



Law Council
OF AUSTRALIA

Office of the President

16 January 2019

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
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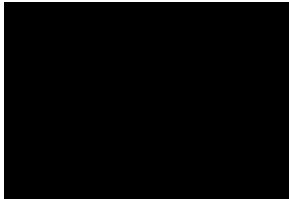
Dear Chair

**Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions)
Bill 2018**

Thank you for the opportunity to contribute to the Parliamentary Joint Committee on Intelligence and Security's inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018. Please find attached the Law Council's submission to the inquiry.

Please contact Dr Natasha Molt, Director of Policy on [REDACTED] or at [REDACTED] in the first instance, if you require further information or clarification.

Yours sincerely



Arthur Moses SC
President



Law Council
OF AUSTRALIA

Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

Parliamentary Joint Committee on Intelligence and Security

16 January 2019

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

In the preparation of this submission, the Law Council is grateful for the assistance of:

- the Law Society of New South Wales;
- the Law Society of South Australia;
- its National Criminal Law Committee;
- its National Human Rights Committee;
- its Constitutional Law Committee, of the Federal Litigation and Dispute Resolution Section;
- its Administrative Law Committee, of the Federal Litigation and Dispute Resolution; and
- its Migration Law Committee, of the Federal Litigation and Dispute Resolution.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (**the Bill**).
2. The Bill seeks to amend the *Australian Citizenship Act 2007* (Cth) (**the Act**) to:
 - remove the requirement that a person be sentenced to 6 or more years of imprisonment for a relevant terrorism offence to be eligible to lose their Australian citizenship; and
 - replace the current requirement that a person is a national or citizen of a country other than Australia at the time the minister makes a determination that the person ceases to be an Australian citizen with the requirement that, if the minister were to determine that the person ceases to be an Australian citizen, the minister is satisfied the person will not become a person who is not a national or citizen of any country.
3. The Law Council understands the necessity of laws which are enacted to maintain the security of Australia and the safety of Australian citizens. However, it is important that such laws are proportionate and be demonstrated by evidence to meet that objective. Measures to remove citizenship challenge key legal principles on which our democracy was founded, and therefore demand very careful consideration by the Commonwealth Parliament.
4. The Law Council notes that the current thresholds to strip dual citizens of their Australian citizenship was the subject of extensive inquiry by the Committee in 2015 in relation to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (**the 2015 Bill**). The Committee at that time recommended that the 2015 Bill be amended to give the Minister discretion to revoke a person's citizenship following conviction for a relevant offence with a sentence applied of at least six years imprisonment, or multiple sentences totaling at least six years' imprisonment.
5. Since the initial laws were passed in 2015, the national threat level has not changed. The conviction-based citizenship loss powers also appear to have not been, or to have rarely been, used. This makes it difficult to assess the extent to which the powers may be regarded as effective while ensuring consistency in their practical operation with the rule of law and Australia's international law obligations. It is therefore unclear why the proposed measures are needed and why the bipartisan recommendation of the Committee no longer represents what is a necessary and proportionate response to the terrorism threat.
6. Further, the proposed changes for conviction-based citizenship loss, appear to inappropriately expand administrative power creating a real risk that a person will be rendered stateless. A person may have their citizenship removed while possessing no other citizenship. This potential outcome which would be permitted under the proposed laws appears to be inconsistent with Australia's international law obligations. For these reasons, the Law Council considers that the Bill should not be passed in its current form.
7. Should the Bill proceed, the Law Council makes the following recommendations aimed towards its improvement:

- The requirement that a person be sentenced to six or more years of imprisonment for a relevant terrorism offence to be eligible to lose their Australian citizenship should be maintained;
- Associating with a terrorist organisation should not be considered a relevant terrorism conviction for the purposes of the legislation;
- The reasonable steps that the Minister should make should be set out in the legislation, including a requirement for verification of citizenship, or immediate eligibility for citizenship, of another country. The Minister should be required to be satisfied through such verification that the person will not be rendered stateless by a determination that the person has lost Australian citizenship;
- The measures in the Bill should *not* apply retrospectively to conduct or convictions that occurred prior to commencement of the Bill when enacted;
- A decision of the Minister to deprive a person of their Australian citizenship should afford procedural fairness and should be subject to judicial and merits review; and
- The Committee should seek the assurance from the Australian Government regarding the constitutional validity of the Bill.

