



Australian  
Human Rights  
Commission

# Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth)

Submission to the Parliamentary Joint  
Committee on Intelligence and Security

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# 1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee) with respect to its inquiry into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) (the Bill).
2. The Bill would amend the circumstances in which a dual citizen's Australian citizenship can be removed as a result of a conviction for a specified terrorism-related offence or where the Minister is satisfied that the person has engaged in certain terrorism-related conduct.
3. The Bill has been introduced in the context of a recent review conducted by the Independent National Legislation Security Monitor (INSLM) into the operation, effectiveness and implications of the citizenship loss provisions in the *Australian Citizenship Act 2007* (Cth) (the Act).
4. The Commission made a submission to the INSLM review, urging reform of the relevant provisions to ameliorate significant human rights concerns.<sup>1</sup> The Commission also notes its submission to the Committee with respect to the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth),<sup>2</sup> which contained some similar proposals to the current Bill, but lapsed with the prorogation of Parliament.
5. The Bill would address several of the Commission's previously articulated concerns, and implements some but not all of the recommendations made by the INSLM.<sup>3</sup>
6. In particular, the Commission welcomes and supports the Bill's revocation of self-executing citizenship loss provisions. This addresses one of the Commission's primary contentions, that loss of citizenship should never be automatic, and greatly enhances the proportionality of the scheme.
7. The amendments would operate so that a determination of the Minister is required before a person can lose their citizenship, either for engaging in certain conduct or following a relevant conviction. However, they do not go so far as to address the Commission's key recommendation, that loss of citizenship should only be possible following a criminal conviction, rather than also being possible on the basis of engaging in particular conduct which may amount to a relevant offence but for which the person has not been convicted. Nor do they provide for merits review of the determination by the Minister, contrary to recommendations by both the Commission and the INSLM.

8. Despite improvements to the human rights compatibility of the regime, the Commission considers that several aspects of the Bill do not remedy previously identified human rights concerns. Some aspects of the Bill also create new human rights concerns. Further, the Commission considers that the proposed procedural safeguards attaching to the revocation of citizenship should be strengthened, to ensure appropriate protection of the rights of individuals in light of the severe consequences.
9. Involuntarily removal of citizenship is an extremely serious matter, whether it occurs automatically or by way of a determination. Overreach or the unjustified application of these provisions could mean that a person's right to enter and remain in their own country, Australia, is seriously and arbitrarily impaired,<sup>4</sup> having adverse consequences for numerous other human rights.
10. These powers can be applied to adults and children as young as ten. Their Australian citizenship could be acquired by birth or otherwise conferred. They may have a strong and enduring connection to Australia.
11. The Commission acknowledges the critical importance of protecting Australia's national security, and the Australian community from terrorism. However, international human rights law requires that any limitation on rights must be reasonable, necessary and proportionate to the achievement of a legitimate objective. The Commission is concerned that numerous aspects of the citizenship loss provisions as amended by the Bill would not satisfy these requirements.
12. The Commission makes 15 recommendations to ameliorate some of the key human rights concerns identified.

## **2 Background**

### **2.1 The Bill**

13. The Bill would amend Division 3, Part 2 of the Act, reforming the circumstances in which a dual citizen or national can have their Australian citizenship removed for terrorism-related conduct or convictions.
14. The Statement of Compatibility with Human Rights states that the purpose of the Bill is as follows:
  15. In 2015, the current citizenship loss provisions were included in the Australian Citizenship Act because of the threat that foreign terrorist fighters presented to Australia and its interests. These provisions

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have helped protect the Australian community and limit citizenship to those who embrace and uphold Australian values. To date, the provisions have assisted in managing the threat posed by foreign terrorists as far from Australian shores as possible.

...

18. Cessation of citizenship is a significant consequence that can be applied in circumstances where, a person, through their own conduct, demonstrates a repudiation of their allegiance to Australia. Cessation of a person's formal membership of the Australian community is appropriate to reduce the possibility of a person engaging in acts or further acts that harm the Australian community, and to protect the integrity of the Australian citizenship framework by limiting membership of the community to those who uphold Australian values.
  19. The measures may also have a deterrent effect by making persons aware that their Australian citizenship is in jeopardy if they participate in certain conduct contrary to their allegiance to Australia.
15. Under current ss 33AA and 35, the Act presently operates to automatically remove a person's Australian citizenship if they engage in certain conduct deemed to repudiate their allegiance to Australia. These provisions are self-executing by operation of law, rather than requiring any positive decision by a decision-maker. Pursuant to current s 35A, the Minister can also make a determination to remove someone's citizenship following certain criminal convictions.
  16. The Bill would repeal the automatic citizenship loss regime in ss 33AA and 35. It would introduce a revised scheme, where Australian citizenship could be removed in relation to either engaging in proscribed conduct or committing a certain criminal offence, by way of a determination made by the Minister.
  17. In summary, proposed new Subdivision C, Part 1 of the Act would permit the Minister to make a determination to remove a person's Australian citizenship in two kinds of cases.
  18. The **first** kind of case applies only to people aged 14 years of age or older where the Minister is satisfied that they have engaged in terrorism-related conduct but where they have not been tried or convicted for that conduct. The Minister must be satisfied that the person has engaged in the specified conduct while outside Australia (including fighting for or being in the service of a declared terrorist organisation), or has engaged in that

conduct while in Australia and has since left Australia and not been tried for an offence in relation to the conduct (proposed s 36B).

19. The **second** kind of case applies to any person above the age of criminal responsibility (currently ten years of age) who has been convicted of one or more specified terrorism-related offences and has been sentenced to a period of imprisonment of at least three years (or periods that total at least three years) (proposed s 36D).
20. In either case, the Minister must also be satisfied of all of the following things:
  - a. that the person's conduct or conviction demonstrates that the person has repudiated their allegiance to Australia
  - b. that it would be contrary to the public interest for the person to remain an Australian citizen, with mandatory factors for consideration set out in proposed s 36E
  - c. that the person would, if the Minister were to make the determination, not become a person who is not a national or citizen of any country.
21. The Bill amends the current regime in numerous ways, most notably:
  - a. repeal of the self-executing provisions that operate to automatically remove a person's citizenship, and applying a Ministerial decision-making model instead
  - b. reducing the minimum sentencing threshold for a relevant conviction from six years to three years
  - c. allowing an individual subject to a citizenship loss determination to apply to the Minister to have the determination revoked, and allowing the Minister to make a revocation at his or her own initiative
  - d. extending retrospectively the time period in which relevant conduct or convictions can be taken into account in determining whether a person may lose their citizenship.

## **2.2 Summary of key concerns**

22. The Commission is concerned by the following features of the Bill:
  - a. the potential to remove a person's Australian citizenship based on administrative 'satisfaction' that they have engaged in certain conduct, without a criminal conviction

- b. the lowering of the threshold for ascertaining whether a person is a dual citizen before removing their Australian citizenship, increasing the risk of statelessness
  - c. the lowering of the sentencing threshold for relevant convictions, from six years imprisonment to three years imprisonment
  - d. the impacts on children, including children as young as ten years old, under the conviction-based loss regime, and children as young as 14 years old under the conduct-based loss regime
  - e. inadequate procedural safeguards when a person's citizenship is removed, including no requirement to take into account all relevant circumstances, to afford natural justice, and to provide reasons or ensure effective service of a notice
  - f. inadequate oversight due to the lack of merits review or review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)
  - g. extended retrospective application, potentially capturing conduct and convictions that occurred more than 16 years ago.
23. More generally, the Commission reiterates its previous view that it is questionable whether the stripping of citizenship will effectively enhance public safety and national security,<sup>5</sup> raising concerns about the reasonableness, necessity and proportionality of these powers.
24. The Commission's concerns are even more acute with respect to the potential removal of a child's Australian citizenship, raising potential compliance issues with Australia's voluntary adopted obligations under the *Convention on the Rights of the Child* (CRC).<sup>6</sup>
25. Violent extremism is a complex and multi-causal phenomenon, and needs to be addressed in a multidisciplinary manner that heeds local and national drivers.<sup>7</sup> Expert commentary has suggested that stripping of citizenship serves a largely symbolic function, rather than any clear national security purpose.<sup>8</sup>
26. Citizenship cessation should also be considered in the context of the other powers already available to national security, intelligence and law enforcement agencies to address the threat of terrorism. This includes the sentences for relevant convictions available under our existing criminal justice system, which are designed to act as both a specific and a general deterrent to the commission of crime. If there is a real risk of future terrorism offences, control orders and preventative detention powers are also available with the specific purpose of protecting public safety.

