



**Australian
Human Rights
Commission**

Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Parliamentary Joint Committee on Intelligence and Security in its Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Bill).
2. The Bill would amend the *Australian Citizenship Act 2007* (Cth) to create new circumstances in which Australians would lose their citizenship.
3. The Commission acknowledges the critical importance of ensuring that appropriate measures are implemented to protect our national security and to protect the human rights of other citizens, including protecting the Australian community from terrorism. However, it is not claimed that the Bill is necessary to achieve these goals.
4. Loss of citizenship is an extremely serious matter. The Commission considers that, if passed, the Bill is likely to lead to the arbitrary interference with a number of human rights, and in particular the rights of people to enter and remain in their own country – Australia.
5. The Commission recommends that the Bill not be passed. In the event that that recommendation is not adopted, the Commission has made a number of alternative recommendations to ameliorate its interference with human rights.

2 Summary

6. Currently, Australians can lose their citizenship involuntarily in extremely limited circumstances. The Bill would expand these circumstances considerably.
7. The new provisions would apply only to persons who are currently dual nationals. However, they would apply to persons born in Australia, of Australian parents, who have never lived elsewhere.
8. The Bill would not confer a discretion on the Minister to revoke citizenship. Nor would loss of citizenship be determined by a court or some other independent tribunal. Rather, the Bill would amend the Australian Citizenship Act so that the Australian citizenship of a dual national would automatically be lost if a person engaged in certain kinds of conduct, or were convicted of certain offences. Most, but not all, of these offences are terrorism-related.
9. The Commission is concerned that the Bill, if passed, would significantly impair the right of Australians to enter or remain in their own country, in an arbitrary fashion. It would also be likely to significantly impair a number of other human rights, including the rights of children. The Commission considers that no adequate justification has been given to the serious effect the Bill would have on the rights of affected persons.
10. The Commission is particularly concerned at the following features of the Bill:

- a. It would lead to automatic loss of citizenship. Individual's circumstances, and the relative seriousness of their conduct, would not be taken into account.
- b. Loss of citizenship would be consequent on the commission of what would amount to criminal conduct. However, a criminal conviction would not be required for citizenship to be lost.
- c. There would be no requirement to notify an affected person of the loss of their citizenship, and there would be limited avenues to challenge that loss.

3 Recommendations

11. The Australian Human Rights Commission makes the following recommendations:

Recommendation 1: The Commission recommends that the Bill not be passed in its present form.

Recommendation 2: In the event that Recommendation 1 is not accepted, the Commission recommends that the Bill be amended so that:

- a. **Loss of citizenship only occurs following a relevant criminal conviction.**
- b. **Loss of citizenship should not be automatic. Any decision or mechanism to deprive a person of citizenship should take into account the particular circumstances of the person and their conduct.**
- c. **Loss of citizenship resulting from terrorist activities should only be possible in the most exceptional cases, for offences commensurate with serving in the armed forces of a state at war with the Commonwealth.**
- d. **The phrase 'in the service of' a declared terrorist organisation in proposed s 35(1)(b)(ii) should be defined.**
- e. **The offence of 'destroying or damaging Commonwealth property' should be removed as a ground enlivening the loss of citizenship.**
- f. **Loss of citizenship by conduct should not be possible in the case of children (either their own conduct, or that of their parents).**
- g. **The Minister should be required to notify any person who loses their citizenship of that loss, and the reasons for it.**
- h. **An affected person should be entitled to make submissions to the relevant decision maker.**

- i. **Any decision leading to loss of citizenship should attract a full right of appeal.**
- j. **The Bill should not operate retrospectively.**

4 The Bill

12. If passed, the Bill would have the effect that Australian citizens, who are also nationals of another country, would lose their citizenship in three circumstances:

- a. The person engages in certain conduct. The specified conduct is mostly, but not solely, related to terrorism, including engaging in terrorism, financing terrorism, and engaging in foreign incursions and recruitment.¹

The definitions for these activities are all taken from the *Criminal Code* (Cth). That is, each relevant type of activity would, if proved to the requisite standard, amount to a criminal offence. Despite that fact, loss of citizenship would not depend on a conviction. It would occur automatically as soon as the relevant conduct took place.

