Law Council
OF AUSTRALIA

Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

Parliamentary Joint Committee on Intelligence and Security

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

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
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- Tasmanian Bar
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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of the Law Society of New South Wales and its National Criminal Law Committee in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) inquiry into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (**the Bill**).

2. The Bill seeks to amend the *Australian Citizenship Act 2007* (Cth) (**the Act**) to modify the provisions in the Act relating to terrorism-related citizenship loss. Key aspects of the Bill include proposals to:

    - repeal existing sections 33AA and 35, which permit loss of citizenship through the operation of law for dual citizens who engage in specific terrorism related conduct;
    - repeal existing section 35A, which allows for the loss of citizenship following a conviction for a terrorism related offence in certain circumstances;
    - create a new Ministerial decision-making scheme whereby the Minister can make a determination for the cessation of citizenship based on certain conduct or convictions in certain circumstances;
    - reduce the sentence term threshold for which a person convicted of a specified terrorism offence may be considered for citizenship cessation, from six years to three years; and
    - replace the current requirement that a person be a national or citizen of a country other than Australia at the time the Minister makes a determination that the person ceases to be an Australian citizen, with a requirement that the Minister need only be satisfied that such a determination would not result in the person becoming someone who is not a national or citizen of any country.

3. The Law Council understands the necessity of laws which are enacted to maintain the security of Australia and the safety of Australian citizens, however, emphasises the importance of ensuring that such laws are proportionate and supported by evidence to meet that objective. Measures to remove citizenship challenge key legal principles on which our democracy was founded, and therefore demand careful consideration by the Commonwealth Parliament.

4. The Law Council maintains its primary position that if citizenship is to be removed, it should only occur where an individual has been convicted by an independent, impartial and competent court of a serious terrorism related offence. It is the view of the Law Council that if, following conviction, a decision is made by a Minister to revoke citizenship, this should only occur after the Minister is satisfied that there is evidence that the person poses a substantial risk to Australia's security. The Minister's decision should be made after complying with the requirements of procedural fairness and be subject to clear and effective judicial review.

5. The Law Council notes the Committee is conducting a concurrent inquiry into the current terrorism related citizenship loss provisions of the Act and is due to report by the 1 December 2019. The Law Council refers the Committee to the Law Council's submission lodged in relation to this related inquiry, as it relates more broadly to the citizenship cessation scheme.[1]

[1] Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Australian Citizenship Renunciation by Conduct and Cessation Provisions* (1 July 2019).

6. The Law Council further notes the Bill has been introduced following the recent review by the Independent National Security Legislation Monitor (**INSLM**) in relation to the operation, effectiveness and implications of the terrorism-related citizenship loss provisions of the Act and seeks to implement, at least in part, the recommendations made by the INSLM following his review.[2]

7. In terms of addressing the specific proposals contained in the Bill, the Law Council welcomes the amendments which seek to repeal the 'self-executing' provisions related to conduct-based citizenship loss. This was recommended by the INSLM and has been previously recommended by the Law Council and others – albeit with differing views as to how the repeal should be addressed.

8. The proposed scheme allows for the cessation of citizenship on determination by the Minister where he or she is satisfied that the person has engaged in certain prescribed conduct which demonstrates the person has repudiated their allegiance to Australia, and where it would be contrary to the public interest for the person to remain an Australian citizen. The person is then required to be served with a notice relating to that determination and informing them of their right to make an application to the Minister to revoke the determination for the cessation of citizenship and their rights to judicial review.

9. While this is an improvement on the current framework, the Law Council is concerned that the Bill does not give effect to all the recommendations of the INSLM, one of which was that a Ministerial decision-making model should be coupled with the availability of merits review of the the finding by the Minister as to the facts that constitute the conduct, fighting or service engaged in by the person, to the Security Appeals Division of the Administrative Appeals Tribunal (**AAT**).[3]

10. Further, the INSLM did not recommend amendment to section 35A, the conviction-based citizenship loss provision. In this regard, the INSLM found that the loss of citizenship 'because of terrorist conduct may be both necessary and proportionate under the conviction-based provisions'.[4] It is therefore of concern that the Bill seeks to amend this provision by lowering the existing threshold in section 35A that there be a sentence of at least six years imprisonment.

11. Further, the proposed changes for both conduct-based and conviction-based citizenship loss appear to inappropriately expand administrative power, increasing the risk that a person may be rendered stateless. There is a concern that this potential outcome may be inconsistent with Australia's international law obligations.

12. In light of these concerns, and others as articulated in this submission, should the Bill proceed, the Law Council makes the following recommendations aimed towards its improvement:

    - A decision of the Minister to deprive a person of their Australian citizenship should be subject to merits review, as recommended by the INSLM.
    - Conduct listed at proposed subsection 36B(5) should be accompanied by an element of intention as exists in the current scheme.
    - Proposed subsection 36B should be amended to require the Minister to be 'reasonably satisfied' of the matters listed at proposed subsection 36B(1).

[2] Independent National Security Legislation Monitor, *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 (Cth)* (3rd INSLM, 7th Report, 2019).
[3] Ibid xi.
[4] Ibid xiii.

- The existing threshold where only a person be sentenced to six or more years of imprisonment for a relevant terrorism offence is eligible to lose their Australian citizenship should be maintained.
- Subparagraph 36D(6)(b)(ii) should be removed from the Bill.
- The steps that the Minister must take to prevent statelessness should be set out in the legislation, including a requirement for verification of citizenship, or immediate eligibility for citizenship, of another country.
- The scheme should not apply to any child or person who suffers from serious mental illness or any cognitive impairment. Alternatively, if the scheme is to apply to children, there should be evidence available to prove the child had the necessary capacity to form the intention to repudiate their allegiance to Australia. A similar test should apply to any individual suffering from a serious mental illness or any cognitive impairment before their citizenship is removed.
- When exercising his or her powers under the Act, the Minister or any other decision maker should be required to consider:
  - the prospects for and actual rehabilitation of the person; and
  - the likely effects of citizenship cessation on any dependents and what, if any, alternative arrangements might apply.
- There should be a discretion to accept an application for revocation of a citizenship cessation determination outside proposed legislative timeframes in certain circumstances.
- A person should be able to file a further application for revocation where they can adduce new evidence relevant to the application that was not available to the person at the time the original application was made.
- Paragraph 36C(2)(b) should be amended to include the phrase, 'seriously prejudicial to the vital interests of Australia'.
- The measures in the Bill should not apply retrospectively to conduct or convictions that occurred prior to commencement of the citizenship cessation scheme.

Current Provisions

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

    - the person, aged 14 years or older, renounces Australian citizenship if the person acts inconsistently with allegiance to Australia by engaging in specified terrorist-related conduct, where the conduct was engaged in outside Australia or the person left Australia before being charged and brought to trial for the conduct (automatic citizenship loss);[5]
    - the person, aged 14 years or older, ceases to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation (automatic citizenship loss);[6] or
    - the Minister determines in writing that a person ceases to be an Australian citizen because the person has been convicted of a specified terrorist-related offence with at least six years of imprisonment (or periods of imprisonment that total at least six years).[7]

14. The intent of the legislation was to:

    > *…deal with the threat caused by those who have acted in a manner contrary to their allegiance to Australia by removing them from formal membership of the Australian community. Cessation of citizenship is a very serious outcome of very serious conduct that demonstrates a person has repudiated their allegiance to Australia*.[8]

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

16. Nonetheless, recent practical experience of the operation of these laws raises serious questions about whether they are effective in protecting a person from statelessness.[9] In the case of Neil Prakash, despite the current legislation having a higher threshold than the proposed legislation, much media attention has been placed on whether or not, he is a Fijian Citizen, as Fiji have stated there is no evidence of his Fijian Citizenship.[10]

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[5] *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) s 33AA.
[6] Ibid s 35.
[7] Ibid s 35A.
[8] Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 14 [59].
[9] Law Council of Australia, 'Law Council of Australia's Statement regarding Neil Prakash's Citizenship Status' (Media Release, 4 January 2019) <https://www.lawcouncil.asn.au/media/media-releases/law-council-of-australias-statement-regarding-neil-prakashs-citizenship-status>; Helen Davidson, 'Dutton Insists Neil Prakash is Fijian Citizen, But Fiji PM Says He 'Cannot Come Here'', *The Guardian* (online), 3 January 2018 <https://www.theguardian.com/australia-news/2019/jan/03/dutton-insists-neil-prakash-is-fijian-citizen-but-fiji-pm-says-he-cannot-come-here>; David Wroe, 'Fijian PM Says Terrorist Neil Prakash Cannot Go to Fiji, Amid Deepening Citizenship Row', *The Canberra Times* (online), 3 January 2018 <https://www.canberratimes.com.au/politics/federal/fijian-pm-says-terrorist-neil-prakash-cannot-go-to-fiji-amid-deepening-row-20190103-p50pcz.html>.
[10] Matthew Doran et al, 'Fiji Casts Fresh Doubt on Decision to Strip Terrorist Neil Prakash of Australian Citizenship', *ABC News* (online), 8 January 2018 <https://www.abc.net.au/news/2019-01-08/neil-prakash-definitely-not-fijian-argue-officials/10698462>.