27. The Commission considers that, before it is passed, the Bill should be amended in accordance with the recommendations below.

## **2.3 Recommendations**

28. The Commission makes the following recommendations to ameliorate some of the significant human rights impacts of the Bill and regime:

### **Recommendation 1**

Proposed s 36B should be removed from the Bill, with the result that loss of citizenship is only possible under proposed s 36D following a relevant criminal conviction, rather than on the basis of conduct without a conviction.

### **Recommendation 2**

Proposed s 36B(1)(b) should be amended, with the result that loss of citizenship is only possible in respect of relevant convictions where a person has been sentenced to a period of imprisonment of at least six years, or to periods of imprisonment that total at least six years.

### **Recommendation 3**

The decision-making criteria in proposed s 36E(2) should be amended to require that the Minister expressly consider:

- a person's connection to Australia
- the ability of the person to travel to, enter and reside in the relevant other country.

### **Recommendation 4**

Proposed s 36G(1) should be amended to require that the Minister must be satisfied that giving of a notice 'would be likely' to prejudice (rather than 'could' prejudice) national security, defence or the international relations of Australia or Australian law enforcement operations before determining not to give a notice.

### **Recommendation 5**

Proposed s 36F should be amended to require that all reasonable attempts be made to ensure effective service of a notice of citizenship cessation.

### **Recommendation 6**

Proposed s 36H(2) should be amended to provide that an application for



revocation may be made within 90 days of the date that the person actually received notice of the cessation of their citizenship.

### **Recommendation 7**

Proposed s 36G should be amended, to provide that a determination that notice of citizenship cessation should not be given will automatically expire after 90 days, subject to a one-off further extension of 90 days determined by the Minister, in accordance with the recommendation of the Independent National Security Legislation Monitor

### **Recommendation 8**

Proposed s 36F should be amended to require that a notice of citizenship cessation set out the reasons for the determination.

### **Recommendation 9**

The Bill should be amended to ensure that each of the elements of a determination by the Minister that a person ceases to be an Australian citizen is amenable to independent merits review in the Administrative Appeals Tribunal.

### **Recommendation 10**

If Recommendation 9 is not accepted, a limited form of independent merits review should be made available in the Administrative Appeals Tribunal in accordance with recommendations made by the Independent National Security Legislation Monitor.

### **Recommendation 11**

The Bill should be amended to ensure that a decision by the Administrative Appeals Tribunal in relation to a determination by the Minister that a person ceases to be an Australian citizen is amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

### **Recommendation 12**

Proposed ss 36B and 36D should be amended to require that the Minister can only make a citizenship cessation determination 'where the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination', as a precondition to the exercise of the power.

### **Recommendation 13**

Proposed s 36D of the Bill should be amended so that only persons aged

at least 14 years of age or older, rather than ten years of age or older, can be subject to removal of citizenship on the basis of a criminal conviction.

#### **Recommendation 14**

Proposed items 18 and 19 Bill should be amended, so that there is no extended retrospective application of the power of the Minister to make a determination under ss 36B or 36D.

#### **Recommendation 15**

If Recommendation 14 is not accepted, item 18(3) should be amended to insert an appropriate time limit on the retrospective application of s 36B(5)(j), so that it is not unlimited.

### **3 Relevant human rights**

#### **3.1 The right to enter and remain in one's own country**

29. Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) provides that 'no one shall be arbitrarily deprived of the right to enter his own country'.<sup>9</sup>
30. In its General Comment No 27, the United Nations Human Rights Committee (UN HR Committee) has stated that article 12(4) includes an implied right to *remain in* one's own country.<sup>10</sup>
31. General Comment No 27 further provides that the concept of one's 'own country' is broader than that of nationality.<sup>11</sup> The concept includes non-nationals who have special ties or an enduring connection to a particular country. Relevant factors will include a person's length of residence, personal and family ties, intention to remain, and lack of these ties to other countries.<sup>12</sup>
32. Clearly, there are many circumstances in which deprivation of Australian citizenship will not sever a person's connection with Australia as their 'own country', such as where a person has acquired their citizenship by birth.
33. The cessation provisions can be applied to conduct of Australians that occurs either domestically or overseas. A person who loses their Australian citizenship while abroad would lose the right to re-enter Australia. A person who loses their Australian citizenship while in Australia would face immigration consequences, including likely mandatory detention until they are removed from Australia.<sup>13</sup>

34. These provisions therefore clearly interfere with the right of an affected person to enter and remain in their own country, Australia. The critical question then becomes whether the limitation is an arbitrary interference.
35. The UN HR Committee has stated in relation to article 12(4):

[A]rbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interferences provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.<sup>14</sup>

### **3.2 Children's rights**

36. Children enjoy all the same human rights protections as adults under key international human rights conventions such as the ICCPR, as well as particular and special protections under the CRC.
37. International human rights law recognises that, in light of their evolving physical and mental capacities, and developing neurological makeup, children have special need of safeguards, care and protection and should therefore be treated differently from adults.<sup>15</sup>
38. Relevantly, article 3 of the CRC requires the government to consider the best interests of the child as a primary consideration in decision-making:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
39. Article 8(1) of the CRC protects the right of children to preserve their identity, which includes their nationality and family relations:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
40. Children are also protected against arbitrary or unlawful interferences with their privacy, family and home under article 16(1) of the CRC.
41. With respect to children arriving in, or returning to, Australia, who may have been involved in armed conflict, the Commission has also previously recommended that the Australian Government ensure the provision of appropriate and specific physical and psychological rehabilitation.<sup>16</sup>

### **3.3 Statelessness and other human rights**

42. Australia has voluntarily assumed obligations under the *Convention on the Reduction of Statelessness* (Statelessness Convention).<sup>17</sup> Article 8(1) of the Statelessness Convention provides that a state 'shall not deprive a person of its nationality if such deprivation would render him stateless'.<sup>18</sup>
43. Article 15(2) of the Universal Declaration of Human Rights (UDHR) further provides that 'no one shall be arbitrarily deprived of his nationality'.<sup>19</sup> This prohibition is considered to be a rule of customary international law.<sup>20</sup>
44. If a person's Australian citizenship is removed on the incorrect understanding that they are the citizen or national of another country, they may be made stateless in contravention of these obligations. A further issue for consideration is if a child is born overseas to an Australian woman whose citizenship has been removed prior to giving birth. There could be significant, complex and adverse implications for the potential citizenship of the child, and their human rights.
45. Removal of citizenship is likely to significantly limit numerous other human rights in ways that may be extensive and not immediately apparent. For example, removal of citizenship may lead to loss of a passport,<sup>21</sup> removal from the electoral roll,<sup>22</sup> and loss of entitlement to social security benefits.<sup>23</sup> It would change the activities that intelligence organisations such as the Australian Secret Intelligence Service and the Australian Signals Directorate can undertake with respect to a person.<sup>24</sup>
46. It may also lead to mandatory (and lengthy) immigration detention and/or involuntary deportation. Immigration detention, or an inability to re-enter Australia, may in turn interfere with a person's family life contrary to articles 17 and 23 of the ICCPR. Removal of a person who was born, raised, or who has spent a long period of their life in Australia could result in forced relocation to a country where they have no family or social connections and that is entirely culturally or otherwise unfamiliar.