The Bill refers to this conduct as amounting to ‘renunciation’ of citizenship.

- b. Serving in the armed forces of a country at war with Australia, or fighting for or ‘being in the service of’ a ‘declared terrorist organisation.’² The phrase ‘in the service of’ is not defined, and its precise scope is not entirely clear.

The first of these grounds reproduces a current ground for loss of citizenship. The second is new. Again, while the relevant conduct would generally constitute criminal conduct,³ loss of citizenship would not require a criminal conviction. It would occur automatically.

- c. Conviction for certain offences.⁴ These are mostly ‘terrorism offences’, but not exclusively. Notably, they include the offences of ‘advocating terrorism’,⁵ ‘urging violence against groups’,⁶ and ‘destroying or damaging Commonwealth property.’⁷

Loss of citizenship would occur automatically on conviction of one of the designated offences.

The Commission notes that one of the offences that would enliven the new loss of citizenship provisions is ‘destroying or damaging Commonwealth property,’ as prohibited by s 29 of the *Crimes Act 1914* (Cth). The Commission is concerned that this provision is not referred to or discussed in the Explanatory Memorandum prepared in relation to the Bill.

13. The Commission notes that all three of these provisions:

- a. apply to Australians no matter how they obtained their citizenship (ie by birth/descent or naturalization), and no matter how long they have held that citizenship
- b. result in *automatic* loss of citizenship. No decision is made to 'cancel' or 'revoke' citizenship. There is therefore no discretion in the application of the operative provisions. The individual circumstances of any person caught by the provisions is not taken into account prior to the cancellation of their Australian citizenship
- c. apply regardless of the relative seriousness of the relevant conduct. A ten year old who graffitied a piece of Commonwealth property, or who donated a single dollar to a terrorist cause, would be affected in exactly the same way as an adult who launched a successful catastrophic terrorist attack.

14. In the event that the relevant Minister learns that these new provisions apply to a person, the Minister would be required to give a written notice of that fact to 'such persons as the Minister considers appropriate.'⁸ However, there is no requirement that the Minister notify the person whose citizenship has ceased. It is to be presumed that these notices would lead to various other administrative steps being taken by other executive agencies. Such steps would conceivably include cancellation of passports and welfare benefits and removal from the electoral roll.

15. Where the Minister has given a notice, the Minister may, if he or she considers it to be in the public interest, rescind the notice, and exempt the person from the loss of their citizenship. The following provisions apply to these powers:

- a. The Minister does not have an obligation to consider exercising them.⁹ That means in any judicial review proceedings, the Minister cannot be compelled to consider exercising his exemption power, or, if he makes a mistake in exercising it, he cannot be compelled to consider exercising it again.¹⁰
- b. They may only be exercised by the Minister personally.¹¹ They are not exercised by a court or tribunal, and they cannot be delegated to some other independent non-political decision maker.
- c. The rules of natural justice do not apply.¹² That means, among other things, that the Minister is not required to give the effected person a hearing or inform them of the evidence against them.
- d. Section 47 of the *Australian Citizenship Act 2007* will not apply to any decision made to issue a notice (or to exempt a person).¹³ That means that the Minister is not required to notify a person of his decision or reasons for it.
- e. Finally, the amendments would have the effect that s 39 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act)

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would not apply in relation to the new loss of citizenship provisions.¹⁴ Section 39 of the ASIO Act provides that a Commonwealth agency may not take a prescribed administrative action on the basis of information from ASIO unless it comprises a ‘security assessment.’ Exempting Ministerial decisions from s 39 would have the effect that the Minister could rely on preliminary advice from ASIO. Further, 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.¹⁵ Specifying that s 39 of the ASIO Act does not apply will therefore have the result that when the Minister relies on advice from ASIO in forming the opinion that a person has lost their citizenship, the person will not be able to have ASIO’s opinion reviewed in the AAT.

