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## Matters of principle and effectiveness

- 4.1 This chapter summarises issues raised in evidence to the inquiry that relate to matters of principle and the effect of the provisions in the Bill. It includes discussion and analysis of:
- different conceptions of the meaning and value of Australian citizenship,
  - the effectiveness of the measures in the Bill in combating terrorism and protecting the Australian community, and possible unintended consequences, and
  - Australia's international obligations relating to statelessness, human rights, combatting terrorism, children and humanitarian assistance.

### **The meaning and value of Australian citizenship**

- 4.2 The existing preamble to the *Australian Citizenship Act 2007* (the Citizenship Act) states that 'Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia', and that Australian citizenship is a 'common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity'. The preamble also states that 'persons conferred Australian Citizenship enjoy these rights and undertake to accept those obligations' by:
- pledging loyalty to Australia and its people,
  - sharing their democratic beliefs,
  - respecting their rights and liberties, and
  - upholding and obeying the laws of Australia.
- 4.3 The conception of citizenship embodied in the preamble to the Citizenship Act is expanded on in the Explanatory Memorandum to the Bill, which

states that citizenship ‘does not simply bestow privileges or rights, but entails fundamental responsibilities’. It adds that citizens ‘owe their loyalty to Australia and its people’, regardless of whether they acquire citizenship automatically through birth in Australia or through application.<sup>1</sup>

- 4.4 In his second reading speech, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP said:

There is no concept of ‘constitutional citizenship’ in Australia and legislation has long provided that Australian citizens by birth can lose their citizenship in certain circumstances, such as fighting a war against Australia or, prior to 2002, becoming a citizen of another country.<sup>2</sup>

- 4.5 The purpose clause of the Bill recognises that Australian citizens may demonstrate that they have severed the common bond of citizenship and repudiated their allegiance to Australia through certain conduct incompatible with the shared values of the Australian community.<sup>3</sup>
- 4.6 The Explanatory Memorandum states that the Bill applies to those who have chosen to put themselves outside the formal Australian community by engaging in acts that demonstrate that they are no longer loyal to Australia and have severed their bond to the Australian community.<sup>4</sup>
- 4.7 Concurrent to this Committee’s inquiry, the Hon Phillip Ruddock MP and Senator the Hon Concetta Fierravanti-Wells have led public consultations on a discussion paper entitled *Australian Citizenship, Your Right, Your Responsibility* where the meaning of citizenship, and what it entails, have been explored by a range of stakeholders.
- 4.8 A number of participants to this inquiry contributed their views on the meaning and value of citizenship. For example, Amnesty International Australia submitted that citizenship is ‘not merely someone’s legal status and entitlement to live in a country’, but that it forms a key part of the individual’s relationship with the state, creating both rights and obligations. As such citizenship lays the foundation for the protection of a wide range of human rights.<sup>5</sup>
- 4.9 The Law Council of Australia submitted that citizenship was ‘critical’ to the Parliament and Government’s responsibility to ensure the security of Australia and its people, as it ‘provides formal membership of the
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1 Explanatory Memorandum, p. 1.

2 *House of Representatives Hansard*, 24 June 2015, p. 7370.

3 Department of Immigration and Border Protection, *Submission 37*, p. 1.

4 Explanatory Memorandum, p. 1.

5 Amnesty International Australia, *Submission 41*, p. 6.

Australian community, which comes with privileges and responsibilities'. The Law Council added that

citizenship cessation removes those privileges and has significant consequences for a person, including the potential for: deportation; detention; prevention from entering Australia; and no longer receiving consular assistance.<sup>6</sup>

- 4.10 The Federation of Ethnic Communities' Councils of Australia (FECCA), highlighted the importance of citizenship as an element of social cohesion, and its particular value to migrant groups:

Becoming a citizen provides a gateway to full participation in the Australian community, including access to voting rights, other forms of political participation, freedom of movement and employment in the public service and Australian Defence Force. Citizenship is also a symbol of acceptance into the Australian community and is highly valued amongst immigrant groups, particularly refugees.<sup>7</sup>

- 4.11 The Refugee Council of Australia similarly explained that citizenship has 'particular significance for refugee and humanitarian entrants', who are, by definition, unable to return to their country of origin because of a well-founded fear of persecution or other forms of serious harm. Australian citizenship is therefore often the first effective and durable form of protection that many refugees receive, and is celebrated and cherished by them. For those who know what it is like to live without freedom and democracy, obtaining citizenship in a free and democratic country can be particularly meaningful.<sup>8</sup>

## Number of dual nationals/citizens in Australia

- 4.12 It is not known precisely how many Australian citizens also hold the citizenship of another country. In its submission, FECCA cited estimates from the year 2000 that there were between four and five million Australian dual citizens.<sup>9</sup> At a public hearing, FECCA indicated that the current figure would 'certainly' be more than this, noting that approximately a quarter of Australia's population was born overseas and another quarter have at least one parent born overseas.<sup>10</sup>
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6 Law Council of Australia, *Submission 26*, p. 3.

7 Federation of Ethnic Communities' Councils of Australia (FECCA), *Submission 12*, p. 1.

8 Refugee Council of Australia, *Submission 22*, p. 1.

9 FECCA, *Submission 12*, p. 2.

10 Ms Gulnara Abbasova, Director, FECCA, *Committee Hansard*, Canberra, 4 August 2015, p. 31.

- 4.13 It was also noted by a number of participants in the inquiry that a large number of dual citizens may be unaware of the fact that they hold another citizenship if it was acquired automatically through operation of a foreign law.<sup>11</sup> This is further discussed in Chapter 7.
- 4.14 When asked about the number of dual citizens in Australia, Professor Triggs of the Australian Human Rights Commission highlighted the impact of the Bill on Australia's multicultural society:
- I think we could say as a matter of basic common sense that it is going to cover many, many millions in the Australian community.<sup>12</sup>
- 4.15 The Department of Immigration and Border Protection explained the difficulties in estimating the precise number of dual citizens, and noted that the figure was 'not captured in the census because it is not a matter directly within the competence of any agency or department'.<sup>13</sup>
- 4.16 The Law Council of Australia noted that while the selective application of the Bill to dual nationals was 'unfortunate', it was also 'unavoidable' due to Australia's obligation to avoid making persons stateless.<sup>14</sup>

## Is citizenship a right or privilege?

- 4.17 Submitters proposed different views as to whether citizenship is a right and a permanent status that cannot be revoked for actions undertaken while a person is a citizen, or whether citizenship is a privilege conferred by law, with Parliament having the power to define the way that privilege is acquired and lost.
- 4.18 Some submissions suggested that citizenship is a right that should not be vulnerable to loss in the manner proposed in the Bill. The Muslim Legal Network (NSW) considered that 'fundamentally, citizenship is a right and not a political tool to be commanded by the Parliament of the day at its wide discretion'.<sup>15</sup>
- 4.19 Blueprint for Free Speech submitted that:
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11 Amnesty International Australia, *Submission 41*, p. 6; Professor Helen Irving, *Submission 15*, p. 7; Muslim Legal Network (NSW), *Submission 27*, p. 11.