## **4 Key human rights issues**

### **4.1 Removal of citizenship without conviction**

47. The Commission welcomes the proposed repeal of ss 33A and 35, which would remove the automatic citizenship loss provisions.

48. However, in line with Recommendation 1 made by the Commission to the INSLM in a submission dated 14 June 2019, the Commission considers that loss of citizenship should only be possible following a relevant criminal conviction, rather than on the basis of the Minister's satisfaction that the person has engaged in proscribed conduct.
49. Proposed s 36B provides that the Minister can remove a person's Australian citizenship if (among other things), the Minister is satisfied that they have engaged in a range of specified conduct. The conduct is largely described in the same terms as certain offences in the Criminal Code.
50. However, it is not necessary for a person to have been convicted of one of these offences under this provision. Further, the conduct may not rise to the level of a criminal offence that would be prosecutable in court. For example, the Minister need not be satisfied of any fault element, which is normally required to establish criminal conduct.
51. Proposed s 36B applies to conduct that is engaged in outside of Australia, or conducted within in Australia where the person has since left Australia and has not been tried for an offence in relation to the conduct.
52. The practical result of proposed s 36B will be that the Minister could make decisions on the basis information that would not be accepted as evidence before an Australian court, or a relevant foreign court. That is, the bar for establishing reasonable satisfaction is one of administrative fact-finding, rather than evidence in a criminal prosecution.
53. This may, for example, include intelligence that has been gathered in a foreign country where the chain of custody is questionable. There may be a far greater level of uncertainty as to whether the physical conduct has occurred, whether the requisite intention can be made out, and the identity of the alleged perpetrator, yet removal of citizenship could still be the result.
54. Further, proposed s 36B could be applied to less serious conduct than proposed s 36D. The latter requires a conviction and sentence of at least three years (itself a reduction from the current standard of six years as discussed in more detail below). While under proposed s 36E(2)(a) the Minister must consider the severity of conduct in deciding whether to remove a person's citizenship, there is no requirement for the nature of the conduct to be as severe as would be required under the conviction based loss provisions.
55. This may be compounded by the lack of requirement to consider a fault element, and the lack of requirement for a person to be given procedural

fairness in advance of citizenship removal. As a result, there is a lower threshold to losing Australian citizenship on the basis of conduct only.

56. The Commission considers that our criminal justice system is best placed to establish that criminal conduct has occurred and to assess its seriousness, applying prospective and clear legislative requirements. Loss of citizenship, being one of the most severe possible civil consequences, is also best justified by reference to the findings of a court rather than being solely a matter of executive discretion.

### **Recommendation 1**

Proposed s 36B should be removed from the Bill, with the result that loss of citizenship is only possible under proposed s 36D following a relevant criminal conviction, rather than on the basis of conduct without a conviction.

## **4.2 Lowered threshold for conviction-based citizenship loss**

57. Current s 35A provides that persons with a 'relevant terrorism conviction' are eligible for removal of citizenship only where they have been sentenced to a period of imprisonment of at least six years or to periods that total at least six years (for convictions from 12 December 2015), or to a period of imprisonment of at least ten years or to periods that total at least ten years (for convictions from 12 December 2005 to 12 December 2015).
58. Proposed s 36D(1)(b) would lower the threshold to a sentence of a period of imprisonment of at least three years, or to periods of imprisonment that total at least three years.
59. The Explanatory Memorandum to the Bill states that:
- 100. New paragraph 36D(1)(b) reduces the period or periods of imprisonment that a person has been sentenced to in order to be subject to citizenship cessation under existing section 35A from 6 years to 3 years.
  - 101. A sentence of imprisonment for a period of at least 3 years, or periods that total at least 3 years reflects the seriousness of a criminal conviction for one of the terrorism-related offences specified in new subsection 36D(5).
  - ...
  - 132. While this extends the power of new section 36D to a greater number of convictions, the conviction for a specified offence is simply the

starting point for the Minister to make a citizenship cessation determination, that being a determination that can be made only after having regard to a number of factors. This is appropriate when considering a determination of this gravity.

60. The Commission considers that this explanation does not elucidate or justify the reason for the reduction in minimum sentence, which will subject a greater number of people to potential loss of citizenship.
61. The current six year minimum sentence requirement was implemented in accordance with a previous recommendation of this Committee with respect to the Amendment (Allegiance to Australia) Bill 2015 (Cth).
62. This recommendation by the Committee was made on the basis that, even following a conviction for a relevant offence:

[T]here will still be degrees of seriousness of conduct and degrees to which conduct demonstrates a repudiation of allegiance to Australia ... 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.<sup>25</sup>
63. Further, the INSLM's recent report states at [6.17] that a key aspect of his finding that the conviction-based regime (currents s 35A) is necessary and proportionate is that there are appropriate safeguards to protect the rights of individuals, and to ensure an appropriate and flexible response to the circumstances of each individual, including that:

[T]here is a substantial sentence of imprisonment of six years or more, imposed by a judge, which shows the level of seriousness of the conduct...
64. The Commission considers that citizenship stripping should only occur in the most exceptional circumstances, where the gravest criminal conduct also repudiates one's allegiance to Australia, and that the current six year requirement remains an appropriate threshold.
65. Maintaining the six year imprisonment requirement would help ensure that only conduct with a higher degree of culpability, and therefore also a likely closer nexus to conduct that repudiates allegiance to Australia, is eligible for removal of citizenship.
66. Where a court imposes a heavy sentence, this signals, among other things, that the conduct is serious and that the person is a risk to the community. By contrast, a lighter sentence can signify a lower risk to the community, or even that the individual may have committed a technical or otherwise less culpable contravention of the criminal law.

67. By lowering the threshold to three year imprisonment requirement, greater discretion is afforded to the Minister to determine whether certain conduct warrants the removal of citizenship. The result is that there is less reliance on the objective seriousness of the conduct and more reliance on impressionistic decision-making by a particular Minister. Given the serious consequences of citizenship loss, the Commission is not convinced that sufficient grounds have been made out to depart from the threshold previously recommended by this Committee.

### **Recommendation 2**

Proposed s 36B(1)(b) should be amended, with the result that loss of citizenship is only possible in respect of relevant convictions where a person has been sentenced to a period of imprisonment of at least six years, or to periods of imprisonment that total at least six years.

## **4.3 Inadequate procedural safeguards**

68. The Commission welcomes a number of enhanced procedural safeguards in the Bill including that:
- a. in all cases, the Minister must make a determination before citizenship ceases
  - b. a person who has ceased to be an Australian citizen because of a determination may apply in writing to the Minister to have the determination revoked (s 36H(1))
  - c. the Minister must consider any application for revocation (observing the rules of natural justice) and:
    - i. must revoke the determination if satisfied that, at the time the determination was made, the person was not a national or citizen of any other country
    - ii. must revoke the determination if satisfied that the person did not engage in the relevant conduct
    - iii. may revoke the determination if satisfied that it would be in the public interest
  - d. if the Minister refuses an application to revoke a determination, the Minister must give notice of their decision including reasons and the person's rights of review (s 36H(4))



- e. the Minister may revoke a citizenship loss determination on their own initiative if satisfied that doing so would be in the public interest—this is personal, non-compellable power, and the rules of natural justice do not apply (s 36J)
  - f. if the Minister makes a determination that a person should not be given notice of citizenship cessation (because of anticipated prejudice to security, defence or international relations), the Minister must consider whether to revoke that determination at least every 90 days (s 36G(2))
  - g. if, within five years, the Minister has not revoked a determination that notice not be given, the determination is taken to be revoked unless it is extended for one year by a further determination (s 36G(3))
  - h. a citizenship loss determination will be automatically revoked if certain events occur (e.g. a court overturns a relevant conviction) (s 36K).
69. However, the Commission considers that other safeguards are inadequate to protect an individual's human rights in light of the grave consequences for a number of reasons, including:
- a. the public interest factors that the Minister is required to take into account in making a determination about citizenship cessation do not provide for adequate consideration of a person's individual circumstances
  - b. there is a requirement to notify a person that their citizenship has been lost through a determination, but no notice has to be given if the Minister is satisfied that giving notice *could* prejudice national security or other interests, which is a relatively low bar
  - c. the service of notice requirements are insufficient to ensure that a person actually receives notification of citizenship cessation
  - d. the time limits in which a person can make an application for revocation of a citizenship loss determination are confined
  - e. there is no requirement to give reasons for a citizenship loss determination
  - f. there is no recourse to independent merits review
  - g. the available form of judicial review may not ensure access to justice.

