Law Council
OF AUSTRALIA

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

Parliamentary Joint Committee on Intelligence and Security

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- Law Society of the Australian Capital Territory
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- Northern Territory Bar Association
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- Queensland Law Society
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The Law Council's website is www.lawcouncil.au.

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Executive summary

1. The Law Council is grateful for the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security (the **Committee**) for its review of the *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (the **2023 Citizenship Amendment**).[1]

2. While the Law Council understands the importance of laws that are enacted to maintain the security of Australia and the safety of the Australian community, it is critical that such laws are necessary and proportionate, and that these objectives are supported by a demonstrated evidential basis.

3. Citizenship deprivation[2] measures challenge key political and legal principles on which our democracy was founded and demand careful consideration by the Commonwealth Parliament. Citizenship provides formal membership of the Australian community, which comes with privileges and responsibilities. Citizenship deprivation removes those privileges and has significant consequences for a person, including the potential for: deportation; detention; prevention from entering Australia; and no longer receiving consular assistance. The Law Council has consistently advocated that such measures should be reserved for the most extraordinary of cases.[3]

4. Australia should ensure that any citizenship deprivation regime does not amount to an arbitrary deprivation of nationality. In 2022, the then United Nations Special Rapporteur on human rights and terrorism indicated her view that citizenship is a 'gateway right' which enables the 'right to have rights', that is to say, 'to claim and secure a collection of other basic human rights, in national legal systems'.[4]

5. The 2023 Citizenship Amendment has potentially far-reaching impacts because it applies to Australian dual citizens. As a vibrant multicultural society, a large proportion of Australian citizens are dual nationals, including those who are born overseas and have parents who were born overseas. The Australian Bureau of Statistics recently found[5] that the overseas-born population in Australia grew by 155,000 people in 2022, increasing to 29.5 per cent of the nation's total population. Previously, the 2021 Census found one in five Australians are born in Australia but have one or both parents born overseas. While the Law Council is unaware of statistics on the percentage of Australians with dual nationality, these figures suggest that the number of Australians potentially affected by these measures may be high. In many cases Australian nationals may have acquired another nationality, or the right to apply for

[1] *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (Cth) inserted a new Subdivision C to Part 2 of the *Australian Citizenship Act 2007* (Cth).
[2] The Law Council has used the term 'citizenship deprivation' rather than 'repudiation' or 'cessation' because it more accurately captures the involuntary character of these provisions: For example, the High Court noted that '[t]he substantive effect of the deprivation of rights of liberty conferred by Australian citizenship is not disguised by the use of the emollient language of "citizenship cessation" … *Alexander v Minister for Home Affairs [2022] HCA 19,* 580 [79] (Kiefel CJ, Keane and Gleeson JJ) ('***Alexander***').
[3] Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (17 October 2019). ('***Law Council 2019 Submission***'); Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (17 July 2015) ('***Law Council 2015 Submission***').
[4] Fionnuala Ní Aoláin, Position of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights consequences of citizenship stripping in the context of counter-terrorism with a particular application to North-East Syria (February 2022), 2-3. ('***Special Rapporteur's 2022 Views***')
[5] Australian Bureau of Statistics, Australia's overseas-born population grows to 29.5% in 2022, (Media Release, 31 October 2023).

another nationality, by operation of the law of another country and without having applied for that citizenship.

6. In outline, the 2023 Citizenship Amendment engages and may limit multiple human rights including criminal process rights, the right to equality and non-discrimination, the rights of the child, and the rights to freedom of movement, protection of the family, and liberty.[6] For a full statement of the human rights compatibility of the 2023 Citizenship Amendment the Law Council refers to the helpful assessment[7] produced by the Parliamentary Joint Committee on Human Rights.

7. The Law Council submits that the 2023 Citizenship Amendment should have been subject to greater deliberation and scrutiny in Parliament. National security laws, containing extraordinary powers with extreme consequences for individual liberty, should be subject to careful scrutiny. The Australian community, civil society stakeholders, including those with subject matter expertise, as well as representatives of culturally and linguistically diverse communities disproportionately affected by these measures should be given a proper opportunity to inform the Parliament of likely impacts on individual liberties of the reforms of the 2023 Citizenship Amendment prior to reforms coming into effect.

8. The Law Council's primary position is that the 2023 Citizenship Amendment is unnecessary, disproportionate and unjustified. Accordingly, the Law Council's primary recommendation is that the changes made by the 2023 Citizenship Amendment should be largely repealed. Subsequently, careful consideration should be given to Australia's changed security environment, the specific threat to be combatted and rule of law and international human rights law considerations which should be applied in designing a more proportionate scheme.

9. Should the 2023 Citizenship Amendment be retained, the Law Council makes the following recommendations relating to the need for further justification to establish the necessity of the 2023 Citizenship Amendment and the inadequate scrutiny of these measures when they were legislated.

- **Recommendation 1**: the Committee should seek further clarification from security agencies to understand the necessity of citizenship deprivation powers to combat any threat posed by returning foreign fighters, particularly in light of the recent downgrading of the National Terror Threat Level.
- **Recommendation 2**: if the threat of terrorism has evolved in ways that require citizenship deprivation as a counter-terrorism tool, clear evidence of those changed intentions and capabilities should be provided in an appropriate form.
- **Recommendation 3**: the Committee should make clear that the timeline for passage of the 2023 Citizenship Amendment was inappropriate. In future, national security legislation raising fundamental constitutional and political questions should be subject to proper debate and scrutiny.
- **Recommendation 4**: the Committee should reaffirm the importance of its oversight role in informing the design of evidence-based, proportionate

[6] See for example, *International Convention on the Elimination of All Forms of Racial Discrimination* [Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969), Art. 5(d)(iii), *International Covenant on Civil and Political Rights*, Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art. 24(3) ('***ICCPR***'); and *Convention on the Rights of the Child* [Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), Art. 7 and 8; *Convention on the Reduction of Statelessness*, [Opened for signature 30 August 1961 989 UNTS 175 (entered into force 13 December 1975), Art. 8(2) and 8(3).

[7] Parliamentary Joint Committee on Human Rights, Report 14 of 2023 (19 December 2023). ('***PJCHR Report***')

national security legislation. The expertise and importance of the Parliamentary Joint Committee on Human Rights should be reaffirmed and a Bill that raises serious human rights concerns should not, generally, be passed without the receipt of that Committee's report on the Bill.

10. The Law Council remains of the view that, if the 2023 Citizenship Amendment is retained, it should only be available where a person has been sentenced to six or more years of imprisonment for a serious terrorism offence, or (subject to additional justification) treason, sabotage or espionage.

- **Recommendation 5:** The subsection 36C(3) definition of 'serious offence' should be amended as set out at paragraphs 56 and 57 of this submission.
- **Recommendation 6:** as a minimum, the definition of serious offence should remove reference to:
  - section 83.1 of the Criminal Code (advocating mutiny); and
  - offences against a provision of Division 92 of the Criminal Code (foreign interference).
- **Recommendation 7:** Citizenship deprivation should be available only where a person has been sentenced to six or more years of imprisonment for a serious offence (as defined in Recommendation 5 and 6). Should this not be accepted, consideration should be given to the amendment contained in sheet 2323 which would impose a minimum sentencing threshold of five years.
- **Recommendation 8:** Concurrent sentences should not be counted cumulatively for the purpose of determining eligibility for a citizenship deprivation. Section 36C(8) should be repealed. The minimum imprisonment threshold specified in section 36C(1)(b) should only be satisfied if either: at least one individual sentence for a serious offence exceeds the threshold; or the aggregate[8] of at least two cumulative[9] sentences for a serious offence/s exceeds the threshold. Combinations of shorter, concurrent, sentences for 'serious offences' should not be included. The Law Council supports the amendments contained in sheet 2318.
- **Recommendation 9:** Section 36C(9)(b) should also be repealed. Citizenship deprivation powers should not be triggered unless it is one or more "serious offence(s)" as defined resulting in a sentence over the threshold. Aggregate sentences, where the length of the sentence is a result of offences that are not 'serious offences', should not be included simply because a shorter sentence for a 'serious offence' is part of the aggregate.

11. In relation to the departures from orthodox principles of sentencing, the Law Council makes the following recommendations.

- **Recommendation 10**: Further clarification is required on the timing of a citizenship cessation order forming part of the sentence. If section 36C(1) is intended to require a citizenship cessation order to be made as part of the sentencing hearing, rather than as part of the sentence, this ought to be explicitly stated.

[8] See further, *Crimes Act 1914* (Cth), s. 16(1) (definition of 'aggregate'). ('***Crimes Act***')
[9] To be precise, a sentencing judge determines the commencement date for each federal sentence which has the practical effect of setting a cumulative, partly cumulative or concurrent sentence. See further, Crimes Act, s. 19.

- **Recommendation 11:**If a citizenship deprivation forms part of the sentence, the orthodox approach to fact finding and the standard of proof must apply. That is, the sentencing judge may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt.
- **Recommendation 12:** Section 36C(11) should be removed and the ordinary principles in sentencing federal offenders contained in Part IB of the *Crimes Act 1914* (Cth) should apply to authorising citizenship deprivation.
- **Recommendation 13:** Revised explanatory materials should accompany any amendment to clarify the operation of orthodox principles of sentencing in relation to citizenship deprivation.
- **Recommendation 14:** Consideration should be given to inserting into section 36C(5)(a) a 'serious prejudice' threshold in line with the UN Convention on the Reduction of Statelessness.

12. In relation to the need to provide further guidance on how the Minister's discretion to make an application for citizenship deprivation, the Law Council makes the following recommendation.

- **Recommendation 15:** The Minister should issue guidelines providing further specification of the considerations applicable to the decision to bring an application for a citizenship deprivation under section 36D(1).

13. The Law Council strongly opposes the application of citizenship deprivation provisions to children and makes the following recommendations.

- **Recommendation 16:** The Minister should only be able to apply for citizenship deprivation where the affected person was 18 years of age at the time of the offending.
- **Recommendation 17:** If citizenship deprivation is available in relation to minors, it should only be authorised in exceptional circumstances.