This context not only had significant implications for the rights of the individual, but also created diplomatic tensions between Australia and Fiji.

Intention of the Bill

17. The proposed reforms contained in the Bill seek to repeal and replace existing sections 33AA, 35 and 35A of the Act. The Bill introduces a Ministerial decision-making requirement in place of existing provisions in the Act which provide that a person can automatically cease their citizenship through conduct. In this respect, the Bill implements recommendations from the INSLM in his 2019 review as they relate to the need to repeal the current 'operation of law' provisions. In making this recommendation, the INSLM found that these provisions were operating in an 'uncontrolled and uncertain' manner.[11] The INSLM review recommended that these provisions:

> *… should, with some urgency, be repealed with retrospective effect, but be simultaneously replaced by a Ministerial decision-making model (and thus with constitutionally entrenched judicial review).*[12]

18. The Bill provides three ways in which an Australian citizen can be considered for citizenship cessation under the Act:

    (a) the person has engaged in terrorism-related conduct which demonstrates that the person has repudiated their allegiance to Australia;[13]

    (b) the person serves in the armed forces of a country at war with Australia or fights for or is in the service of a declared terrorist organisation;[14]

    (c) the person has been convicted of a specified terrorism-related offence under the Criminal Code which has resulted in a period of imprisonment of at least three years.[15]

19. In relation to the last of these scenarios, the Bill proposes to change the current threshold in section 35A of the Act which requires a term of imprisonment of at least six years for a terrorism related offence or offences.

20. The Bill provides for a period in which the individual subject to a determination resulting in the cessation of their citizenship can apply to the Minister to have the determination revoked. It also provides a mechanism for the Minister to revoke a determination on his or her own initiative, or for the determination to be automatically revoked in certain circumstances.

Citizenship cessation based on conduct

21. As noted above, proposed section 36B of the Bill seeks to consolidate existing sections 33AA and 35 of the Act as they relate to citizenship cessation based on conduct. The Explanatory Memorandum states that 'new section 36B will provide for citizenship

[11] Independent National Security Legislation Monitor, *Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007 (Cth),* xv.
[12] Ibid xi.
[13] Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) cl 36B(1).
[14] Ibid cl's 36B(5)(i) and (j).
[15] Ibid cl 36D.

cessation to occur by a determination, rather than cessation occurring by operation of law if a person engages in certain conduct'.[16]

22. Proposed subsection 36B(1) will permit the Minister to determine in writing that a person aged 14 or over ceases to be an Australian citizen if the Minister is satisfied that the person has either:

    - engaged in conduct specified in proposed subsection 36B(5) while outside Australia; or
    - engaged in conduct specified in any proposed paragraphs 36B(5)(a) to (h) while in Australia, but has not been tried for that conduct and has subsequently left Australia.

23. In addition, the Minister must be satisfied that:

    - the conduct demonstrates that the person has repudiated their allegiance to Australia; and
    - it would be contrary to the public interest for the person to remain an Australian citizen.

24. Proposed subsection 36B(2) states the Minister must not make the determination if the Minister is satisfied that if the determination is made, the person would 'become a person who is not a national or citizen of any country'. Under the proposed measures, the person ceases to be an Australian citizen at the time the determination is made under proposed subsection 36B(3).

25. It continues to be the primary position of the Law Council that loss of citizenship should only occur following a conviction being imposed for terrorism related conduct, as occurs with section 35A. Australian citizens who engage in such conduct should be held to account in courts following a trial conducted in accordance with the rule of law. This includes the safeguards that a criminal trial provides, such as the presumption of innocence, the right to a fair trial, the application of the procedural fairness and the requirement for the Crown to prove the offence beyond a reasonable doubt. This ensures the process is one that accords with both the rule of law and the separation of powers, both fundamental to Australian democratic values.

26. As noted in its submissions to the INSLM, the Law Council maintains that while its preferred position is that loss of citizenship be contingent upon conviction, an alternative and preferred model to the self-executing provisions of existing sections 33AA and 35 is for the Minister to seek a determination from a Court as to the matters contained in subsections 33AA(2),(3) and (4) or subsection 35(1) so that it can make an order to terminate citizenship.

27. Under this alternate approach, where a conviction is not possible and revocation of citizenship is to be determined based on conduct, the Minister should make an application to a court seeking an order for the revocation of citizenship. Before such an order is made the court must be satisfied, at least to the civil standard of proof of the conduct relied on for the cessation of citizenship, and that the individual is a citizen or national of another country.

28. Despite the above positions, the Law Council acknowledges that the INSLM has recommended in favour of a Ministerial determination model, similar to that which is contained in the Bill. While not aligned with the Law Council's preferred approach, the

[16] Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) 7 [39].

Law Council nonetheless welcomes measures that will repeal the problematic self-executing provisions in the Act and views the proposed measures as an improvement on the current scheme. In particular, the Law Council acknowledges that under the proposed Ministerial decision-making model, decisions will be subject to more clearly defined rights to judicial review, which is a significant improvement.

29. However, the Law Council is concerned that the proposed measures at section 36B do not give effect to all the recommendations of the INSLM, in particular, it is noted that the INSLM recommended that a Ministerial decision-making model should be coupled with the availability of merits review as to the finding by the Minister as to the facts that constitute the conduct, fighting or service engaged in by the person. The absence of the availability of merits review is a major deviation from the model as recommended by the INSLM. This concern is exacerbated by the fact that a person has no opportunity to make submissions to the Minister prior to the decision to revoke citizenship and natural justice is expressly excluded in the initial ministerial decision-making process.

30. The Law Council raises a number of further issues with the proposed Ministerial determination model with the view to improving safeguards under proposed section 36B. These are further elaborated upon below.

Review of Ministerial determinations

31. As noted above, the Bill does not appear to implement the recommendation of the INSLM that merits review should be available in relation to a decision by the Minister to remove citizenship based on conduct. In this regard, the INSLM recommended that:

> *… there should be merits review in the SAD* [Security Appeals Division] *as to whether there could have been or is reasonable satisfaction as to the existence of the requisite conduct for citizenship loss. That would replace any right of challenge to the QSA* [Qualified Security Assessment] *(challenge of which would therefore be redundant). In order to provide some 'equality of arms' in the AAT, the special advocate legislation now in the* National Security Information (Civil and Criminal Proceedings) Act 2004 *(Cth) in relation to control orders would be extended to this process.*[17]

32. The INSLM then considered that as well as the availability of merits review in the Security Appeals Division of the AAT, there would then also be 'the normal right of appeal on questions of law to the Federal Court, which will be able to view both the open and closed reasons of the AAT, as will any special advocate on appeal'.[18]

33. While the INSLM recommended that there should be ministerial power to deprive a person of Australian citizenship in certain circumstances, it was emphasised that the exercise of this power should be subject to 'meaningful review' and that 'judicial review should be supplemented by full merits review'.[19] The Law Council remains concerned about the lack of available merits review under the proposed amendments, particularly in light of the Minister's increased discretionary power under the Bill and considers that the recommendations of the INSLM to provide for merits review of a Minister's decision to remove citizenship based on conduct should be incorporated into the proposed measures.

