessation of 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 cessation of Australian citizenship will 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.[22]

2.24 Similarly to proposed section 33AA, the loss of citizenship under section 35 is proposed to be automatic and a conviction would not be required for it to take effect. The Minister would be required to give written notice of the cessation 'at such time and to such persons as the Minister considers appropriate' and have non-compellable discretion to rescind a notice and exempt a person. The exercise of these powers would be non-delegable, not subject to natural justice, would not be a legislative instrument and a formal security assessment from ASIO would not be required.[23]

2.25 'Declared terrorist organisation' is defined in the Bill as any terrorist organisation listed under subsection 102.1(1) of the Criminal Code that the responsible Minister declares in writing. There are no specified criteria that the responsible Minister would be required to consider in making such a declaration and the Minister's declaration would not be a legislative instrument.[24]

2.26 The Bill's application provisions indicate that proposed section 35 would apply to Australian citizens regardless of when they became citizens, and in regard to fighting or service that occurred, or continued to occur, on or after the Act commenced (the day after Royal Assent).[25]

---

21 Explanatory Memorandum, p. 14.

22 Explanatory Memorandum, p. 14.

23 Proposed subsections 35(2), (5)–(11).

24 Proposed subsection 35(4).

25 Items 8(2), (3).

Proposed section 35A – Conviction for terrorism offences and certain other offences

2.27 Proposed new section 35A of the Citizenship Act would provide that a person automatically ceases to be an Australian citizen if they are convicted of an offence under the Criminal Code or *Crimes Act 1914* (Crimes Act) that is specified in the proposed section.

2.28 The proposal is limited to persons who are nationals or citizens of another country, regardless of how they obtained their Australian citizenship.[26]

2.29 The specified offences, and current maximum penalties, that would result in automatic cessation of citizenship for persons convicted are outlined in Table 2.1.

Table 2.1 Offences leading to loss of citizenship under proposed section 35A on conviction

Act/Provision	Offence	Maximum Penalty (Imprisonment)
Criminal Code Section 72.3	International terrorist activities using explosive or lethal devices*	Life
Criminal Code Section 80.1	Treason	Life
Criminal Code Section 80.1AA	Treason – material assisting enemies	Life
Criminal Code Section 80.2	Urging violence against the Constitution, the Government, a lawful authority of the Government, an election, or a referendum	7 years
Criminal Code Section 80.2A(1)	Urging violence against groups	7 years
Criminal Code Section 80.2B(1)	Urging violence against members of groups	7 years
Criminal Code Section 80.2C	Advocating terrorism	5 years
Criminal Code Section 91.1	Espionage	25 years
Criminal Code Section 101.1	Terrorist acts*	Life
Criminal Code Section 101.2	Providing or receiving training connected with terrorist acts*	15 or 25 years
Criminal Code Section 101.4	Possessing things connected with terrorist acts	10 or 15 years
Criminal Code Section 101.5	Collecting or making documents likely to facilitate terrorist acts	10 or 15 years
Criminal Code Section 101.6	Other acts done in preparation for, or planning, terrorist acts	Life

26 Proposed subsection 35A(1) and (4).

Criminal Code Section 102.2	Directing the activities of a terrorist organisation*	10 or 15 years
Criminal Code Section 102.3	Membership of a terrorist organisation	10 years
Criminal Code Section 102.4	Recruiting for a terrorist organisation*	15 or 25 years
Criminal Code Section 102.5	Training involving a terrorist organisation	25 years
Criminal Code Section 102.6	Getting funds to, from or for a terrorist organisation	15 or 25 years
Criminal Code Section 102.7	Providing support to a terrorist organisation	15 or 25 years
Criminal Code Section 103.1	Financing terrorism*	Life
Criminal Code Section 103.2	Financing a terrorist*	Life
Criminal Code Section 119.1	Incursions into foreign countries with intention to engage in hostile activities*	Life
Criminal Code Section 119.2	Entering or remaining in a declared area*	10 years
Criminal Code Section 119.4	Preparations for incursions into foreign countries for purposes of engaging in hostile activities*	Life
Criminal Code Section 119.5	Allowing use of buildings, vessels and aircraft to commit offences*	Life
Criminal Code Section 119.6	Recruiting persons to join organisations engaged in hostile activities against foreign governments*	25 years
Criminal Code Section 119.7	Recruiting persons to serve in or with an armed force in a foreign country*	10 years
Crimes Act Section 24AA	Treachery	Life
Crimes Act Section 24AB	Sabotage	15 years
Crimes Act Section 25	Inciting mutiny against the Queen's Forces	Life
Crimes Act Section 26	Assisting prisoners of war to escape	Life
Crimes Act Section 27(1)	Unlawful drilling	5 years
Crimes Act Section 29	Destroying or damaging Commonwealth property	10 years

** denotes conduct that would also result in automatic renunciation of citizenship under proposed section 33AA.*

2.30 The Explanatory Memorandum describes the reasons for the inclusion of these particular offences as follows:

> The specified offences reflect the policy intention that an offence listed for the purpose of cessation under new subsection 35A(1)

> must be a terrorism-related offence where the maximum penalty is considerable. However, it is not as restricted as the offences listed in new sections 33AA and 35 as a criminal offence is required for the operation of this new section 35A so it is appropriate that the list of offences is broader. The offences are of a nature that on the face of them a person who undertakes such offences has repudiated their allegiance to Australia.[27]

2.31 As with the other proposed sections described above, the Minister would be required to give written notice of the cessation 'at such time and to such persons as the Minister considers appropriate' and have non-compellable discretion to rescind a notice and exempt a person. The exercise of these powers would be non-delegable, not subject to natural justice, would not be a legislative instrument and a formal security assessment from ASIO would not be required.[28]

2.32 The Bill's application provisions indicate that proposed section 35A would apply to Australian citizens regardless of when they became citizens, and in regard to convictions handed down after the Act commenced (the day after Royal Assent); regardless of when the conduct leading to the conviction occurred.[29]

Proposed amendment to section 36 – Children of responsible parents who cease to be citizens

2.33 Existing section 36 of the Citizenship Act provides that when the parent of a child aged under 18 years loses his or her citizenship, and there is no remaining Australian-citizen parent responsible for the child, then the Minister may also revoke the child's citizenship. This does not apply in circumstances where the remaining parent dies (as opposed to having their citizenship revoked), or if the child would become stateless.

2.34 The Bill proposes to extend the existing section 36 to cover the three new grounds for loss of citizenship described above. The Bill would not otherwise alter the provision.

---

27 Explanatory Memorandum, p. 19.

28 Proposed subsections 35A (5)–(11).

29 Item 8(4). As part of the inquiry, the Committee has been asked to consider whether proposed section 35A should be extended to apply retrospectively with respect to convictions handed down prior to the commencement of the Act.

Proposed section 36A – No resumption of citizenship if ceases under section 33AA, 35, or 35A

2.35 Proposed new section 36A of the Citizenship Act would provide that a person who ceases to be an Australian citizen under any of the above clauses would never be able to obtain Australian citizenship again.

2.36 The Explanatory Memorandum describes the reason for this provision as follows:

> It is not appropriate for a person to regain the privileges and responsibilities of Australian citizenship if their citizenship has been ceased for something as grave as terrorist related conduct and the person has repudiated their allegiance to Australia.[30]

2.37 This bar would not apply if the Minister exercised his or her discretionary powers to rescind the notice that the person's citizenship has ceased.[31] The Explanatory Memorandum states that the bar would also not apply if the reasons for the person's citizenship ceasing were quashed by a court on review.[32]

International comparisons

2.38 Many countries have legislation which enables citizenship to be revoked under specified circumstances. In particular, countries such as the United Kingdom and Canada have recently amended legislation relating to citizenship revocation in order to provide its application to those engaging in terrorist activities.

2.39 The mechanisms for citizenship revocation vary between countries according to constitutional and legislative frameworks. How Australia might frame updated citizenship revocation measures must necessarily be appropriate to the Australian Constitution and to the *Australian Citizenship Act 2007*.

2.40 The following section outlines citizenship revocation provisions in Canada, New Zealand, the United Kingdom, the United States and France.

30 Explanatory Memorandum, pp. 24–25.

31 See note to proposed section 36A.

32 Explanatory Memorandum, p. 25.

Canada

2.41 In June 2015, legislation came into force to authorise the revocation of citizenship from dual citizens (whether born in Canada or naturalized) in the following situations:

- the Minister of Citizenship and Immigration Canada has a discretion to revoke citizenship if a dual citizen has been convicted of terrorism, high treason, treason or spying with particular minimum sentences[33], and
- the Minister can ask the Federal Court of Canada to make a declaration that a person has served as a member of an armed force or organised armed group engaged in armed conflict with Canada. Such a declaration operates as a revocation of citizenship.[34]

2.42 Individuals whose citizenship has been revoked under these grounds are barred permanently from obtaining citizenship again.[35]

New Zealand

2.43 The Minister of Internal Affairs may deprive a person of New Zealand citizenship if satisfied that the person is also the citizen of another country and, while aged over 18 and of full capacity, has acted in a manner contrary to the interests of New Zealand.[36]

2.44 A person who has been served a notice of 'intention to deprive' may, within 28 days, appeal to the High Court for a declaration that there are insufficient grounds to justify deprivation. If the person appeals and is unsuccessful, the Minister can make an order depriving the person of citizenship. In these cases, all citizenship and passport documents are recalled, and Immigration New Zealand may begin deportation procedures.[37]

2.45 The Prime Minister of New Zealand has stated that New Zealand is unlikely to amend its citizenship legislation concerning foreign fighters and those involved in terrorist activities.[38]

---

33 *Citizenship Act 1977* (Canada), section 10(2).

34 *Citizenship Act 1977* (Canada), sections 10.1(2)–(3).

35 *Citizenship Act 1977* (Canada), section 22(1)(g).

36 *Citizenship Act 1977* (New Zealand), section 16.

37 Department of Immigration and Border Protection, *Submission 37.3*, p. [4ff].

38 'New Zealand will not follow Australia if it strips citizenship of dual national in Syria', *International Business Times*, 27 May 2015, <http://www.ibtimes.com.au/new-zealand-will-not-follow-australia-if-it-strips-citizenship-dual-national-syria-1449764>, viewed 28 August 2015. See also 'NZ could not stop dual citizen's return – Key', *Radio New Zealand News*, 25 May 2015, <http://www.radionz.co.nz/news/political/274488/nz-could-not-stop-dual-citizen's-return-key>, viewed 28 August 2015.

United Kingdom

2.46 A British dual citizen may be deprived of their citizenship if the Secretary of State is satisfied that deprivation would be conducive to the public good.[39]

2.47 However, recent amendments provide that the Secretary of State may also make an order depriving a naturalised person of British citizenship if the Secretary of State is satisfied that

- deprivation is conducive to the public good because the person has conducted himself in a manner which is seriously prejudicial to the vital interests of the UK, and
- the Secretary of State has reasonable grounds for believing that the person is able to become a national of another country.[40]

United States

2.48 In the United States, the 14th Amendment to the US Constitution protects citizenship rights. An individual's US citizenship cannot be revoked through legislative enactment, however a person can voluntarily perform certain expatriating acts which can lead a court to declare that the individual intended to relinquish their US citizenship. These acts are:

- obtaining naturalisation in, or taking an oath of allegiance to, a foreign state,
- entering or serving in the armed forces of a country at war with the United States,
- assuming or performing official duties in a foreign government, and
- committing an act of treason or conspiracy against the United States.

2.49 In all cases except the last-named, the subject must be outside the United States in order to for the loss of citizenship to take effect.[41]

France

2.50 According to Article 25 of the Civil Code, an acquired French citizenship can be revoked for serious matters, such as being convicted of acts of terrorism or of crimes or offences which threaten the fundamental interest of the State.

---

39 *British Nationality Act 1981* (UK), sections 40(2) and 40(3).

40 *Immigration Act 2014* (UK), section 66, inserting section 40(4A) into the *British Nationality Act 1981*.

41 Department of Immigration and Border Protection, *Submission 37.3*, p. [4ff]. See also Centre for Comparative Constitutional Studies, *Submission 29*, p. 8.

2.51 Revocation of citizenship for non-terrorist related crimes is possible if the dual national obtained French citizenship within the ten years preceding the offence. In the case of crimes of terrorism, this period is fifteen years (due to a 2005 extension by the French Government).[42]

42 'Ad-Hoc Query on Revoking Citizenship on Account of Involvement in Acts of Terrorism or Other Serious Crimes', *European Commission*, 25 September 2014, <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/visas/604_emn_ahq_revoking_citizenship_terrorism_25september2014_en.pdf> viewed 27 August 2015.

3

Constitutional validity

3.1 A large number of submissions and witnesses at public hearings discussed the constitutional validity of the Bill.[1] The discussion centred on two constitutional questions:

- does the Constitution grant the Commonwealth power to legislate with respect to citizenship and the conditions under which it is held, and
- are there constitutional limitations that might apply, specifically arising from the separation of powers provisions in Chapter III and the implied right to vote.

3.2 The following chapter discusses the constitutional issues raised by submitters in relation to the Bill as proposed.

---

1 Mr Paul McMahon, *Submission 7*, p. 4; Australian Defence Association, *Submission 8*, p. 4; Executive Council of Australian Jewry, *Submission 9*, p. 3; Professor Helen Irving, *Submission 15*, pp. 1–5; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 1–4; Australian Lawyers for Human Rights, *Submission 20*, p. 7; NSW Society of Labor Lawyers, *Submission 25*, pp. 3–6; Law Council of Australia, *Submission 26*, p. 8; Muslim Legal Network (NSW), *Submission 27*, p. 4; Centre for Comparative Constitutional Studies, *Submission 29*, pp. 6–7; Castan Centre for Human Rights, *Submission 30*, pp. 2–4; Councils for civil liberties across Australia, *Submission 31*, pp. 2–4; Professor Kim Rubenstein, *Submission 35*, pp. 5-6; Immigration Advice and Rights Centre, *Submission 36*, p. 4; Migration Law Program, ANU College of Law, *Submission 40*, pp. 5, 10; Australian Bar Association, *Submission 43*, p. 2; Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 1; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 12; Mr Peter Wetheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 24; Laureate Professor Cheryl Saunders, Foundation Director, Centre for Comparative Constitutional Studies, *Committee Hansard*, Canberra, 5 August 2015, p. 36; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44; Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, p. 45.

Constitutional head of power

3.3 The Explanatory Memorandum states that 'the principal source of power for a person's Australian citizenship ceasing is the aliens power in section 51(xix) of the Constitution'.[2] In so doing, the Bill relies on the concept that an 'alien' is 'a person lacking allegiance to Australia'.[3] However, there has not yet been a High Court case in which it has been necessary for the Court to decide the constitutional meaning of 'alienage', or for it to determine the 'outer limits' of Parliament's power under section 51(xix).[4]

3.4 The Constitution, on its face, does not define citizenship or expressly limit the Parliament's power with respect to citizenship law.[5] Indeed, the High Court has consistently held that citizenship in Australia is a matter for legislation, and its acquisition or loss follows from what the Parliament legislates.[6]

3.5 As such, the Parliament has the power to 'create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode'.[7] However, the High Court has also held that an important qualification operates to limit the Parliament's powers:

> The qualification is that … Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word. However, within the class of those who could answer that description, Parliament can determine who it will be applied.[8]

3.6 Therefore, while the Parliament is authorised to define the conditions on which citizenship depends, that power is not unlimited and may be subject to implied constitutional limitations.[9] That is, as Ms Shipra

2 Explanatory Memorandum, p. 5.

3 Explanatory Memorandum, p. 5. See *Koroitamana v Commonwealth* (2006) 227 CLR 31.

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

5 Professor Helen Irving, *Submission 15*, p. 2; Centre for Comparative Constitutional Studies, *Submission 29*, p. 6.

6 Professor Helen Irving, *Submission 15*, p. 2; Law Council of Australia, *Submission 26*, p. 8; NSW Society of Labor Lawyers, *Submission 25*, pp. 4–5; See also *Singh v Commonwealth* (2004) 222 CLR 322; *Re Yates; Ex parte Walsh* (1925) 37 CLR 36.

7 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 per Gleeson CJ at 173.

8 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 per Gleeson CJ at 173; See also Centre for Comparative Constitutional Studies, *Submission 29*, pp. 6–7.

9 *Hwang v Commonwealth* (2005) ALR 83; Law Council of Australia, *Submission 26*, p. 8.

Chordia, Ms Sangeetha Pillai and Professor George Williams (Chordia et al) explained, the Parliament's power is 'not … an unfettered discretion to determine when such allegiance is lacking'.[10]

3.7 Importantly, the link between the constitutional head of power (the aliens power) and citizenship law is a question of allegiance. Indeed, current interpretation of the 'aliens power' with respect to citizenship law, defines citizenship as the 'obverse of alienage, or aliens are not citizens'.[11] Professor Helen Irving explained:

> The test for characterising the law as a law, with respect to citizenship, rests upon a formal attribution of allegiance versus absence of allegiance. A person becomes a citizen by satisfying the criteria under the *Citizenship Act*. They acquire citizenship. With that, in a formal, technical sense, they acquire allegiance. What makes a person an alien is that either they have no allegiance to Australia or they have no allegiance to a state at all. They are either a citizen or a national of another state or they are stateless.[12]

3.8 Professor Irving went on to say that a 'characterisation connection' between the aliens power and citizenship law may lead to a constitutional problem if that citizenship law seeks to define a person as an alien without a specific test of allegiance.[13] The mere statement that certain conduct amounts to a breach of allegiance would be unlikely to be sufficient.[14] Professor George Williams explained:

> It was on that basis that the High Court struck down [the] Communist Party dissolution act, on the basis that parliament said, 'We think it demonstrates something,' and the High Court said, 'No, that's for us.' Merely stating that this amounts to a lack of allegiance or, in that case, 'You are a communist,' is not sufficient. The High Court will examine it itself and, if the High Court takes the view that any of the grounds put in the bill do not give rise to a necessary lack of allegiance, we have a real problem

---

10 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 4. See also NSW Society of Labor Lawyers, *Submission 25*, p. 4; Muslim Legal Network (NSW), *Submission 27*, p. 4; Centre for Comparative Constitutional Studies, *Submission 29*, p. 6; Immigration Advice and Rights Centre, *Submission 36*, pp. 4–5.

11 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 50.

12 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 50.

13 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 50. See also, Professor Kim Rubenstein, *Committee Hansard*, Canberra, 4 August 2015, p. 37.

14 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 19 (citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1).

> … on constitutional grounds, because you are rendering people aliens where there is no valid legal basis for doing that.[15]

3.9 The Centre for Comparative Constitutional Studies also noted this tension, commenting that the Bill's definition of an 'alien' as a person lacking allegiance to Australia rested on an 'unusual, extended use of the notion of allegiance'.[16] Although a number of High Court cases have included statements on the extent of the Parliament's power to make laws for the renunciation of allegiance, the Centre commented that these statements 'have been made in entirely different factual contexts … and the Bill extends well beyond any other legislation based on [the aliens power, and] … its constitutional validity should not be regarded as assured'.[17]

3.10 Chordia et al expressed similar concerns, and ultimately concluded that 'it is likely that certain provisions of the Bill exceed any power that Parliament does have to determine [when allegiance is lacking]'.[18]

3.11 The Law Council of Australia expressed concerns that the 'basis for and scope of the Commonwealth's power to enact citizenship legislation is uncertain'.[19] However the Law Council also noted that 'issues of Constitutional validity will ultimately be a matter for the High Court to determine'.[20]

3.12 The Law Council of Australia suggested that other heads of power granted in section 51 of the Constitution may provide supplementary support for parts of the Bill—such as the defence power (section 51(vi)), external affairs power (section 51(xxix)), and the immigration power (section 51(xxvii)).[21] However, such provisions may not support the Bill in its entirety.[22]

---

15 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 19. See also Ms Sangeetha Pillai, *Committee Hansard*, Canberra, 4 August 2015, p. 19.

16 Centre for Comparative Constitutional Studies, *Submission 29*, p. 6.

17 Centre for Comparative Constitutional Studies, *Submission 29*, p. 7.

18 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 4; see also Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 13.

19 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 1.

20 Law Council of Australia, *Submission 26*, p. 8.

21 Law Council of Australia, *Submission 26*, p. 8.

22 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 4; Law Council of Australia, *Submission 26*, p. 8.

Constitutional limitations

Separation of powers

3.13 Chapter III of the Constitution outlines judicial power, such as the interpretation of law and adjudication according to law, and places well-recognised limits on the exercise of judicial power. Specifically, neither the Parliament nor the Executive may exercise judicial power, which is the exclusive domain of the courts.

3.14 Indeed, the High Court has held that:

> When an exercise of legislative power is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chapter III [of the Constitution]. For that reason it is beyond the competence of the Parliament to invest with any part of the judicial power anybody or person except a court created pursuant to section 71.[23]

3.15 A number of participants in the inquiry commented that the Bill in its current form reflects an attempt to avoid the direct conflict with the separation of powers that would arise in the event of a Minister having a unilateral power to revoke a person's citizenship.[24]

3.16 Certainly, proposed sections 33AA and 35 (where a court conviction is not required) involve 'operation of law' provisions: once a person engages in certain prescribed conduct, the law operates automatically (without a Ministerial decision) to cancel that citizenship. In such situations, there is no 'decision' but rather, a finding of fact (that the person has engaged in certain conduct). For example, the Law Council of Australia stated:

> The current drafting of the Bill may avoid Constitutional invalidity on the grounds that it is not inconsistent with Chapter III of the Constitution. This is because it purports to avoid the Executive exercising an essentially judicial function of adjudicating the law by way of the Bill's self-executing provisions.[25]

3.17 In order to enliven the administrative actions that will flow from the automatic loss of citizenship (by operation of law), an administrative process (or a finding of fact) would occur.

23 *R v Kirby; Ex parte Boilermakers' Society of Australia* [1965] HCA 10, para 5 per Dixon CJ, McTiernan, Fullagar and Kitto JJ. See Executive Council of Australian Jewry, *Submission 9*, p. 3.

24 For example, Paul McMahon, *Submission 7*, p. 4; Professor Helen Irving, *Submission 15*, p. 3; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 2; Australian Bar Association, *Submission 43*, p. 2; Mr Geoffrey Kennett SC, Chair, Administrative Law Committee, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 3; Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, p. 48.

25 Law Council of Australia, *Submission 26*, p. 8.

3.18 Importantly, the High Court has held that a 'finding of fact' is distinct from a 'decision' and is therefore not an exercise of power, though there are undisputed limits that remain exclusively exercised by the judiciary:

> If … the only powers conferred upon a so-called tribunal are in the nature of calculation or the mere ascertainment of some physical fact or facts, and not the declaration of or giving effect to a controverted matter of legal right, it may be that they do not appertain, except incidentally, to the judicial power. … Convictions for offences and the imposition of penalties and punishments are matters appertaining exclusively to that [judicial] power.[26]

3.19 Reflecting on the High Court's jurisprudence quoted above, the Executive Council of Australian Jewry commented that a finding of fact under proposed section 33AA 'may amount to … a declaration of or giving effect to a controverted matter of legal right, which would be an exercise of judicial power'.[27]

3.20 A large number of participants questioned whether an operation of law provision can operate in relation to the type and complexity of conduct covered by proposed sections 33AA and 35.[28] The Commonwealth Ombudsman was of the view that the operation of law provisions (also referred to as self-executing or automatic provisions) of the Bill 'conceals administrative decision-making process, given that that must logically occur for the Bill to operate'.[29] In a submission to the inquiry, the Commonwealth Ombudsman described this as a 'legal fiction'.[30]

3.21 Dr Rayner Thwaites similarly noted 'no law is entirely self-executing; it needs the interposition of human judgement … somebody needs to reach a determination that the conduct triggering revocation of citizenship has

---

26 *Waterside Workers' Federation v JW Alexander Ltd* (1918) 25 CLR 434, at 443 per Griffith CJ. See Executive Council of Australian Jewry, *Submission 9*, p. 3.

27 Executive Council of Australian Jewry, *Submission 9,* p. 5.

28 For example: Human Rights Committee, Law Society of NSW, *Submission 11*, pp. 3–4; Australian Lawyers Alliance, *Submission 14*, p. 4; Professor Helen Irving, *Submission 15*, p. 3; Dr Rayner Thwaites, *Submission 16*, pp. 1–2; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 2; Australian Lawyers for Human Rights, *Submission 20*, p. 7; NSW Society of Labor Lawyers, *Submission 25*, p. 11; Councils for civil liberties across Australia, *Submission 31*, p. 4; Commonwealth Ombudsman, *Submission 34*, p. 1; Australian Bar Association, *Submission 43*, p. 2; Mr Bill O'Connor, *Submission 42*, p. 1; Australian Bar Association, *Submission 43*, p. 2; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 14; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44.

29 Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, Canberra, 4 August 2015, p. 35.

30 Commonwealth Ombudsman, *Submission 34*, p. 2.

occurred'.[31] Professor George Williams also commented that 'no law self-executes':

> It is a very odd provision in that it is described as self-executing but, of course, it is not; no law self-executes. What it effectively does is push the key decision-making away from the minister and to the department … That is why it does not cure the ministerial discretion point; in the end, it is still the executive that is making the key decisions … You have got on the record a letter from the Department itself … making it very clear that you can expect the departments will make decisions and engage in these matters in the way that certainly does not cure the prior concern about the Executive making key decisions.[32]

3.22 The Australian Human Rights Commission summarised the central concern about operation of law provisions and separation of powers when it stated '[t]he key point is that it is not for the Executive to be passing laws along these lines and then making judgements as to whether the laws have been breached'.[33]

3.23 Professor Helen Irving commented that if this fact finding process purported to be a decision of a judicial nature, in that it 'empowered a Minister to determine guilt as a condition for the revocation of a person's citizenship, that legislation would not be [constitutionally] valid'.[34] At a public hearing, Professor Irving was sceptical about the self-executing nature of the proposed sections, stating:

> … a determination must be made that such conduct has been undertaken, and if in fact this determination is made by the minister, notwithstanding that the provision attempts to remove executive determination from the picture, a constitutional objection will arise … [If] the bill is attempting to take the revocation of citizenship as a consequence of conduct out of the hands of the courts, it is unlikely to succeed [constitutionally] since the conduct is defined by reference to [criminal] offences.[35]

---

31 Dr Rayner Thwaites, *Submission 16*, p. 2. Referencing Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action*, 5th ed (Sydney: Lawbook Co, 2013), and *Australian Postal Corporation v Forgie* [2003] FCAFC 223.

32 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 14. See also Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 2.

33 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 13. See also Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 10 August 2015, p. 27.