14. The Law Council strongly opposes the potential retrospective application of the 2023 Citizenship Amendment and recommends as follows.

- **Recommendation 18:** The 2023 Citizenship Amendment should only apply to convictions that pertain to conduct after the commencement date of 8 December 2023.

15. In relation to issues of constitutional validity, the Law Council recommends as follows.

- **Recommendation 19:** The Committee should make inquiries of the Attorney-General's Department regarding the characterisation of the 2023 Citizenship Amendment is within the scope of a constitutional head of power. Consideration should be given to whether there is sufficient connection between the expanded approach to 'serious offences' in the 2023 Citizenship Amendment and the scope of the aliens power.
- **Recommendation 20:** The Law Council supports the amendments contained in sheet 2287[10] which ensure that, prior to making a citizenship cessation order, the court must be satisfied that the affected person is not an Aboriginal or Torres Strait Islander person.

[10] Amendment Sheet 2287 (Moved by Senator David Pocock), Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023.

The Law Council's position

16. The Law Council's primary position is that the 2023 Citizenship Amendment is unnecessary, disproportionate and unjustified, and should be largely repealed.

17. The Law Council reiterates[11] its long-standing view that citizenship deprivation must occur only in exceptional circumstances: that is, where an individual has been convicted by an independent, impartial and competent court of a serious offence. The Law Council recognises that the 2023 Citizenship Amendment is an improvement[12] on previous regimes because it addresses the issues of constitutional validity arising from the decision of the High Court in *Alexander* and *Benbrika.* The power to deprive citizenship as punishment for conduct repudiatory of the shared values of the Australian community, is exclusively judicial and, therefore, must be imposed by judges not executive officials.

18. Beyond this, however, the Law Council does not consider that a persuasive case for the necessity of the 2023 Citizenship Amendment, in light of the changed security assessments of the national terror threat level, has been provided. Concerningly, no evidence was provided for the significant expansion of the definition of serious offences beyond the scope of previous similar regimes. The Law Council is unpersuaded that there was sufficient reason to bypass the usual parliamentary scrutiny and proper debate in the course of passage of the 2023 Citizenship Amendment. The absence of scrutiny has contributed to some of the uncertainties described in this submission.

19. The Law Council does not consider that all the issues pertaining to constitutional validity of the 2023 Citizenship Amendment were adequately considered prior to its passage. In particular further justification should be provided to establish a 'sufficient connection' to characterise the expanded definition of 'serious offences' in the 2023 Citizenship Amendment as being within the scope of the aliens power at clause 51(xix) of the Constitution.

20. Given that the 2023 Citizenship Amendment envisages a significant departure from orthodox principles of sentencing in respect of similar offending behaviour, only in respect of dual citizens, it risks undermining consistency in sentencing of federal offenders. The need for such consistency is well-accepted.[13] The Australian Law Reform Commission has noted that '[i]t is a fundamental principle of the criminal law and the sentencing process that like cases should be treated in a like, or consistent, manner'.[14]

21. Stripping citizenship at the time of sentencing is antithetical to our criminal justice system which is based upon not only punishment and retribution but the encouragement of rehabilitation for the benefit not only of the offender but of the community. Many people who have expressed, and acted upon, the most repugnant beliefs have been rehabilitated during the course of their sentence and, with maturation, education and treatment, completely resiled from those beliefs (see, for example, *Al-Kutobi* and *Kiad v R* [2023] NSWCCA 155). To strip citizenship at the

[11] Law Council 2019 Submission, 5 [4].
[12] At the time the 2023 Citizenship Amendment was introduced, the Law Council noted that insofar as 'these measures vest decision-making powers on citizenship cessation in the judiciary as opposed to the executive, the Bill represents a real improvement on the existing framework.' Law Council of Australia, Removal of Australian citizenship deserves democratic scrutiny, (Media Release, 30 November 2023).
[13] See further, Australian Law Reform Commission, Same Crime, Same Time: Sentencing of Federal Offenders (ALRC Report 103, 13 September 2006).
[14] Ibid, 14.

sentencing stage is to deny the efficacy of a fundamental premise of the criminal justice system: the capacity for reform and rehabilitation.

22. The core premise underlying the 2023 Citizenship Amendment is that because citizenship deprivation is punitive in character it should be imposed as a part of sentencing by courts. That premise risks incoherence because of the fundamental ways in which the orthodox principles of sentencing are undercut by the 2023 Citizenship Amendment. For example, as explained below, section 36C(8), regarding the counting of concurrent sentences for the purpose of a period of imprisonment undercuts the principles of totality and parity and risks producing arbitrary outcomes.

23. Citizenship deprivation (a form of de-naturalisation which is restricted to Australian citizens who will not be rendered stateless) risks discriminatory operation in that it means that there will always be three classes of Australians: those who are born in Australia without any deemed allegiance to any other country, dual-national Australians who can be stripped of their citizenship and Australian citizens who are at risk of statelessness if subjected to citizenship deprivation. The Government has not provided convincing justification as to why, as a matter of principle, a person who has dual nationality should be subject to the prospect of additional punishment merely by virtue of that fact (which may result from happenstance).

24. The Law Council is concerned that these provisions may disproportionately apply to non-Anglo Australian religious and political extremists while being less likely to apply to the emerging threat of 'white supremacists', 'neo-Nazis' and 'sovereign citizen' extremists, many of whom are likely to be Australian born Anglo-Australians. In this regard, the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has indicated her views:[15]

> *The Special Rapporteur is particularly troubled about observed patterns of gender inequality and gendered exceptionalities in current counter-terrorism citizenship stripping practices. She also identifies targeting of religious and ethnic minorities with increased selective application of citizenship stripping. These practices in effect create second-class citizenship for minority groups whose lived experience of citizenship functions as less stable than it does for majority or dominant populations in society.*

25. The Law Council expresses doubt about the utility of citizenship deprivation as an effective tool for punishing and deterring serious terrorism-related behaviour because of the suite of counter-terrorism tools that apply to all offenders irrespective of their citizenship status. In this regard, the Law Council has recently considered[16] the extensive range of criminal offences, law enforcement powers and post-sentence orders, such as Control Orders under Division 104 and Extended Supervision Orders under Division 105A of the Criminal Code, that are available to security agencies to regulate the security risk posed by all serious offenders—including, for example, returning foreign fighters. In particular, the Law Council has argued[17] that modifying the Extended Supervision Order regime under Division 105A, based on the detailed

[15] Special Rapporteur's 2022 Views, 2-3.
[16] Law Council of Australia, Submission to PJCIS, Counter-Terrorism and Other Legislation Amendment Bill 2023 (13 October 2023); Law Council of Australia, Submission to PJCIS, Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995 (Cth) (17 July 2023) ('***Law Council Division 105A***')
[17] Law Council Division 105A, 6.

recommendations[18] of the fourth Independent National Security Legislation Monitor Grant Donaldson SC, is a proportionate tool to regulate security risk.

26. As a matter of practice, illustrated in the case of *Re Canavan* [2017] HCA 45, the Law Council is concerned that these laws may be unworkable and arbitrary because of the inherent uncertainty in determining, as a factual question under foreign law, whether a person holds, or is entitled to hold, foreign citizenship.[19]

27. Commentators have described the difficulties encountered in ascertaining foreign citizenship as a factual question.[20] The Law Council refers to the evidence of Professor Helen Irving that there is a risk that '[i]f a State does not accept a decision of an Australian Government or court that a person is one of its citizens, the person whose Australian citizenship is revoked will become stateless, contrary to the Bill and contrary to Australia's international obligations'.[21] The Law Council has previously highlighted[22] that the case of Neil Prakash demonstrates that the recent practical experience of the operation of citizenship deprivation in the case of dual-citizens raises serious questions about whether safeguards are effective in protecting a person from statelessness.

28. Should the 2023 Citizenship Amendment be retained, it must be amended to render it a less disproportionate measure. Those improvements are discussed below.

Introduction

Overview

29. The 2023 Citizenship Amendment amended the *Australian Citizenship Act 2007* (Cth) (the **Citizenship Act**) to repeal provisions, and establish new provisions, for the deprivation of Australian citizenship in certain circumstances.

30. The 2023 Citizenship Amendment was passed following the High Court of Australia decisions of *Alexander v Minister for Home Affairs* [2022] HCA 19 ('***Alexander***') and *Benbrika v Minister for Home Affairs* [2023] HCA 33 ('***Benbrika***'). Amongst other things, it repeals sections 36B to 36K of the Citizenship Act which empowered the Minister for Home Affairs to make a determination that an individual cease to be an Australian citizen in specified circumstances.

31. *Alexander* and *Benbrika* held that sections 36B and 36D of the Citizenship Act, inserted by the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth) (**2020 Citizenship Amendment**), were invalid because they reposed in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt. The High Court held that there was no constitutional barrier to the Commonwealth Parliament legislating to deprive an individual of their Australian citizenship in extreme

[18] Independent National Security Legislation Monitor, Mr Grant Donaldson SC, Review of Division 105A (and related provisions of the Criminal Code (Report, Tabled 30 March 2023).
[19] Those cases demonstrate in particular the arbitrary situation where reasons came to light in relation to politicians who, by operation of the laws of another country, unknowingly held dual-citizenship or the capacity to obtain it.
[20] See for example, Rayner Thwaites and Helen Irving, 'Allegiance, Foreign Citizenship and the Constitutional Right to Stand for Parliament' (2020) 48 *Federal Law Review* 299-323.
[21] Professor Helen Irving, Submission no. 6 to the PJCIS, Review of the amendments made by the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023, 3.
[22] Law Council 2019 Submission, 8 [16].

cases.[23] However, sections 36B and 36D inserted by the 2020 Citizenship Amendment pertained to two different situations.[24]

- Section 36B provided for deprivation of citizenship on the determination of the Minister, where the Minister was satisfied that a person over 14 years of age had engaged in terrorism-related conduct but where they had not been tried or convicted for that conduct.
- Section 36D provided for deprivation of citizenship on the determination of the Minister, where the Minister was satisfied that the affected person had been convicted of one or more specified terrorism-related offences and had been sentenced to a period of imprisonment of at least three years (or periods that total at least three years).

