

Chapter 1

New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 22 to 25 June 2015 and legislative instruments received from 29 May to 11 June 2015.

1.2 The report also includes the committee's consideration of responses arising from previous reports.

1.3 The committee generally takes an exceptions based approach to its examination of legislation. The committee therefore comments on legislation where it considers the legislation raises human rights concerns, having regard to the information provided by the legislation proponent in the explanatory memorandum (EM) and statement of compatibility.

1.4 In such cases, the committee usually seeks further information from the proponent of the legislation. In other cases, the committee may draw matters to the attention of the relevant legislation proponent on an advice-only basis. Such matters do not generally require a formal response from the legislation proponent.

1.5 This chapter includes the committee's examination of new legislation, and continuing matters in relation to which the committee has received a response to matters raised in previous reports.

Bills not raising human rights concerns

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns. The following categorisation is indicative of the committee's consideration of these bills.

1.7 The committee considers that the following bills do not require additional comment as they either do not engage human rights or engage rights (but do not promote or limit rights):

- Acts and Instruments (Framework Reform) (Consequential Provisions) Bill 2015;
- Customs Tariff Amendment (Fuel Indexation) Bill 2015;
- Excise Tariff Amendment (Fuel Indexation) Bill 2015;
- Fuel Indexation (Road Funding) Bill 2015;
- Fuel Indexation (Road Funding) Special Account Bill 2015;
- Tax and Superannuation Laws Amendment (2015 Measures No. 2) Bill 2015;
- Tax Laws Amendment (Small Business Measures No. 3) Bill 2015;

- Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015; and
- Voice for Animals (Independent Office of Animal Welfare) Bill 2015.

1.8 The committee considers that the following bills do not require additional comment as they promote human rights or contain justifiable limitations on human rights (and may include bills that contain both justifiable limitations on rights and promotion of human rights):

- Aboriginal Land Rights (Northern Territory) Amendment Bill 2015;
- Australian Defence Force Cover Bill 2015;
- Australian Defence Force Superannuation Bill 2015;
- Australian Government Boards (Gender Balanced Representation) Bill 2015;
- Civil Law and Justice (Omnibus Amendments) Bill 2015;
- Defence Legislation Amendment (Superannuation and ADF Cover) Bill 2015;
- Higher Education Support Amendment (New Zealand Citizens) Bill 2015;
- Social Security (Administration) Amendment (Consumer Lease Exclusion) Bill 2015; and
- Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015.

Instruments not raising human rights concerns

1.9 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.¹ Instruments raising human rights concerns are identified in this chapter.

1.10 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

Deferred bills and instruments

1.11 The committee has deferred its consideration of the Shipping Legislation Amendment Bill 2015.

1.12 As previously noted, the committee continues to defer one bill and a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.²

1 See Parliament of Australia website, 'Journals of the Senate', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

1.13 The committee also continues to defer a number of instruments in connection with its ongoing examination of the autonomous sanctions regime and the Charter of the United Nations sanctions regime.³

2 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); and Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015).

3 See Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015).

New matters

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 24 June 2015

Purpose

1.14 The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the bill) proposes to amend the *Australian Citizenship Act 2007* (Citizenship Act) to expand the basis on which a dual citizen's Australian citizenship will cease. The bill includes two broad bases on which the citizenship of dual nationals will cease:

- (a) Automatic cessation on the basis of conduct:
 - if the person engages in specified conduct; or
 - if the person fights for, or is in the service of, a declared terrorist organisation; and
- (b) Automatic cessation on the basis of conviction:
 - if the person is convicted of a specified offence.

1.15 The bill also provides that the minister may revoke the citizenship of a child of a parent whose citizenship has automatically ceased under any of these new provisions.¹

1.16 Proposed new section 33AA operates so that a dual Australian citizen will automatically cease to be an Australian citizen if they engage in specified conduct, as defined in the *Criminal Code Act 1995* (Criminal Code) such as:

- engaging in international terrorist activities using explosive or lethal devices;²
- engaging in a terrorist act;³
- providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;⁴
- directing the activities of a terrorist organisation;⁵
- recruiting for a terrorist organisation;⁶

1 See amendments in item 6 of the bill to paragraph 36(1)(a) of the Citizenship Act.

2 See section 72.3 of the Criminal Code.

3 See section 101.1 of the Criminal Code.

4 See section 101.2 of the Criminal Code.

5 See section 102.2 of the Criminal Code.

- financing terrorism;⁷
- financing a terrorist;⁸ and
- engaging in foreign incursions and recruitment.

1.17 The term 'engaging in foreign incursions and recruitment', includes:

- entering a foreign country with the intention of engaging in hostile activity, engaging in, or preparing to engage in, hostile activity (which includes intending to overthrow by force or violence the government of a foreign country; intimidating the public of a foreign country; and unlawfully destroying or damaging property belonging to the government of a foreign country);⁹
- entering or remaining in an area declared by the Foreign Affairs Minister;¹⁰
- providing or receiving military training (or being present at a meeting intending to provide or receive training), in order to prepare for engaging in hostile activity;¹¹
- giving money, goods or services with the intention of supporting or promoting the offence of engaging in hostile activity;¹²
- allowing a building to be used to hold a meeting with the intention of committing, supporting or promoting military training or the giving of money or goods to support or promote engagement in hostile activity;¹³ and
- publishing an advertisement or an item of news (for money or other consideration) and either being reckless as to whether it is for the purpose of recruiting persons to serve in any capacity with foreign armed forces; or the advertisement or news item contains information relating to where applications or information can be sought regarding serving with the armed forces in a foreign country; or relating to how a person can travel to another country in order to serve with the armed forces of a foreign country.¹⁴

6 See section 102.4 of the Criminal Code.

7 See section 103.1 of the Criminal Code.

8 See section 103.2 of the Criminal Code.

9 See section 119.1 and 119.4 of the Criminal Code.

10 See section 119.2 of the Criminal Code.

11 See subsections 119.4(3) and (4) of the Criminal Code.

12 See subsection 119.4(5) of the Criminal Code.

13 See section 119.5 of the Criminal Code.

14 See section 119.7 of the Criminal Code.

1.18 Under proposed section 35A, a dual Australian citizen will cease to be an Australian citizen if they are convicted of one of 57 offences under either the Criminal Code or the *Crimes Act 1914* (Crimes Act). In addition to the type of conduct that will give rise to automatic cessation of citizenship under proposed section 33AA, citizenship will also cease following conviction for numerous offences, including:

- knowing that another person intends to commit treason (including harming the Prime Minister) and failing to inform the police within a reasonable time;¹⁵
- advocating terrorism and being reckless as to whether another will engage in a terrorist act or commit a terrorist offence (this includes advocating that someone make an asset available to a proscribed person under the *Charter of the United Nations Act 1945*);¹⁶
- communicating or making available (or recording or copying) information concerning the security or defence of Australia or another country without lawful authority and intending to give an advantage to another country's security or defence;¹⁷
- making funds directly or indirectly available to another person and being reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act;¹⁸
- destroying, damaging or impairing any article used by the Defence Force or in connection with the manufacture of weapons of war, where 'from the circumstances of the case, from his or her conduct or from his or her known character as proved' it appears the intention was to prejudice the safety or defence of Australia;¹⁹
- assisting prisoners of war to escape;²⁰ and
- intentionally destroying or damaging any property belonging to the Commonwealth.²¹

1.19 Under subsections 33AA(6) and 35A(6), the Minister for Immigration and Border Protection must give written notice to an Australian citizen whose conduct or

15 See paragraph 80.1(2)(b) of the Criminal Code.

16 See section 80.2C of the Criminal Code and the definition of terrorism offence in subsection 3(1) of the Crimes Act.

17 See section 91.1 of the Criminal Code.

18 See section 103.2 of the Criminal Code.

19 See section 24AB of the Crimes Act.

20 See section 26 of the Crimes Act.

21 See section 29 of the Crimes Act.

conviction has resulted in the cessation of their citizenship, as soon as the minister becomes aware of that conduct. The minister may also either rescind this notice or exempt the person from the effect of these sections if he or she considers it in the public interest to do so. The bill provides that the minister's powers are personal, non-compellable and the rules of natural justice do not apply.

1.20 The amendments in the bill will apply to all Australian citizens holding dual citizenship, regardless of how the person became an Australian citizen. Accordingly, the provisions will not render a person stateless.

1.21 A person who has lost their citizenship under the provisions in the bill is prohibited from ever obtaining Australian citizenship again unless the minister allows it.

1.22 Measures raising human rights concerns or issues are set out below.

Background

1.23 This analysis of the bill's engagement of human rights consists of three parts:

- Part 1 considers the bill's engagement of substantive human rights (such as the right to freedom of movement) flowing from the loss of citizenship under the bill. This part of the analysis considers the loss of citizenship by both conduct and conviction together, as the consequences of loss of citizenship is the same regardless of the method by which the individual's citizenship is lost.
- Part 2 of the analysis considers the bill's engagement of procedural or process rights (right to a fair hearing, right to a fair trial and right to an effective remedy). This part of the analysis considers provisions providing for the automatic loss of citizenship from conduct, separately from the loss of citizenship on conviction, as the measures engage the process and procedural rights in different ways.
- Part 3 considers how the measures particularly impact on children, both in terms of the substantive loss of citizenship provisions and the provision that gives the minister the power to remove the citizenship of a child whose parents have lost their citizenship.

Part 1—Substantive human rights engaged by the bill

Automatic cessation of citizenship

1.24 As set out above, the bill seeks to amend the Citizenship Act to expand the basis on which Australian citizenship will cease. The bill includes two broad bases on which the citizenship of dual nationals will cease: automatic cessation on the basis of conduct and automatic cessation on the basis of conviction.

1.25 Currently under the Citizenship Act, citizenship can be lost in limited circumstances. The principal exception to this is section 35 of the Citizenship Act which allows for automatic cessation of citizenship if the person serves in the armed

forces of a country at war with Australia. This provision has never been used to deprive a person of citizenship.

1.26 Very serious consequences flow from loss of Australian citizenship. The enjoyment of many rights is tied to citizenship under Australian law including, for example, the right to fully participate in public affairs.

Multiple rights

1.27 The proposed cessation of citizenship provisions engage and may limit the following human rights and human rights standards:

- right to freedom of movement;²²
- right to a private life;²³
- protection of the family;²⁴
- right to take part in public affairs;²⁵
- right to liberty;²⁶
- obligations of non-refoulement;²⁷
- right to equality and non-discrimination;²⁸
- right to a fair hearing and criminal process rights;²⁹
- prohibition against retrospective criminal laws;³⁰
- prohibition against double punishment;³¹
- rights of children;³²
- right to work;³³

22 Article 12 of the International Covenant on Civil and Political Rights (ICCPR).

23 Article 17 of the ICCPR.

24 Articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

25 Article 25 of the ICCPR.

26 Article 9 of the ICCPR.

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

28 Article 26 of the ICCPR.

29 Article 14 of the ICCPR.

30 Article 15 of the ICCPR.

31 Article 14(7) of the ICCPR.

32 Convention on the Rights of the Child (CRC).

33 Articles 6, 7 and 8 of the ICESCR.

-
- right to social security;³⁴
 - right to an adequate standard of living;³⁵
 - right to health;³⁶ and
 - right to education.³⁷

1.28 While the cessation of citizenship may affect numerous human rights, the analysis focuses on the immediate consequences of loss of citizenship and does not consider the broader economic, social and cultural rights which may be limited as a consequence of loss of citizenship.³⁸

1.29 As set out above, this Part 1 of the analysis considers the impact of the bill as a whole on the substantive human rights engaged, without distinguishing how citizenship is lost (i.e. if it is an automatic loss on the basis of conduct or on the basis of conviction).

Right to freedom of movement (right to leave any country)

1.30 Article 12 of the International Covenant on Civil and Political Rights (ICCPR) protects freedom of movement. The right to freedom of movement includes the right to leave any country. The right may be restricted in certain circumstances.

Compatibility of the measures with the right to freedom of movement (right to leave any country)

1.31 The automatic loss of an Australian's citizenship engages and limits their right to freedom of movement, including the right of a person to leave any country.

