Peter McMullin Centre on Statelessness

Melbourne Law School

The University of Melbourne

Committee Secretary

Parliamentary Joint Committee on Intelligence and Security

13 February 2024

Dear Secretary,

Review of the amendments made by the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023

Thank you for the opportunity to provide this submission into the review of the operation, effectiveness and implications of amendments made by the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023 ("Citizenship Repudiation Bill 2023"), which was passed on 6 December 2023.

The Peter McMullin Centre on Statelessness is an expert centre at the University of Melbourne's Law School that undertakes research, teaching, and public policy engagement and outreach activities aimed at reducing statelessness and protecting the rights of stateless people in Australia, the Asia Pacific, and as appropriate more broadly.

In making this submission, we refer to our previous submissions to the Committee regarding its review of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (October 2019), as well as review of the Australian Citizenship Renunciation by Conduct and Cessation Provisions (13 August 2019).

As the Citizenship Repudiation Bill 2023 was only passed into law on 6 December 2023, insufficient time has elapsed since then to meaningfully assess the operation and effectiveness of the amendments made by that Bill. As such, this submission will focus on the implications of the amendments.

First, it must be noted that the amendments introduce a welcome correction to the error identified by the High Court in *Alexander v Minister for Home Affairs* [2022] HCA 19 and *Benbrika v Minister for Home Affairs* [2023] HCA 33, by removing the power to revoke Australian citizenship as a punitive matter from the discretion of the Minister for Immigration, Citizenship and Multicultural Affairs, and vesting it instead in the court in adherence with the constitutional principle of separation of powers.

Notwithstanding the shift of responsibility for citizenship stripping to the court, however, the amendments have a number of implications for Australia's compliance with its international legal obligations, primarily relating to the reduction and prevention of statelessness. In this

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regard, Australia is party to the 1954 Convention relating to the Status of Stateless Persons ("1954 Statelessness Convention"), as well as the 1961 Convention on the Reduction of Statelessness ("1961 Statelessness Convention"), which are the key international treaties to protect stateless people and to prevent and reduce statelessness. Australia is also party to the 1966 International Covenant on Civil and Political Rights ("ICCPR"), as well as the 1989 Convention on the Rights of the Child ("CRC"), both of which protect a child's right to a nationality.

1. Dual Citizenship and Statelessness

1.1 Section 36C(2) of the Australian Citizenship Act ("Citizenship Act"), introduced by the amendments made by the Citizenship Repudiation Bill 2023, provides that a court may not make an order to strip a person of their Australian citizenship, "if the court is satisfied that the person would, if the court were to make the order, become a person who is not a national or citizen of any country." This provision is clearly intended to ensure that Australia meets its international obligations not to render a person stateless, that is, someone who is not recognised as a national by any country under the operation of its laws. This necessarily means that the person whose Australian citizenship the court is considering removing must also be the national of at least one other country, or a dual national. There are several issues with this.

1.2 First, the inclusion of language "would…become a person who is not a national or citizen of another country" replicates a lower, problematic, threshold which replaced the original requirement that a person's Australian citizenship could only cease if, as a matter of fact, they were at the time of the citizenship stripping, also a national of another country.[1] The language " would… become" allows for a temporal gap and predictive element to the Court's assessment.

1.3 The term 'stateless' is defined in Article 1(1) of the 1954 Statelessness Convention as a person "who is not considered as a national by any State under the operation of its law". Australia is a party to this Convention and the definition of a stateless person contained in the 1954 Convention is also part of customary international law. The terms of Article 1(1) make clear that the question as to whether an individual is stateless is a present determination ('is not considered'). It is not an inquiry into whether a person may have a right to apply for or acquire citizenship, or otherwise at some point be 'considered as a national ... ' by a state. This is supported by the UNHCR Handbook on Protection of Stateless Persons which clarifies that: An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question.[2]

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[1] Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) at 62 and 63.