16. The provisions discussed above would greatly expand the circumstances in which Australians will lose their citizenship as a result of their conduct. Section 35 of the Australian Citizenship Act currently provides that Australian citizenship is lost when a dual national ‘serves in the armed forces of a country at war with Australia.’ That provision therefore applies to conduct which is clearly directed against the sovereign interests of the Commonwealth. The potential seriousness of such conduct is reflected in the fact that the analogous criminal offence of treason, found in s 80.1AA of the Criminal Code, is punishable by a maximum penalty of imprisonment for life. The Commission is concerned that the Bill would greatly expand both the *nature* of the conduct which would lead to loss of citizenship (for instance, damaging Commonwealth property), and the *relative seriousness* of the conduct which would lead to such loss (a number of the offences that would lead to automatic loss of citizenship carry maximum terms of imprisonment of 5 years.¹⁶ These of course are maxima: in some circumstances the actual sentence imposed might be very much less).

5 The purpose of the Bill

17. The Bill states that it 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 the bond and repudiated their allegiance to Australia.¹⁷

18. The Statement of Compatibility with Human Rights, contained in the explanatory memorandum, states that the Bill is also directed towards a number of additional purposes. For instance, it states:

[t]he Government considers that 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 interests¹⁸

and:

[i]t is the Government's position that the measures may also have a deterrent effect by making radicalised persons aware that their Australian citizenship is in jeopardy if they participate in certain conduct contrary to their allegiance to Australia.¹⁹

6 Human Rights implications – the right to enter one's own country

19. Article 12(4) of the ICCPR provides:

No one shall be arbitrarily deprived of the right to enter his own country.

20. This right implies the right to *remain in* one's own country.²⁰

21. The concept 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. Relevant factors will include length of residence, close personal and family ties, intention to remain, and lack of these ties to other countries.²¹

22. 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 Statement of Compatibility with Human Rights prepared in relation to the Bill acknowledges that this is so.²²

23. The proposed provisions would apply both to conduct that occurred within Australia and to conduct overseas. Loss of 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.

24. A person who lost their citizenship while outside Australia would lose the right to re-enter Australia. That would for many affected people result in preventing them from entering their own country.

25. A person who lost their citizenship while in Australia would, absent further legislative change, automatically be granted an ex-citizen visa.²³ However, that visa could be revoked at the discretion of the Minister, ultimately leading to deportation. The circumstances which led to the loss of citizenship would almost certainly lead to the person failing the character test which would enliven the Minister's powers to cancel the visa. In the case of loss of citizenship on the basis of a conviction, the conviction would be likely to enliven the automatic visa cancellation provision in s 501(3A) of the *Migration Act 1958*. Loss of citizenship and cancellation of their visa would render a person subject to mandatory immigration detention until such time as they were removed from Australia.²⁴

26. For these reasons 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. This consequence of loss of citizenship has been recognised by the UN Human Rights Committee, which has stated:

A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.²⁵

7 Permissible limitations on the right

27. Like most human rights, the right to enter one’s own country is not absolute. Article 12(4) prohibits ‘arbitrary’ interference with the right. The United Nations Human Rights Committee has stated that:

The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.²⁶

28. Any limitation on human rights must also:

- a. be **lawful**. That means that any limitations on a human right must be provided for by law. Legislation must be sufficiently specific, and detail the precise circumstances in which interferences with rights may be permitted. Laws must be precise and clear enough to allow individuals to regulate their conduct, and should provide effective remedies in the case of abuse.
- b. be **necessary** to achieve a legitimate objective, which objective is consistent with the provisions and aims of the ICCPR.
- c. be **proportionate** to achieving the legitimate objective.²⁷

29. In the case of article 12(4), the UN Human Rights Committee has stated:

[t]he Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.²⁸

30. Further to this general principle, there are particular reasons why interference with Australians’ right to enter their own country following the loss of their citizenship is highly likely to be arbitrary, both for the purposes of international law and also in the common usage of that word. These reasons include:

- a. the Bill would result in automatic loss of citizenship. That means that an individual’s particular circumstances cannot be taken into account.
- b. Whether loss of citizenship follows from a conviction or from conduct alone, the relative seriousness of the conduct is not taken into account. As noted above, all or virtually all of the conduct would amount to criminal conduct. The maximum penalties for the relevant crimes range from 5 years’ imprisonment to life imprisonment. Yet the various types of conduct would all have the equal result of loss of citizenship.

