Submission to the PJCIS:
Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

Professor Kim Rubenstein, Associate Professor Matthew Zagor and Dr Dominique Dalla-Pozza
ANU Law School, ANU College of Law, ANU
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We thank the Committee for the opportunity to make a submission on this Bill, and we would be grateful to also have the opportunity to appear before the Committee in person to expand upon it.

Professor Rubenstein is the author of *Australian Citizenship Law (*2016, Thomson Reuters).

In addition, as a practitioner on the roll of the High Court of Australia, Professor Rubenstein has been Counsel in three High Court matters concerning Australian citizenship and has appeared in a matter before the Full Federal Court regarding the interpretation of the *Australian Citizenship Act 2007* (Cth), as well as in several AAT matters on interpretation issues under the Act.

Between November 2004 and 30 June 2007, Professor Rubenstein was a consultant to the Commonwealth of Australia, represented by the then Department of Immigration and Multicultural and Indigenous Affairs, now the Department of Home Affairs (the Department) in relation to its review and restructure of the *Australian Citizenship Act 1948* (Cth) which resulted in the *Australian Citizenship Act 2007* (Cth) which this current Bill seeks to amend. Professor Rubenstein would like to stress that she has *not* been a consultant to the Department and has not been involved in any way with this amendment Bill.

In 2008 Professor Rubenstein was a member of the Independent Committee established by the then Minister for Immigration and Citizenship, Chris Evans, reviewing the Australian Citizenship Test. She assisted in the drafting of its report *Moving Forward: Improving pathways to Citizenship* http://www.citizenship.gov.au/_pdf/moving-forward-report.pdf

Professor Rubenstein also made submissions to this committee around ***Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*** and refers the Committee to her comments in that submission which are relevant to this submission.

Associate Professor Zagor is the Director of the Law Reform and Social Justice program at the ANU College of Law, Adjunct Fellow at the ANU Centre for European Studies, Senior Research Fellow at the Refugee Law Institute at the University of London, and Senior Editor on the Australian Year Book of International Law. He has more than 20 years experience as a human rights advocate, practitioner and scholar, with particular expertise in refugee, constitutional and international law.

Dr Dalla-Pozza researches, writes and teaches in the area of Australian National Security Law at the ANU College of Law. She has a particular interest in the workings of the PJCIS.

Overall Recommendations for the Committee

***Recommendation 1**: That the PJCIS recommend that Parliament not pass the Bill.*

As we explain below, the most appropriate option would be for the Parliament to abandon this Bill.

While we agree with the Government that terrorism does represent a significant threat to Australia's national security, and it is important that Australia's legislative framework be regularly reviewed and adjusted to ensure that Australians remain safe,[1] we believe the particular legislative changes contained within the Bill inappropriately use citizenship law to achieve purposes which are more appropriately achieved using the criminal law.

Moreover, introducing these changes has the potential to undermine the way that citizenship law can advance a cohesive community committed to the rule of law and will not assist in achieving the important policy objectives the Bill is purported to advance in reducing terrorism and its impact on Australians.

In the event that the PJCIS is not persuaded to make recommendation 1, we make the following recommendations in relation to the Bill if it is to proceed in *any* manner.

***Recommendation 2(a):** That the requirement that a sentence of six years or more be required before the Minister can exercise the discretion contained within s 35A be maintained.*

In the event that *Recommendation 2(a)* is not adopted we recommend the following:

***Recommendation 2(b):** That a sentence of three years or more be required before the Minister can exercise the discretion contained within s 35A.*

***Recommendation 3:** That the change to the adjustment of the threshold in relation to knowledge of potential statelessness be abandoned.*

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[1] Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) Attachment A 'Statement of Compatibility with Human Rights', 7-8; Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2018, 11762.

Recommendation 4: *That s 35A be amended to require Minister to take into consideration the full range of rights impacted as well as the availability of alternative means for achieving the same objectives, and to engage in a proportionality assessment consistent with Australia's international obligations.*

Recommendation 5: *That the Bill be amended to provide a right to full merits review of any decision regarding deprivation of nationality by adding s 35A to the decisions where merits review is available (by amending s 52 of the* Australian Citizenship Act 2007*).*

Discussion of the Bill:

The Bill 2018 makes changes to the provisions which would allow a person holding dual citizenship to lose their citizenship once they have been convicted of a 'relevant terrorism conviction'.

