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Conduct-based provisions – proposed sections 33AA and 35

Introduction

5.1 Proposed sections 33AA and 35 of the Bill (hereafter referred to as the 'conduct–based provisions') provide that citizenship may be lost by engaging in certain conduct. Importantly, the loss of citizenship occurs by operation of law. That is, as soon as a person engages in certain conduct or receives a conviction for a certain offence, the law operates automatically so as to remove that person's citizenship. Such provisions are commonly referred to as self-executing provisions.

5.2 In such a process, there is no 'decision' to remove citizenship. Rather, after an administrative process to make findings of fact, the Minister is informed that certain conduct has occurred. Upon becoming aware, the Minister must issue a notice that a person has lost their citizenship, though has discretion about when and to whom that notice is issued. The Bill allows a Minister, after issuing a notice, to exercise a personal discretion to exempt the person from the provision that led to the loss of citizenship.

5.3 This chapter discusses the concerns raised in a large number of submissions that the conduct provisions of the Bill lack procedural fairness. The chapter then discusses discrete issues related to each of proposed section 33AA and proposed section 35.

Administrative process to make findings of fact

5.4 The Bill provides that a Minister may issue a notice for the loss of citizenship upon 'becoming aware' of conduct.[1] The Bill does not elaborate on the administrative process that would take place to make a 'finding of fact' that the relevant conduct had occurred.[2]

5.5 In a submission to the inquiry, the Department of Immigration and Border Protection (the Department) described the administrative processes as follows:

> Operationalising the Act will involving identifying dual nationals to whom one or more of the provisions relating to automatic loss of citizenship apply. This will require close cooperation across government. The Department, including the Australian Border Force, will work closely with relevant departments and agencies, including law enforcement and intelligence agencies, to put in place the appropriate steps and processes to support the new provisions. Where available and suitable, existing whole of government intelligence and law enforcement coordination mechanisms will be utilised. In addition, deputy secretaries from relevant departments and agencies … will provide information to the Secretary of the Department of Immigration and Border Protection both on cases and other matters, such as the identification of relevant terrorist organisations for the purposes of the Act. The Secretary will bring cases to the attention of the Minister.[3]

5.6 In summary:

- First, an 'interagency board or … committee' of deputy secretaries of a number of government departments and agencies would consider information to make findings of fact in order to assess whether the Bill's provisions have been engaged.[4]

1 Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, ss 33AA(6) and 35(5).

2 Ms Rachel Noble, Deputy Secretary, Policy Group, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 3. Proposed section 35A, as drafted, also operates by law upon conviction. This administrative process was not addressed in submissions or hearings and therefore will not be discussed further in this report.

3 Department of Immigration and Border Protection, *Submission 37*, p. 2.

4 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 19.

- Secondly, on reaching a conclusion, the interagency board/committee would inform the Secretary of the Department, who would 'sign off' on the conclusion.[5]
- Finally, the Secretary would inform the Minister.

5.7 The Minister for Immigration and Border Protection, the Hon Peter Dutton MP, has stated publicly that the following agencies would be represented on the interagency committee: the Department of Immigration and Border Protection, the Attorney-General's Department, the Department of Defence and the Department of Foreign Affairs and Trade.[6] The Committee heard that the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO) would also be involved.[7]

5.8 The policy rationale provided by the Department for the range of government departments and agencies being involved was that 'joined up' advice would lead to better quality advice, because 'every agency that has got something to say on the issue or has got fragments of the information that pertain to the conduct' is involved.[8]

5.9 The Secretary of the Department sought to clarify the role of the interagency committee at a public hearing, commenting,

> In that systematic way of looking at persons of interest… decisions will be made along the way to say, 'We are now hitting a threshold here for section 33AA action,' for instance. But they are not sitting as a tribunal.[9]
>
> …
>
> It is the government's contention, on the face of both the legislation, the second reading speech and the explanatory memorandum, that officials are not engaged… in administrative decision making of that type commonly understood. We are

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

6 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, 'Interview with ABC 7.30', 23 June 2015.

7 Ms Kerri Hartland, Deputy Director-General, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 10 August 2015, p. 8.

8 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 19.

9 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 8.

> assembling facts and drawing them to the attention of the [Minister].[10]

5.10 In the view of the Department, the interagency committee would 'need to assess facts, intelligence and other forms of reports' in order to make conclusions about what conduct has occurred.[11]

5.11 The Department confirmed that the interagency committee would meet privately and may consider confidential information in relation to a person's conduct.[12] The interagency committee would have a 'range of information' at their disposal, which may include publicly available information and also classified information from intelligence agencies, including foreign intelligence services:

> It will be a dossier, to the extent that we have been able to pull that together, of what we know or what our international partners know about somebody's conduct.[13]

5.12 In regard to its role in the process, ASIO advised that it envisaged

> that the support we will provide really mirrors what is a pretty well-established process in which we provide support to, for example, law enforcement agencies, such as the AFP, in terrorism prosecutions. It is a very similar process in that case.[14]

5.13 In their deliberations, the conclusions of the interagency committee would be reached by consensus. If there were differing views about whether the conduct amounted to the conduct specified in one of the proposed sections of the Bill, the Department stated that 'better practice' would be to not advise the Minister until consensus was achieved. However, the Secretary clarified that in some circumstances where consensus could not be reached (either on the finding of fact in relation to the conduct, or the advice about whether to delay notice for a public interest rationale), 'it might be that the Minister would be given options as to how to deal with the notice'.[15] The notice requirements of the Bill are discussed in the following section.

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10 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 17.

11 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 18.

12 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, pp. 7, 9.

13 Ms Rachel Noble, Deputy Secretary, Policy Group, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 4.

14 Ms Kerri Hartland, Deputy Director-General, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 10 August 2015, p. 8.