70. The effect of the Bill would be that a person will not be notified in advance of the prospect of their citizenship being removed, and will not have the opportunity to make submissions or respond to adverse allegations at this stage. They may also not be notified at all, for a period of up to six years, if the Minister is satisfied that notification 'could' cause certain prejudice.
71. Further, even if notification is provided in accordance with the requirements of the legislation, this may not be adequate to ensure that the notice actually reaches them due to insufficient service requirements. If the person wants to apply for revocation of the determination, this must be done within 90 days of the notice being sent to their last known place of residence (or within 30 days of it being sent to an email address) even if that is no longer whether they live. There is a real prospect that an Australian citizen will lose their citizenship without the ability to seek revocation if the Department does not have their contact details.
72. If the notice does reach them, they may not be provided with more than 'a basic description' of the relevant conduct. This may not be sufficient for them to make meaningful submissions about revocation. For example, there is no requirement for them to be provided with reasons for the cessation of their citizenship.
73. Significantly, and contrary to the recommendations of the INSLM, there is no avenue to seek independent merits review of a determination by the Minister that person's citizenship should cease.
74. In addition to increasing the risk of arbitrary violations of article 12(4), these factors may also be inconsistent with an individual's rights to a fair hearing and an effective remedy under articles 14(1) and 2(3) of the ICCPR respectively.
75. The Commission is concerned that the proposed safeguards are not sufficient to ensure that removal of citizenship only occurs as a last resort in the most extreme instances, with appropriate opportunities for review. It considers that the safeguards should be enhanced to ensure that a fair, just and correct decision is made in the first instance, as far as possible, and to provide adequate oversight.
76. These factors are considered in more detail below.

(a) *Public interest factors*

77. Proposed ss 36B(1)(c), 36D(1)(d) and 36E provide that, in order to make a citizenship cessation determination, the Minister must be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen 'having regard' to certain factors. This is in addition to a requirement that the Minister be satisfied that the relevant conduct demonstrates that the person has repudiated their allegiance to Australia.
78. The proposed public interest factors under s 36E(2) are based on the current public interest factors in s 33AA(17). They include the severity of the relevant conduct, the degree of threat posed to the Australian community, whether the person is being or likely to be prosecuted, the age of the person, if the person is a child – their best interests, the person's connection to the other country, the availability of their rights of citizenship there, and Australia's international relations. While the criteria permit consideration of 'any other matter of public interest' there is no express requirement to consider of a person's connection to Australia.<sup>26</sup>
79. Circumstances may arise where a person has a strong connection to Australia, for example where they were born in Australia, have lived in Australia for a long period and have dependent children or other family who are Australian citizens. While courts have found that legislative provisions should be interpreted consistently with Australia's international obligations,<sup>27</sup> this does not afford the same level of protection as statutory decision-making criteria.
80. Nor does s 36E(2) expressly require consideration of the practical ability of a person to enter and reside in the country of which they may be a national or citizen. This is a different inquiry to a person's potential other citizenship as a matter of law. Rather, it would require consideration of diplomatic, pragmatic and other considerations. For example, the other country may disagree that the person is a citizen and/or refuse to issue a passport, which would effectively render them stateless.
81. The Commission considers that these additional factors should be prescribed as mandatory considerations, to ensure appropriate consideration of individual circumstances of the affected person and help decrease the risk of disproportionate or arbitrary revocation of citizenship.

### **Recommendation 3**

The decision-making criteria in proposed s 36E(2) should be amended to require that the Minister expressly consider:

- a person's connection to Australia
- the ability of the person to travel to, enter and reside in the relevant other country.

#### *(b) Notification*

82. Proposed s 36F(1) provides that if the Minister makes a citizenship revocation determination under ss 36B(1) or 36D(1), he or she must give written notice of the determination to the person as soon as practicable after the determination is made.
83. The required content of a notice is set out in proposed s 36F(5)–(6), summarised as follows:
  - the fact that the Minister has determined under subsection 36B(1) or 36D(1) that the person has ceased to be an Australian citizen
  - either a basic description of the conduct, or the specific convictions or sentences, to which the determination relates
  - the date of the notice
  - the person's rights of review.
84. The notice must not contain information that is operationally sensitive or that could prejudice law enforcement, security, defence or international relations, endanger a person's safety or 'be contrary to the public interest for any other reason'.
85. Proposed s 36F(2) provides that the notice must be posted to the address of the place of residence of the person last known to the Department. Proposed s 36F(3) provides that, if the Minister is satisfied that the person did not receive the notice by mail and has become aware of the electronic address for the person, the notice may be given again by email.
86. Under proposed s 36G, the Minister can make a determination in writing that notice of the citizenship cessation should not be given, if the Minister is satisfied that it 'could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations'.

87. If a determination not to give a notice is made, notice does not need to be given until as soon as practicable after the determination is revoked. If the Minister becomes aware of an electronic address for the person while a determination is in force under proposed s 36G, when the determination is revoked the Minister may give notice by email rather than by mail.
88. Under proposed s 36G(2)-(5), the Minister must review a s 36G determination at least every 90 days to consider whether to revoke it. After five years, the determination is taken to be revoked unless the Minister extends the determination for one more year.
89. Once a notice is given of citizenship cessation, under proposed s 36H a person has 90 days to apply to the Minister for a revocation. Natural justice will be afforded in this particular process.
90. The Statement of Compatibility with Human Rights at [38]–[39] explains the notification and review provisions as follows:
  38. In circumstances where the Minister has made a determination to cease a person's citizenship, the provisions make clear that the starting presumption is that the Minister must give notice of the cessation to the affected person. Notice may be withheld if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia or Australian law enforcement operations. A determination to withhold notice can be in place for up to 6 years, but a decision to withhold notice must be reviewed every 90 days. The requirement for frequent reviews gives ample opportunity for the individual circumstances to be assessed and prevent arbitrary withholding of notice. This recognises that the provisions seek to balance competing public interests, including national security and the rights of the person. At the conclusion of the 6 years, notice must be provided to the individual, giving a maximum period during which notice may be withheld. ...
  39. Once the person is provided notice, they have 90 days to apply to the Minister in writing for a revocation of the determination that resulted in the cessation of their citizenship. Outside the 90 day period, if the Minister is satisfied the person did not receive the original notice, the Minister may provide notice again and the person is provided 30 days to make an application. Natural justice is afforded to this process. This ensures the person is provided an opportunity to make representations and present information specific to their case to the Minister.

91. The Commission has several concerns about the fairness and proportionality of these provisions.
92. **First**, the threshold for withholding notification of loss of citizenship is that notification 'could' cause certain prejudice. In practice, this means that a trivial or purely hypothetical risk to national security or Australia's international relations could be sufficient to deny an individual notice of the fact that their citizenship has been lost. The Commission notes that exemptions from the notice requirements have been frequently relied upon to prevent the giving of notices under the current Act.
93. The comparatively low threshold of 'could' makes it more likely that a disproportionate weight will be placed on the low risk to national security (or the other named factors) to the detriment of an individual whose rights will be seriously diminished by their citizenship being lost without notice.
94. While the requirement on the Minister to periodically review a determination not to give a notice provides some protection, the Commission considers that a higher bar should apply before the Minister may decide not to give notice to an affected individual.
95. The Minister should need to be satisfied that giving of a notice 'would be likely' to prejudice national security, defence or the international relations of Australia or Australian law enforcement operations before determining not to give a notice. This provides a more robust, objective standard that is familiar to administrative decision-making.