12 Professor Gillian Triggs, *Committee Hansard*, Canberra, 4 August 2015, p. 17.

13 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 5 August 2015, p. 57. Australia's statelessness obligations are discussed later in this chapter.

14 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 9. See UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

15 Muslim Legal Network (NSW), *Submission 27*, p. 4.

Citizenship is an inherent right given to a person that is fundamental to the concept of a modern society. There is no chicken and egg debate here. Before government, before the rule of law, before all other political concepts is the notion and meaning of 'citizen'. To take that away from someone is not the abstract removal of some esoteric right. To use an analogy, it is removing the lowest brick of a brick house. Without it, the house crumbles. This proposal to take away a citizen's (one cannot even discuss how important the concept of a citizen is without using the word itself) is plainly outrageous.<sup>16</sup>

- 4.20 Other submissions referred to High Court cases,<sup>17</sup> and to the statement by Chief Justice Gleeson that:

Parliament has the power to determine the legal basis by reference to which Australia deals with matters of nationality and immigration, 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.<sup>18</sup>

- 4.21 Both the Human Rights Committee of the Law Society of NSW and the NSW Society of Labor Lawyers submitted that Parliament's power with respect to citizenship is not unlimited. They noted comments by Justice McHugh, sitting as a single judge, that:

No doubt the Parliament does not have unlimited power to declare the conditions on which citizenship or membership of the Australian community depends. It could not declare that persons who were among 'the people of the Commonwealth' were not 'people of the Commonwealth' for any legal purpose ... [A]s long as it does not exclude from citizenship, those persons who are undoubtedly among 'the people of the Commonwealth', nothing in the Constitution prevents the Parliament from declaring who are the citizens of the Commonwealth, which is simply another name for the Constitutional expression, 'people of the Commonwealth'.<sup>19</sup>

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16 Blueprint for Free Speech, *Submission 18*, p. 2.

17 *Minister for Immigration and Multicultural Affairs; Ex Parte Te* (2002) 212 CLR 162; [2002] HCA 48; *Singh v Commonwealth* (2004) 222 CLR 322; [2004] HCA 43; *Hwang v Commonwealth* (2005) 80 ALJR 125; [2005] HCA 66; and *Koroitamana v Commonwealth* (2006) 227 CLR 31; [2006] HCA 28.

18 *Re Minister for Immigration and Multicultural Affairs: Ex parte Te* (2002) 212 CLR 162 at [31]. Referred to by Human Rights Committee, Law Society of NSW, *Submission 11*, p. 3; NSW Society of Labor Lawyers, *Submission 25*, p. 9.

19 *Hwang v Commonwealth* (2005) ALR 83 at [18].

## The effectiveness of the proposed approach

- 4.22 The Explanatory Memorandum sets out that by providing for loss of citizenship of persons who have repudiated their allegiance to Australia through their conduct, the measures in the Bill are intended to protect the Australian community from harm, in addition to deterring persons from engaging in terrorist-related conduct.<sup>20</sup>
- 4.23 In a public submission to the inquiry, the Department of Immigration and Border Protection provided the following overview of the current security threat:
- Australia faces a heightened and complex security environment. Since the terror level was raised last September, there have been two terrorist attacks. Twenty-three Australians have been charged as a result of eight counter-terrorism operations – almost one third of all terrorism-related arrests since 2001. Some 120 Australians are known to be fighting with terrorist organisations. Around 155 Australians are known to be supporting them with financing and recruitment. About 25–30 Australians have so far been killed in Syria and Iraq as a result of their involvement in the conflict.<sup>21</sup>
- 4.24 Participants in the inquiry questioned whether providing for the loss of citizenship of dual citizens involved in terrorism-related conduct would be an effective deterrent and also suggested there could be unintended social consequences arising from this approach.

### Effectiveness as a deterrent

- 4.25 Some participants queried whether the Bill would fulfil the intended purpose of improving community safety and deterring terrorism-related conduct.<sup>22</sup> For example, Mr Paul McMahon submitted:

The activities with which the amendments deal, which would be committed in Australia, are already liable to substantial punishment upon conviction. Those who have travelled overseas to carry out proscribed conduct (new Section 35) would know they risk criminal prosecution and substantial punishment if they ever return to Australia. Presumably, their Australian passports would

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20 Explanatory Memorandum, pp. 1, 4, 14.

21 Department of Immigration and Border Protection, *Submission 37*, p. [2].

22 Professor Ben Saul, *Submission 2*, p. 2; Bruce Baer Arnold, *Submission 6*, p. 4; Paul McMahon, *Submission 7*, pp. 7–8; Blueprint for Free Speech, *Submission 18*, p. 6; Refugee Council of Australia, *Submission 22*, p. [3]; UNICEF Australia, *Submission 24*, p. 22; Councils for civil liberties across Australia, *Submission 31*, p. 3; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 43.

already have been cancelled and they would be on a watch list making an unnoticed return quite unlikely. It is not clear that a significant beneficial effect would be gained by terminating their citizenship prior to their return and conviction.<sup>23</sup>

- 4.26 Professor Ben Saul of the University of Sydney similarly submitted that there was 'no evidence' terrorists would be deterred and that

[i]f the existing criminal offences carrying penalties of life imprisonment—and the threat of death by military operations overseas—do not deter significant numbers of Australians from fighting overseas, it is hard to see why loss of Australian citizenship would provide anything more than marginal deterrence.<sup>24</sup>

- 4.27 On the other hand, when asked whether the Bill would have a deterrent effect, the President of the Australian Human Rights Commission, Professor Gillian Triggs, raised concerns that the Bill would have a 'chilling effect' on the behaviour of dual nationals more generally:

I would think that a bill with such broad language, and the adoption of terms and phrases that we have never had in Australia before, will have a chilling effect. Presumably, people will be much more careful that they do not do anything which comes within the terms of the proposed bill, because so many millions of Australians could potentially be affected by this. So I think that it is at least rational to say that the current language and structure of the bill could easily have a chilling effect on people's behaviour. That may very well be what the government desires. But I think that needs to be spelled out properly to the public and spelled out in the bill itself.<sup>25</sup>

## Committee comment

- 4.28 The Committee notes concerns raised by some participants in the inquiry that the deterrent effect of the Bill may be limited. However, the Committee notes that the primary intention of the Bill, as noted in the Explanatory Memorandum and summarised in Chapter 2 of this report, is the protection of the Australian community and the upholding of its values.
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23 Paul McMahon, *Submission 7*, p. 8.