1.32 The statement of compatibility acknowledges the right is engaged but considers that it is nevertheless not limited because:

...the person is a dual citizen, either a travel document from the person's other country of nationality, a temporary document issued by Australia, or some other facility could potentially be used.³⁹

1.33 However, this analysis assumes that the person's other country of nationality would issue (or has previously issued and would not cancel) a passport or the person

34 Article 9 of the ICESCR.

35 Article 11 of the ICESCR.

36 Article 12 of the ICESCR.

37 Article 13 and 14 of the ICESCR and article 28 of the CRC.

38 For example, full access to a range of benefits, such as social security, health care, education and work rights, may only be available to citizens (or those holding permanent residency visas) and loss of citizenship, and a consequential loss of a right to full residence in Australia, would constitute a limit on the ex-citizen's economic, social and cultural rights.

39 Explanatory Memorandum (EM), Attachment A, 29.

is in a situation where they could apply for alternative travel documents. For those whose citizenship ceases when they are outside Australia, and in a country which they do not hold nationality, their right to leave another country may be particularly limited in the absence of any valid travel documents.

1.34 In addition, if a person is in Australia at the time it is recognised that their citizenship ceases, they are entitled to an ex-citizen visa. This visa allows them to remain in Australia but it prohibits any travel from Australia as a person who leaves Australia on an ex-citizen visa loses any entitlement to return to Australia.

1.35 Accordingly, the automatic cessation of citizenship clearly engages and limits the right to freedom of movement (right to leave any country).

1.36 For a limitation on a right to be justifiable, it is necessary to demonstrate that the measure seeks to achieve a legitimate objective, the measure is rationally connected to that objective and is a proportionate means of achieving the stated objective.

1.37 The statement of compatibility states that the legitimate objective of the bill, in effectively stripping someone of citizenship, is to ensure the safety of the Australian community. It does not assess whether the measures are rationally connected, or proportionate, to this objective.

1.38 Under international human rights law, ensuring the safety of the community would be considered a legitimate objective provided that such an objective is founded on reasoned and evidence-based explanations of why the measures address a pressing or substantial concern. As the Attorney-General's Department's guidance on the preparation of statements of compatibility states, the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.

1.39 The statement of compatibility does not provide reasoning or evidence that the measures support a pressing or substantial concern. Instead the statement of compatibility contains statements about 'threat[s] to Australian security', 'Australia's national security', 'security and safety considerations of Australians', 'necessary to ensure the integrity of the citizenship programme' and the 'protection of the Australian community'.⁴⁰ No evidence is given of what these threats are, beyond references to 'existing and emerging threats to national security' and reducing the possibility of a person engaging in acts or further acts that harm Australians or Australian interests.⁴¹

1.40 In order to determine that the bill pursues a legitimate objective the legislation proponent needs to provide evidence and reasoning as to the nature of the threat to national security including information about how many people are

40 EM, Attachment A, see 29, 33, 34 and 35.

41 EM, Attachment A, 28.

likely to be affected by the cessation of citizenship powers and why existing methods of keeping the community safe and protecting national safety are insufficient.

1.41 In addition, if it were assumed that the bill pursued a legitimate objective, it is not clear that the automatic cessation of citizenship is rationally connected to that objective, that is that the measures are likely to be effective in achieving the objective being sought. The automatic cessation of citizenship applies to a very broad range of activities, many of which do not appear to fall within the description of 'serious terrorism-related activities'.⁴² For example, citizenship will automatically cease in relation to the following activities:

- damaging Commonwealth property;⁴³
- damaging property belonging to the government of a foreign country (or entering a country with the intent of damaging such property);⁴⁴
- entering or remaining in a declared area (with no requirement for any intent to carry out unlawful activity);⁴⁵
- publishing an item of news (for consideration of any kind) which relates to how a person can travel to another country in order to serve with the armed forces of a foreign country (including the legitimate forces of an ally);⁴⁶ and
- damaging Defence Force property.⁴⁷

1.42 It is not clear that removing citizenship from a person who has damaged property or who has published an item of news would protect national security or the Australian community.

1.43 In addition, in order for a limitation on a right to be justifiable, it needs to be demonstrated that the measures are proportionate to the objective sought to be achieved. It is not clear that the measures, in automatically depriving a person of citizenship in relation to a broad range of circumstances, can be said to be proportionate. In order to be proportionate a limitation on a right must be the least rights restrictive means of achieving a legitimate objective and must include appropriate safeguards.

1.44 As set out above, the bill would remove citizenship automatically on the basis of a broad range of conduct thus limiting the right to freedom of movement

42 See Second Reading Speech, the Hon Peter Dutton MP, Minister for Immigration and Border Protection, 24 June 2015.

43 See section 29 of the *Crimes Act 1914* (Crimes Act).

44 See section 119.1 and 119.4 of the Criminal Code.

45 See section 119.2 of the Criminal Code.

46 See section 119.7 of the Criminal Code.

47 See section 24AB of the Crimes Act.

(right to leave any country). As listed above at paragraphs [1.15] to [1.18] and [1.41], there are numerous listed offences for which citizenship will automatically cease which are not related to terrorism or national security. The statement of compatibility justifies the cessation of citizenship on the basis that the person, in engaging in such conduct, has repudiated their allegiance to Australia.⁴⁸ However, not all of the types of conduct that will cause citizenship to cease would appear to reflect a repudiation of allegiance, for example, graffitiing Commonwealth property or damaging Defence Force property. Accordingly, the measure appears significantly broader than necessary.

1.45 In addition, the loss of citizenship is automatic. The only exception is in circumstances where the minister exercises his discretion to exempt a person. This power is personal, non-delegable and not subject to the rules of natural justice. This would not appear a robust safeguard to ensure that individuals do not lose their citizenship and thus freedom of movement in circumstances that would be unjust.

1.46 The loss of citizenship is also permanent. A person who has lost their citizenship is ineligible under section 36A, to resume citizenship at any time. This permanency underlies the extraordinary nature of the provisions, particularly as many of the offences for which citizenship may be lost carry a maximum prison term of no more than 5 years under the Criminal Code. The statement of compatibility does not explain how such a measure is proportionate to the legitimate objective.

1.47 In terms of safeguards, the automatic cessation of citizenship, would occur at the time conduct occurred and not on the basis of a conviction. Accordingly, there may be a genuine contest as to whether or not that conduct has in fact occurred. An individual may have their freedom of movement limited, not only in the absence of a conviction, but prior to or during their attempt to challenge whether the conduct occurred. How this is reasonable and proportionate is not explained in the statement of compatibility.

1.48 Further, the bill expressly excludes section 39 of the *Australian Security Intelligence Organisation Act 1979*. This provision provides that a Commonwealth agency must not take any action on the basis of any communication from ASIO that does not amount to a security assessment. Accordingly, the effect of the bill is that a Commonwealth agency can act on preliminary ASIO information that is less certain than a security assessment when determining whether someone is an Australian citizen or whether in fact they have lost that citizenship based on conduct outlined by ASIO. In practice, a decision may be made that a person has lost their citizenship on the basis of supposition and conjecture as to whether they may have engaged in specified conduct. This could apply when the person is not in Australia and not in a practical position to challenge the lawfulness or correctness of this decision.

48 EM, Attachment A, 28.

1.49 The committee's assessment of the automatic cessation of citizenship powers against article 12 of the International Covenant on Civil and Political Rights (right to freedom of movement) raises questions as to whether restricting the freedom of movement of a person deprived of citizenship is justifiable.

1.50 As set out above, the automatic cessation of citizenship engages and limits the right to freedom of movement. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective. In particular, how many people are likely to be affected by these measures and why existing laws and powers are insufficient to protect national security and the safety of the Australian community;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective. In particular, advice is sought as to how decisions will be made by the minister or officials to effectively decide that a person's citizenship has ceased and whether this is the least rights restrictive approach. In addition, specific advice is sought in relation to each of the following offences or conduct, as to how each offence operates in practice and whether it is proportionate that citizenship should cease on the basis of each offence or conduct:
 - engaging in foreign incursions and recruitment as defined in Division 119 of the Criminal Code (with specific information given in relation to each offence provision in Division 119);
 - sections 80.1(2), 80.2, 80.2A, 80.2B, 80.2C, 91.1, 102.6(2), 102.7(2), 103.1, 103.2 of the Criminal Code; and
 - sections 24AB, 27 and 29 of the Crimes Act.

1.51 The committee also seeks the minister's advice on these questions regarding each of the human rights set out in Part 1 below (articles 9, 12, 17, 23, 25 and 26 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights).

Right to freedom of movement (right to enter one's 'own country')

1.52 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to enter one's own country—including a right to remain in the country, return to it and enter it. The reference to a person's 'own

country' is not necessarily restricted to the country of one's citizenship—it might also apply when a person has very strong ties to the country.

1.53 There are few, if any, circumstances in which depriving a person of the right to enter their own country could be justified. Australia cannot, by stripping a person of nationality or by expelling them to a third country, arbitrarily prevent a person from returning to his or her own country.

Compatibility of the measure with the right to freedom of movement (right to enter one's own country)

1.54 The statement of compatibility acknowledges that the right to enter one's 'own country' could apply to people whose citizenship has ceased:

While a person whose citizenship has ceased or has been renounced would no longer be a citizen under Australian law, under international law Australia may still be considered their 'own country' for the purposes of Article 12(4). The phrase 'his own country' has been interpreted broadly by the UN Human Rights Committee and the drafting history of the provisions supports the interpretation that 'own country' goes beyond mere nationality.⁴⁹

1.55 This is consistent with recent views expressed by the UN Human Rights Committee (HRC), including in relation to Australia. In *Nystrom v. Australia*⁵⁰ the HRC interpreted the right to freedom of movement under article 12(4) of the ICCPR as applying to non-citizens where they had sufficient ties to a country, and noting that 'close and enduring connections' with a country 'may be stronger than those of nationality'.⁵¹

1.56 In this context, the interpretation of 'own country' is clearly one that imports a significantly broader meaning to the phrase than the term 'citizenship'. As such, even if a person has a second citizenship, if they are deprived of their Australian citizenship in circumstances where Australia is their 'own country' they would have a right to remain in, and return to, Australia.

1.57 The statement of compatibility states that the 'own country' provisions do not apply in relation to a person whose citizenship has automatically ceased by their own conduct as by those very actions that person will have repudiated their allegiance to Australia and any ties they may have to Australia will have been voluntarily severed.⁵²

49 EM, Attachment A, 29.

50 See *Nystrom v Australia*, (1557/07), UN Human Rights Committee, 18 July 2011 (*Nystrom*).

51 *Nystrom* at [7.4]. The HRC subsequently affirmed this view in *Warsame v Canada* (1959/2010), UN Human Rights Committee, 21 July 2011.

52 EM, Attachment A, 29.

1.58 However, the automatic cessation of citizenship provisions do not require a person to specifically repudiate their citizenship of Australia – rather, the provisions operate automatically (including in relation to the commission of offences which would not appear to result in the repudiation of allegiance, such as that of damaging government property).⁵³ Accordingly, the statement of compatibility provides insufficient information to demonstrate that the 'own country' provisions do not apply.

1.59 The statement of compatibility goes on to assess the compatibility of the measure should a person still be able to consider Australia their 'own country':

Should circumstances arise where a person whose citizenship has ceased or has been renounced can properly consider Australia to be “his [or her] country”, depriving them of the right to enter Australia would not be arbitrary. It would be based on a genuine threat to Australia’s security posed by a person who is fighting on behalf of or is in the service of a terrorist organisation or is convicted of particular terrorism-related offences and has repudiated their allegiance to Australia. The cessation or renunciation of Australian citizenship (**thereby preventing return to Australia**) is, in the Government’s view, proportionate to the legitimate goal of ensuring the security of the Australian community.⁵⁴

1.60 It is clear from the statement of compatibility that the intention is to exclude Australian citizens who are outside Australia at the time their citizenship ceases from being able to return to Australia. This clearly limits the right to return to one's own country. The UN Human Rights Committee has said, in relation to limitations on the right to return to one's own country:

there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. 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.⁵⁵

1.61 It therefore seems difficult to justify depriving an Australian who has become an 'ex-citizen' as a result of conduct that is deemed to result in automatic loss of citizenship of the right to return to Australia. It is clear that the deprivation of citizenship therefore engages and limits the right to freedom of movement, and as such this limitation needs to be justified. Much of the analysis at paragraphs [1.36] to [1.48] in relation to the legitimate objective, rational connection and proportionality

53 See proposed section 35A of the bill which provides that citizenship ceases if a person is convicted of an offence against section 29 of the Crimes Act, which makes it an offence to damage property belonging to the Commonwealth.