There are three concerning aspects of the proposed changes. In our discussion we will discuss two: first the expansion of ministerial discretion afforded by the '**removal of the requirement of sentence of six years or more**' for the newly designated 'relevant terrorism conviction[s].' Second, the effect of proposed s 35A(1)(b) so that the Minister only needs to be the 'satisfied that the person would not, if the Minister were to determine that the person ceases to be an Australian citizen, become a person who is not a national or citizen of any country' (the **adjustment of the threshold in relation to knowledge of potential statelessness**') . We remain concerned that this bill will also operate retrospectively, but will not discuss this in this submission.

Each of these proposed changes undermines important legal protections that should not be removed as set out further below.

Removal of the requirement of a sentence of six years or more.

We accept the Government's statement that the changes in the Bill would only add one terrorism offence where conviction would now trigger the Minister's discretion to decide that Australian citizenship would cease: the offence of 'Associating with terrorist organisations' contained in s 102.8 of the *Criminal Code.* We also acknowledge the Government's view that including this offence sends a signal about the 'fundamental unacceptability of…[a] terrorist organisation' and that associating with such an organisation is 'a serious offence'.[2]

Nevertheless, we are of the view that completely removing the requirement that a person be sentenced to a prison term of six years inappropriately expands the discretion given to the Minister to determine that the Australian citizenship of person who holds dual citizenship has ceased once they have been convicted. We echo the concerns raised by

[2] Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth), 4.

the Senate Standing Committee for the Scrutiny of Bills ('SSBC') last year when it examined the Bill that:

> [r]emoving the length of the sentence imposed on a person gives greater discretion to the minister to remove citizenship, and the committee considers these amendments may inappropriately expand administrative power and may unduly trespass on personal rights and liberties [3]

We particularly draw the PJCIS's attention to the example provided by the SSBC: that under the proposed changes a person convicted of an offence of providing funds to an organisation based outside Australia, and also found to be reckless as to whether the organisation was a terrorist organisation, might receive 'no custodial sentence'.[4]

As indicated by the SSCB, under the changes proposed in this Bill, such a person might be vulnerable to the cessation of their Australian citizenship .[5] Given that the entire logic of denying citizenship to persons convicted of such an offence is that they have 'repudiated their allegiance to Australia',[6] it is unjust that a person in that position, whose conduct has been judged by a court not to warrant a custodial sentence, could still suffer the severe consequence of the cessation of their Australian citizenship.

The Committee examined this issue in the course of considering the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015. It is clear from the Committee's 2015 comments that it was felt to be beneficial to 'limit section 35A to more serious conduct' [7] Indeed this was the Committee's rationale for recommending that the power in s 35A only be available when a person has been sentenced to a period of six years of more.[8]

We accept the Government's claim that since the National Terrorism Threat Level was raised to 'probable', there have (sadly) been a number of terrorist attacks in Australia, including the incident on Bourke Street in Melbourne in November 2018. We also accept that since 2014 Australian authorities have fortunately disrupted a number of plots. We also accept that most of the 93 people who have been charged with terrorist offences since 2014 were charged after the 2015 amendments to the *Citizenship Act 2007* (Cth) were passed.[9]

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[3] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest*, No 15 of 2018, 5 December 2018, para [1.9].

[4] Ibid, para [1.8]. The offence referred to by the SSCB was s 102.6 of the *Criminal Code*.

[5] Ibid para [1.8].

[6] Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) Attachment A 'Statement of Compatibility with Human Rights',9.

[7] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) para [6.26]. See also para [6.25].

[8] Ibid, 117 (Recommendation 7).

[9] Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) Attachment A 'Statement of Compatibility with Human Rights', 7-8.

Despite this information, we do not believe that the threat level facing Australia has deteriorated to such an extent that it necessitates such a drastic removal of an important safeguard. More significantly, the changes will not have an identifiable impact on achieving a more secure position for Australia.

Our recommendation is that the limitation remain as currently enacted.

Recommendation 2(a): *That the requirement that a sentence of six years or more be required before the Minister can exercise the discretion contained within s 35A be maintained.*

If the Committee does decide that the existing limits on s 35A require some adjustment we would recommend that the power in s 35A not be able to be enlivened unless a court levies a 'relevant terrorism conviction' with a sentence of a period of imprisonment of three years or more (either for a single offence or cumulatively). The advantage of this position is that it would still allow a conviction for the offence of 'Associating with a terrorist organisation' to be included amongst the list of 'relevant terrorism conviction[s]', although a person would have to be sentenced to the maximum sentence under this provision if that conviction alone is to enliven the Minister's power under s 35A. As we argue below, there are significant dangers involved in any presumption that an association offence represents a repudiation of allegiance, let alone warrants the deprivation of nationality.