Current provisions

8. The *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) introduced three new ways in which a person, who is a national or citizen of a country other than Australia, can cease to be an Australian citizen:

- the person, aged 14 years or older, renounces Australian citizenship if the person acts inconsistently with allegiance to Australia by engaging in specified terrorist-related conduct, where the conduct was engaged in outside Australia or the person left Australia before being charged and brought to trial for the conduct (automatic citizenship loss);¹
- the person, aged 14 years or older, ceases to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation (automatic citizenship loss);²
- the Minister may determine in writing that a person ceases to be an Australian citizen because the person has been convicted of a specified terrorist-related offence with at least six years of imprisonment (or to periods of imprisonment that total at least six years) (conviction-based citizenship loss).³

9. The intent of the legislation was to:

*...deal with the threat caused by those who have acted in a manner contrary to their allegiance to Australia by removing them from formal membership of the Australian community. Cessation of citizenship is a very serious outcome of very serious conduct that demonstrates a person has repudiated their allegiance to Australia.*⁴

10. Currently, a person may only have Australian citizenship removed under these provisions if the person is a dual citizen. This applies to both the automatic and the conviction-based citizenship loss provisions. This ensures that a person is not rendered stateless where a person has citizenship removed by the operation of the current provisions.

11. Nonetheless, recent practical experience of the operation of these laws raises serious questions about whether they are effective in protecting a person from statelessness.⁵ Recently, in the case of Neil Prakash, despite the current legislation having a higher threshold than the proposed legislation, much media attention has been placed on

¹ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) s 33AA.

² *Ibid* s 35.

³ *Ibid* s 35A.

⁴ Explanatory Memorandum, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*, 14 [59].

⁵ The Law Council of Australia, 'Law Council of Australia's Statement regarding Neil Prakash's Citizenship Status' (Media Release, 4 January 2019) <<https://www.lawcouncil.asn.au/media/media-releases/law-council-of-australias-statement-regarding-neil-prakashs-citizenship-status>>; Helen Davidson, 'Dutton insists Neil Prakash is Fijian citizen, but Fiji PM says he 'cannot come here'', *The Guardian* (online), 3 January 2018 <<https://www.theguardian.com/australia-news/2019/jan/03/dutton-insists-neil-prakash-is-fijian-citizen-but-fiji-pm-says-he-cannot-come-here>>; David Wroe, 'Fijian PM says terrorist Neil Prakash cannot go to Fiji, amid deepening citizenship row' *The Canberra Times* (online), 3 January 2018 <<https://www.canberratimes.com.au/politics/federal/fijian-pm-says-terrorist-neil-prakash-cannot-go-to-fiji-amid-deepening-row-20190103-p50pcz.html>>.

whether or not, he is a Fijian Citizen, as Fiji have stated there is no evidence of his Fijian Citizenship.⁶

Amendments

12. The Bill seeks to make the revocation of Australian citizenship easier by amending the conviction-based citizenship loss provisions in the Act to:
 - remove the requirement that a person be sentenced to 6 or more years of imprisonment for a relevant terrorism offence to be eligible to lose Australian citizenship; and
 - replace the current requirement that a person is a national or citizen of a country other than Australia at the time the Minister makes a determination that the person ceases to be an Australian citizen with the requirement that, if the Minister determines that the person ceases to be an Australian citizen, the Minister is satisfied the person will not become a person who is not a national or citizen of any country.
13. The automatic citizenship loss provisions in the Act that relate to terrorism are not proposed to be amended by the Bill.

Minimum sentencing requirement of six years imprisonment

14. Currently, paragraph 35A(1)(c) (conviction-based loss) requires that the Minister may determine in writing that a person ceases to be an Australian citizen if, for example: that person has been convicted of certain offences; the person has, in respect of the conviction or convictions, been sentenced to a period of imprisonment of at least 6 years, or to periods of imprisonment that total at least six years; and (c) the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination.
15. Proposed new subsections 35A(1A) and (1B) would separate the offences listed in current subsection 35A(1) into 'relevant terrorism convictions' and 'relevant other convictions' (such as espionage, sabotage, foreign interference), respectively.
16. Proposed section 35A(1A) would expand the current list of terrorism convictions to include a conviction for an offence under section 102.8 of Part 5.3 of *the Criminal Code Act 1995* (Cth) (**Criminal Code**) (associating with a terrorist organisation). This offence carries a maximum penalty of 3 years' imprisonment.
17. The effect of separating 'relevant terrorism convictions' from 'relevant other convictions' is that the current requirement for a person having, in respect of the conviction or convictions, been sentenced to a period of imprisonment of at least 6 years, or to periods of imprisonment that total at least six years – only applies to the non-terrorism-based offences. That is, terrorism offences no longer carry a sentencing limit.
18. The Explanatory Memorandum to the Bill explains the rationale for the proposed inclusion of the section 102.8 offence under proposed subsection 35A(1A) as follows:

⁶ Matthew Doran et al, Fiji casts fresh doubt on decision to strip terrorist Neil Prakash of Australian citizenship, ABC News (online), 8 January 2018 < <https://www.abc.net.au/news/2019-01-08/neil-prakash-definitely-not-fijian-argue-officials/10698462>>.

... knowingly associating with a terrorist organisation, on multiple occasions, for the purposes of supporting the terrorist organisation to expand or continue to exist, is a serious offence. It is appropriate that persons convicted of this offence be eligible for cessation of citizenship on conviction, as the offence addresses the fundamental unacceptability of the terrorist organisation itself, by making meeting or communicating ('associating') with its members in a manner which assists its continued existence or expansion, illegal.⁷

19. To remain consistent with the intended purpose of the Bill, it is important that the type of offence required to trigger loss of citizenship is such that it demonstrates a repudiation of allegiance to Australia *and* that it is of a considerable level of seriousness.
20. Removing the six year sentencing limit would not appear to meet this standard and would allow citizenship on account of low level offending. In some jurisdictions, such as New South Wales, offences carrying, for example a 3 years' imprisonment penalty, are not considered to be serious indictable offences. Offences carrying three years maximum penalty are dealt with to finality in the Local Court. Hence, it appears disproportionate that a person could lose citizenship for an offence that carries an imprisonment term that for those offences with equivalent maximum penalties would not be considered a serious indictable offence in an Australian jurisdiction.
21. The Senate Standing Committee for the Scrutiny of Bills (**Committee for the Scrutiny of Bills**) noted that:

... the proposed amendments would allow the minister the discretion to remove the citizenship of a person who has been convicted of a 'relevant terrorism offence' but who may have received a very short sentence or no sentence at all. For example, a person may be convicted of providing funds to an overseas organisation and was found to be reckless as to whether the organisation was a terrorist organisation. In those circumstances, while the person may not be given a custodial sentence, the conviction would empower the minister to determine that the person ceases to be a citizen—leading to their possible detention and removal from Australia.

...

Removing the length of the sentence imposed on a person gives greater discretion to the minister to remove citizenship, and the committee considers these amendments may inappropriately expand administrative power and may unduly trespass on personal rights and liberties.⁸

22. The Law Council agrees. Conduct and offences captured by laws that lead to citizenship loss should be of a sufficient level of seriousness to trigger citizenship cessation.
23. The Committee producing a bipartisan report previously recognised the need for establishing a level of seriousness for a relevant terrorism conviction in Recommendation 7 of its Advisory Report on the 2015 Bill, which stated that:

⁷ Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, [13].

⁸ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 15 of 2018* (2018) 3 [1.8].

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

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

- *the person's conviction demonstrates that they have repudiated their allegiance to Australia, and*
- *it is not in the public interest for the person to remain an Australian citizen, taking into account the following factors:*
 - *the seriousness of the conduct that was the basis of the conviction and the severity of the sentence/s,*
 - *the degree of threat to the Australian community, ...*⁹

24. The Committee also noted that:

While limiting the provision to more serious offences is an appropriate measure to better define the scope of conduct leading to revocation, the Committee notes that even following a conviction there will still be degrees of seriousness of conduct and degrees to which conduct demonstrates a repudiation of allegiance to Australia. Therefore, the Committee recommends that loss of citizenship under this provision not be triggered unless the person has been given sentences of imprisonment that together total a minimum of six years for offences listed in the Bill.