54 EM, Attachment A, 29, emphasis added.

55 Human Rights Committee, *General Comment 27, Freedom of Movement*, 1999, [21], emphasis added.

of the measures applies equally (and even more forcefully given the UN Human Rights Committee's statement that there are few circumstances in which it could be reasonable to deprive a person of access to their own country) in relation to this aspect of the right to freedom of movement.

Right to a private life

1.62 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

1.63 A private life is linked to notions of personal autonomy and human dignity: it includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

1.64 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measure with the right to a private life

1.65 The statement of compatibility makes no reference to the right to a private life. However, there is a strong argument that the bill engages and limits the right to a private life. The term 'private life' has been interpreted broadly, encompassing notions of a person's identity, which has been said to be linked to a person's nationality.

1.66 The European Court of Human Rights, in interpreting the right to a private life, has stated:

[T]he concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity...the Court has previously stated that it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under [the right to a private life] because of the impact of such a denial on the private life of the individual.⁵⁶

1.67 The United Kingdom Joint Committee on Human Rights, when examining the United Kingdom's laws enabling citizenship to be removed, stated that 'nationality is

56 *Genovese v Malta*, European Court of Human Rights, Application no. 5314/09, 11 November 2011. This is based on article 8 of the European Convention on Human Rights which is in substantially similar terms to article 17 of the ICCPR.

part of a person's identity and therefore, potentially at least, their private life'.⁵⁷ The United Kingdom government acknowledged in its supplementary memorandum on the bill that gave additional powers to the Secretary of State to strip a person of citizenship, that 'deprivation of citizenship is capable of engaging [the right to a private life]'. The United Kingdom government referred to the case of *Genovese v Malta* cited above and concluded:

This is because nationality is part of a person's identity and, therefore, potentially their private life. This applies to all deprivation, not just deprivation rendering some stateless.⁵⁸

1.68 Accordingly, the deprivation of citizenship therefore engages and limits the right to a private life, and as such this limitation needs to be justified. The analysis at paragraphs [1.36] to [1.48] in relation to the legitimate objective, rational connection and proportionality of the measures applies equally in relation to the limitations on the right to a private life.

Protection of the family

1.69 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection.

1.70 An important element of protection of the family, arising from the prohibition under article 17 of the ICCPR against unlawful or arbitrary interference with family, is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation or forcibly remove children from their parents, will therefore engage this right.

Compatibility of the measure with the right to protection of the family

1.71 The statement of compatibility acknowledges that the right to the protection of the family is engaged by the bill:

The cessation or renunciation of the Australian citizenship of a parent may engage the right of a child to be cared for by his or her parents in Article 7(1) and the right to family in Article 23(1). However, they would only be engaged in circumstances where the actions of the parent whose citizenship has ceased or been renounced casts serious doubt on their

57 UK Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill (second report), Twelfth Report of Session 2013-14*, 26 February 2014, available at: <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/142.pdf>.

58 Immigration Bill, European Convention on Human Rights, Supplementary Memorandum by the Home Office, January 2014, [12], available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276660/Deprivation_ECHR_memo.pdf.

suitability as a parent, and where the safety and security considerations and Australia's national security are likely to justify a limitation of the right.

The right to family may also be engaged in circumstances without children, for example in circumstances where a husband's Australian citizenship ceases or renounces but his wife's citizenship does not. The Government has considered this right and has assessed that the security and safety considerations of Australians and national security outweigh the rights of the individuals affected.⁵⁹

1.72 As set out above, the offences and conduct for which citizenship will automatically cease is extremely broad and does not support the generalised and emotive statement that such conduct 'casts serious doubts on their suitability as a parent'. For example, damaging property (including graffiti) or travelling to a location declared to be off limits by the Minister for Foreign Affairs does not necessarily suggest that such a person is not a suitable parent, or whether it is reasonable and proportionate to separate that person from their family.

1.73 The statement of compatibility appears only to identify the objective of the measure—being security and safety considerations—and does not assess the question of rational connection or, importantly, the proportionality of the measures. In particular, no information is given as to whether due consideration will be given to maintaining the family unit when decisions are made to deny an ex-citizen re-entry to Australia or to deport a person from Australia.

1.74 In addition, the analysis at paragraphs [1.36] to [1.48] in relation to the legitimate objective, rational connection and proportionality of the measures applies equally in relation to the limitations on the right to protection of the family.

Right to take part in public affairs

1.75 Article 25 of the ICCPR protects the right to take part in public affairs. Article 25 provides the right to take part in public affairs and elections, and guarantees the right of citizens to stand for public office, to vote in elections and to have access to positions in public service. The right to take part in public affairs applies only to citizens.

Compatibility of the measure with the right to take part in public affairs

1.76 One of the consequences of losing citizenship is that a person who was previously entitled to the right to take part in public affairs would be denied that right. Aside from the right to vote, this also results in a person not being entitled to stand for public office or to hold positions in the public service. The statement of compatibility does not assess the effect of the cessation of citizenship on the right to take part in public affairs.

59 EM, Attachment A, 33-34.

Right to equality and non-discrimination

1.77 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the ICCPR.

1.78 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.79 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),⁶⁰ which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.⁶¹ The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.⁶²

Compatibility of the measure with the right to equality and non-discrimination

1.80 The statement of compatibility states the right to equality and non-discrimination is engaged by these measures, but states that any limitation on this right is justifiable on the following bases:

Differentiation on the basis of dual nationality is the consequence of obligations relating to statelessness, and as such represents a measure of extra protection for those without dual nationality, rather than a means of possibly selecting those who may be subject to the new provisions.

The broader differentiation at the heart of the cessation and renunciation amendments, i.e. that by acting against the interests of Australia by choosing to engage in terrorism, they have evidently repudiated their allegiance to Australia, thereby renouncing their Australia citizenship, is proportionate to the seriousness of the conduct.⁶³

1.81 However, aside from the direct discrimination on the basis of dual nationality, there is also the possibility of indirect discrimination on the basis of race or religion.

60 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

61 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989).

62 *Althammer v Austria* HRC 998/01, [10.2].

63 EM, Attachment A, 32.

1.82 International human rights law recognises that a measure may be neutral on its face but in practice have a disproportionate impact on groups of people with a particular attribute such as race, colour, sex, language, religion, political or other status. Where this occurs without justification it is called indirect discrimination.⁶⁴ Indirect discrimination does not necessarily import any intention to discriminate and can be an unintended consequence of a measure implemented for a legitimate purpose. The concept of indirect discrimination in international human rights law therefore looks beyond the form of a measure and focuses instead on whether the measure could have a disproportionately negative effect on particular groups in practice.

1.83 Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. However, under international human rights law such a disproportionate effect may be justifiable.

1.84 The statement of compatibility did not address the issue of indirect discrimination, and in relation to direct discrimination, simply stated that the cessation of citizenship was proportionate to the seriousness of the conduct, without providing any analysis about how it is proportionate (given the range of offences it applies to). It is not clear whether these measures would impact disproportionately on persons from a particular race or religion.

Right to liberty and obligations of non-refoulement

1.85 Article 9 of the ICCPR protects the right to liberty—the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. This prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.86 Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require the detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty, including immigration detention.

1.87 Article 9 applies to all forms of deprivations of liberty, including immigration detention.

1.88 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are

64 *Althammer v Austria* HRC 998/01, [10.2].

found not to be refugees.⁶⁵ This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.⁶⁶

1.89 Non-refoulement obligations are absolute and may not be subject to any limitations.

1.90 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.⁶⁷

Compatibility of the measures with the right to liberty and Australia's non-refoulement obligations

1.91 The statement of compatibility explains that a person whose citizenship ceases under these provisions and who is in Australia at the time their citizenship ceases, acquires an ex-citizen visa by operation of law.⁶⁸ This is a permanent visa allowing the holder to remain in, but not re-enter, Australia. It is subject to cancellation at any time. The statement of compatibility also explains that expulsion from Australia may be the outcome of a process that begins with cessation of citizenship.⁶⁹ The statement of compatibility states that this is most likely under section 189 of the *Migration Act 1958* (Migration Act) (but presumably this should read section 198), which provides that an unlawful non-citizen can be removed from Australia.

1.92 The statement of compatibility identifies that removal may be a consequence of the cancellation of citizenship, but states:

any decision to remove a person from Australia may be the result of decisions about visas following the automatic cessation or renunciation of citizenship in this circumstance, it is clearly linked to compelling reasons of

65 CAT article 3(1); ICCPR, articles 6(1) and 7; and Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty.

66 See Refugee Convention article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

67 ICCPR article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and *Fourth Report of the 44th Parliament* (March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 513.

68 See section 35 of the Migration Act.

69 EM, Attachment A, 30.

national security. Judicial pathways would be available for the review of such decisions.⁷⁰

1.93 The statement of compatibility does not identify that the automatic cancellation of citizenship engages and may limit the right to liberty and the obligations of non-refoulement.

1.94 The right to liberty is engaged by the automatic cancellation of citizenship as it appears likely that any person whose citizenship has ceased because of having engaged in, or been convicted of, specified conduct, is likely to have their ex-citizen visa cancelled on character grounds. Following cancellation of this visa the ex-citizen would then be subject to mandatory immigration detention pending their deportation.

1.95 The detention of a non-citizen on cancellation of their visa pending deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. However, in the context of mandatory detention, in which individual circumstances are not taken into account, and where there is no right to periodic judicial review of the detention, as the committee has previously noted, there may be situations where the detention could become arbitrary under international human rights law.⁷¹ This is most likely to apply in cases where the person cannot be returned to their country of nationality on protection grounds (due to the obligation of non-refoulement or where there is no other country willing to accept the person). This may apply to ex-citizens who have had their citizenship cancelled on the basis of having engaged in specified conduct and whose country of dual nationality may be unwilling to allow the person entry.

1.96 Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. It is the blanket and mandatory nature of detention for those whose visa has been cancelled but to whom Australia cannot deport that makes such detention arbitrary. In particular, the Australian system provides for no consideration of whether detention is justified and necessary in each individual case—detention is simply required as a matter of policy. It is this essential feature of the mandatory detention regime that invokes the right to liberty in article 9 of the ICCPR.

1.97 In addition, even if a person can be deported to their country of dual nationality or a third country, deportation in certain situations may raise concerns around Australia's obligations of non-refoulement. As set out at paragraphs [1.88] to

70 EM, Attachment A, 30.

71 For example, see *A v Australia* (Human Rights Committee Communication No. 560/1993) and *C v Australia* (Human Rights Committee Communication No. 900/1999). See also *F.K.A.G et al v Australia* (Human Rights Committee Communication No. 2094/2011) and *M.M.M et al v Australia* (Human Rights Committee Communication No. 2136/2012).

[1.90], Australia has an obligation not to return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.⁷² These obligations are absolute and may not be subject to any limitations.

1.98 There is nothing in Australian law that would prevent an unlawful non-citizen, including ex-citizens, from being removed to a place where they may face persecution. Rather, section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

1.99 The obligation of non-refoulement and the right to an effective remedy requires an opportunity (before removal) for effective, independent and impartial review of the decision to expel or remove.⁷³ Applied to the Australian context, there is no provision for merits review in relation to removal of non-citizens from Australia. Rather, access is only to judicial review which represents a considerably limited form of review, allowing a court to consider only whether the decision was lawful (that is, within the power of the decision maker). The court cannot undertake a full review of the facts (that is, the merits) of a particular case to determine whether the case was correctly decided.

1.100 Accordingly, in the Australian context, judicial review is not sufficient to fulfil the international standard required of 'effective review', because it is only available on a number of restricted grounds of review that do not relate to whether that decision was correct or preferable. The ineffectiveness of judicial review is particularly apparent when considered against the purpose of effective review of non-refoulement decisions under international law, which is to 'avoid irreparable harm to the individual'.

1.101 The committee's assessment of the automatic cessation of citizenship powers against articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) (obligations of non-refoulement) raises questions as to whether depriving a person of citizenship, and therefore potentially exposing them to deportation, is compatible with Australia's

72 See Refugee Convention, article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

73 *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) [13.7] and *Josu Arkauz Arana v. France*, CAT/C/23/D/63/1997, (CAT), 5 June 2000. See also *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006) [11.8].

non-refoulement obligations, given the lack of statutory protection and lack of 'independent, effective and impartial' review of decisions to remove a person.