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Further, within any particular class of conduct, the conduct may be more or less serious. For instance, the offence of destroying or damaging Commonwealth property would include conduct ranging from painting graffiti on a building, damaging a plate glass door,²⁹ or damaging a police car³⁰ to destroying a building or other large scale infrastructure. Yet in each case, automatic loss of citizenship would result. This cannot be characterized as proportionate.

By way of comparison, it may be noted that persons convicted of relatively serious criminal offences are not entitled to vote for the duration of their incarceration. These provisions only apply to persons sentenced to terms of imprisonment exceeding three years, and loss of the right to vote only lasts for so long as the term of imprisonment.³¹ The Commission is not commenting on the merits of depriving convicted criminals of the right to vote. However these provisions are an example of how an attempt has been made to ensure the consequence of offending is proportionate to the seriousness of the relevant conduct.

- c. The conduct leading to loss of citizenship will amount to criminal conduct. However, no conviction, and no finding by a court or any other independent body, is required to enliven that loss, or to enliven the administrative consequences of that loss.
- d. There is no requirement to notify a person that they have lost their citizenship, or have been adjudged by the Minister to have done so, despite the seriousness of the consequences. No justification has been given for this omission.
- e. Loss of citizenship will in some circumstances be, in effect, retrospective. That is particularly so in the case of loss as a result of criminal conviction: the new provisions will apply in the case of a conviction entered after the passage of the Bill in relation to conduct occurring prior to the passage of the Bill.³² There is no limitation period for the offences that will lead to loss of citizenship; a conviction for such conduct may occur many years after the relevant conduct took place. In such a case a person will have had no opportunity to regulate their conduct by reference to the new cessation of citizenship provisions.
- f. The stated purposes of the Bill are plainly not sufficient to justify the extreme consequence of loss of citizenship. That is particularly so given the range of other measures available to combat risks to the community posed by terrorists, which now include revocation of visas, cancellation of passports, and control orders, as well as imprisonment following conviction.

31. The Minister's personal, non-compellable discretionary power to exempt individuals from the operation of the new laws will not cure these difficulties, for a number of reasons:

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- a. The exemption power is bestowed on the Minister personally and is non-delegable. The Minister is necessarily a member of both the executive and the legislature. That means that the power cannot be exercised by an independent decision maker.
 - b. The Minister is not required to afford natural justice to an affected person. That means he or she is not required to give that person a hearing, inform them of evidence the Minister has relied on or may rely on, or give them the opportunity to respond to the allegations made against them.
 - c. The Minister is not required to consider exercising his discretion, regardless of the merits of a particular case.
 - d. There is no possibility of merits review of a decision of the Minister. Any judicial review will be extremely limited as a result of the particular powers given to the Minister.
 - e. The Minister is not required to notify an affected person of any decision he or she makes.
 - f. The Minister may rely on a preliminary advice from ASIO not amounting to a security assessment. The Minister may rely on advice from ASIO that is not subject to review in the AAT.
32. In addition to failing to protect against arbitrary violations of article 12(4), these factors may well also amount to a breach of article 2(3) of the ICCPR.