#### **Recommendation 4**

Proposed s 36G(1) should be amended to require that the Minister must be satisfied that giving of a notice 'would be likely' to prejudice (rather than 'could' prejudice) national security, defence or the international relations of Australia or Australian law enforcement operations before determining not to give a notice.

96. **Secondly**, the Commission is concerned that the proposed service requirements are inadequate to ensure that a person actually receives notice that their citizenship has been revoked. This is especially so if citizenship loss provisions are applied to people who are already outside Australia—which the Commission understands has been universally the case to date—or who are incarcerated.

97. Service by mail to the place of residence last known to the Department may be inadequate actually to reach the person. The Department may not have current residential addresses for every Australian citizen. The Commission also notes that proposed s 36F(3) does not require service by email if the Minister is satisfied that the person did not receive the notice by mail, rather the Minister 'may' effect service by email again. Further, contrary to paragraph 39 of the Explanatory Memorandum set out above, the statutory discretion to attempt service again is limited to circumstances where the Minister becomes aware of an email address for the person. The Bill is silent about what happens if the Minister is satisfied that the person did not receive the notice by mail but becomes aware of the current physical address for a person.
98. The Commission considers that all reasonable attempts should be made to ensure effective service of a notice of citizenship cessation. This would be consistent with the minimum standard under the current Act which requires the Minister to give, or make reasonable attempts to give, notice of citizenship cessation.<sup>28</sup> Reasonable attempts would include the Minister being required to effect service by both post (to a person's last known place of residence or other address such as a relevant corrections facility) and email (if the Department has a record of the affected person's e-mail address). It would include calling the person (if the Department has a record of the affected person's phone number) if the Department does not have other contact details or if it appears that service of the notice was not successful. It would also include making further attempts at service, if it appeared that service was not successful in the first instance but the Department has subsequently been made aware of new contact details.

### **Recommendation 5**

Proposed s 36F should be amended to require that all reasonable attempts be made to ensure effective service of a notice of citizenship cessation.

99. **Thirdly**, the Commission is concerned by the limited time period in which a person can apply for a review of citizenship revocation by the Minister under s 36H(2). This is 90 days after the date of the notice given by mail or 30 days after the date of the notice if sent again to an electronic address.
100. The inadequacy of the notice requirements discussed above mean that a person could lose the right to seek revocation of citizenship cessation

because the notice provisions have been complied with, but the person still has not actually received the notice.

101. While s 36J allows the Minister to later revoke a citizenship cessation determination on his or her own initiative, this is a personal, discretionary, non-compellable power, and therefore provides a very limited safeguard.

### **Recommendation 6**

Proposed s 36H(2) should be amended to provide that an application for revocation may be made within 90 days of the date that the person actually received notice of the cessation of their citizenship.

102. **Fourthly**, the Commission considers that the length of time for which notice of citizenship cessation can be withheld under proposed s 36G, being up to six years, has not been shown to be a reasonable, necessary and proportionate maximum time limit.
103. The Commission supports the approach of the INSLM, who has recommended that a determination to withhold notice should expire after 90 days.
104. The INSLM further recommended that the Minister only have a one-off ability to extend the withholding of notification for a further 90 days, and be required to notify the Committee and the IGIS if this extension power is exercised. The INSLM commented: 'in my view, six months is a sufficient maximum period to withhold notice'.<sup>29</sup>

### **Recommendation 7**

Proposed s 36G should be amended, to provide that a determination that notice of citizenship cessation should not be given will automatically expire after 90 days, subject to a one-off further extension of 90 days determined by the Minister, in accordance with the recommendation of the Independent National Security Legislation Monitor.

#### *(c) Provision of reasons*

105. Proposed ss 36F(5)-(6) provides that a notice of citizenship loss must only set out a 'basic description' of the relevant conduct (for conduct-based loss) or specify the relevant conviction/s and sentence/s (for conviction-based loss). There is no requirement to provide reasons for the decision to remove a person's citizenship.



106. For example, there is no requirement for the Minister to explain how they were satisfied that the conduct of the person demonstrated that they had repudiated their allegiance to Australia, or why it would be contrary to the public interest for the person to remain an Australian citizen. There is no requirement for the Minister to explain how the public interest factors set out in s 36E were taken into account. There is no requirement that the Minister explain how they were satisfied that the person had another nationality or citizenship.
107. The Commission is concerned that notices may be given that contain very little detail, making it difficult for a person to effectively respond to any relevant adverse allegations or to make submissions about why the determination should be revoked.
108. While there is a requirement in proposed s 36H(4) that the Minister provide reasons for refusing a person's revocation application, these reasons will only be provided after the refusal has occurred. It therefore will not inform a person of the case against them in advance of making their application for revocation, in a manner that would maximise procedural fairness, increase transparency and support good administrative decision-making.
109. The Commission considers that s 36F should require that a notice of citizenship cessation contain reasons for the determination, including by reference to the public interest factors considered by the Minister.
110. If a notice is sent to a child, the notice and reasons should also be set out in accessible language.

### **Recommendation 8**

Proposed s 36F should be amended to require that a notice of citizenship cessation set out the reasons for the determination.

#### *(d) Merits review and judicial review*

111. The Commission reiterates its previous view that independent merits review should be available for all decisions made under proposed new Division 3, Part 2 of the Act. Recommendations for a limited form of merits review were also made by the INSLM but have not been adopted in the Bill.

112. As discussed above, proposed s 36H provides that a person can apply to the Minister for revocation of a determination by the Minister that a person's citizenship cease. However, the Commission considers that further consideration by the original decision maker should not be a replacement for merits review before an independent decision-maker.
113. The following relevant principles have been identified by the Administrative Review Council (ARC), to guide what decisions should be subject to merits review:<sup>30</sup>
- a. as a matter of principle an administrative decision that will 'affect the interests of a person' should be subject to merits review
  - b. the fact that a decision-making power involves matters of national sovereignty, such as the question of who is admitted to enter the country, does not, alone, mean that decisions made under the power should be excluded from review
  - c. a decision is not inappropriate for merits review merely because that decision may also be the subject of judicial review.
114. Balanced against these factors are the arguments that decisions of high political content including those relating to national security, and particularly decisions of this kind made personally by a Minister, may justify excluding merits review.
115. In seeking to evaluate these conflicting positions, the Commission's view is influenced by the fact that these decisions have the potential to gravely affect a person's interests and basic human rights. Further, that the Bill would operate to remove citizenship and notify someone after the fact, and would not afford procedural fairness at the time the determination is made.<sup>31</sup>
116. It also notes the existing mechanisms available in merits review hearings to ensure the protection of sensitive, classified information, and to protect the Australian community, but that still afford meaningful and independent review. This includes the use of special advocates.
117. On balance, the Commission considers that a broader approach should be applied to maximise access to justice and the protection of human rights. As stated by the ARC:
- If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely

affected by a decision. Further, there is a risk of losing the broader and beneficial effects that merits review is intended to have on the overall quality of government decision-making.<sup>32</sup>

118. The Commission notes the INSLM's view, that citizenship loss on the basis of conduct should be subject to a limited form of merits review, in the Security Appeals Division of the Administrative Appeals Tribunal (AAT).
119. The INSLM recommend a person be able to apply to the Minister to revoke a determination that their citizenship cease. If the Minister affirmed their original decision, the INLSM said that this affirmation decision should be reviewable in the AAT. The review in the AAT would be limited to the question of whether the Minister could have been reasonably satisfied that the person engaged in the relevant conduct. The onus would be on the person to satisfy the AAT that they did not engage in the relevant conduct.
120. The INSLM also recommended use of special advocates based partly on existing procedures for the review of adverse security assessments and partly on provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).
121. In the Commission's view, the AAT should also be able to consider whether the Minister could reasonably have been satisfied that:
- the relevant conduct demonstrates that the person has repudiated their allegiance to Australia, and
  - it would be contrary to the public interest for the person to remain an Australian citizen, having regard to the factors set out in s 36E.
122. While these decisions involve significant matters of public interest, involving the composition of the Australian population, that does not mean that they are not appropriate subjects for administrative review. As the ARC said:

The fact that a decision-making power involves matters of national sovereignty (such as the question of who is admitted to enter the country) or the prerogative power (the inherent powers of the Government) does not, alone, mean that decisions made under the power should be excluded from review.