24 Professor Ben Saul, *Submission 2*, p. 2.

25 Professor Gillian Triggs, *Committee Hansard*, Canberra, 4 August 2015, p. 12.

## Social impacts

4.29 While noting that the Bill is directed to dual citizens, a common concern raised was that the Bill would result in a ‘two class’ system of citizenship. In such a system the continuing Australian citizenship of dual nationals would be less secure than that for sole Australian citizens, potentially affecting social cohesion.<sup>26</sup> For example, Dr Rayner Thwaites of the University of Sydney submitted that the Bill ‘clearly establishes dual citizens as “second-class” citizens, liable to suffer additional penalties and vulnerable to detrimental measures not suffered by those holding Australian citizenship alone’. Dr Thwaites argued this would be ‘corrosive of equality between citizens and the existence of a “common bond” between all Australians’, and that

[t]he Bill as introduced destabilises Australian citizenship, introducing a dynamic whereby a dual citizen’s legal status as an Australian citizen is vulnerable to removal for ill-specified conduct, via a non-specified process, attended by non-specified legal protections. To ignore, or be dismissive of, the very real sense in which this is likely to leave many Australians feeling less safe and secure would be irresponsible and to our lasting detriment as a country.<sup>27</sup>

4.30 Similarly, Professor Kim Rubenstein expressed concern that the proposed amendments would change the ‘proper balance’ in the relationship between the executive and the individual, and the nature of the membership in the Australian community.<sup>28</sup> She further stated:

I see citizenship as being something much more profound. There are better ways and more appropriate ways for us as a nation to be dealing with the concerns about terrorism in a globalised world. I think that even more particularly, in relation to the fact that this bill ultimately is targeting dual citizens in a multicultural nation, the consequence of that will actually be counterproductive to the very principles of trying to create an inclusive society where members of the community are not attracted to terrorist activities

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26 Michael Evans, *Submission 5*, p. [1]; Paul McMahon, *Submission 7*, pp. 7–8; FECCA, *Submission 12*, pp. 1–2; Professor Helen Irving, *Submission 15*, p. 7; Dr Rayner Thwaites, *Submission 16*, pp. [11–12]; Refugee Council of Australia, *Submission 22*, pp. [1–3]; Centre for Comparative Constitutional Studies, *Submission 29*, p. 10; Councils for civil liberties across Australia, *Submission 31*, pp. 3–4; Professor Kim Rubenstein, *Submission 35*, p. 6; Migration Law Program, ANU College of Law, *Submission 40*, pp. 5–6.

27 Dr Rayner Thwaites, *Submission 16*, pp. [11–12].

28 Professor Kim Rubenstein, *Committee Hansard*, Canberra, 4 August 2015, p. 37.

or to activities there are against the Western, liberal democratic system.<sup>29</sup>

- 4.31 As noted earlier, FECCA considered pathways to citizenship to be an important element of social cohesion that is highly valued amongst immigrant groups, particularly refugees, as a symbol of acceptance into the Australian community. FECCA stated that the Bill would ‘disproportionally affect migrants and their children’.<sup>30</sup>
- 4.32 The Refugee Council of Australia similarly emphasised the significance of citizenship to refugees. The Council registered its concern that the measures in the Bill would undermine the principles of citizenship and the strength of the bond between people and their country.<sup>31</sup>
- 4.33 Inquiry participants also told the Committee that the singling out of dual nationals would cause division and risk further marginalising sections of the community, potentially contributing to radicalisation.<sup>32</sup> For example, Mr Michael Evans submitted that the Bill would be ‘unduly divisive in what has been to date a relatively harmonious settler society’. He argued that the measure may be counter-productive because it risked ‘alienating people who would otherwise remain loyal Australian citizens’.<sup>33</sup>
- 4.34 Blueprint for Free Speech made a similar point in its submission:
 

We know that extremism is fuelled by disassociation, disempowerment, disenfranchisement and poverty. That is an uncontroversial view. To remove citizenship from someone only seeks to increase each of these factors. It’s feeding the beast, rather than taming it.<sup>34</sup>
- 4.35 The Muslim Legal Network (NSW) noted the potential for a particular impact on the Muslim community, which it considered had been affected by a ‘rise in Islamophobia and further marginalisation’ over the previous 12 months:
 

We are of the view that it is the Muslim community that will be most affected by these laws. These proposed laws will once again place Muslims under the spotlight and again questions the place of

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29 Professor Kim Rubenstein, *Committee Hansard*, Canberra, 4 August 2015, p. 37.

30 FECCA, *Submission 12*, p. 1.

31 Refugee Council of Australia, *Submission 22*, pp. [1–2].

32 Michael Evans, *Submission 5*, p. [1]; Bruce Baer Arnold, *Submission 6*, p. 4; Paul McMahon, *Submission 7*, pp. 7–8; Blueprint for Free Speech, *Submission 18*, p. 6; Robert Hayward, *Submission 19*, p. [1–2]; Refugee Council of Australia, *Submission 22*, p. 8; Muslim Legal Network (NSW), *Submission 27*, pp. 5–6; Islamic Council of Queensland, *Submission 33*, p. [2]; Professor Kim Rubenstein, *Submission 35*, p. 2.

33 Mr Michael Evans, *Submission 5*, p. [1].

34 Blueprint for Free Speech, *Submission 18*, p. 6.

Muslims in Australia. These objections and concerns of Muslim community leaders and organisations are expressed as concerned Australian citizens, not a sub group of society.<sup>35</sup>

## Reduced ability to bring terrorists to justice

4.36 Some participants in the inquiry raised concerns that removing the citizenship of dual nationals fighting overseas would mean that Australia would no longer have the ability to bring those persons to justice for terrorism offences, potentially threatening international security and Australian interests abroad.<sup>36</sup> For example, Professor Ben Saul of the University of Sydney submitted:

Foreign fighters who wish to return to Australia would no longer be subject to law enforcement measures in Australia designed to neutralize or contain the threat they pose, such as by arrest, prosecution and imprisonment; imposition of anti-terrorism control orders; surveillance; or deradicalisation and rehabilitation strategies.

Foreign fighters who wish to remain overseas would no longer be subject to efforts by Australian law enforcement to secure their return to face justice in Australia, such as by extradition, mutual legal assistance, or removal/deportation to Australia.

...

It also threatens Australian national security because Australian terrorists would remain free to plot attacks against Australian interests abroad, including Australian embassies and diplomats, tourists and business people, and companies. Such terrorists also remain free to radicalize, recruit, and train others within Australia through the internet.<sup>37</sup>

4.37 On the other hand, the Australia Defence Association submitted that while ‘ideally every traitor would be punished by convicting them in an Australian court’, the necessity for a conviction would cause ‘insuperable moral and practical difficulties’. The Association specifically highlighted:

- the difficulty of capturing offenders and bringing them back to Australia for trial,
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35 Muslim Legal Network (NSW), *Submission 27*, pp. 5–6.