*Some members of the Committee were of the view that a lower or higher threshold was preferable; however, on balance it was considered that a six year minimum sentence would clearly limit the application of proposed section 35A to more serious conduct. It was noted that three years is the minimum sentence for which a person is no longer entitled to vote in Australian elections. Loss of citizenship should be attached to more serious conduct and a greater severity of sentence, and it was considered that a six year sentence would appropriately reflect this.*¹⁰

25. Given the above, it is unclear why removing the threshold of a six year sentencing penalty is now considered to be justified, particularly as it has only recently been reviewed in 2015. The only justification provide in the Explanatory Memorandum is that due to the 'evolving terrorist threat' yet it is not explained in any detail why this is any different to that in 2015.
26. Further, the COAG Review of Counter-Terrorism Legislation previously recommended the repeal of this section 102.8 of the Criminal Code (associating with a terrorist organisation) as it was considered to interfere too much with freedom of association and is neither necessary nor effective, particularly as the Commonwealth Director of

⁹ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (September 2015), xvi-xvii recommendation 7.

¹⁰ Ibid 115–6 [6.25]–[6.26].

Public Prosecutions had observed that it poses difficulties for giving directions to juries.¹¹

27. Accordingly, the Law Council does not support either the removal of the six year sentencing penalty threshold in the Bill nor the inclusion of section 102.8 of the Criminal Code as a relevant terrorism conviction.
28. In addition, the attempted division in the Bill between relevant terrorism convictions (where the six year penalty will no longer apply) and relevant other convictions (where the six year penalty will continue to apply) appears to be arbitrary. Relevant other convictions such as those for espionage offences can carry significant penalties just as terrorism offences can and, arguably, both kinds of offences may evidence that a person has repudiated his or her allegiance to Australia (the constitutional grounding for the Act).
29. The Law Council has also not supported the offence provision in section 102.8 of the Criminal Code and recommended its repeal for reasons set out below.

Inclusion of associating with a terrorist organisation

30. As noted, the Law Council does not support the proposed inclusion of section 102.8 of the Criminal Code in proposed paragraph 35A(1A)(c) of the Bill.
31. Under section 102.8, it is an offence to, on two or more occasions, associate with a member of a listed terrorist organisation or a person who promotes or directs the activities of a listed terrorist organisation, in circumstances where that association will provide support to the organisation, and it is known that the organisation is a terrorist organisation, and it is intended to help the organisation expand or continue to exist.¹² This offence attracts a penalty of 3 years imprisonment.
32. Subsection 102.8(4) provides limited exemptions for certain types of association, such as those with close family members or legal counsel.¹³ Subsection 102.8(6) also provides that the offence provision in section 102.8 does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.
33. The Law Council's concerns with respect to this offence is that it casts the net of criminal liability too widely by criminalising a person's associations, as opposed to conduct.
34. The Law Council does not consider that it was necessary to expand the scope of the test of criminal liability in section 35A in this way, given that existing principles of accessory liability in Part 2.4 of the Criminal Code already provide for an expansion of criminal responsibility in circumstances of attempt, aiding and abetting, common purpose, incitement and conspiracy. These established principles draw a more appropriate line between direct and intentional engagement in criminal activity and association through complicity.
35. The current offence in section 102.8 criminalises mere association without clearly or precisely identifying any particular conduct worthy of attracting criminal punishment.

¹¹ Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), xiii recommendation 23, 33–7 [125]–[139].

¹² *Criminal Code Act 1995* (Cth) ss 102.8(1)–(2).

¹³ *Ibid* ss 102.8(4)(a), (d).

The offence is couched in broad terms, such as ‘associates’, ‘promotes’ and ‘supports’, making the prosecution of such offences inherently difficult.

36. Moreover, given that the elements of the association offence are so difficult to define and the scope of the offence so broad, it potentially applies indiscriminately to large sections of the community without any clear justification. This gives rise to the risk that the association offence will capture a range of legitimate activities, such as participation in some social and religious festivals and gatherings.¹⁴
37. The Law Council therefore maintains its position that the association offence in section 102.8 of the Criminal Code should be repealed.

Recommendations:

- **The requirement that a person be sentenced to six or more years of imprisonment for a relevant terrorism offence to be eligible to lose their Australian citizenship should be maintained.**
- **Associating with a terrorist organisation should not be considered a relevant terrorism conviction for the purposes of the legislation.**

Minister satisfaction of citizenship of a person – change in threshold

38. Proposed new subsection 35A(1) would set out the circumstances in which the Minister may determine, in writing, that a person ceases to be an Australian citizen. The person must have a relevant terrorism conviction or a relevant other conviction. In addition, proposed paragraph 35A(1)(b) would provide that the Minister must be satisfied that the person would not become a person who is not a national or citizen of any country if their Australian citizenship were to cease. Current paragraph 35A(1)(c) permits the Minister to determine that a person ceases to be an Australian citizen if the person is a national or citizen of a country other than Australia.
39. The Explanatory Memorandum to the Bill explains the proposed change in the threshold as follows:

New paragraph 35A(1)(b) adjusts the threshold for dual citizenship to capture Australian citizens who the Minister is satisfied will not become a person who is not a national or citizen of any country as a result of cessation of citizenship. This is consistent with other provisions of the Citizenship Act. For example, current paragraph 34(3)(b) of the Citizenship Act provides that the Minister must not revoke a person’s Australian citizenship on the basis of certain offences or fraud if the Minister is satisfied that the person would become a person who is not a national or citizen of any country. It is well-established under case law that where statute provides a Minister must be ‘satisfied’ of a matter, it is to be understood as requiring the attainment of that satisfaction reasonably. For consistency with other existing provisions of the Citizenship Act, new paragraph 35A(1)(b) thus requires the Minister to be ‘satisfied’ the person will not become a person who is not a national or citizen of any country.

¹⁴ See Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006), 132-3 [10.75].

*Consistent with the operation of the current provisions of the Citizenship Act, including current paragraph 34(3)(b), it is not the intention that new paragraph 35A(1)(b) would allow the Minister to determine that a person ceases to be an Australian citizen in breach of Australia's international obligations regarding statelessness.*¹⁵

40. The Law Council is concerned that the proposed provisions enhance the possibility that a person will be left stateless. At present the Minister has no power to revoke a person's Australian citizenship if that would, as a matter of fact and law, leave the person stateless. The proposed change in threshold opens up scope for a person, on revocation, to be left stateless as the Minister is only required to be 'satisfied' that the person would not become stateless. By contrast, under the existing provision, the Minister's power of revocation is conditioned upon the existence of circumstances where the person as a matter of fact and law will not be left stateless.

41. The Committee for the Scrutiny of Bills expressed similar concerns:

*...the committee notes this could have the consequence that a person could have their citizenship removed while possessing no other citizenship (and perhaps not ever being able to obtain such citizenship in practice), thereby rendering the person stateless. The committee notes that a non-citizen of Australia who does not possess a valid visa may be detained indefinitely in immigration detention if no other country is willing to accept that person. As such, these amendments have the potential to unduly trespass on personal rights and liberties.*¹⁶

42. The United Nations' *Convention on the Reduction of Statelessness* (1961), to which Australia gave accession in 1973, sets out that a contracting state shall not deprive a person of his or her nationality if such deprivation would render the person stateless.¹⁷ The convention does permit, however, renunciation of citizenship in circumstances where the person concerned possesses or acquires another nationality.¹⁸
43. While international law dictates that everyone has the right to a nationality and that no one shall be arbitrarily deprived of their nationality¹⁹, there is no guarantee that a person will acquire citizenship/nationality of another country. In such circumstances, a person who is in Australia at the time when his or her Australian citizenship is removed may, if the Minister's state of satisfaction as to some other citizenship or nationality is erroneous, be left stateless and subject to indefinite immigration detention.²⁰ This is because if the person was not a dual citizen, then the person would become an unlawful non-citizen and have no country to which the person could be removed and then face the possibility of indefinite detention. This may be inconsistent with

¹⁵ Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, [19]-[20].

¹⁶ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 15 of 2018* (2018) 4 [1.11].

¹⁷ *Convention on the Reduction of Statelessness*, 989 UNTS 176 (entered into force 13 December 1975), art 8.

¹⁸ *Ibid* art 7.

¹⁹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) [15].

²⁰ See *Migration Act 1958* (Cth) s 35. A citizen who is in Australia at the time their citizenship ceases will automatically acquire an ex-citizen visa allowing them to remain in, but not re-enter Australia. However, under section 501 of the Act the Minister has the power to cancel the visa on character grounds, which would be a likely outcome if the person lost their citizenship under s33AA, 35 or 35A. The person would then become a non-citizen subject to immigration detention.

international law, which holds that all individuals, including non-citizens, must be protected from arbitrary indefinite detention.²¹