1.102 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the cessation of citizenship provisions and decisions to remove an ex-citizen will be subject to sufficiently 'independent, effective and impartial' review so as to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.

Part 2 – Procedural and process rights

1.103 Part 2 addresses procedural and process rights in relation to proposed powers to automatically remove citizenship.

1.104 As discussed above, the enjoyment of a range of rights and entitlements under Australian law is tied to Australian citizenship. The processes by which citizenship may be stripped, and the safeguards that exist in relation to this process, are therefore of great importance to the question of compatibility with human rights.

1.105 The proposed provisions for the loss of citizenship engage and limit a number of procedural and process rights including:

- the right to a fair trial;
- the right to a fair hearing; and
- the right to an effective remedy.

1.106 Each measure which removes the citizenship of adults are addressed in turn. Particular human rights concerns in relation to loss of a child's citizenship are set out in Part 3 below.

Automatic loss of citizenship through conduct

1.107 As noted at [1.16] to [1.17] above, under proposed section 33AA a dual Australian citizen will automatically lose their Australian citizenship if they engage in specified conduct.

1.108 In addition, under new subsection 35(1) a person automatically ceases to be an Australian citizen if the person is a dual national and the person, outside of Australia, serves in the armed forces of a country at war with Australia or fights for, or is in the services of, a declared terrorist organisation. A 'declared terrorist organisation' is any terrorist organisation as defined by the Criminal Code and declared by the Minister for Immigration and Border Protection.

Right to a fair hearing

1.109 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

Compatibility of the measure with the right to a fair hearing

1.110 The statement of compatibility states that the right to a fair hearing is not limited by the measure as:

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.⁷⁴

1.111 However, the statement of compatibility does not fully explain how the availability of judicial review and the potential for declaratory relief would be sufficient for compatibility with the right to a fair hearing.

1.112 The statutory scheme for judicial review in Australia is the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), and represents a considerably limited form of review in that it allows a court to consider only whether a decision was lawful (that is, was within the power of the decision maker).

1.113 However, the construction of the proposed provisions mean that it is unclear that the minister does in fact make a decision to remove a person's citizenship. Rather, a person's citizenship is automatically lost from the time an individual engages in any of the conduct outlined above under proposed section 33AA or 35(1).

1.114 Given this, it appears very unlikely that the ADJR Act will apply to the automatic loss of citizenship under section 33AA or 35(1).

1.115 However, an individual whose citizenship has been lost may still seek declaratory relief from a court. A declaration by a court is not 'judicial review' as commonly understood in the Australian context, but rather a statement of the law or of the rights and duties of a party,⁷⁵ and in the present case would presumably require the court to consider whether or not the conduct leading to the automatic loss of citizenship had actually occurred. The court could therefore, in effect, declare that an individual's citizenship was never lost.

1.116 However, it should be noted that there is significant uncertainty as to how an application for declaratory relief in relation to the automatic loss of citizenship would operate in practice.

1.117 This is because of the unusual construction of proposed section 33AA and amended section 35, whereby particular conduct is deemed to be a renunciation of citizenship, with the consequent automatic loss of citizenship. This mechanism is to

74 EM 31.

75 Mark Robinson (ed), *Judicial Review: the Laws of Australia* (2009) 685. Declarations by courts therefore do not create rights and duties but indicate what they have always been.

be contrasted with the loss of citizenship occurring, for example, directly through the decision of a court or the executive.⁷⁶

1.118 First, it is unclear whether, in the absence of a decision, the onus of proof in such a matter would rest with the respondent or with the plaintiff (that is, with the person whose citizenship has purportedly been lost). If the latter, the plaintiff may be placed in the difficult position of having to prove that they had not engaged in the conduct which led to the automatic loss of their citizenship. The inherent difficulty in proving a negative for a plaintiff may seriously limit that person's right to a fair hearing.

1.119 It may be, however, that a court would approach the question of whether the conduct had occurred as a matter of 'jurisdictional fact'. A jurisdictional fact is one that must exist in order for a decision maker to lawfully exercise a power.⁷⁷ In relation to objective jurisdictional facts, a court can receive evidence and decide for itself whether or not the fact exists.⁷⁸

1.120 If a court were to take such an approach, because the conduct resulting in automatic loss of citizenship is to have the same meaning as in the Criminal Code, the court would essentially be required to determine whether a particular crime has been committed. However, while it is usually the respondent who must prove the existence of a 'jurisdictional fact', because the proposed provision is self-executing (meaning there is no decision as such), it may be unlikely that a court would approach the question of whether the conduct had occurred as one of 'jurisdictional fact'.

1.121 The proceedings under discussion are civil rather than criminal in nature under Australian domestic law. It is important to note therefore that the civil standard of proof is on the balance of probabilities, rather than to the criminal standard of beyond reasonable doubt.⁷⁹ As discussed below, the application of civil burdens and standards of proof without the usual protections afforded in a criminal proceeding also adversely affects the compatibility of the measure with the right to a fair trial.

1.122 Further, the effect of the operation of sections 33AA and 35(1) is that a person is considered to have lost their citizenship through conduct. However, the

76 It should be noted that declaratory orders by courts are discretionary rather than as of right, which in theory would increase the uncertainty of the availability of judicial review through the seeking of a declaration by a court. However, given the circumstances in which a person would be seeking such a declaration, it might be assumed that a court would not lightly refuse to exercise its discretion to provide declaratory relief.

77 Judith Bannister, Gabrielle Appleby & Anna Olijnyk, *Government Accountability: Australian Administrative Law* (2015) 524.

78 See *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, 63.

79 See *Evidence Act 1995* (Cth) section 140.

evidence in relation to that alleged conduct may be in fact contested, which means that an individual may be treated as a non-citizen before having the opportunity to challenge or respond to allegations of specified conduct.⁸⁰

1.123 Given the potential difficulties in bringing a claim for effective review of the automatic stripping of citizenship, noted above, the right to a fair hearing is engaged and limited in relation to the proposed measure.

1.124 In light of the serious consequences that may result from loss of citizenship, it is critical that there is clarity and certainty around the process for challenging any loss of citizenship. In this regard, it is noted that the onus is on the legislation proponent to ensure that proposed processes are compatible with the right to a fair hearing, including that there is procedural fairness and equality in proceedings.

1.125 However, the statement of compatibility for the bill does not provide any information on how judicial review would operate in respect of proposed sections 33AA and 35(1), including which party will bear the applicable burden of proof or standard of proof, or address other uncertainties with respect to the operation of sections 33AA and 35(1).

1.126 Such information is necessary to determine whether the measure is compatible with the right to a fair hearing.

1.127 Indeed, noting the serious consequences of the loss of citizenship, it may be appropriate for there to be specific guidance in the legislation in relation to applicable burdens and standards of proof in respect of challenging the loss of citizenship.

1.128 The committee therefore considers that the automatic loss of citizenship through conduct engages and limits the right to a fair hearing under article 14 of the International Covenant on Civil and Political Rights. The statement of compatibility provides insufficient information to allow a full assessment of this potential limitation, particularly given the unusual construction of proposed sections 33AA and 35(1).

1.129 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the availability of judicial review and the potential for declaratory relief is sufficient for compatibility with the right to a fair hearing in light of the particular construction of sections 33AA and 35(1) (including with reference to where the burden of proof falls and the standard of proof applicable to such proceedings).

80 For example, an individual may be denied consular assistance at an Australian embassy on the basis that they are no longer a citizen because they have travelled to Mosul which is a declared area.

Right to a fair trial

1.130 The right to a fair trial is protected by article 14 of the ICCPR. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.131 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)), the right not to be punished twice for the same conduct (article 14(7)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to a fair trial

1.132 The statement of compatibility argues that the right to a fair trial is not limited as individuals will have access to judicial review.

1.133 However, there are a range of specific guarantees in relation to the right to a fair trial in the determination of a criminal charge which would not be available in a civil action such as judicial review or an application for declaratory relief as described above. These specific guarantees include the presumption of innocence and the right not to incriminate oneself.

1.134 As noted above at paragraphs [1.115] to [1.120], the courts may be able to declare that the alleged conduct leading to the automatic loss of citizenship has not occurred, with the result that an individual's citizenship was never lost. However, in considering whether to grant such declaratory relief, a court would effectively need to determine whether or not a particular crime (specified as leading to the automatic loss of citizenship) has been committed, in accordance with the definitions set out in the Criminal Code.

1.135 Given that the court would therefore effectively be determining a criminal charge, the criminal process rights contained in article 14 of the ICCPR appear to be engaged. The concept of a 'criminal charge' extends to acts that are criminal in nature with sanctions that must be regarded as penal.⁸¹

1.136 The proposal for automatic loss of citizenship on the basis of conduct as defined by reference to the Criminal Code, may constitute punitive action against the individual. That is, it may be considered to be a form of banishment.⁸² Banishment

81 See UN Human Rights Committee, General Comment 32 [15].

82 See, J Bleichmar, 'Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law', *Georgetown Immigration Law Journal* (1999) 27. Macklin, Audrey and Rainer Baubock, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' (February 2015), Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/14. Barry, Christian and Luara Ferracioli,

has historically been regarded as one of the most serious forms of punishment.⁸³ The statement of compatibility acknowledges that the ultimate outcome of cessation of citizenship will most likely be removal from Australia for the individual concerned.⁸⁴

1.137 Accordingly, the removal of an Australian's citizenship, in circumstances which may ultimately lead to their effective banishment, may be considered to be a form of punishment under international human rights law.

1.138 As set out in the committee's Guidance Note 2, even if a penalty is classified as civil or administrative under domestic law it may nevertheless be considered 'criminal' under international human rights law. A provision that is considered 'criminal' under international human rights law will engage criminal process rights under articles 14 and 15 of the ICCPR, such as the right to be presumed innocent.

1.139 The first consideration in determining whether a penalty may be considered 'criminal' under human rights law is whether the penalty is classified as 'criminal' under Australian domestic law—if classified as criminal under Australian domestic law then the penalty will be considered 'criminal' for the purposes of human rights law. In this case it is unclear whether or not the penalty is classified as 'criminal'. However, given the direct references to loss of citizenship resulting from criminal conduct in the proposed provision, it is arguable that under Australian domestic law the penalty is classified as criminal in key respects.

1.140 Even if the penalty of loss of citizenship is not strictly classified as criminal under Australian domestic law, it may still be considered 'criminal' under international human rights law. The criteria for determining whether a penalty may be considered 'criminal' under human rights law in circumstances where it is not classified as criminal under domestic law relates to the nature of the penalty and the severity of the penalty.

1.141 In relation to the nature of the penalty, the penalty is likely to be considered criminal for the purposes of human rights law if (a) the purpose of the penalty is to punish or deter; and (b) the penalty applies to the public in general (rather than

'Can Withdrawing Citizenship Be Justified?', *Political Studies* (forthcoming), accessed at <http://philpapers.org/archive/BARCWC-3.pdf>; Craig Forcese, 'A Tale of Two Citizenships: Citizenship Revocation for "Traitors and Terrorists" 39(2) *Queen's Law Journal* (2014) 573; Audrey Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' 40(1) *Queen's Law Journal* (2014) 1-54.

83 See, Rebecca Kingston, 'The Unmaking of Citizens: Banishment and the Modern Citizenship Regime in France', (2005) 9 *Citizenship Studies* 23. Macklin, Audrey and Rainer Baubock, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' (February 2015), Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/14. Barry, Christian and Luara Ferracioli, 'Can Withdrawing Citizenship Be Justified?', *Political Studies* (forthcoming), accessed at <http://philpapers.org/archive/BARCWC-3.pdf>.

84 See EM 30 which acknowledges that the measures may ultimately result in the expulsion of the former Australian citizen.

being restricted to people in a specific regulatory or disciplinary context). In this regard, the statement of compatibility notes that the measure may have a significant deterrent effect and could apply to all dual citizens and is not limited to a particular regulatory context.

1.142 Even if both (a) and (b) of the above test are not fully satisfied, a penalty may be considered 'criminal' depending upon its severity. In this regard, the serious consequences that may ultimately flow from the loss of a person's citizenship may also mean that the penalty is considered 'criminal' for the purposes of human rights law, thereby engaging the full range of criminal process rights under articles 14 and 15 of the ICCPR.