32. The new provisions in sections 36B and 36D, inserted into the Citizenship Act by the 2023 Citizenship Amendment, repose in a sentencing court the power to deprive a person of citizenship at the time of sentence and as part of the sentence, upon an application by the Minister.

- If a person is convicted of one or more serious offences and the court has decided to impose on the person, in respect of the conviction or convictions, a period of imprisonment that is at least 3 years or periods of imprisonment that total at least 3 years; then under section 36D, the Minister may make an application for citizenship deprivation before the person is sentenced.[25] The Minister's application must be made in the jury's absence, must not be referred to in the presence of the jury and must only be heard after the person is convicted of one or more serious offences.[26]
- The Minister's application must also include certain information, for example, about the person's nationality or citizenship of other countries.[27] Written notice must be provided to the person affected as soon as practicable after the application is made.[28]
- In deciding whether to authorise citizenship deprivation under section 36C(1), the sentencing court must consider certain matters specified in sections 36C(4), (5) and (6), including that the court must be satisfied that the person is aged 14 years or over; the person is an Australian citizen; and the person's conduct to which the conviction or convictions relate is 'so serious and significant that it demonstrates that the person has repudiated their allegiance to Australia'.[29]
- The court must also have regard to certain matters including, if the person subject to citizenship deprivation is under 18 years of age, the best interests of the child.[30] If the person has any dependent children in Australia, the court must consider the best interests of those children.[31] Additionally, the court must consider the person's 'connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of

[23] Alexander, [63] – [64] and [96] (Kiefel CJ, Keane and Gleeson JJ).
[24] In both cases, the Minister had to be satisfied that the person's conduct or conviction demonstrated that the person had repudiated their allegiance to Australia and that it would be contrary to the public interest for the person to remain an Australian citizen, with reference to certain mandatory factors for consideration.
[25] Ibid, s. 36D(1).
[26] Ibid, s. 36D(5).
[27] Ibid, s. 36D(4)(c).
[28] Ibid, s. 36D(6).
[29] Ibid, s. 36C(4)(c).
[30] Ibid, s. 36C(6)(a).
[31] Ibid, s. 36C(6)(b).

that country to the person'.[32] The court has the discretion to consider other relevant matters in deciding whether to make an order.[33]

33. For context, there are other grounds for citizenship deprivation that reflect the need to protect the integrity of the naturalisation process. Paragraph 34(2)(b) of the Citizenship Act already permits the Minister to, in respect of naturalised Australian citizens, revoke citizenship on certain grounds:[34] for example, because the person has been convicted of a serious offence after making the application to become an Australian citizen. The constitutional validity of that power was recently upheld by the High Court on the basis that it was reasonably capable of being seen as necessary for the purpose of protecting the integrity of the naturalisation process.[35]

Legislative history and security background

34. Examination of the legislative history[36] of counter-terrorism related citizenship deprivation powers reflects that these powers were included in the Citizenship Act as part of a suite of responses to the threat that foreign terrorist fighters perceived to present to Australia and its interests.[37] A crucial background assumption informing the scrutiny of the development of these provisions has been that the threat posed by terrorism was especially pronounced between 2014 and 2022 when Australia's National Terror Threat level was classified as 'probable'.

The Allegiance to Australia Bill 2015

35. The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the **2015 Citizenship Amendment**) was one of a suite[38] of legislative measures introduced in response to the security threat to Australia posed by the 'unexpected rise of ISIL, the creation of its so-called caliphate, and the significant numbers of Australian dual nationals who fought for or supported ISIL, or otherwise were involved in its terrorist activities'.[39] The Minister's Second Reading Speech stated that:[40]

> *The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 implements the commitment made by the Prime Minister, myself and the Australian government to address the challenges posed by dual citizens who betray Australia by participating in serious terrorism related activities … We face a heightened and complex security environment. Regrettably, some of the most pressing threats to the security of the*

[32] 2023 Citizenship Amendment, s. 36C(6)(c).
[33] 2023 Citizenship Amendment, s. 36C(7).
[34] See for example, Citizenship Act, s. 34(2)(b)(i) which permits citizenship deprivation where the person has been convicted of an offence relating to false statements or representations in relation to the person's application to become an Australian citizen.
[35] See further, *Jones v Commonwealth of Australia* [2023] HCA 34 ('***Jones***').
[36] See further, Parliamentary Joint Committee on Intelligence and Security (**PJCIS**), Advisory Report on the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Report, August 2020), 4-17 ('***PJCIS 2020 Report***'); PJCIS, Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Report, September 2015), 9-18 ('***PJCIS 2015 Report***').
[37] Third Independent National Security Legislation Monitor, Dr James Renwick CSC SC, Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007 (Report, 2019), x-xii.
[38] See further, amendments to extend the grounds on which Australian passports could be revoked or cancelled for persons seeking to travel to engage in foreign conflict: Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.
[39] Third Independent National Security Legislation Monitor, Dr James Renwick SC, Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007 (Report, 2019), x 1.7.
[40] Commonwealth, Parliamentary Debates, House of Representatives, 24 June 2015 (Peter Dutton MP—Minister for Immigration and Border Protection), 7369.

> *nation and the safety of the Australian community come from citizens engaged in terrorism. It is now appropriate to modernise provisions concerning loss of citizenship to respond to current terrorist threats. The world has changed, so our laws should change accordingly.*

36. Furthermore, this suite of measures followed the findings of the January 2015 *Review of Australia's Counter-Terrorism Machinery*[41] (the **2015 Review**) regarding the need to better manage the security risk posed by returning foreign fighters. The 2015 Review stated that the Government was, at that time, investigating around 230 Australians who were fighting for, or supporting, extremist groups. Of that cohort, around 90 were in Syria, Iraq and the region, while 140 were located in Australia. The 2015 Review recommended coordination across Government to 'develop a strategy for managing the controlled return of Australian foreign fighters, subject to the Government's imposition of stringent, individually-tailored terms and conditions'.[42] It was proposed that citizenship revocation should be one option, among a range of less onerous conditions, to be imposed on returning foreign fighters: for example, temporary exclusion and mandatory de-radicalisation, and cooperation with law enforcement.

37. Notably, the 2015 Citizenship Amendment, which responded to a more immediate deterioration in the security situation, was subject to greater scrutiny, resulting in significant legislative amendment, reflecting the concerns of civil society stakeholders, including the Law Council. The Committee agreed[43] with some of the Law Council's recommendations and made 27 detailed recommendations to improve the proportionality of the scheme. The Government accepted those recommendations and introduced relevant amendments.[44]

38. It is also notable that the PJCIS 2015 Report placed weight on the 'heightened security environment in Australia'[45] driven by Australians travelling overseas to train with, fight for or otherwise support extremist groups, and the risks posed by those persons on their return to Australia.

Current National Terrorism Threat Level

39. The Law Council acknowledges the evolving character of the threat posed by terrorism. However, the starting point for consideration of the current status of that threat must refer to the recent change in the current National Terrorism Threat Level. The threat level, which was downgraded[46] from '*probable*' in November 2022, is currently '*possible*'—which is designated as meaning that 'there are a small number of people in Australia and overseas who want to cause Australia harm'.[47]

40. A crucial feature of the diminished terror threat assessment is the diminished capabilities and threat posed by offshore violent extremist groups like the Islamic State of Iraq and the Levant. In this regard, the current threat assessment states that:[48]

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[41] Department of the Prime Minister and Cabinet, Review of Australia's Counter-Terrorism Machinery (Report, January 2015).
[42] Ibid, vi.
[43] See for example, the Committee's consideration of the Law Council's concern in relation to the application of citizenship deprivation provisions to children: 164, [8.15] and 178, Recommendations 20, 21.
[44] See further, Peter Dutton MP, 'Government responds to report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Media Release, 10 November 2015).
[45] PJCIS 2015 Report, 46 [4.42].
[46] Director-General of Security, Mike Burgess, National Terrorism Threat Level (Statement, 28 November 2022).
[47] Australian Government, Current National Terrorism Threat Level (Webpage, 28 November 2022).
[48] Ibid.

> *The threat from religiously motivated violent extremists has moderated. In particular, the offshore networks, capabilities and allure of Sunni violent extremist groups—such as the Islamic State of Iraq and the Levant and al-Qa'ida—have been substantially degraded. Accordingly, the support for these groups in Australia has declined further. But the violent extremist beliefs which motivated these groups persist, and will continue to appeal to a small number of Australians.*

41. In a recent submission to this Committee, reviewing extraordinary powers introduced, and renewed, during the period when the national terror threat level was probable, the Law Council stated:[49]

> *There is an onus on Government and law enforcement bodies to provide the requisite justification of the necessity of these measures given their extraordinary character and the changing nature of threats to Australia's security.*

42. Because of the truncated consultation prior to passage of the 2023 Citizenship Amendment there has been limited opportunity for security agencies to explain changes in the nature of the security risk posed by returning foreign fighters after the degrading of the Islamic State—in particular, evidence of attack planning, intent and capability to justify the continuation of citizenship deprivation powers. The Law Council acknowledges that these matters cannot be completely disclosed in public forums. However, the Committee should seek clarification in classified settings.

Recommendations

- **Recommendation 1: The Committee should seek further clarification from security agencies to understand the necessity of citizenship deprivation powers to combat any threat posed by returning foreign fighters, particularly in light of the recent downgrading of the National Terror Threat Level.**
- **Recommendation 2: If the threat of terrorism has evolved in ways that require citizenship deprivation as a counter-terrorism tool, clear evidence of those changed intentions and capabilities should be provided in an appropriate form.**

Inadequate timeline for review and debate

43. The Law Council reiterates[50] its concern that the 2023 Citizenship Amendment proceeded through Parliament without sufficient scrutiny and opportunity for debate and bypassing review by this Committee. The timeline of the passage of the 2023 Citizenship Amendment is set out below.

- 29 November 2023—the 2023 Citizenship Amendment was introduced and read a first time in the House of Representatives.
- 30 November 2023—the bill was introduced in the Senate.
- 4 December 2023—the Senate resolved that, following passage of the bill, it would be referred for review by this Committee.