[2] Part One of UNHCR, Handbook on Protection of Stateless Persons (UNHCR Handbook), 30 June 2014, paragraph 50, emphasis added. See also UNHCR Expert Meeting (Tunis): '[S]tates are required to examine whether the person possesses another nationality at the time of [...] deprivation, not whether they could acquire a nationality at some future date'. UNHCR Expert Meeting, 'Interpreting the 1961 Statelessness

1.4 Accordingly, it may be open on the language of Section 36C(2) for the Court to find that an individual "would" not "become" stateless because the individual (in the Court's view) may have the opportunity or right to apply for citizenship elsewhere, despite not possessing a second citizenship at the time that she or he is stripped of their Australian citizenship. This conflicts both with the plain meaning of Article 1(1) of the 1954 Convention and UNHCR's authoritative guidance. The UNHCR states that "a Contracting State cannot avoid its obligations based on its own interpretation of another State's nationality laws" and that the burden of proof "lies primarily with the authorities of a State .... to show that the person affected has another nationality."[3]

1.5 Secondly, Section 36 C (2) also creates a real risk that even if a person is a dual national at the time a court orders the person to be stripped of their Australian citizenship, he or she may be rendered *de facto* stateless, whereby a person who is nominally a citizen in a country other than Australia may not be able to exercise rights associated with citizenship in practice. They may also be unable to return to their country of citizenship, if they are, for example, a refugee due to a well-founded fear of persecution.

1.6 Alternatively, it may also be that a dual national who is stripped of their nationality becomes stateless at the point that they are due to be deported and the country of nationality denies them entry, or denies that he or she is in fact a national. This is a highly probable scenario facing persons who have been convicted of a "serious offense", as has been exemplified by a significant number of people indefinitely detained prior to the recent case *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37. Based on the wording of section 36C(2), it is therefore highly likely that any person being stripped of their citizenship for having committed a serious offense, "would…become" stateless, or *de facto* stateless, upon their country of second nationality becoming aware of their conviction.

1.7 Thirdly, focusing citizenship stripping on dual nationals may be in contravention of the international legal principle of non-discrimination. This principle is set out in numerous widely ratified international treaties to which Australia is also a party including Article 26 of the ICCPR, Article 2 of the CRC, Article 9 of the 1981 Convention on the Elimination of Discrimination Against Women ("CEDAW"), and Article 5 of the 1969 Convention on the Elimination of Racial Discrimination ("CERD"). Dual nationals are likely to hold their second nationality on account of their ethnic or racial background. UNHCR's Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness state that "States should take steps to ensure that the practical effect of withdrawal of nationality is not that certain groups (e.g., ethnic, or religious minorities) are disproportionately affected by laws and policies on and practices of withdrawal of nationality. Such a discriminatory

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Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality: Summary Conclusions,' Expert meeting convened by the Office of the United Nations High Commissioner for Refugees, Tunis, Tunisia, 31 October-1 November 2013.

[3] Ibid.

effect on a particular group may be present even when legislation in the State contains strong safeguards against statelessness."[4]

2. "Serious Offenses"

2.1 The amendments introduce an exhaustive list of "serious offenses," at least one of which a person must be convicted of before the court considers whether to impose an order to strip that person's Australian citizenship. These serious offenses are set out in Section 36C (3) of the Citizenship Act and range from "advocating mutiny" to "treason". Given, as outlined in paragraph 1.4 above, Section 36C (2) leaves it potentially open to a court to strip someone of their citizenship even if this would in fact leave them stateless, Australia must comply with the strict limits that apply to deprivation of nationality as set out in the 1961 Statelessness Convention.

2.2 Article 8(1) of the 1961 Statelessness Convention provides that "[a] Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless." This is the general rule. To apply this rule, if an act of deprivation of citizenship would result in statelessness, the State may only proceed if one of the exceptions to the general rule set out in Articles 8(2) or 8(3) applies.

2.3 For the purposes of this submission, Article 8(3) of the 1961 Statelessness Convention is the most relevant. It provides that: "Notwithstanding the provisions of paragraph 1 of this Article, a Contracting State may retain the right to deprive a person of his nationality, *if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time*: (a) that, inconsistently with his duty of loyalty to the Contracting State, the person (i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or (ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State; (b) that the person has taken an oath, or made a formal declaration of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State." (own emphasis added).