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[17] Independent National Security Legislation Monitor, *Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007 (Cth),* xv-xvi, Recommendation 1.32(3)(e).
[18] Ibid xvi, Recommendation 1.32(3)(f).
[19] Ibid 58 [6.93].

Recommendation:

- **A decision of the Minister to deprive a person of their Australian citizenship should be subject to merits review, as recommended by the INSLM.**

Intention and conduct-based cessation

34. One notable proposed change to the existing provisions is that under the current provisions there is a requirement under subsection 33AA(3) that a person not only engages in the specified conduct, but does so with the intention of 'advancing a political, religious or ideological cause' together with 'coercing, or influencing by intimidation' a government or 'intimidating the public or a section of the public'. Subsection 33AA(4) is a deeming provision that provides a person is taken to have 'engaged in conduct with an intention referred to in subsection (3)', if, when the person engaged in the conduct the person was a member of or was acting on instruction of, or in co-operation with a 'declared terrorist organisation' as defined in section 35AA.

35. This requirement for conduct to be accompanied by specified intent is not reproduced in proposed section 36B. Instead, proposed paragraph 36B(1)(b) requires the Minister to be satisfied that the conduct demonstrates that the person has repudiated their allegiance to Australia. The Explanatory Memorandum provides some explanation for this, stating that:

> *… new paragraph 36B(1)(b) ensures that a person's citizenship cannot be ceased unless the Minister is satisfied that their conduct repudiated their allegiance to Australia. A person who, for example, unknowingly participated in conduct set out in new subsection 36B(5) is unlikely to satisfy the Minister that they have repudiated their allegiance to Australia.*[20]

36. The Law Council considers that the requirement for intention as well as conduct is necessary to justify the significant step of stripping a person of citizenship, particularly where it is being done in the absence of a person being convicted in a court of a criminal offence. A criminal conviction for terrorism related offending will require the proof of the relevant fault element as well as the physical element. Consideration of the element of intention should occur before the Minister can make a decision as to the repudiation of allegiance to Australia.

37. In this regard, the Law Council notes the commentary provided by the INSLM in relation to section 35 of the Act:

> *One difficulty with s 35 (in contrast to s 35A or even s 33AA) is that it does not seek to have the disqualifying conduct correspond with specified criminal conduct. While there can be no doubt that fighting for or being in the service of a terrorist organisation may be a serious criminal offence, the seriousness varies considerably depending on the nature of the acts and whether the fault element is intent or recklessness.*[21]

38. The Law Council notes that in relation to proposed paragraph 36B(5)(i), which relates to 'fighting for, or being in the service of a declared terrorist organisation', that proposed subsection 36B(7) reproduces the wording in subsection 35(4) and provides some

[20] Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) [46].
[21] Independent National Security Legislation Monitor, *Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007 (Cth)*, 47 [6.35].

protection in that a person 'is not in the service of a declared terrorist organisation' to the extent that:

(a) the person's actions are unintentional;

(b) the person is acting under duress or force; or

(c) the person is providing neutral and independent humanitarian assistance.

39. The Law Council notes that a person's actions might be intentional however, lack the requisite knowledge that such actions might be taken as being within the service of declared terrorist organisation. For example, a person providing funds to what they believe to be an aid agency, may be captured if the recipient is in fact linked to a declared terrorist organisation. This issue is compounded by the lack of requirement for a criminal conviction before the cessation of citizenship can occur.

40. The Law Council considers that the Bill would be improved by requiring the conduct in remaining paragraph's 36B(a) to (h) to be accompanied by the intention as defined in current subsection 33AA(3).

Recommendation:

- **Conduct listed at proposed subsection 36B(5) should be accompanied by an element of intention as exists in the current scheme.**

Requirement to be reasonably satisfied

41. In his report on the citizenship cessation provisions, the INSLM recommended a model whereby the Minister may revoke citizenship based on conduct if the Minister:

(a) is reasonably satisfied that the physical conduct element exists (as it currently appears is sections 35 and 33AA of the Act); and

(b) has regard to the factors listed in the current subsection 33AA(17) of the Act to determine that, firstly, a repudiation of the allegiance to Australia exists and secondly, that it is not in the public interest for the person to remain an Australian citizen.[22]

42. It is noted that proposed section 36B requires the Minister to be 'satisfied' of matters akin to the above, as opposed to adopting the INSLM's preferred approach of being 'reasonably satisfied'.

43. In line with the INSLM's recommendation, the Law Council considers that the Bill would be improved if the words 'reasonably satisfied' were used as opposed to simply 'satisfied' in accordance with the recommended wording of the INSLM.

Recommendation:

- **Proposed subsection 36B should be amended to require the Minister to be 'reasonably satisfied' of the matters listed at proposed subsection 36B(1).**

Citizenship cessation based on certain convictions

[22] Ibid xv, Recommendation 1.32(a).

44. Proposed subsection 36D is intended to replace existing section 35A, permitting the Minister to make a determination for the cessation of citizenship where the person has been convicted of one or more terrorism-related offences. The prescribed offences listed in proposed subsection 36D(5) are the same as those listed in the current paragraph 35A(1)(a).

45. Proposed subsection 36D(1) states that the Minister may determine in writing that a person ceases to be an Australian citizen if:

    (a) the person has been convicted of an offence or offences, against one or more of the provisions listed in subsection (5); and

    (b) the person in respect of these convictions has been sentenced to a period or total period of imprisonment of at least three years or a sentence of three years for a particular offence; and

    (c) the Minister is satisfied that the conduct which forms the basis of the conviction(s) demonstrates that the person has repudiated their allegiance to Australia; and

    (d) the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

46. The phrase 'public interest' is partially defined in proposed section 36E which lists a number of factors which the Minister must consider when deciding whether to make or revoke a citizenship cessation determination.

47. In relation to the existing section 35A of the Act, the INSLM concluded, that as opposed to sections 33AA and 35, this provision was 'necessary, proportionate and contains appropriate safeguards for protecting the rights of individuals'.[23] The INSLM considered that the key to his conclusion as to the necessity and proportionality of section 35A was that the 'law allows an appropriate response to the 'unique and complex' circumstances of each individual'.[24] He reached this conclusion on the following features of section 35A:

    (a) there is conviction by a jury, so the terrorist conduct is established beyond a reasonable doubt;

    (b) there is a substantial sentence of imprisonment of six years or more, imposed by a Judge, reflecting the serious nature of the conduct;

    (c) there is proper protection against the person becoming stateless, through the requirement of dual citizenship;

    (d) if those circumstances are established, the Minister must then be satisfied of:

        (i) i. that the conduct to which the conviction relates demonstrates the person has repudiated their allegiance to Australia; and

        (ii) ii. the comprehensive list of factors set out in paragraph 35A(1)(e), in deciding whether it is in the 'public interest' for the person to lose their Australian citizenship.

[23] Ibid 44 [6.15].
[24] Ibid 45 [6.16].

48. For these reasons, as well as the availability of judicial review under the Constitution and the *Judiciary Act 1903* (Cth), the INSLM did not recommend the repeal or amendment of section 35A.[25] The Law Council agrees with this conclusion, and regards section 35A as currently framed to be a provision which largely addresses the concerns the Law Council has in relation to procedural fairness and proportionality.

49. The Law Council therefore has concern with the amendments contained within proposed section 36D, most notably the proposal to reduce the minimum sentencing threshold required to invoke citizenship cancellation under this provision. This concern is discussed further below.

Reduction in minimum sentencing threshold

50. Proposed subsection 36D(1) states that the Minister can determine that a person ceases to be an Australian citizen if they have been convicted of a specified terrorism-related offence under the Criminal Code which has resulted in a period of imprisonment of at least three years. As noted above, this is a reduction in the current threshold in section 35A of the Act, which requires a term of imprisonment of at least six years.