34 Professor Helen Irving, *Submission 15*, p. 3.

35 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44.

3.24 It is not within the constitutional powers of the Executive to make a determination about conduct and impose a penalty for the commission of that conduct. Professor Irving was of the view that this is 'an essential weakness' of proposed section 33AA because a court would be unlikely to 'treat a reference to the provisions of the Criminal Code as purely definitions, when the conduct itself amounts to an offence under the Code'.[36] Professor Irving commented that any advice that indicated the Executive could 'make a determination based on criminal guilt, then that must be clearly flawed advice … [as] an administrative determination [would] … be very clearly contrary to the separation of powers'.[37]

3.25 During the hearings, questions were raised about why the existing section 35 provision in the *Australian Citizenship Act 2007* (which provides for an automatic cessation of citizenship where a dual national 'serves in the armed forces of a country at war with Australia')[38] has not attracted similar constitutional concerns.

3.26 Although already enacted, Professor Williams noted that existing section 35 'suffers from the same' separation of powers problem. Professor Williams explained that the existing section was introduced in 1948, prior to the decision by the High Court in the 'Boilermakers' case' of 1956,[39] where it specifically restricted the use of judicial power to courts established under Chapter III of the Constitution. Professor Williams stated:

> So if you are following that model from 1948 you are following it at a different time in our constitutional evolution before the High Court identified these restrictions as binding in this way. Indeed, if someone was to lose their citizenship under the existing section 35, a challenge would be open to them based upon that 1956 precedent of the High Court.[40]

3.27 Professor Irving concluded that although the Bill 'does not appear to be unconstitutional on its face', it may in its operation, breach the separation of powers.[41] Professor Williams commented that in any court challenge, the High Court would approach these matters by not looking 'simply at the form of the law but at the substance—how it operates in practice'.[42]

---

36 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 49.

37 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 49, see also Australian Bar Association, *Submission 43*, p. 3.

38 *Australian Citizenship Act 2007*, section 35.

39 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

40 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 13.

41 Professor Helen Irving, *Submission 15*, p. 9.

42 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 14.

Consequently, Professor Williams concluded that 'this is the first time that I am prepared to say that I am confident not only that there is a strong case against this Bill, but more likely than not it would be struck down by the High Court'.[43] Professor Williams had earlier stated publicly that the Bill 'may well be constitutional, but this does not mean it will produce a sound and sensible reform'.[44]

3.28 The administrative process to make findings of fact is discussed in greater detail in Chapter 5.

Implied right to vote

3.29 Some participants in the inquiry also raised the possibility of a constitutional challenge on the grounds that the Bill would remove the capacity of a person to vote in federal elections.[45]

3.30 The Constitution states that 'thse people of the Commonwealth' must directly choose the members of the federal Parliament.[46] The High Court has held that it is within the Parliament's power to temporarily suspend the right to vote for citizens or the 'people of the Commonwealth'.

3.31 Any suspension of a citizen's right to vote must be for a legitimate purpose. The High Court has held that the suspension of voting rights to a person serving a prison sentence of less than three years is not constitutionally permissible as the length of the sentence did not represent sufficiently serious criminal conduct to justify the suspension.[47]

3.32 Chordia et al identified that, although the Bill's goal of fostering national security 'may qualify as a legitimate purpose', the 'manner in which it pursues this purpose is not likely to be proportionate to this goal'.[48] More specifically, they explained that the range of conduct that will trigger loss of citizenship is 'far wider than necessary' and the processes for

43 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, pp. 12–13.

44 Professor George Williams, 'Deeply flawed citizenship law casts wide net', *The Age*, 25 June 2015, p. 24.

45 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 2–3; NSW Society of Labor Lawyers, *Submission 25*, p. 5; Australian Bar Association, *Submission 43*, p. 2.

46 Australian Constitution, sections 7 and 24.

47 *Roach v Electoral Commissioner* [2007] HCA 43; see also Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 3, and Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 13.

48 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 3; see also Australian Bar Association, *Submission 43*, p. 2.

citizenship loss are 'inappropriate, unfair and inconsistent with the standards that apply in other national security legislation'.[49]

3.33 In order for the Bill to be a proportionate response to the goal of promoting national security, Chordia et al were of the view that the range of conduct captured by its provisions should be narrow and strictly limited to 'offences that demonstrably involve actions that are inconsistent with allegiance to Australia'.[50] The range of conduct captured by the Bill will be discussed in Chapters 5 and 6.

Departments' response

3.34 The Committee raised a number of these concerns with the Department of Immigration and Border Protection and the Attorney-Generals' Department at public hearings.

3.35 The Attorney-General's Department stated that 'obviously in terms of the drafting and the construction of the bill, it has been done with a view to ensuring constitutionality'.[51] This was confirmed at a later public hearing:

> Obviously, constitutional considerations were looked at very closely in terms of the development of the Bill. The Bill was drafted with those considerations in mind, and the draft Bill as presented is informed by that.[52]

3.36 The Department of Immigration and Border Protection similarly commented that '[t]he government has advice to hand that suggests that we are on legally sound ground'.[53]

Committee Comment

3.37 The Committee notes the extent of constitutional concerns raised. In evidence, the Committee heard detailed concerns about the constitutionality of the Bill from expert witnesses, including a number of

49 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 3; see also Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 13.

50 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 3–4.

51 Ms Katherine Jones, Deputy Secretary, National Security and Criminal Justice Group, Attorney-General's Department, *Committee Hansard*, Canberra, 5 August 2015, p. 59.

52 Ms Katherine Jones, Deputy Secretary, National Security and Criminal Justice Group, Attorney-General's Department, *Committee Hansard*, Canberra, 10 August 2015, p. 2.

53 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 2.

Australia's leading constitutional lawyers and the peak representative body of the Australian legal profession, the Law Council of Australia, and the representative body of Australian barristers, the Australian Bar Association. The Committee has referred to some of this material earlier in this chapter.

3.38 The Committee also notes the statements by the Attorney-General that the Commonwealth Solicitor-General was consulted and that it was the Government's intention to ensure the Bill is consistent with 'the rule of law and within the Constitution'.[54]

3.39 The Committee requested further information from the Government about the constitutionality of the proposed Bill.[55] While the Government declined to provide the Solicitor-General's advice to the Committee, a letter from the Attorney-General, Senator the Hon George Brandis QC, was made available to the Committee and approved for publication. The letter stated:

> the Government has received advice from the Solicitor-General, Mr Justin Gleeson SC, that, in his opinion, there is a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the draft Bill.

3.40 The Attorney-General's letter is included at Appendix D.

3.41 Some members of the Committee continued to hold concerns about the ability of the proposed legislation to withstand constitutional challenge. These members considered that, although it is ultimately a matter for the High Court to determine the constitutionality of any Bill, it is incumbent on governments and parliamentarians to legislate in a manner which minimises the risk of a successful constitutional challenge. This is particularly so where the Parliament is considering national security legislation that impacts on the fundamental rights of individuals. The concerns of a minority of members were not allayed by the qualified assurances in the Attorney-General's letter. The view of these members is that without the benefit of substantive explanation from the Government, the very serious concerns raised in evidence remain unanswered.

3.42 In recommending that the Bill be passed, with amendments, this minority of members of the Committee with outstanding concerns about the

---

54 Senator the Hon George Brandis QC, Attorney-General, Transcript of Press Conference, Canberra, 23 June 2015.

55 Hon Phillip Ruddock MP, *Committee Hansard*, Canberra, 5 August 2015, p. 59; Hon Bruce Scott MP, *Committee Hansard*, Canberra, 5 August 2015, p. 59; Hon Anthony Byrne MP, *Committee Hansard*, Canberra, 5 August 2015, p. 59; Hon Mark Dreyfus QC MP, *Committee Hansard*, Canberra, 5 August 2015, pp. 59-60.

constitutionality of the Bill have relied on the assurances made by the Government as to the Bill's ability to withstand constitutional challenge.

3.43 A majority of the Committee were reassured by the Attorney-General's letter, which sets out advice the Government received from the Solicitor-General, namely that there is a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the Bill.

4

Matters of principle and effectiveness

4.1 This chapter summarises issues raised in evidence to the inquiry that relate to matters of principle and the effect of the provisions in the Bill. It includes discussion and analysis of:

- different conceptions of the meaning and value of Australian citizenship,
- the effectiveness of the measures in the Bill in combating terrorism and protecting the Australian community, and possible unintended consequences, and
- Australia's international obligations relating to statelessness, human rights, combatting terrorism, children and humanitarian assistance.

The meaning and value of Australian citizenship

4.2 The existing preamble to the *Australian Citizenship Act 2007* (the Citizenship Act) states that 'Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia', and that Australian citizenship is a 'common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity'. The preamble also states that 'persons conferred Australian Citizenship enjoy these rights and undertake to accept those obligations' by:

- pledging loyalty to Australia and its people,
- sharing their democratic beliefs,
- respecting their rights and liberties, and
- upholding and obeying the laws of Australia.

4.3 The conception of citizenship embodied in the preamble to the Citizenship Act is expanded on in the Explanatory Memorandum to the Bill, which

states that citizenship 'does not simply bestow privileges or rights, but entails fundamental responsibilities'. It adds that citizens 'owe their loyalty to Australia and its people', regardless of whether they acquire citizenship automatically through birth in Australia or through application.[1]

4.4 In his second reading speech, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP said:

> There is no concept of 'constitutional citizenship' in Australia and legislation has long provided that Australian citizens by birth can lose their citizenship in certain circumstances, such as fighting a war against Australia or, prior to 2002, becoming a citizen of another country.[2]

4.5 The purpose clause of the Bill recognises that Australian citizens may demonstrate that they have severed the common bond of citizenship and repudiated their allegiance to Australia through certain conduct incompatible with the shared values of the Australian community.[3]

4.6 The Explanatory Memorandum states that the Bill applies to those who have chosen to put themselves outside the formal Australian community by engaging in acts that demonstrate that they are no longer loyal to Australia and have severed their bond to the Australian community.[4]

4.7 Concurrent to this Committee's inquiry, the Hon Phillip Ruddock MP and Senator the Hon Concetta Fierravanti-Wells have led public consultations on a discussion paper entitled *Australian Citizenship, Your Right, Your Responsibility* where the meaning of citizenship, and what it entails, have been explored by a range of stakeholders.

4.8 A number of participants to this inquiry contributed their views on the meaning and value of citizenship. For example, Amnesty International Australia submitted that citizenship is 'not merely someone's legal status and entitlement to live in a country', but that it

> forms a key part of the individual's relationship with the state, creating both rights and obligations. As such citizenship lays the foundation for the protection of a wide range of human rights.[5]

4.9 The Law Council of Australia submitted that citizenship was 'critical' to the Parliament and Government's responsibility to ensure the security of Australia and its people, as it 'provides formal membership of the

1 Explanatory Memorandum, p. 1.

2 *House of Representatives Hansard*, 24 June 2015, p. 7370.

3 Department of Immigration and Border Protection, *Submission 37*, p. 1.

4 Explanatory Memorandum, p. 1.

5 Amnesty International Australia, *Submission 41*, p. 6.

Australian community, which comes with privileges and responsibilities'. The Law Council added that

> citizenship cessation removes those privileges and has significant consequences for a person, including the potential for: deportation; detention; prevention from entering Australia; and no longer receiving consular assistance.[6]

4.10 The Federation of Ethnic Communities' Councils of Australia (FECCA), highlighted the importance of citizenship as an element of social cohesion, and its particular value to migrant groups:

> Becoming a citizen provides a gateway to full participation in the Australian community, including access to voting rights, other forms of political participation, freedom of movement and employment in the public service and Australian Defence Force. Citizenship is also a symbol of acceptance into the Australian community and is highly valued amongst immigrant groups, particularly refugees.[7]

4.11 The Refugee Council of Australia similarly explained that citizenship has 'particular significance for refugee and humanitarian entrants', who are, by definition, unable to return to their country of origin because of a well-founded fear of persecution or other forms of serious harm. Australian citizenship is therefore often the first effective and durable form of protection that many refugees receive, and is celebrated and cherished by them. For those who know what it is like to live without freedom and democracy, obtaining citizenship in a free and democratic country can be particularly meaningful.[8]

Number of dual nationals/citizens in Australia

4.12 It is not known precisely how many Australian citizens also hold the citizenship of another country. In its submission, FECCA cited estimates from the year 2000 that there were between four and five million Australian dual citizens.[9] At a public hearing, FECCA indicated that the current figure would 'certainly' be more than this, noting that approximately a quarter of Australia's population was born overseas and another quarter have at least one parent born overseas.[10]

---

6 Law Council of Australia, *Submission 26*, p. 3.

7 Federation of Ethnic Communities' Councils of Australia (FECCA), *Submission 12*, p. 1.

8 Refugee Council of Australia, *Submission 22*, p. 1.

9 FECCA, *Submission 12*, p. 2.

10 Ms Gulnara Abbasova, Director, FECCA, *Committee Hansard*, Canberra, 4 August 2015, p. 31.

4.13 It was also noted by a number of participants in the inquiry that a large number of dual citizens may be unaware of the fact that they hold another citizenship if it was acquired automatically through operation of a foreign law.[11] This is further discussed in Chapter 7.

4.14 When asked about the number of dual citizens in Australia, Professor Triggs of the Australian Human Rights Commission highlighted the impact of the Bill on Australia's multicultural society:

> I think we could say as a matter of basic common sense that it is going to cover many, many millions in the Australian community.[12]

4.15 The Department of Immigration and Border Protection explained the difficulties in estimating the precise number of dual citizens, and noted that the figure was 'not captured in the census because it is not a matter directly within the competence of any agency or department'.[13]

4.16 The Law Council of Australia noted that while the selective application of the Bill to dual nationals was 'unfortunate', it was also 'unavoidable' due to Australia's obligation to avoid making persons stateless.[14]

Is citizenship a right or privilege?

4.17 Submitters proposed different views as to whether citizenship is a right and a permanent status that cannot be revoked for actions undertaken while a person is a citizen, or whether citizenship is a privilege conferred by law, with Parliament having the power to define the way that privilege is acquired and lost.

4.18 Some submissions suggested that citizenship is a right that should not be vulnerable to loss in the manner proposed in the Bill. The Muslim Legal Network (NSW) considered that 'fundamentally, citizenship is a right and not a political tool to be commanded by the Parliament of the day at its wide discretion'.[15]

4.19 Blueprint for Free Speech submitted that:

---

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

12 Professor Gillian Triggs, *Committee Hansard*, Canberra, 4 August 2015, p. 17.

13 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 5 August 2015, p. 57. Australia's statelessness obligations are discussed later in this chapter.

14 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 9. See UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

15 Muslim Legal Network (NSW), *Submission 27*, p. 4.

> Citizenship is an inherent right given to a person that is fundamental to the concept of a modern society. There is no chicken and egg debate here. Before government, before the rule of law, before all other political concepts is the notion and meaning of 'citizen'. To take that away from someone is not the abstract removal of some esoteric right. To use an analogy, it is removing the lowest brick of a brick house. Without it, the house crumbles. This proposal to take away a citizen's (one cannot even discuss how important the concept of a citizen is without using the word itself) is plainly outrageous.[16]

4.20 Other submissions referred to High Court cases,[17] and to the statement by Chief Justice Gleeson that:

> Parliament has the power to determine the legal basis by reference to which Australia deals with matters of nationality and immigration, to create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode.[18]

4.21 Both the Human Rights Committee of the Law Society of NSW and the NSW Society of Labor Lawyers submitted that Parliament's power with respect to citizenship is not unlimited. They noted comments by Justice McHugh, sitting as a single judge, that:

> No doubt the Parliament does not have unlimited power to declare the conditions on which citizenship or membership of the Australian community depends. It could not declare that persons who were among 'the people of the Commonwealth' were not 'people of the Commonwealth' for any legal purpose … [A]s long as it does not exclude from citizenship, those persons who are undoubtedly among 'the people of the Commonwealth', nothing in the Constitution prevents the Parliament from declaring who are the citizens of the Commonwealth, which is simply another name for the Constitutional expression, 'people of the Commonwealth'.[19]

---

16 Blueprint for Free Speech, *Submission 18*, p. 2.

17 *Minister for Immigration and Multicultural Affairs; Ex Parte Te* (2002) 212 CLR 162; [2002] HCA 48; *Singh v Commonwealth* (2004) 222 CLR 322; [2004] HCA 43; *Hwang v Commonwealth* (2005) 80 ALJR 125; [2005] HCA 66; and *Koroitamana v Commonwealth* (2006) 227 CLR 31; [2006] HCA 28.

18 *Re Minister for Immigration and Multicultural Affairs: Ex parte Te* (2002) 212 CLR 162 at [31]. Referred to by Human Rights Committee, Law Society of NSW, *Submission 11*, p. 3; NSW Society of Labor Lawyers, *Submission 25*, p. 9.

19 *Hwang v Commonwealth* (2005) ALR 83 at [18].

The effectiveness of the proposed approach

4.22 The Explanatory Memorandum sets out that by providing for loss of citizenship of persons who have repudiated their allegiance to Australia through their conduct, the measures in the Bill are intended to protect the Australian community from harm, in addition to deterring persons from engaging in terrorist-related conduct.[20]

4.23 In a public submission to the inquiry, the Department of Immigration and Border Protection provided the following overview of the current security threat:

> Australia faces a heightened and complex security environment. Since the terror level was raised last September, there have been two terrorist attacks. Twenty-three Australians have been charged as a result of eight counter-terrorism operations—almost one third of all terrorism-related arrests since 2001. Some 120 Australians are known to be fighting with terrorist organisations. Around 155 Australians are known to be supporting them with financing and recruitment. About 25–30 Australians have so far been killed in Syria and Iraq as a result of their involvement in the conflict.[21]

4.24 Participants in the inquiry questioned whether providing for the loss of citizenship of dual citizens involved in terrorism-related conduct would be an effective deterrent and also suggested there could be unintended social consequences arising from this approach.

Effectiveness as a deterrent

4.25 Some participants queried whether the Bill would fulfil the intended purpose of improving community safety and deterring terrorism-related conduct.[22] For example, Mr Paul McMahon submitted:

> The activities with which the amendments deal, which would be committed in Australia, are already liable to substantial punishment upon conviction. Those who have travelled overseas to carry out proscribed conduct (new Section 35) would know they risk criminal prosecution and substantial punishment if they ever return to Australia. Presumably, their Australian passports would

20 Explanatory Memorandum, pp. 1, 4, 14.

21 Department of Immigration and Border Protection, *Submission 37*, p. [2].

22 Professor Ben Saul, *Submission 2*, p. 2; Bruce Baer Arnold, *Submission 6*, p. 4; Paul McMahon, *Submission 7*, pp. 7–8; Blueprint for Free Speech, *Submission 18*, p. 6; Refugee Council of Australia, *Submission 22*, p. [3]; UNICEF Australia, *Submission 24*, p. 22; Councils for civil liberties across Australia, *Submission 31*, p. 3; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 43.

> already have been cancelled and they would be on a watch list making an unnoticed return quite unlikely. It is not clear that a significant beneficial effect would be gained by terminating their citizenship prior to their return and conviction.[23]

4.26 Professor Ben Saul of the University of Sydney similarly submitted that there was 'no evidence' terrorists would be deterred and that

> [i]f the existing criminal offences carrying penalties of life imprisonment—and the threat of death by military operations overseas—do not deter significant numbers of Australians from fighting overseas, it is hard to see why loss of Australian citizenship would provide anything more than marginal deterrence.[24]

4.27 On the other hand, when asked whether the Bill would have a deterrent effect, the President of the Australian Human Rights Commission, Professor Gillian Triggs, raised concerns that the Bill would have a 'chilling effect' on the behaviour of dual nationals more generally:

> I would think that a bill with such broad language, and the adoption of terms and phrases that we have never had in Australia before, will have a chilling effect. Presumably, people will be much more careful that they do not do anything which comes within the terms of the proposed bill, because so many millions of Australians could potentially be affected by this. So I think that it is at least rational to say that the current language and structure of the bill could easily have a chilling effect on people's behaviour. That may very well be what the government desires. But I think that needs to be spelled out properly to the public and spelled out in the bill itself.[25]

Committee comment

4.28 The Committee notes concerns raised by some participants in the inquiry that the deterrent effect of the Bill may be limited. However, the Committee notes that the primary intention of the Bill, as noted in the Explanatory Memorandum and summarised in Chapter 2 of this report, is the protection of the Australian community and the upholding of its values.

---

23 Paul McMahon, *Submission 7*, p. 8.

24 Professor Ben Saul, *Submission 2*, p. 2.

25 Professor Gillian Triggs, *Committee Hansard*, Canberra, 4 August 2015, p. 12.

Social impacts

4.29 While noting that the Bill is directed to dual citizens, a common concern raised was that the Bill would result in a 'two class' system of citizenship. In such a system the continuing Australian citizenship of dual nationals would be less secure than that for sole Australian citizens, potentially affecting social cohesion.[26] For example, Dr Rayner Thwaites of the University of Sydney submitted that the Bill 'clearly establishes dual citizens as "second-class" citizens, liable to suffer additional penalties and vulnerable to detrimental measures not suffered by those holding Australian citizenship alone'. Dr Thwaites argued this would be 'corrosive of equality between citizens and the existence of a "common bond" between all Australians', and that

> [t]he Bill as introduced destabilises Australian citizenship, introducing a dynamic whereby a dual citizen's legal status as an Australian citizen is vulnerable to removal for ill-specified conduct, via a non-specified process, attended by non-specified legal protections. To ignore, or be dismissive of, the very real sense in which this is likely to leave many Australians feeling less safe and secure would be irresponsible and to our lasting detriment as a country.[27]

4.30 Similarly, Professor Kim Rubenstein expressed concern that the proposed amendments would change the 'proper balance' in the relationship between the executive and the individual, and the nature of the membership in the Australian community.[28] She further stated:

> I see citizenship as being something much more profound. There are better ways and more appropriate ways for us as a nation to be dealing with the concerns about terrorism in a globalised world. I think that even more particularly, in relation to the fact that this bill ultimately is targeting dual citizens in a multicultural nation, the consequence of that will actually be counterproductive to the very principles of trying to create an inclusive society where members of the community are not attracted to terrorist activities

26 Michael Evans, *Submission 5*, p. [1]; Paul McMahon, *Submission 7*, pp. 7–8; FECCA, *Submission 12*, pp. 1–2; Professor Helen Irving, *Submission 15*, p. 7; Dr Rayner Thwaites, *Submission 16*, pp. [11–12]; Refugee Council of Australia, *Submission 22*, pp. [1–3]; Centre for Comparative Constitutional Studies, *Submission 29*, p. 10; Councils for civil liberties across Australia, *Submission 31*, pp. 3–4; Professor Kim Rubenstein, *Submission 35*, p. 6; Migration Law Program, ANU College of Law, *Submission 40*, pp. 5–6.

27 Dr Rayner Thwaites, *Submission 16*, pp. [11–12].

28 Professor Kim Rubenstein, *Committee Hansard*, Canberra, 4 August 2015, p. 37.

> or to activities there are against the Western, liberal democratic system.[29]

4.31 As noted earlier, FECCA considered pathways to citizenship to be an important element of social cohesion that is highly valued amongst immigrant groups, particularly refugees, as a symbol of acceptance into the Australian community. FECCA stated that the Bill would 'disproportionally affect migrants and their children'.[30]

4.32 The Refugee Council of Australia similarly emphasised the significance of citizenship to refugees. The Council registered its concern that the measures in the Bill would undermine the principles of citizenship and the strength of the bond between people and their country.[31]

4.33 Inquiry participants also told the Committee that the singling out of dual nationals would cause division and risk further marginalising sections of the community, potentially contributing to radicalisation.[32] For example, Mr Michael Evans submitted that the Bill would be 'unduly divisive in what has been to date a relatively harmonious settler society'. He argued that the measure may be counter-productive because it risked 'alienating people who would otherwise remain loyal Australian citizens'.[33]

4.34 Blueprint for Free Speech made a similar point in its submission:

> We know that extremism is fuelled by disassociation, disempowerment, disenfranchisement and poverty. That is an uncontroversial view. To remove citizenship from someone only seeks to increase each of these factors. It's feeding the beast, rather than taming it.[34]

4.35 The Muslim Legal Network (NSW) noted the potential for a particular impact on the Muslim community, which it considered had been affected by a 'rise in Islamophobia and further marginalisation' over the previous 12 months:

> We are of the view that it is the Muslim community that will be most affected by these laws. These proposed laws will once again place Muslims under the spotlight and again questions the place of

29 Professor Kim Rubenstein, *Committee Hansard*, Canberra, 4 August 2015, p. 37.

30 FECCA, *Submission 12*, p. 1.

31 Refugee Council of Australia, *Submission 22*, pp. [1–2].

32 Michael Evans, *Submission 5*, p. [1]; Bruce Baer Arnold, *Submission 6*, p. 4; Paul McMahon, *Submission 7*, pp. 7–8; Blueprint for Free Speech, *Submission 18*, p. 6; Robert Hayward, *Submission 19*, p. [1–2]; Refugee Council of Australia, *Submission 22*, p. 8; Muslim Legal Network (NSW), *Submission 27*, pp. 5–6; Islamic Council of Queensland, *Submission 33*, p. [2]; Professor Kim Rubenstein, *Submission 35*, p. 2.

33 Mr Michael Evans, *Submission 5*, p. [1].

34 Blueprint for Free Speech, *Submission 18*, p. 6.

> Muslims in Australia. These objections and concerns of Muslim community leaders and organisations are expressed as concerned Australian citizens, not a sub group of society.[35]

Reduced ability to bring terrorists to justice

4.36 Some participants in the inquiry raised concerns that removing the citizenship of dual nationals fighting overseas would mean that Australia would no longer have the ability to bring those persons to justice for terrorism offences, potentially threatening international security and Australian interests abroad.[36] For example, Professor Ben Saul of the University of Sydney submitted:

> Foreign fighters who wish to return to Australia would no longer be subject to law enforcement measures in Australia designed to neutralize or contain the threat they pose, such as by arrest, prosecution and imprisonment; imposition of anti-terrorism control orders; surveillance; or deradicalisation and rehabilitation strategies.
>
> Foreign fighters who wish to remain overseas would no longer be subject to efforts by Australian law enforcement to secure their return to face justice in Australia, such as by extradition, mutual legal assistance, or removal/deportation to Australia.
>
> …
>
> It also threatens Australian national security because Australian terrorists would remain free to plot attacks against Australian interests abroad, including Australian embassies and diplomats, tourists and business people, and companies. Such terrorists also remain free to radicalize, recruit, and train others within Australia through the internet.[37]

4.37 On the other hand, the Australia Defence Association submitted that while 'ideally every traitor would be punished by convicting them in an Australian court', the necessity for a conviction would cause 'insuperable moral and practical difficulties'. The Association specifically highlighted:

- the difficulty of capturing offenders and bringing them back to Australia for trial,

35 Muslim Legal Network (NSW), *Submission 27*, pp. 5–6.

36 Professor Ben Saul, *Submission 2*, pp. 1–2; Ms Jenny Rae, *Submission 4*, p. [1]; Australian Lawyers for Human Rights, *Submission 20*, p. 4; Councils for civil liberties across Australia, *Submission 31*, pp. 3–4; Mr John Ryan, *Submission 32*, p. [1].