2.4 Australia acceded to the 1961 Statelessness Convention in December 1973, but did not, at the time of accession, in accordance with Article 8(3), specify any retention of its right to deprive a person of their nationality on the grounds set out in that Article. Accordingly, if a court were to strip a person of their Australian citizen and thereby render them stateless, this would be in contravention of its international legal obligations under the 1961 Convention.

[4] Paragraph 111, UNHCR, Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, May 2020, HCR/GS/20/05.

3. Children

3.1 The amendments extend the ability of a court to issue an order to strip Australian citizenship from children as young as 14 years.[5] As noted earlier, Australia is party to both the CRC and the ICCPR which protect every child's right to a nationality. Australia's compliance with its international legal obligations under these instruments comes under strain when considering that a child could also be left stateless, for the reasons set out in paragraphs 1.4 and 1.5 above.

3.2 Secondly, Section 36C (6)(a) requires a court that is considering stripping the citizenship of a child to "have regard to…the best interests of the child." It is difficult to imagine any circumstances in which stripping a child of his or her citizenship, such that they might risk being left stateless at the time of citizenship stripping or at the point that their removal from the country becomes impossible for the reasons set out in paragraphs 1.4 and 1.5 above, could be considered to be in their best interests. Indeed, in 2011, the African Committee on the Rights and Welfare of the Child, held that "being stateless as a child is generally antithesis to the best interests of children."[6]

3.3 Thirdly, stripping citizenship from Australian adults with dependent children, with a view to deporting those adults is also likely to be contrary to "the best interests of the child." Section 36C (6)(b) of the Citizenship Act requires the court to consider the best interests of dependent children of parents whose Australian citizenship it is considering stripping. Removal of Australian citizenship would significantly impair the ability of a parent to live and work in the country, and provide for their family and would therefore not be in the best interests of dependent children. Further, if citizenship stripping is used as a precursor to deporting that person from the country and thus splitting up the family unit, this could contravene Australia's international legal obligations with respect to protecting private and family life set out in Articles 17(1) and 23 of the ICCPR, Article 10 of the International Covenant on Economic, Social and Cultural Rights, Article 16 of the CRC, Article 23 of the Convention on the Rights of Persons with Disabilities, and Article 44 of the International Convention on the Rights of all Migrant Workers and Members of their Families.

4. Conclusion

4.1 The amendments made by the Citizenship Repudiation Bill 2023 risk further rendering the Citizenship Act inconsistent with Australia's international legal obligations in three critical ways:

- First, the framing of Section 36C (2) of the Australian Citizenship Act leaves it open to a court to strip someone of their Australian citizenship, such that they could be left stateless immediately or at a future point, when their country of

[5] Section 36C (4)(a) of the Australian Citizenship Act.
[6] African Committee on the Rights and Welfare of the Child, Decision on the communication submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian Descent in Kenya) against the Government of Kenya, Decision: No 002/Com/002/2009, 22 March 2011.

second nationality decides not to recognise their nationality on account of their conviction of a serious offense in Australia. Australia's international legal obligations under the 1961 Statelessness Convention, prevent it from removing Australian citizenship from a person if it would leave them stateless. With its focus on stripping nationality from those who are dual nationals, the amendments also risk indirectly discriminating against ethnic or religious minority groups thereby breaching the international legal principle of non-discrimination set out in numerous international treaties to which Australia is a party;

- Secondly, given that Article 36C(2) leaves it open to a court to render a person stateless by stripping them of their Australian citizenship for committing a serious offense, Australia risks being in breach of its international legal obligations under Article 8 of the 1961 Statelessness Convention. This is because at the time it acceded to the 1961 Statelessness Convention, it never, in accordance with Article 8(3), specified any retention of its right to deprive a person of their nationality on the grounds set out in that Article; and

- Thirdly, by allowing children as young as 14 years to be stripped of their Australian citizenship and potentially left stateless, Australia risks breaching its international legal obligations under numerous treaties to which it is a party which protect the right of a child to a nationality, as well as the right to private and family life.

4.2 For the reasons provided in this submission, the Peter McMullin Centre on Statelessness urges a further review and broader consultation of the amendments introduced to the Citizenship Act by the Citizenship Repudiation Bill 2023.

Yours sincerely,

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