36 Professor Ben Saul, *Submission 2*, pp. 1–2; Ms Jenny Rae, *Submission 4*, p. [1]; Australian Lawyers for Human Rights, *Submission 20*, p. 4; Councils for civil liberties across Australia, *Submission 31*, pp. 3–4; Mr John Ryan, *Submission 32*, p. [1].

37 Professor Ben Saul, *Submission 2*, pp. 1–2.

- difficulties with the admissibility of evidence obtained from war zones into Australian courts,
- the need to overcome an ‘impractical precedent’ that provided a ‘get-out-of-gaol-free’ card to a previous terrorism suspect,
- the unfairness to Australian defence personnel who are confronting such ‘traitors’ on the battlefield, and
- the need to ‘deter and actively counter treachery’, not just punish it afterwards.<sup>38</sup>

## Alternative approaches

- 4.38 Some inquiry participants suggested alternative approaches that they considered would be more effective in addressing the threat of terrorism. For example, the Refugee Council of Australia submitted that the Government’s focus in combatting terrorism should be on promoting the inclusion and participation of all people in Australian society. It recommended further consideration be given to strategies to promote inclusion and participation and that the Government ‘review policies which adversely affect the capacity of refugee and humanitarian entrants to settle successfully in Australia and contribute to their communities’.<sup>39</sup>
- 4.39 In its submission, UNICEF Australia called for the Government to ‘adequately resource targeted programs to rehabilitate and reintegrate Australian citizens who have been associated with armed forces or armed groups’.<sup>40</sup> UNICEF expanded on this proposal at a public hearing:

In our view, measures that punish or further isolate already vulnerable children will fail both the individual child and any national security efforts. By doing so, we are simply building a richer recruitment pool for extremist groups ... In UNICEF’s view, the best option for children associated with armed conflict is a safe return, which means demobilisation, psychosocial support, re-education, rehabilitation and, eventually, reintegration. While the recovery process is intensive, it is the best success measure to prevent children being re-recruited. UNICEF carries out this work globally with considerable success.<sup>41</sup>

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38 Australia Defence Association, *Submission 8*, pp. 10–11.

39 Refugee Council of Australia, *Submission 22*, pp. [8–9].

40 UNICEF Australia, *Submission 24*, p. 25.

41 Dr Norman Gillespie, Chief Executive Officer, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, pp. 1–2.

- 4.40 Similarly, Blueprint for Free Speech argued that a focus on rehabilitation would be a more effective response to the challenge of ‘foreign fighters’. It highlighted the example of Denmark, which

has opted for a complex and multi-tiered approach to engagement with the communities that produce the ‘ISIS Recruits’. Moreover, upon their return to Denmark, those that have fought with extremist forces are repatriated in a manner that seeks rehabilitation and not punishment, including psychological support to re-enter society and safe avenues for debriefing any horrors they may have seen. Hopefully this short-circuits any acting out of those horrors in the society to which they return. That principle is consistent with the Australian approach to criminal law, which seeks above all else to rehabilitate criminals such that they do not become recidivists.<sup>42</sup>

## Committee comment

- 4.41 The Committee notes concerns raised by some inquiry participants that the Bill may have a marginalising effect on sections of the Australian community. The Committee fully supports prevention strategies and efforts to promote social cohesion, and considers these are necessary measures to address terrorism threats.

- 4.42 The Committee has previously recognised the heightened security environment in Australia. In its inquiry into the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, the Committee noted:

Throughout its inquiry, the Committee was very mindful that its review of the proposed legislation has coincided with a heightened level of security threat to Australians and our interests overseas. As ASIO and the AFP highlighted to the Committee in their evidence, a major reason for this increased threat level is Australians travelling overseas to train with, fight for or otherwise support extremist groups, and the risks posed by those persons on their return to Australia. The Committee heard that such persons are likely to be further ‘radicalised’, with the result that they are both more able and more willing to commit terrorism offences.<sup>43</sup>

- 4.43 In this inquiry, the Committee heard that the measures proposed in the Bill comprise ‘part of a larger consideration of counter-terrorism measures
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42 Blueprint for Free Speech, *Submission 18*, p. 5.

43 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, Canberra, October 2014, pp. 185–186.

associated with the phenomenon known as foreign fighters'.<sup>44</sup> The Explanatory Memorandum noted that the Government is taking a multi-faceted approach to countering terrorism threats, including:

- strengthening coordination of agencies,
- introducing initiatives to counter violent extremism and manage the return of foreign fighters, and
- improving community understanding of the threat level.<sup>45</sup>

- 4.44 The Explanatory Memorandum states that cessation of Australian citizenship is part of the Government's response, and notes that the existing revocation powers in the *Australian Citizenship Act 2007* are 'inadequate to address the Government's concerns in relation to persons who have acted contrary to their allegiance to Australia by engaging in terrorist-related conduct.'<sup>46</sup>
- 4.45 In evidence, the Committee was informed that the measures proposed in the Bill would give agencies additional capacity in this heightened security environment.<sup>47</sup>
- 4.46 The Committee recognises that there are a substantial and growing number of foreign fighters. Events in the last twelve months have also demonstrated a growth in attack planning in Australia. The Committee accepts that there is a significantly enhanced risk of an event occurring and accepts that measures are required to address the threats terrorism poses to the Australian community. The Committee therefore considers it appropriate that persons who clearly repudiate their allegiance to the Australian community by engaging in serious terrorism-related conduct against Australia or Australian interests should no longer have the right to call themselves Australian citizens.

## Australia's international obligations

- 4.47 The Bill engages a number of Australia's international obligations under international law. These can be broadly grouped into the following categories:
- statelessness,
  - human rights,
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<sup>44</sup> Mr Michael Pezullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 5 August 2015, p. 57.

<sup>45</sup> Explanatory Memorandum, p. 1.

<sup>46</sup> Explanatory Memorandum, p. 1.

<sup>47</sup> *Classified Committee Hansard*, 5 August 2015, pp. 5, 6.

- children,
- combatting terrorism, and,
- humanitarian.

## Statelessness obligations

- 4.48 The *Convention on the Reduction of Statelessness 1961* (Statelessness Convention) entered into force on 13 December 1975,<sup>48</sup> and complements the earlier *Convention on relating to the Status of Stateless Persons 1954*. Australia acceded to both conventions in December 1973. In combination, these two treaties form the foundation of the international legal framework to address statelessness.
- 4.49 The Statelessness Convention sets out rules to limit the occurrence of statelessness and gives effect to Article 15 of the *Universal Declaration of Human Rights*, which recognises that 'everyone has the right to nationality'.<sup>49</sup>
- 4.50 The Statelessness Convention provides that States shall not deprive people of their nationality so as to render them stateless unless the citizenship was acquired by fraud.<sup>50</sup> The Convention does permit, however, renunciation of citizenship in circumstances where the person concerned possesses or acquires another nationality.<sup>51</sup>
- 4.51 The Statelessness Convention also provides that States can deprive nationality where a person has committed acts seriously prejudicial to the vital interests of the state even if it leads to statelessness. However, this is only lawful if the state's law already provided for such revocation at the time of accession to the Convention and the state made a declaration to that effect.<sup>52</sup>

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48 *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175.