37 Professor Ben Saul, *Submission 2*, pp. 1–2.

- difficulties with the admissibility of evidence obtained from war zones into Australian courts,
- the need to overcome an 'impractical precedent' that provided a 'get-out-of-gaol-free' card to a previous terrorism suspect,
- the unfairness to Australian defence personnel who are confronting such 'traitors' on the battlefield, and
- the need to 'deter and actively counter treachery', not just punish it afterwards.[38]

Alternative approaches

4.38 Some inquiry participants suggested alternative approaches that they considered would be more effective in addressing the threat of terrorism. For example, the Refugee Council of Australia submitted that the Government's focus in combatting terrorism should be on promoting the inclusion and participation of all people in Australian society. It recommended further consideration be given to strategies to promote inclusion and participation and that the Government 'review policies which adversely affect the capacity of refugee and humanitarian entrants to settle successfully in Australia and contribute to their communities'.[39]

4.39 In its submission, UNICEF Australia called for the Government to 'adequately resource targeted programs to rehabilitate and reintegrate Australian citizens who have been associated with armed forces or armed groups'.[40] UNICEF expanded on this proposal at a public hearing:

> In our view, measures that punish or further isolate already vulnerable children will fail both the individual child and any national security efforts. By doing so, we are simply building a richer recruitment pool for extremist groups … In UNICEF's view, the best option for children associated with armed conflict is a safe return, which means demobilisation, psychosocial support, re-education, rehabilitation and, eventually, reintegration. While the recovery process is intensive, it is the best success measure to prevent children being re-recruited. UNICEF carries out this work globally with considerable success.[41]

38 Australia Defence Association, *Submission 8*, pp. 10–11.

39 Refugee Council of Australia, *Submission 22*, pp. [8–9].

40 UNICEF Australia, *Submission 24*, p. 25.

41 Dr Norman Gillespie, Chief Executive Officer, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, pp. 1–2.

4.40 Similarly, Blueprint for Free Speech argued that a focus on rehabilitation would be a more effective response to the challenge of 'foreign fighters'. It highlighted the example of Denmark, which

> has opted for a complex and multi-tiered approach to engagement with the communities that produce the 'ISIS Recruits'. Moreover, upon their return to Denmark, those that have fought with extremist forces are repatriated in a manner that seeks rehabilitation and not punishment, including psychological support to re-enter society and safe avenues for debriefing any horrors they may have seen. Hopefully this short-circuits any acting out of those horrors in the society to which they return. That principle is consistent with the Australian approach to criminal law, which seeks above all else to rehabilitate criminals such that they do not become recidivists.[42]

Committee comment

4.41 The Committee notes concerns raised by some inquiry participants that the Bill may have a marginalising effect on sections of the Australian community. The Committee fully supports prevention strategies and efforts to promote social cohesion, and considers these are necessary measures to address terrorism threats.

4.42 The Committee has previously recognised the heightened security environment in Australia. In its inquiry into the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014,* the Committee noted:

> Throughout its inquiry, the Committee was very mindful that its review of the proposed legislation has coincided with a heightened level of security threat to Australians and our interests overseas. As ASIO and the AFP highlighted to the Committee in their evidence, a major reason for this increased threat level is Australians travelling overseas to train with, fight for or otherwise support extremist groups, and the risks posed by those persons on their return to Australia. The Committee heard that such persons are likely to be further 'radicalised', with the result that they are both more able and more willing to commit terrorism offences.[43]

4.43 In this inquiry, the Committee heard that the measures proposed in the Bill comprise 'part of a larger consideration of counter-terrorism measures

42 Blueprint for Free Speech, *Submission 18*, p. 5.

43 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014,* Canberra, October 2014, pp. 185–186.

associated with the phenomenon known as foreign fighters'.[44] The Explanatory Memorandum noted that the Government is taking a multi-faceted approach to countering terrorism threats, including:

- strengthening coordination of agencies,
- introducing initiatives to counter violent extremism and manage the return of foreign fighters, and
- improving community understanding of the threat level.[45]

4.44 The Explanatory Memorandum states that cessation of Australian citizenship is part of the Government's response, and notes that the existing revocation powers in the *Australian Citizenship Act 2007* are 'inadequate to address the Government's concerns in relation to persons who have acted contrary to their allegiance to Australia by engaging in terrorist-related conduct.'[46]

4.45 In evidence, the Committee was informed that the measures proposed in the Bill would give agencies additional capacity in this heightened security environment.[47]

4.46 The Committee recognises that there are a substantial and growing number of foreign fighters. Events in the last twelve months have also demonstrated a growth in attack planning in Australia. The Committee accepts that there is a significantly enhanced risk of an event occurring and accepts that measures are required to address the threats terrorism poses to the Australian community. The Committee therefore considers it appropriate that persons who clearly repudiate their allegiance to the Australian community by engaging in serious terrorism-related conduct against Australia or Australian interests should no longer have the right to call themselves Australian citizens.

Australia's international obligations

4.47 The Bill engages a number of Australia's international obligations under international law. These can be broadly grouped into the following categories:

- statelessness,
- human rights,

44 Mr Michael Pezullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard,* 5 August 2015, p. 57.

45 Explanatory Memorandum, p. 1.

46 Explanatory Memorandum, p. 1.

47 *Classified Committee Hansard,* 5 August 2015, pp. 5, 6.

- children,
- combatting terrorism, and,
- humanitarian.

Statelessness obligations

4.48 The *Convention on the Reduction of Statelessness 1961* (Statelessness Convention) entered into force on 13 December 1975,[48] and complements the earlier *Convention on relating to the Status of Stateless Persons 1954*. Australia acceded to both conventions in December 1973. In combination, these two treaties form the foundation of the international legal framework to address statelessness.

4.49 The Statelessness Convention sets out rules to limit the occurrence of statelessness and gives effect to Article 15 of the *Universal Declaration of Human Rights*, which recognises that 'everyone has the right to nationality'.[49]

4.50 The Statelessness Convention provides that States shall not deprive people of their nationality so as to render them stateless unless the citizenship was acquired by fraud.[50] The Convention does permit, however, renunciation of citizenship in circumstances where the person concerned possesses or acquires another nationality.[51]

4.51 The Statelessness Convention also provides that States can deprive nationality where a person has committed acts seriously prejudicial to the vital interests of the state even if it leads to statelessness. However, this is only lawful if the state's law already provided for such revocation at the time of accession to the Convention and the state made a declaration to that effect. [52]

---

48 *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175.

49 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Article 15.

50 *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175, Article 9.

51 *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175, Article 7.

52 *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175, Article 8(3).

There is a distinction between a declaration and a reservation to a treaty. A reservation is a statement whose operation is aimed at excluding or modifying the legal effect of a treaty provision with regard to the country that is making the reservation. In contrast, a declaration (also known as an interpretive declaration) is a statement made by a country that is a party to a treaty in order to clarify its understanding of a matter contained in or the interpretation of a

4.52 In contrast to other signatories such as the United Kingdom and Brazil,[53] Australia made no declaration or reservation to the Convention. If a signatory State had made a declaration or reservation to the Convention, the deprivation of citizenship must be in accordance with law.[54]

Application to Bill

4.53 The Explanatory Memorandum states that the amendments 'will not result in a person becoming stateless [as it] only applies to persons who are a national or citizen of a country other than Australia, that is, dual citizens, and who would therefore not be rendered stateless if their Australian citizenship were to cease'.[55]

4.54 The Department of Immigration and Border Protection also stated:

> A person cannot be rendered stateless by the loss of their Australian citizenship. The references in the Bill to 'a national or citizen' of a country other than Australia is consistent with the existing revocation provisions in the *Citizenship Act 2007* and is intended to reflect the fact that the terms are often used interchangeably internationally, with the result that both are covered.[56]

4.55 As the Department's statement indicates, *nationality* and *citizenship* can be used interchangeably, but critically, these two terms can refer to two distinct forms of legal status: a person can be a national of a country but not necessarily a citizen.[57]

---

particular provision in a treaty or indeed the object of the whole treaty. Unlike a reservation, a declaration does not purport to exclude or modify the legal effects of a treaty.

A list of reservations submitted by State parties to the Convention on the Reduction of Statelessness 1961 is available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en>, viewed 14 August 2015.

53 The **United Kingdom** lodged a reservation to Article 8, stating that it retains the right to deprive a British national of its citizenship where the person has engaged in conduct that is 'seriously prejudicial to the vital interests' of Britain. As a result of this reservation, legislation passed by the UK Parliament in early 2015 would not fall foul of Britain's obligations under the Convention. **Brazil** lodged a late interpretive declaration with respect to Article 8(3). Brazil acceded to the Convention in October 2007, and the Brazilian Parliament approved the accession in late 2007 with the caveat permitted in Article 8(3) was exercised. The Brazilian Government lodged an interpretive declaration in December 2009 permitted under Article 8(3) to allow for the deprivation of nationality on the grounds of conduct seriously prejudicial to the vital interests of the Brazilian state.

54 *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175, Article 8(4).

55 Explanatory Memorandum, p. 2.

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

57 Law Council of Australia, *Submission 26*, p. 9; Australian Lawyers for Human Rights, *Submission 20*, p. 5. For example, a person born in an outlying possession of the United States

4.56 Australian Lawyers for Human Rights argued that this could mean, in circumstances where a dual national is a national of another country but not a citizen, the Bill could operate automatically to remove Australian citizenship leaving a person without any other citizenship.[58] The use of the phrase 'national or citizen' may unintentionally render a person stateless in breach of Australia's obligations under the Statelessness Convention.[59]

4.57 The Refugee Council of Australia expressed concerns that a dual citizen or national who lost their citizenship under the proposed sections of the Bill, may nonetheless become 'de facto stateless if they do not enjoy effective citizenship in their other countries of nationality'.[60] The Council elaborated:

> [W]e could potentially see the same sort of problem if we have a person who is nominally a citizen of another country but, in effect, cannot practically exercise their citizenship rights. There is certainly a risk in that case of a person becoming de facto stateless.[61]

4.58 The Law Council of Australia commented that the selective application of the legislation to dual nationals/citizens only 'is unfortunate but unavoidable' because of Australia's obligations under the Statelessness Convention.[62]

4.59 To address these concerns, the Executive Council of Australian Jewry recommended that the Bill be amended to clarify that a person affected by the Bill would need to have an 'indefeasible right [to citizenship in another country] and also a right of residence'.[63]

---

is an American national but not a citizen. American non-citizen nationals may obtain American passports (if eligible) and owe permanent allegiance to the United States, but cannot vote in an election or hold office.

58 Australian Lawyers for Human Rights, *Submission 20*, p. 5.

59 Australian Lawyers for Human Rights, *Submission 20*, p. 5.

60 Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 20. See also, Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 17, and Ms Eugenia Grammatikakis, Acting Chair, Federation of Ethnic Communities' Councils of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 31.

61 Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 21; See also Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 1.

62 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 9. See also, Professor Helen Irving, Committee Hansard, Canberra, 5 August 2015, p. 54.

63 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 27.

4.60 FECCA was concerned by the Bill's application to humanitarian entrants who hold Australian citizenship, but also continue to hold citizenship in their country of origin that was the site of their persecution. Returning a person to a State where they will face persecution would be in breach of Australia's obligations under the *Convention Relating to the Status of Refugees*.[64]

4.61 FECCA stated 'they would not be able to return there safely and would possibly end up in immigration detention awaiting a safe return'.[65] More specifically, FECCA was concerned that there is 'no safeguard' in relation to Australian citizens who were formally humanitarian entrants, and was supportive of the consideration of such an amendment in the Bill.[66]

4.62 The Department did not address the specific proposals put forward by these stakeholders. However, the Department did clarify that if a person were to lose their citizenship under one of the proposed sections of the Bill, the issue of their reception in another country 'really goes to their treatment when and if they become a non-citizen' under the *Migration Act 1958*. Mr Michael Pezzullo, Secretary of the Department of Immigration and Border Protection stated:

> In how you then deal with that person, it is not that they are stateless, because they have another citizenship; [it] is whether or not they can be removed. Just to be very strictly accurate about it, that goes to the operation of the *Migration Act* not the *Australian Citizenship Act*.[67]

4.63 The issue of possible indefinite detention is discussed in Chapter 7.

Human rights obligations

4.64 Significant concerns regarding the Bill's engagement with human rights were raised by participants in the inquiry. In addition, the Bill's engagement with human rights has been reported on by two parliamentary committees charged with this function. The Parliamentary Joint Committee on Human Rights (PJCHR) reported to the Parliament on

64 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

65 Ms Eugenia Grammatikakis, Acting Chair, Federation of Ethnic Communities' Councils of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 31.

66 Ms Eugenia Grammatikakis, Acting Chair, Federation of Ethnic Communities' Councils of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 31.

67 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 5.

11 August 2015,[68] and the Senate Standing Committee for the Scrutiny of Bills released an Alert Digest on 12 August 2015.[69]

4.65 The PJCHR and the Scrutiny of Bills Committee both requested that the Minister provide additional information addressing how the measures contained in the Bill are necessary to achieve the legitimate objective of national security, and are proportionate to achieving that legitimate objective. The information to be provided by the Minister in response to these reports will assist in informing the Parliament in its debate on the Bill.

4.66 A number of submitters to this inquiry raised human rights concerns and these are summarised in the following sections. The Bill's engagement of human rights occurs in two distinct ways: first, substantive human rights flowing from the loss of citizenship, and secondly, procedural or process rights that flow from the automatic loss of citizenship from conduct (separate from the loss of citizenship upon a conviction).[70]

4.67 As identified by the PJCHR, the Bill engages the following human rights:

- right to freedom of movement,[71]
- right to a private life,[72]
- protection of the family,[73]
- right to take part in public affairs,[74]
- right to liberty,[75]
- obligations of non-refoulement,[76]
- right to equality and non-discrimination,[77]
- right to a fair hearing and criminal process,[78]
- prohibition against retrospective criminal laws,[79]
- prohibition against double punishment,[80]

68 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: twenty-fifth report of the 44th Parliament*, 11 August 2015.

69 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2015*, 12 August 2015.

70 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament: Human rights scrutiny report*, 11 August 2015.

71 Article 12 of the ICCPR.

72 Article 17 of the ICCPR.

73 Articles 17 and 23 of the ICCPR and Article 10 of the ICESCR.

74 Article 25 of the ICCPR.

75 Article 9 of the ICCPR.

76 Articles 6 and 7 of the ICCPR, and the Convention Against Torture (CAT).

77 Article 26 of the ICCPR.

78 Article 14 of the ICCPR.

79 Article 15 of the ICCPR.

- rights of children,[81]
- right to work,[82]
- right to social security,[83]
- right to an adequate standing of living,[84]
- right to health,[85] and
- right to education.[86]

4.68 A number of submissions raised concerns about the Bill's engagement with these human rights.[87] However, three specific rights were of central concern: right to enter one's own country; procedural fairness rights; and, protection against retrospective laws. These are discussed below.

Substantive rights

4.69 The *International Covenant on Civil and Political Rights* (ICCPR) provides that 'no one shall be arbitrarily deprived of the right to enter his own country'.[88] The Australian Human Rights Commission advised that meaning of one's 'own country' in the ICCPR is 'broader than that of nationality. It includes non-nationals who have special ties or an enduring connection to a particular country'.[89]

4.70 The Australian Human Rights Commission further explained:

> The mere fact that the Minister deprived an Australian of citizenship would not have the result that Australia ceased to be that person's 'own country'. As noted above, the proposed provisions would apply to people born in Australia, to Australian parents, who have never left Australia or have left Australia for only brief periods …
>
> The proposed provisions would apply both to conduct that occurred within Australia and to conduct overseas. Loss of

80 Article 14(7) of the ICCPR.

81 Convention on the Rights of the Child.

82 Articles 6, 7, and 8 of the ICESCR.

83 Article 9 of the ICESCR.

84 Article 11 of the ICESCR.

85 Article 12 of the ICESCR.

86 Article 13 and 14 of the ICESCR and Article 28 of the CRC.

87 Ms Eugenia Grammatikakis, Acting Chair, Federation of Ethnic Communities' Councils of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 30; Ms Amy Lamoin, Chief Technical Advisor, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 2; Mr Guy Ragen, Government Relations Adviser, Amnesty International Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 26.

88 ICCPR, Article 12 (4).

89 Australian Human Rights Commission, *Submission 13*, p. 8.

> citizenship would be automatic and therefore, as a matter of law, instant. Administrative steps consequent on the loss of citizenship could be commenced at any time thereafter. An Australian could therefore lose their citizenship, or first suffer the consequences, either while in Australia or abroad …
>
> … it is clear that the loss of citizenship will be likely to lead to the interference with the right of people both to enter and to remain in their 'own country'—Australia.[90]

4.71 However, like most human rights, the right to enter one's own country 'is not absolute'. Any limitation on human rights, however, must also be lawful, necessary to achieve a legitimate objective, and proportionate to achieving that legitimate objective.

4.72 The Australian Human Rights Commission was of the view that the loss of citizenship under the Bill is 'highly likely to be arbitrary', identifying six reasons to support its conclusion:

- the Bill would result in automatic loss of citizenship, and therefore individual circumstances cannot be taken into account,
- the relative seriousness of the conduct is not taken into account (whether or not the loss of citizenship follows from a conviction or from conduct alone),
- the conduct that triggers loss of citizenship is not determined by a finding of a court to enliven that loss,
- there is no requirement to notify the affected person despite the seriousness of the consequences,
- loss may be retrospective and there is no limitation period for the offences that will lead to loss of citizenship, and
- the stated purposes of the Bill 'are plainly not sufficient to justify the extreme consequences of loss of citizenship … particularly … given the range of other measures available to combat risks to the community posed by terrorists'.[91]

4.73 At a public hearing, the Commission further noted that 'the notion of automaticity, where there is no capacity whatever to make a judgement, is seriously in breach of the rule of law and in breach of our human rights international obligations'.[92]

---

90 Australian Human Rights Commission, *Submission 13*, p. 8. See also, United Nations Human Rights Committee, *General Comment 27* (1999), UN Doc CCPR/C/21/Rev.1/Add.9, [21].

91 Australian Human Rights Commission, *Submission 13*, pp. 9–10.

92 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 16.

4.74 The Human Rights Committee of the Law Society of NSW similarly commented that proposed sections 33AA and 35 would be 'likely to result' in the arbitrary deprivation of this right as the sections do not consider individual circumstances; are engaged through alleged conduct rather than convictions; do not involve court hearings; and, the gravity of the penalty.[93]

4.75 Amnesty International Australia commented that, at a minimum, the Bill should be amended to 'ensure the legislation adheres to Australia's international legal obligations preserving the principle that stripping citizenship is both an extraordinary measure and a last resort'.[94] Amnesty further commented:

> We acknowledge that the choices before the executive and the legislature when it comes to policymaking on national security issues are not easy and rarely black and white … While states have an obligation to protect the security of their citizens, they also have an obligation to protect the human rights of their citizens. Loss of citizenship means that someone loses an array of human rights. Stripping an Australian of their citizenship is one of the most severe actions the Australian government can take against an Australian citizen.[95]

4.76 The Law Council of Australia also expressed concern that the procedures for losing citizenship and subsequent administrative action 'do not provide sufficient safeguards to accord with the rule of law, the presumption of innocence, the right to a fair trial, and the right of appeal'.[96]

4.77 The Australian Human Rights Commission was of the view that these difficulties could not be 'cured' by the Minister's personal, non-compellable discretionary power to exempt individuals from the operation of the Bill's provision. Specifically, the Commission argued that:

- the power cannot be exercised by an independent decision maker,
- natural justice is specifically excluded from the Minister's decision-making process,

---

93 Human Rights Committee, Law Society of NSW, *Submission 11*, p. 3.

94 Mr Guy Ragen, Government Relations Adviser, Amnesty International Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 26.

95 Mr Guy Ragen, Government Relations Adviser, Amnesty International Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 26.

96 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 1.

- there is no possibility of merits review of the Minister's decision to exempt and judicial review will be extremely limited,
- the Minister is not required to notify an affected person of any decision, and
- the Minister may rely on preliminary advice from ASIO not amounting to a security assessment, which therefore does not attract review rights in the Administrative Appeals Tribunal.[97]

4.78 The operation of the Minister's discretion to exempt a person from the Bill's operation is discussed in Chapter 7.

Procedural rights: right to fair trial and hearing

4.79 The Bill engages a number of procedural and process rights including the rights to a fair hearing and trial, and the right to an effective remedy. The right to a fair hearing and trial is protected by Article 14 of the ICCPR and applies to both criminal and civil proceedings. The right is concerned with procedural fairness and is therefore linked to concepts of equality in proceedings, and the right to public hearings by independent and impartial bodies.

4.80 The Statement of Compatibility with Human Rights contained in the Explanatory Memorandum states that the right to a fair hearing is not limited by the Bill:

> The proposal does not limit the application of judicial review of decisions that might be 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.[98]

4.81 The Parliamentary Joint Committee on Human Rights has argued in its report on the Bill that the Statement of Compatibility does not fully explain how the availability of judicial review and the potential for declaratory relief—both rights of appeal and not originating rights—would be sufficient for compatibility with the right to a fair hearing or right to a fair trial.[99]

97 Australian Human Rights Commission, *Submission 13*, p. 11.

98 Explanatory Memorandum, p. 31.

99 See Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament: Human rights scrutiny report*, 11 August 2015, p. 25.

4.82 The Committee specifically sought additional comment from the Department about the Bill's relationship to the rights to a fair hearing and trial. The response from the Department was that:

> The Government considers that the right to a fair trial and fair hearing are not limited by the proposal.[100]

4.83 Matters of procedural fairness are further discussed in Chapter 5.

Protection against retrospective criminal laws and imposition of heavier penalties

4.84 The ICCPR creates a protection for individuals against retrospective criminal laws and the imposition of heavier penalties than were applicable at the time of the conduct.[101] The Human Rights Committee of the Law Society of NSW was of the view that proposed section 35A may engage this right, as

> citizenship [under this provision] can be removed based on commission of one or more … criminal [acts] … The provision also applies to conduct occurring before its commencement. As such, it is likely to be regarded as a 'heavier penalty' than that 'applicable when the criminal offence was committed.[102]

4.85 The issues of retrospectivity and the imposition of heavier penalties are further examined in Chapter 6 of this Report.

Obligations to children

4.86 As a party to the *Convention on the Rights of the Child* (CRC), Australia has an obligation to treat the best interests of the child as a primary consideration in all actions concerning children.[103]

4.87 As the Explanatory Memorandum acknowledges, the CRC is engaged in two broad circumstances: in respect of a minor who engages in prescribed conduct, and in respect of the parent of a minor.[104] The Explanatory Memorandum further states that 'the proposed amendments apply to all Australian (dual citizens) regardless of age'.[105]

4.88 The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000)* (the Optional Protocol)

---

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

101 ICCPR, Article 15(1).

102 Human Rights Committee, Law Society of NSW, *Submission 11*, p. 3; see also Australian Human Rights Commission, *Submission 13*, p. 13.

103 *Convention on the Rights of the Child*, Article 3(1).

104 Explanatory Memorandum, p. 32.

105 Explanatory Memorandum, p. 32

provides that parties 'shall cooperate … in the rehabilitation and social integration of persons who are victims' as child soldiers. Australia has been a party to the Optional Protocol since September 2006. Individuals under 18 years of age, who engaged in hostilities with armed groups—such as those operating in Syria and Iraq—are likely to fall within the definition of a child solider and therefore attract the protection that the Optional Protocol provides.[106]

Application to Bill

4.89 The automatic cessation of children's citizenship has the potential to be inconsistent with the recognised rights of children.[107] For example, UNICEF Australia was of the view that the Bill, as currently drafted is not in line with Australia's international obligations under the CRC or Optional Protocol, commenting:

> [I]t is not aligned with our international obligations at all. UNICEF is very respectful of the great importance of governments taking all reasonable and necessary action to ensure the security of its citizens … But, again, it has to meet that test of what is reasonable, necessary and proportionate, and on that question of whether it is reasonable, necessary and proportionate to introduce a sweeping bill like this that does not take into account rule of law and that does not in any terms factor in core protection measures for children is very concerning. What is most important, if you are assessing the best interests of a child, is: are these measures necessary? And UNICEF's view is: not only are they not necessary; they will be ineffective in relation to the government's identified purpose.[108]

4.90 However the Australian Human Rights Commission noted that as the CRC has not been enacted into Australian law, Australian courts 'cannot apply the principles of that treaty in a decision in our national laws'. The Commission qualified this answer in reference to previous High Court decisions that found that 'public officials or government officials should at least take into account the commitments that Australia has accepted under the [CRC]'.[109]

---

106 Professor Ben Saul, *Submission 2*, p. 7; See also Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 7.

107 Law Council of Australia, *Submission 26*, p. 23.

108 Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August, 2015, p. 6.

109 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 11; see also *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) ALR 353.

4.91 The nature and extent of the Bill's application to children is further addressed in Chapter 8.

Obligations to combat terrorism

4.92 Australia has a number of international obligations (from a wide range of sources) to combat terrorism. Following the terror attacks in New York and Washington on 11 September 2001, the Security Council passed *Resolution 1373*.[110] The resolution requires all States to criminalise terrorist acts, bring terrorists to justice, and prevent the cross-border movement of terrorists. In addition, *Security Council Resolution 1566* (2004) requires all States to cooperate fully in the fight against terrorism and to deny safe haven and bring to justice through prosecution or extradition any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.[111]

4.93 Australia is also a signatory to a number of counter-terrorism conventions since the 1960s, requiring Australia to 'prosecute or extradite' terrorists to face justice for their actions and ensure that they do not enjoy impunity—this is, the principle of *aut dedere aut judicare* (extradite or prosecute).[112] These agreements require Australia to establish jurisdiction over crimes by its nationals. Australia is therefore expected not to unilaterally strip nationality to avoid these obligations.[113]

4.94 Some submissions raised concerns that the Bill will undermine these obligations. Professor Ben Saul explained:

> Unilaterally stripping citizenship undermines these obligations. Where a person stripped of citizenship is in Australia, they may be expelled to their other country of nationality without any guarantees that the person will be subject to prosecution or appropriate law enforcement measures in that country—thus allowing the cross-border movement of terrorists and impunity for terrorist crimes. Where a person is already overseas, the Bill does

110 UN Security Council, *Security Council resolution 1373 (2001), Concerning threats to international peace and security caused by terrorist acts*, 28 September 2001, S/RES/1373 (2001).