8 Other potential human rights implications

33. The loss of citizenship is likely to lead to the interference with a number of other human rights protected in the ICCPR. For instance, in the event a person who loses their citizenship is arbitrarily prevented from re-entering Australia, it is likely there will be an interference with their family and family life. These are protected by articles 17 and 23 of the ICCPR.
34. In the event that a person loses their citizenship while within Australia, they may, as noted above, be subject to subsequent mandatory detention. Under Article 9 of the ICCPR, detention will become arbitrary when it is not necessary and proportionate to achieving a legitimate objective, and is not subject to periodic review. Australia's mandatory immigration detention scheme has been found by the Human Rights Committee to have led to the arbitrary detention of a significant number of complainants, contrary to articles 9(1) and 9(4).³³ Detention may in turn interfere with family life contrary to articles 17 and 23.
35. Loss of citizenship may also lead to loss of a passport,³⁴ removal from the electoral roll,³⁵ and loss of entitlement to social security benefits.³⁶ It will change the activities that intelligence organisations such as ASIS and the ASD can undertake with respect to a person.³⁷ This submission does not purport to contain a comprehensive summary of the consequences of loss of citizenship

or the resultant human rights implications. However it is clear that these may be extensive and not all may be immediately apparent.

9 The rights of children

36. The Commission is particularly concerned about the potential effects of the Bill on children. 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.³⁸ In recognition of that fact, Australia has ratified the *Convention on the Rights of the Child (CRC)*.³⁹

37. The Bill would potentially affect children in two ways:

- a. Children who engaged in relevant conduct would automatically lose their citizenship in the same way as adults. In the case of loss as a result of criminal conviction, this would apply to children as young as 10 years of age.⁴⁰ In the case of loss as a result of conduct, it is not clear that even this lower limit would apply.
- b. Children whose parents have their citizenship cancelled may consequently have their own citizenship cancelled by the Minister.⁴¹

38. Children enjoy all the rights protected by the ICCPR, including the right to enter and remain in their own country. In addition, 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.

39. Thus in the case of Australian children, Australia has agreed to protect their right to Australian nationality.

40. Further, article 3 of the CRC provides that:

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.

41. In assessing the best interests of a child, it is necessary to take into account all the circumstances of the particular child and the particular action.⁴² It is also necessary to ensure that procedural safeguards are implemented, including that children are allowed to express their views,⁴³ that decisions and decision making processes be transparent,⁴⁴ and that there be mechanisms to review decisions.⁴⁵ For the reasons given above, these criteria will not be met by the proposed loss of citizenship provisions contained in the Bill.

42. 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. That is so for a range of reasons, including that a child is less culpable for wrongdoing, is more vulnerable to any adverse consequences, any may suffer loss of citizenship through no fault of their own.

10 Retrospectivity

43. In its terms of reference, the Committee has been asked to consider whether the proposed amendments relating to loss of citizenship as a result of criminal conviction should be made retrospective. That is, should citizenship automatically be lost in relation to convictions entered before the amendments come into force.
44. For the reasons given above, the Bill would already have a retrospective effect. The Commission opposes any extension of the retroactive effect of the Bill.
45. It is strongly arguable that, for the purposes of international human rights law, applying the loss of citizenship provisions to persons with historic convictions would amount to retrospectively imposing a 'heavier penalty' for criminal conduct than that applicable at the time the crime was committed (and indeed, at the time the affected persons were convicted and sentenced). That is expressly prohibited by article 15(1) of the ICCPR.
46. For the purposes of article 15, whether a measure will constitute a 'penalty' is not to be determined purely by the way the measure is characterised in domestic law.⁴⁶ Were that not the case, states could circumvent their obligations simply by describing penalties in some other way (for instance, by describing financial penalties as a 'tax', or making statements that punitive detention is intended to be 'protective.') Relevant factors will include whether the measure attaches to criminal conduct, the severity of the measure and its purpose.⁴⁷ Manfred Nowak has stated that 'every sanction that has not only a preventive but also a retributive and/or deterrent character is thus to be termed a penalty...'⁴⁸
47. In the present context, the following factors are of particular relevance:
- a. the Bill will result in Australians who engage in specified conduct losing their citizenship. That is an extremely severe consequence.
 - b. The conduct which will lead to loss of citizenship is all criminal conduct under Australian law. In this particular context, the loss of citizenship will follow from a criminal conviction that has already been finally disposed of.
 - c. At least one of the purposes of the Bill is to deter people from engaging in relevant types of conduct by making them aware 'that their Australian citizenship is in jeopardy'.⁴⁹
48. Retrospective laws, and in particular criminal laws, are also contrary to the rule of law. This is reflected in the common law presumption against retrospectivity. That presumption exists is because such laws are generally unfair: they falsify laws on the basis of which 'people have ordered their affairs, exercised their rights and incurred liabilities and obligations.'⁵⁰