51. The only justification provided in the Explanatory Memorandum is that '[a] sentence of imprisonment for a period of at least 3 years, or periods that total 3 years, reflects the seriousness of a criminal conviction for one of the terrorism-related offences specified in new subsection 36D(5)'.[26]

52. The Law Council again notes that the INSLM did not make any recommendation in relation to reducing this threshold. The Law Council also submits that the current thresholds to strip dual citizens of their Australian citizenship was the subject of extensive inquiry by the Committee in 2015 in relation to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (**the 2015 Bill**). The Committee at that time recommended that the 2015 Bill be amended to give the Minister discretion to revoke a person's citizenship following conviction for a relevant offence with a sentence applied of at least six years imprisonment, or multiple sentences totalling at least six years' imprisonment.

53. In its Advisory Report on the 2015 Bill, the Committee noted that:

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

[25] Ibid [6.17]-[6.18].
[26] Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) 18.

of sentence, and it was considered that a six year sentence would appropriately reflect this.[27]

54. Since the initial laws were passed in 2015, the national threat level has not changed. The conviction-based citizenship loss powers have not been used at all. This makes it difficult to assess the extent to which the powers may be regarded as effective while ensuring consistency in their practical operation with the rule of law and Australia's international law obligations. It is therefore unclear why some of the proposed measures are needed and why the bipartisan recommendation of the Committee no longer represents what is a necessary and proportionate response to the terrorism threat.

55. It is further noted that proposed paragraph 36D(6)(a) provides that the 'a period of imprisonment does not include a suspended sentence'. However, the section otherwise applies to the head sentence so that if a person received a relatively short non-parole period of, for example 12 months imprisonment, the threshold for the Minister to be able to make a cessation of citizenship determination may still be crossed.

56. In order to remain consistent with the intended purpose of the proposed new subsection, it is important that the type of offence required to trigger the potential loss of citizenship is such that it demonstrates a repudiation of allegiance to Australia *and* that it is of a considerable level of seriousness.

57. The operation of proposed subparagraph 36D(6)(b)(ii) is also of concern to the Law Council. Under this proposed section a person does not need to be sentenced to three years imprisonment for a specified terrorism related offence to meet the threshold for loss of citizenship. This paragraph operates so that where it is not clear that only a particular part of a total period of imprisonment relates to a specified terrorism offence, the person is deemed to have been sentenced in relation to the offence listed in subsection 36D(5) 'for the whole period of imprisonment' or the total of the sentence.

58. The effect of this provision will be that even where a person was sentenced to less than three years imprisonment for an offence listed in proposed subsection 36D(5), where that sentence is part of an aggregate sentence with other offences, they can still be subject to a Ministerial cessation of citizenship determination. For this reason, the Law Council considers that subparagraph 36D(6)(b)(ii) should be removed.

59. It is acknowledged that the Minister is required to be satisfied that the conduct to which the conviction relates 'demonstrated that the person has repudiated their allegiance to Australia' and in accordance with proposed paragraph 36E(2)(b), the Minister must have regard to the 'severity of the conduct that was the basis of the conviction or convictions, and the sentence or sentences to which the determination relates'. The Law Council nonetheless opposes this amendment and maintains that removing the six-year sentencing limit would allow cessation of citizenship on account of low level offending. In some jurisdictions, such as New South Wales, for example, offences carrying a three-year imprisonment penalty, are not considered to be serious indictable offences and are dealt with to finality in the Local Court. Hence, it appears disproportionate that a person could lose citizenship for an offence that carries an imprisonment term that for those offences with equivalent maximum penalties would not be considered a serious indictable offence in an Australian jurisdiction.

60. Conduct and offences captured by laws that lead to citizenship loss should be of a sufficient level of seriousness to trigger citizenship cessation. In light of the above, it is unclear why reducing the threshold of a six year sentencing penalty is now considered

[27] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Report, 4 September 2015) 115–6 [6.25]–[6.26].

to be justified. Accordingly, the Law Council does not support the reduction of the six-year sentencing penalty threshold in the Bill.

Recommendations:

- **The requirement that a person be sentenced to six or more years of imprisonment for a relevant terrorism offence to be eligible to lose their Australian citizenship should be maintained; and**
- **Subparagraph 36D(6)(b)(ii) should be removed from the Bill.**

Ministerial satisfaction of dual citizenship

61. The proposed new subsections 36B(2) and 36D(2) provide that a Minister must not make a determination for the cessation of citizenship if the Minister is satisfied that the person would become a person who is not a national or citizen of any other country. Currently, paragraphs 35A(1)(c), 35(1)(a) and subsection 33AA(1) permits the Minister to determine that a person ceases to be an Australian citizen if the person is a national or citizen of a country other than Australia.

62. This amendment to the requirement for a person as a matter of fact being a dual national or citizen, was also contained in the Australian Citizenship Amendment (Strengthening Citizenship Loss Provisions) Bill 2018 (**Strengthening Citizenship Loss Bill**). The Explanatory Memorandum to the Strengthening Citizenship Loss Bill explained the proposed change in the threshold as follows:

> *New paragraph 35A(1)(b) adjusts the threshold for dual citizenship to capture Australian citizens who the Minister is satisfied will not become a person who is not a national or citizen of any country as a result of cessation of citizenship. This is consistent with other provisions of the Citizenship Act. For example, current paragraph 34(3)(b) of the Citizenship Act provides that the Minister must not revoke a person's Australian citizenship on the basis of certain offences or fraud if the Minister is satisfied that the person would become a person who is not a national or citizen of any country. It is well-established under case law that where statute provides a Minister must be 'satisfied' of a matter, it is to be understood as requiring the attainment of that satisfaction reasonably. For consistency with other existing provisions of the Citizenship Act, new paragraph 35A(1)(b) thus requires the Minister to be 'satisfied' the person will not become a person who is not a national or citizen of any country.*[28]

63. In the current Bill the proposed change is explained as follows:

> *Currently, a person's citizenship can only cease under existing section 35 of the Citizenship Act if, as a matter of fact, they are a national or citizen of another country.*
>
> *In order to facilitate the Minister's power to make a determination with regard to cessation of citizenship under new section 36D(1), the Minister needs to be satisfied that the person would not become a person who is not a national or citizen of any country. The Minister will be required to turn his or her mind to the*

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

issue, using the materials available to him at the time. This adjusts the current threshold in relation to this issue, and adds additional safeguards, namely:

- *the Minister must revoke his decision on application by a person, under new subparagraph 36H(a)(i) if he is satisfied that a person is not a national or citizen of any country.*

- *The determination will be automatically revoked under new paragraph 36K(1)(c) if a court finds that the person was not a national or citizen of any country at the time the determination was made*.[29]

64. It is submitted that the proposed change in threshold increases the possibility for a person, on revocation, to be left stateless as the Minister is only required to be 'satisfied' that the person would not become stateless. At present the Minister has no power to revoke a person's Australian citizenship if that would, as a matter of fact and law, leave the person stateless.

65. Relevant to this issue is one of the key criticisms the INSLM made of the current operation of law provisions, that:

> *… failure to consult with foreign law experts may lead to a wrong conclusion by the [Citizenship Loss Board] that a person has dual nationality when they do not. The person is then effectively stateless unless and until they obtain a declaration from an Australian court, or obtain an equivalent declaration from a foreign court or government and persuade the Minister to exempt.*[30]

66. The case of Prakash serves to highlight the above concerns. While this case related to the automatic citizenship loss provisions under the Act rather than the conviction-based provisions, reports indicated that the level of consultation conducted by Australia with Fiji to determine and verify Prakash's citizenship status appeared unclear with both countries now maintaining he is not a citizen of their nation.[31] Further, given the complexity of this area of law, noting that expert witnesses are often called upon to give evidence with respect to difficult questions of foreign nationality law (i.e. the recent referral of multiple parliamentarians to the High Court over potential foreign citizenship), there is a possibility that the Minister may err in believing that a person was a national/citizen of another country when they are not on the basis that a court, assuming it gets to court, can 'fix it up later' if the Minster was in fact mistaken.