111 Law Council of Australia, *Submission 26*, p. 11, quoting UN Security Council, *Security Council Resolution 1566 (2004), Concerning Threats to International Peace and Security Caused by Terrorism*, 8 October 2004, S/RES/1566 (2004).

112 Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (Art 7), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (Art 3, 7, 11), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (Arts 5, 6, 7, 8, 10, 13); International Convention for the Suppression of Acts of Nuclear Terrorism 2005 (Art 2, 5, 7, 10, 11, 13, 14).

113 Professor Ben Saul, *Submission 2*, p. 2.

> not require that their other country of nationality will readmit them in practice or otherwise take responsibility for suppressing terrorist conduct.[114]

4.95 Whilst Australia has obligations to prosecute those who commit terrorist acts, it also has the right to uphold its national security. As noted by the Deputy Commissioner National Security of the Australian Federal Police (AFP), keeping people who engage in terrorism, offshore 'is one less thing [that the AFP] have to deal with'.[115] Committee members heard consistent advice in a comparable jurisdiction.

4.96 Similarly, the Deputy Director-General of the Australian Security Intelligence Organisation expressed support for any measure that has the ability to keep problems offshore and reduce the direct threat to Australia.[116]

Humanitarian obligations

4.97 Australia's obligations under international humanitarian law principally arise as a result of the Geneva Conventions of 1949.[117] Under the Geneva Conventions, all wounded people have a right to basic medical care, and protection is given to those providing a range of humanitarian assistance.

4.98 A number of stakeholders raised concerns that the provision of medical care to wounded fighters (which is protected by the Geneva Conventions) by organisations such as the Red Cross or Médecins Sans Frontières could amount to conduct captured by proposed section 35, specifically, conduct that is 'in the service of a declared terrorist organisation'.[118]

---

114 Professor Ben Saul, *Submission 2*, p. 2. See also Refugee Council of Australia, *Submission 22*, p. 3; John Ryan, Submission 32, p. 1.

115 Mr Michael Phelan, Deputy Commissioner National Security, Australian Federal Police, *Committee Hansard*, Canberra, 10 August 2015, p. 7.

116 Deputy Director-General, Counter-Terrorism, Australian Security Intelligence Organisation, *Classified Committee Hansard*, 5 August 2015, p. 6.

117 International Committee of the Red Cross, *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* (First Geneva Convention), 12 August 1949, 75 UNTS 31; International Committee of the Red Cross, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Second Geneva Convention), 12 August 1949, 75 UNTS 85; International Committee of the Red Cross, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

118 Professor Ben Saul, *Submission 2*, p. 3; Law Council of Australia, *Submission 26*, p. 11; Human Rights Committee, Law Society of NSW, *Submission 11*, p. 3; Professor Helen Irving, *Submission 15*, p. 6; Dr Rayner Thwaites, *Submission 16*, p. 7; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 5; Australian Lawyers for Human Rights, *Submission 20*, p. 8; NSW Society of Labor Lawyers, *Submission 25*, p. 10; Muslim Legal

4.99 Indeed, the Explanatory Memorandum links this proposed section to the provision of medical assistance: 'a person may act in the service of a declared terrorist organisation if they undertake activities such as providing medical support'.[119]

4.100 Ms Amy Lamoin, Chief Technical Adviser at UNICEF, explained her concerns with the proposed section's application to dual citizens engaged in humanitarian work:

> I am a humanitarian worker who has worked overseas. We demobilise, rehabilitate and reintegrate children. We have to use much care and caution and have to negotiate with some armed groups to release children safely into our care and then provide them with emergency support and eventually that long-term care, reintegration and education. It concerns me that if I were a dual citizen I could potentially, as a humanitarian, fall within the scope of this bill, given its current scope and nature.[120]

4.101 The Committee makes further comment about proposed section 35 of the Bill and the meaning of the term 'in the service of' in Chapter 5 of this report.

Network (NSW), *Submission 27*, p. 10; Executive Council of Australian Jewry, *Submission 9*, p. 4; Australian Bar Association, Submission 43, p. 3; Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 5.

119 Explanatory Memorandum, p. 14.

120 Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 5.

5

Conduct-based provisions – proposed sections 33AA and 35

Introduction

5.1 Proposed sections 33AA and 35 of the Bill (hereafter referred to as the 'conduct–based provisions') provide that citizenship may be lost by engaging in certain conduct. Importantly, the loss of citizenship occurs by operation of law. That is, as soon as a person engages in certain conduct or receives a conviction for a certain offence, the law operates automatically so as to remove that person's citizenship. Such provisions are commonly referred to as self-executing provisions.

5.2 In such a process, there is no 'decision' to remove citizenship. Rather, after an administrative process to make findings of fact, the Minister is informed that certain conduct has occurred. Upon becoming aware, the Minister must issue a notice that a person has lost their citizenship, though has discretion about when and to whom that notice is issued. The Bill allows a Minister, after issuing a notice, to exercise a personal discretion to exempt the person from the provision that led to the loss of citizenship.

5.3 This chapter discusses the concerns raised in a large number of submissions that the conduct provisions of the Bill lack procedural fairness. The chapter then discusses discrete issues related to each of proposed section 33AA and proposed section 35.

Administrative process to make findings of fact

5.4 The Bill provides that a Minister may issue a notice for the loss of citizenship upon 'becoming aware' of conduct.[1] The Bill does not elaborate on the administrative process that would take place to make a 'finding of fact' that the relevant conduct had occurred.[2]

5.5 In a submission to the inquiry, the Department of Immigration and Border Protection (the Department) described the administrative processes as follows:

> Operationalising the Act will involving identifying dual nationals to whom one or more of the provisions relating to automatic loss of citizenship apply. This will require close cooperation across government. The Department, including the Australian Border Force, will work closely with relevant departments and agencies, including law enforcement and intelligence agencies, to put in place the appropriate steps and processes to support the new provisions. Where available and suitable, existing whole of government intelligence and law enforcement coordination mechanisms will be utilised. In addition, deputy secretaries from relevant departments and agencies … will provide information to the Secretary of the Department of Immigration and Border Protection both on cases and other matters, such as the identification of relevant terrorist organisations for the purposes of the Act. The Secretary will bring cases to the attention of the Minister.[3]

5.6 In summary:

- First, an 'interagency board or … committee' of deputy secretaries of a number of government departments and agencies would consider information to make findings of fact in order to assess whether the Bill's provisions have been engaged.[4]

1 Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, ss 33AA(6) and 35(5).

2 Ms Rachel Noble, Deputy Secretary, Policy Group, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 3. Proposed section 35A, as drafted, also operates by law upon conviction. This administrative process was not addressed in submissions or hearings and therefore will not be discussed further in this report.

3 Department of Immigration and Border Protection, *Submission 37*, p. 2.

4 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 19.

- Secondly, on reaching a conclusion, the interagency board/committee would inform the Secretary of the Department, who would 'sign off' on the conclusion.[5]
- Finally, the Secretary would inform the Minister.

5.7 The Minister for Immigration and Border Protection, the Hon Peter Dutton MP, has stated publicly that the following agencies would be represented on the interagency committee: the Department of Immigration and Border Protection, the Attorney-General's Department, the Department of Defence and the Department of Foreign Affairs and Trade.[6] The Committee heard that the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO) would also be involved.[7]

5.8 The policy rationale provided by the Department for the range of government departments and agencies being involved was that 'joined up' advice would lead to better quality advice, because 'every agency that has got something to say on the issue or has got fragments of the information that pertain to the conduct' is involved.[8]

5.9 The Secretary of the Department sought to clarify the role of the interagency committee at a public hearing, commenting,

> In that systematic way of looking at persons of interest… decisions will be made along the way to say, 'We are now hitting a threshold here for section 33AA action,' for instance. But they are not sitting as a tribunal.[9]
>
> …
>
> It is the government's contention, on the face of both the legislation, the second reading speech and the explanatory memorandum, that officials are not engaged… in administrative decision making of that type commonly understood. We are

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

6 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, 'Interview with ABC 7.30', 23 June 2015.

7 Ms Kerri Hartland, Deputy Director-General, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 10 August 2015, p. 8.

8 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 19.

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

> assembling facts and drawing them to the attention of the [Minister].[10]

5.10 In the view of the Department, the interagency committee would 'need to assess facts, intelligence and other forms of reports' in order to make conclusions about what conduct has occurred.[11]

5.11 The Department confirmed that the interagency committee would meet privately and may consider confidential information in relation to a person's conduct.[12] The interagency committee would have a 'range of information' at their disposal, which may include publicly available information and also classified information from intelligence agencies, including foreign intelligence services:

> It will be a dossier, to the extent that we have been able to pull that together, of what we know or what our international partners know about somebody's conduct.[13]

5.12 In regard to its role in the process, ASIO advised that it envisaged

> that the support we will provide really mirrors what is a pretty well-established process in which we provide support to, for example, law enforcement agencies, such as the AFP, in terrorism prosecutions. It is a very similar process in that case.[14]

5.13 In their deliberations, the conclusions of the interagency committee would be reached by consensus. If there were differing views about whether the conduct amounted to the conduct specified in one of the proposed sections of the Bill, the Department stated that 'better practice' would be to not advise the Minister until consensus was achieved. However, the Secretary clarified that in some circumstances where consensus could not be reached (either on the finding of fact in relation to the conduct, or the advice about whether to delay notice for a public interest rationale), 'it might be that the Minister would be given options as to how to deal with the notice'.[15] The notice requirements of the Bill are discussed in the following section.

---

10 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 17.

11 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 18.

12 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, pp. 7, 9.

13 Ms Rachel Noble, Deputy Secretary, Policy Group, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 4.

14 Ms Kerri Hartland, Deputy Director-General, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 10 August 2015, p. 8.

15 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 19.

5.14 Once the interagency committee made a finding of fact about a person's conduct, the compiled dossier would be forwarded to the Secretary of the Department:

> Given the consequence of the matters in discussion, we felt that something that the secretary signs off was the appropriate level of authority.[16]

5.15 After the Secretary was satisfied, the Minister would then be informed that a finding of fact has been made by the interagency committee. However, before a notice could be issued that the Minister is aware that the event has occurred, there would need to be a 'clear degree of mental apprehension—or knowledge—that [conduct] has occurred'.[17] The Department's General Counsel advised that 'awareness is knowledge that is underpinned by [a] high degree of probability that the event has occurred'.[18] Counsel elaborated:

> It is more than a belief or a suspicion. It does not require absolute proof. It involves a clear degree of mental apprehension. The minister needs to be satisfied by way of an awareness … That would be knowledge based on a high degree of probability as to the facts underpinning the assessment. We would say that the same type of awareness is required as to whether the person is dual citizen. Then, upon the minister becoming aware that that event occurs, it sets in train a series of motion.[19]

5.16 The Secretary of the Department advised that, in the process of the Minister developing the appropriate degree of knowledge that the event occurred, the Minister may seek additional meetings with the Secretary or other statutory office holders, to scrutinise the information further:

> [W]e would anticipate any self-respecting minister would want a high degree of confidence that they were acting on sound grounds. They would get that both on the face of the document and perhaps by way of follow-up meetings with the person who put the advice—in this case, the secretary—but they might well seek to call in other statutory officers. The minister might be minded to probe the level of confidence that we have, but if we are doing our

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

17 Ms Philippa De Veau, General Counsel/First Assistant Secretary Legal Division, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 18.

18 Ms Philippa De Veau, General Counsel/First Assistant Secretary Legal Division, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 19.

19 Ms Philippa De Veau, General Counsel/First Assistant Secretary Legal Division, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 18.

> job properly we would give him or her that confidence on the face of the submission that we provide.[20]

5.17 After scrutinising the information provided by the relevant agencies, the Minister may nonetheless reach a conclusion that the conduct has not occurred. The Secretary advised:

> I guess I could foresee a situation where the secretary and/or other officers have not done their job very well and have not satisfied the minister that the notice is in a fit state to be signed … I can envisage a circumstance where a minister says, 'You haven't convinced me'.[21]

5.18 The Bill's administrative processes relating to the conduct provisions attracted significant comment from stakeholders.[22] Comments centred on the following issues, each of which is examined below:

- uncertainty about the administrative process that would 'operationalise' the Bill's provisions,
- whether there is a 'decision' made in the course of this administrative process,
- the efficacy and appropriateness of an administrative process to make findings of fact that assess whether citizenship has been lost, and
- oversight of the administrative process.

---

20 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 19.

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

22 Ms Janine Truter, *Submission 1*, p. 1; Professor Ben Saul, *Submission 2*, p. 5–6; Bruce Baer Arnold, *Submission 6*, p. 4; Mr Paul McMahon, *Submission 7*, p. 2; Human Rights Committee, Law Society of NSW, *Submission 11*, p. 4; FECCA, *Submission 12*, pp. 2–3; Australian Human Rights Commission, *Submission 13,* pp. 9–10; Professor Helen Irving, *Submission 15*, pp. 4–5; Dr Rayner Thwaites, *Submission 16*, p. 1; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 4–5, 6; Australian Lawyers for Human Rights, *Submission 20*, pp. 2, 6; NSW Society of Labor Lawyers, *Submission 25*, pp. 10–11; Muslim Legal Network (NSW), *Submission 27*, p. 10; Councils for civil liberties across Australia, *Submission 31*, p. 4; Mr John Ryan, *Submission 32*, p. 1; Islamic Council of Queensland, *Submission 33*, p. 1; Commonwealth Ombudsman, *Submission 34*, p. 2; Migration Law Program, ANU College of Law, *Submission 40*, p. 7; Australian Bar Association, *Submission 43*, p. 2; Mr Geoffrey Kennett SC, Chair, Administrative Law Committee, Law Council of Australia, *Committee Hansard,* Canberra, 4 August 2015, p. 3; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, pp. 14, 16; Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, Canberra, 4 August 2015, pp. 35–36; Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 6; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 12.

Clarifying the administrative process

5.19 A large number of participants in the inquiry expressed uncertainty about what the administrative process would be, with some describing the lack of detail in the Bill about this process as concerning.[23] For example, the Australian Human Rights Commission commented that the Bill is 'very curious in adopting this automaticity provision, without some kind of a statement as to how the practical consequences would flow from the act which complies or meets the standard definitions within the proposed legislation'.[24]

5.20 The Commonwealth Ombudsman recommended that the Bill be amended to specifically provide for, and therefore clarify, the administrative process described by the Department.[25] Similarly, the Law Council of Australia was concerned that, in the absence of specific inclusion of this administrative process in the text of the Bill itself, a 'legal vacuum' would be created:

> [T]here is a whole gathering of information in a legal vacuum from across various government departments, with, it seems, no controls, transparency or accountability in any of that process ultimately leading to the minister issuing a notice and/or an exemption. So it really underscores the fact that there is an entire vacuum around that process.[26]

5.21 Dr Rayner Thwaites stated that due to the complexity of the conduct that acts as the trigger, there 'clearly needs to be a determination … some human judgement in the process' and that this would 'help, operationally

---

23 Mr Paul McMahon, *Submission 7*, p. 2; FECCA, *Submission 12*, p. 2; Dr Rayner Thwaites, *Submission 16*, p. 1; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 4–5; Australian Lawyers for Human Rights, *Submission 20*, p. 6; Muslim Legal Network (NSW), *Submission 27*, p. 10; Islamic Council of Queensland, *Submission 33*, p. 1; Commonwealth Ombudsman, *Submission 34*, p. 2; Mr Geoffrey Kennett SC, Chair, Administrative Law Committee, Law Council of Australia, *Committee Hansard,* Canberra, 4 August 2015, p. 3; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 14; Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, pp. 25–26; Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, Canberra, 4 August 2015, p. 35. Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 6; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, pp. 9, 12; Mr Guy Ragen, Government Relations Advisor, Amnesty International Australia, Committee Hansard, Canberra, 5 August 2015, p. 31.

24 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 12.

25 Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, Canberra, 4 August 2015, p. 35.

26 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard,* Canberra, 4 August 2015, p. 6.

and legally, to clarify what the decision-making process is'.[27] Dr Thwaites continued:

> [T]he reality is that there will be administrative action that underlies the operation of the new provisions, and that needs to be acknowledged and there need to be clear standards that are to be employed by the relevant decision makers to ensure that the measure as framed does not invite dysfunction and tie up valuable government resources that would otherwise be usefully addressed to keeping our fellow Australians safe. These points are not simply lawyers' points in the pejorative sense that that word sometimes is used. They lose sight of the fact that many of the legal objections, if heeded, would provide for greater clarity in decision making and accountability, curtail potential abuse of the power, minimise error and bring clarity to the purpose and goals.[28]

5.22 There was also uncertainty among stakeholders about what 'standard of proof' would need to be met in order for the Minister to become 'aware'.[29]

Is there a 'decision'?

5.23 Throughout the inquiry, stakeholders repeatedly questioned whether the administrative processes described above amounted to a 'decision' in practice.[30] How the interagency committee would make assessments about conduct is particularly important when examining the constitutionality of the proposed sections. In the absence of specific statements in the Bill or the Explanatory Memorandum that provide clarity about these administrative processes, participants speculated about whether there would be a 'decision' or 'determination'.

5.24 Responding to these concerns, the Secretary of the Department commented that 'no-one is going to be deciding whether someone has

27 Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, p. 48.

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

29 For example, Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 25.

30 Mr Paul McMahon, *Submission 7*, p. 2; Professor Helen Irving, *Submission 15*, pp. 4–5; Dr Rayner Thwaites, *Submission 16*, p. 1; Australian Lawyers for Human Rights, *Submission 20*, p. 6; NSW Society of Labor Lawyers, *Submission 25*, p. 11; Councils for civil liberties across Australia, *Submission 31*, p. 4; John Ryan, *Submission 32*, p. 1; Commonwealth Ombudsman, *Submission 34*, p. 2; Migration Law Program, ANU College of Law, *Submission 40*, p. 7; Australian Bar Association, *Submission 43*, p. 2; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 16; Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, Canberra, 4 August 2015, pp. 35–36; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 9; Mr Guy Ragen, Government Relations Advisor, Amnesty International Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 31;

engaged in traitorous conduct from the point of view of guilt or innocence'.[31] The Secretary stated:

> [I]t is the government's contention … that in that circumstance the minister is not in fact making a decision to deprive anyone of anything. The minister is operationalising because for administrative purposes the fact of someone's renunciation of their allegiance to Australia … has already occurred.[32]

5.25 To further clarify the legal status of the administrative process, the Secretary used the following terms to characterise the findings of fact by the interagency board/committee:

> They will have to satisfy themselves that it has occurred.[33]
>
> They are pulling together an information brief that suggests that they are satisfied that the conduct has occurred.[34]
>
> … in that small 'd' sense of a decision – yes, a group of officials have to decide [whether conduct has occurred].[35]

Efficacy and appropriateness of interagency assessment of conduct

5.26 In addition to these legal and constitutional concerns, stakeholders expressed policy concerns about the efficacy and appropriateness of the interagency assessment of conduct.[36] Specifically, stakeholders were of the view that the process was unfair and arbitrary, and questioned whether it was appropriate for public servants to be making the assessments when such serious consequences would flow from that assessment.

---

31 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 5.

32 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 4. See also Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 6.

33 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 9.

34 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 9.

35 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 9.

36 Ms Janine Truter, *Submission 1*, p. 1; Professor Ben Saul, *Submission 2*, p. 5–6; Bruce Baer Arnold, *Submission 6*, p. 4; Mr Paul McMahon, *Submission 7*, pp. 5–6; Executive Council of Australian Jewry, *Submission 9*, p. 6; Human Rights Committee, Law Society of NSW, *Submission 11*, p. 4; FECCA, *Submission 12*, pp. 2–3; Australian Human Rights Commission, *Submission 13*, pp. 9–10; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 6; Australian Lawyers for Human Rights, *Submission 20*, p. 2; NSW Society of Labor Lawyers, *Submission 25*, p. 10; Muslim Legal Network (NSW), *Submission 27*, p. 10; Councils for civil liberties across Australia, *Submission 31*, p. 4.

5.27 For example, Professor Ben Saul noted that loss of citizenship is 'amongst the most serious legal consequences for any person' and as such, argued that loss of citizenship should only occur with 'rigorous and effective procedural safeguards including due process and independent, impartial decision-makers'.[37]

5.28 The Executive Council of Australian Jewry commented that the administrative processes that would operationalise the Bill's provisions would make it possible to 'decide on a person's allegiance to Australia on the sole basis of untested interpretations of alleged evidence, with no opportunity for the accused person to … challenge the case against him'.[38] The Council argued:

> The rule of law… demands that citizens not be subjected to punishment by administrative fiat, but only through the due process of the law, which remains the most reliable method for testing the merits of allegations of wrongful conduct.[39]
>
> … [W]e have policy concerns as to whether it is appropriate for … public servants or officials behind closed doors to come to certain conclusions about somebody's conduct which have very severe consequences for that person, and which that person might not even become aware of until after the event, if at all.[40]

5.29 The Refugee Council of Australia made similar comments emphasising the importance of due process:

> [I]f we had a person in Australia, for example, who was suspected of a different kind of serious crime—if they had been suspected of multiple murders, for instance—we would not penalise them in this manner on the basis of suspicion alone. We would have to have due process, even if we had people involved who, as you suggested, witnessed what had happened or suggested that they had strong evidence of it. That evidence would have to be presented in a court of law … I do not see why we should be applying a differential standard here to different types of serious

37 Professor Ben Saul, *Submission 2*, p. 5.

38 Executive Council of Australian Jewry, *Submission 9*, p. 6.

39 Executive Council of Australian Jewry, *Submission 9*, p. 6. See also Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 25.

40 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 24.

> crimes. Especially when the penalties are so serious, I think due process becomes even more important, rather than less.[41]

5.30 Professor Saul commented that the administrative process would require the Minister to consider 'highly complex matters of fact and law':

> These include legal issues on which the jurisprudence is unsettled or contested, including how the complex, multipronged definitions of terrorist offences apply in given cases. They also include serious questions concerning the reliability of evidence or intelligence whose admissibility would ordinarily be subject to challenge in criminal proceedings. The risk of serious error is magnified by the inability of the affected person to know or challenge the Minister's legal reasoning prior to notice being given; and the absence of any right to be legally represented in the process.[42]

5.31 The Executive Council of Australian Jewry expressed concern that 'the Bill as drafted seems to presume rather than prove that the commission of a particular act [entails] a severance of the bond of citizenship and a repudiation of allegiance to Australia'.[43] The Council was of the view that if the Bill were to be enacted in its present form 'it would open the door wide to error and abuse'.[44]

5.32 Examining the administrative process more broadly, the Law Council of Australia stated that, although it appreciated the constitutional rationale for the Bill's approach, it had reservations about a self-executing model

> largely because it does not provide a process up-front where a person's status can be authoritatively determined. They may engage in conduct which may not come to anybody's attention for some years … It may then be some time before that crystallises in any sort of government action against the person.[45]

5.33 Indeed, the importance of an independent and authoritative assessment of the information was reflected on by a number of stakeholders. For example Ms Janine Truter questioned whether the Bill's current

---

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

42 Professor Ben Saul, *Submission 2*, p. 6. See also Australian Lawyers for Human Rights, *Submission 20*, pp. 6–7.

43 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 24.

44 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 25.

45 Mr Geoffrey Kennett SC, Chair, Administrative Law Committee, Law Council of Australia, Committee Hansard, Canberra, 4 August 2015, pp. 3–4.

administrative process would be able to be independent: 'implementation of a law should be free from the influence of those who make the law'.[46]

5.34 As some of these concerns indicate, a large number of stakeholders were of the view that the conduct provisions should require an independent determination about the conduct in a court or tribunal.[47] This specific proposal is discussed in detail later in this chapter.

5.35 A number of stakeholders also discussed the specific administrative process to support the Bill's operation with regard to children, and whether assessments about the child's culpability could be made without speaking to that child directly.[48] These issues are discussed in detail in Chapter 8.

Oversight of the administrative processes

5.36 In a submission to the inquiry, the Commonwealth Ombudsman discussed the oversight of the administrative action that flows from the finding of fact. The Ombudsman advised that if the source of advice was the Department of Immigration and Border Protection or a Commonwealth law enforcement agency, the matters of administration associated with the provision of that advice would fall within the jurisdiction of the Ombudsman. However, if the source of the advice was an intelligence agency, the administration action would fall within the jurisdiction of the Inspector-General of Intelligence and Security.[49]

5.37 As discussed earlier in this chapter, the Department advised that the source of the advice to the Minister would be the interagency committee.

5.38 Within this structure, it is therefore reasonable to assume, as the Ombudsman identified in his submission, that 'complaints about these matters will be made to … [the Office of the Commonwealth Ombudsman] and the Inspector-General of Intelligence and Security'.[50]

---

46 Ms Janine Truter, *Submission 1*, p. 1.

47 For example, Human Rights Committee, Law Society of NSW, *Submission 11*, pp. 3–4; Australian Human Rights Commission, *Submission 13*, p. 10; Law Council of Australia, *Submission 26*, p. 10; Centre for Comparative Constitutional Studies, *Submission 29*, p. 2; Immigration Advice & Rights Centre Inc., *Submission 36*, p. 3; Migration Law Program, ANU College of Law, *Submission 40*, p. 9; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 15.

48 For example, Law Council of Australia, Submission 26, p. 24; Professor Anne Twomey, Submission 10, p. 3; UNICEF Australia, Submission 24, p. 6; Centre for Comparative Constitutional Studies, Submission 29, p. 3; Australian Human Rights Commission, Submission 13, p. 12; Ms Amy Lamoin, UNICEF Australia, Committee Hansard, 5 August 2015, p. 6; Ms Erin Gillen, FECCA, Committee Hansard, 4 August 2015, p. 31.

49 Commonwealth Ombudsman, *Submission 34*, pp. 2–3.

50 Commonwealth Ombudsman, *Submission 34*, p. 3.

The Inspector-General of Intelligence and Security did not make a submission to the inquiry.

5.39 Broader issues relating to oversight of the Bill are discussed in Chapter 9.

Committee comment

5.40 Stakeholders expressed concerns that there was a lack of clarity about the nature of the administrative process that would lead to findings of fact that conduct has occurred to trigger the loss of citizenship under proposed sections 33AA and 35.