44. Australia has obligations under Article 9(1) of the *International Covenant on Civil and Political Rights* not to subject anyone to arbitrary detention. The United Nations Human Rights Committee has considered that 'arbitrary detention' includes detention which, although lawful under domestic law, is unjust or disproportionate. Therefore, for the detention of a person not to be arbitrary, it must be a reasonable and necessary measure in all the circumstances.²²
45. While the intention of the Bill as stated in the Explanatory Memorandum is not, as noted above, that the Minister would be permitted to determine that a person ceases to be an Australian citizen in breach of Australia's international obligations regarding statelessness, the lowering of the threshold risks rendering a person stateless in breach of Australia's international obligations. This is evidenced through the recent Neil Prakash case referred to in paragraph 11, where despite currently a higher threshold there remains doubt as to whether or not he is stateless. Further, given the complexity of this area of law, noting that expert witnesses are often called upon to give evidence with respect to difficult questions of foreign nationality law (i.e. the recent referral of multiple parliamentarians to the High Court over potential foreign citizenship), there is a possibility that the Minister may err in believing that a person was a national/citizen of another country when they are not.
46. A person may also be subject to indefinite detention in circumstances because a person could not be returned to a country where the person may be subject to torture or the death penalty even if the person has citizenship or a right of entry to that country. Australian²³ and international law²⁴ prohibits returning people in such cases.²⁵ Refoulement in such circumstances would likely be in breach of international law.
47. It may be that a person facing such harm is eligible for a protection visa but they may be ineligible on character grounds. If they are ineligible on character grounds, it is at least reasonably arguable that section 197C of the *Migration Act 1958* (Cth) (**Migration Act**) requires their removal to the place they fear such harm. The only way to prevent a breach of international law is if the Minister personally intervenes and grants some form of visa such as an ex-citizen visa under section 35 of the Migration

²¹ *Conka v. Belgium* (2002) Eur Court HR, 51564/99.

²² Human Rights Committee, *Views: Communication No 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) ('*Van Alphen v Netherlands*'), [5.8]. Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*'), [9.4].

²³ *Migration Act 1958* (Cth) s36(2)(aa). This paragraph states that a protection visa may be granted to a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

²⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 171 (entered into force 3 January 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, A/RES/44/128; *Convention on the Rights of a Child*, opened for signature 20 November 1987, 1577 UNTS 3 (entered into force 2 September 1990); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

²⁵ International human rights protections apply to a person who has lost citizenship. In particular, a person must not be returned to a country where they may be subjected to the death penalty or other arbitrary deprivation of life, persecution, or cruel, inhuman or degrading treatment or punishment – Human Rights Committee, *Views: Communication No 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) ('*FKAG v Australia*'); Human Rights Committee, *Views: Communication No 2136/2012*, 108th sess, UN Doc CCPR/C/108/D/2136/2011 (20 August 2013) ('*MMM v Australia*').

Act (only if the person was in the migration zone at the time of that loss) or a Class XA protection visa. However, given the Minister would have cancelled the person's citizenship, it may be highly unlikely that the person would be granted a protection visa leaving them to either being removed if able to be or indefinite detention. Even if such a visa were granted it may then be exposed to cancellation on character grounds under section 501 of the Migration Act. International obligations are put aside in making a decision to remove. However, the Minister has the power to grant visas to such persons to ensure that Australia does not break its international obligations.

48. The recent case of Prakash serves to highlight the above concerns. While this case related to the automatic citizenship loss provisions under the Act rather than the conviction-based provisions, reports indicated that the level of consultation conducted by Australia with Fiji to determine and verify Prakash's citizenship status appeared unclear with both countries now maintaining he is not a citizen of their nation.²⁶
49. The automatic citizenship loss provisions may not require a state of satisfaction by the Minister or the attainment of that satisfaction reasonably. Provisions that are engaged by operation of law on specific facts do not turn on a state of satisfaction. However, the facts are jurisdictional and a court can determine whether or not the critical facts exist.
50. Nonetheless, it is unclear what steps a court will consider the Minister must make in order to reach a state of reasonable satisfaction under proposed paragraph 35A(1)(b). For example, it is not clear whether a court would determine that a Minister should verify citizenship status with other countries with which the offender may have a connection.
51. This uncertainty regarding a matter as serious as potentially rendering a person stateless is undesirable. In the event that the Bill is passed, there should be positive provision in the legislation to protect against such circumstances arising.
52. The double negative in proposed paragraph 35A(1)(b) means that the provision is not clearly drafted. It appears to suggest that the Minister may determine in writing that a person ceases to be an Australian citizen if they are satisfied that the person might or is eligible to become a national or citizen of any country. The Law Council holds serious concerns with such a proposal and would consider that this may be in breach of Australia's international law obligations.