[49] Law Council of Australia, Submission to PJCIS, Counter-Terrorism and Other Legislation Amendment Bill 2023 (13 October 2023).
[50] Law Council of Australia, Removal of Australian citizenship deserves democratic scrutiny (Media release, 30 November 2023). ('***Law Council November Media Release***')

- 6 December 2023—the bill passed both houses.

44. It is unclear, based on the evidence advanced in public, why passage of the 2023 Citizenship Amendment was considered urgent. Instead, the harsh and unusual form of punishment that it provided for should have signalled the need for nuanced scrutiny of the necessity, proportionality and effectiveness of the legislation.

45. Review by a parliamentary committee prior to its passage would have provided an opportunity for stakeholders to scrutinise the provisions of the 2023 Citizenship Amendment, identify any unintended consequences, and determine whether it struck an appropriate balance.

46. Deprivation of citizenship is a profound detriment[51] that implies far-reaching consequences for the human rights of the individual concerned. Justices Gordon and Edelman found that citizenship deprivation involves 'the total destruction of the individual's status in organized society'.[52] Justice Gordon described the extent of the impact on an affected individual's rights in the following terms:[53]

> *… a permanent rupture in the relationship between the individual and the State in which the individual had enjoyed equal participation in the exercise of political sovereignty, destroy(ing) for the individual the political existence that was centuries in the development. It involves loss of fundamental rights of nationality and citizenship with immediate effect and permanently. The individual is made vulnerable to exclusion or deportation from the territory (with no right of return), and to detention in custody to the extent necessary to make the deportation effective.*

47. Citizenship deprivation also raises fundamental questions about the liberal democratic character of our society, namely—the nature and limits of membership of the Australian body politic. The plurality in *Alexander v Minister for Home Affairs* described the nature and severity of citizenship deprivation in terms of the loss of 'public rights' of 'fundamental importance'.[54] It is appropriate that the determination of these public rights be subject to comprehensive debate and scrutiny by all Australians.

Failure to consider input of Parliamentary Joint Committee on Human Rights

48. The Law Council notes with concern the assessment[55] of the Parliamentary Joint Committee on Human Rights, which identified several human rights related concerns in the 2023 Citizenship Amendment (including, for example, 'a significant risk that the measure would not be compatible with the absolute prohibition on retrospective punishment'[56]) and other matters discussed further below.

49. Concerningly, the Committee observed that 'the speed of [the 2023 Citizenship Amendment's] passage meant that the committee was unable to provide its human rights scrutiny considerations while the bill was before the Parliament'.[57]

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[51] *Benbrika v Minister for Home Affairs* [2023] HCA 33, [63] (Gordon J) ('***Benbrika***').
[52] *Alexander,* [248] (Edelman J) and [172] (Gordon J) citing *Trop v Dulles* (1958) 356 US 86 at 101.
[53] *Benbrika*, [63] (Gordon J).
[54] *Alexander*, [74] (Kiefel CJ, Keane and Gleeson JJ).
[55] Parliamentary Joint Committee on Human Rights, Report 14 of 2023 (19 December 2023). ('***PJCHR Report***')
[56] PJCHR Report, 27 [1.49].
[57] PJCHR Report, 29 [1.52].

50. The Law Council expresses concern that the explanatory materials accompanying the 2023 Citizenship Amendment, the timeline for passage of the bill, and the absence of detailed review by a parliamentary committee meant that it did not meet the standard for heightened justification set out above.

Recommendations

- **Recommendation 3: The Committee should make clear that the timeline for passage of the 2023 Citizenship Amendment was inappropriate. In future, national security legislation raising fundamental constitutional and political questions should be subject to proper debate and scrutiny.**
- **Recommendation 4: The Committee should reaffirm the importance of its oversight role in informing the design of evidence-based, proportionate national security legislation. The expertise and importance of the Parliamentary Joint Committee on Human Rights should be reaffirmed and a Bill that raises serious human rights concerns should not generally be passed without the receipt of that Committee's report on the Bill.**

Proportionality concerns

51. Should the 2023 Citizenship Amendment be retained, the Law Council's key areas of concern, and suggested improvements, are outlined below.

Discussion of the definition of 'serious offence'

The overextension of the definition of 'serious offence'

52. Conduct and offences captured by laws that lead to citizenship deprivation should be of a sufficient level of objective seriousness to warrant such an extreme consequence. The Law Council remains of the view that, if the 2023 Citizenship Amendment is retained, it should only be available where a person has been sentenced to six or more years of imprisonment for a serious terrorism offence.

53. Subsection 36C(3) defines 'serious offence' to mean a list of prescribed offences, which vary widely in the range of seriousness—including, for example, an offence against a provision of Division 92 of the Criminal Code relating to foreign interference. As set out above, the only requirements in addition to conviction for a 'serious offence' are that the person has been sentenced to a period of imprisonment that is at least 3 years or periods of imprisonment that total at least 3 years, and the court is satisfied of the matters specified in subsection 36C(4).[58]

54. The expanded approach to the definition of serious offences in the 2023 Citizenship Amendment is contrary to the approach taken in both section 36D(5) inserted by the

[58] A person need not even be sentenced to an effective total of three years. Pursuant to s. 36C(8), the sanction would apply to persons who were sentenced to individual concurrent sentences where none of them, including the overall effective or aggregate sentence, exceeded three years. Application of the principle would then depend upon the prosecution's decision whether or not to lay a separate charge for course of conduct which involves different offences but little additional criminality. Also, the sentence for a serious offence may be minor, but subsumed in a longer sentence for an offence which is not a "serious offence" as defined but might be a serious enough offence to warrant a sentence of three years or more (such as Centrelink fraud or a serious assault).

2019 Citizenship Amendment and section 35A(1)(a) of the 2015 Citizenship Amendment.

55. The current scope of subsection 36C(3) serious offences extends beyond that of less restrictive post-sentence orders (see Division 105A Subdivision B of the Criminal Code); it is therefore conceivable that an individual could be subject to citizenship deprivation, but not have been eligible for an extended supervision order. The exclusion of proportionality as a consideration when determining whether or not to make a citizenship cessation order serves only to highlight the incongruity of the scope of section 36C(3).

56. In the first instance, if the 2023 Citizenship Amendment is retained, the definition of 'serious offence' should be limited to terrorist offences for which a post-sentencing order may be made, consistent with section 105A.3(1) of the Criminal Code. This would include convictions in relation to the following provisions:

- an offence against Subdivision A of Division 72 (international terrorist activities using explosive or lethal devices);
- a serious Part 5.3 offence;
- an offence against Part 5.5 (foreign incursions and recruitment), except an offence against subsection 119.7(2) or (3) (publishing recruitment advertisements); and
- an offence against the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*, except an offence against paragraph 9(1)(b) or (c) of that Act (publishing recruitment advertisements).

57. Subject to a compelling justification being provided regarding the inclusion of other serious offences, the Law Council supports the section 36C(3) definition of 'serious offence' being amended to include an offence against the following provisions:

- a provision of Subdivision B of Division 80 of the Criminal Code (treason);
- a provision of Division 82 of the Criminal Code (sabotage), other than section 82.9; and
- a provision of Division 91 of the Criminal Code (espionage).

Reduction in minimum sentencing threshold

58. The Law Council argued[59] against the reduction in the minimum sentencing threshold from six years to three years first imposed by the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 because it was contrary to the weight of reasoning across multiple reviews—including by this Committee. The Law Council maintains this position.

59. A sentence of three years is not generally imposed for cases with a high degree of objective seriousness or moral culpability. The Committee accepted the logic of the Law Council's preferred position in its reasoning in its Advisory Report on the 2015 Bill:[60]

> *While limiting the provision to more serious offences is an appropriate measure to better define the scope of conduct leading to revocation, the Committee notes that even following a conviction there will still be degrees of seriousness of conduct and degrees to which conduct*

[59] Law Council 2019 Submission, 15-17 [50] – [60].
[60] PJCIS 2015 Advisory Report, 115 [6.25].

> *demonstrates a repudiation of allegiance to Australia. Therefore, the Committee recommends that loss of citizenship under this provision not be triggered unless the person has been given sentences of imprisonment that together total a minimum of six years for offences listed in the Bill.*
>
> *Some members of the Committee were of the view that a lower or higher threshold was preferable; however, on balance it was considered that a six year minimum sentence would clearly limit the application of proposed section 35A to more serious conduct. It was noted that three years is the minimum sentence for which a person is no longer entitled to vote in Australian elections. Loss of citizenship should be attached to more serious conduct and a greater severity of sentence, and it was considered that a six year sentence would appropriately reflect this.*

60. The Law Council's National Criminal Law Committee has queried the characterisation in the Explanatory Memorandum that '[a]ny term of imprisonment is considered serious, and courts often only impose imprisonment for the most serious of offences'.[61] While it is true that courts may only impose imprisonment as a last resort,[62] imposition of an imprisonment term of three years does not itself indicate a penalty being imposed for a high degree of culpability or in relation to a high level of objective seriousness.

61. Illustratively, the offence of reckless foreign interference under section 92.3 of the Criminal Code, which has a maximum applicable penalty of 15 years, only requires recklessness as to whether the conduct will, for example, influence a political or governmental process of the Commonwealth or a State or Territory. If a person is convicted and sentenced to three years imprisonment in respect of that offence it would indicate that the behaviour is towards the lower end of objective seriousness and culpability. Similarly, a preparatory offence[63]—which requires a low level of culpability and results in a low level of harm—may also result in a penalty of three years imprisonment being imposed. Additionally, the counting of concurrent sentences, as highlighted below, may mean that a person falls within the ambit of citizenship deprivation as a result of two or more concurrent sentences of less than three years.

62. For the reasons outlined above, the Law Council recommends that, if the 2023 Citizenship Amendment is retained, it should be amended so that citizenship deprivation is available only where a person has been sentenced to six or more years of imprisonment for a serious terrorism offence.