5.41 Evidence provided by the Department of Immigration and Border Protection at the final public hearing into the Bill sought to clarify the process.

Issues of procedural fairness

5.42 Although not expressly recognised in the Australian Constitution, the common law recognises a duty to accord a person procedural fairness, or natural justice, when a decision is made affecting their rights or interests.[51]

5.43 A core principle of procedural fairness was outlined by Justice Mason in *Kioa v West (1985)*:

> It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[52]

5.44 Inquiry participants, including legal and constitutional experts, raised a number of issues of procedural fairness and natural justice that they considered to flow from the 'self–executing' nature of proposed sections 33AA and 35.

5.45 Specifically, there was concern that, by omitting the role of the court, an individual's right to a fair trial would be encroached by the proposed new provisions. It was argued that the self-executing nature of the provisions

---

51 Australian Law Reform Commission, *Traditional Rights and Freedoms – encroachments by Commonwealth Laws (ALRC Interim Report 127)*, p. 411.

52 *Kioa v West* (1985) 159 CLR 550, 582 (Mason J). See *Australian Law Reform Commission, Traditional Rights and Freedoms – encroachments by Commonwealth Laws (ALRC Interim Report 127)*, p. 412.

veiled a decision-making process that must occur to determine whether the provisions had been triggered.

5.46 Other issues raised included ambiguity regarding the standard of proof required to determine that conduct had occurred, and an argument that hiding the decision-making process diminished a person's rights of review.

5.47 Dr Rayner Thwaites considered that these legal objections to the Bill, if heeded, would provide for 'greater clarity in decision making and accountability, curtail potential abuse of the power, minimise error and bring clarity to the purpose and goals'.[53]

5.48 The possible consequences of including or omitting a court process in the operation of proposed sections 33AA and 35 are discussed below. A person's rights of review are discussed in detail in Chapter 7.

Cessation of citizenship by 'operation of law'

5.49 Proposed sections 33AA and 35 provide that a person's citizenship may cease by operation of law, or as self-executing provisions.[54]

5.50 The self-executing nature of the provisions means that the cessation of citizenship does not result from either a criminal conviction as determined by a Court, or an administrative decision of a Minister. Rather, the Explanatory Memorandum states that:

> [A] person's own conduct, specified in the new sections 33AA, 35 and 35A will be the cause of the person's citizenship to cease.[55]

5.51 The Commonwealth Ombudsman submitted that the notion that the cessation of citizenship occurred by operation of the statute concealed the necessary decision-making that must occur to determine the conduct had occurred. In this way, the Ombudsman considered that the self-executing nature of the provisions was a 'legal fiction'.[56]

5.52 Many submitters endorsed this characterisation and argued that it circumvented what should be a court determination of criminal conduct.[57]

5.53 The Muslim Legal Network (NSW) submitted that it was unclear why the Bill failed to recognise the role of the criminal justice system in

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

54 Explanatory Memorandum, p. 14.

55 Explanatory Memorandum, p. 7.

56 Commonwealth Ombudsman, *Submission 34,* p. 2. See also, Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, 4 August 2015, pp. 35–36.

57 See for example, Dr Rayner Thwaites, *Committee Hansard*, 5 August 2015, p. 45; Australian Bar Association, *Submission 43*, p. 2; Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 6.

determining guilt and did not offer appropriate means of redress for incorrect findings made by the Minister, such as administrative review.[58]

5.54 UNICEF Australia raised a number of procedural concerns relating to how it would be assessed that conduct had occurred under the self-executing provisions, including the evidence that would be used, the standard of proof that would be adopted, and the rules of evidence, if any, that would be applied.[59]

5.55 The Law Council of Australia considered that the Bill effectively replaced what would ordinarily be a criminal court process with an administrative law process:

> The absence of a requirement for a conviction in proposed sections 33AA and 35 means that ASIO officials will be advising the Minister and making an assessment of whether a person has engaged in what would otherwise be unlawful conduct under the *Criminal Code*.[60]

5.56 Evidence presented to the Committee argued that the operation of law model in proposed sections 33AA and 35 failed to recognise the functions of the court, under the separation of powers. For example, Professor George Williams suggested that the proposed self-executing model bypassed the court at the critical moment of determining whether the requisite liability applied:

> It is akin to another statute that, for example, in a self-executing way says that if a person commits murder they are automatically to be jailed, without providing any mechanism for a court to determine that.[61]

5.57 The constitutional concerns raised in relation to the Bill, including issues regarding separation of powers, are discussed further in Chapter 3.

Need for Court determination

5.58 Inquiry participants raised concerns that the conduct leading to the automatic loss of citizenship under proposed section 33AA amounted to criminal conduct, which would usually be dealt with in a criminal court

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

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

60 Law Council of Australia, *Submission 26*, p. 10.

61 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 12.

pursuant to procedures outlined in the *Criminal Code Act 1995* (the Criminal Code).[62]

5.59 Professor Helen Irving submitted that proposed sections 33AA could not be quarantined from a determination that certain conduct had occurred, and any attempt to take the revocation of citizenship as a consequence of conduct out of the hands of the courts would be unlikely to succeed, since the conduct was defined by reference to criminal offences.[63]

5.60 The Migration Law Program of the ANU College of Law submitted that the Bill represented a blurring of the boundaries between criminal law and citizenship law and, in particular, represented an undesirable 'increase in Executive and administrative decision-making at the expense of criminal justice due process'.[64]

5.61 The Migration Law Program noted that proposed sections 33AA and 35 in effect created new offences punishable by loss of citizenship—but without proper judicial oversight of hearing evidence according to the rules of evidence and determining guilt or innocence according to law.[65]

5.62 The Australian Human Rights Commission was concerned that a loss of citizenship could be enlivened automatically with no regard for a person's individual circumstances or the relative seriousness of their conduct.[66]

5.63 Professor Gillian Triggs, President of the Commission, stated that while there was a clear need to balance loss of citizenship with the egregious nature of terrorist acts, the question remained whether it was appropriate 'to use the penalty of loss of citizenship without proper judicial or administrative processes to ensure that the evidence upon which that loss of citizenship is based is accurate and fair'.[67]

5.64 Unlike offences in the Criminal Code, the proposed conduct-based provisions in section 33A and 35A do not require a decision to prosecute. According to the Centre for Comparative Constitutional Studies, prosecutorial discretion generated various protections for the individual, as an independent prosecutor would have to ensure there were reasonable prospects of conviction and that the conviction was in the public interest.[68]

62 See, for example, Human Rights Committee, Law Society of NSW, *Submission 11*, pp. 3–4; Australian Human Rights Commission, *Submission 13*, p. 10; Immigration Advice & Rights Centre Inc., *Submission 36*, p. 3.

63 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44.

64 Migration Law Program, ANU College of Law, *Submission 40*, p. 9.

65 Migration Law Program, ANU College of Law, *Submission 40*, p. 9.

66 Australian Human Rights Commission, *Submission 13*, p. 4; p. 6.

67 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 15.

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

5.65 Further, inquiry participants noted that discretionary prosecutorial independence could prevent the misapplication of criminal offence provisions for situations where it was never conceived the provisions would apply.[69]

5.66 As a court determination of guilt was not required under the proposed legislation, inquiry participants stated it was unclear what standard of proof would be applied by the Department of Immigration and Border Protection in assessing whether the conduct provisions had been triggered. It was assumed, however, that the standard of proof would be lower than would be required by a court for criminal conviction. [70]

5.67 The Law Council of Australia raised concerns that the scheme established in the Bill would avoid long-standing judicial procedures for testing and challenging evidence in criminal trials. The Law Council submitted that rather than the prosecution having to prove 'beyond reasonable doubt' that a person was guilty of an offence as is usually required for the conduct listed in proposed section 33AA, it was likely that only a civil standard of proof would apply. This would mean that it would only have to be shown on the 'balance of probabilities' that a person had engaged in certain conduct.[71]

5.68 The Centre for Comparative Constitutional Studies agreed, further arguing that as deprivation of citizenship was 'an extremely serious sanction', a criminal standard of proof should be applied in all cases.[72]

5.69 The Law Council of Australia took the view that as proposed sections 33AA and 35 operated without the need for a court determination that conduct had occurred, the individual would carry the ultimate burden of proof to show he or she had *not* ceased to be an Australian citizen.[73] The Muslim Legal Network (NSW) submitted that this would encroach on the fundamental right of a person to be presumed innocent until proven guilty.[74]

---

69 See Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 40. See also Centre for Comparative Constitutional Studies, *Submission 29,* p. 2.

70 See Mr Paul McMahon, *Submission 7*, pp. 5–6; Executive Council of Australian Jewry, *Submission 9*, p. 5; Commonwealth Ombudsman, *Submission 34*, p. 2; Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 20.

71 Law Council of Australia, *Submission 26*, p. 10.

72 The Centre for Comparative Constitutional Studies, *Submission 29*, p. 3.

73 Law Council of Australia, *Submission 26*, p. 10.

74 Muslim Legal Network (NSW), *Submission 27*, p. 5. See also Amnesty International, *Submission 41*, p. 5.

5.70 In its report into the Bill, the Parliamentary Joint Committee on Human Rights (PJCHR) considered the procedural and process rights affected by the Bill's proposed powers to automatically remove citizenship, including the right to a fair trial, the right to a fair hearing and the right to an effective remedy. The PJCHR considered:

> The automatic loss of citizenship through conduct as defined by reference to the *Criminal Code* engages and limits criminal process rights, which form part of the right to a fair trial under article 14 of the ICCPR. This is because the measure does not contain the protection of any of these criminal process rights.[75]

5.71 The PJCHR sought advice from the Minister for Immigration and Border Protection on the limitation to the right to a fair trial and whether that limitation was a reasonable and proportionate measure to achieve the objective of the provisions.[76]

5.72 The human rights that would be impacted by the Bill, including the right to a fair trial, were discussed in Chapter 4.

5.73 The Committee sought advice from the Department of Immigration and Border Protection regarding the standard of proof required to provide satisfaction that the conduct had occurred pursuant to proposed sections 33AA or 35.

5.74 The Department responded that:

> [T]he starting point is: the cessation of citizenship occurs by operation of law based on the occurrence of a certain event. Then, if the next step under the legislation is that there is an obligation to issue a notice upon the minister becoming aware, the question is: what does 'awareness' mean and what do they need to be aware of? We would say that awareness is a knowledge that something has occurred. It is more than a belief or a suspicion. It does not require absolute proof. It involves a clear degree of mental apprehension. The minister needs to be satisfied by way of awareness. Before a notice can be issued that the minister is aware that the event has occurred, there needs to be that clear degree of mental apprehension—or knowledge—that it has occurred. That would be knowledge based on a high degree of probability as to the facts underpinning the assessment.[77]

75 Parliamentary Joint Committee on Human Rights, *Twenty–fifth report of the 44th Parliament*, August 2015, pp. 30–31.

76 Parliamentary Joint Committee on Human Rights, *Twenty–fifth report of the 44th Parliament*, August 2015, pp. 30–31.

77 Ms Phillipa De Veau, General Counsel/First Assistant Secretary Legal Division, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 18.

Alternative models

5.75 During the hearings, witnesses were asked to give their views on possible alternative models for revocation of citizenship that would comply with the rule of law, while still achieving its purpose of protecting the Australian community.

5.76 If the Government was to legislate for loss of citizenship, the majority of inquiry participants were in favour of a conviction-based model. However, witnesses acknowledged the challenges in gathering comprehensive intelligence and evidence that could be usefully relied upon in prosecuting people for terrorism-related offences in a court. Witnesses also recognised the need to protect both information and the source of intelligence or information from any unintended consequences that would prejudice national security.[78]

5.77 Professor Gillian Triggs of the Australian Human Rights Commission considered there were various ways to take a rule of law approach to the problem, while protecting information and sources. This might include using processes that are already used in other national security matters, such as hearing matters ex parte and in-camera, as part of a process of judicial review to test evidence obtained by ASIO or another department. Professor Triggs also flagged the possibility of temporarily suspending a person's citizenship to allow them to put their case to a court.[79]

5.78 Professor George Williams considered there were two options that could be considered as an alternative to the self-executing model proposed in the Bill in order to address constitutional and rule of law concerns. The first proposal, outlined in his submission (co-authored with Ms Sangeetha Pillai and Ms Shipra Chordia) was as follows:

- Revocation should only occur in response to conduct that involves disloyalty to Australia of a similar level of seriousness to the conduct covered by the current s 35.
- This disloyalty should be evident as a result of a finding by a fair and independent process. Hence, revocation should only arise when a person has been convicted by a court for committing a relevant offence, such as an act of terrorism.
- The required level of seriousness of the offence should not be dictated only by the nature of the offence, but also by the penalty applied. The possibility of revocation should arise in

78 See, for example, Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, pp. 15–16; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 22; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 50.

79 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, pp. 15–16.

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.
- Once these factors are made out, revocation should not be automatic. A person should lose their citizenship if the Minister is satisfied that revocation is in the public interest and the conduct that led to conviction was directed at Australia or Australians in a manner that suggests disloyalty or lack of allegiance to Australia. The affected person should be given the chance to be heard, and the ministerial determination should be subject to judicial review and merits review.[80]

5.79 Professor Williams also supported consideration of an alternative model by the Law Council of Australia (outlined in the following section):

> We would suggest that a model which would be worth exploring, at least, would be for the minister to seek for a court to make a declaration on the motion of the minister that a person has engaged in conduct and therefore ceased to be a citizen. That would not need to occur on the criminal standard of proof, although a court would, at least ordinarily, want to see some evidence in order to make a finding. A decision by a court under declaration, on the application of the minister, would seem to us, at least on the face of it, not to be obviously unconstitutional—other people might have different views on that—and would have the merit of providing an authoritative up-front determination of the matter.[81]

5.80 Professor Williams noted that a judicial process was the first step in both models:

> I recognise the operational concerns that have been raised here—the difficulties in getting evidence and proving these matters—but this is the inescapable nature of Australia's constitutional framework; it does not permit consequences akin to punishment to be visited upon a person unless the evidence is robust and tested in an appropriate forum.[82]

---

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

81 Mr Geoffrey Kennett SC, Chair, Administrative Law Committee, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 4. See also, Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 15. Note the Law Council of Australia's primary recommendation, if the Parliament decided that a citizenship cessation scheme was necessary, was for loss of citizenship to occur only after a court conviction, followed by a decision by the Minister. See *Submission 26*, pp. 3–4.

82 See Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 15.

5.81 Professor Helen Irving also considered what alternative model might address constitutional concerns, noting that the independence of the courts has to be protected by the relevant legislation:

> The courts cannot be required to automatically act upon the advice from the executive. The courts have to have the power of independently reviewing an application and independently acting upon that application.[83]

5.82 Professor Irving continued:

> As to courts acting upon an application by the executive to order particular consequences, absent a criminal conviction, it is possible that guidance could be given. As long as there is no interference in the independence of the court and certain procedures are not denied to the court, you may well have a constitutionally sound alternative there.[84]

Application to the court for declaration

5.83 Following a request from the Committee, the Law Council of Australia gave further consideration to an alternative model, whereby the Minister would first seek a declaration from a court that a person had, on the 'balance of probabilities', engaged in certain conduct.[85]

5.84 The Law Council of Australia submitted that this model would have the merit of providing an independent up-front determination of whether the individual had engaged in the prescribed conduct. If carefully drafted, the Law Council was of the view that this model could avoid the constitutional and other legal issues raised in relation to the self-executing model.[86]

5.85 The Law Council of Australia outlined the declaration model that had been implemented in Canada as an example of how such a model might operate. Pursuant to the Canadian *Citizenship Act 1977*, a Minister may seek a declaration of revocation of citizenship from a Federal Court, if the Minister has reasonable grounds to believe that a citizen served as a member of an armed force of a country, was a member of an organised armed group and that country or group was engaged in an armed conflict with Canada.[87] A declaration would also need to be sought by the Minister

83 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 51.

84 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 51.

85 Law Council of Australia, *Submission 26.1*, p. 7.

86 Law Council of Australia, *Submission 26.1*, p. 7.

87 Law Council of Australia, *Submission 26.1*, p. 7.

if an individual was accused of acquiring citizenship in false, fraudulent or otherwise deceptive circumstances.[88]

5.86 In the Canadian model, the question determined by the Court is whether the person, while a Canadian citizen, 'served as a member of an armed force of a country or as a member of an organised armed group and that country or group was engaged in an armed conflict with Canada'[89]. The declaration has the effect of revoking citizenship, rendering the person a foreign national.[90]

5.87 The Canadian model also allows for the Canadian citizenship of a dual citizen to be revoked by the Minister if the individual is convicted of certain 'national security' offences in Canada or abroad with a minimum sentence applied of between five years and life imprisonment, depending on the offence.[91]

5.88 In its supplementary submission, the Department of Immigration and Border Protection included information on Canada's laws. In relation to the Canadian model, the submission stated:

> The Federal Court will decide on cases of fraud involving concerns related to security, organized criminality, war crimes and crimes against humanity, and also cases involving serving as a member in an armed force or organized armed group engaged in armed conflict with Canada, given that such cases raise complex issues of fact and law.[92]

5.89 The Law Council suggested that this model could be applied in an Australian context, where the court might instead determine, on the balance of probabilities, whether an individual engaged in the prescribed conduct. The Law Council proposed that a court determination could be combined with Ministerial discretion to revoke an individual's citizenship if it was in Australia's interests.[93]

5.90 This model would have the advantage of allowing an independent process for determining conduct, without engaging a criminal standard of proof, or requiring a full criminal conviction.[94]

---

88 See Centre for Comparative Constitutional Studies, *Submission 29*, p. 7; Department of Immigration and Border Protection, *Submission 37.3*, p. 4.

89 Section 10.1(2), *Citizenship Act 1977* (Canada). See Law Council of Australia, *Submission 26.1*, p. 7.

90 Law Council of Australia, *Submission 26.1*, p. 7.

91 See Centre for Comparative Constitutional Studies, *Submission 29*, p. 7; Department of Immigration and Border Protection, *Submission 37.3*, p. 4.

92 Department of Immigration and Border Protection, *Submission 37.3*, p. 4.

93 Law Council of Australia, *Submission 26.1*, p. 7.

94 Law Council of Australia, *Submission 26.1*, p. 8.

5.91 The Law Council noted:

> Should a declaration model be explored, it would be important to allow the court sufficient discretion in making an order and to allow the appropriate testing of evidence. That is, the Constitutional integrity of the court would need to be maintained. The court cannot be used to rubber stamp the objectives of the executive.[95]

5.92 The Centre for Comparative Constitutional Studies noted that a constitutional appeal had been lodged in relation to the Canadian legislation. Nevertheless, the Centre submitted that the declaration model provided an important safeguard:

> The test for a making of a threshold determination by a court prior to the Minister's exercise of the revocation power provides a form of safeguard that is notably absent in the Bill. Secondly, the rules of natural justice are not entirely excluded under the Canadian legislation. As previously discussed, providing individuals with the opportunity of a 'fair hearing' is of fundamental importance within a legislative scheme that involves the exercise of public power that carries severe consequences.[96]

5.93 Sensitive security information could retain a level of protection under the model through the application of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSI Act), and through other common legal procedures such as allowing matters to be heard ex parte, where necessary.[97]

Response from the Department of Immigration and Border Protection

5.94 The Committee asked the Department of Immigration and Border Protection (the Department) whether a court declaration model could be used in place of the self-executing provisions.

5.95 The Department indicated that this was a policy question and a matter for Government.[98]

5.96 The Committee also sought further information regarding how the NSI Act might apply in court proceedings relating to a loss of citizenship, to protect sensitive information.

---

95 Law Council of Australia, *Submission 26.1*, p. 8.

96 Centre for Comparative Constitutional Studies, *Submission 29*, p. 8.

97 Law Council of Australia, *Submission 26.1*, p. 8.

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

5.97 The Department explained that in proceedings relating to the cessation of citizenship, the Commonwealth could have recourse to the NSI Act and public interest immunity claims under the common law.[99]

5.98 The NSI Act is triggered by the Attorney–General (or another minister) giving written notice to the parties and the court that the NSI Act applies to the proceedings. The Attorney–General may issue a civil non–disclosure certificate or witness exclusion certificate if it is expected that the disclosure of information during the course of proceedings or by a witness may relate to or affect national security. Such a certificate triggers a requirement for the court to hold a closed hearing at which parties and their legal representatives may be present, subject to their exclusion by the court. The court may make an order in relation to the disclosure of information, however in doing so must give the greatest weight to the risk of prejudice to national security if the information was disclosed or the witness was called.[100]

5.99 A claim for public interest immunity might also be made under the common law, and is also available under section 130 of the uniform Evidence Acts. Claims are most commonly made by the Government in relation to national security and the activities of ASIO officers, police informers and other types of informers or covert operatives.

5.100 The Department noted that where a claim of public interest immunity is made, the court is expected to give 'great weight' to the claim; however it will need to reach its own conclusions. It is therefore not absolute that the information pursuant to the claim will remain protected.[101]

Committee comment

5.101 The Committee notes evidence from participants in the inquiry that the Bill, through the self-executing nature of proposed sections 33AA and 35, lacks procedural fairness and circumvents the role of the court in decision-making. In addition, assertions were made that the self-executing provisions were a 'legal fiction' and thus could attract legal challenge. Some participants outlined possible alternative approaches to address these perceived flaws.

5.102 The Committee also notes the Government's view, based on advice, that the Bill is 'constitutionally sound' and 'constructed in the best way possible that has regard to both the separation of powers concerns … and

99 Department of Immigration and Border Protection, *Submission 37.4*, pp. 3–4.

100 Department of Immigration and Border Protection, *Submission 37.4*, pp. 3–4.

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

other matters'.[102] The Committee reiterates that it is not its role to determine matters of constitutionality.

5.103 The Committee's view is that proposed sections 33AA and 35 should continue to operate by law. The Committee notes these provisions would be an extension of the existing section 35 of the *Australian Citizenship Act 2007*, which serves as a precedent that loss of citizenship can occur by operation of law on the basis of conduct.

5.104 The Committee considers that these provisions are likely to be used only rarely and in circumstances where criminal prosecution, which could otherwise lead to loss of citizenship under proposed section 35A, is not possible. Given the intended exceptional nature of these provisions, the Committee has determined to support the approach proposed in the Bill for sections 33AA and 35.

5.105 However, given the seriousness of the measures and the extraordinary nature of their operation, the Committee has made a number of recommendations in Chapter 9 to provide a robust system of oversight and monitoring. This will ensure they operate in the circumstances required and only as intended.

Proposed section 33AA – specific issues

Overlap with 35A

5.106 There are a number of items of conduct listed in proposed section 33AA of the Bill that are also offences under the Criminal Code for which a person, if convicted, would lose their citizenship under proposed section 35A. The items referenced in both sections are:

- engaging in international terrorist activities using explosive or lethal devices,
- engaging in a terrorist act,
- providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act,
- directing the activities of a terrorist organisation,
- recruiting for a terrorist organisation,
- financing terrorism,
- financing a terrorist, and

102 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 5 August 2015, p. 59.

- engaging in foreign incursions and recruitment.

5.107 A number of submissions raised concerns about the overlap between proposed sections 33AA and 35A, where the same conduct could lead to loss of citizenship at the time when it was done or when a conviction is entered in relation to the conduct. This was said to undermine the protections of the criminal law given by proposed 35A.[103]

5.108 Councils for civil liberties across Australia submitted:

> The Bill presents a fundamental threat to the rule of law. It is entirely possible that a person may be acquitted by a jury of his or her peers of terrorism offences (and therefore proposed s.35A of the Act would have no work to do), but the Minister may be satisfied—at a lesser standard than the criminal standard of beyond reasonable doubt—that the person has engaged in prohibited conduct pursuant to section 33AA or section 35 of the Act and has renounced his or her citizenship notwithstanding the acquittal. It should be for the courts and not the executive branch of government to make decisions that are so fundamental to a person's rights and freedoms.[104]

5.109 Dr Rayner Thwaites and Professor Helen Irving suggested that the conflict between the two provisions could be resolved by providing that proposed section 33AA only operates in relation to conduct offshore, which would therefore be beyond the reach of proposed section 35A.[105] In this way, Dr Thwaites submitted that proposed section 33AA would

> circumvent anticipated practical and legal difficulties that might attend an attempt to convict an Australian in another country of conduct that occurred in a country other than Australia.[106]

5.110 Following their appearance at a public hearing, the Law Council of Australia provided a supplementary submission that identified a further possible unintended consequence of overlap between the provisions, namely, that a person might be able to evade prosecution for certain offences. The Law Council submitted:

> Section 33AA would have the effect that a person would cease to be an Australian citizen upon engaging in the relevant prescribed conduct. A person may engage in further conduct which the

103 Dr Rayner Thwaites, *Submission 16*, p. [8]. See also NSW Society of Labor Lawyers, *Submission 25*, p. 7; Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams, *Submission 17*, p.6; Muslim Legal Network (NSW), *Submission 27*, p.8.

104 Councils for civil liberties across Australia, *Submission 31*, p. 6.

105 Professor Helen Irving, *Submission 15*, p. 5; Dr Rayner Thwaites, *Submission 16*, p. [8].

106 Dr Rayner Thwaites, *Submission 16*, p. [8]; Professor Helen Irving, *Submission 15*, p. 5.

> Crown may wish to bring to trial and obtain a conviction for (such as a different offence prescribed by section 35A or another offence under Commonwealth legislation). It may be that, unwittingly, because the person is not a citizen, they cannot be tried for the further offence either because the fact of not being a citizen either provides a defence to the criminal offence or attracts some kind of constitutional argument or generally creates difficulties with jurisdiction in trying the person for the further and potentially more serious offence.
>
> For example, offences relating to cluster munitions under s72.38 of the Criminal Code have a category B jurisdiction (s72.38(3) of the Criminal Code). Category B jurisdiction requires that the person who engaged in the relevant conduct was an Australian citizen, Australian resident or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory. Under the self-executing scheme proposed by the Bill, a person who ceases to be an Australian citizen under s33AA may evade prosecution under an offence such as s 72.38(3), which is currently proposed to be captured by s35A.[107]

5.111 In evidence, the Secretary of the Department admitted it would be possible that the same conduct that gave rise to a prosecution and resulted in an acquittal may be examined and found to have led to loss of citizenship under proposed section 33AA.[108] He noted that a reason why a person may be acquitted of the offence may be that the conduct occurred offshore and there were difficulties with acquiring foreign evidence that could be admitted in an Australian prosecution.[109]

5.112 The Department confirmed that the level of awareness that the Minister would need, in order to issue a notice that a person had lost citizenship under proposed section 33AA, would not be the standard of 'beyond reasonable doubt', which would be required for a conviction for the same conduct. The General Counsel advised that:

> We would say that awareness is a knowledge that something has occurred. It is more than a belief or a suspicion. It does not require absolute proof. It involves a clear degree of mental apprehension. The Minister needs to be satisfied by way of an awareness. Before

---

107 Law Council of Australia, *Submission 26.1*, pp. 6–7.

108 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 16.