1.143 As discussed above, a person who loses their citizenship by the operation of section 33AA may seek declaratory relief from a court. However, this would be a civil matter under Australian domestic law and civil burdens and standards of proof would therefore apply. That is, the matter would be decided on the balance of probabilities. On the application of this lower standard of proof an individual could therefore lose their citizenship despite reasonable doubt as to whether they had engaged in the purported conduct. On this basis, the measure would accordingly limit the right to be presumed innocent.

1.144 Further, the process of seeking a declaration could only occur after citizenship has already purportedly been lost. This means that the Australian government may treat the person as a non-citizen on the basis of conduct alleged but not proven. The measure would accordingly limit the right to be presumed innocent. The presumption of innocence generally requires that the prosecution prove each element of a criminal offence to the criminal standard of beyond reasonable doubt. However, the statement of compatibility provides no justification in relation to this limitation on the right to a fair trial.

1.145 Further, in seeking a declaration of the court an individual who had lost their citizenship would have to bring evidence to the court as to why a declaration should be provided in their favour and would not be able to rely on other criminal process rights such as the protection against self-incrimination.

1.146 The proposed provisions are likely to be considered 'criminal' for the purposes of international human rights law. Accordingly, the criminal process rights in articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) would apply, including the right to be presumed innocent and the right not to incriminate oneself. 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.

1.147 As set out above, the statement of compatibility does not acknowledge that the right to a fair trial is limited and accordingly does not justify that limitation

for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Quality of law

1.148 Human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

Compatibility of the measure with the quality of law test

1.149 As outlined at paragraphs [1.112] to [1.120], there is a high degree of uncertainty as to how the automatic loss of citizenship provisions will work in practice. This includes how an individual may seek declaratory relief if they believe they have not engaged in such conduct that led to the automatic cessation of their citizenship and how the courts will determine the rights and responsibilities of the parties in court proceedings.

1.150 As a matter of international human rights law, it is critical that there is clarity and certainty around the processes for challenging any loss of citizenship. In this regard, it is noted that the onus is on the legislation proponent to ensure that the proposed processes are compatible with the right to a fair hearing and right to a fair trial, including that there is procedural fairness and equality in proceedings. For the purposes of the quality of law test, it is insufficient for the legislation proponent to assert that the courts will manage these uncertainties in accordance with established practice and principles. It should be clear in the legislation how the provisions will operate in practice and how the rights of individuals to due process and the rule of law are protected by the bill.

1.151 **The committee's assessment of the automatic cessation of citizenship powers against the quality of law test raises questions as to whether the provisions providing for automatic loss of citizenship for certain conduct are sufficiently certain.**

1.152 **As set out above, the automatic cessation of citizenship engages the quality of law test. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with the quality of law test.**

Prohibition on double punishment

1.153 The right to a fair trial includes specific procedural guarantees. Article 14, paragraph 7 of the ICCPR, provides that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law.

Compatibility of the measure with the prohibition on double punishment

1.154 As outlined at paragraphs [1.46] to [1.54], the provisions that provide for automatic loss of citizenship on the basis of defined conduct may be considered punitive for the purposes of international human rights law. That is, the loss of citizenship is a punishment for the conduct engaged in, notwithstanding the absence of a court process to determine guilt beyond reasonable doubt. The practical effect of this is that loss of citizenship may occur before or during a criminal trial for specific offences that relate to that conduct. Potentially, citizenship could also be lost in the context of a trial at which a person is ultimately acquitted (because of the differing standards of proof), meaning a person could effectively be tried twice for the same conduct (which is also prohibited by article 14(7) of the ICCPR).

1.155 An individual subjected to both the automatic loss of citizenship and a criminal conviction and punishment for the same conduct will effectively suffer double punishment. The statement of compatibility does not address how these measures are compatible with the prohibition on double punishment.

1.156 The committee's assessment of the automatic cessation of citizenship powers against article 14(7) of the International Covenant on Civil and Political Rights (prohibition on double punishment) raises questions as to whether depriving a person of citizenship will act as a double punishment.

1.157 As set out above, the automatic cessation of citizenship may engage and limit the prohibition on double punishment. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with article 14(7).

Right to an effective remedy

1.158 Article 2 of the ICCPR requires state parties to ensure access to an effective remedy for violations of human rights. State parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, state parties may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

1.159 State parties are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations.

1.160 Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of person including, and particularly, children.

Compatibility of the measure with the right to an effective remedy

1.161 The automatic loss of citizenship by conduct provisions engage and may limit the right to an effective remedy as the provisions operate automatically and may apply in circumstances where the individual concerned contests whether the conduct actually occurred.

1.162 It is noted that the automatic cessation provisions would enable government officials to take action notwithstanding that the minister has not yet issued a notice, including declining consular assistance, and notwithstanding the absence of a criminal conviction.

1.163 A person, who contests that they did not engage in the conduct causing the automatic loss of citizenship, may apply to the federal courts to seek declaratory relief. However, as set out above at paragraphs [1.115] to [1.120] there is significant uncertainty as to how an application for declaratory relief regarding the automatic loss of citizenship would operate in practice. This uncertainty raises concerns about the efficacy of any judicial process to ensure that a person who wrongfully lost their citizenship is able to seek effective review and redress.

1.164 It is also noted that an Australian who loses their citizenship outside of Australia may face significant practical hurdles in seeking access to courts to seek declaratory relief. These include difficulty in obtaining the necessary visas to travel to Australia to appear before the courts and the ability to seek and obtain necessary documentary evidence to present to the courts.

1.165 The statement of compatibility does not assess the effect of the cessation of citizenship on the right to an effective remedy.

1.166 The committee's assessment of the automatic cessation of citizenship powers against article 2 of the International Covenant on Civil and Political Rights (right to an effective remedy) raises questions as to whether a person who has lost their citizenship will have access to an effective remedy.

1.167 As set out above, the automatic cessation of citizenship engages and limits the right to an effective remedy. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**

- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Automatic loss of citizenship on conviction

1.168 As noted at paragraph [1.18], under proposed section 35A, a dual Australian citizen will cease to be an Australian citizen if they are convicted of any one of 57 offences. The loss of citizenship following conviction engages the prohibition on double punishment.

1.169 In addition, the provisions will apply to individuals who are convicted following enactment of the bill even if the conduct that is the subject of that conviction occurred prior to the Act's enactment. Accordingly, the provisions engage the prohibition on retrospective criminal laws.

Prohibition on double punishment

1.170 The prohibition on double punishment is outlined at paragraph [1.153] above.

Compatibility of the measure with the prohibition on double punishment

1.171 As outlined at paragraphs [1.132] to [1.142], the act of removing someone's citizenship may be considered punitive for the purposes of international human rights law. Provisions that automatically impose a loss of citizenship following conviction for certain offences may be considered to impose an additional punishment to that imposed by the court in accordance with the Criminal Code. The statement of compatibility does not address how these measures are nevertheless compatible with the prohibition on double punishment.

1.172 The committee's assessment of the automatic cessation of citizenship powers on conviction for certain offences, against article 14(7) of the International Covenant on Civil and Political Rights (prohibition on double punishment) raises questions as to whether depriving a person of citizenship will act as a double punishment inconsistent with this prohibition.

1.173 As set out above, the automatic cessation of citizenship on conviction may engage and limit the prohibition on double punishment. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with article 14(7).

Prohibition against retrospective criminal laws

1.174 Article 15 of the ICCPR prohibits retrospective criminal laws. This prohibition supports long-recognised criminal law principles that there can be no crime or punishment without law. Laws which set out offences need to be sufficiently clear to ensure people know what conduct is prohibited.

1.175 This is an absolute right and it can never be justifiably limited.

1.176 Article 15 requires that laws must not impose criminal liability for acts that were not criminal offences at the time they were committed. Laws must not impose greater punishments than those which would have been available at the time the acts were done. Further, if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right, where an offence is decriminalised, to the retrospective decriminalisation (if the person is yet to be penalised).

Compatibility of the measure with the prohibition on retrospective criminal laws

1.177 As set out above, the automatic loss of citizenship on conviction provisions will apply to individuals who are convicted following enactment of the bill, even if the conduct that is the subject of that conviction occurred prior to the enactment.⁸⁵ A core aspect of article 15 is that laws must not impose greater punishments than those which would have been available at the time the acts were done. Accordingly, the bill would appear to limit the absolute prohibition on retrospective criminal laws. This is not identified or addressed in the statement of compatibility.

1.178 The committee also notes that the bill was referred to the Parliamentary Joint Committee on Intelligence and Security to inquire into and report. The committee notes that as part of that referral the Attorney-General asked that committee to consider whether proposed section 35A 'should apply retrospectively with respect to convictions prior to the commencement of the Act'.⁸⁶ The committee notes that were amendments to be made to the bill to apply the cessation of citizenship provisions to anyone ever convicted of any of the listed offences, this would raise serious concerns about the compatibility of the measures with the prohibition on retrospective criminal laws.

1.179 The committee's assessment of the automatic cessation of citizenship powers on conviction for certain offences, against article 15 of the International Covenant on Civil and Political Rights (ICCPR) (prohibition on retrospective criminal laws) raises questions as to whether the provisions should apply to conduct that occurs prior to the bill becoming law.

1.180 As set out above, the automatic cessation of citizenship on conviction may engage and limit the prohibition on retrospective criminal laws which is an absolute right. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with article 15(1) of the ICCPR.

85 See item 8(4) of the bill.

86 See the terms of references to the Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, available at:
http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Terms_of_Reference.

Part 3—Children

1.181 The final part of the analysis considers how the bill will apply to children, which under international human rights law means all people aged under 18 years.

1.182 Proposed new section 33AA would operate so that a dual Australian citizen will automatically cease to be an Australian citizen if they engage in specified conduct, as defined in the Criminal Code. The Explanatory Memorandum (EM) notes that the offences in the Criminal Code have limited application with respect to minors. Under the Criminal Code, a person under 10 years is not criminally responsible for an offence. Accordingly, the EM explains that section 33A would not apply to persons under 10 years of age. However, it should be noted that there is nothing in the bill itself that would restrict the automatic cessation of citizenship on conduct provisions to those over the age of criminal responsibility. It should also be noted that, despite what the EM says, the statement of compatibility states that there are documented cases of children fighting with extremist organisations and otherwise being involved with terrorism and the 'proposed amendments apply to all Australian (dual) citizens regardless of age'.⁸⁷

1.183 The EM also notes that under the Criminal Code, a child aged between 10 and 14 years of age can only be criminally responsible for an offence if the child knows that his or her conduct is wrong. This reflects that children have different capacities and levels of maturity than adults to make judgements. The EM is silent on how section 33A will apply to persons aged between 10 and 14 and whether the provisions in the bill will apply to a person in that age bracket. Noting the analysis above in relation to the right to a fair hearing and a right to fair trial, there 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.

1.184 The bill also amends section 35(1) of the Citizenship Act to provide that a person automatically ceases to be an Australian citizen if they are a dual national and fights for, or is in the services of, a declared terrorist organisation. This provision does not reference the Criminal Code and accordingly the proposed section 35(1) would certainly apply regardless of age. For example, a six year old who fetches drinking water from a well for a village elder who is fighting in a declared terrorist organisation would automatically lose their citizenship. This would occur regardless of the child's criminal culpability, or their understanding of how the fetching of water from the well relates to or contributes to the activities of a terrorist organisation.

1.185 Under proposed section 35A, a dual Australian citizen will cease to be an Australian citizen if they are convicted of one of 57 offences (see paragraph [1.18] above). The offences apply to children over 10 years of age. Children aged 10 to 14

87 EM, Attachment A 32.

would only be convicted, and thus subject to automatic loss of citizenship, if they knew that the conduct was wrong in accordance with the standards and procedures of domestic criminal law.

1.186 As the automatic loss of citizenship provisions apply to children, the preceding analysis of the rights implications of those measures set out in Parts 1 and 2 applies equally to children and the minister's response needs to address the human rights compatibility of those measures with respect to their application to both adults and children. This Part considers specific human rights obligations with respect to children that are engaged by these measures.

1.187 In addition, this Part considers item 6 of the bill which gives the minister a discretionary power to cancel the citizenship of a child following the cancellation of the citizenship of the child's parent in accordance with the provisions in the bill.

Automatic loss of citizenship

1.188 As set out above, the bill would amend the Citizenship Act to expand the basis on which Australian citizenship will cease. The bill includes two broad bases on which the citizenship of dual nationals will cease, automatic cessation on the basis of conduct and automatic cessation on the basis of conviction. Automatic loss of citizenship would apply to children as set out above at paragraphs [1.182] to [1.185].