49 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Article 15.

50 *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175, Article 9.

51 *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175, Article 7.

52 *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175, Article 8(3).

There is a distinction between a declaration and a reservation to a treaty. A reservation is a statement whose operation is aimed at excluding or modifying the legal effect of a treaty provision with regard to the country that is making the reservation. In contrast, a declaration (also known as an interpretive declaration) is a statement made by a country that is a party to a treaty in order to clarify its understanding of a matter contained in or the interpretation of a

- 4.52 In contrast to other signatories such as the United Kingdom and Brazil,<sup>53</sup> Australia made no declaration or reservation to the Convention. If a signatory State had made a declaration or reservation to the Convention, the deprivation of citizenship must be in accordance with law.<sup>54</sup>

### **Application to Bill**

- 4.53 The Explanatory Memorandum states that the amendments ‘will not result in a person becoming stateless [as it] only applies to persons who are a national or citizen of a country other than Australia, that is, dual citizens, and who would therefore not be rendered stateless if their Australian citizenship were to cease’.<sup>55</sup>

- 4.54 The Department of Immigration and Border Protection also stated:

A person cannot be rendered stateless by the loss of their Australian citizenship. The references in the Bill to ‘a national or citizen’ of a country other than Australia is consistent with the existing revocation provisions in the *Citizenship Act 2007* and is intended to reflect the fact that the terms are often used interchangeably internationally, with the result that both are covered.<sup>56</sup>

- 4.55 As the Department’s statement indicates, *nationality* and *citizenship* can be used interchangeably, but critically, these two terms can refer to two distinct forms of legal status: a person can be a national of a country but not necessarily a citizen.<sup>57</sup>

particular provision in a treaty or indeed the object of the whole treaty. Unlike a reservation, a declaration does not purport to exclude or modify the legal effects of a treaty.

A list of reservations submitted by State parties to the Convention on the Reduction of Statelessness 1961 is available at

<[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-4&chapter=5&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en)>, viewed 14 August 2015.

53 The **United Kingdom** lodged a reservation to Article 8, stating that it retains the right to deprive a British national of its citizenship where the person has engaged in conduct that is ‘seriously prejudicial to the vital interests’ of Britain. As a result of this reservation, legislation passed by the UK Parliament in early 2015 would not fall foul of Britain’s obligations under the Convention. **Brazil** lodged a late interpretive declaration with respect to Article 8(3). Brazil acceded to the Convention in October 2007, and the Brazilian Parliament approved the accession in late 2007 with the caveat permitted in Article 8(3) was exercised. The Brazilian Government lodged an interpretive declaration in December 2009 permitted under Article 8(3) to allow for the deprivation of nationality on the grounds of conduct seriously prejudicial to the vital interests of the Brazilian state.

54 *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175, Article 8(4).

55 Explanatory Memorandum, p. 2.

56 Department of Immigration and Border Protection, *Submission 37.4*, p. 8.

57 Law Council of Australia, *Submission 26*, p. 9; Australian Lawyers for Human Rights, *Submission 20*, p. 5. For example, a person born in an outlying possession of the United States

- 4.56 Australian Lawyers for Human Rights argued that this could mean, in circumstances where a dual national is a national of another country but not a citizen, the Bill could operate automatically to remove Australian citizenship leaving a person without any other citizenship.<sup>58</sup> The use of the phrase 'national or citizen' may unintentionally render a person stateless in breach of Australia's obligations under the Statelessness Convention.<sup>59</sup>
- 4.57 The Refugee Council of Australia expressed concerns that a dual citizen or national who lost their citizenship under the proposed sections of the Bill, may nonetheless become 'de facto stateless if they do not enjoy effective citizenship in their other countries of nationality'.<sup>60</sup> The Council elaborated:
- [W]e could potentially see the same sort of problem if we have a person who is nominally a citizen of another country but, in effect, cannot practically exercise their citizenship rights. There is certainly a risk in that case of a person becoming de facto stateless.<sup>61</sup>
- 4.58 The Law Council of Australia commented that the selective application of the legislation to dual nationals/citizens only 'is unfortunate but unavoidable' because of Australia's obligations under the Statelessness Convention.<sup>62</sup>
- 4.59 To address these concerns, the Executive Council of Australian Jewry recommended that the Bill be amended to clarify that a person affected by the Bill would need to have an 'indefeasible right [to citizenship in another country] and also a right of residence'.<sup>63</sup>

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is an American national but not a citizen. American non-citizen nationals may obtain American passports (if eligible) and owe permanent allegiance to the United States, but cannot vote in an election or hold office.

58 Australian Lawyers for Human Rights, *Submission 20*, p. 5.

59 Australian Lawyers for Human Rights, *Submission 20*, p. 5.

60 Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 20. See also, Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 17, and Ms Eugenia Grammatikakis, Acting Chair, Federation of Ethnic Communities' Councils of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 31.

61 Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 21; See also Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 1.

62 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 9. See also, Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 54.

63 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 27.

- 4.60 FECCA was concerned by the Bill's application to humanitarian entrants who hold Australian citizenship, but also continue to hold citizenship in their country of origin that was the site of their persecution. Returning a person to a State where they will face persecution would be in breach of Australia's obligations under the *Convention Relating to the Status of Refugees*.<sup>64</sup>
- 4.61 FECCA stated 'they would not be able to return there safely and would possibly end up in immigration detention awaiting a safe return'.<sup>65</sup> More specifically, FECCA was concerned that there is 'no safeguard' in relation to Australian citizens who were formally humanitarian entrants, and was supportive of the consideration of such an amendment in the Bill.<sup>66</sup>
- 4.62 The Department did not address the specific proposals put forward by these stakeholders. However, the Department did clarify that if a person were to lose their citizenship under one of the proposed sections of the Bill, the issue of their reception in another country 'really goes to their treatment when and if they become a non-citizen' under the *Migration Act* 1958. Mr Michael Pezzullo, Secretary of the Department of Immigration and Border Protection stated:
- In how you then deal with that person, it is not that they are stateless, because they have another citizenship; [it] is whether or not they can be removed. Just to be very strictly accurate about it, that goes to the operation of the *Migration Act* not the *Australian Citizenship Act*.<sup>67</sup>
- 4.63 The issue of possible indefinite detention is discussed in Chapter 7.