67. It is submitted that the INSLM's concerns about 'a risk of de facto or temporary statelessness'[32] are exacerbated by lowering the threshold for Ministerial satisfaction as

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[29] Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) 20 [118]-[119].
[30] Independent National Security Legislation Monitor, *Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007 (Cth)*, 13 [2.41].
[31] David Wroe, 'Fijian PM Says Terrorist Neil Prakash Cannot Go to Fiji, Amid Deepening Citizenship Row', *The Canberra Times* (online), 3 January 2018 <https://www.canberratimes.com.au/politics/federal/fijian-pm-says-terrorist-neil-prakash-cannot-go-to-fiji-amid-deepening-row-20190103-p50pcz.html>; David Wroe, 'Citizenship Revocation Could Jeopardise Extradition Chances, Says Law Council', *The Sydney Morning Herald* (online), 3 January 2019 <https://www.smh.com.au/politics/federal/prakash-citizenship-revocation-could-jeopardise-extradition-chances-says-law-council-20190103-p50ph6.html>; Mark Schliebs, 'Petter Dutton Stands Firm as Fiji Rejects Prakash', *The Australian* (online), 4 January 2019 <https://www.theaustralian.com.au/national-affairs/immigration/dutton-embarrassed-as-fiji-rejects-prakash/news-story/ae3de1c00a03aaf57090756e63dbb51a>.
[32] Independent National Security Legislation Monitor, *Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007 (Cth)*, 57 [6.87].

to dual citizen status. Further, the Committee for the Scrutiny of Bills expressed similar concerns when considering the same proposed amendment contained in the Strengthening Citizenship Loss Bill:

> *…the committee notes this could have the consequence that a person could have their citizenship removed while possessing no other citizenship (and perhaps not ever being able to obtain such citizenship in practice), thereby rendering the person stateless. The committee notes that a non-citizen of Australia who does not possess a valid visa may be detained indefinitely in immigration detention if no other country is willing to accept that person. As such, these amendments have the potential to unduly trespass on personal rights and liberties.*[33]

68. The Law Council considers that at the very least, the process undertaken by the Minister to determine dual citizenship should be specified in the Bill. In this regard such a determination process should follow the procedure prescribed by the United Nations High Commissioner for Refugees in its *Handbook on the Protection of Stateless Persons*,[34] which was created under the 1954 *Convention Relating to the Status of Stateless Persons*.[35]

69. The United Nations' *Convention on the Reduction of Statelessness*, to which Australia gave accession in 1973, sets out that a contracting state shall not deprive a person of his or her nationality if such deprivation would render the person stateless.[36] The convention does permit, however, renunciation of citizenship in circumstances where the person concerned possesses or acquires another nationality.[37]

70. While international law dictates that everyone has the right to a nationality and that no one shall be arbitrarily deprived of their nationality[38], there is no guarantee that a person will acquire citizenship/nationality of another country. In such circumstances, a person who is in Australia at the time when his or her Australian citizenship is removed may, if the Minister's state of satisfaction as to some other citizenship or nationality is erroneous, be left stateless and subject to indefinite immigration detention.[39] This is because if the person was not a dual citizen, then the person would become an unlawful non-citizen and have no country to which the person could be removed and then face the possibility of indefinite detention. This may be inconsistent with international law, which holds that all individuals, including non-citizens, must be protected from arbitrary indefinite detention.[40]

71. Australia has obligations under Article 9(1) of the *International Covenant on Civil and Political Rights* not to subject anyone to arbitrary detention. The United Nations Human

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[33] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 15 of 2018, 5 December 2018) 4 [1.11].
[34] The United Nations High Commissioner for Refugees, *Handbook on the Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons* (2014).
[35] *Convention Relating to the Status of Stateless Persons*, opened for signature 23 September 1954, 360 UNTS 117 (entered into force 6 June 1960).
[36] Ibid art 8.
[37] Ibid art 7.
[38] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) [15].
[39] See *Migration Act 1958* (Cth) s 35. A citizen who is in Australia at the time their citizenship ceases will automatically acquire an ex-citizen visa allowing them to remain in, but not re-enter Australia. However, under section 501 of the Act the Minister has the power to cancel the visa on character grounds, which would be a likely outcome if the person lost their citizenship under s33AA, 35 or 35A. The person would then become a non-citizen subject to immigration detention.
[40] *Conka v Belgium* (European Court of Human Rights, Third Section, Application No 51564/99, 5 February 2002).

Rights Committee has considered that 'arbitrary detention' includes detention which, although lawful under domestic law, is unjust or disproportionate. Therefore, for the detention of a person not to be arbitrary, it must be a reasonable and necessary measure in all the circumstances.[41]

72. While the determination for the cessation of citizenship will be revoked under proposed paragraph 36K(1)(c) if a court finds that the person was not a national or citizen of another country at the time the determination was made, this 'safeguard' is contingent on the person being able to bring a court action in Australia against the decision of the Minister. If the court does not ever get an opportunity to make any such finding as to the citizenship status of the person, the proposed amendment increases the already very real risk that a person will be rendered stateless following a ministerial determination for the cessation of citizenship.

73. A person may also be subject to indefinite detention in circumstances where the person could not be returned to a country because the person may be subject to torture or the death penalty. Even if the person has citizenship or a right of entry to that country, Australian[42] and international law[43] prohibits returning people in such cases.[44] Refoulement in such circumstances would likely be in breach of international law.

74. It may be that a person facing such harm is eligible for a protection visa but they may be ineligible on character grounds. If they are ineligible on character grounds, it is at least reasonably arguable that section 197C of the *Migration Act 1958* (Cth) (**Migration Act**) requires their removal to the place they fear such harm. The only way to prevent a breach of international law is if the Minister personally intervenes and grants some form of visa such as an ex-citizen visa under section 35 of the Migration Act (only if the person was in the migration zone at the time of that loss) or a Class XA protection visa. However, given the Minister would have cancelled the person's citizenship, it may be highly unlikely that the person would be granted a protection visa leaving them to either being removed if able to be or indefinite detention. Even if such a visa were granted it would then be exposed to cancellation on character grounds under section 501 of the Migration Act. International obligations are put aside in making a decision to remove, however the Minister has the power to grant visas to such persons to ensure that Australia does not breach its international obligations.

75. It remains unclear what steps a court will consider the Minister must make in order to reach a state of satisfaction under proposed subsections 36D(2) and 36B(2). For

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

[42] *Migration Act 1958* (Cth) s 36(2)(aa). This paragraph states that a protection visa may be granted to a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

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

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

example, it is not clear whether a court would determine that a Minister should verify citizenship status with other countries with which the person may have a connection.

76. This uncertainty regarding a matter as serious as potentially rendering a person stateless is undesirable. In the event that the Bill is passed, there should be positive provision in the legislation to protect against such circumstances arising.

Recommendation:

- **The steps that the Minister must take to prevent statelessness should be set out in the legislation, including a requirement for verification of citizenship, or immediate eligibility for citizenship, of another country.**

Children and people with cognitive impairment

77. The Law Council has previously raised with the Committee a concern regarding the interaction with the current citizenship cessation scheme and consistency with Australia's international obligations in relation to children.[45]

78. Under the Bill, the Minister can make a determination based on the conduct of an individual under section 36B in relation to any person aged 14 years or over. Section 36D is based on the existence of a criminal conviction and could in theory apply to any person aged 10 years or over as this is the current minimum age of criminal responsibility under the Criminal Code.

79. While the Explanatory Memorandum to the Bill states that 'the Government must consider the protection of the Australian community alongside the best interests of the child', the Law Council questions whether these provisions (that could lead to the loss of citizenship for a child) are consistent with the *Convention on the Rights of the Child*, which protects a child's right to identity, nationality, and family relations. Article 3(1) provides that:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

80. The Law Council is also concerned that proposed section 36B will apply to children as young as 14, without any requirement for consideration of the child to form any intention related to terrorist activity that would be required where the conduct relates to a specified criminal offence. On this point, in relation to existing section 33AA, the INSLM stated:

> *One of the serious problems with s 33AA is how to be sure at any particular time that there has been the requisite intention or deemed intention… The point is that s 33AA may have operated to remove citizenship from someone who arrived as a child, who never had terrorist like intention but rather had no, or no real choice whether or not to follow ISIL instructions.*[46]

[45] Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Australian Citizenship Renunciation by Conduct and Cessation Provisions* (1 July 2019) 14-5.
[46] Independent National Security Legislation Monitor, *Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007 (Cth)*, 53 [6.48].