Obligation to consider the best interests of the child

1.189 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.⁸⁸

1.190 This principle requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

Compatibility of the measures with the obligation to consider the best interests of the child

1.191 The statement of compatibility explains that the automatic loss of citizenship for conduct engages the obligation to consider the best interests of the child.

1.192 The statement of compatibility explains that:

The Government has considered the best interests of the child in these circumstances where conduct of a minor is serious enough to engage the cessation or renunciation provisions and has assessed that the protection

88 Article 3(1).

of the Australian community and Australia's nation security outweighs the best interest of the child.⁸⁹

1.193 However, this 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 with that objective. The Committee on the Rights of the Child has said that the CRC:

seeks to ensure that the right is guaranteed in all decisions and actions concerning children. This means that every action relating to a child or children has to take into account their best interests as a primary consideration. The word "action" does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures.⁹⁰

1.194 The Committee on the Rights of Children has further explained that:

Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.⁹¹

1.195 The procedure for automatic loss of citizenship set out in the bill does not appear to provide for a consideration of the best interests of the child, as the provision applies automatically to specified conduct. The provision does not take into account each child's capacity for reasoning and understanding in accordance with their emotional and intellectual maturity. It does not take into account the child's culpability for the conduct in accordance with normative standards of Australian law. It does not take into account whether the loss of citizenship would be in the best interests of the child given their particular circumstances.

1.196 Instead, proposed section 33A would apply to all children aged 10 years and above (or possibly to all children based on the statement in the statement of compatibility) and proposed section 35(1) would apply to all children regardless of age. In addition, as set out above in Part 1, the conduct for which automatic loss of

89 EM 33.

90 Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* [40].

91 Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* [40].

citizenship applies extends far beyond that which would appear to genuinely threaten national security, including covering property offences.

1.197 The only way that an individual child's circumstances may be taken into account is if the minister decides to exempt a child from the operation of the provisions. This power is entirely discretionary and not subject to the rules of natural justice. There is no specific obligation on the minister that requires his or her decision to take into account the best interests of the child. As a result, this provision is not a sufficient safeguard for the purposes of international human rights law.

1.198 Accordingly, the statement of compatibility has not demonstrated that the provisions have been drafted consistently with Australia's obligation to ensure that in all actions concerning a child, their best interests are a primary consideration.

1.199 The committee's assessment of the automatic cessation of citizenship powers against article 3 of the Convention on the Rights of the Child (best interests of the child) raises questions as to whether the draft provisions are compatible with Australia's obligation to consider the best interests of the child in all actions concerning children.

1.200 As set out above, the automatic cessation of citizenship engages and limits the obligation to consider the best interests of the child. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

1.201 The committee also seeks the minister's advice on these questions in relation to the rights contained in articles 7, 8 and 12 of the Convention on the Rights of the Child (right to a nationality and right of the child to be heard), as set out below.

The right to nationality

1.202 Every child has the right to acquire a nationality under article 7 of the CRC and article 24(3) of the ICCPR.⁹² Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child

92 Article 24(3) of the ICCPR.

has a nationality when born. Article 8 of the CRC provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

Compatibility of the measure with the right to nationality

1.203 The statement of compatibility acknowledges that the automatic loss of citizenship for conduct provision engages and limits the right of a child to preserve his or her nationality. The statement of compatibility states that the provisions are lawful as a matter of domestic law and that the loss of nationality:

...would in all the circumstance be reasonable, proportionate and necessary in light of the serious conduct of the child that gives rise of the cessation nor renunciation coming into effect.⁹³

1.204 Whether or not the provisions are lawful under Australian domestic law is not determinative of whether the provisions comply with Australia's obligations under international law.

1.205 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,⁹⁴ and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.⁹⁵ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

Right of the child to be heard in judicial and administrative proceedings

1.206 Article 12 of the CRC provides that state parties shall assure to a child capable of forming his or her own views the right to express those views freely in all

93 EM, 34.

94 Appendix II; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

95 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>.

matters affecting the child. The views of the child must be given due weight in accordance with the age and maturity of the child.

1.207 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Compatibility of the measures with the right of the child to be heard

1.208 The statement of compatibility acknowledges that the proposed measures engage the right of the child to be heard. The statement of compatibility focuses on the minister's power to exempt a person from the application of the automatic loss of citizenship provisions but doesn't address the automatic nature of the provisions themselves. As the provisions create an automatic loss of citizenship flowing from certain conduct there is no opportunity for a child to express their views and be heard before losing citizenship, which is inconsistent with article 12.

1.209 In relation to the ministerial exemption power, the statement of compatibility states that:

The Government considers that this limitation on the right to be heard is necessary and proportionate in the circumstances, given the serious conduct on the part of a child that has given rise to the cessation provisions in the first place. Any impact that cessation may have on the child, and the child's best interests, will be considered by the Minister as part of the public interest component relating to exemption.⁹⁶

1.210 No analysis or evidence is provided to support the statement that the limitation on the right to be heard is necessary and proportionate. As set out above at [1.205], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law. This requires a reasoned and evidence-based explanation of how the measure supports a legitimate objective, how the measure is rationally connected to that objective and how the measure is reasonable and proportionate for the achievement of that objective.

Discretionary power to remove the citizenship of a child whose parent has automatically lost their citizenship

1.211 Item 6 of the bill would amend the Citizenship Act to provide that, where a person ceases to be an Australian citizen at a particular time under sections 33, 33AA, 34, 34A, 35, or 35A and the person is a responsible parent of a child under the age of 18, the minister may revoke the child's citizenship. There are exceptions for where this would leave a child stateless or where the child has an alternative parent.

1.212 Very serious consequences flow from loss of Australian citizenship. The enjoyment of many human rights is tied to citizenship under Australian law. No separate analysis is provided of the human rights engaged and limited by this measure. This measure needs to be separately justified and all limitations on human rights need to have a legitimate objective, be rationally connected to that objective and proportionate.

Multiple Rights

1.213 The measure engages and may limit the following human rights and human rights standards:

- right to freedom of movement;⁹⁷
- right to a private life;⁹⁸
- protection of the family;⁹⁹
- right to take part in public affairs;¹⁰⁰
- right to liberty;¹⁰¹
- obligations of non-refoulement;¹⁰²
- right to equality and non-discrimination;¹⁰³
- right to a fair hearing and criminal process rights;¹⁰⁴
- prohibition against retrospective criminal laws;¹⁰⁵
- prohibition against double punishment;¹⁰⁶
- rights of children;¹⁰⁷
- right to work;¹⁰⁸

97 Article 12 of the ICCPR.

98 Article 17 of the ICCPR.

99 Articles 17 and 23 of the ICCPR and article 10 of the ICESCR.

100 Article 25 of the ICCPR.

101 Article 9 of the ICCPR.

102 Articles 6 and 7 of the ICCPR and the CAT.

103 Article 26 of the ICCPR.

104 Article 14 of the ICCPR.

105 Article 15 of the ICCPR.

106 Article 14(7) of the ICCPR.

107 CRC.

108 Articles 6, 7 and 8 of the ICESCR.

-
- right to social security;¹⁰⁹
 - right to an adequate standard of living;¹¹⁰
 - right to health;¹¹¹ and
 - right to education.¹¹²

Compatibility of the measure with the multiple rights

1.214 The measure engages and limits multiple rights in a similar manner to the other provisions in the bill which provide for the loss of citizenship, as set out in Part 1 and Part 2 above. The statement of compatibility does not provide a separate and detailed analysis of how this measure is nevertheless justified.

1.215 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law, as set out above at paragraph [1.205].

1.216 The committee's assessment of the discretionary ministerial power to revoke the citizenship of a child following a parent's automatic cessation of citizenship under the bill against Australia's obligations under the International Covenant on Civil and Political Rights raises questions as to whether the limitation on rights is justifiable.

1.217 As set out above, the discretionary ministerial power to revoke the citizenship of a child engages and limits multiple rights. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective.;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective. In particular, advice is sought as to how decisions will be made by the minister or officials to remove a child's citizenship and whether this is the least rights restrictive approach.**

109 Article 9 of the ICESCR.

110 Article 11 of the ICESCR.

111 Article 12 of the ICESCR.

112 Article 13 and 14 of the ICESCR and article 28 of the CRC.

1.218 The committee also seeks the minister's advice on these questions in relation to the specific rights contained in articles 3, 7, 8 and 12 of the Convention on the Rights of the Child (best interests of the child, the right to a nationality and the right of the child to be heard), as set out below.

Obligation to consider the best interests of the child

1.219 The obligation is discussed at paragraphs [1.189] to [1.190] above.

Compatibility of the measure with the obligation to consider the best interests of the child

1.220 The statement of compatibility acknowledges that the measure engages the obligation to consider the best interests of the child.

1.221 The statement of compatibility explains that:

Any exercise by the Minister of his discretionary power to revoke the Australian Citizenship of a child in circumstances where the Australian citizenship of the parents has ceased under the new provisions must take into consideration all relevant circumstances, including the best interests of the child.¹¹³

1.222 However, this statement appears to misapprehend the nature of the obligation to consider the best interests of the child. It is an obligation to consider the best interests of the child as a primary consideration, not just one amongst many considerations of equal weight. Moreover, the ministerial power to cancel a child's citizenship is entirely discretionary and the minister is under no statutory obligation to consider the best interests of the child.

1.223 Accordingly, the measure limits the obligation to consider the best interests of the child. The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law, as set out above at paragraph [1.205].

The right to nationality

1.224 This right is described above at paragraph [1.202].

Compatibility of the measure with the right to nationality

1.225 The statement of compatibility does not consider whether the measure engages and limits the right to a nationality, particularly, the right to preserve an existing nationality and identity as specifically provided for by article 8 of the CRC. The measure engages and limits this right as a child may lose their Australian citizenship where their nationality and identity is Australian notwithstanding that

they have dual nationality. For example, they may have spent their entire life in Australia.

1.226 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law as set out above at paragraph [1.205].

Right of the child to be heard in judicial and administrative proceedings

1.227 The right is described above at paragraph [1.206] to [1.207] above.

Compatibility of the measure with the right of the child to be heard

1.20 The statement of compatibility acknowledges that the proposed measure engages and limits the right of the child to be heard. The statement of compatibility explains:

When considering whether to revoke a child's citizenship under section 36 in light of the new cessation provisions, the Minister must accord natural justice. Natural justice may involve inviting the child or parent of the child to make representations to the Minister about excusing the person. If the child or parent makes such representations to the Minister, the Minister may, having regard to these representations and any other matters the Minister considers relevant, decide not to revoke the Australian citizenship of the child. These provisions give the child, the child's parent or the child's representative the opportunity to be heard, thereby satisfying Article 12. The government considers that this strikes the appropriate balance between giving a person a fair opportunity to address any issues raised in the information before the Minister while ensuring the effectiveness of cessation as a measure to protect the public interest.¹¹⁴

1.228 Importantly, the statement of compatibility notes that the minister *may* rather than *must* give a child the right to make representations. There is no statutory obligation requiring the minister to specifically allow for a child to be heard prior to a decision to revoke their citizenship. A discretionary, non-compellable ministerial power is an insufficient safeguard to ensure that a limitation on a right is justified.

1.229 In addition, the statement of compatibility outlines a process of seeking to balance the right of the child with the effectiveness of the measure. This misapprehends the nature of Australia's obligations under the CRC. In order for any measure that limits the right of a child to be heard to be compatible with international law, it must pursue a legitimate objective, be rationally connected to that legitimate objective and impose a proportionate limitation.

114 EM 34-35.

1.230 The statement of compatibility needs to provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law as set out above at paragraph [1.205].

Fairer Paid Parental Leave Bill 2015

Portfolio: Social Services

Introduced: House of Representatives, 25 June 2015

Purpose

1.231 The Fairer Paid Parental Leave Bill 2015 (the bill) seeks to amend the *Paid Parental Leave Act 2010* (PPL Act) to:

- provide that from 1 July 2016 primary carers of newborn children will no longer receive both employer-provided primary carer leave payments (such as maternity leave pay) and the full amount of parental leave pay under the government-provided paid parental leave (PPL) scheme; and
- remove the requirement for employers to provide paid parental leave to eligible employees, unless an employer chooses to manage the payment to employees and the employees agree for the employer to pay them.