## Human rights obligations

- 4.64 Significant concerns regarding the Bill's engagement with human rights were raised by participants in the inquiry. In addition, the Bill's engagement with human rights has been reported on by two parliamentary committees charged with this function. The Parliamentary Joint Committee on Human Rights (PJCHR) reported to the Parliament on

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64 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

65 Ms Eugenia Grammatikakis, Acting Chair, Federation of Ethnic Communities' Councils of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 31.

66 Ms Eugenia Grammatikakis, Acting Chair, Federation of Ethnic Communities' Councils of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 31.

67 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 5.

11 August 2015,<sup>68</sup> and the Senate Standing Committee for the Scrutiny of Bills released an Alert Digest on 12 August 2015.<sup>69</sup>

- 4.65 The PJCHR and the Scrutiny of Bills Committee both requested that the Minister provide additional information addressing how the measures contained in the Bill are necessary to achieve the legitimate objective of national security, and are proportionate to achieving that legitimate objective. The information to be provided by the Minister in response to these reports will assist in informing the Parliament in its debate on the Bill.
- 4.66 A number of submitters to this inquiry raised human rights concerns and these are summarised in the following sections. The Bill's engagement of human rights occurs in two distinct ways: first, substantive human rights flowing from the loss of citizenship, and secondly, procedural or process rights that flow from the automatic loss of citizenship from conduct (separate from the loss of citizenship upon a conviction).<sup>70</sup>
- 4.67 As identified by the PJCHR, the Bill engages the following human rights:
- right to freedom of movement,<sup>71</sup>
  - right to a private life,<sup>72</sup>
  - protection of the family,<sup>73</sup>
  - right to take part in public affairs,<sup>74</sup>
  - right to liberty,<sup>75</sup>
  - obligations of non-refoulement,<sup>76</sup>
  - right to equality and non-discrimination,<sup>77</sup>
  - right to a fair hearing and criminal process,<sup>78</sup>
  - prohibition against retrospective criminal laws,<sup>79</sup>
  - prohibition against double punishment,<sup>80</sup>
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68 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: twenty-fifth report of the 44<sup>th</sup> Parliament*, 11 August 2015.

69 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2015*, 12 August 2015.

70 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44<sup>th</sup> Parliament: Human rights scrutiny report*, 11 August 2015.

71 Article 12 of the ICCPR.

72 Article 17 of the ICCPR.

73 Articles 17 and 23 of the ICCPR and Article 10 of the ICESCR.

74 Article 25 of the ICCPR.

75 Article 9 of the ICCPR.

76 Articles 6 and 7 of the ICCPR, and the Convention Against Torture (CAT).

77 Article 26 of the ICCPR.

78 Article 14 of the ICCPR.

79 Article 15 of the ICCPR.

- rights of children,<sup>81</sup>
  - right to work,<sup>82</sup>
  - right to social security,<sup>83</sup>
  - right to an adequate standard of living,<sup>84</sup>
  - right to health,<sup>85</sup> and
  - right to education.<sup>86</sup>
- 4.68 A number of submissions raised concerns about the Bill's engagement with these human rights.<sup>87</sup> However, three specific rights were of central concern: right to enter one's own country; procedural fairness rights; and, protection against retrospective laws. These are discussed below.

## Substantive rights

- 4.69 The *International Covenant on Civil and Political Rights* (ICCPR) provides that 'no one shall be arbitrarily deprived of the right to enter his own country'.<sup>88</sup> The Australian Human Rights Commission advised that meaning of one's 'own country' in the ICCPR is 'broader than that of nationality. It includes non-nationals who have special ties or an enduring connection to a particular country'.<sup>89</sup>

- 4.70 The Australian Human Rights Commission further explained:

The mere fact that the Minister deprived an Australian of citizenship would not have the result that Australia ceased to be that person's 'own country'. As noted above, the proposed provisions would apply to people born in Australia, to Australian parents, who have never left Australia or have left Australia for only brief periods ...

The proposed provisions would apply both to conduct that occurred within Australia and to conduct overseas. Loss of

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80 Article 14(7) of the ICCPR.

81 Convention on the Rights of the Child.

82 Articles 6, 7, and 8 of the ICESCR.

83 Article 9 of the ICESCR.

84 Article 11 of the ICESCR.

85 Article 12 of the ICESCR.

86 Article 13 and 14 of the ICESCR and Article 28 of the CRC.

87 Ms Eugenia Grammatikakis, Acting Chair, Federation of Ethnic Communities' Councils of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 30; Ms Amy Lamoin, Chief Technical Advisor, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 2; Mr Guy Ragen, Government Relations Adviser, Amnesty International Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 26.

88 ICCPR, Article 12 (4).

89 Australian Human Rights Commission, *Submission 13*, p. 8.

citizenship would be automatic and therefore, as a matter of law, instant. Administrative steps consequent on the loss of citizenship could be commenced at any time thereafter. An Australian could therefore lose their citizenship, or first suffer the consequences, either while in Australia or abroad ...

... it is clear that the loss of citizenship will be likely to lead to the interference with the right of people both to enter and to remain in their 'own country' – Australia.<sup>90</sup>

- 4.71 However, like most human rights, the right to enter one's own country 'is not absolute'. Any limitation on human rights, however, must also be lawful, necessary to achieve a legitimate objective, and proportionate to achieving that legitimate objective.
- 4.72 The Australian Human Rights Commission was of the view that the loss of citizenship under the Bill is 'highly likely to be arbitrary', identifying six reasons to support its conclusion:
- the Bill would result in automatic loss of citizenship, and therefore individual circumstances cannot be taken into account,
  - the relative seriousness of the conduct is not taken into account (whether or not the loss of citizenship follows from a conviction or from conduct alone),
  - the conduct that triggers loss of citizenship is not determined by a finding of a court to enliven that loss,
  - there is no requirement to notify the affected person despite the seriousness of the consequences,
  - loss may be retrospective and there is no limitation period for the offences that will lead to loss of citizenship, and
  - the stated purposes of the Bill 'are plainly not sufficient to justify the extreme consequences of loss of citizenship ... particularly ... given the range of other measures available to combat risks to the community posed by terrorists'.<sup>91</sup>
- 4.73 At a public hearing, the Commission further noted that 'the notion of automaticity, where there is no capacity whatever to make a judgement, is seriously in breach of the rule of law and in breach of our human rights international obligations'.<sup>92</sup>

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90 Australian Human Rights Commission, *Submission 13*, p. 8. See also, United Nations Human Rights Committee, *General Comment 27* (1999), UN Doc CCPR/C/21/Rev.1/Add.9, [21].

91 Australian Human Rights Commission, *Submission 13*, pp. 9–10.

92 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 16.