81. There remains a lack of clarity about how the Minister will be in a position to determine whether a particular child has the capacity to form the necessary intention required by proposed section 36B to repudiate their allegiance to Australia or know that his or her conduct is capable of demonstrating that they are repudiating allegiance with Australia. Capacity is usually a matter for determination by a court after psychological evaluations have been conducted, the court has had access to school records and reports and the child has been examined by an appropriate expert. Similar issues arise in relation to individuals who may be considered to have insufficient capacity due to mental illness or cognitive impairment.

82. Given the lack of any requirement for an assessment of the capacity of a child or a person with cognitive impairment to know that their conduct demonstrates a repudiation of allegiance with Australia, the Law Council considers that at the very least, both children and people with mental illness or cognitive impairment should be exempt from the operation of sections 36B and 36D.

83. In the alternative, the Law Council considers that there be a requirement that before a citizenship cessation determination is made by the Minister, there be consideration of evidence as to the capacity of the person to form the necessary intention to engage in the conduct listed in section 36B that can result in the loss of citizenship and the intention to sever their allegiance to Australia in the process. This point was made in the Committee's Advisory report in relation to the 2015 Bill where it stated 'that even for adolescent children, the capacity of the individual should be considered'.[47]

84. These concerns are of equal application and relevance to people who suffer from cognitive impairment or significant mental illness who may lose their Australian citizenship as a result of these provisions.

Recommendations:

- **The scheme should not apply to any child or person who suffers from serious mental illness or any cognitive impairment.**
- **Alternatively, if the scheme is to apply to children, there should be evidence available to prove the child had the necessary capacity to form the intention to repudiate their allegiance to Australia. A similar test should apply to any individual suffering from a serious mental illness or any cognitive impairment before their citizenship is removed.**

Public interest considerations

85. Proposed section 36E applies when the Minister is considering the 'public interest' for the purpose of deciding whether to make determination for the cessation of citizenship under proposed sections 36B or 36D.

86. The Minister must take into account the criteria listed in proposed subsection 36E(2) which is the same criteria currently listed in the current paragraph 35A(1)(e), with the addition of proposed paragraph 36E(1)(f), 'whether the person is being or is likely to be prosecuted in relation to conduct to which the determination relates'.

[47] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Report, 4 September 2015) 177.

87. The Explanatory Memorandum to the Bill states that:

> *The application of the public interest test will require a balancing of competing interests and will be a question of fact and degree (Hogan v Hinch (2011) 243 CLR 506). Public interest consideration in this context may include matters such as public confidence in the safety of the Australian community, actual public safety, the need for deterrence and the impact on the person.*
>
> *The Minister is well placed to make an assessment of public interest as an elected member of the Parliament. The Minister represents the Australian community and has a particular insight into Australian community standards and values and if it would be contrary to the public interest for the person to remain an Australian citizen.*[48]

88. The Law Council welcomes the addition of the requirement that the Minister have regard to whether the person is being or is likely to be prosecuted in relation to the conduct. The Law Council maintains that where a person may or is being prosecuted for a terrorism related offence, that person should not risk deportation by having their citizenship cease. It is far more appropriate in terms of protection of the community, the interests of justice, international relations and compliance by Australia with its international obligations in this area to ensure, wherever possible the prosecution of Australian citizens who engage in terrorism related offending.

89. The Law Council also maintains that additional criteria should be added to paragraph 36E(2) to include a requirement that the Minister have regard to whether the person has demonstrated they have successfully achieved (or are likely to achieve) de-radicalisation and rehabilitation as well as whether the person has dependents in Australia. If the person has dependent children in Australia, consideration ought to be given to the rights of those children in any determination to be made in relation to the cessation of citizenship for their parent or primary caregiver. In this regard the INSLM was critical of section 35 of the Act as it 'makes no allowance for matters typically the subject of mitigation in criminal proceedings'.[49]

Recommendation:

- **When exercising his or her powers under the Act, the Minister or any other decision maker should be required to consider:**
  - **the prospects for and actual rehabilitation of the person; and**
  - **the likely effects of citizenship cessation on any dependents and what, if any, alternative arrangements might apply.**

Notice of citizenship cessation

90. The Bill proposes a scheme whereby once the Minister makes a determination for the cessation of citizenship, proposed paragraph 36F(1)(a) requires the Minister to give written notice of the determination to the person either as soon as practicable after the

[48] Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) 9 [53]-[54].
[49] Independent National Security Legislation Monitor, *Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007 (Cth)*, 48 [6.41].

determination is made, or after a determination to not provide notice under proposed subsection 36G(1) is revoked.

91. Service is effected by posting the notice 'to the address of the place of residence of the person last known to the Department'. Only in circumstances where the Minister is satisfied the person did not receive the notice by post and where the Minister has become aware the electronic address for the person, can the Minister choose to give the notice again by sending it to the electronic address for the person as provided by proposed subsection 36F(3). The Minister may also choose to send the notice to an electronic address only, following the revocation of a determination to not provide notice made in accordance with proposed section 36G.

92. Proposed subsection 36F(5) requires the notice to state:

    (a) that the Minister has determined that the person has ceased to be an Australian citizen;

    (b) a basic description of the conduct or the conviction(s) and sentence(s) to which the determination relates;

    (c) the date of the notice; and

    (d) the person's rights of review.

93. Under proposed section 36G the Minister may determine in writing that a notice not be provided to the person if to do so 'could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations'. The Minister is then required to review this decision to not provide notice of the determination of the cessation of citizenship every 90 days and if the Minister does not revoke the determination to not serve a notice within 5 years, the determination is automatically revoked and the notice is required to be served, unless the Minister makes a further one year extension under proposed subsection 36G(3). As stated in the Explanatory Memorandum:

> *A notice provided under new section 36F alerts the person to the formation of official opinion as a means of ensuring that the person may bring the substantive issue before a court for determination. Furthermore, the notice can assist the person in applying to the Minister for revocation of the decision under new section 36H.*[50]

94. While the Law Council considers that the requirement for the provision of notice is an important step, particularly in relation to advising of steps to apply for revocation, it is concerned that notice is only provided once a decision has been made. As noted above, the removal of natural justice in the decision-making process, coupled with the lack of prior notification of a decision to cancel does not allow for a person to challenge material before the Minister.

95. The Law Council agrees that there should be a high threshold in the legislation before the requirement to provide notice under proposed section 36F can be avoided. As noted by the INSLM one of the criticisms of the existing sections 35 and 33AA is that 'the problems are compounded by the capacity of the Minister not to give notice of the loss

[50] Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) 29 [170].

of citizenship: the revokee may well order their life on the basis that they remain a citizen when they are not'.[51]

Revocation of a citizenship cessation determination

96. A person who has ceased to be an Australian citizen under the scheme can make an application in writing to the Minister to have that determination revoked under proposed section 36H. Under the proposal, the application must be made within 90 days after the date notice was given by post, or if it was then served again by electronic means, within 30 days of the date that the notice was served electronically.[52]

97. The Minister must consider the application and the note in proposed section 36H says the Minister must 'observe the rules of natural justice' in making the decision to either grant the application for revocation or to refuse the application. The Minister may only revoke the determination if satisfied that to do so would be in the 'public interest' within the meaning of proposed section 36E.[53]

98. Once the Minister has determined the application the Minister is required to provide written notice to the person which must set out the decision, and where the application is refused provide the reasons for the decision, and the person's rights of review. Where the Minister revokes the citizenship cessation determination either on application, or by initiative, the person's citizenship is taken to never have been revoked under proposed subsections 36H(6) and 36J(2).

99. The Law Council considers that there should be some discretion available for a person to be granted leave by the Minister to file an application for revocation outside this time period where it is in the interests of justice to do so. This is because something as significant as the loss of citizenship requires some capacity for flexibility for a person to bring an application for revocation outside the prescribed time limit. It is consistent with natural justice principles that a meritorious revocation application should not be precluded due to an arbitrary time limit.