1.232 Measures raising human rights concerns or issues are set out below.

Background

1.233 The bill reintroduces a measure previously introduced in the Paid Parental Leave Amendment Bill 2014 (PPLA bill), which would remove the requirement for employers to provide paid parental leave to eligible employees. The PPLA bill was introduced into the House of Representatives on 19 March 2014 and is currently before the Senate. The committee considered the PPLA bill in its *Fifth Report of the 44th Parliament*¹ and requested further information from the Minister for Small Business as to the compatibility of the measures with the right to social security, rights at work and the right to equality and non-discrimination. The committee then considered the minister's response in its *Eighth Report of the 44th Parliament*.²

Schedule 1 – Adjustment to primary carer pay

1.234 Schedule 1 to the bill would amend the PPL Act to provide that from 1 July 2016 primary carers of newborn children will no longer receive both employer-provided primary carer leave payments (such as maternity leave pay) and the full amount of parental leave pay under the government-provided PPL scheme.

1.235 Primary carers who are entitled to receive employer-provided parental leave payments will not be eligible to receive payments under the government's PPL scheme, unless their employer-provided payments are valued at less than the total amount of payments under the government's PPL scheme.

1 Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament* (25 March 2014) 13-16.

2 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 54-57.

1.236 The committee considers the reductions in PPL payments for primary carers who receive employer-funded primary carer leave payments engage and may limit the right to social security, rights at work and the right to equality and non-discrimination.

Right to social security

1.237 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

1.238 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

1.239 Under article 2(1) of the ICESCR, Australia has certain obligations in relation to the right to social security. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.240 Specific situations which are recognised as engaging a person's right to social security, include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

Compatibility of the measure with the right to social security

1.241 Under the PPL Act, the initial primary carers of children currently have access to up to 18 weeks of parental leave pay at the national minimum wage in order to stay home from work and look after their baby. Some primary carers are also able to receive additional employer-funded payments where offered by their employer under registered agreements, employment contracts and workplace policies.

Individuals who receive employer-funded payments currently do not lose their entitlement to PPL payments.

1.242 The amendments in Schedule 1 to the bill would revise these provisions so that primary carers can receive only one form of parental leave pay (either government or employer-funded). As primary carers who receive employer-funded parental leave pay will have their government-funded entitlements reduced or removed under the bill, the amendments therefore engage and may limit the right to social security.

1.243 As noted above at [1.239], Australia has obligations not to unjustifiably take any backwards steps (retrogressive measures) that might affect the rights to social security.

1.244 The statement of compatibility explains that the right to social security is engaged by the measure. There is no explicit acknowledgement that the right is limited as a result of the reduced payments for some new parents.

1.245 The statement of compatibility identifies the purpose of the amendments as ensuring that the PPL scheme:

continues to support mothers who would not otherwise have access to generous paid maternity leave provisions, while enabling Government resources to be refocused on other complementary measures to support working parents, including increased childcare support.³

1.246 The committee has consistently recognised that under international human rights law budgetary constraints are capable of providing a legitimate objective for the purpose of justifying reductions in government support that impact on economic, social and cultural rights.⁴ However, in order to be accepted as a legitimate objective, reasoning and evidence is needed to support the stated objective. In particular, more information is required to explain why it is necessary to reduce the current level of social security available (for example, a brief explanation of the fiscal difficulties facing the government) and where it is intended that the savings will be directed to.

1.247 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,⁵ and the Attorney-General's Department's guidance on the

3 Explanatory memorandum (EM), Statement of Compatibility (SoC) 1.

4 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 172.

5 Appendix II; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.⁶ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.248 The committee's assessment of the reduction to paid parental leave against article 9 of the International Covenant on Economic, Social and Cultural Rights (right to social security) raises questions as to whether the amendments are justifiable.

1.249 As set out above, the reduction of access to paid parental leave engages and limits the right to social security. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Right to work and the right to maternity leave

1.250 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the ICESCR.⁷

1.251 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work,

6 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>.

7 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

1.252 The right to work may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

1.253 The right to maternity leave is protected by article 10(2) of the ICESCR and article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Further provisions are contained within articles 3 and 9 of the ICESCR and articles 4(2) and 5(b) of the CEDAW.

1.254 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to maternity leave include the obligation to guarantee 'adequate maternity leave for women, paternity leave for men, and parental leave for both men and women'.⁸

1.255 In addition, the CEDAW requires state parties to implement measures to eliminate discrimination against women in the field of employment. Particular obligations include:

To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.⁹

1.256 Accordingly, the CEDAW recognises that adequate provisions for maternity leave are a critical component of the right to work.

Compatibility of the measure with the right to work

1.257 The bill reduces the amount of maternity leave pay that many primary carers are currently entitled to under law.

1.258 The statement of compatibility for the bill states that Schedule 1 is likely to engage rights at work, including the right to maternity leave as protected by article 11(2)(b) of the CEDAW and article 10(2) of the ICESCR. However, the statement of compatibility does not address the limitation of this right, or provide any justification for the limitation. Instead, it states that 'eligible mothers may use their entitlements to other types of leave, such as annual leave or long service leave, before, after or at the same time as Parental Leave Pay'.¹⁰ The availability of other leave or payments is not directly relevant to the question as to whether the reduction in primary carer pay for some new parents is justified under international human rights law.

8 UN Committee on Economic, Social and Cultural Rights, *General Comment 16*, The equal right of men and women to the enjoyment of all economic, social and cultural rights (2005).

9 Article 11(2)(b) of the CEDAW.

10 EM, SoC 3.

1.259 As noted above at [1.247], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. Additionally, it must be shown that a limitation is rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law. The statement of compatibility does not explain whether the measure is proportionate, in particular given the extent of the interference with the obligation on the state to provide for paid maternity leave for a reasonable period of time.

1.260 The committee's assessment of the reduction of access to paid parental leave against article 11 of the Convention on the Elimination of All Forms of Discrimination against Women and article 10(2) of the International Covenant on Economic, Social and Cultural Rights (rights at work and the right to maternity leave) raises questions as to whether the reduction of maternity leave entitlements is justifiable.

1.261 As set out above, the reduction of access to paid parental leave engages and limits rights at work and the right to maternity leave. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Right to equality and non-discrimination

1.262 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

1.263 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.264 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),¹¹ which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.¹² The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.¹³

1.265 Articles 2, 3, 4 and 15 of the CEDAW further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the rights to equality for women.

Compatibility of the measure with the right to equality and non-discrimination

1.266 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. As women are the primary recipients of the paid parental leave scheme, reductions to this scheme under the bill will disproportionately impact upon this group.

1.267 The statement of compatibility states that the measures may engage the right to equality and non-discrimination, and are likely to promote the right for some groups of working parents.¹⁴ The statement of compatibility does not, however, address the limitation of this right in terms of its potential to indirectly discriminate against women, or provide any justification for the limitation.

1.268 If a provision has a disproportionate negative effect or is indirectly discriminatory it may nevertheless be justified if the measure pursues a legitimate objective, the measure is rationally connected to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective.

1.269 The committee's assessment of the adjustment to primary carer pay against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) raises questions as to whether the disproportionate impact upon women is justifiable.

1.270 As set out above, the adjustment to primary carer pay engages and limits the right to equality and non-discrimination (indirect discrimination). The statement of compatibility does not sufficiently justify that limitation for the

11 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

12 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989).

13 *Althammer v Austria* HRC 998/01, [10.2].

14 EM, SoC 5.

purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Schedule 2 – Employer opt-in

1.271 Schedule 2 to the bill would amend the PPL Act to remove the requirement for employers to provide and manage government-funded parental leave pay to eligible employees. These employees would instead be paid directly by the Department of Human Services, unless an employer 'opts in' to provide parental leave pay to its employees and is agreed upon by the relevant employee. This amendment would commence from 1 April 2016.

1.272 The committee considers that the employer 'opt in' engages and limits the rights to social security, the right to just and favourable conditions of work and the right to equality and non-discrimination.

Right to social security

1.273 The right to social security is protected by article 9 of the ICESCR. Australia is required to satisfy certain minimum aspects of this right; see [1.237] to [1.240] above.

Right to an adequate standard of living

1.274 The right to an adequate standard is guaranteed by article 11(1) of the ICESCR, and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.275 In respect of the right to an adequate standard of living, article 2(1) of the ICESCR also imposes on Australia the obligations listed above in relation to the right to social security.

Right to work

1.276 The right to work is protected by articles 6(1), 7 and 8(1)(a) of the ICESCR, and article 11 of the CEDAW; see [1.250] to [1.256] above.

Right to equality and non-discrimination

1.277 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the ICCPR, and articles 2, 3, 4 and 15 of the CEDAW; see [1.262] to [1.265] above.

Compatibility of the measure with the right to social security and an adequate standard of living, the right to work and the right to equality and non-discrimination

1.278 The statement of compatibility for the bill states that no human rights are engaged by the amendments as they are limited to changes in administrative arrangements in the ongoing implementation of the PPL scheme.¹⁵

1.279 However, the regulation impact statement for the bill states that:

...there may be an impact on the after tax-income of employees with salary sacrifice arrangements in place. Where their employer is administering PLP payments, salary sacrificing arrangements are able to continue and so the employee's tax liability would continue to be calculated on a lower salary. However, as DHS does not offer salary sacrifice deduction functionality, an employee's tax liability could increase if the mandatory employer role is removed and their employer does not opt back in to be the PPL paymaster... While this impact is not a compliance cost, it may have an impact on the after-tax income a person may receive, dependent on an employee's income and the level of salary sacrificed under the arrangement.¹⁶

1.280 The committee has previously considered these measures as part of its consideration of the PPLA Bill 2014. In its previous analysis, the committee requested further information from the Minister for Small Business as to the compatibility of the measures with the right to social security, right to an adequate standard of living, right to just and favourable conditions at work, and right to equality and non-discrimination. The committee concluded its consideration of these matters as being compatible with Australia's international human rights obligations on the basis of the further information provided by the minister.¹⁷ None of this further information has been included in the statement of compatibility for this bill.

1.281 The committee's usual expectation is that where additional information has been provided to establish that a measure is compatible with human rights, this information should be included in future statements of compatibility for measures of a similar type.

15 EM, SoC 6.

16 EM, Regulation impact statement 4.

17 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 54-57.

Migration Amendment (Regional Processing Arrangements) Bill 2015

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 24 June 2015

Purpose

1.282 The Migration Amendment (Regional Processing Arrangements) Bill 2015 (the bill) seeks to amend the *Migration Act 1958* to empower the Commonwealth to:

- take, or cause to be taken, any action relating to an arrangement in place with a regional processing country and to take action in relation to regional processing functions;
- make, or cause to be made, payments relating to the arrangement or regional processing functions of a regional processing country; and
- do anything else incidental or conducive to the taking of such action or the making of such payments.

1.283 The bill provides that the amendments made by the bill commence retrospectively, namely on 18 August 2012.

1.284 Measures raising human rights concerns or issues are set out below.

Background

1.285 The bill was introduced into the House of Representatives on 24 June 2015 and passed the same day. It was introduced the following day into the Senate and passed the Senate that day, finally passing both Houses on 25 June 2015 and achieving Royal Assent on 30 June 2015.

Power to take action in a regional processing country

1.286 The bill empowers the Commonwealth to take broad unfettered action in a regional processing country if that action relates to the 'arrangement' or the 'regional processing functions' of a regional processing country.

1.287 Action is defined as including exercising restraint over the liberty of a person and taking action in a regional processing country or another country – 'action' in these countries is undefined.

1.288 An 'arrangement' is defined as any arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding. A 'regional processing function' includes the implementation of any law or policy or the taking of any action by the regional processing country—thereby empowering the Commonwealth to do anything the regional processing country could do in connection with their role as a processing country.

1.289 The committee considers the bill engages and limits multiple human rights, as set out below.

Multiple human rights

1.290 The committee, in its *Ninth Report of 2013* (previous report), examined the human rights implications of the Migration Regional Processing package of legislation. This legislation re-established offshore processing for asylum seekers who arrived by boat in Australia on or after 13 August 2012.¹

1.291 In the previous report the committee considered that the regional processing regime engaged and limited a number of rights, including:

- the prohibition against arbitrary detention;²
- the right to humane treatment in detention;³
- the right to health;⁴
- the rights of the child;⁵ and
- the prohibition against degrading treatment.⁶

1.292 In its previous report the committee considered the nature and territorial scope of Australia's human rights obligations.⁷ It noted that it is well accepted in international law that the human rights obligations of a state extend to persons who are outside the territory of the state but 'under the effective control' of the authorities of the state.