4.74 The Human Rights Committee of the Law Society of NSW similarly commented that proposed sections 33AA and 35 would be ‘likely to result’ in the arbitrary deprivation of this right as the sections do not consider individual circumstances; are engaged through alleged conduct rather than convictions; do not involve court hearings; and, the gravity of the penalty.<sup>93</sup>

4.75 Amnesty International Australia commented that, at a minimum, the Bill should be amended to ‘ensure the legislation adheres to Australia’s international legal obligations preserving the principle that stripping citizenship is both an extraordinary measure and a last resort’.<sup>94</sup> Amnesty further commented:

We acknowledge that the choices before the executive and the legislature when it comes to policymaking on national security issues are not easy and rarely black and white ... While states have an obligation to protect the security of their citizens, they also have an obligation to protect the human rights of their citizens. Loss of citizenship means that someone loses an array of human rights. Stripping an Australian of their citizenship is one of the most severe actions the Australian government can take against an Australian citizen.<sup>95</sup>

4.76 The Law Council of Australia also expressed concern that the procedures for losing citizenship and subsequent administrative action ‘do not provide sufficient safeguards to accord with the rule of law, the presumption of innocence, the right to a fair trial, and the right of appeal’.<sup>96</sup>

4.77 The Australian Human Rights Commission was of the view that these difficulties could not be ‘cured’ by the Minister’s personal, non-compellable discretionary power to exempt individuals from the operation of the Bill’s provision. Specifically, the Commission argued that:

- the power cannot be exercised by an independent decision maker,
- natural justice is specifically excluded from the Minister’s decision-making process,

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93 Human Rights Committee, Law Society of NSW, *Submission 11*, p. 3.

94 Mr Guy Ragen, Government Relations Adviser, Amnesty International Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 26.

95 Mr Guy Ragen, Government Relations Adviser, Amnesty International Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 26.

96 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 1.

- there is no possibility of merits review of the Minister's decision to exempt and judicial review will be extremely limited,
  - the Minister is not required to notify an affected person of any decision, and
  - the Minister may rely on preliminary advice from ASIO not amounting to a security assessment, which therefore does not attract review rights in the Administrative Appeals Tribunal.<sup>97</sup>
- 4.78 The operation of the Minister's discretion to exempt a person from the Bill's operation is discussed in Chapter 7.

### Procedural rights: right to fair trial and hearing

- 4.79 The Bill engages a number of procedural and process rights including the rights to a fair hearing and trial, and the right to an effective remedy. The right to a fair hearing and trial is protected by Article 14 of the ICCPR and applies to both criminal and civil proceedings. The right is concerned with procedural fairness and is therefore linked to concepts of equality in proceedings, and the right to public hearings by independent and impartial bodies.
- 4.80 The Statement of Compatibility with Human Rights contained in the Explanatory Memorandum states that the right to a fair hearing is not limited by the Bill:

The proposal does not limit the application of judicial review of decisions that might be made as a result of the cessation or renunciation of citizenship. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been exercised according to law. A person also has a right to seek declaratory relief as to whether the conditions giving rise to the cessation have been met.<sup>98</sup>

- 4.81 The Parliamentary Joint Committee on Human Rights has argued in its report on the Bill that the Statement of Compatibility does not fully explain how the availability of judicial review and the potential for declaratory relief – both rights of appeal and not originating rights – would be sufficient for compatibility with the right to a fair hearing or right to a fair trial.<sup>99</sup>

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97 Australian Human Rights Commission, *Submission 13*, p. 11.

98 Explanatory Memorandum, p. 31.

99 See Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44<sup>th</sup> Parliament: Human rights scrutiny report*, 11 August 2015, p. 25.

- 4.82 The Committee specifically sought additional comment from the Department about the Bill's relationship to the rights to a fair hearing and trial. The response from the Department was that:

The Government considers that the right to a fair trial and fair hearing are not limited by the proposal.<sup>100</sup>

- 4.83 Matters of procedural fairness are further discussed in Chapter 5.

### Protection against retrospective criminal laws and imposition of heavier penalties

- 4.84 The ICCPR creates a protection for individuals against retrospective criminal laws and the imposition of heavier penalties than were applicable at the time of the conduct.<sup>101</sup> The Human Rights Committee of the Law Society of NSW was of the view that proposed section 35A may engage this right, as

citizenship [under this provision] can be removed based on commission of one or more ... criminal [acts] ... The provision also applies to conduct occurring before its commencement. As such, it is likely to be regarded as a 'heavier penalty' than that 'applicable when the criminal offence was committed.<sup>102</sup>

- 4.85 The issues of retrospectivity and the imposition of heavier penalties are further examined in Chapter 6 of this Report.

### Obligations to children

- 4.86 As a party to the *Convention on the Rights of the Child* (CRC), Australia has an obligation to treat the best interests of the child as a primary consideration in all actions concerning children.<sup>103</sup>
- 4.87 As the Explanatory Memorandum acknowledges, the CRC is engaged in two broad circumstances: in respect of a minor who engages in prescribed conduct, and in respect of the parent of a minor.<sup>104</sup> The Explanatory Memorandum further states that 'the proposed amendments apply to all Australian (dual citizens) regardless of age'.<sup>105</sup>
- 4.88 The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000) (the Optional Protocol)
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<sup>100</sup> Department of Immigration and Border Protection, *Submission 37.4*, p. 8.

<sup>101</sup> ICCPR, Article 15(1).

<sup>102</sup> Human Rights Committee, Law Society of NSW, *Submission 11*, p. 3; see also Australian Human Rights Commission, *Submission 13*, p. 13.

<sup>103</sup> *Convention on the Rights of the Child*, Article 3(1).

<sup>104</sup> Explanatory Memorandum, p. 32.

<sup>105</sup> Explanatory Memorandum, p. 32

provides that parties ‘shall cooperate … in the rehabilitation and social integration of persons who are victims’ as child soldiers. Australia has been a party to the Optional Protocol since September 2006. Individuals under 18 years of age, who engaged in hostilities with armed groups—such as those operating in Syria and Iraq—are likely to fall within the definition of a child soldier and therefore attract the protection that the Optional Protocol provides.<sup>106</sup>

### Application to Bill

- 4.89 The automatic cessation of children’s citizenship has the potential to be inconsistent with the recognised rights of children.<sup>107</sup> For example, UNICEF Australia was of the view that the Bill, as currently drafted is not in line with Australia’s international obligations under the CRC or Optional Protocol, commenting:

[I]t is not aligned with our international obligations at all. UNICEF is very respectful of the great importance of governments taking all reasonable and necessary action to ensure the security of its citizens … But, again, it has to meet that test of what is reasonable, necessary and proportionate, and on that question of whether it is reasonable, necessary and proportionate to introduce a sweeping bill like this that does not take into account rule of law and that does not in any terms factor in core protection measures for children is very concerning. What is most important, if you are assessing the best interests of a child, is: are these measures necessary? And UNICEF’s view is: not only are they not necessary; they will be ineffective in relation to the government’s identified purpose.<sup>108</sup>

- 4.90 However the Australian Human Rights Commission noted that as the CRC has not been enacted into Australian law, Australian courts ‘cannot apply the principles of that treaty in a decision in our national laws’. The Commission qualified this answer in reference to previous High Court decisions that found that ‘public officials or government officials should at least take into account the commitments that Australia has accepted under the [CRC]’.<sup>109</sup>
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<sup>106</sup> Professor Ben Saul, *Submission 2*, p. 7; See also Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 7.