100. Further, the Law Council also notes proposed subsection 36H(7) which provides that a person may only apply once to the Minister seeking a revocation of the determination for the cessation of citizenship. The Law Council submits that there should be some flexibility for a person to bring a further application where the person can adduce new evidence relevant to the application that was not available to the person at the time the original application was made.

101. The Law Council considers that given the importance that follows from a being successful in the judicial review of Ministerial determination for the cessation of citizenship, it is all the more important there be some flexibility in the person being able to access and exercise their rights to judicial review.

Recommendations:

- **There should be a discretion to accept an application for revocation of a citizenship cessation determination outside proposed legislative timeframes in certain circumstances.**

[51] Independent National Security Legislation Monitor, *Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007 (Cth),* 60 [6.51].
[52] See Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) cl 36H(2).
[53] Ibid 36H(3)(b).

- **A person should be able to file a further application for revocation where they can adduce new evidence relevant to the application that was not available to the person at the time the original application was made.**

Express limitation on natural justice

102. The Law Council notes that proposed subsections 36B(11), 36D(9), 36F(7), 36G(8) and 36J(8) of the Bill provide that natural justice is explicitly excluded in relation to the exercise of the Minister's powers under these subsections. It is noted that proposed subsection 36H(3) provides that natural justice does apply in circumstances where a person has applied to the Minister in writing to have the determination for the cessation of citizenship revoked.

103. The Explanatory Memorandum to the Bill states that 'natural justice has not been removed, it is to be afforded at a later point in time'.[54] Notwithstanding this explanation, the Law Council remains concerned that the express limitation on natural justice in the Bill leaves significant scope for arbitrary decision making in relation the proposed citizenship cessation provisions.

Declared Terrorist Organisations

104. The Law Council notes that proposed section 36C allows the Minister, by way of legislative instrument, to declare an organisation a 'declared terrorist organisation' as a subset of listed terrorist organisations under the Criminal Code. Proposed section 36C is relevant to proposed paragraph 36B(5)(i) which provides for the cessation of citizenship where, inter alia, a person fights for, or is in the service of, a 'declared terrorist organisation'.

105. Proposed section 36C provides a slight variation in the test provided in the current section 35AA. Currently, before such a declaration can be made, the Minister must be satisfied on reasonable grounds that the organisation:

(a) either:

(i) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or

(ii) advocates the doing of a terrorist act; and

(b) is opposed to Australia, or to Australia's interests, values, democratic beliefs, rights or liberties, so that if a person were to fight for or be in the service of such an organisation the person would be acting inconsistently with their allegiance to Australia.

106. Under proposed paragraph 36C(2)(b) the words 'acting inconsistently with' are replaced by the word 'repudiating'.

107. The proposed subsection is in effect a deeming provision which operates so that where a person fights with a terrorist organisation that is opposed to Australia or to any of Australia's values, interests, democratic beliefs, rights or liberties, the person is deemed to be 'repudiating their allegiance to Australia'.

[54] Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) 20.

108. The wording in the first limb of proposed paragraph 36C(2)(b), namely 'Australia's interests, values, democratic beliefs, rights or liberties' is not common in Australian law. The wording in proposed paragraph 36C(2)(b) may have sought to reflect the wording of the Australian citizenship pledge. The Explanatory Memorandum to the 2015 Bill provides that the characteristics stated in the first limb of paragraph 35AA(2)(b) are included in the pledge of commitment as a citizen of Australia. It is stated in the Explanatory Memorandum for the 2015 Bill that:

> *Australia's values, democratic beliefs, rights or liberties are the uniting characteristics for Australian citizenship. These characteristics are expressly included in the pledge of commitment as citizen of Australia. Therefore, where a person fights with a terrorist organisation that is opposed to Australia or to any of Australia's values, democratic beliefs, rights or liberties, the person has evidently repudiated their allegiance to Australia.*[55]

109. The Australian citizenship pledge also includes pledging loyalty to Australia and its peoples 'whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey'.[56] Further, the preamble of the Act includes similar wording to the pledge:

> *The Parliament recognises that persons conferred Australian citizenship enjoy these rights and undertake to accept these obligations:*
>
> *(a) by pledging loyalty to Australia and its people; and*
>
> *(b) by sharing their democratic beliefs; and*
>
> *(c) by respecting their rights and liberties; and*
>
> *(d) by upholding and obeying the laws of Australia*.[57]

110. There does not appear to be any common law consideration or interpretation given to the phrase 'Australia's interests, values, democratic beliefs, rights or liberties'. Furthermore, the wording 'interests, values, democratic beliefs, rights or liberties' does not appear to be found in international instruments or in the domestic policies of comparable jurisdictions.

111. 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;*[58] *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.*[59]

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[55] Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 71.
[56] This version of the citizenship pledge has existed since 1993: Department of Home Affairs, 'Citizenship Ceremony: Australian Citizenship Pledge', *Immigration and Citizenship* (Web Page, 6 September 2018) <https://immi.homeaffairs.gov.au/citizenship/ceremony/what-is-the-pledge>.
[57] *Australian Citizenship Act 2007* (Cth) preamble.
[58] *Convention Relating to the Status of Stateless Persons*, opened for signature 23 September 1954, 360 UNTS 117 art 8(3)(a)(ii).
[59] Ibid art 8(3)(b).

112. The Law Council considers that any amendment to paragraph 36C(2)(b) should focus on the phrase 'is opposed to Australia, or to Australia's interests, values, democratic beliefs, rights or liberties', which is ambiguous in its application and is lacking in relevant guidance and authority.

113. In order to provide greater clarity that a person's allegiance to Australia has been repudiated, the Law Council considers that the Bill should be explicit that the declared terrorist organisation for the purpose of section 36C must be an organisation which is clearly against Australia. To this end, the Law Council considers that proposed paragraph 36C(2)(b) should be amended to include the phrase, 'seriously prejudicial to the vital interests of Australia' so that it reads:

> *(b) is seriously prejudicial to the vital interests of Australia, so that if a person were to fight for or be in the service of such an organisation the person would be repudiating their allegiance to Australia.*

114. The current wording of proposed paragraph 36C(2)(b) can be interpreted broadly and lacks sufficient clarity. The difficulties with such a provision were identified in the unanimous judgment of the High Court in *Wilkie v The Commonwealth; Australian Marriage Equality Ltd v Cormann*.[60]

115. The merit of the proposal to substitute the first part of proposed paragraph 36(2)(b) with the phrase 'seriously prejudicial to the vital interests of Australia' is that it is a phrase around which considerable legal commentary has developed, including in relation to Article 8 of the UN Convention and in relation to the *European Convention on Nationality*.[61] The existence of this sophisticated legal commentary on the phrase increases the likelihood of a reviewing court finding that the phrase supplies a tractable legal benchmark or limit against which the Minister's 'satisfaction on reasonable grounds' can be assessed. It would bring some clarity to the current broad and uncertain scope of paragraph 36(2)(b).

Recommendation:

- **Paragraph 36C(2)(b) should be amended to read:**

  (b) is seriously prejudicial to the vital interests of Australia, so that if a person were to fight for or be in the service of such an organisation the person would be repudiating their allegiance to Australia.

Retrospectivity and transitional provisions

116. Part 2 of the Bill deals with the 'Application and transitional provisions' of the Bill. Item 16 of the Bill seeks to define designated non-citizen as a person who immediately before commencement of the provisions in the Bill ceased to be an Australian citizen under sections 33AA or 35, and the Minister either made reasonable attempts to provide notice to the person, or alternatively made a no-notice determination under those sections. Sub-item 17(1) of the Bill states that in these circumstances the Minister is 'taken to have made a determination (a designated non-citizen determination) under subsection 36B(1) of the amended Act in relation to a designated non-citizen.'

[60] [2017] HCA 40, [101]-[109].
[61] *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000).

117. The Bill then seeks to apply 'as if the designated non-citizen determination had been made under subsection 36B(1) of the amended Act'.[62] However, if the Minister made reasonable attempts to previously serve notice on the person, notice is deemed to have been effected under proposed section 36F of the Bill at the time the Minister first attempted to effect service. Under proposed sub-item 17(3)(b) the person, in these circumstances, 'cannot apply under section 36H of the amended Act to have the designated non-citizen determination revoked'.