Concurrent sentences

63. The Law Council considers that section 36C(8), which requires a court to add the total length of concurrent sentences for the purpose of applying the threshold, is disproportionate. The example set out underneath section 36C(8) encapsulates the operation of the provision:

> *A person is convicted of 2 serious offences and a court has decided to impose on the person in respect of the convictions 2 periods of 2 years*

[61] Explanatory Memorandum, 35.
[62] See for example, *Crimes Act 1914* (Cth), s. 17A(1) which requires that a court shall not pass a sentence of imprisonment on any person for a federal offence, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case. ('***Crimes Act***')
[63] See for example, Criminal Code, s. 92.4 (offence of preparing for a foreign interference offence).

> *imprisonment to be served concurrently. For the purposes of subsection (1), the total period of imprisonment is 4 years.*

64. In criminal law, the extent of accumulation or concurrency between sentences must reflect the principle of totality—that is, the aggregate or overall effective sentence imposed for multiple offences, must be 'just and appropriate' to the totality of the offending behaviour.[64]

65. Section 36C(8) risks undercutting the principle of totality by allowing revocation of the citizenship of a person sentenced to a combined total of less than the minimum threshold (three years imprisonment). In the example above from the note to the section itself, the sentencing court which imposed two concurrent sentences of two years imprisonment must have decided that two years—not three years—imprisonment was the appropriate overall sentence to reflect the totality of the criminality involved in *both* offences.

66. Concurrent sentences should not be treated as if they were accumulative. To do so would be antithetical to the totality principle. Furthermore, it may lead to arbitrary application of the citizenship deprivation provisions based upon prosecutorial discretion. Two otherwise identical offenders could be treated differently where, in one case, the prosecution lays a separate charge for each act in a course of conduct while, in another case, laying a single 'rolled up' charge. A sentencing court would be likely to impose the same overall sentence reflecting the totality of criminality. If the overall criminality called for less than the threshold amount, the provision would apply to the offender who was sentenced for a single count. However, it may apply to the other offender because each individual sentence would be added together.

67. For the reasons outlined above, consideration should be given to the amendments contained in sheet 2318[65] which would ensure that, for the purpose of determining the minimum period of imprisonment specified in section 36C(1)(b), periods of imprisonment, to the extent that those periods are to be served concurrently, are counted only once.

68. Further, Section 36C(9)(b) should be repealed so that the provision should only apply if at least one individual sentence for a serious offence, or the aggregate of at least two such sentences, exceeds the threshold of at least 6 years. Combinations of shorter, concurrent, sentences for "serious offences" should not be included (section 36C(8)).

69. Likewise, aggregate sentences where the length of the sentence is a result of offences that are not "serious offences" should not be included simply because a shorter sentence for a "serious offence" is part of the aggregate (section 36C(9)(b)). An example could be where an offender is being sentenced for major drug or fraud offences and, at the same time, for a minor example of a terrorism offence (such an offence could be, for example, sending a single text message in support of terrorism and might call for a sentence well below the threshold). The sentence for the drug or fraud offences would then be the reason why the threshold was exceeded, and the offender was made subject to possible citizenship deprivation.

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[64] *Mill v The Queen* [1988] HCA 70, [8]. For a description of the two limbs of the totality principle, see further: *Roffey v Western Australia* [2007] WASCA 246, [24]-[26] (McLure JA) ('***Roffey***')

[65] Amendment Sheet 2318, Moved by Senator Thorpe (Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023.

Recommendations

- **Recommendation 5: The subsection 36C(3) definition of 'serious offence' should be amended as set out at paragraph 56 and 57.**
- **Recommendation 6: As a minimum, the definition of serious offence should remove reference to:**
  - **section 83.1 of the Criminal Code (advocating mutiny); and**
  - **offences against a provision of Division 92 of the Criminal Code (foreign interference).**
- **Recommendation 7:Citizenship deprivation should be available only where a person has been sentenced to six or more years of imprisonment for a serious terrorism offence. Should this not be accepted, consideration be given to the amendment contained in sheet 2323 which would impose a minimum sentencing threshold of five years.**
- **Recommendation 8: Concurrent sentences should not be counted cumulatively for the purpose of determining eligibility for a citizenship deprivation. Section 36C(8) should be repealed. The minimum imprisonment threshold specified in section 36C(1)(b) should only be satisfied if either: at least one individual sentence for a serious offence exceeds the threshold; or the aggregate of at least two cumulative sentences for a serious offence/s exceeds the threshold. Combinations of shorter, concurrent, sentences for 'serious offences' should not be included. The Law Council supports the amendments contained in sheet 2318.**
- **Recommendation 9: Section 36C(9)(b) should also be repealed. Citizenship deprivation powers should not be triggered unless it is one or more "serious offence(s)" as defined resulting in a sentence over the threshold. Aggregate sentences where the length of the sentence is a result of offences that are not 'serious offences' should not be included simply because a shorter sentence for a 'serious offence' is part of the aggregate.**

Departures from orthodox principles of sentencing

70. The Law Council considers that the manner in which the implications of *Alexander* and *Benbrika* are addressed by the 2023 Citizenship Amendment risks incoherence because—while it is contended that 'the power to make a citizenship cessation order is vested in the courts and is an appropriate exercise of judicial, rather than executive, power'—the orthodox principles of sentencing that guide judicial decision making are undercut in fundamental ways.[66]

'As part of the sentence or sentences'

71. Section 36C(1) makes plain that a citizenship deprivation can be made by the court when imposing a period of imprisonment of at least three years or periods of imprisonment that total at least three years,[67] at that time *as part of the sentence or sentences imposed* for relevant offences. On a plain reading of the provision, the

[66] Explanatory Memorandum, 3.
[67] See 2023 Citizenship Amendment, s. 36C(8) for how sentence length is to be calculated.

person would, therefore, be sentenced to a term of imprisonment and a citizenship deprivation.

72. This model of sentencing stands in contrast with what would, in the context of states and territories, ordinarily be characterised as ancillary or other orders. For example, forfeiture and disposal orders, or mandatory orders pursuant to the *Sex Offender Registration Act 2004* (Vic) which, whilst ordinarily being made at the time of sentence, do not amount to part of the sentence. Indeed, that legislation provides guidance[68] as to whether or not such orders can permissibly be taken into account when determining the sentence to be imposed.

73. Whilst it could be argued that sentencing principles relating to deportation[69] would appear to be an obvious comparator for how a citizenship deprivation could be taken into account in the exercise of the sentencing discretion, given the citizenship deprivation forms part of the sentence (rather than merely being a consequence or potential consequence of it), there are significant differences.

74. If section 36C(1) is intended to require a citizenship cessation order to be made as part of the sentencing hearing, rather than as part of the sentence, this ought to be explicitly stated.

75. Should the 2023 Citizenship Amendment be retained, the Law Council is supportive of citizenship deprivation forming part of the sentence, as this most accurately reflects the punitive nature of such an order as recognised by the High Court in *Alexander* and *Benbrika*. However, given the absence of case law, there is a need for further legislative guidance on what is meant by citizenship deprivation being imposed as part of the sentence or sentences imposed. For example, the legislation should plainly state that an affected person would be sentenced to a term of imprisonment *and* a citizenship deprivation. As set out below, it should also provide guidance on how the making of a citizenship deprivation can permissibly be taken into account in sentencing.

Approach to fact finding and standard of proof

76. Flowing from those matters considered above, if a citizenship deprivation forms part of the sentence, the orthodox approach to fact finding and the standard of proof must apply, as stated by the Victorian Court of Appeal in *R v Storey* [1998] 1 VR 359.[70]

77. A court considering a citizenship deprivation would, therefore have to be satisfied of the matters in section 36C(4)—and most notably that the person's conduct to which the conviction or convictions relate is so serious that the person has repudiated their allegiance to Australia—beyond reasonable doubt.[71]

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[68] See for example, *Sentencing Act 1991* (Vic) ss. 5(2A)-(2BE).

[69] The Victorian Bar note that in Victoria, the prospect that an offender will be deported following sentence is relevant to sentence if it will make the burden of imprisonment more onerous or may result in the offender losing the opportunity to settle permanently in Australia. See *Guden v The Queen* [2010] VSCA 196. It is noted that not all State jurisdictions treat deportation in the same way, although within a State the relevant principles are applied consistently to those sentenced for Federal and State offences.

[70] That is to say,

> *The judge may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities.*

That statement of principle was endorsed by the majority in *R v Olbrich* (1999) 199 CLR 270.

[71] 2023 Citizenship Amendment, s. 36C(4)(c).

78. Given the very significant consequences of a citizenship deprivation, the Law Council supports a sentencing judge having to be satisfied beyond reasonable doubt of a person's repudiation of their allegiance to Australia.

Maintaining the discretion of the sentencing court

79. Whilst a citizenship deprivation can be made as part of the sentence imposed, section 36C(11) provides that Part 1B of the *Crimes Act 1914* (Cth) (the **Crimes Act**) does not apply in relation to citizenship deprivation. Significantly, this excludes those matters in section 16A of the Crimes Act (matters to which court must have regard when passing sentence for federal offences) although they would remain applicable to the determination of any other part of the sentence, including the duration of any term of imprisonment to be served.

80. In deciding whether the court is satisfied that the person's conduct, to which the serious offence convictions relate, is 'so serious and significant that it demonstrates that the person has repudiated their allegiance to Australia'[72] the court must have regard to certain considerations set out in section 36C(5).

81. Those matters include whether the conduct demonstrates a 'repudiation of the values, democratic beliefs, rights and liberties that underpin Australian society',[73] the degree, duration or scale of the person's commitment or involvement in the conduct,[74] the intended scale of the conduct,[75] the actual impact[76] of the conduct to which the convictions relate, and whether the conduct caused harm[77] to human life or loss of human life. The Explanatory Memorandum states that these matters comprise a 'non-exhaustive list and the court may have regard to other matters relevant to the circumstances of the case including any mitigating factors'.[78]

82. If a citizenship deprivation regime is to be administered as a part of the sentencing decision, then the ordinary principles, embedded in statute, that guide sentencing of federal offenders should apply to the decision to deprive citizenship. For that reason, the Law Council supports removing section 36C(11) which provides that Part IB of the Crimes Act does not apply to the making of a citizenship cessation order under section 36C(1).