109 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, pp. 15–16.

> a notice can be issued that the Minister is aware that the event has occurred, there needs to be that clear degree of mental apprehension—or knowledge—that it has occurred. That would be knowledge based on a high degree of probability as to the facts underpinning the assessment.[110]

5.113 In evidence, the Department identified possible practical difficulties where a loss of citizenship under proposed section 33AA relied on the same facts as proposed section 35A. The General Counsel submitted:

> It might be that, having been made aware that the charges have been laid and the prosecution is proceeding before the courts, it would be appropriate for the minister to say, 'I'm going to forestall issuing a notice until such time as we find out the outcome of the charges before the court and proceed to consider use of the other provisions that hinge upon a conviction'—if indeed the same conduct is caught in those provisions.[111]

5.114 In a supplementary submission, the Department stated that the question of whether proposed section 33AA could be limited to overseas conduct is a policy question and a matter for government. The Department did not identify any legal impediments to the use of this model.[112]

Committee comment

5.115 The Committee notes the various concerns expressed about the overlap of conduct covered by proposed sections 33AA and 35A, which were well documented in written submissions and at the hearing. The primary concern was that, due to the self-executing nature of the conduct-based section 33AA, this provision would 'take effect' immediately for conduct that could also be subject to prosecution and conviction-based revocation under section 35A. For the overlapping offences, there would be no opportunity for the outcomes of any prosecution to be taken into account. Further, the additional safeguards built into the conviction-based section 35A would not be able to apply, and, conceivably, a person could lose their citizenship by operation of law under section 33AA even if they were acquitted of the offence in a Court.

5.116 The Committee notes that, where the conduct occurs in Australia, it is expected that citizenship revocation would occur following conviction and subject to Ministerial discretion. However, the Committee recognises that

110 Ms Philippa De Veau, General Counsel, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 18.

111 Ms Philippa De Veau, General Counsel, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 15.

112 Department of Immigration and Border Protection, *Submission 37.4*, p. 5.

there are likely to be instances where a person engages in conduct that breaches their allegiance to Australia, but it is either not feasible to bring a person to trial (for example, because they remain offshore) or a person is not able to be convicted because of difficulties in gathering foreign evidence.

5.117 There were differing views on the Committee as to whether proposed section 33AA should be applied to conduct both inside and outside Australia, as currently drafted, or whether its operation should be limited to conduct that has occurred offshore.

5.118 On balance, after detailed discussion, the Committee considers that the Bill should be amended to operate so that:

- proposed section 33AA is limited to:
  - ⇒ persons who have engaged in relevant conduct offshore, or
  - ⇒ persons who have engaged in relevant conduct onshore and left Australia before being charged and brought to trial for that conduct, and
- proposed section 35A applies to conduct occurring onshore, where the person remains onshore and is convicted of a relevant offence.

5.119 The Committee considers that section 33AA should not apply to cases where a prosecution has not been successful in respect of the same conduct.

5.120 This distinction would allow Australia to maintain the long held standards of criminal justice that apply within its domestic jurisdiction.

5.121 Applying proposed section 33AA to conduct offshore would be consistent with the advice received from eminent constitutional law expert Professor Helen Irving and her colleague Dr Rayner Thwaites from the University of Sydney, who argued it would 'circumvent the practical and legal difficulties that might attend an attempt to convict an Australian in another country of conduct that occurred in a country other than Australia'. Offshore application would also be consistent with the Bill's other conduct-based provision, proposed section 35.

5.122 The Committee considers that the prospects of bringing a person to trial and successfully convicting that person would be more constrained if that person is offshore. In order to protect the community, it is appropriate in these circumstances that there is a process for citizenship to be lost based on conduct that has been found to have occurred.

5.123 The Committee recommends a number of oversight mechanisms in Chapter 9 to monitor the frequency and circumstances in which each of the provisions are used and to ensure the Bill operates as intended.

Recommendation 1

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to limit the operation of proposed section 33AA to individuals who have:

- **engaged in relevant conduct offshore; or**
- **engaged in relevant conduct onshore and left Australia before being charged and brought to trial in respect of that conduct.**

Relationship between conduct under proposed section 33AA and the Criminal Code

5.124 Legal experts told the Committee that there were potential legal problems associated with transferring a list of conduct that was contained in the Criminal Code into the Bill, without also engaging the criminal law process for determining whether the conduct had occurred.

5.125 Subsection 33AA(3) of the Bill states:

> Words and expressions used in paragraphs (2)(a) to (h) have the same meanings as in Subdivision A of Division 72, sections 101.1, 101.2, 102.4, 103.1 and 103.2 and Division 119 of the *Criminal Code*, respectively.

5.126 Professor Anne Twomey observed that while it may have been intended that all aspects of meaning of the relevant terms, as set out in the Criminal Code, were picked up in the interpretation of proposed section 33AA, it was not clear if the qualifications attached to equivalent offences in the Criminal Code also applied in the operation of the Bill.[113]

5.127 Professor Helen Irving submitted that it was implausible that the conduct in proposed section 33AA, which is defined by reference to particular offences in the Criminal Code and attracts very serious penalties (but was also subject to defences), could be treated as distinct from the relevant offences in the Code.[114]

5.128 Professor Jeremy Gans, of the Centre for Comparative Constitutional Studies, considered that a number of problems arose from including a list of conduct in proposed section 33AA, which was not further defined:

> The particular problem that you have raised is one of a set of problems that comes from the fact that, when these words were

113 Professor Anne Twomey, *Submission 10*, pp. 1–4.

114 Professor Helen Irving, *Submission 15*, p. 4.

> put into the *Criminal Code*, they were inserted into a context where there was a criminal process in place and principles of criminal responsibility and interpretation were in place that restrain or combine or sometimes expand the meaning of ordinary words.[115]

5.129 Professor Gans stated that it was unclear how issues that would normally arise in a criminal trial would be resolved under section 33AA.[116]

5.130 Concerns were raised as to whether the conduct in proposed section 33AA also captured the general principles of criminal responsibility that exist in the Criminal Code, including the requirement to prove fault elements such as voluntariness and the absence of mistake and duress.[117]

5.131 Specifically, questions arose regarding whether the assessment of conduct pursuant to proposed section 33AA would include considering all elements of the conduct as per the definitions contained in the Criminal Code.

5.132 For example, 'financing terrorism',[118] when defined as an offence in the Criminal Code, covers conduct, circumstances, results, fault elements, exceptions, limiting principles and extension principles. Professor Gans said it was 'completely unclear' whether the qualifiers that existed in the Criminal Code for this offence also applied to the conduct in proposed section 33AA.[119]

5.133 In another example highlighted to the Committee, subsection 33AA(2)(c) of the Bill provides that citizenship be automatically renounced if a person was found to be 'providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act'. This conduct, when listed as an offence pursuant to section 101.2 of the Criminal Code, requires that a person either knew the training was 'connected with preparation for, the engagement of a person in, or assistance in a terrorist act', or was reckless as to that fact.[120]

5.134 If, as the Explanatory Memorandum suggests, the qualifications contained in the criminal provisions were included in the interpretation of proposed

---

115 Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 39.

116 Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 40.

117 Professor Anne Twomey, *Submission 10*, pp. 1–4; Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 39; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44.

118 Proposed subsection 33AA(2)(f) of the Bill.

119 Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 39.

120 Dr Rayner Thwaites, *Submission 16*, pp. 3–4.

subsection 33AA(2)(c), Dr Rayner Thwaites submitted that the immediate issue was how the qualifications would be established if the provisions were self–executing.[121]

5.135 Similarly, in the Criminal Code, there is an exemption for members of the Australian Defence Force in relation to conduct that amounts to 'engaging in international terrorist activities using explosive or lethal devices'. Professor Gans submitted that it was unclear whether this exemption also existed under proposed section 33AA(2)(a).[122]

5.136 Professor Helen Irving considered that without the elements of knowledge and intention, which are found in the Criminal Code provisions, and a corresponding criminal trial, the Bill could automatically capture innocent acts. Accordingly, Professor Irving argued that determinations as to knowledge and intent would need to be determined in a court of law:

> If, as I suggest, it is implausible that the definition and the offence should be legitimately detached from each other, and if these forms of conduct that are referred to in proposed section 33AA are an offence—which they are—then that needs to be determined in a court of law, with the element of intention and the defences, exceptions and so on that are found in the *Criminal Code*.[123]

5.137 Professor Twomey agreed that without the relevant elements of knowledge and intention, the provisions might capture innocent conduct where a person did not have the relevant knowledge and intention to achieve an end such as terrorism. Questions of personal intention and knowledge were matters that would normally require proof before any action could be taken.[124]

5.138 Professor Twomey submitted:

> If intention and knowledge are required before citizenship is 'renounced' (and it would seem to be logically difficult to 'renounce' one's citizenship if one had no idea that one's conduct had anything to do with actions inconsistent with allegiance to Australia and had any effect upon one's citizenship status) then this gives rise to difficulties with the automatic application of the termination of citizenship.[125]

---

121 Dr Rayner Thwaites, *Submission 16*, pp. 3–4.

122 Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 39. See also, Centre for Comparative Constitutional Studies, *Submission 29*, p. 3.

123 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44.

124 Professor Anne Twomey, *Submission 10*, p. 3.

125 Professor Anne Twomey, *Submission 10*, p. 3.

5.139 Professor Gans considered that the only way to resolve all of the issues associated with the inclusion of criminal conduct in proposed section 33AA would be to require a court conviction:

> Once you require a conviction you bring in the process, which has existed for so long, to try and deal with all of these issues in a sensible way with people being warned of particulars, methods to resolve questions and a standard of proof. It would also pick up the usual protections of criminal law.[126]

5.140 The Committee sought advice from the Department regarding whether the defences, fault elements, exemptions and extensions included in the Criminal Code were intended to apply to conduct under proposed section 33AA, and how this would be determined.

5.141 The Department responded as follows:

> Whether the person engages in the relevant conduct outlined in section 33AA(2) will be a matter of fact. The phrase used in the Bill 'a person engages in the relevant conduct' must necessarily mean conduct as a whole, and not restricted to meaning only the physical elements of the provisions in the *Criminal Code*.
>
> The meaning of engaging in any of the conduct listed in the sub–paragraphs of 33AA(2) is to be considered in light of the whole meaning of the listed phrases.[127]

Committee comment

5.142 Inquiry participants highlighted a lack of clarity as to whether the qualifiers attached to the Criminal Code offences referenced in proposed section 33AA were intended to apply.

5.143 The Committee notes the clarification provided by the Department of Immigration and Border Protection that such conduct should be considered in light of the meaning of the listed phrases outlined in the Criminal Code, and should not be restricted to meaning only the physical elements of the provisions. Noting the confusion expressed by inquiry participants, the Committee considers it would be helpful if the Bill and its Explanatory Memorandum were amended to clarify this intention.

126 Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 41.

127 Department of Immigration and Border Protection, *Submission 37.4*, p. 5.

Recommendation 2

The Committee recommends that changes be made to clarify that the conduct leading to loss of citizenship listed in proposed section 33AA of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 is intended to be considered in light of the meaning of the equivalent provisions in the *Criminal Code Act 1995*, and is not intended to be restricted to the physical elements.

The Committee recommends that, if possible, these amendments be made in the Bill, with additional amendments to the Explanatory Memorandum where necessary.

Proposed section 35 – specific issues

5.144 A number of participants in the inquiry expressed support for the concept of 'modernising' the existing section 35 of the *Australian Citizenship Act 2007* (the Citizenship Act) in response to the current international security environment.[128] Other participants expressed concerns with both the existing section and its proposed extension.[129]

5.145 Proposed section 35 of the Bill provides that, in addition to the existing provision under the Citizenship Act for service in the armed forces of a country at war with Australia, a dual national loses their Australian citizenship if he or she 'fights for, or is in the service of, a declared terrorist organisation' outside Australia.[130]

'Declared terrorist organisations'

5.146 'Declared terrorist organisation' is defined in the Bill as being any of the existing terrorist organisations listed under subsection 102.1(1) of the Criminal Code that are declared by the Immigration Minister for the purposes of the proposed section.[131]

128 See, for example, Executive Council of Australian Jewry, *Submission 9*, p. 3; Australia Defence Association, *Submission 8*; Professor George Williams, Ms Shipra Chordia and Ms Sangeetha Pillai, *Submission 17*, p. 1; Pirate Party Australia, *Submission 28*, p. 4; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 14.

129 See, for example, Muslim Legal Network (NSW), *Submission 27*, p. 9; Councils for civil liberties across Australia, *Submission 31*, pp. 2–3; Professor Kim Rubenstein, *Submission 35*, pp. 3, 4.

130 Proposed subsection 35(1).

131 Proposed subsection 35(4).

5.147 There are currently 20 terrorist organisations listed under subsection 102.1(1) of the Criminal Code.[132] These organisations are listed, or re-listed, in regulations that expire after three years. To qualify for listing, the Attorney-General must be 'satisfied on reasonable grounds that the organisation: (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or (b) advocates the doing of a terrorist act'.[133] A regulation listing a terrorist organisation is a disallowable instrument, and the Parliamentary Joint Committee on Intelligence and Security may review the listing and report the Committee's comments and recommendations to each House of the Parliament before the end of the applicable disallowance period.[134]

5.148 The Bill does not explicitly provide any additional criteria that must be met for a terrorist organisation to be made a 'declared terrorist organisation' by the Minister for the purposes of proposed section 35. The Bill specifies that the declaration would *not* be a legislative instrument.[135]

5.149 The Explanatory Memorandum provides some additional information on the intended interaction between 'declared terrorist organisations' for the purposes of the Bill and the terrorist organisations listed under the Criminal Code:

> It is intended that the Minister rely upon the terrorist organisation list under the Criminal Code because fighting for, or being in the service of, a terrorist organisation in this list demonstrates a repudiation of allegiance to Australia. This amendment reflects the policy intention that only terrorist organisations that are opposed to Australia or are opposed to any of Australia's values, democratic beliefs, rights or liberties.
>
> … Therefore, where a person fights with a terrorist organisation that is opposed to Australia or to any of Australia's values, democratic beliefs, rights or liberties, the person has evidently repudiated their allegiance to Australia.[136]

Criteria for declaration

5.150 A number of participants in the inquiry submitted that fighting for or serving a 'declared terrorist organisation' may not always be connected to the Bill's purpose of removing citizenship from persons who no longer

132 See 'Australian National Security – Listed Terrorist Organisations', *Australian Government*, <www.nationalsecurity.gov.au/ListedTerroristOrganisations> viewed 9 August 2015.

133 *Criminal Code Act 1995*, subsections 102.1(2) and (3).

134 *Criminal Code Act 1995*, section 102.1A.

135 Proposed subsection 35(10).

136 Explanatory Memorandum, p. 16.

have allegiance to Australia. For example, the Law Council of Australia pointed out that

> [t]here is no requirement for the declared terrorist organisations under proposed section 35 to pose a direct threat to Australia's interests or the health or safety of Australians or the maintenance of Australian values against committing war crimes or crimes against humanity.
> … It is conceivable that some listed terrorist organisations do not identify Australia or Australian interests as targets.[137]

5.151 The Law Council of Australia supported the insertion of criteria into the Bill to ensure that only organisations that posed such a threat could be declared.[138]

5.152 The Executive Council of Australian Jewry discussed the example of the Kurdistan Workers Party (PKK) in its submission and in oral evidence:

> [T]he fact that a person is a member of, or has fought on the side of, an organisation that is listed as a terrorist organisation under the *Criminal Code* does not necessarily mean that that person has been disloyal to Australia. One of those organisations is the Kurdistan Workers Party (PKK), whose members have been engaged, directly or indirectly, in combat in Syria and Iraq against another listed terrorist organisation, Islamic State. Arguably, the Kurds' military successes against Islamic State have been consistent with Australia's national interests, especially as Australian forces themselves have been involved in assisting the Iraqi army to combat Islamic State in Iraq.[139]
>
> … Mere service with that organisation, even fighting with that organisation, in our view does not necessarily entail a severance of the bond of citizenship and a repudiation of allegiance to Australia. We would take the view that, on the contrary, somebody fighting in that organisation may well feel a degree of sympathy with other Western countries, including Australia, and therefore it should not automatically be presumed that that person is hostile to Australia.[140]

137 Law Council of Australia, *Submission 26*, p. 13.

138 Law Council of Australia, *Submission 26*, p. 13; Dr Natasha Molt, Senior Policy Lawyer, Criminal and National Security Law, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 6.

139 Executive Council of Australian Jewry, *Submission 9*, pp. 1–2

140 Mr Peter Wertheim AM, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 24.

5.153 The Muslim Legal Network (NSW) similarly used the PKK as an example to demonstrate that not all of the 20 terrorist organisations currently listed under the Criminal Code 'pose a threat to Australia or its citizens'.[141]

5.154 Professor Ben Saul of the University of Sydney argued against the creation of 'conflicting lists' of terrorist organisations altogether, indicating that this would create 'confusion about legal liabilities' and suggest to Australians that 'some listed terrorist organisations deserve loss of citizenship but not others'.[142]

5.155 The Australian Human Rights Commission, on the other hand, noted at a public hearing that it was not clear whether 'declared terrorist organisations' would in fact be a subset of the currently listed terrorist organisations. The Commission echoed concerns raised by other submitters that there would not necessarily be a 'nexus' between service with a declared terrorist organisation and activities 'directed against Australia or Australian sovereignty'.[143]

Process for declaration

5.156 The NSW Society of Labor Lawyers submitted that the existing process for listing of terrorist organisations was a 'decision of the relevant Minister only with no independent or court process involved'. It raised concerns that lack of transparency for the additional 'declared terrorist organisation' process would compound concerns about the initial listing:

> Here the Minister is given the discretion to further declare which of the previously declared terrorist bodies is caught by this section, presumably to avoid involving organisations with no connection to Australia. As such, we are dealing with an opaque administrative process overlaid on the earlier opaque, much-criticised declaration process.[144]

5.157 When asked by the Committee whether criteria could be included in the Bill that the Minister would have to be satisfied of before declaring a terrorist organisation for the purpose of section 35, and whether the declaration could be made a disallowable instrument, the Department of Immigration and Border Protection responded that this 'is a policy question and a matter for government'. The Department did not identify any legal impediments or unintended consequences in its response, but explained that

141 Muslim Legal Network (NSW), *Submission 27*, p. 9.

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

143 Mr John Howell, Lawyer, Australian Human Rights Commission, *Committee Hansard,* Canberra, 5 August 2015, p. 14.

144 NSW Society of Labor Lawyers, *Submission 25*, p. 8.

> the Minister will declare those organisations that are opposed to Australia or Australia's values, democratic beliefs, rights and liberties. This provision has been deliberately tied to the definition of 'terrorist organisation' in the Criminal Code to limit its operation to those falling within that definition, that are so declared by the Minister.[145]

Committee comment

5.158 The Committee notes concerns raised by participants in the inquiry that there are organisations that are listed as terrorist organisations under the Criminal Code but do not necessarily pose any direct threat to Australia or its interests. Support for such organisations, while a criminal offence, may not necessarily entail a repudiation of allegiance to Australia.

5.159 Concerns were also raised that the introduction of an additional list of 'declared terrorist organisations'—as a subset of the existing list of terrorist organisations proscribed under the Criminal Code—risks sending a confusing message to the public. Some members of the Committee felt that it would be preferable for there to be a single list of proscribed terrorist organisations, with equal consequences for supporting any organisation on the list.

5.160 The Committee understands that the intent of the 'declared terrorist organisation' provision is to enable the Minister for Immigration and Border Protection to declare a subset of listed terrorist organisations to which support for would entail a repudiation of allegiance to Australia. The Committee agrees with inquiry participants that this intent could be made clearer in the Bill and its Explanatory Memorandum. This could be achieved by including explicit criteria in the Bill that the Minister must be satisfied of before making a declaration.

5.161 The Committee considers the criteria for a terrorist organisation to be 'declared' should clearly connect to the Bill's purpose, which states that citizens 'may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed [the common bond of citizenship] and repudiated their allegiance to Australia'. Providing such criteria would also more directly link the provision to the 'aliens' power under the Constitution.

5.162 The Committee further considers that, given the distinct purpose of the subset list of 'declared terrorist organisations' compared to the complete list of terrorist organisations under the Criminal Code, it is appropriate that declarations be subject to at least the same procedural safeguards as

145 Department of Immigration and Border Protection, *Submission 37.4*, p. 5.

the current listing process.[146] The Committee is therefore of the view that declarations should be considered disallowable legislative instruments and be reviewable by this Committee.

Recommendation 3

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to include explicit criteria that the Minister must be satisfied of before declaring a terrorist organisation for the purpose of proposed section 35. The criteria should make clear the connection between proposed section 35 and the purpose of the Bill.

Recommendation 4

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to make the Minister's declaration of a 'declared terrorist organisation' for the purpose of proposed section 35 a disallowable instrument.

Further, the Committee recommends that the Bill be amended to enable the Parliamentary Joint Committee of Intelligence and Security to conduct a review of each declaration and report to the Parliament within the 15 sitting day disallowance period.

Definition of 'in the service of'

5.163 The Bill does not further define what is to be considered activity 'in the service of' a declared terrorist organisation for the purposes of proposed section 35. The Explanatory Memorandum, however, states:

> In this context the term, 'in the service of' is intended to cover acts done by persons willingly and is not meant to cover acts done by a person against their will (for example, an innocent kidnapped person) or the unwitting supply of goods (for example, the provision of goods following online orders by innocent persons). A person may act in the service of a declared terrorist organisation if they undertake activities such as providing medical support, recruiting persons to join declared terrorist organisations,

146 See section 102.1A of the *Criminal Code Act 1995*.

> providing money or goods, services and supplies to a declared terrorist organisation.[147]

5.164 A number of participants in the inquiry raised concerns about the breadth of conduct that could fall under the term 'in the service of'.[148] In particular, as a result of the reference to 'medical support' in the Explanatory Memorandum, participants were concerned as to whether the delivery of impartial, humanitarian medical assistance to a member of a declared terrorist organisation would lead to automatic loss of citizenship. For example, the Law Council of Australia submitted that a Red Cross worker assisting an injured jihadist in Syria could potentially be considered to have lost their citizenship.[149]

5.165 The Muslim Legal Network (NSW) submitted that even trivial associations with an element of a declared terrorist organisation could jeopardise a person's citizenship, including 'the donation of aid in conflict zones' that is 'distributed only by limited means or through organisations not overtly related to the declared terrorist organization':

> This could prove problematic for aid workers who are subject to varying regions of control in conflict areas, particularly where it is unclear which particular group is providing protection to a hospital or similar unconventional aid facility. An interesting example is that of the International Red Cross or Médecins Sans Frontières (Doctors without borders) who have historically provided assistance and aid to any injured persons during times of conflict.[150]

5.166 Professor Ben Saul of the University of Sydney argued that the Bill would 'criminalise' conduct that was 'highly desirable in armed conflict and protected under the Geneva Conventions of 1949':

> All wounded people hors de combat ('out of combat'), whether Nazi soldiers or so-called 'terrorists', have a right to basic medical care because they are human beings entitled to humane treatment.

---

147 Explanatory Memorandum, p. 14.

148 Professor Ben Saul, *Submission 2*, p. 3; Human Rights Committee, Law Society of NSW, *Submission 11*, p. 4; Australian Human Rights Commission, *Submission 13*, p. 4; Professor Helen Irving, *Submission 15*, p. 6; Dr Rayner Thwaites, *Submission 16*, p. 7; Professor George Williams, Ms Shipra Chordian and Ms Sangeetha Pillai, *Submission 17*, p. 5; Law Council of Australia, *Submission 26*, p. 15; Muslim Legal Network (NSW), *Submission 27*, pp. 9–10; Ms Amy Lamoin, Chief Technical Advisor, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 5.

149 Law Council of Australia, *Submission 26*, p. 15.

150 Muslim Legal Network (NSW), *Submission 27*, pp. 9–10.

> Stripping citizenship from those who provide medical care is entirely indefensible.[151]

5.167 UNICEF Australia told the Committee that some of UNICEF's own humanitarian work in conflict zones could also potentially fall under the term 'in the service of':

> [A]s part of UNICEF's work globally there are times when we have to educate armed groups in relation to child protection as part of their being released—actually outlining international law to members of armed groups and explaining the serious consequences for children. Would I then qualify as being 'in the service', even though I am firmly in the service of UNICEF globally and in the service of children?[152]

5.168 The Australian Human Rights Commission suggested there was a general need to clarify what is intended by the term 'in the service of':

> The primary concern is the phrase is one that does not have any established jurisprudence. It is very unclear exactly what it means. It is not as simple, as you would appreciate, as saying 'whether one is part of the armed forces of a body'. This is the complexity of creating new laws that recognise that we do not have insignia for Army or hierarchies. We do not have that kind of clarity with an army. It is obvious that one has to come up with different tests for what can often be just singular actions. But I think 'in the service of' is a very broad term and, if it were to be retained, it would be helpful if it could be explained what exactly that means.[153]

5.169 In a supplementary submission, the Commission noted concerns that the existing section 35 of the Citizenship Act relating to serving in the armed forces of a country at war with Australia 'may not be entirely consistent with international human rights norms' because, for example, it could apply to 'a person forcibly conscripted to serve in the armed forces of another nation in a non-combat role'. It argued, however, that the proposed amendments to section 35 were 'more likely to limit the human rights of Australians in an arbitrary way' for a number of reasons:

- there was likely to be 'significantly less doubt' about whether a person had served in the armed forces of another country than about whether they had fought for or been in the service of a terrorist group,

151 Professor Ben Saul, *Submission 2*, p. 3.

152 Ms Amy Lamoin, Chief Technical Advisor, UNICEF Australia, *Committee Hansard,* Canberra, 5 August 2015, p. 5.

153 Professor Triggs, *Committee Hansard*, Canberra, 10 August 2015, p. 28.

- the content of the phrase 'is in the service of … a terrorist organisation' was less clear than the phrase 'serves in the armed forces of a country at war with Australia',
- the connection between being in the service of a terrorist organisation and a person's allegiance to Australia was 'less clear' than the connection between serving in the armed forces of a country at war with Australia and their allegiance to Australia, and
- under proposed section 36A of the Bill, a person who lost their Australian citizenship under section 35 would no longer be able to become a citizen again.[154]

5.170 The Human Rights Committee of the Law Society of NSW submitted that the term 'in the service of' should be clarified to

> only operate to deny a person of their Australian citizenship where that person has conducted him or herself in a manner seriously prejudicial to the vital interests of Australia or has taken an oath, or made a formal declaration, of allegiance to another State (or terrorist organisation), or given definite evidence of his determination to repudiate his allegiance to Australia.[155]

5.171 In its submission, the Law Council of Australia additionally recommended that an exception should be provided in proposed section 35 (and 33AA) for conduct that takes place under duress, and that it should be a requirement that a person has *voluntarily intended* to engage in the applicable conduct before their citizenship is ceased.[156]

5.172 The Executive Council of Australian Jewry similarly argued that the legislation had to be 'sufficiently sophisticated' to take into account situations like the case of a person who was 'kidnapped by a terrorist organisation and, under threat of their own life … is thereby induced to serve with that terrorist organisation'.[157]

5.173 The Department of Immigration and Border Protection was asked whether the term 'in the service of' could be clarified in respect to the provision of neutral humanitarian assistance. The Department did not offer any further clarification, but re-iterated advice from the Explanatory Memorandum that the phrase 'in the service of' should be given its ordinary meaning, and that it is only intended to cover acts done willingly and knowingly.[158]

---

154 Australian Human Rights Commission, *Submission 13.1*, pp. 1–2.

155 Human Rights Committee, Law Society of NSW, *Submission 11*, p. 4.

156 Law Council of Australia, *Submission 26*, p. 15.

157 Mr Peter Wertheim AM, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 24.

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

Committee comment

5.174 The Committee notes concerns that the term 'in the service of' a declared terrorist organisation could be interpreted to apply to neutral and independent humanitarian assistance, such as that provided by the Red Cross or Médecins Sans Frontières. The Committee does not believe this is the intent of the provision.