For example, the Council recognises that an aspect of the national sovereignty is the power to determine who is admitted to the country and the composition of its population.

But the Council does not consider that this power is incompatible with the availability of remedies to ensure that administrative decisions taken under it are lawful and correct, within the context of the legislative and policy framework in which they are made. Further, Australian citizens may well have a real interest in the admission of a relative, friend or prospective employee.<sup>33</sup>

123. As set out in the following section, the Commission is also of the view that a person's status as someone with another nationality or citizenship should be a question of jurisdictional fact rather than a matter of subjective satisfaction by the Minister. This factual question should also be subject to merits review.
124. The Commission is also concerned that decisions relating to the revocation of citizenship are only amenable to a limited form of judicial review, which may not ensure access to justice. Making judicial review available under the ADJR Act would provide a clearer, more straightforward and accessible means of review when compared with review in the original jurisdiction of the High Court or Federal Court.<sup>34</sup>

### **Recommendation 9**

The Bill should be amended to ensure that each of the elements of a determination by the Minister that a person ceases to be an Australian citizen is amenable to independent merits review in the Administrative Appeals Tribunal.

### **Recommendation 10**

If Recommendation 9 is not accepted, a limited form of independent merits review should be made available in the Administrative Appeals Tribunal in accordance with recommendations made by the Independent National Security Legislation Monitor.

### **Recommendation 11**

The Bill should be amended to ensure that a decision by the Administrative Appeals Tribunal in relation to a determination by the Minister that a person ceases to be an Australian citizen is amenable to

judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

#### **4.4 Risk of statelessness**

125. The Commission is concerned that the Bill would the weaken the current safeguard in the Act that protects against a person being made stateless.
126. Current ss 33AA(1), 35(1)(a) and 35A(1)(c) permits a person's Australian citizenship to be removed if, among other things, 'the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination'.
127. Proposed ss 36B(2) and 36D(2) are drafted as double negatives which make them difficult to read. However, the effect of these sections is to change the question of whether a person would be rendered stateless from a question of fact to a question of the subjective 'satisfaction' of the Minister.
128. The Commission considers that the Explanatory Memorandum does not adequately justify this amendment. It states:
  60. The operation of new section 36B is limited to persons that the Minister is satisfied are nationals or citizens of a country other than Australia. The purpose of this amendment is to ensure that the application of this provision will not result in a person becoming stateless.
  - ...
  62. The requirement that the Minister be satisfied that a person would not become a person who is not a national or citizen of any country differs slightly from the formulation in the provision in existing sections 33AA and 35 of the Citizenship Act. Currently, a person's citizenship can only cease under section 33AA or 35 of the Citizenship Act if, as a matter of fact, they are a national or citizen of another country.
  63. In order to facilitate the Minister's power to make a determination with regard to cessation of citizenship under new section 36B(1), the Minister needs to be satisfied that the person would not become a person who is not a national or citizen of any country. The Minister will be required to turn his or her mind to the issue, using the materials available to him or her at the time. This adjusts the current

threshold in relation to this issue, and adds additional safeguards, namely:

- the Minister must revoke his decision on application by a person, under new subparagraph 36H(3)(a)(i) if he is satisfied that a person is not a national or citizen of any country.
- the determination will be automatically revoked under new paragraph 36K(1)(c) if a court finds that the person was not a national or citizen of any country other than Australia at the time the determination was made.

129. Despite the stated intention that a person will not become stateless, the Commission holds serious concerns that an important safeguard is being diluted in two ways.
130. First, it removes the need for a person to be a national or citizen of country other than Australia, as a *precondition* that enlivens the ability of the Minister to exercise the power to remove a person's citizenship. A requirement that a decision maker be reasonably satisfied of a particular matter is different, and a weaker protection, from a requirement that the particular matter actually exists.
131. That is, the current test requires that a person *is* a dual citizen. The new proposed test would only require the Minister to reach a state of satisfaction that the person would not become stateless, acting reasonably. This provides for less rigorous protection, as the Minister must only be satisfied that an event will not occur (a subjective judgment in the negative), rather than needing to establish the fact of a person's dual citizenship (a positive condition).
132. Secondly, the Bill would lower the intensity of available judicial review. Currently, the Act makes the question whether a person is a national or citizen of another country a jurisdictional fact. This means that a court in judicial review can receive evidence of whether the individual in question is indeed a dual citizen.
133. By contrast, the Bill would reduce the capacity of a court to correct this error, because the court would only be able to review the *reasonableness* of the Minister's satisfaction that a person would not become stateless. If the Minister acts reasonably, but is still mistaken, the Court may be less able to intervene and the individual could be rendered stateless.
134. The Commission is not convinced that the safeguards in ss 36H(3)(a)(i) and 36K(1)(c) are sufficient. The first safeguard depends on the Minister becoming aware that they have made an error and is also couched in the

language of Ministerial satisfaction. The second safeguard depends on a person rendered stateless being able to effectively access a federal court in Australia.

135. This proposed amendment raises a serious risk of conflict with article 15(2) of the UDHR, the Statelessness Convention and the CRC.
136. The Commission considers that the current threshold is an appropriate test to meet, given the severe consequences. It provides stronger legislative protection against statelessness, by increasing the likelihood that a correct decision will be made as to the citizenship status of a relevant person, by virtue of the obligations on the Minister in decision-making and the intensity of available judicial review. This is all the more important if the Bill is not amended to include independent merits review.

### **Recommendation 12**

Proposed ss 36B and 36D should be amended to require that the Minister can only make a citizenship cessation determination 'where the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination', as a precondition to the exercise of the power.

## **4.5 Impact on children**

137. The Commission is particularly concerned about the potential human rights impacts of citizenship loss on children.
138. The citizenship loss provisions apply to children in two ways:
  - a. children as young as ten years of age who have relevant criminal convictions could lose their citizenship<sup>35</sup>
  - b. children as young as fourteen who the Minister is satisfied have engaged in relevant proscribed conduct could lose their citizenship.<sup>36</sup>
139. International human rights law recognises that, in light of their evolving physical and mental capacities, and developing neurological makeup, children have special need of safeguards, care and protection and should therefore be treated differently from adults.<sup>37</sup>

140. In recognition of that fact, Australia has ratified the CRC, which protects the best interests of the child (article 3) and the right of children to preserve their identity including their nationality (article 8(1)).
141. Removal of a child's citizenship, and consequent loss of their right to enter or remain in Australia, is even more likely to be arbitrary in contravention of article 12(4) of the ICCPR than in the case of an adult. That is so for a range of reasons, including that a child is less culpable for wrongdoing, is more vulnerable to any adverse consequences, and is at risk of exploitation or manipulation by adults.
142. The Commission supports the decision-making criteria in proposed s 36E(2)(e), that would require the Minister to consider the best interests of the child as a primary consideration before making a determination to remove the citizenship of a person aged under 18.
143. In assessing the best interests of a child under article 3 of the CRC, the Commission notes that it is necessary to take into account all of the circumstances of the particular child and the particular action.<sup>38</sup> Article 3 also requires that procedural safeguards are implemented that allow children to express their views,<sup>39</sup> to ensure that decisions and decision-making processes are transparent,<sup>40</sup> and that provide mechanisms to review decisions.<sup>41</sup>
144. Overall, removal of a child's citizenship is extremely difficult to justify under international law. The Committee on the Rights of the Child, in concluding observations made with respect to Australia, has stated:
- With reference to article 8 of the Convention, the Committee further recommends that the State party undertake measures to ensure that no child is deprived of citizenship *on any ground* regardless of the status of his/her parents. [emphasis added]<sup>42</sup>
145. With respect to proposed s 36D, the Commission considers that it is inappropriate for younger children to be subject to citizenship loss under the conviction-based regime. This accords with previous calls made by the Commission to raise the age of criminal responsibility to at least 14 years of age.
146. Currently, the minimum age of responsibility in all states and territories in Australia is ten years of age, mitigated by the principle of *doli incapax*. This age is comparatively low compared with many other countries.<sup>43</sup> There



have been increasing and repeated calls for raising this age, including by expert bodies.