Additionally, placing a limitation of a sentence of three years or more would ensure the Minister's ability to deprive a person of citizenship remains in line with the restrictions on an Australian citizen's right to vote that were endorsed by the High Court in *Roach v Australian Electoral Commissioner.*[10] As was noted by the NSW Society of Labour Lawyers, and cited in the PJCIS 2015 report, such a lack of consistency between limits on the right to vote and the right to be an Australian citizenship would be 'surprising.'[11]

Recommendation 2(b): *That a sentence of three years or more be required before the Minister can exercise the discretion contained within s 35A.*

Adjustment of the threshold in relation to knowledge of potential statelessness

As the Committee is aware, a further change contained in the Bill is the insertion of a new s 35A(1)(b). The Explanatory Memorandum states that the proposed new form of s 35A(1)(b) 'provides that the Minister must be satisfied that the person would not become a person who is not a national or citizen of any country if their Australian citizenship were to cease'[12]. The EM also indicates that this change 'adjusts the threshold for dual

[10](2007) 233 CLR 162, 179 (Gleeson CJ) and 203-4 (Gummow, Kirby and Crennan JJ). Although it is worth noting that these High Court members conceded that Parliament had some flexibility in determining the term of imprisonment that would lead to a person being deprived of their ability to vote.

[11] As quoted by the PJCIS above n 7 para [6.15].

[12] Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 5.

citizenship to capture Australian citizens who the Minister is satisfied will not become a person who is not a national or citizen of any country as a result of cessation of citizenship'.[13]

The Government argues this change is 'consistent with other provisions of the Citizenship Act'. In particular the EM cites s 34(3)(b).[14] We disagree that this change is consistent with the Act in its entirety. There are many instances in the Act that are designed to *reduce* statelessness. See for example ss 16(2)(c) and 16(3)(c), as well as ss 21(8), 24(8), and 36(3) and 52(2) of the *Australian Citizenship Act 2007* (Cth).

Our concern (which was also raised by the SSBC) is that the proposed change in wording may make it possible for a ministerial decision to make a person stateless. [15] As such it is a change which will have significant, and dramatic consequences, which are being downplayed in the information about the Bill presented by the Government, including the Statement of Compatibility with Human Rights which provides too brief an analysis of this risk.

We are opposed to any change to the law which makes statelessness more likely. Our primary recommendation in relation to this proposed change is as follows:

Recommendation 3: That the change to the adjustment of the threshold in relation to knowledge of potential statelessness be abandoned.

To this end we include broader principles of international law that provide a justification for resisting this change.

Compatibility with International Law

The amendments raise several international legal concerns. This section highlights the risk that the legislation as currently drafted may result in a breach of the prohibition on the arbitrary deprivation of nationality and the rendering of a person stateless.

Arbitrary Deprivation of Nationality

International law recognises that 'an individual's legal bond to a particular state through citizenship remains in practice an essential prerequisite to the enjoyment and protection of the full range of human rights.'[16] As a result, several human rights instruments emphasise the importance of the acquisition and retention of a nationality by prohibiting its arbitrary deprivation. This prohibition is found in art 15(2) of the Universal Declaration of Human Rights, which provides that '[n]o one shall be arbitrarily deprived of his nationality.' Analogous rights are found in art 5 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art 24(3)

[13] Ibid.
[14] Ibid.
[15] Senate Standing Committee for the Scrutiny of Bills, above n 3 para [1.11].
[16] Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27 *Refugee Survey Quarterly* 93, 93.

of the 1966 International Covenant on Civil and Political Rights (ICCPR), and arts 7 and 8 of the 1989 Convention on the Rights of the Child (CROC) – all instruments to which Australia is a party.

Arbitrariness is a term of art in international human rights law, its content fleshed out by various bodies and tribunals over several decades. As the Human Rights Committee has repeatedly confirmed, 'arbitrariness' is not to be equated merely with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.[17] In the context of the legislation before the Committee, the Report of the Secretary General of the United Nations into Human Rights and Arbitrary Deprivation of Nationality usefully sets out the principles that must be adhered to (emphasis added):

> [I]n order not to be arbitrary, deprivation of nationality must be in conformity with domestic law and in addition *comply with specific procedural and substantive standards, in particular the principle of proportionality*. Measures leading to deprivation of nationality *must serve a legitimate purpose* that is consistent with international law and in particular the objectives of international human rights law. Such *measures must be the least intrusive* instrument amongst those which might achieve the desired result *and they must be proportional to the interest to be protected.*[18]

Moreover, given the particularly severe impact on individual rights which statelessness involves, international law strictly limits the circumstances in which cessation or deprivation of nationality leading to statelessness can be recognized as serving a legitimate purpose. These are set out in articles 5-8 of the 1961 Convention on the Reduction of Statelessness (1961 Convention).