83. For instance, the principle of proportionality—which requires that the sentence imposed must be no more severe than is necessary and is contained in section 16A(1) of the Crimes Act—is expressly excluded in relation to the making of a citizenship cessation order by the operation of section 36C(11) of the Bill. It would still apply, however, to the exercise of the sentencing discretion.

84. Totality, being a common law principle that is not expressly excluded by the provisions, would, however, remain a relevant consideration, given a citizenship deprivation is part of the sentence imposed. No guidance is given by the provisions in this regard, although section 36C(7) would permit a court to have regard to totality in deciding whether or not to deprive a person of citizenship. As explained above, this principle is undermined by section 36C(8) because a court will have considered the totality

[72] 2023 Citizenship Amendment, s. 36C(4)(c).
[73] Ibid, s. 36C(5)(a)
[74] Ibid, s. 36C(5)(b)
[75] Ibid, s. 36C(5)(c)
[76] Ibid, s. 36C(5)(d)
[77] Ibid, s. 36C(5)(e)
[78] Explanatory Memorandum, 15 [34].

principle in deciding on the overall effective length of a combination of sentences and the extent of any concurrency.

85. In light of the above, the legislation would also require a court to depart from the orthodox sentencing method whereby its task is to arrive at an appropriate sentence by 'instinctive synthesis'. As the High Court explained in *Wong:*[79]

> *… the task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.*

86. The Law Council notes the Victorian Bar's view that, in mandating separate requirements for the imposition of the 'traditional' part of sentence and the citizenship deprivation, which by application of section 36C(1) is part of the sentence, the provisions risk two stage sentencing, an approach that has been repeatedly rejected[80] by the courts.

87. Accordingly, the Law Council submits that the mandatory criteria that a Court must typically consider in sentencing federal offenders should apply equally to an order for citizenship deprivation. Section 16A(1) of the Crimes Act provides that a court must impose a sentence that is 'of a severity appropriate in all the circumstances of the offence'. Courts have found[81] that section 16A(1) embeds in statute the common law principle of proportionality in sentencing.

88. In ordinary circumstances, when federal offenders are sentenced, under section 16A(2) of the Crimes Act, the court must take into account certain matters 'as are relevant and known to the court' including, for example, the following matters which may have salience to a citizenship deprivation decision:

- the nature and circumstances of the offence;
- the degree to which the person has shown contrition for the offence;
- if the person has pleaded guilty to the charge in respect of the offence;
- the deterrent effect that any sentence or order under consideration may have on the person sentenced (specific deterrence);
- the deterrent effect that any sentence or order under consideration may have on other persons (general deterrence);
- the character, antecedents, age, means and physical or mental condition of the person;
- the prospect of rehabilitation of the person; and
- the probable effect that any sentence or order under consideration would have on any of the person's family or dependents.

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[79] *Wong*, [75] Gaudron Gummow, Hayne JJ).
[80] See *Wong*; *R v Geddes* (1936) 36 SR(NSW) 554; *R v Gallagher* (1991) 23 NSWLR 220; *R v Beavan* unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 22 August 1991; *Winchester* (1992) 58 A Crim R 345; *R v Williscroft* [1975] VR 292; *R v Young* [1990] VR 951; R v Perrier (No 2) [1991] 1 VR 717; *O'Brien* (1991) 55 A Crim R 410; *R v Nagy* [1992] 1 VR 637; *R v Harman* [1989] 1 Qd R 414; *R v Corrigan* [1994] 2 Qd R 415; *Pavlic v The Queen* (1995) 5 Tas R 186.
[81] *Wong v the Queen* [2001] HCA 64 ('***Wong***'), [71] (Gaudron Gummow, Hayne JJ); *Bahar v the Queen* [2011] WASCA 249, [44] – [45] (McLure P, Martin CJ and Mazza JA agreeing).

89. The Law Council considers that mandatory consideration of such mitigating factors is even more important, given the consequences that flow from citizenship repudiation. The Law Council supports providing greater specification in section 36C(5)(a) of the degree of prejudice required. In this regard, the Law Council reiterates[82] its previous recommendation, about a separate citizenship deprivation provision, that formulation of a more certain and precise threshold should refer to the 'serious prejudice' threshold contained in the United Nations *Convention on the Reduction of Statelessness*.[83]

90. The UN Convention on the Reduction of Statelessness allows for loss of nationality where the Contracting State has, at the time of signature, ratification or accession, specified its retention of such a right to deny nationality where the person, inconsistently with his or her duty of loyalty to the Contracting State, has:

- conducted him or herself in a manner seriously prejudicial to the vital interests of the State; or
- has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of their determination to repudiate their allegiance to the Contracting State.

Recommendations

- **Recommendation 10:Ffurther clarification is required on the timing of a citizenship cessation order forming part of the sentence. If section 36C(1) is intended to require a citizenship cessation order to be made as part of the sentencing hearing, rather than as part of the sentence, this ought to be explicitly stated.**
- **Recommendation 11: If a citizenship deprivation forms part of the sentence, the orthodox approach to fact finding and the standard of proof must apply. That is, the sentencing judge may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt.**
- **Recommendation 12: Section 36C(11) should be removed and the ordinary principles in sentencing federal offenders contained in Part IB of the *Crimes Act 1914* (Cth) should apply to authorising citizenship deprivation.**
- **Recommendation 13: Revised explanatory materials should accompany any amendment to clarify the operation of orthodox principles of sentencing in relation to citizenship deprivation.**
- **Recommendation 14: Consideration should be given to inserting into section 36C(5)(a) a 'serious prejudice' threshold in line with the UN Convention on the Reduction of Statelessness**

[82] Law Council 2019 Submission, 27 [111].
[83] *Convention on the Reduction of Statelessness*, [Opened for signature 30 August 1961 989 UNTS 175 (entered into force 13 December 1975), Art. 8(2) and 8(3). Australia acceded on 13 December 1973 without reservations. See also, *Convention relating to the Status of Stateless Persons*, [Opened for signature 28 September 1954 360 UNTS 117 (entered into force 6 June 1960). Australia acceded on 13 December 1973.

Initiative of the Minister

91. A unique feature of the 2023 Citizenship Amendment is that, under section 36D(1), the decision to bring an application for citizenship deprivation is at the discretion of the Minister. The Law Council is concerned about how this discretion will interact with the need to protect the operational independence of the Commonwealth Director of Public Prosecutions who will be seeking the sentencing disposition on behalf of the Commonwealth.

92. The Law Council considers that this issue may be partly addressed by the Minister issuing detailed guidelines providing greater specification around the types of circumstances where an application to deprive a person of citizenship will be brought. In particular, this might include further guidance on the interpretation of the types of conduct that are considered to be incompatible with the shared values of the Australian community, and which demonstrate that an individual has repudiated their allegiance to Australia.

Recommendation

- **Recommendation 15: The Minister should issue guidelines providing further specification of the considerations applicable to the decision to bring an application for citizenship deprivation under section 36D(1)**

Deprivation of citizenship for children

93. Under the 2023 Citizenship Amendment, a person aged fourteen or over may be deprived of their citizenship. Paragraph 36C(6)(a) provides some protection for a child, requiring that in deciding whether to make a citizenship cessation order, the court must have regard to the best interests of the child if the person is under 18 years of age. It does not, however, explicitly take into account the emphasis on rehabilitation of children in international law.

94. The Law Council has explained[84] at length why communities will, generally, be safer and healthier if greater consideration and effort is given to diverting young people from the justice system. Additionally, the Law Council has long argued that responses to young people in the criminal justice system should reflect Australia's international obligations. The Law Council considers early intervention and rehabilitation solutions should be prioritised by Governments to address underlying issues to help prevent young people from becoming involved in criminal activities.

95. The Law Council considers that it is antithetical to those principles regarding youth justice and child wellbeing, and the liberal democratic character of our society, to strip citizenship from a child who is considered not yet mature enough to exercise the right to vote.

96. Article 3(1) of the *Convention on the Rights of the Child* (**CRC**) requires that in all actions concerning children, the best interests of the child are a primary consideration. This means that there must be an individualised judgment which 'must be assessed and determined in light of the specific circumstances of the particular child'.[85] It is also

[84] Law Council of Australia, Submission to Australian Human Rights Commission, Youth Justice and Child Wellbeing Reform (24 July 2023).
[85] UN Committee on the Rights of the Child, General comment 14 on the right of the child to have his or her best interests taken as a primary consideration (2013), 3.

important to bear in mind that every child has the right to acquire a nationality[86] and the right to preserve their identity, including their nationality, without unlawful interference.[87] In this regard, the UN Committee on the Rights of Child has stated that:[88]

> *the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child…*

97. The Law Council's primary view is that the 2023 Citizenship Amendment should not apply to minors at all because it is likely to always be a disproportionate interference with Article 3(1), taking into account prevailing conceptions of the capacity and culpability of children, as well as the need to ensure they are rehabilitated and reintegrated into society.

98. The CRC sets out principles governing the sentencing process of children. A child accused or convicted of a crime should be dealt with in a manner which gives due consideration to the desirability of promoting his or her reintegration into society.[89] In particular, the Law Council refers to the commentary in Rule 17 of the Beijing Rules that 'strictly punitive approaches are not appropriate' and retributive sanctions 'should always be outweighed by the interest of safeguarding the well-being and the future of the young person'.[90]

99. Although 14 years of age is greater than the current Commonwealth age[91] of criminal responsibility, and above the threshold for *doli incapax*,[92] it is still very young. It is uncontroversial to observe that children's brains are still developing, and that the potential for cognitive, emotional and/or psychological immaturity of a young person, including impressionability and poor impulse control is very real. The applicability of these concepts is apparent in the context of the serious offences that may attract a citizenship deprivation. Again, it is significant that for a post-sentence order[93] to be made in respect of serious terrorism offenders under Division 105A of the Criminal Code, the affected person must be at least 18 years old when the relevant sentence for the serious terrorism conviction ends.[94]

100. For the reasons outlined above, the Law Council is supportive of the intent of the amendments contained in sheet 2284.[95] However, the Law Council considers it imperative that section 36C(4)(a) be amended to require that the person be 18 years of age *at the time of the offending.* The amendment contained in sheet 2284 would only require that the court be satisfied that the affected person is aged 18 years or over at the time that the citizenship cessation order application is determined.