11 Loss of citizenship in other countries

49. While the Commission is not in a position to undertake a global survey of laws governing the loss of citizenship, it notes that while some comparable jurisdictions do allow for loss of citizenship for engaging in terrorism, these laws are not equivalent to those being proposed in the Bill.
50. The United States provides for renunciation of citizenship; however, it is necessary that a person *intend* to renounce their citizenship.⁵¹
51. The United Kingdom allows for the revocation of citizenship on public interest grounds. However, loss of citizenship is not automatic. It requires a decision to be made by the Secretary of State, and avenues of appeal are provided.⁵²
52. Canada allows for revocation of citizenship for persons convicted of certain offences. However, account is taken of the severity of the offending. Affected persons are informed of the grounds of the decision and allowed make submissions. Avenues of appeal are available.⁵³
53. New Zealand does not have any equivalent loss of citizenship provisions.

12 Recommendations

54. For the reasons above, the Commission recommends that the Bill not be passed in its present form.

Recommendation 1: The Commission recommends that the Bill not be passed in its present form.

55. In the event that this recommendation is not adopted, the Commission recommends that the Bill be amended so that it is less likely to lead to arbitrary outcomes.

Recommendation 2: In the event that Recommendation 1 is not accepted, the Commission recommends that the Bill be amended so that:

- a. **Loss of citizenship only occurs following a relevant criminal conviction.**
- b. **Loss of citizenship should not be automatic. Any decision or mechanism to deprive a person of citizenship should take into account the particular circumstances of the person and their conduct.**
- c. **Loss of citizenship resulting from terrorist activities should only be possible in the most exceptional cases, for offences commensurate with serving in the armed forces of a state at war with the Commonwealth.**
- d. **The phrase ‘in the service of’ a declared terrorist organisation in proposed s 35(1)(b)(ii) should be defined.**

- e. The offence of ‘destroying or damaging Commonwealth property’ should be removed as a ground enlivening the loss of citizenship.**
- f. Loss of citizenship by conduct should not be possible in the case of children (either their own conduct, or that of their parents).**
- g. The Minister should be required to notify any person who loses their citizenship of that loss, and the reasons for it.**
- h. An affected person should be entitled to make submissions to the relevant decision maker.**
- i. Any decision leading to loss of citizenship should attract a full right of appeal.**
- j. The Bill should not operate retrospectively.**

¹ Proposed s 33AA.

² Proposed s 35.

³ Eg assisting the enemy constitutes treason under s 80.1AA of the *Criminal Code* (Cth); re assisting terrorist organisations see division 102 of the *Criminal Code*.

⁴ Proposed s 35A.

⁵ Contrary to *Criminal Code*, s 80.2C.

⁶ Contrary to *Criminal Code*, s 80.2A.

⁷ Contrary to s 29 *Crimes Act 1914*.

⁸ Proposed ss 33AA(6), 35(5), 35A(5).

⁹ Proposed ss 33AA(8), 35(7), 35A(7).

¹⁰ cf Plaintiff *M61 v Commonwealth* (2010) 243 CLR 319, 358 [99].

¹¹ Proposed ss 33AA(9), 35(8), 35A(8).

¹² Proposed ss 33AA(10), 35(9), 35A(9).

¹³ Proposed ss 33AA(10), 35(9), 35A(9).

¹⁴ Proposed ss 33AA(12), 35(11), 35A(11).

¹⁵ ASIO Act, s 54.

¹⁶ Eg *Criminal Code* ss 80.2A, 80.2B, 80.2C; *Crimes Act* s 27(1).

¹⁷ Bill, s 4.

¹⁸ Statement of Compatibility with Human Rights, 29 [9].