The legislation as currently drafted lacks the requisite procedural and substantive standards to avoid the arbitrary deprivation of nationality, including deprivation that results in statelessness.

States are under an obligation to implement, interpret and apply a treaty in good faith,[19] and not take actions that might foreseeably result in a breach of the treaty or undermine its efficacy, frustrating its object and purpose.[20] In order to ensure that Australia's treaty obligations are adhered to, it is crucial that any decision to deprive a person of their Australian nationality only be undertaken a) where the Minister is confident to a high

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[17] See, for instance, Human Rights Committee, General Comment No. 27, para. 21. Human Rights Committee, general comment No. 16, para. 4. It is also clear from the travaux preparatoires of art 15 of the Universal Declaration of Human Rights that 'arbitrariness' was not to be equated with 'illegally'. See discussion in Sandra Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives* (Brill, 2015) 31-7.

[18] Report of the Secretary-General "Human rights and arbitrary deprivation of nationality" (A/HRC/13/34, 14 December 2009, para. 49.

[19] Vienna Convention on the Law of Treaties, arts 26 and 31.

[20] See Lord McNair, The Law of Treaties, (1961), 540, 550; *Nuclear Tests (Australia v. France) Case*, ICJ Rep., (1974), 253, 268.

standard of proof that the individual concerned has another effective nationality, b) where the Minister is required to take into account the full range of rights impacted as well as the availability of alternative means for achieving the same objectives, and c) where adequate procedural safeguards are put in place consistent with due process rights. Such amendments are necessary to ensure decisions are neither arbitrarily reached nor result in a person becoming stateless.

We note that the Bill is not designed to raise any of the exceptions to deprivation leading to statelessness allowable under the 1961 Convention. Section 35A(1)(b) is prima facie designed to prevent statelessness occurring. However, we are seriously concerned that by lowering the threshold for cessation of Australian citizenship without introducing adequate procedural safeguards and substantive considerations as required under international law, the Bill exacerbates the already significant risks of Australia breaching its obligations under the 1961 Convention as well as its obligation not arbitrarily to deprive a person of their nationality.

The likelihood of this occurring is increased by the expansion of the categories of those eligible for citizenship stripping, and the implicit assumption, evident in the Explanatory Memorandum, that 'association' with a terrorist organisation represents either a breach of allegiance or a threat to the Australian community.

i) Legitimate purpose and proportionality

The twofold purpose of the legislation is set out in the Explanatory Memorandum's Statement of Compatibility with Human Rights: 'to keep Australians safe from evolving terrorist threats, and to uphold the integrity of Australian citizenship and the privileges that attach to it.'[21] While these are undoubtedly legitimate purposes, it is questionable whether the means adopted are proportionate to their achievement, or whether they could not be better achieved by other mechanisms.

We note, for instance, that there is a perverse logic involved in stripping nationality from an Australian convicted overseas of terrorism offences that then effectively precludes their extradition while doing nothing to address their ability to influence and participate in international terrorist activities. Deprivation of nationality in such circumstances could conceivably harm Australia's interests and endanger other Australian nationals at home and abroad, as has been pointed out by terrorism experts who have considered the legislation in Australia.[22]

The Australian Parliament must be sensitive to the danger evident in other jurisdictions of 'exporting terrorism' through legislation that strips citizens of their nationality without a 'careful audit of security benefits'.[23] The principle of proportionality requires a decision-

[21] Statement of Compatibility with Human Rights, para 1.
[22] See, for instance, comments of Professor Greg Barton in David Wroe, 'Unwanted man: Prakash decision many-layered headache for Canberra', Sydney Morning Herald, 5 January 2019.
[23] See commentary in David Anderson QC, Independent Reviewer of Terrorism Legislation, *Citizenship Removal Resulting in* Statelessness: First Report of the Independent Reviewer on the operation of the

maker to take into account the gravity of the offence *compared to the consequences of the withdrawal of nationality*.[24] The removal of the six-year sentence threshold raises a prima facie question as to whether citizenship deprivation will be proportionate. That the power might now be applied to those who have committed offences not considered serious enough to warrant a lengthy prison sentence increases the risk that the power will be used in a disproportionate manner.