Recommendation:

- **The reasonable steps that the Minister should make should be set out in the legislation, including a requirement for verification of citizenship, or immediate eligibility for citizenship, of another country. The Minister should be required to be satisfied through such verification that the person will not be rendered stateless by a determination that the person has lost Australian**

²⁶ David Wroe, 'Fijian PM says terrorist Neil Prakash cannot go to Fiji, amid deepening citizenship row' *The Sydney Morning Herald* (online), 3 January 2019 <<https://www.smh.com.au/politics/federal/prakash-citizenship-revocation-could-jeopardise-extradition-chances-says-law-council-20190103-p50ph6.html>>; David Wroe, 'Citizenship revocation could jeopardise extradition chances, says Law Council, *The Sydney Morning Herald* (online), 3 January 2019 <<https://www.smh.com.au/politics/federal/prakash-citizenship-revocation-could-jeopardise-extradition-chances-says-law-council-20190103-p50ph6.html>>; Mark Schliebs, 'Petter Dutton stands firm as Fiji rejects Prakash, *The Australian* (online), 4 January 2019 <<https://www.theaustralian.com.au/national-affairs/immigration/dutton-embarrassed-as-fiji-rejects-prakash/news-story/ae3de1c00a03aaf57090756e63dbb51a>>.

citizenship.

Retrospectivity

53. The Bill will have retrospective operation to the extent that it would apply in relation to a relevant terrorism conviction occurring on or after 12 December 2005 and in relation to a relevant other conviction of a person if: (a) the conviction occurred on or after 12 December 2005; and (b) if the conviction occurred before 12 December 2015 – the person was sentenced to a period of imprisonment of at least 10 years in respect of the conviction.
54. This appears to be in direct conflict with the Committee's Recommendation 10 on the 2015 Bill that:

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be applied retrospectively to convictions for relevant offences where sentences of ten years or more have been handed down by a court. The Ministerial discretion to revoke citizenship must not apply to convictions that have been handed down more than ten years before the Bill receives Royal Assent.²⁷

55. This is because the amendments would apply to persons convicted up to 13 years ago. The Committee for the Scrutiny of Bills expressed its concerns regarding the justification provided for the retrospective operation of the Bill:

The committee notes that this explanation focuses on the general threat of terrorism, without explaining how applying the amendments to persons convicted up to 13 years ago who received a penalty of less than six years imprisonment would 'protect the Australian community'. The committee does not consider that this explanation, without more, to be sufficient to justify the retrospective application of a provision such as this (i.e. a provision which means the serious consequence of loss of citizenship can arise based on convictions that occurred before commencement).²⁸

56. In light of the concerns outlined above and below, the Law Council submits that the measures in the Bill should *not* apply retrospectively with respect to conduct or relevant convictions that occurred before commencement of the Act.
57. Retrospective laws are generally inconsistent with the rule of law. Lord Bingham has stated:

Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for

²⁷ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (September 2015), xviii recommendation 10, 127–8 [6.82]–[6.88].

²⁸ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 15 of 2018* (2018) 5 [1.15].

*something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.*²⁹

58. Retrospective measures offend rule of law principles that the law must be readily known and available, and certain and clear.³⁰ In this context, Lord Diplock has stated:

*...acceptance of the rule of law as a constitutional principle requires that a citizen before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.*³¹

59. The law should be certain and its reach ascertainable by those who are subject to it. Further:

*A person cannot rely on ignorance of the law and is required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly.*³²

60. While it is within the power of the Parliament to enact retrospective laws,³³ making a person liable to automatic loss of citizenship for conduct that did not have that consequence at the time of the conduct, this contravenes fundamental notions of justice, fairness and the rule of law. Retroactive removal of a person's citizenship is a substantive alteration of a person's legal rights and obligations, and fundamentally unjust.
61. Prospective laws may arguably have a general deterrent effect or a specific deterrent effect on individuals vulnerable to radicalisation, but there is no evidence to suggest that making the laws retrospective will achieve these outcomes. Retrospectivity may unwittingly capture those who have reformed or assisted the authorities, thereby demonstrating current allegiance or subsequent allegiance. This is another circumstance where retrospective provisions may operate unjustly. It is not explained in the Explanatory Memorandum why the date in 2005 has been selected.
62. For those who have already been convicted of offences covered by proposed section 35A, the courts have the ability in sentencing to ensure the offender is adequately punished for the offence and to protect the community from the offender. For those who have engaged in the conduct prior to commencement, the criminal law system is available to apply punitive measures.