147. The United Nations Committee on the Rights of the Child, in its Draft General Comment No 24, has stated that the desirable minimum age of criminal responsibility is at least 14 years old. However, it has commended states to adopt a higher minimum age, for instance at least 15 or 16 years old. The Commission has expressed its support for this position,<sup>44</sup> along with the preservation of *doli incapax*, and the availability of appropriate diversionary programs for children.
148. Reasons for raising the age of criminal responsibility, and the application of proposed s 36D to persons aged at least 14 years or older, include that:
  - a. many children involved in the criminal justice system come from disadvantaged backgrounds and have complex needs better addressed outside the criminal justice system<sup>45</sup>
  - b. research on brain development shows that younger teens have not developed the requisite level of maturity to form the necessary intent for full criminal responsibility<sup>46</sup>
  - c. younger children, particularly under the age of 14 years, may lack the capacity to properly engage in the criminal justice system, resulting in a propensity to accept a plea bargain, give false confessions or fail to keep track of court proceedings<sup>47</sup>
  - d. studies have shown that the younger the child is when encountering the justice system, the more likely they are to reoffend<sup>48</sup>
  - e. it would bring Australia into line with its obligations under the CRC.<sup>49</sup>
149. The Commission considers that young children, aged below 14 years old if not older, should not be subject to criminal responsibility or the related result and adverse impacts of citizenship removal. This would also provide consistency with the conduct-based regime in proposed s 36B, which only applies to persons aged 14 years old or older. The other safeguards currently in place to protect children should also continue to apply.

### **Recommendation 13**

Proposed s 36D of the Bill should be amended so that only persons aged at least 14 years of age or older, rather than ten years of age or older, can be subject to removal of citizenship on the basis of a criminal conviction.

## **4.6 Retrospectivity**

150. Article 15(1) of the ICCPR prohibits retrospective criminal laws, including the imposition of heavier penalties than the one applicable at the time the offence was committed.
151. The Bill would extend the time period in which persons who engaged in specified conduct or who are convicted of certain offences may have their citizenship removed. The effect of this provision is to extend the retrospective application of citizenship removal, capturing conduct and convictions that may have occurred long before the passage of the Bill.
152. Under items 18 and 19 of the Bill, the following extended time periods would apply for citizenship cessation based on the conduct identified:
  - a. conduct in proposed s 36B(5)(a)–(h) engaged in from 29 May 2003 (compared to 12 December 2015 at present)
  - b. conduct in proposed s 36B(5)(j), being ‘serving in the armed forces of a country at war with Australia’ engaged in at any time in the past (compared to 1 July 2007 at present)
  - c. convictions of at least three years for one or more relevant offences under proposed s 36D from 29 May 2003 (compared to convictions of at least ten years for one or more relevant offences from 12 December 2005 or convictions of at least six years for one or more relevant offences from 12 December 2015 at present).
153. The practical effect of the provisions would be that is dual citizens convicted up to 16 years ago, or who the Minister was satisfied engaged in proscribed conduct up to 16 years ago, could now have their citizenship removed. This is an extension of the retrospective operation of the Act of between two and a half and 12 and a half years depending on the offence. At the same time, the seriousness of offending that may lead to a loss of citizenship is being significantly reduced.

154. If a person has served in the armed forces of a country at war with Australia, there would be no time limit to the retrospective application of the citizenship loss provisions at all.
155. The Statement of Compatibility with Human Rights to the Bill describes the reasons for extending retrospectivity as follows:
- 44. Relevantly, making a citizenship cessation determination following conviction does not amount to an additional punishment for an offence for which a person has already been convicted or acquitted. Rather than being a punitive measure, this provision, and its retrospective application, provides further administrative options to manage offenders who continue to pose a threat to the community. Section 36D does not create a new criminal offence; rather, it allows for the imposition of an administrative consequence at the Minister's discretion. When doing so, the Minister must be satisfied it is not in the public interest for the individual to remain an Australia citizen, having regard to a number of factors.
  - ...
  - 47. Past terrorist-related conduct is widely recognised as repugnant and a contradiction of the values that define our society. It is appropriate to take past conduct into consideration in order to ensure the safety and security of Australia and its people, and to ensure the community of Australian citizens is limited to those who continue to retain an allegiance to Australia. The discretionary nature of the cessation provisions and the public interest criteria the Minister may regard in making a determination prevent arbitrary application.<sup>50</sup>
156. The Commission has previously articulated in detail why it considers that, in the present context, the removal of citizenship constitutes a penalty in a manner that is inconsistent with article 15(1).<sup>51</sup>
157. Further, retrospective laws, and in particular criminal laws, are generally contrary to the rule of law. It is a fundamental principle that the existence of an offence and penalty be established prospectively, as reflected in the common law presumption against retrospectivity.<sup>52</sup>
158. The Commission notes that the retrospectivity of the originally introduced citizenship removal powers in the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) was restricted to individuals convicted of a relevant offence with a term of at least ten years imprisonment, within ten years prior to the passage of that Act.

159. The ten year limit on retrospective application implemented a recommendation previously made by this Committee. In this respect, the Committee stated:

6.85 The Committee acknowledges the concerns raised by stakeholders. The Committee acknowledges that retrospectivity should only be applied with great caution and following careful deliberation, with regard to the nation as a whole.

6.86 While some members of the Committee expressed concern regarding the principle of retrospective application, on balance the Committee determined these to be special circumstances. The Committee formed the view that past terrorist-related conduct, to which persons have been convicted under Australian law, is conduct that all members of the Australian community would view as repugnant and a deliberate step outside of the values that define our society.

...

Recommendation 10: The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be applied retrospectively to convictions for relevant offences where sentences of ten years or more have been handed down by a court.

The Ministerial discretion to revoke citizenship must not apply to convictions that have been handed down more than ten years before the Bill receives Royal Assent.<sup>53</sup>

160. It is significant that when this Committee considered the retrospective application of the 2015 amending Act, it recommended that offences in the past be *more* serious than those provided for in the amendments, bearing in mind the serious consequences of retrospective legislation. While the Act provided for citizenship cancellation upon being sentenced to at least six years for specified offences a person was convicted of in the future, the Act would only apply to offences a person had previously been convicted of if the sentence imposed was at least ten years.

161. The present Bill seeks to simultaneously extend the period of retrospectivity even further (by more than 12 and a half years for conduct that did not result in a conviction, and by more than two and a half years for most convictions) while also significantly decreasing the seriousness of the conduct to which the provisions will have retrospective application. In the case of conduct resulting in a conviction, the Act will apply retrospectively if the person was sentenced to only three years. In the case

of conduct not resulting in a conviction, there is no minimum seriousness required.

162. The Commission queries why a further extension of retrospective application is proposed without any compelling justification, in a manner so out of step with the previous recommendation of the Committee.
163. The Commission considers that extending retrospectivity generally reduces the proportionality of the Bill with respect to its purported goals. Further, affected persons would not have known at the earlier time that they may be liable to Australian citizenship removal and the severe human rights consequences that flow from it.
164. The Commission notes that a Ministerial decision will be required that requires consideration of prescribed factors including the severity of the conduct and the age of the person, but holds concerns that the decision-making criteria and other safeguards are inadequate to properly protect human rights, as discussed above.
165. The Commission opposes any extension of the retrospective application of the citizenship removal power.