5.175 The Committee notes the substantial funding provided by the Australian Government to the International Committee of the Red Cross (ICRC), for example, in support of its mandate under the Geneva Conventions to help victims of armed conflict on 'both sides of the battlefield' with neutrality and independence.[159] This support includes being a key partner in the ICRC's 'Health Care in Danger' initiative to improve the delivery of health care in conflict zones.[160]

5.176 While it would not be desirable to entirely exclude medical support from the definition of 'in the service of a declared terrorist organisation', the Committee agrees with inquiry participants that more could be done to clarify that section 35 is not intended to apply to the type of impartial, independent humanitarian assistance provided by organisations such as the ICRC, Médecins Sans Frontières and UNICEF. Given the self-executing nature of the Bill, it is essential that it be made readily apparent in the text of the Bill that proposed section 35 does not apply to this assistance.

5.177 The Committee notes that the Explanatory Memorandum clearly states that the term 'in the service of' is not intended to apply to conduct that takes place unwittingly or against a person's will (for example, through kidnapping).[161] However, as the loss of citizenship under section 35 is proposed to be a self-executing provision, the Committee considers that this intention should also be made clear in the text of the Bill.

5.178 The Committee notes that the concerns expressed in relation to humanitarian work may also extend to other types of legitimate conduct. This may include activities undertaken by Australian law enforcement and intelligence officers or their agents as part of national security operations. The proposed section is clearly not intended to apply in such

159 Department of Foreign Affairs and Trade Annual Report 2013–14, p. 179; International Committee of the Red Cross, 'The ICRC: Its mission and its work', 2009, pp. 3–4, 6–7, <https://www.icrc.org/eng/resources/documents/publication/p0963.htm> viewed 9 August 2015.

160 AusAID Annual Report 2012–13, p. 148; International Committee of the Red Cross, 'Health Care in Danger' <https://www.icrc.org/eng/what-we-do/safeguarding-health-care> viewed 9 August 2015.

161 Explanatory Memorandum, p. 14.

circumstances and this should be clarified in the Bill. A similar exemption should be included for proposed section 33AA.

Recommendation 5

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and the Explanatory Memorandum be amended to clarify the intended scope of the term 'in the service of' a declared terrorist organisation.

In particular, the Bill should be amended to make explicit that the provision of neutral and independent humanitarian assistance, and acts done unintentionally or under duress, are not considered to be 'in the service of' a declared terrorist organisation for the purposes of proposed section 35.

Recommendation 6

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and the Explanatory Memorandum be amended to provide that staff members or agents of Australian law enforcement or intelligence agencies are exempted from sections 33AA and 35 of the Bill when carrying out actions as part of the proper and legitimate performance of their duties.

Other suggested amendments to section 35

5.179 The existing section 35 of the Citizenship Act has never been used since its enactment in 1949. In part, this is because Australia has never been in a formally declared state of war since 1949.[162]

5.180 Professor Anne Twomey of the University of Sydney noted that '[t]hese days, it is rare for countries to declare war' and that Australia 'may be involved in armed conflicts without any declaration of war'. Professor Twomey suggested an amendment to proposed section 35 to address this issue:

> Section 80.1AA of Criminal Code accommodates this problem by referring to circumstances where the 'Commonwealth is at war

162 Professor Kim Rubenstein, *Submission 3*, p. 3.

> with an enemy (whether or not the existence of a state of war has been declared)' and provides for the enemy to be specified by Proclamation as an enemy at war with the Commonwealth. It may be helpful to pick up such an approach (if it is not done elsewhere).[163]

5.181 The Australia Defence Association noted in its submission that treachery occurs 'whenever an Australian chooses to fight our defence force when it is deployed overseas' and that the Bill 'fails to account for situations where the armed group may not be a terrorist one'. The Association recommended that proposed section 35 be expanded to also include loss of citizenship for persons who fight for, or are in the service of, 'any armed group fighting the Australian Defence Force'.[164]

Committee comment

5.182 The Committee notes suggestions that proposed section 35 of the Bill be extended further to apply to countries at war with Australia where that state of war is not formally declared; and to apply to any armed group fighting the Australian Defence Force. The Committee considers that these suggestions may have merit and deserve further consideration by the Government. However, neither extension was included within scope of Bill presented to the Parliament and, as such, the Committee has not received sufficient evidence on these matters to form a recommendation.

163 Professor Anne Twomey, *Submission 10*, p. 4.

164 Australia Defence Association, *Submission 8*, pp. 4, 11.

6

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, S*ubmission 37.3*, p. 22.

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

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

10 Department of Immigration and Border Protection, S*ubmission 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.

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

---

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]

---

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

---

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

---

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]

---

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

---

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:

---

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:

---

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:

---

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

---

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]

---

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]

---

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.

---

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.

8

Children

8.1 There are two ways that the Bill may impact on children: either through a child's own conduct or through the conduct of a child's parent.

8.2 The Explanatory Memorandum states:

> There are documented cases of children fighting with extremist organisations overseas and being otherwise involved in terrorist activities, so the question of the cessation and renunciation power applying to minors should be addressed. The proposed amendments apply to all Australian (dual) citizens regardless of age.[1]

8.3 The following chapter considers two key issues arising during the inquiry. Firstly, the degree to which the Bill should apply to children and secondly, the extent to which it is consistent with Australia's accepted obligations to children.

Application of the Bill to children

Loss of citizenship through child's own conduct

8.4 A child may lose their citizenship through their own conduct under proposed sections 33AA, 35 and 35A of the Bill.

8.5 The Explanatory Memorandum states that the restrictions under the *Criminal Code Act 1995* (the Criminal Code) relating to children will apply to proposed sections 33AA and 35A.[2]

8.6 The relevant provisions are sections 7.1 and 7.2 of the Criminal Code, which provide that:

---

1 Explanatory Memorandum, p. 32.

2 Explanatory Memorandum, pp. 10, 19.

> 7.1 Children under 10
>
> **A child under 10 years old is not criminally responsible for an offence.**
>
> 7.2 Children over 10 but under 14
>
> **A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.**
>
> The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.[3]

8.7 Similar provisions exist in section 4M and section 4N of the *Crimes Act 1914.*

8.8 The Explanatory Memorandum goes on to say that a child under the age of 10 years 'will not automatically renounce their Australian citizenship by engaging in the terrorist related conduct specified in new subsection 33AA(2)'.[4] The Explanatory Memorandum is silent however on the application of proposed section 35 to children.

8.9 Notwithstanding these statements, submitters raised concerns about the lack of clarity on the face of the Bill concerning children.[5]

8.10 Professor Anne Twomey of the University of Sydney argued that the Explanatory Memorandum

> asserts that the restrictions upon the application of offences under the *Criminal Code* to children under the age of 14 'will apply to the application of new section 33AA'. It is not clear on the face of the legislation, however, that this is so. No express application of these restrictions is made. The most one can rely upon is the statement in proposed s 33AA(3) that 'words and expressions' in s 33AA(2) have the same meaning as in certain provisions of the *Criminal Code.* It is not at all clear that this imports a restriction on the application of proposed s 33AA to minors.[6]

---

3 Section 7.1 and Section 7.2 of the *Criminal Code Act 1995.*

4 Explanatory Memorandum, p. 10.

5 Law Council of Australia, *Submission 26,* p. 24; Professor Anne Twomey, *Submission 10,* p. 3; UNICEF Australia, *Submission 24,* p. 6; Centre for Comparative Constitutional Studies, *Submission 29,* p. 3; Australian Human Rights Commission, *Submission 13,* p. 12; Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 6; Ms Erin Gillen, Senior Policy and Project Officer, Federation of Ethnic Communities' Councils of Australia (FECCA), *Committee Hansard,* 4 August 2015, p. 31.

6 Professor Anne Twomey, *Submission 10,* p. 3.

8.11 The Centre for Comparative Constitutional Studies at the University of Melbourne suggested that the intended operation of proposed section 33AA should be made clear:

> [T]he Explanatory Memorandum states that s 33AA would not apply to minors under the age of 10, and would have limited application to minors between the ages of 10 and 14, in accordance with the *Criminal Code*. Given that s 33AA(3) makes no reference to the general provisions of the *Code,* it is unclear whether the section's operation is confined in this way. If this is the intended operation of s 33AA, it should be expressly stated in the legislation.[7]

8.12 Regarding limited application to children, the Law Council of Australia similarly commented:

> We do not see any of that addressed within the bill, although the explanatory memorandum suggests it is the intention that that be here somewhere.[8]

8.13 Professor George Williams of the University of New South Wales considered the conduct provisions (proposed sections 33AA and 35) would apply to children of any age:

> There is nothing put in the bill to apply the normal rules of criminal responsibility and nor are they implicit, because the parts of the Criminal Code picked up do not include those provisions. So, yes, you could pick up children of any age and they could lose their citizenship by virtue of this.[9]

8.14 Noting that section 7.2 of the Criminal Code requires a child aged between 10 and 14 years to know that his or her conduct is wrong, UNICEF Australia outlined the difficulties associated with making this assessment:

> The question of whether or not a child knows that his or her conduct is wrong … is a highly complex investigation, ordinarily requiring expert evidence, direct discussions with the child, a deep understanding of the evolving capacities of the child and the checks and balances of a court environment. This information must be gathered and then considered against the specific circumstances of that child including their level of maturity, their access to quality education, the countries that they have

---

7 Centre for Comparative Constitutional Studies, *Submission 29,* p. 3.

8 Ms Gabrielle Bashir SC, Member, National Criminal Law Committee, Law Council of Australia, *Committee Hansard,* 4 August 2015, p. 3. See also Law Council of Australia, *Submission 26,* p. 24.

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

> predominantly resided in and their family-based environment. Again, it is unclear on the face of the Bill who will, in effect, be assessing whether a child knows that his or her conduct is wrong, what evidence the assessor will use, what standard of proof the assessor will adopt or what, if any, rules of evidence apply.[10]

8.15 The Law Council of Australia raised similar concerns, arguing that it is unclear in relation to proposed section 33AA and 35 as to how, with no requirement for conviction, 'the Minister will be in a position to determine whether a particular child has the capacity to know his or her conduct is wrong'.[11] The Law Council noted that 'capacity is usually a matter for determination by a court after psychological evaluations have been conducted and the child has been examined'.[12]

8.16 The Australian Human Rights Commission considered that 'loss of citizenship by conduct should not be possible in the case of children'.[13]

8.17 In its report on the Bill, tabled on 11 August 2015, the Parliamentary Joint Committee on Human Rights (PJCHR) stated:

> [T]here is real uncertainty as to how judicial processes would determine whether the provisions apply to young people under the age of 10 and between 10 and 14 years of age and uncertainty as to how court process would work in practice.[14]

8.18 The PJCHR noted in particular that proposed subsection 35(1) does not reference the Criminal Code, concluding that 'accordingly the proposed section 35(1) would certainly apply regardless of age'.[15]

8.19 In its Alert Digest, the Senate Standing Committee for the Scrutiny of Bills similarly stated:

> [I]t is unclear—on the face of the legislation—whether the general provisions in the Criminal Code which relate to children are applicable.[16]

8.20 The Committee sought clarification as to the application of the bill to children less than 10 years old and to children aged between 10 and 14

10 UNICEF Australia, *Submission 24,* pp. 7–8; Ms Amy Lamoin, UNICEF Australia, *Committee Hansard,* 5 August 2015, pp. 3, 6.

11 Law Council of Australia, *Submission 26,* p. 24.

12 Law Council of Australia, *Submission 26,* p. 24.

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

14 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament,* Canberra, August 2015, p. 36.

15 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament,* Canberra, August 2015, p. 36.

16 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2015,* 12 August 2015, p. 4.

years, and questioned how a determination of a child's understanding of his or her conduct would be made. In response, the Department of Immigration and Border Protection advised:

> In the event that the Minister considers it is in the public interest, he or she may rescind a notice for any person, including a child. In the case of a child, the Minister would give primary consideration to the principles in the Criminal Code relating to children. Where the Minister rescinds a notice in the public interest, this would exempt the child from the operation of the Bill.[17]

Loss of citizenship through conduct of a parent

8.21 The second way a child may lose their citizenship is through the conduct of a parent. The Bill includes a note at the end of proposed subsections 33AA(5), 35(1) and 35A(1) that '[a] child of the person may also cease to be an Australian citizen: see section 36'.

8.22 Section 36 of the *Australian Citizenship Act 2007* (the Citizenship Act) allows a child's citizenship to be revoked in certain circumstances where a responsible parent's citizenship is revoked. The Bill would amend section 36 so that it applies in relation to proposed sections 33AA, 35 and 35A.

8.23 Specifically, under subsection 36(1), if a person ceases to be an Australian citizen at a particular time (the cessation time) and, at the cessation time, the person is a responsible parent of a child aged under 18, then the Minister may, by writing, revoke the child's Australian citizenship. The child then ceases to be an Australian citizen at the time of the revocation.

8.24 However, subsection 36(2) provides that if, at the cessation time, another responsible parent of the child is an Australian citizen, subsection 36(1) does not apply to the child:

- while there is a responsible parent who is an Australian citizen; and
- if there ceases to be such a responsible parent because of the death of a responsible parent—at any time after that death.

8.25 This matter was addressed by a number of submitters.[18] The Immigration Advice and Rights Centre Inc stated:

---

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

18 FECCA, *Submission 12,* p. 4; UNICEF Australia, *Submission 24,* p. 12; Muslim Legal Network (NSW), *Submission 27,* p. 13; Islamic Council of Queensland Inc, *Submission 33,* p. [2]; Immigration Advice and Rights Centre Inc, *Submission 36,* p. 5; Australian Lawyers for Human Rights, *Submission 20,* p. 8; Dr Norman Gillespie, Chief Executive Officer, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 1; Ms Amy Lamoin, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 5; Ms Erin Gillen, FECCA, *Committee Hansard,* 4 August 2015, p. 31; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard,*

> We do not consider denying citizenship … to children for the conduct of a parent to be reasonable, necessary or proportionate.[19]

8.26 Similarly, the Islamic Council of Queensland Inc considered that:

> Children should be protected from losing their citizenship in instances where this proposed legislation is applied against their parents.[20]

8.27 UNICEF Australia concurred with this view:

> In the context of the criminal justice system, it would be inconceivable for a child to be punished on the basis of the criminal conduct of a parent. Likewise, it should be inconceivable that a child should suffer very serious consequences in relation to his or her citizenship on the basis of conduct of an adult parent.[21]

8.28 In evidence, the Refugee Council of Australia told the Committee:

> The other area where we see potential for innocent people to be penalised is in relation to family members, particularly partners and children of people who may have their citizenship ceased under these provisions. This is outlined in our submission. Just briefly, we would be very concerned if we saw people who had committed no offence whatsoever being penalised in the same manner as a relative who had actually committed an offence, especially if those people are children. So we really would like to see mechanisms included in the bill to make sure that they are not penalised unfairly.[22]

8.29 Australian Lawyers for Human Rights made the following observation and recommendation:

> While the EM states that the Minister would take the best interests of a child into account in exercising their powers in relation to termination of a child's citizenship, there is no such requirement in the legislation. **We recommend that such a requirement be included in section 36.** For children to be penalised for crimes committed by their parents is, we submit, a form of collective punishment. Collective punishment is an intimidatory measure which penalises both the guilty and the innocent. In the context of

5 August 2015, p. 11; Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard,* 5 August 2015, p. 23.

19 Immigration Advice and Rights Centre Inc, *Submission 36,* p. 5.

20 Islamic Council of Queensland Inc, *Submission 33,* p. [2].

21 Dr Norman Gillespie, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 1.

22 Ms Lucy Morgan, Refugee Council of Australia, *Committee Hansard,* 5 August 2015, p. 23.

armed conflict or occupation, it would be **in breach of Article 33 of the Fourth Geneva Convention** which reads as follows:

> No persons may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.[23]

8.30 The Federation of Ethnic Communities' Councils of Australia (FECCA), in stating its opposition to section 36, drew attention to Australia's obligations to children under the *Convention on the Rights of the Child* (CRC).[24] In evidence, FECCA commented that

> given the breadth of the provisions here and the number of people who might fall under the new provisions, we might find an increase in the number of children who could have their citizenship revoked under section 36.[25]

8.31 UNICEF Australia echoed this view, also noting that the Committee on the Rights of the Child has, on more than one occasion, raised concerns about section 36.[26]

8.32 In evidence, Professor Gillian Triggs, President of the Australian Human Rights Commission, told the Committee:

> [T]here may be many instances in which a child has been born and lives in Australia but the parent has been engaged in a terrorist activity or something defined within the bill and that child would suffer significantly as a consequence of loss of citizenship. That is our primary concern.[27]

8.33 The Committee asked the Department of Immigration and Border Protection what would happen to a child whose parent loses their citizenship. The Department advised:

> A child of a person who loses their citizenship does not automatically lose his or her citizenship. The Minister has discretion to revoke the citizenship of a child of a dual citizen who loses their citizenship under the Bill, except if the child's other responsible parent is an Australian citizen or if the revocation would render the child stateless. Any exercise by the Minister of his discretionary power to revoke the Australian Citizenship of a

23 Australian Lawyers for Human Rights, *Submission 20,* p. 8.

24 FECCA, *Submission 12,* p. 4.

25 Ms Erin Gillen, FECCA, *Committee Hansard,* 4 August 2015, p. 31.

26 Ms Amy Lamoin, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 5; UNICEF Australia, *Submission 24,* p. 12.

27 Professor Gillian Triggs, Australian Human Rights Commission, *Committee Hansard,* 5 August 2015, p. 11.

> child must take into consideration all relevant circumstances, including the best interests of the child.[28]

Minister's exemption

8.34 The Bill provides that, where the Minister has given a notice under proposed subsections 33AA(6), 35(5) or 35A(5), the Minister may 'if he or she considers it in the public interest to do so' rescind the notice and exempt the person from the application of the relevant section.

8.35 The Explanatory Memorandum explains that matters that may fall within the public interest include, among other things:

> 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.[29]

8.36 As outlined in the Bill, the Minister's power to exempt is a non-compellable, discretionary power that is not subject to the rules of natural justice.

8.37 In its submission, FECCA argued that there are not appropriate safeguards in the Bill to protect children. While noting that the Explanatory Memorandum states that

> the cessation or renunciation of a child's Australian citizenship would only occur as a result of extremely serious conduct. The Minister's ability to exempt the child from the cessation of their Australian citizenship allows consideration of all the circumstances of the case in determining whether it is in the public interest to do so.[30]

FECCA went on to argue that

> [d]espite this statement, the Minister is not under any obligation to consider the exemptions provided for in the Bill, even if they are requested to do so. In the case of children who may be considered to have renounced their citizenship, this is particularly alarming.[31]

8.38 Submitters also raised concerns that the Minister is not specifically required to consider the best interests of the child.[32] In its analysis of the exemption provision, the Parliamentary Joint Committee on Human Rights concluded that, with no specific obligation on the Minister to take

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

29 Explanatory Memorandum, pp. 12, 17, 22.

30 See Explanatory Memorandum, p. 33.

31 FECCA, *Submission 12,* p. 4.

32 UNICEF Australia, *Submission 24,* p. 11.

into account the best interests of the child, 'this provision is not a sufficient safeguard for the purposes of international human rights law'.[33]

8.39 The implications of the Bill in terms of Australia's international obligations are discussed further below.

Compatibility with Australia's international obligations to children

8.40 Australia has a number of international obligations that are relevant to its treatment of children, including, as noted in Chapter 4, the CRC and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (Optional Protocol).

8.41 Submitters argued that the Government's approach to children should be informed by:

- the special needs and rights of children in both process and outcome as laid down in the CRC,
- Australia's obligations under the *International Covenant on Civil and Political Rights* (ICCPR), and
- the complexities associated with children involved with armed groups and terrorism.

CRC and ICCPR

8.42 Article 3 of the CRC provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

8.43 This right will be engaged in the two broad circumstances captured by the Bill: in respect of a child directly, and in respect of their parent.

8.44 UNICEF Australia emphasised to the Committee that Article 3 of the CRC requires the best interests of the child to be taken as a 'primary consideration'.[34]

8.45 The Statement of Compatibility with Human Rights (attached to the Explanatory Memorandum) explains the Government's position in relation to a child's conduct, stating that:

33 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament*, Canberra, August 2015, p. 39.

34 UNICEF Australia, *Submission 24*, p. 11.

> The Government has considered the best interests of the child in these circumstances where the conduct of a minor is serious enough to engage the cessation or renunciation provisions and has assessed that the protection of the Australian community and Australia's national security outweighs the best interests of the child.[35]

8.46 In relation to the conduct of a parent, the Statement of Compatibility with Human Rights concludes that any exercise of the Minister of his discretionary power 'must take into consideration all relevant circumstances, including the best interests of the child'.[36]

8.47 Australia also has obligations under Articles 23 and 24 of the ICCPR and Article 7 of the CRC. Specifically:

- ⇒ Paragraph 1 of Article 23 of the ICCPR provides that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'
- ⇒ Article 24 of the ICCPR provides that:
  1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
  2. Every child shall be registered immediately after birth and shall have a name.
  3. Every child has the right to acquire a nationality.
- ⇒ Article 7 of the CRC provides that:
  1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
  2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.[37]

8.48 The Statement of Compatibility with Human Rights indicates that the Government has assessed these matters as follows:

- The right to acquire a nationality is not the same as a right to retain a nationality. In particular, Articles 7 and 24 'do not provide a right to

35 Explanatory Memorandum, p. 33.

36 Explanatory Memorandum, p. 33.

37 Explanatory Memorandum, p. 33.

acquire *Australian* nationality–merely to acquire *a* nationality'.[38] [italics in original]

- In relation to Article 24(1), cessation or renunciation of a child's Australian citizenship would only occur as a result of extremely serious conduct and the Minister's ability to exempt the child 'allows consideration of all the circumstances of the case in determining whether it is in the public interest to do so'.[39]
- The right to be cared for by his or her parents (Article 7(1)) and right to family (Article 23(1)) would be engaged in circumstances that cast 'serious doubt' on the suitability of a parent. National security considerations are considered to justify limitations on this right.[40]

8.49 Australia's obligations also include the right to preservation of identity (Article 8) and right to participation (Article 12) of the CRC.

8.50 The Statement of Compatibility with Human Rights indicates that the Government considers the Bill's provisions in relation to its Article 8 obligation to be 'reasonable, proportionate and necessary' in relation to the serious conduct of a child.[41] The Statement does not offer any comment however when citizenship is lost as a result of a parent's conduct.

8.51 Article 12 of the CRC provides:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

8.52 The Statement of Compatibility with Human Rights offers the following explanation in relation to Article 12:

- The exclusion of the rules of natural justice and limitation on the right to be heard is 'necessary and proportionate' to the circumstances in the event of a child's conduct, with the impact on the child and the child's best interests being considered by the Minister as part of the public interest component of any exemption consideration.

38 Explanatory Memorandum, p. 33.

39 Explanatory Memorandum, p. 33.

40 Explanatory Memorandum, pp. 33–34.

41 Explanatory Memorandum, p. 34.

- Natural justice will apply to any revocation of a child's citizenship under section 36.[42]

8.53 The Parliamentary Joint Committee on Human Rights (PJCHR) has undertaken a detailed analysis of the Bill's implications for children against Australia's human rights obligations.[43] In relation to the Government's statement that Australia's national security outweighs the best interests of the child (cited in full earlier in this section), the PJCHR made the following comment:

> [t]his statement misapprehends the nature of the obligation to consider the best interests of the child. It is not possible to simply assert that this obligation has been taken into account in a global sense and considered to be outweighed by national security. The procedure for automatic loss of citizenship in the bill must, as a matter of international law, provide for a consideration of the best interests of the individual child, which may be subject only to limitations that pursue a legitimate objective, are rationally connected to that objective and otherwise proportionate to that objective.[44]

8.54 The PJCHR concluded that provisions relating to automatic loss of citizenship do not:

- provide for consideration of the best interests of the child,
- take into account 'each child's capacity for reasoning and understanding in accordance with their emotional and intellectual maturity',
- take account of a child's culpability, or
- take into account whether the loss of citizenship would be in the best interests of the child given their particular circumstances.[45]

8.55 The PJCHR raised concerns about the Bill's compatibility with a series of children's rights under the CRC, ICCPR and International Covenant on Economic, Social and Cultural Rights and challenged the adequacy of the

42 Explanatory Memorandum, pp. 34–35.

43 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament,* Canberra, August 2015, pp. 36–46.

44 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament,* Canberra, August 2015, p. 38.