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[86] CRC, Art. 7. ICCPR, Art. 24(3).
[87] CRC, Art. 8.
[88] UN Committee on the Rights of the Child, General comment 14 on the right of the child to have his or her best interests taken as a primary consideration (2013).
[89] CRC, Art. 40. See, also, UN Committee on the Rights of the Child, General Comment 10: children's rights in juvenile justice (2007) [10].
[90] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('***The Beijing Rules***'), Adopted by General Assembly resolution 40/33 of 29 November 1985, 10.
[91] A child under 10 years old is not criminally responsible for an offence: Criminal Code, s. 7.1
[92] A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if they know that their conduct is wrong. That is a question of fact and the burden of proving this is on the prosecution: Criminal Code, s. 7.2.
[93] For example, an Extended Supervision Order or a Continuing Detention Order.
[94] Criminal Code, s. 105A.3(1)(c).
[95] Amendment Sheet 2284, Moved by Senator Pocock (Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023.

101. Should the Law Council's primary recommendation that citizenship deprivation only apply to adults not be accepted, the Law Council supports amendments so that a citizenship deprivation can be only made in relation to a child, or arising solely from conduct committed when the person was a child, in exceptional circumstances.

Recommendations

- **Recommendation 16: The Minister should only be able to apply for a citizenship deprivation where the affected person was 18 years of age at the time of the offending.**
- **Recommendation 17: If citizenship deprivation is available in relation to minors, it should only be authorised in exceptional circumstances.**

Absolute prohibition against retrospective criminal punishment

102. Article 15(1) of the International Covenant on Civil and Political Rights states that:

> *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*

103. Citizenship deprivation is likely[96] to be considered a criminal penalty under international law because it is imposed as a punishment and entails a profound detriment. The reasons for that conclusion are set out below with reference to the criteria[97] for determining whether a penalty is criminal for the purpose of international human rights law.

- Citizenship deprivation is classified as a punishment under Australian law.[98] For example, the plurality opinion in *Alexander* found that citizenship deprivation provisions were intended to regulate 'conduct that is conceived of as being so reprehensible that it is radically incompatible with the values of the community' and that '[t]he response of the Parliament to that reprehensible conduct is retribution in the form of the deprivation of the entitlement to be at liberty in Australia'.[99]

[96] The PJCHR observed that 13 [1.16]:

> *In assessing whether a penalty may be regarded as criminal under international human rights law, it is necessary to consider the nature and purpose of the penalty (including whether it applies to the public in general rather than a specific regulatory or disciplinary context); whether there is an intention to punish or deter; and the severity of the penalty.*

The Law Council notes that the PJCHR tentatively concluded that 'citizenship cessation may amount to a punishment'. 27, [1.49].

[97] See further, Parliamentary Joint Committee on Human Rights, Guidance Note 2—Offence provisions, civil penalties and human rights (December 2014), 3:

- Step one: Is the penalty classified as criminal under Australian Law?
- Step two: What is the nature and purpose of the penalty?
- Step three: What is the severity of the penalty?

[98] See further, *Alexander* and *Benbrika*.

[99] *Alexander*, [82] (Kiefel CJ,

- The nature and purpose of citizenship deprivation is to punish and deter—and applies to the public in general. As noted by Edelman J, the punitive character of the impugned citizenship deprivation provisions was indicated by the stated purpose of the provisions which included the recognition by the Parliament that the common bond of Australian citizenship may be severed by citizen 'through certain conduct incompatible with the shared values of the Australian community'.[100] Edelman J said that '[t]he focus upon the breach of norms of conduct shared in the community is an indication, at a lower level of generality, of a purpose of sanctioning that conduct'.[101]
- The severity of the penalty involves a profound detriment—for example, Gordon and Edelman JJ cited the judgment of Warren CJ in the Supreme Court of the United States judgment in *Trop v Dulles*. In that case, Warren CJ observed:[102]

  > *[t]here may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.*

- Similarly, the Special Rapporteur indicated her view that 'citizenship stripping has monumental consequences for those left stateless de facto or de jure' and that '[e]ven where individuals are not left stateless, citizenship stripping has economic, social, cultural, and familial after-effects with particularly deleterious effects on children whose parents are deprived of their nationality'.[103]

104. The application provision[104] contained in the 2023 Citizenship Amendment risks engaging Article 15(1) of the ICCPR to the extent that citizenship deprivation may be authorised in respect of conduct that occurred after 12 December 2015—that is, the date on which the 2015 Citizenship Amendment commenced but before the passage of the 2023 Citizenship Amendment.

105. This retrospective operation is particularly anomalous in relation to convictions that relate to conduct that falls short of the six-year minimum threshold under the 2015 Citizenship Amendment but satisfies the diminished three-year threshold under the 2023 Citizenship Amendment. The Law Council shares the concern of the PJCHR that:[105]

> *This lower threshold applies in circumstances where a person was alleged to have engaged in relevant criminal conduct on or after 12 December 2015, but had not yet been convicted. As such, citizenship cessation would potentially be applicable to a broader class of persons than would otherwise have been exposed but for this measure.*

106. The rationale for the retrospective application of these provisions is that as a result of the 2015 Citizenship Amendment, and prior to the 2020 Citizenship Amendment, 'convictions which resulted in a sentence of six years or more, or convictions in the ten years prior resulted in a sentence of at least ten years imprisonment, could be

[100] *Alexander*, [251] (Edelman J).
[101] Ibid.
[102] See for example, *Alexander* [172] Gordon J citing Warren CJ in *Trop v Dulles* (1958) 356 US 86; [248] (Edelman J).
[103] Special Rapporteur 2022 Views, 3.
[104] Inserted by Schedule 1, Part 2, Item 18 of the 2023 Citizenship Amendment.
[105] PJCHR Report, 14 [1.19].

considered for citizenship cessation'. The Explanatory Memorandum expresses the rationale for the expanded retrospectivity in the following terms:[106]

> *Any term of imprisonment is considered serious, and courts often only impose imprisonment for the most serious of offences. Given the range of factors a court may take into account when sentencing an offender, some of those factors may reduce a defendant's sentence but this may not impact the serious risk posed by the nature of the offence. It is reasonable, necessary and proportionate to reduce the sentencing threshold at which cessation of citizenship may be considered to a term of imprisonment of at least three years, as this duration adequately balances the risk presented to the community by the commission of the offence with the possible cessation of the offender's citizenship.*

107. The Law Council concurs with the assessment of the PJCHR that '[t]he prohibition against retrospective criminal law is absolute and may never be subject to permissible limitations' and '[a]s such, questions of reasonableness, necessity and proportionality do not arise'.[107]

108. The Law Council has consistently argued, based on its Rule of Law Policy Statement,[108] that the law must be both readily known and available and certain and clear. And, in particular, legislative provisions that create criminal or civil penalties should not be retrospective in their operation.

109. For the reasons outlined above, the Law Council recommends that the 2023 Citizenship Amendment only apply to convictions pertaining to conduct after the commencement date of 8 December 2023.

Recommendation

- **Recommendation 18: the 2023 Citizenship Amendment should only apply to convictions that pertain to conduct after the commencement date of 8 December 2023.**

Constitutional validity

Separation of powers

110. The Committee has previously noted[109] that the constitutional validity of citizenship deprivation provisions centres on two questions:

- whether the citizenship deprivation provision is supported by a head of Commonwealth legislative power; and
- whether there are implied constitutional limitations that are entailed by, for example, the separation of powers envisaged under Chapter III of the Constitution, or the implied right to vote.

111. The Law Council acknowledges that one of the primary improvements made by the 2023 Citizenship Amendment is to address the issues of constitutional validity arising from the decision of the High Court in *Alexander* and *Benbrika.* Namely, that the

[106] Explanatory Memorandum, 34-35.
[107] PJCHR Report, 15 [1.21].
[108] Law Council of Australia, Policy Statement—Rule of Law Principles (March 2011).
[109] PJCIS 2015 Report, 23 3.1. See further, Law Council 2019 Submission, 31; Law Council 2015 Submission, 8.

determination of citizenship deprivation—within a statutory framework designed to punish individuals for past reprehensible conduct—is part of the exclusively judicial function of adjudging and punishing criminal guilt and is not a power that can be conferred on an executive official. This follows from the limitation on Commonwealth legislative power implied by the separation of powers established by Chapter III of the Constitution.

112. At the time that the 2023 Citizenship Amendment was introduced, the Law Council said:[110]

> *Citizenship deprivation should only be a matter for the courts. To the extent that these measures vest decision-making powers on citizenship cessation in the judiciary as opposed to the Executive, the Bill represents a real improvement on the existing framework.*

113. However, the Law Council considers that the explanatory materials supporting the 2023 Citizenship Amendment inadequately address outstanding questions pertaining to constitutional validity. Those matters are discussed further below.

Head of power

114. The Explanatory Memorandum accompanying the 2023 Citizenship Amendment does not explicitly refer to the head of power relied on under the Commonwealth Constitution. However, the Explanatory Memorandum to the 2015 Citizenship Amendment stated that 'the principal source of power for a person's Australian citizenship ceasing is the aliens power in section 51(xix) of the Constitution'.[111] The Committee has previously considered[112] the issue of whether previous manifestations of the citizenship deprivation regime is supported by a head of Commonwealth legislative power.

115. For completeness, the Law Council notes that other heads of power granted in section 51 of the Constitution may provide supplementary support for parts of the Bill, such as, the defence power (section 51(vi)), external affairs power (section 51(xxix)), and the immigration power (section 51(xxvii)). In the time available, the Law Council has been unable to consider these matters in detail.