¹⁹ Statement of Compatibility with Human Rights, 29 [10].

²⁰ United Nations Human Rights Committee, *General Comment 27* (1999), UN Doc CCPR/C/21/Rev.1/Add.9, [19].

²¹ See eg *Nystrom v Australia*, UN Human Rights Committee, Communication No. 1557 of 2007, [7.4].

²² Statement of Compatibility with Human Rights, 29 [17]-[18].

²³ *Migration Act 1958* (Cth), s 35.

²⁴ *Migration Act 1958*, ss 189, 198.

²⁵ United Nations Human Rights Committee, *General Comment 27* (1999), UN Doc CCPR/C/21/Rev.1/Add.9, [21].

²⁶ United Nations Human Rights Committee, *General Comment 27* (1999), UN Doc CCPR/C/21/Rev.1/Add.9, [21].

²⁷ See, for example, the UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc. E/CN.4/1985/4, Annex (1985).

²⁸ United Nations Human Rights Committee, *General Comment 27* (1999), UN Doc CCPR/C/21/Rev.1/Add.9, [21].

²⁹ *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338.

³⁰ *Re R v Allan Christopher Ward* [1985] FCA 469.

³¹ *Commonwealth Electoral Act 1918*, s 93(8AA).

³² Bill, Schedule 1, clause 8.

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³³ Eg *F.K.A.G. et al. v Australia*, United Nations Human Rights Committee, Communication No. 2094 of 2011; *M.M.M. et al. v Australia*, United Nations Human Rights Committee, Communication No. 2136 of 2012.

³⁴ *Australian Passports Act 2005*, ss 8 & 22.

³⁵ *Commonwealth Electoral Act 1918*, ss 93 & Parts VI-X.

³⁶ *Social Security Act 1991*, s 7 and various provisions. Australian residence is generally the precondition of receipt of social security payments.

³⁷ See eg *Intelligence Services Act 2001*, s 15.

³⁸ *Convention on the Rights of the Child*, preamble. See also *Declaration of the Rights of the Child*, preamble; *Universal Declaration of Human Rights*, art. 25(2).

³⁹ (New York, 20 November 1989), [1991] ATS 4.

⁴⁰ *Criminal Code (Cth)*, Division 7; see Statement Of Compatibility With Human Rights, 19 [100].

⁴¹ *Australian Citizenship Act 2007*, s 36.

⁴² UN Children's Rights Committee, *General Comment 14*, UN Doc. CRC/C/GC/14, [46]-[51].

⁴³ UN Children's Rights Committee, *General Comment 14*, UN Doc. CRC/C/GC/14, [89]-[91].

⁴⁴ UN Children's Rights Committee, *General Comment 14*, UN Doc. CRC/C/GC/14, [87].

⁴⁵ UN Children's Rights Committee, *General Comment 14*, UN Doc. CRC/C/GC/14, [98].

⁴⁶ *Perterer v Austria*, UN Human Rights Committee Communication No. 1015 of 2001, [9.2]. See also M Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (2nd ed 2005), 363; in the context of the European Convention on Human Rights, see eg *Welch v United Kingdom*, ECHR, Application No. 17440 of 1990, (9 February 1995), [27]ff.

⁴⁷ UN Human Rights Committee, *General Comment 32*, [15]. While made in the context of art. 14, the discussion of the nature of what makes a sanction 'penal' is also relevant to the characterisation of a 'penalty' for the purposes of art. 15.

⁴⁸ M Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (2nd ed 2005), 363.

⁴⁹ Statement of Compatibility with Human Rights, p. 28 [10].

⁵⁰ *Australian Education Union v General Manger of Fair Work Australia* (2012) 246 CLR 117, 134 [30] French CJ, Crennan and Kiefel JJ.

⁵¹ Title 8 of the U.S. Code s 1481; *Vance v. Terrazas* 444 U.S. 252 (1980).

⁵² *British Nationality Act 1981* (UK), ss40,40A.

⁵³ *Strengthening Canadian Citizenship Act 2014*.