118. The Law Council considers that a preferred approach is for fresh notices to be attempted to be served on persons to whom a 'designated non-citizen determination' has been made so that those people can avail themselves of the opportunity to make an application for revocation of the determination under proposed section 36H.

119. The Bill seeks to have retrospective operation in relation to past conduct, stating that proposed paragraphs 36B(5)(a) to (h) would apply in relation to conduct engaged in on or after 29 May 2003. This is a significant extension of the retrospective application of conduct-based cessation of citizenship, which is presently conduct which occurred on or after the 12 December 2015. In relation to conviction-based cessations, the retrospective application at present is outlined in the Explanatory Memorandum as follows:

> *Under the current provisions, convictions from 12 December 2015 are subject to a threshold of a period of at least 6 years imprisonment, and convictions for the ten years prior, from 12 December 2005, are subject to a threshold of at least 10 years imprisonment.*[63]

120. Under the proposed measures, where conduct relates to what is listed in proposed paragraph 36B(5)(i), that is fighting for or being in the service of a declared terrorist organisation, the Bill seeks to apply to such conduct that was engaged in on or after the 12 December 2015, even if the conduct commences before, on or after that date. In relation to proposed paragraph 36B(5)(j), 'serving in the armed forces of a country at war with Australia', the Bill seeks to operate in relation to 'conduct that was engaged in before or after commencement'.

121. The Explanatory Memorandum states that the Bill seeks to apply to conduct occurring and convictions which occurred on or after the 29 May 2003 because:

> *This is the date of commencement of the Criminal Code Amendment (Terrorism) Act 2003. That Act re-enacted the terrorism offences in Part 5.3 of the Criminal Code with the support of State references of power to ensure their operation throughout Australia, without any limitations arising from limits on Commonwealth constitutional powers. This is also consistent with the date from which relevant convictions can form the basis of a citizenship cessation determination under new 36D. While this extends the power of subsection 36B to potentially a greater number of cases of relevant conduct, it only has legal consequences if the Minister decides to make a determination under section 36B after commencement, and the conduct meets the other requirements the Minister is required to consider when making such a determination.*

[62] Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 cl 17(2).
[63] Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 23 [131].

> *The transitional provisions that apply to new section 36B enable the Minister to make future decisions, and therefore attach new consequences, on the basis of conduct that occurred from 29 May 2003.*[64]

122. The Bill's attempt to capture convictions dating back to 29 May 2003 appears to be in direct conflict with the Committee's recommendations on the 2015 Bill that:

> *… proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be applied retrospectively to convictions for relevant offences where sentences of ten years or more have been handed down by a court. The Ministerial discretion to revoke citizenship must not apply to convictions that have been handed down more than ten years before the Bill receives Royal Assent.*[65]

123. The Committee for the Scrutiny of Bills also expressed its concerns regarding the justification provided for the retrospective operation of the 2015 Bill:

> *The committee notes that this explanation focuses on the general threat of terrorism, without explaining how applying the amendments to persons convicted up to 13 years ago who received a penalty of less than six years imprisonment would 'protect the Australian community'. The committee does not consider that this explanation, without more, to be sufficient to justify the retrospective application of a provision such as this (i.e. a provision which means the serious consequence of loss of citizenship can arise based on convictions that occurred before commencement).*[66]

124. The Law Council notes that the measures proposed in the Bill seek to have even greater retrospective operation than that contained in the 2015 Bill, seeking to apply to convictions which were imposed up to 16 years ago and where the penalty threshold is retrospectively reduced. A person may have been convicted, served their sentence and been released a number of years ago to now, by the operation the proposed retrospective operation of the Bill, be subject to a citizenship cessation determination that did not even exist at the time the person committed the original offence.

125. Retrospective laws are generally inconsistent with the rule of law. In this regard, the Law Council points to a statement from Lord Bingham:

> *Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.*[67]

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[64] Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) 11-2 [72-73].
[65] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Report, 4 September 2015) xviii, Recommendation 10, 127–8 [6.82]–[6.88].
[66] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 15 of 2018, 5 December 2018) 5 [1.15].
[67] Tom Bingham, *The Rule of Law* (Penguin UK, 2011). There are also prohibitions on retrospective criminal laws in international law. Article 15 of the *International Covenant on Civil and Political Rights* expressing a rule of customary international law (*Polyukhovich v Commonwealth* (1991) 172 CLR 501, 574 (Brennan CJ)), provides: 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the

126. Retrospective measures offend rule of law principles that the law must be readily known and available, and certain and clear.[68] In this context, Lord Diplock states:

> *…acceptance of the rule of law as a constitutional principle requires that a citizen before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it*.[69]

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

> *A person cannot rely on ignorance of the law and is required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly*.[70]

128. While it is within the power of the Parliament to enact retrospective laws,[71] making a person liable to loss of citizenship for conduct that did not have that consequence at the time of the conduct was engaged in contravenes fundamental notions of justice, fairness and the rule of law. Retroactive removal of a person's citizenship is a substantive alteration of a person's legal rights and obligations, and fundamentally unjust.

129. Prospective laws may arguably have a general deterrent effect or a specific deterrent effect on individuals vulnerable to radicalisation, but there is no evidence to suggest that making the laws retrospective will achieve these outcomes. Retrospectivity may unwittingly capture those who have reformed or assisted the authorities, thereby demonstrating current or subsequent allegiance to Australia.

130. The Law Council considers that for those who have already been convicted of offences covered by section 35A, the courts have the ability in sentencing to ensure the offender is adequately punished for the offence and to protect the community from the offender. For those who have engaged in the conduct prior to commencement, the criminal law system is available to apply punitive measures.

Recommendation:

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

Constitutional validity

131. In 2015, the Australian Government attempted to extend citizenship loss to a broader range of national security offences without any minimum sentence requirement or any need for seriousness of the relevant conduct. As a consequence, the Law

lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

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

[69] *Black-Clawson International Ltd v Papierwerke Waldhof-Ascjaffenburg* [1975] AC 591.

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

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

Council among others raised concerns about the potential for Constitutional invalidity. The Committee accordingly made its recommendation to restrict the offences and require a minimum six-year sentence as necessary to 'appropriately target the most serious conduct that is closely linked to a terrorist threat'.[72]

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

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

134. Parliament has the power to:

> *… create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode.*[73]

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

> *Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word. However, within the class of those who could answer that description, Parliament can determine who it will be applied.*[74]

136. While Parliament may define the conditions on which citizenship depends, the power is not unlimited and may be subject to implied constitutional limitations.[75]

137. 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)).

138. The Law Council also notes that unlike proposed section 36D, which requires a conviction for a terrorism related offence to trigger the cessation of citizenship, proposed section 36B empowers the Minister to determine in writing that a person aged 14 years or older ceases to be an Australian citizen if satisfied that the person engaged in certain terrorism-related conduct.

139. It remains arguable that the cessation of citizenship at the Minister's discretion under proposed subsection 36B amounts to punishment for terrorism related criminal conduct in the absence of a judicial ruling. The Law Council therefore remains concerned that this represents executive overreach, and notes that the High Court has held that Chapter III of the Constitution embodies the doctrine of the separation of powers, relevantly meaning that 'the judicial power of the Commonwealth' may only be vested in Chapter III courts.[76]

140. The Law Council acknowledges that the INSLM ultimately concluded that he did not consider 'there are any significant constitutional defects in the current legislation or in

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[72] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Report, 4 September 2015) 115 [6.23].
[73] *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 173 (Gleeson CJ).
[74] Ibid.
[75] *Hwang v Commonwealth* (2005) ALR 8.
[76] *R v Kirby; Ex parte Boilermakers' Society of Australia ('Boilermakers' case')* (1956) 94 CLR 254.

relation to my recommendations'.[77] However, the Law Council maintains that it will ultimately be a matter for the High Court to determine just how significant any constitutional 'defects' may be and it is critical therefore that the Committee continues to assure itself of the constitutional validity of the Bill prior to any recommendation regarding the Bill's possible enactment.

[77] Independent National Security Legislation Monitor, *Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007 (Cth)*, 20 [3.36].