Scope of the aliens power

116. It is well-settled[113] in Australian constitutional law that the process of characterising whether a Commonwealth law is supported by a federal head of power involves the following five principles:[114]

- construction of the constitutional text 'with all the generality which the words used admit';

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[110] Law Council November Media Release.
[111] Revised Explanatory Memorandum, 2015 Citizenship Amendment, 2.
[112] PJCIS 2015 Report, 24-26 [3.7] – [3.12].
[113] See generally, James Stellios, Melbourne University Law Review, Constitutional Characterisation: Embedding Value Judgments about the Relationship between the Legislature and the Judiciary (2020) Vol. 45(1) 277-322; Constitutional Law in Australia, Peter Hanks, Frances Gordon & Graeme Hill, Constitutional Law in Australia (LexisNexis Butterworths, 4th ed, 2018), [1.44].
[114] *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 [16] ('***Grain Pool***'), quoting *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225. See also, *New South Wales v Commonwealth of Australia (Work Choices Case)* (2006) 229 CLR 1, 103 [142]; *Spence v Queensland* (2019) 268 CLR 355, 405 [57], 456 [197].

- the character of the impugned Commonwealth law must be determined by reference to the rights, powers, liabilities, duties and privileges it creates—that entails examining the practical operation of the impugned legislation, rather than the motives for enacting it;
- the 'practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power';
- '[i]n a case where a law fairly answers the description of being a law with respect to two subject matters, one of which is and the other of which is not a subject matter appearing in section 51, it will be valid notwithstanding that there is no independent connection between the two subject matters'; and
- 'if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice'.

117. Section 51(xix) of the Constitution empowers the Commonwealth Parliament to make laws with respect to 'naturalization and aliens'.

118. It is well-established[115] that whereas alienage—that is, a lack of formal legal relationship with the body politic or community—is a constitutional concept, 'the Constitution leaves it to Parliament to decide who shall be granted the status of citizenship and what that status may mean in terms of the rights, privileges, immunities and duties of citizens'.[116] In *Chetcuti*,[117] Kiefel CJ, Gageler, Keane and Gleeson JJ went so far as to say 'the aliens power encompasses both power to determine who is and who is not to have the legal status of an alien and power to attach consequences to that status'.[118]

119. However, that general position is qualified by the limitation expressed by Gibbs CJ in *Pochi v Macphee*[119] that 'Parliament cannot, simply by giving its own definition of 'alien', expand the power under section 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word'. In this regard, in *Hwang v Commonwealth*,[120] Justice McHugh said the Parliament cannot 'exclude from citizenship, those persons who are undoubtedly among 'the people of the Commonwealth'.[121] Edelman J recently stated that the aliens power extends only to 'those who have not been unconditionally absorbed into the Australian political community'.[122]

120. The determination of the boundary of the limitation described in *Pochi* has been subject to uncertainty.[123]

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[115] *Alexander*, [33] (Kiefel CJ, Keane and Gleeson JJ); *Chetcuti v The Commonwealth* (2021) 95 ALJR 704, 718 [53], 720 [59].
[116] *Alexander* [33] (Kiefel CJ, Keane and Gleeson JJ).
[117] (2021) 95 ALJR 704.
[118] Ibid, 710 [12].
[119] (1982) 151 CLR 101, 109, cited with approval in *Singh v The Commonwealth* (2004) 222 CLR 322, 329 [4]
[120] *Hwang v Commonwealth* (2005) 222 ALR 83.
[121] Ibid, 89 [18].
[122] *Jones*, [105] (Edelman J).
[123] Edelman J said in *Alexander*, [202]:

> *But that "limit" is not some outer extreme within which Parliament has free rein. Rather, it is an absolutely orthodox requirement that the aliens power be applied in accordance with its meaning. As the application of the aliens power has strayed further and further from its essential meaning, the question has become how to identify which categories or groups of people are not aliens. And as the groups of people who are not aliens have come to be treated as diminishingly smaller, the answer to that question has not been readily forthcoming.*

121. In *Alexander*, the majority upheld the characterisation of the 2015 Citizenship Amendment as coming within the scope of the aliens power on the basis that:[124]

> *It does not stretch the ordinary understanding of the expression "alien" to include within that category an individual who has engaged in conduct exhibiting such extreme enmity to Australia as to warrant being excluded from membership of the Australian community. The Parliament has the power under s 51(xix) to attribute the constitutional status of alien to a person who has lost the statutory status of citizenship. By the same power, Parliament can define the circumstances in which that occurs.*

122. Critically, in *Alexander,* the High Court, in scrutinising citizenship deprivation provisions that captured terrorism related incursion and recruitment behaviour in a foreign state, accepted the characterisation of the Solicitor-General that this conduct was 'inherently suggestive of the absence of a continuing commitment to the Australian body politic'.[125] The High Court found that it was reasonably open to the Parliament to regard that type of conduct as 'so reprehensible as to be incompatible with the common bonds of allegiance to the Australian community, even though the person who has engaged in that conduct did not act intentionally to repudiate the bonds of citizenship'.[126]

123. As is explained above at paragraphs 52 to 55, the combined operation of an extended list of serious offences and the reduction in the applicable minimum sentence threshold mean that the 2023 Citizenship Amendment extends considerably beyond the paradigm cases of '*extreme enmity to Australia*' regulated by the 2015 Citizenship Amendment and upheld in *Alexander.* For that reason, the Law Council considers that further justification should be provided to establish a 'sufficient connection' to characterise the 2023 Citizenship Amendment as falling within the scope of the aliens power.[127]

124. Ensuring that the Government justifies the adoption of the view of the scope of the aliens power it has taken—and that this justification is subject to review by Parliament and debate in public—has important political and constitutional consequences. Setting aside questions of constitutional validity, as stated above, the Law Council has profound reservations, based on the multicultural character of modern Australia, about the Government adopting a reading of the aliens power that establishes different tiers of Australian citizenship.

125. In this regard, Edelman J, who agreed with the plurality opinion in *Alexander*, expressed the view in *Jones* that such a broad reading of the aliens power would be undesirable for the following reason:

> *One class of true Australians, or first-class Australians, would be beyond the scope of the head of power in s 51(xix) concerning aliens ("the aliens power"). That class, on the defendants' submission, would be those who*

[124] *Alexander,* [35]
[125] *Alexander*, [48].
[126] *Alexander*, [51].
[127] By way of example, the broad definition of national security in s 90.4 of the Code as including "the county's political, military or economic relations with another country" has the potential to render some of the specified offences as offences criminalising conduct which is designed to defend not repudiate the values, democratic beliefs, rights and liberties that underpin Australian society. For example, a citizen could publish information or an article showing that Australian companies, with the support of the Australian Government, were supporting the actions of a government in Africa that was discriminating against citizens of a country with whom Australia was closely allied. This conduct, intended to support Australian values of non-discrimination against Australia's allies, would nonetheless be capable of being an offence against s 91.1(1) of the Code because it was intended to change Australia's economic and political relations with that first country.

> *are born in Australia, to two Australian-citizen parents, and without any other citizenship or nationality. Almost all other citizens, including all those such as Mr Jones who had been naturalised, would be second-class Australians, permanently within the scope of the aliens power in s 51(xix) of the Constitution. The Commonwealth Parliament would have perpetual power to define them as aliens and to treat them as such including by empowering the Executive to revoke their citizenship and to deport them from Australia for any non-punitive reason.*[128]

126. In light of the requirement for a sentencing court to determine whether the person's conduct is so serious and significant that it demonstrates that the person has repudiated their allegiance to Australia, the Law Council's National Human Rights Committee notes that there may be a related question as to whether the tasks assigned by the amended legislation to the Chapter III courts, and state courts invested with federal jurisdiction under Chapter III of the Constitution, are judicial in nature.[129]

Recommendation

- **Recommendation 19: the Committee should make inquiries of the Attorney-General's Department regarding the characterisation of the 2023 Citizenship Amendment is within the scope of a constitutional head of power. Consideration should be given to whether there is sufficient connection between the expanded approach to 'serious offences' in the 2023 Citizenship Amendment and the scope of the aliens power.**

Certain categories of non-aliens—Aboriginal or Torres Strait Islander person

127. Given that the constitutional power is linked to the concepts of alienage and allegiance, it is concerning that there has been insufficient consideration given to recent High Court authorities interpreting the limits of those constitutional concepts. For example, in *Love v the Commonwealth*,[130] a majority of the High Court held that Aboriginal Australians who satisfy the tripartite test in *Mabo v Queensland [No 2]*[131] constitute a separate category of non-citizen, non-alien.[132] Bell J described the majority as agreeing that 'Aboriginal Australians (understood according to the tripartite test in *Mabo [No 2]*) are not within the reach of the "aliens" power conferred by s 51(xix) of the Constitution'.[133]

[128] *Jones*, [103].
[129] See further, Sangeetha Pillai, 'The exclusion of aliens under federal law: Analysing the impact of NZYQ, Alexander and Benbrika' (8 February 2024).
[130] (2020) 270 CLR 152, 192 [81], 244 [252], 247 [260], 253-254 [271]-[272], 261-262 [295], 263 [300], 264-266 [304]-[311], 305-308 [432]-[437].
[131] (1992) 175 CLR 1.
[132] *Alexander*, [34].
[133] *Love*, 192 [81].

128. Accordingly, the Law Council supports the amendment contained in sheet 2287 which would impose a new requirement[134] that, prior to depriving a person of their citizenship, the court is satisfied that the person is not an Aboriginal or Torres Strait Islander person. Additionally, the Law Council would impose a new requirement[135] on the Minister to include, in the application to the court for citizenship deprivation, information about whether the person is an Aboriginal or Torres Strait Islander person.

Recommendation

- **Recommendation 20: the Law Council supports the amendments contained in sheet 2287[136] which ensures that prior to making a citizenship cessation order, the court is satisfied that the affected person is not an Aboriginal or Torres Strait Islander person.**

[134] Amendment Sheet 2287, new s. 36C(4)(aa).
[135] Amendment Sheet 2287, new s. 36D(4)(d).
[136] Amendment Sheet 2287 (Moved by Senator David Pocock), Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023.