<sup>107</sup> Law Council of Australia, *Submission 26*, p. 23.

<sup>108</sup> Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August, 2015, p. 6.

<sup>109</sup> Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 11; see also *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) ALR 353.

- 4.91 The nature and extent of the Bill's application to children is further addressed in Chapter 8.

## Obligations to combat terrorism

- 4.92 Australia has a number of international obligations (from a wide range of sources) to combat terrorism. Following the terror attacks in New York and Washington on 11 September 2001, the Security Council passed *Resolution 1373*.<sup>110</sup> The resolution requires all States to criminalise terrorist acts, bring terrorists to justice, and prevent the cross-border movement of terrorists. In addition, *Security Council Resolution 1566* (2004) requires all States to cooperate fully in the fight against terrorism and to deny safe haven and bring to justice through prosecution or extradition any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.<sup>111</sup>
- 4.93 Australia is also a signatory to a number of counter-terrorism conventions since the 1960s, requiring Australia to 'prosecute or extradite' terrorists to face justice for their actions and ensure that they do not enjoy impunity – this is, the principle of *aut dedere aut judicare* (extradite or prosecute).<sup>112</sup> These agreements require Australia to establish jurisdiction over crimes by its nationals. Australia is therefore expected not to unilaterally strip nationality to avoid these obligations.<sup>113</sup>
- 4.94 Some submissions raised concerns that the Bill will undermine these obligations. Professor Ben Saul explained:

Unilaterally stripping citizenship undermines these obligations. Where a person stripped of citizenship is in Australia, they may be expelled to their other country of nationality without any guarantees that the person will be subject to prosecution or appropriate law enforcement measures in that country – thus allowing the cross-border movement of terrorists and impunity for terrorist crimes. Where a person is already overseas, the Bill does

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110 UN Security Council, *Security Council resolution 1373* (2001), *Concerning threats to international peace and security caused by terrorist acts*, 28 September 2001, S/RES/1373 (2001).

111 Law Council of Australia, *Submission 26*, p. 11, quoting UN Security Council, *Security Council Resolution 1566* (2004), *Concerning Threats to International Peace and Security Caused by Terrorism*, 8 October 2004, S/RES/1566 (2004).

112 Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (Art 7), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (Art 3, 7, 11), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (Arts 5, 6, 7, 8, 10, 13); International Convention for the Suppression of Acts of Nuclear Terrorism 2005 (Art 2, 5, 7, 10, 11, 13, 14).

113 Professor Ben Saul, *Submission 2*, p. 2.

not require that their other country of nationality will readmit them in practice or otherwise take responsibility for suppressing terrorist conduct.<sup>114</sup>

- 4.95 Whilst Australia has obligations to prosecute those who commit terrorist acts, it also has the right to uphold its national security. As noted by the Deputy Commissioner National Security of the Australian Federal Police (AFP), keeping people who engage in terrorism, offshore ‘is one less thing [that the AFP] have to deal with’.<sup>115</sup> Committee members heard consistent advice in a comparable jurisdiction.
- 4.96 Similarly, the Deputy Director-General of the Australian Security Intelligence Organisation expressed support for any measure that has the ability to keep problems offshore and reduce the direct threat to Australia.<sup>116</sup>

## Humanitarian obligations

- 4.97 Australia’s obligations under international humanitarian law principally arise as a result of the Geneva Conventions of 1949.<sup>117</sup> Under the Geneva Conventions, all wounded people have a right to basic medical care, and protection is given to those providing a range of humanitarian assistance.
- 4.98 A number of stakeholders raised concerns that the provision of medical care to wounded fighters (which is protected by the Geneva Conventions) by organisations such as the Red Cross or Médecins Sans Frontières could amount to conduct captured by proposed section 35, specifically, conduct that is ‘in the service of a declared terrorist organisation’.<sup>118</sup>
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114 Professor Ben Saul, *Submission 2*, p. 2. See also Refugee Council of Australia, *Submission 22*, p. 3; John Ryan, *Submission 32*, p. 1.

115 Mr Michael Phelan, Deputy Commissioner National Security, Australian Federal Police, *Committee Hansard*, Canberra, 10 August 2015, p. 7.

116 Deputy Director-General, Counter-Terrorism, Australian Security Intelligence Organisation, *Classified Committee Hansard*, 5 August 2015, p. 6.

117 International Committee of the Red Cross, *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (First Geneva Convention), 12 August 1949, 75 UNTS 31; International Committee of the Red Cross, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Second Geneva Convention), 12 August 1949, 75 UNTS 85; International Committee of the Red Cross, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

118 Professor Ben Saul, *Submission 2*, p. 3; Law Council of Australia, *Submission 26*, p. 11; Human Rights Committee, Law Society of NSW, *Submission 11*, p. 3; Professor Helen Irving, *Submission 15*, p. 6; Dr Rayner Thwaites, *Submission 16*, p. 7; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 5; Australian Lawyers for Human Rights, *Submission 20*, p. 8; NSW Society of Labor Lawyers, *Submission 25*, p. 10; Muslim Legal

- 4.99 Indeed, the Explanatory Memorandum links this proposed section to the provision of medical assistance: ‘a person may act in the service of a declared terrorist organisation if they undertake activities such as providing medical support’.<sup>119</sup>
- 4.100 Ms Amy Lamoin, Chief Technical Adviser at UNICEF, explained her concerns with the proposed section’s application to dual citizens engaged in humanitarian work:

I am a humanitarian worker who has worked overseas. We demobilise, rehabilitate and reintegrate children. We have to use much care and caution and have to negotiate with some armed groups to release children safely into our care and then provide them with emergency support and eventually that long-term care, reintegration and education. It concerns me that if I were a dual citizen I could potentially, as a humanitarian, fall within the scope of this bill, given its current scope and nature.<sup>120</sup>

- 4.101 The Committee makes further comment about proposed section 35 of the Bill and the meaning of the term ‘in the service of’ in Chapter 5 of this report.

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Network (NSW), *Submission 27*, p. 10; Executive Council of Australian Jewry, *Submission 9*, p. 4; Australian Bar Association, *Submission 43*, p. 3; Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 5.

<sup>119</sup> Explanatory Memorandum, p. 14.

<sup>120</sup> Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 5.