45 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament,* Canberra, August 2015, p. 38.

assessments in the Statement of Compatibility with Human Rights. These matters are outlined in detail in the Committee's report.[46]

8.56 Contributors to this inquiry also raised concerns about the Bill's consistency with Australia's international obligations.[47] UNICEF Australia, for example, was of the view that the Bill was not in line with Australia's obligations under the CRC or the Optional Protocol, stating:

> regardless of how a child's citizenship would cease or be revoked, revoking a child's citizenship under any circumstances[48] is inconsistent with the rights of the child.[49]

8.57 UNICEF Australia offered the following reasons for this conclusion:

- whether a child is in Australia or overseas, Australia owes an obligation to protect the child from all forms of violence and exploitation,
- severing a child's connection with Australia could risk rendering the child effectively stateless and without protection, as second or third states may be unwilling to permit a return or unable to provide protection and support,
- a child's other citizenship might be ceased in similar circumstances to those provided for in the Bill, effectively rendering the child without the protection of any state,
- revoking or ceasing citizenship threatens a child's connection with family, education, health, nationality, identity and standard of living, and
- the Bill fundamentally threatens a child's entire identity.[50]

8.58 The Australian Human Rights Commission expressed particular concern about the potential effects of the Bill on children, noting:

> It is recognised in international human rights law that in light of their physical and mental immaturity, children have special need of safeguards, care and protection. In recognition of that fact,

---

46 In particular, in relation to automatic loss of citizenship: Articles 3, 7, 8 and 12 of the CRC, and Article 24(3) of the ICCPR. In addition, in relation to loss of citizenship as a result of a parent's conduct: Articles 6, 7, 9, 12, 14, 15, 17, 23, 25 and 26 of the ICCPR, Articles 6, 7, 8 and 10 of the ICESCR, and the Convention Against Torture.

47 Centre for Comparative Constitutional Studies, *Submission 29,* p. 12; Law Council of Australia, *Submission 26,* p. 23.

48 Other than by a free, prior and informed decision of the parent/s or guardian/s of the child.

49 UNICEF Australia, *Submission 24,* p. 6. See also Ms Amy Lamoin, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 6.

50 UNICEF Australia, *Submission 24,* pp. 10–11.

> Australia has ratified the *Convention on the Rights of the Child* (CRC).[51]

8.59 The Australian Human Rights Commission noted that children enjoy all the rights protected by the ICCPR, including the right to enter and remain in their own country. Further, Article 8(1) of the CRC provides:

> States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

8.60 The Australian Human Rights Commission concluded that 'in the case of Australian children, Australia has agreed to protect their right to Australian nationality'.[52]

8.61 In commenting on the assessment of the best interests of the child as provided for in Article 3 of the CRC, the Australian Human Rights Commission stated:

> [I]t is necessary to take into account all the circumstances of the particular child and the particular action. It is also necessary to ensure that procedural safeguards are implemented, including that children are allowed to express their views, that decisions and decision making processes be transparent, and that there be mechanisms to review decisions.[53]
>
> Loss of a child's citizenship, and consequent loss of their right to enter or remain in Australia, is even more likely to be arbitrary than in the case of an adult. This is so for a range of reasons, including that a child is less culpable for wrongdoing, is more vulnerable to any adverse consequences, and may suffer loss of citizenship through no fault of their own.[54]

8.62 With regard to the ICCPR, the Centre for Comparative Constitutional Studies argued in relation to section 36 of the Citizenship Act that revocation of a child's citizenship 'would contravene the prohibition on arbitrary deprivation of nationality under [Article] 12(4) as it is conditioned on the conduct of another person'.[55]

---

51 Australian Human Rights Commission, *Submission 13,* p. 12.

52 Australian Human Rights Commission, *Submission 13,* p. 12.

53 Australian Human Rights Commission, *Submission 13,* p. 12, citing United Nations Children's Rights Committee, *General Comment 14,* UN Doc. CRC/C/GC/14, pp [46]–[51], [87], [89]–[91], [98].

54 Australian Human Rights Commission, *Submission 13,* p. 12. See also Professor Gillian Triggs, Australian Human Rights Commission, *Committee Hansard,* 10 August 2015, p. 28; Mr John Howell, Lawyer, Australian Human Rights Commission, *Committee Hansard,* 10 August 2015, p. 28; UNICEF Australia, *Submission 24,* pp. 9–10.

55 Centre for Comparative Constitutional Studies, *Submission 29,* p. 12.

8.63 Contributors sought additional safeguards in the Bill to ensure that the best interests of the child are a primary consideration.[56] UNICEF Australia, for example, sought the inclusion of general obligations to take into account the best interests of children as the primary consideration in all decisions affecting children under the scope of the Bill.[57] Professor Gillian Triggs of the Australian Human Rights Commission told the Committee:

> [W]e are really asking for a process, and that during that process the interests of the child would be taken into account as a primary consideration.[58]

Involvement of children with armed groups and terrorism

8.64 The CRC and the Optional Protocol impose obligations upon States Parties to protect citizens aged 18 and under who are affected by armed conflict, to rehabilitate child victims, and to provide social reintegration.[59]

8.65 In evidence to the Committee, UNICEF Australia noted that 'children and young people are both targets and tools of war and terrorism'.[60] It is estimated that 300 000 children worldwide are involved in armed conflict, approximately 40 per cent of whom are girls.[61] These children are recruited for a range of purposes, including as fighters, human shields, porters, cooks, messengers, and for sexual exploitation and forced marriage.[62] UNICEF Australia argued that children and young people who have been radicalised or associated with armed groups must be treated, first and foremost, as children.[63]

8.66 The Refugee Council of Australia advocated that in cases where Australian children are suspected of having committed terrorist offences, 'any response must be strongly guided by child protection considerations'.[64]

8.67 In evidence, the Refugee Council of Australia explained that:

---

56 Professor Gillian Triggs, Australian Human Rights Commission, *Committee Hansard,* 5 August 2015, p. 29; Ms Erin Gillen, FECCA, *Committee Hansard,* 4 August 2015, p. 31.

57 Ms Amy Lamoin, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 2.

58 Professor Gillian Triggs, Australian Human Rights Commission, *Committee Hansard,* 5 August 2015, p. 29.

59 Articles 38 and 39 of the CRC; Articles 6(3) and 7(1) of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (2000).

60 Dr Norman Gillespie, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 1.

61 Dr Norman Gillespie, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 1.

62 Dr Norman Gillespie, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 1.

63 Dr Norman Gillespie, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 1.

64 Refugee Council of Australia, *Submission 22,* p. [6].

> We see quite a disconnect between the way Australia would support and protect children who had been involved in other serious crimes at a very young age and the way it seems to treat children under this legislation. We have people living in Australia right now who were resettled in Australia as refugees because they were forcibly recruited as child soldiers or at risk of recruitment. In those cases our response has taken much more of a child protection focus to look at what we can do to protect children who, in those circumstances, should primarily be seen as victims rather than perpetrators of crimes. We believe the same sorts of considerations really should be more strongly informing this legislation.[65]

8.68 The Muslim Legal Network (NSW) similarly noted that '[i]n Australia, the Children's courts and sentencing principles in relation to juveniles prioritise rehabilitation'.[66]

8.69 Professor Ben Saul of the University of Sydney described the Bill's treatment of children as 'unreasonable', and considered it inconsistent with Australia's international human rights obligations. Professor Saul stated:

> Child terrorists are victims and deserve protection and rehabilitation not banishment.[67]

8.70 Professor Saul went on to note that Article 7(1) of the Optional Protocol to the CRC provides for the cooperation between States parties in the rehabilitation and social integration of persons who are victims of acts contrary to the Protocol, including child soldiers.[68]

8.71 Both Professor Saul and the Law Council of Australia considered that children engaged in hostilities with armed groups in places such as Syria and Iraq would be child soldiers and therefore entitled protection consistent with the Optional Protocol.[69]

Committee comment

8.72 The Committee considers ceasing or revoking a child's citizenship to be a serious matter, with significant consequences for a child and their family.

---

65 Ms Lucy Morgan, Refugee Council of Australia, *Committee Hansard,* 5 August 2015, p. 21.

66 Muslim Legal Network (NSW), *Submission 27,* p. 13.

67 Professor Ben Saul, *Submission 2,* p. 8.

68 Professor Ben Saul, *Submission 2,* p. 8.

69 Professor Ben Saul, *Submission 2,* p. 8; Law Council of Australia, *Submission 26,* p. 23. See also Refugee Council of Australia, *Submission 22,* p. 6.

8.73 The Committee notes that a number of submitters considered the measures proposed in the Bill to be neither reasonable, necessary nor proportionate in relation to children. Further, concerns were raised about the Bill's compatibility with Australia's international obligations. This is a matter that has been addressed in some detail by the Parliamentary Joint Committee on Human Rights.

8.74 It is the Committee's view that the Bill should operate in a manner that is consistent with the Criminal Code provisions relating to children and that this should be made explicit on the face of the Bill.

8.75 Accordingly, the Committee considers the Bill should be amended to state that it does not, in any circumstances, apply to children aged under 10 years.

8.76 For children aged under 14 years, the Committee considers the Bill should be amended so that the self-executing conduct provisions in proposed sections 33AA and 35 do not apply.

8.77 The Committee acknowledges that because the proposed section 35A hinges on a conviction, its application to a child aged between 10 and 14 years will be consistent with either the Criminal Code or *Crimes Act 1914*. This means that a child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.

8.78 The Committee notes that even for adolescent children, the capacity of the individual should be considered.[70] For this reason, the Committee is also concerned about the breadth of offences for which a child aged between 14 and 18 could lose their citizenship through the self-executing provisions. The Committee is of the view that in circumstances where the Minister considers rescinding a notice or exempting a child from proposed section 33AA or section 35, then the Minister should consider the best interests of the child as a primary consideration.

8.79 In addition, the Committee considers that, in making a decision about revocation of a child's citizenship under proposed section 35A, the Minister must consider all matters affecting the child including, as a primary consideration, their best interests. The Bill should be amended as recommended in Chapter 6 to require the Minister to consider the best interests of the child in reaching this decision.

8.80 The Committee notes concerns expressed by contributors that section 36 of the Citizenship Act is inconsistent with Australia's international obligations. Some submitters argued that the loss of a child's citizenship as

70 UNICEF Australia, *Submission 24,* p. 18; Ms Amy Lamoin, UNICEF Australia, *Committee Hansard,* 5 August 2015, p. 3.

a result of the conduct of a parent is neither reasonable nor proportionate. Indeed, it could be argued that, as the Bill is premised upon a person's repudiation of allegiance, section 36 should not apply given it is contingent upon the conduct of another person. A parent's actions do not indicate that a child under the age of 18 has repudiated his or her allegiance to Australia.

8.81 The Committee considers that the Bill should be amended so that section 36 of the Citizenship Act does not apply to loss of citizenship under the provisions proposed in the Bill.

Recommendation 20

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to limit the extent of its application to children. The amendments should provide:

- **that no part of the Bill applies to conduct by a child aged less than 10 years, and**
- **that proposed sections 33AA and 35 do not apply to conduct by a child aged under 14 years.**

The amendments should make the Bill's application to children explicit on the face of the legislation.

The Committee notes that in relation to proposed section 35A, section 7.2 of the *Criminal Code Act 1995* or section 4N of the *Crimes Act 1914* will apply to a child aged 10 to 14 years.

Recommendation 21

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended so that section 36 of the *Australian Citizenship Act 2007* (which enables the Minister to revoke a child's citizenship following revocation of a parent's citizenship) does not apply to proposed sections 33AA, 35 and 35A.

9

Concluding comments

9.1 The Committee supports the policy intention of the Bill to help protect the community from persons who have clearly renounced their allegiance to Australia by engaging in serious terrorism-related acts that harm Australians or Australian interests.

9.2 The Committee also notes the strong concerns raised by many participants in the inquiry about aspects of the Bill, as detailed in the preceding chapters. Concerns were raised both in respect to the policy approach taken in the Bill, and to the fairness and workability of its provisions.

9.3 The Committee examined these concerns and has made recommendations in this report aimed at making the Bill's scope more limited and procedures more transparent.

9.4 Adding to this, the Committee considers that enhanced transparency, oversight and review mechanisms will help foster public confidence in the process and operation of the provisions in the Bill. Such measures will be important given the evolving threat environment that Australia faces, the high level of public interest in ensuring the provisions are operating as intended, and the serious implications that loss of citizenship may have for an individual.

9.5 While the Committee does not consider it appropriate for details of specific cases to be publicly reported, the Committee considers that a degree of public transparency on the operation of the provisions is warranted. This would be achieved if the Government was required to report publicly, every six months, the number of persons who have lost their citizenship under each of the provisions in the Bill, and a brief, declassified, statement of reasons for that loss. The Committee understands that the provisions in the Bill are intended to be used sparingly, for only the most serious conduct. Such reporting would help assure the public that this continues to be the case into the future.

Recommendation 22

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to require the Government to publicly report, every six months, the number of times a notice for loss or revocation of citizenship has been issued under each of the grounds contained in Bill, and provide a brief statement of reasons.

9.6 Areas of government involving national security are, necessarily, not able to be subject to the same level of public scrutiny as other areas of government. Therefore it is important that such areas are subject to rigorous independent oversight to ensure that the national security powers entrusted to agencies by the Australian public are wielded fairly, effectively and as intended.

9.7 It is essential that sensitive intelligence and security processes are protected; however, it is equally essential that there is a comprehensive system of proper and rigorous oversight of the powers and processes exercised by government departments.

9.8 The Committee sees a role for itself in providing ongoing oversight of the exercise of the Bill's provisions. In its advisory report on the Counter-Terrorism Amendment (Foreign Fighters) Bill 2014, the Committee recommended that its oversight functions be extended to include the counter-terrorism activities of the Australian Federal Police (AFP). The Committee noted at the time that this would provide a valuable additional oversight, particularly in relation to classified material that is not able to be considered by other parliamentary committees.

9.9 This recommendation was enacted by the Government amending the *Intelligence Services Act 2001* (IS Act) to provide that the Committee is to monitor and review the performance by the AFP of its functions under Part 5.3 of the *Criminal Code Act 1995* and to report its findings to both Houses of Parliament. The Committee was also given the authority to request informational briefings from the Commissioner of the AFP for the purpose of performing its functions.

9.10 In recognition of the changed responsibilities of the Department of Immigration and Border Protection and its expanded role in implementing national security measures, the Committee recommends that its own functions be extended to enable it to monitor and review the performance of the Department's new functions under the Bill. The expansion of these functions should be consistent with the Committee's existing remit under the IS Act, which does not allow for review of operational matters.

Recommendation 23

The Committee recommends that *Intelligence Services Act 2001* (IS Act) be amended to extend the functions of the Parliamentary Joint Committee on Intelligence and Security to include monitoring and reviewing the performance by the Department of Immigration and Border Protection of its functions under the provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015. The extended functions should be consistent with the Committee's current remit under the IS Act.

The IS Act should also be amended to enable relevant agency heads to brief the Committee for the purpose of this new function.

9.11 Fulfilling this oversight function will require the Committee to be kept informed on a regular basis of the exercise of powers under the Bill. Given the nature of the conduct-based provisions, this will be particularly important in relation to the exercise of sections 33AA and 35.

9.12 The Committee notes the intended exceptional nature of proposed sections 33AA and 35. The Committee reiterates that it considers the use of these provisions will be infrequent and in circumstances where criminal prosecution under proposed section 35A is not possible.

9.13 Given the nature of their operation, and their importance to ensuring national security, the Committee considers that it should be advised and provided the opportunity to be briefed of each instance where a notice for loss of citizenship has been issued by the Minister under the conduct-based provisions. This advice should go to whether notice has been provided to the person, the conduct leading to the loss of citizenship, and whether an exemption has been given. Providing a timeframe of 20 sitting days within which to advise the Committee affords the requisite flexibility for the relevant agencies.

9.14 This requirement to advise the Committee of the Minister issuing a notice under the conduct-based provisions will ensure a robust system of monitoring and oversight that ensures the provisions operate in the circumstances intended. It is intended that these briefings will inform the Committee's review of the operation of the Bill and the Committee will provide comment in its annual report.

Recommendation 24

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to require the Minister to advise the Parliamentary Joint Committee on Intelligence and Security upon issuing a notice for the loss of citizenship under the Bill. A subsequent briefing should be offered to the Committee within 20 sitting days of the initial notice being issued. The advice given to the Committee should detail whether notice has been provided to the person, the conduct that engaged the Bill's provisions and whether an exemption has been given by the Minister.

9.15 The serious measures in the Bill are necessary in light of the current threat posed by persons who are Australian citizens but act to cause Australia harm. However, it will be desirable for their effectiveness to be reviewed by this Committee after several years of operation. The Committee's review would explore whether the provisions have been effective in their goal to help protect the Australian community; whether the laws have been applied as intended; any practical difficulties encountered in their application; and any unintended consequences that may have become apparent.

9.16 Similarly to other counter-terrorism measures to be reviewed by the Committee in the coming years, the Committee suggests that the Independent National Security Legislation Monitor (INSLM) should be tasked with undertaking his own review of the provisions. The INSLM's review should be completed no less than 12 months before the Committee's review in order for his findings to be taken into account by the Committee.[1]

1 The Committee made similar recommendations, which were accepted by the Government, in its *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* to require the INSLM to complete a review by 12 months after the next Federal election of the operation of the following powers: the control order regime; prevention detention order regime; stop, search and seizure powers relating to terrorism offences; and the questioning and detention warrant regime. The Committee will subsequently complete a review of each of these powers by 7 March 2018.

Recommendation 25

The Committee recommends that the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor to finalise a review of the revocation of citizenship provisions in the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 by 1 December 2018.

Recommendation 26

The Committee recommends that the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to complete a review of the revocation of citizenship provisions in the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 by 1 December 2019.

9.17 The Committee has recommended a number of amendments to the Bill. Some of these recommended changes provide greater clarity to allay public concerns regarding the operation of the Bill. Other recommendations reinforce the accountability, procedural fairness and oversight of the Bill.

9.18 The Committee considers that the recommendations made in this report serve to strengthen the operation of the Bill and the achievement of its policy intent to help protect the community from persons who have demonstrated a clear lack of allegiance to Australian by engaging in serious terrorism-related conduct.

Recommendation 27

The Committee recommends that, following implementation of the recommendations in this report, the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be passed.

Dan Tehan MP
Chair
September 2015

A

Appendix A – List of Submissions

Submissions

1. Ms Janine Truter
2. Professor Ben Saul
3. Dr John Tomlinson
4. Ms Jenny Rae
5. Mr Michael Evans
6. Bruce Baer Arnold
7. Mr Paul McMahon
8. Australia Defence Association
9. Executive Council of Australian Jewry
10. Professor Anne Twomey
11. Human Rights Committee of the Law Society of NSW
12. Federation of Ethnic Communities' Councils of Australia
    - 12.1. Supplementary
13. Australian Human Rights Commission
    - 13.1. Supplementary
14. Australian Lawyers Alliance
15. Professor Helen Irving
16. Dr Rayner Thwaites
17. Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams AO
18. Blueprint for Free Speech
19. Mr Robert Hayward
20. Australian Lawyers for Human Rights
21. Joint media organisations

22. Refugee Council of Australia
23. Dr Alice Hill
24. UNICEF Australia
25. NSW Society of Labor Lawyers
26. Law Council of Australia
    - 26.1. Supplementary
27. Muslim Legal Network (NSW)
28. Pirate Party Australia
29. Centre for Comparative Constitutional Studies
30. Castan Centre for Human Rights Law
31. Councils for civil liberties across Australia
32. Mr John Ryan
33. Islamic Council of Queensland
34. Commonwealth Ombudsman
35. Professor Kim Rubenstein
36. Immigration Advice & Rights Centre
37. Department of Immigration and Border Protection
    - 37.1. Supplementary
    - 37.2. Supplementary
    - 37.3. Supplementary
    - 37.4. Supplementary
38. Australian Federal Police
39. Human Rights Law Cente
40. Migration Law Program, ANU College of Law
41. Amnesty International Australia
42. Mr Bill O'Connor
43. Australian Bar Association

B

Appendix B –Witnesses appearing at public and private hearings

Tuesday, 4 August 2015 (public hearing)

Executive Council of Australian Jewry

Mr Peter Wertheim AM, Director

Federation of Ethnic Communities' Councils of Australia

Ms Eugenia Grammatikakis, Acting Chair

Ms Gulnara Abbasova, Director

Ms Erin Gillen, Senior Policy and Project Officer

Individuals

Ms Sangeetha Pillai

Professor Kim Rubenstein

Professor George Williams AO

Law Council of Australia

Mr Duncan McConnel, President

Mr Geoffrey Kennett SC, Chair, Administrative Law Committee

Ms Gabrielle Bashir SC, Member, National Criminal Law Committee

Dr Natasha Molt, Senior Policy Lawyer, Criminal and National Security Law

Office of the Commonwealth Ombudsman

Mr Colin Neave, Commonwealth Ombudsman

Ms Doris Gibb, Acting Deputy Ombudsman

Wednesday, 5 August 2015 (public hearing)

Amnesty International Australia

Ms Catherine Wood, Legal Governance Manager

Mr Guy Ragen, Government Relations Adviser

Attorney-General's Department

Ms Katherine Jones, Deputy Secretary, National Security and Criminal Justice Group

Australian Federal Police

Mr Neil Gaughan AM, Acting Deputy Commissioner National Security

Australian Human Rights Commission

Professor Gillian Triggs, President

Mr John Howell, Lawyer

Australian Security Intelligence Organisation

Ms Kerri Hartland, Deputy Director-General

Centre for Comparative Constitutional Studies

Laureate Professor Cheryl Saunders, Foundation Director

Professor Adrienne Stone, Director

Professor Jeremy Gans, Member

Department of Immigration and Border Protection

Mr Michael Pezzullo, Secretary

Ms Maria Fernandez, Deputy Secretary, Intelligence and Capability Group

Ms Rachel Noble, Deputy Secretary, Policy Group

Mr Michael Outram PSM, Deputy Commissioner, Australian Border Force

Ms Philippa De Veau, General Counsel

Individuals

Professor Helen Irving

Dr Rayner Thwaites

Refugee Council of Australia

Ms Lucy Morgan, Information and Policy Coordinator

UNICEF Australia

Dr Norman Gillespie, Chief Executive Officer

Ms Amy Lamoin, Chief Technical Adviser

Wednesday, 5 August 2015 (private hearing)

Attorney-General's Department

Ms Katherine Jones, Deputy Secretary, National Security and Criminal Justice Group

Australian Federal Police

Mr Michael Phelan, Deputy Commissioner

Australian Security Intelligence Organisation

Ms Kerri Hartland, Deputy Director-General

Deputy Director-General, CT Group

Department of Immigration and Border Protection

Mr Michael Pezzullo, Secretary

Ms Rachel Noble, Deputy Secretary, Policy Group

Monday, 10 August 2015 (public hearing)

Attorney-General's Department

Ms Katherine Jones, Deputy Secretary, National Security and Criminal Justice Group

Australian Federal Police

Mr Michael Phelan, Deputy Commissioner

Australian Human Rights Commission

Professor Gillian Triggs, President

Mr John Howell, Lawyer

Australian Security Intelligence Organisation

Ms Kerri Hartland, Deputy Director-General

Department of Immigration and Border Protection

Mr Michael Pezzullo, Secretary

Ms Maria Fernandez, Deputy Secretary, Intelligence and Capability Group

Ms Rachel Noble, Deputy Secretary, Policy Group

Mr Michael Outram PSM, Deputy Commissioner, Operations Group

Ms Philippa De Veau, General Counsel

C

Appendix C – Delegation to the United Kingdom, France and the United States

United Kingdom, 19 – 23 July 2015

Monday, 20 July 2015

Former Chief of the Secret Intelligence Service

International Centre for the Study of Radicalisation

Former Director General of the Security Service

Tuesday, 21 July 2015

Director General and Director of Prevent, Office for Security and Counter-Terrorism

Chief Surveillance Commissioner

National Security and Resilience Studies, Royal United Services Institute (RUSI)

Defence and Intelligence Directorate and National Security Directorate

Wednesday, 22 July 2015

Deputy Assistant Commissioner, Scotland Yard

Independent Reviewer of Terrorism Legislation

Institute for Strategic Dialogue

Former Chair of the Intelligence and Security Committee

Interception of Communications Commissioner's Office (IOCCO)

Former Special Advocate

France, 23 – 25 July 2015

Thursday, 23 July 2015

Unité de Coordination de la Lutte Anti-Terroriste (UCLAT)

President of the Legal Committee and member of the Parliamentary Committee for Intelligence

Friday, 24 July 2015

Direction Générale de la Sécurité Intérieure (DGSI)

General Secretary of the Inter-Ministerial Committee for the Prevention of Crime

National Intelligence Coordinator

United States, 25 July – 31 July 2015

Monday, 27 July 2015

US Department of State

American Enterprise Institute (AEI)

National Journal Political Editor

Tuesday, 28 July 2015

Department of Homeland Security

Senate Select Committee on Intelligence

House Permanent Select Committee on Intelligence

House Committee on Homeland Security

Former Chair of House Permanent Select Committee on Intelligence

Wednesday, 29 July 2015

Federal Bureau of Investigation (FBI)

National Counter Terrorism Centre (NCTC)

Office of the Director of National Intelligence (ODNI)

Senate Homeland Security and Governmental Affairs Committee

Thursday, 30 July 2015

Central Intelligence Agency (CIA)

Political Analyst

Friday, 31 July 2015

Twitter HQ

Facebook HQ

Google Information Security

Cybersecurity experts

D

Appendix D – Letter from the Attorney-General

ATTORNEY-GENERAL

CANBERRA

27 August 2015

The Hon Mark Dreyfus QC MP
Member for Isaacs
Parliament House
CANBERRA ACT 2600

Dear Mr Dreyfus

I understand that the Opposition has requested that the Government provide the Parliamentary Joint Committee on Intelligence and Security (the Committee) with the Solicitor-General's Opinion on the Australian Citizenship and other Legislation Amendment (Allegiance to Australia) Bill 2015 (the Bill) on the basis that the Opposition perceives the existence of an unacceptable level of constitutional risk.

As you know, it has been the practice of successive governments not to publish or provide legal advice that has been obtained for the purposes of drafting legislation. I do not propose to depart from that precedent on this occasion.

Nevertheless, given the concerns raised by the Opposition and the desire of the Government to assist the Committee in its deliberations on the Bill, I can assure you that the Government has received advice from the Solicitor-General, Mr Justin Gleeson SC, that, in his opinion, there is a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the draft Bill.

Due to the number of Australians fighting for ISIL overseas and the growing threat from home grown terrorism, it is critical that this legislation be dealt with by the Parliament without further delay. The Government looks forward to the Opposition's continued commitment to this important national security measure.

Yours faithfully

(George Brandis)

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102