1.293 After considering the evidence of Australia's involvement in the regional processing of asylum seekers in Nauru or on Manus Island, the committee noted that Australia's involvement in the arrangements relating to the detention, upkeep and provision of services to those transferred to Nauru and Manus Island was significant. The committee concluded that 'the evidence demonstrates that Australia could be viewed as exercising 'effective control' of the arrangements relating to the treatment of persons transferred to Manus Island or Nauru.'⁸

Compatibility of the measures with multiple human rights

1.294 The statement of compatibility for the bill states that the bill does not engage any human rights 'because the Government's position is that the Regional

1 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013* (June 2013).

2 Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

3 Article 10 of the ICCPR.

4 Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

5 Convention on the Rights of the Child.

6 Article 7 of the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

7 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013* (June 2013) 30-43.

8 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013* (June 2013) 43.

Processing Centres are managed and administered by the governments of the countries in which they are located, under the law of those countries.⁹ The statement of compatibility goes on to state that while the government recognises that there may be circumstances in which the rights set out in human rights instruments apply extraterritorially, 'Australia does not exercise the degree of control necessary in regional processing centres to enliven Australia's international obligations'.¹⁰

1.295 As set out above at paragraphs [1.292] to [1.293], the committee has previously concluded that on all available evidence, Australia could be viewed as exercising 'effective control' of the arrangements relating to the treatment of persons transferred to Manus Island or Nauru. The committee notes that the bill reinforces this finding as it empowers the Commonwealth to take any action, including restraining a person, in relation to regional processing functions. As described above at paragraphs [1.286] to [1.288], this gives extremely broad powers to the Commonwealth in relation to the processing of asylum seekers in external countries. Read in conjunction with the findings of the committee in its previous report, the bill confirms the committee's previous conclusion that Australia, in exercising effective control, owes human rights obligations to those asylum seekers in Nauru and Manus Island.

1.296 As the bill empowers the Commonwealth to take broad action in regional processing countries, the bill, as with the previous package of legislation relating to regional processing, engages and limits multiple rights. The committee reiterates the concerns set out in its previous report¹¹ in relation to the regional processing regime, which applies equally to this bill, namely:

- **that the regional processing regime as currently implemented carries a significant risk of being incompatible with a range of human rights. To the extent that some of those rights may be limited, the committee considers that the reasonableness and proportionality of those limitations have not been clearly demonstrated. Of particular concern is:**
 - **the absence of legally-binding requirements relating to minimum conditions in regional processing facilities. While detention necessarily involves constraints on the full enjoyment of rights by detainees, the government has not demonstrated that the conditions on Nauru or Manus Island are consistent with the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights**

9 Explanatory Memorandum (EM), Attachment A, 9.

10 EM, Attachment A, 10.

11 See Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013* (June 2013) particularly 81-84.

(ICESCR), the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment; and

- the cumulative effect of the arrangements, which is likely to have a significant impact on the physical and mental health of asylum seekers, contrary to the right to health in article 12 of the ICESCR and the prohibition against degrading treatment in article 7 of the ICCPR.

1.297 Noting that the bill has already passed both Houses of Parliament, the committee has concluded its examination of the bill.

Social Services Legislation Amendment (Defined Benefit Income Streams) Bill 2015

Portfolio: Social Services

Introduced: House of Representatives, 23 June 2015

Purpose

1.298 The Social Services Legislation Amendment (Defined Benefit Income Streams) Bill 2015 (the bill) seeks to amend the *Social Security Act 1991* to provide that the deductible amount for defined benefit income streams, excluding military defined benefits schemes, is capped at a maximum 10 per cent of the gross payments to an individual for the income year.

1.299 Measures raising human rights concerns or issues are set out below.

Alterations to the income test for defined benefit income streams

1.300 Under the bill, individuals who receive defined benefit income from their superannuation fund will have a greater proportion of that income included in the income test for the pension. As a result, a number of individuals who receive defined benefit income from their superannuation fund will either have their pension amount reduced or removed all together.

1.301 Accordingly, the bill engages and limits the right to social security.

Right to social security

1.302 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

1.303 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care; and
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

1.304 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to social security. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;

- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.305 Specific situations which are recognised as engaging a person's right to social security, include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

Compatibility of the measure with the right to social security

1.306 The statement of compatibility states that the right to social security is engaged. However it also states that:

The Bill has no effect on the right to social security.¹

1.307 The statement of compatibility also explains that:

[The bill] gives a fairer assessment of an individual's personal contributions to a defined benefit income streams.²

1.308 The bill will reduce the pension entitlement of certain individuals and accordingly limits the right to social security. As the statement of compatibility claims the measure doesn't limit the right to social security, the statement does not provide any information as to the legitimate objective of the measures, how the measures are rationally connected to that objective and how the measures are otherwise proportionate.

1.309 The bill will produce savings of \$465.5 million over four years. However, no information is provided in the explanatory memorandum (EM) or statement of compatibility as to how many individuals will be affected by the measure or any information as to the likely impact on those individuals, including their capacity to meet their cost of living following the implementation of the bill. Accordingly, it is not possible to assess the compatibility of the measure with the right to social security.

1.310 The statement of compatibility could have advanced an argument that, while the bill does limit the right to social security, the proposed measures are nevertheless justified as they are reasonable, necessary and proportionate to achieve a legitimate aim.

1.311 The committee notes that budgetary constraints have been recognised as being capable of providing a legitimate objective for the purpose of justifying

1 EM, SoC 1.

2 EM, SoC 1.

reductions in government support that impact on economic, social and cultural rights.

1.312 Further, in justifying the proposed measures as proportionate to a legitimate aim, the statement of compatibility could have advanced an argument about the capacity of individuals receiving a defined benefit income from their superannuation fund to meet their costs of living notwithstanding their reduced entitlement to social security.

1.313 The bill will reduce the aged pension entitlement of certain individuals and accordingly limits the right to social security. The statement of compatibility for the bill states that the bill engages but does not limit the right to social security. As a result, the statement of compatibility does not justify the limitation on the right to social security. Noting that the bill has already passed both Houses of Parliament, the committee has concluded its examination of the bill.

Social Security (Administration) (Income Management—Crediting of Accounts) Rules 2015 [F2015L00781]

Portfolio: Social Services

Authorising legislation: Social Security (Administration) Act 1999

Last day to disallow: 20 August 2015

Purpose

1.314 The Social Security (Administration) (Income Management—Crediting of Accounts) Rules 2015 (the rules) set out the particular circumstances in which the income management record and a person's income management account can be credited with an amount that is ascertained in accordance with the rules. These circumstances all relate to debits that are made from a person's record and account for the purpose of giving a BasicsCard to a person or increasing the monetary value stored on a BasicsCard.

1.315 Measures raising human rights concerns or issues are set out below.

Background

1.316 The committee has previously conducted an inquiry into the Stronger Futures in the Northern Territory Bill and related legislation,¹ including in relation to income management, and is currently undertaking a new examination into the legislation.

Income management

1.317 The income management regime engages multiple human rights, in particular the right to a private life, the right to equality and non-discrimination, the right to social security and the right to an adequate standard of living.²

1.318 The rules particularly engage the right to privacy, in that it sets out the specific circumstances in which a person can access their social security benefits. For example, a person must apply to the Secretary of the Department of Human Services if they wish to reduce the amount of money stored on their BasicsCard and have the money provided to them directly in order to address a priority need. The affected person needs to make an application to the Secretary and explain the priority need for which they require direct access to their social security benefits, thereby engaging and limiting the person's right to a private life.

1.319 The statement of compatibility does not consider the right to privacy and so provides no justification as to whether the rules are compatible with this right.

1 Parliamentary Joint Committee on Human Rights, *Stronger Futures in the Northern Territory Act 2012 and related legislation, Eleventh Report of 2013* (June 2013).

2 See articles 17 and 26 of the International Covenant on Civil and Political Rights and articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights.

1.320 The committee is currently undertaking a broader inquiry: *Review of Stronger Futures in the Northern Territory Act 2012 and related legislation* and intends to report on this in late 2015. The committee will defer its consideration of this instrument as part of its broader inquiry.

Federal Courts Legislation Amendment (Fees) Regulation 2015 [F2015L00780]

Portfolio: Attorney-General

Authorising legislation: Federal Court of Australia Act 1977; Family Law Act 1975; and Federal Circuit Court of Australia Act 1999

Last day to disallow: 20 August 2015

Purpose

1.321 The Federal Courts Legislation Amendment (Fees) Regulation 2015 (the regulation) makes amendments to the Federal Court and Federal Circuit Court Regulation 2012 to:

- exclude 'public authorities' (such as government agencies) from having to pay fees applicable to a 'corporation' when filing all matters in the Federal Court of Australia and the Federal Circuit Court of Australia (the federal courts), other than bankruptcy matters;
- remove the 'publicly listed company' fee category, and instead provide that such companies pay the lower fees applicable to a 'corporation' when filing all matters in the federal courts, other than bankruptcy matters;
- increase all fee categories (as amended above) by 10 per cent for the federal courts, except for those fees not subject to a biennial fee increase; and
- exempt certain procedural international arbitration matters from the general filing fee.

1.322 Schedule 2 of the regulation also sought to amend the Family Law (Fees) Regulation 2012 to:

- increase the fee for certain divorce applications, consent orders and issuing subpoenas by a prescribed amount;
- increase all other existing family law fee categories (by an average of 10 per cent) except for the reduced divorce fee in the Federal Circuit Court and divorce fees in the Family Court of Australia, and
- establish a new fee category for the filing of amended application.

1.323 Measures raising human rights concerns or issues are set out below.

Background

1.324 On 25 June 2015, the Senate disallowed Schedule 2 of the regulation. Accordingly, this analysis deals only with Schedule 1 of the regulation which continues in force.¹

Increased fees for federal court proceedings

1.325 Schedule 1 of the regulation increased the costs in all fee categories by 10 per cent for all proceedings in the federal courts. This includes the costs of commencing an application or appeal and the costs for the hearing of the application or appeal.

1.326 The committee considers that this engages and may limit the right to a fair hearing (access to justice).

Right to a fair hearing

1.327 The right to a fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Circumstances which engage the right to a fair trial and fair hearing may also engage other rights in relation to legal proceedings contained in Article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings.

1.328 The right also includes the right to have equal access to the courts, regardless of citizenship or other status. This requires that no one is to be barred from accessing courts or tribunals (although there are limited exceptions if these are based on objective and reasonable grounds, for example vexatious litigants). To be real and effective this may require access to legal aid and the regulation of fees or costs that could indiscriminately prevent access to justice.

Compatibility of the measure with the right to a fair hearing

1.329 The statement of compatibility states that the regulation does not engage any of the applicable rights or freedoms and does not raise any human rights issues.

1.330 However, the right to a fair hearing includes a right to access to justice. A substantial increase in the cost of making an application to the federal courts, and in conducting a case before the courts, engages the right to a fair hearing, as this right includes a right to access to justice. The UN Human Rights Committee has said that

1 Note that on 9 July 2015 a new instrument was made which increased the fees relating to divorce, consent orders and subpoenas and all other existing family law fee categories to an amount similar to that contained in the regulation; see Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 [F2015L01138].

the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under the right to a fair hearing.²

1.331 Whether the right is limited will depend on whether the increase in fees to access the federal courts would indiscriminately prevent access to justice. No information is provided in the statement of compatibility as to whether there is any ability for an applicant to seek to have the fees waived if the fees would effectively prevent them from accessing the federal courts.

1.332 The committee's assessment of the 10 per cent increase for all federal court fees against article 14 of the International Covenant on Civil and Political Rights (right to a fair hearing) raises questions as to whether the increase in court fees is a limitation on the right to access to justice.

1.333 As set out above, the increase in fees engages and may limit the right to a fair hearing. The statement of compatibility does not explore whether the measure limits the right to a fair hearing and does not justify any limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Attorney-General as to whether the measure is likely to limit the right to a fair hearing, and if so:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between any limitation and that objective; and**
- **whether any limitation is a reasonable and proportionate measure for the achievement of that objective.**

2 See UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007). See also *Lindon v Australia*, Communication No. 646/1995 (25 November 1998), para. 6.4.