The mandatory considerations which the Minister must take into account in reaching a decision, set out in proposed s 35A(1)(d) of the Act, do not adequately ensure that the principle of proportionality will be adhered to. It does not, for instance, expressly require a consideration of the gravity of offence *compared to the consequences of withdrawal of nationality*. In particular, the proportionality principle requires a broader set of rights-based considerations. As the Court of Justice of the European Union noted in the recent case of *Rothmann v Freistatt Bayern*, 'it is necessary [as part of the proportionality exercise] ... to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen...'

In addition to recommending that the existing threshold in relation to the Minister's knowledge of potential statelessness be maintained, we recommend that the impact of a decision on the rights and interests of both the individual and their families be made mandatory considerations in s 35A(1). This would also better ensure compliance with other international human rights law instruments to which Australia is a party.

Recommendation 4: *That s 35A be amended to require Minister to take into consideration the full range of rights impacted as well as the availability of alternative means for achieving the same objectives, and to engage in a proportionality assessment consistent with Australia's international obligations.*

ii) Lowering of thresholds

The risks that a decision will be either arbitrary and/or result in a person being made stateless are exacerbated by the lowering of the threshold to a 'satisfaction' that a person will not become stateless (s 35A(1)(b)), and by the Minister's 'satisfaction' that a person has repudiated their allegiance to Australia as a result of their conduct (s 35A(1)(c)).

International jurisprudence indicates that states should maintain a high standard of proof on both of these matters given the seriousness of the consequences of the decision.[25]

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power to remove citizenship obtained by naturalisation from persons who have no other citizenship' (April 2016) [3.5]-[3.8], and the literature cited therein.

[24] CJEU, Case C-135/08, *Rottmann v. Freistaat Bayern*, 2 March 2010.

[25] Charles H. Hooker, 'The Past as Prologue: Schneiderman v. United States and Contemporary Questions of Citizenship and Denationalization' (2005) 19 *Emory Int'l L. Rev.* 305 at 324, citing Schneiderman v. United States, 320 U.S. 118 (1943) at 122.

iii) Presumptions by way of 'association'

We also note that there are risks involved in extrapolating a repudiation of allegiance from an 'association' with a terrorist organisation. The Explanatory Memorandum's assertion that 'it is reasonable, necessary and proportionate for the cessation of Australian citizenship to individuals convicted of supporting the very existence of these organisations' is both inconsistent with international jurisprudence on association offences, and states an unfounded presumption.

In the analogous area of the operation of exclusion clauses under the 1951 Convention relating to the Status of Refugees, courts have treated such presumptions with extreme caution. The significant expansion of categories of accessorial liability in international criminal law casts a very wide net over those who may now be subject to exclusion of refugee status for the commission of relatively minor 'terrorism-related' offences of association. In this vein, the UK Supreme Court in *JS (Sri Lanka)* called the presumption of exclusion as a result of voluntary membership of a terrorist organisation a 'dangerous doctrine. … It diverts attention from a close examination of the facts and the need for a carefully reasoned decision…'[26] A similar concern could be raised with respect of a provision that presumes association with a terrorist organization should lead to the cessation of citizenship and the concomitant stripping of rights which this would involve. It is hard to see how such an outcome could necessarily be considered either reasonable or proportionate. This could, however, be addressed by requiring a sentence of six (or at least three) years before the Minister can exercise the discretion contained within s 35A (see discussion above).

iv) Least intrusive means

Consistent with the principles of necessity and proportionality, we recommend to include amongst the considerations in s 35A whether deprivation of nationality is the best and least intrusive means for achieving the aims sought. As noted above, stripping of citizenship can have adverse and even perverse consequences both for the individual involved and Australia's security interests. While we appreciate this might be broadly covered by the catch-all category of 'public interest' in s 35A(1)(d)(vii) ('any other matters of public interest'), it would be preferable to see this consideration expressly mandated.

v) Procedural safeguards

Finally, as noted above, international law requires that basic procedural safeguards be put in place to ensure Australia not fall foul of its international obligations. We note in this regard and endorse the submissions made by the Australian Human Rights Commission (AHRC) to previous inquiries.[27] As the AHRC noted, art 14 of the International Covenant

[26] [2011] 1 AC 184, [44] (Lord Hope).
[27] For instance, Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Legislation Committee, An inquiry into the Australian Citizenship and Other Legislation

on Civil and Political Rights (ICCPR) contains due process guarantees in relation to legal proceedings that should be applicable to a decision involving the types of grave consequences involved for an individual facing revocation of their citizenship. The applicability of the provision to civil proceedings such as these has been confirmed by the ICCPR's Human Rights Committee.[28] It requires a fair hearing by a competent, independent and impartial tribunal established by law, as well as a full merits review.