²⁹ Tom Bingham, *The Rule of Law* (Penguin UK, 2011). There are also prohibitions on retrospective criminal laws in international law. Article 15 of the *International Covenant on Civil and Political Rights* expressing a rule of customary international law (*Polyukhovich v Commonwealth* (1991) 172 CLR 501, 574 (Brennan CJ)), provides: 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

³⁰ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), Principle 1.

³¹ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591.

³² *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoting Francis Bennion and K Goodall, *Bennion on Statutory Interpretation* (Lexis Nexis UK, 5th ed, 2008).

³³ *Polyukhovich v Commonwealth* (1991) 172 CLR 501. See also *Millner v Raith* (1942) 66 CLR 1.

Recommendation:

- **The measures in the Bill should *not* apply retrospectively to conduct or convictions that occurred prior to commencement of the Bill when enacted.**

Judicial Review

63. Under the Bill, merits review of the Minister's decision is unavailable.³⁴ The Committee for the Scrutiny of Bills noted that, under the current provision, the Minister must be satisfied that 'the person is a national or citizen of another country other than Australia at the time when the Minister makes the determination', which is a question of a jurisdictional fact that could be reviewed by the courts for correctness.³⁵ The Bill purports to enable citizenship to be removed if the Minister 'is satisfied that the person would not become a person who is not a national or citizen of any country' - a determination which would be subject to judicial review for legal reasonableness but leaves limited scope for the Minister's opinion to be reviewed. The Committee for the Scrutiny of Bills concluded that the Bill would introduce an 'intensity of permissible judicial review' that is significantly lower than is allowable under the current provision. The Law Council shares this concern regarding the lack of available merits review, particularly in light of the Minister's increased discretionary power under the Bill.³⁶

Recommendation:

- **A decision of the Minister to deprive a person of their Australian citizenship should afford procedural fairness and should be subject to judicial and merits review.**

Constitutional validity

64. In 2015, the Australian Government attempted to extend citizenship loss to a broader range of national security offences without any minimum sentence requirement or any need for seriousness of the relevant conduct. As a consequence, the Law Council among others raised concerns about the potential for Constitutional invalidity. The Committee accordingly made its recommendation to restrict the offences and require a minimum six year sentence as necessary to 'appropriately target the most serious conduct that is closely linked to a terrorist threat'.³⁷

65. While issues of constitutional validity will ultimately be a matter for the High Court to determine, the basis for and scope of the Commonwealth's power to enact the Bill is uncertain.

³⁴ *Australian Citizenship Act 2007* (Cth) s 52. The review of a decision under section 35A is not listed as a decision that may be reviewed by the Administrative Appeals Tribunal.

³⁵ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 15 of 2018* (2018) 4-5 [1.12].

³⁶ *Ibid.*

³⁷ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (September 2015), 115 [6.23].

66. The principal source of power for a person's Australian citizenship ceasing is the aliens power in section 51(xix) of the Constitution. The Bill therefore relies (as did the 2015 Bill) on the concept that an 'alien' is a person lacking allegiance to Australia.

67. Parliament has the power to:

... create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode.³⁸

68. However, this power is not unlimited and is subject to the qualification that:

Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word. However, within the class of those who could answer that description, Parliament can determine who it will be applied.³⁹

69. While Parliament may define the conditions on which citizenship depends, the power is not unlimited and may be subject to implied constitutional limitations.⁴⁰

70. Other heads of power granted in section 51 of the Constitution may provide supplementary support for parts of the Bill, such as, the defence power (section 51(vi)), external affairs power (section 51(xxix)), and the immigration power (section 51(xxvii)).

71. However, such provisions may not support the Bill in its entirety.

72. It is critical therefore that the Committee assures itself of the constitutional validity of the Bill prior to any recommendation regarding the Bill's possible enactment.

Recommendation:

- **The Committee seeks the assurance from the Australian Government regarding the constitutional validity of the Bill.**

³⁸ *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 173 (Gleeson CJ).

³⁹ *Ibid.*

⁴⁰ *Hwang v Commonwealth* (2005) ALR 8.