#### **Recommendation 14**

Proposed items 18 and 19 Bill should be amended, so that there is no extended retrospective application of the power of the Minister to make a determination under ss 36B or 36D.

#### **Recommendation 15**

If Recommendation 14 is not accepted, item 18(3) should be amended to insert an appropriate time limit on the retrospective application of s 36B(5)(j), so that it is not unlimited.

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<sup>1</sup> Australian Human Rights Commission, Submission to the Independent National Security Legislation Monitor, *Review of citizenship loss provisions in the Australian Citizenship Act 2007* (Cth). At <https://www.inslm.gov.au/sites/default/files/submissions/ahrc-citizenship-loss-review-inslm-submission-14-june-19.pdf>.

<sup>2</sup> Australian Human Rights Commission, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (Cth). At <https://www.aph.gov.au/DocumentStore.ashx?id=804cc1f2-83bc-49ba-bd3e-d48b44b4da70&subId=664696>.

<sup>3</sup> The Explanatory Memorandum to the Bill states that the Bill has been introduced to address the INSLM's recommendations, including his key recommendation to replace the current

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- operation of law scheme with a Ministerial decision model. See Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) 1.
- 4 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(4).
- 5 Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) 1-3.
- 6 *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) arts 3, 8(1).
- 7 See for example UN Secretary-General, *Plan of Action to Prevent Violent Extremism*, UN Doc A/70/674 (24 December 2015).
- 8 Sangeetha Pillai and George Williams, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia' (2017) 41(2) *Melbourne University Law Review* 845, 881; 885.
- 9 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 10 United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)* 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [19].
- 11 United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)* 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [20].
- 12 See for example United Nations Human Rights Committee, *Views: Communication No. 1557/2007*, 102<sup>nd</sup> sess, UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) 18 [7.4] ('*Nystrom v Australia*').
- 13 *Migration Act 1958* (Cth) ss 189, 198.
- 14 United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)* 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [21].
- 15 *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) preamble; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg UN Doc A/810 (10 December 1948) article 25(2).
- 16 Australian Human Rights Commission, Submission to the United Nations Committee on the Rights of the Child, *Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict* (1 November 2018).
- 17 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).
- 18 Relevant exceptions to article 8(1) of the *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) include where a person has conducted himself in a manner seriously prejudicial to the vital interests of the State, or where the person has given definite evidence of his determination to repudiate his allegiance. However, for a state to rely on these exceptions, article 8(3) provides that the State must specify that it retains the right to deprive a person of his nationality on those grounds, as at the time of signature, ratification or accession of the Convention, and that the grounds need to exist in domestic law at the relevant time. Australia has made no such declaration.
- 19 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg UN Doc A/810 (10 December 1948) art 15.
- 20 See for example Michelle Foster and Hélène Lambert, 'Statelessness as a human rights issue: a concept whose time has come' (2016) 28(4) *International Journal of Refugee Law* 564,

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- 578; United Nations Human Rights Council, Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General, 13th sess, Agenda item 3, UN Doc A/HRC/13/34, (14 December 2009) 5–6 [19–22].
- 21 *Australian Passports Act 2005* (Cth) ss 8, 22.
- 22 *Commonwealth Electoral Act 1918* (Cth) ss 93, Parts VI–X.
- 23 *Social Security Act 1991* (Cth) s 7 and various other provisions. Australian residence is generally a precondition of receipt of social security payments.
- 24 See for example *Intelligence Services Act 2001* (Cth) s 15.
- 25 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (September 2015) 115–116.
- 26 This can be contrasted with the exercise of other powers in the migration context. For example, when deciding whether to refuse or cancel a visa under s 501 or 501CA of the *Migration Act 1958* (Cth), a Ministerial Direction requires decision-makers to have regard to the ‘strength, nature and duration’ of a person’s ties to Australia. See Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014) [10.2].
- 27 *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 287, 291.
- 28 *Australian Citizenship Act 2007* (Cth), ss 33AA(10)(a), 35(5)(a), 35A(5)(a).
- 29 Independent National Security Legislation Monitor, *Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007* (15 August 2019) 59.
- 30 Administrative Review Council, *What decisions should be subject to merit review?* (Report, 1999) [2.1].
- 31 Proposed ss 36D(9) and 36B(11) provide that the rules of natural justice do not apply in relation to the making of a citizenship cessation determination, either on the basis of certain conduct or convictions. The Commission notes that under current s 35A(11), dealing with conviction-based cessation of citizenship, there is presently an obligation on the Minister to observe the rules of natural justice when deciding to revoke a person’s citizenship.
- 32 Administrative Review Council, *What decisions should be subject to merit review?* (Report, 1999) [2.5].
- 33 Administrative Review Council, *What decisions should be subject to merit review?* (Report, 1999) [5.3]–[5.5].
- 34 Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, September 2012) 72–73 [4.4].
- 35 *Criminal Code* (Cth) Division 7; *Australian Citizenship Act 2007* (Cth) s 35A.
- 36 Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) proposed ss 36B(1).
- 37 *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) preamble; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg UN Doc A/810 (10 December 1948) article 25(2).
- 38 United Nations Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration* (art 3, para 1), 62<sup>nd</sup> sess, UN Doc. CRC/C/GC/14 (29 May 2013) 12 [46]–[51].
- 39 United Nations Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration* (art 3, para 1), 62<sup>nd</sup> sess, UN Doc. CRC/C/GC/14 (29 May 2013) 18–19 [89]–[91].

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- <sup>40</sup> United Nations Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62<sup>nd</sup> sess, UN Doc. CRC/C/GC/14 (29 May 2013) 18 [87].
- <sup>41</sup> United Nations Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62<sup>nd</sup> sess, UN Doc. CRC/C/GC/14 (29 May 2013) 20 [98].
- <sup>42</sup> United Nations Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention*, 60<sup>th</sup> sess, UN Doc. CRC/C/AUS/CO/4 (28 August 2012) 9 [38].
- <sup>43</sup> Australian Human Rights Commission, *Children's Rights Report 2016* (2016) 189 <<https://www.humanrights.gov.au/our-work/childrens-rights/projects/childrens-rights-reports>>.
- <sup>44</sup> Australian Human Rights Commission (National Children's Commissioner), Letter to the United Nations Committee on the Rights of the Child, *Call for comments on Draft Revised General Comment No 10 (2007)* (7 January 2019) 3.
- <sup>45</sup> Sally Parnell, Jesuit Social Services, Too Much Too Young: Raise The Age of Criminal Responsibility, Letter to Attorneys-General (2015) <[http://jss.org.au/wp-content/uploads/2016/01/Letter\\_to\\_AGs\\_Age\\_of\\_Criminal\\_responsibility.pdf](http://jss.org.au/wp-content/uploads/2016/01/Letter_to_AGs_Age_of_Criminal_responsibility.pdf)>.
- <sup>46</sup> Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives' (2011) 6(2) *Journal of Children's Services*, 86, 87.
- <sup>47</sup> Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives' (2011) 6(2) *Journal of Children's Services* 86, 86-95.
- <sup>48</sup> Australian Institute of Health and Welfare, Young people aged 10–14 in the youth justice system 2011–2012 (2013) vi <<http://www.aihw.gov.au/publication-detail/?id=60129543944>>.
- <sup>49</sup> See generally, Australian Human Rights Commission, *Children's Rights Report 2016* (2016) Part 4.3.2 <<https://www.humanrights.gov.au/our-work/childrens-rights/projects/childrens-rights-reports>>.
- <sup>50</sup> Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) 10.
- <sup>51</sup> Australian Human Rights Commission, *Strengthening the Citizenship Loss Provisions Bill 2018*, Submission to the Parliamentary Joint Committee on Intelligence and Security (10 January 2019) [4.3].
- <sup>52</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No 129 (2016) 362.
- <sup>53</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) 128.