At present, the decision to deprive a person of their citizenship can be made without any involvement of the affected individual in the decision-making process or the opportunity of merits review. This arises as a result of the exclusion of a decision under s 35A from decisions where merits review is available under s 52 of the *Australian Citizenship Act 2007* (as was also noted by the SSCB).[29] At the very least, a thorough merits review process at the Administrative Appeals Tribunal might act to ameliorate the danger of an arbitrary deprivation of nationality and the rendering of a person as stateless.
We consider that the availability of judicial review under s 75(v) Constitution to be inadequate to this task (as will be discussed below). As the AHRC points out, 'a court will not be able to consider the merits of the application – that is, there will be no reassessment of the substantive question', the court being limited to considering whether the Minister made a jurisdictional error. Seeking declaratory relief, in other words, will not be a sufficient remedy.

In light of the above discussion, we make the following recommendation in addition to those already noted, in order to ensure compliance with Australia's international obligations:

Recommendation 5: *That the Bill be amended to provide a right to full merits review of any decision regarding deprivation of nationality by adding s 35A* to the decisions where merits review is available (by amending s 52 of the *Australian Citizenship Act 2007).*

Concerns about the Adequacy of Judicial Review

Moreover, we want to endorse the SSCB's concern that the proposed adjustment to the threshold required regarding statelessness could mean that 'the intensity of permissible judicial review would be considerably lower than is allowable under the current provision'. As explained by the SSCB this is because under the version of the provision which is currently in force, the Minister cannot exercise the discretion to determine that a person's Australian citizenship has ceased after conviction unless a person '*is* a national or citizen of a country other than Australia at the time when the Minister makes the determination'. [30]

Amendment Bill 2014 (6 November 2014), [42]-[47].
[28] Human Rights Committee, General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (23 August 2007) para 16.
[29] Senate Standing Committee for the Scrutiny of Bills, above n 3, para [1.12]
[30] Senate Standing Committee for the Scrutiny of Bills, above n 3,para [1.12].

According to the SSCB this means that whether a person *is* a dual citizen could become a 'jurisdictional fact'. In turn, this gives a court the ability to examine whether a person is *in fact* a citizen. Under the proposed amendments, the Court would only be able to examine whether the Minister 'reasonably' formed the view that a person was a dual citizen.[31]

This change is even more problematic given that a decision under s 35A is not subject to merits review (as discussed above).

Other international law considerations

Certain international law considerations also arise with respect to the deprivation of nationality of those who have travelled overseas on Australian passports. In certain circumstances, it might be considered as a violation of the territorial sovereignty of the other state to deny readmission of that individual, especially where they are considered a security threat, effectively transferring responsibility for them to a state of which they are not a national.[32]

Professor Goodwin-Gill cites the eminent jurist Paul Weis:

> The good faith of a State which has admitted an alien on the assumption that the State of his nationality is under an obligation to receive him back would be deceived if by subsequent denationalisation this duty were to be extinguished.[33]

Under international law, according to Goodwin-Gill, any State which admitted an individual on the basis of his or her British passport would be fully entitled to ignore any purported deprivation of citizenship and, as a matter of right, to return that person to the country which had granted their passport. In the current scenario, if Australia were to refuse re-admission, and if no other country had expressed its willingness to receive that person, Australia would be in breach of its obligations towards the receiving State.

We look forward to elaborating upon this submission in person.

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[31] Ibid

[32] See Jurunn Brandvoll, 'Deprivation of nationality: limitations on rendering persons stateless under international law' in Alice Edwards and Laura van Waas, *Nationality and statelessness under international law* (CUP, 2014) 214.

[33] Guy S. Goodwin-Gill, 'Mr Al-Jedda, Deprivation of Citizenship, and International Law' Revised draft of a paper presented at a Seminar at Middlesex University on 14 February 2014, citing P. Weis, *Nationality and Statelessness in International Law* (Alphen aan den Rijn: Sijthoff & Noordhoff, 2nd ed., 1979), 55.

Professor Kim Rubenstein
Kim.Rubenstein@anu.edu.au

Matthew Zagor
Matthew.Zagor@anu.edu.au

Dominique Dalla-Pozza
Dominique.Dalla-Pozza@anu.edu.au

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