15 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 19.

5.14 Once the interagency committee made a finding of fact about a person's conduct, the compiled dossier would be forwarded to the Secretary of the Department:

> Given the consequence of the matters in discussion, we felt that something that the secretary signs off was the appropriate level of authority.[16]

5.15 After the Secretary was satisfied, the Minister would then be informed that a finding of fact has been made by the interagency committee. However, before a notice could be issued that the Minister is aware that the event has occurred, there would need to be a 'clear degree of mental apprehension—or knowledge—that [conduct] has occurred'.[17] The Department's General Counsel advised that 'awareness is knowledge that is underpinned by [a] high degree of probability that the event has occurred'.[18] Counsel elaborated:

> It is more than a belief or a suspicion. It does not require absolute proof. It involves a clear degree of mental apprehension. The minister needs to be satisfied by way of an awareness … That would be knowledge based on a high degree of probability as to the facts underpinning the assessment. We would say that the same type of awareness is required as to whether the person is dual citizen. Then, upon the minister becoming aware that that event occurs, it sets in train a series of motion.[19]

5.16 The Secretary of the Department advised that, in the process of the Minister developing the appropriate degree of knowledge that the event occurred, the Minister may seek additional meetings with the Secretary or other statutory office holders, to scrutinise the information further:

> [W]e would anticipate any self-respecting minister would want a high degree of confidence that they were acting on sound grounds. They would get that both on the face of the document and perhaps by way of follow-up meetings with the person who put the advice—in this case, the secretary—but they might well seek to call in other statutory officers. The minister might be minded to probe the level of confidence that we have, but if we are doing our

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

17 Ms Philippa De Veau, General Counsel/First Assistant Secretary Legal Division, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 18.

18 Ms Philippa De Veau, General Counsel/First Assistant Secretary Legal Division, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 19.

19 Ms Philippa De Veau, General Counsel/First Assistant Secretary Legal Division, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 18.

> job properly we would give him or her that confidence on the face of the submission that we provide.[20]

5.17 After scrutinising the information provided by the relevant agencies, the Minister may nonetheless reach a conclusion that the conduct has not occurred. The Secretary advised:

> I guess I could foresee a situation where the secretary and/or other officers have not done their job very well and have not satisfied the minister that the notice is in a fit state to be signed … I can envisage a circumstance where a minister says, 'You haven't convinced me'.[21]

5.18 The Bill's administrative processes relating to the conduct provisions attracted significant comment from stakeholders.[22] Comments centred on the following issues, each of which is examined below:

- uncertainty about the administrative process that would 'operationalise' the Bill's provisions,
- whether there is a 'decision' made in the course of this administrative process,
- the efficacy and appropriateness of an administrative process to make findings of fact that assess whether citizenship has been lost, and
- oversight of the administrative process.

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20 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 19.

21 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 11.

22 Ms Janine Truter, *Submission 1*, p. 1; Professor Ben Saul, *Submission 2*, p. 5–6; Bruce Baer Arnold, *Submission 6*, p. 4; Mr Paul McMahon, *Submission 7*, p. 2; Human Rights Committee, Law Society of NSW, *Submission 11*, p. 4; FECCA, *Submission 12*, pp. 2–3; Australian Human Rights Commission, *Submission 13,* pp. 9–10; Professor Helen Irving, *Submission 15*, pp. 4–5; Dr Rayner Thwaites, *Submission 16*, p. 1; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 4–5, 6; Australian Lawyers for Human Rights, *Submission 20*, pp. 2, 6; NSW Society of Labor Lawyers, *Submission 25*, pp. 10–11; Muslim Legal Network (NSW), *Submission 27*, p. 10; Councils for civil liberties across Australia, *Submission 31*, p. 4; Mr John Ryan, *Submission 32*, p. 1; Islamic Council of Queensland, *Submission 33*, p. 1; Commonwealth Ombudsman, *Submission 34*, p. 2; Migration Law Program, ANU College of Law, *Submission 40*, p. 7; Australian Bar Association, *Submission 43*, p. 2; Mr Geoffrey Kennett SC, Chair, Administrative Law Committee, Law Council of Australia, *Committee Hansard,* Canberra, 4 August 2015, p. 3; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, pp. 14, 16; Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, Canberra, 4 August 2015, pp. 35–36; Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 6; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 12.

Clarifying the administrative process

5.19 A large number of participants in the inquiry expressed uncertainty about what the administrative process would be, with some describing the lack of detail in the Bill about this process as concerning.[23] For example, the Australian Human Rights Commission commented that the Bill is 'very curious in adopting this automaticity provision, without some kind of a statement as to how the practical consequences would flow from the act which complies or meets the standard definitions within the proposed legislation'.[24]

5.20 The Commonwealth Ombudsman recommended that the Bill be amended to specifically provide for, and therefore clarify, the administrative process described by the Department.[25] Similarly, the Law Council of Australia was concerned that, in the absence of specific inclusion of this administrative process in the text of the Bill itself, a 'legal vacuum' would be created:

> [T]here is a whole gathering of information in a legal vacuum from across various government departments, with, it seems, no controls, transparency or accountability in any of that process ultimately leading to the minister issuing a notice and/or an exemption. So it really underscores the fact that there is an entire vacuum around that process.[26]

5.21 Dr Rayner Thwaites stated that due to the complexity of the conduct that acts as the trigger, there 'clearly needs to be a determination … some human judgement in the process' and that this would 'help, operationally

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23 Mr Paul McMahon, *Submission 7*, p. 2; FECCA, *Submission 12*, p. 2; Dr Rayner Thwaites, *Submission 16*, p. 1; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 4–5; Australian Lawyers for Human Rights, *Submission 20*, p. 6; Muslim Legal Network (NSW), *Submission 27*, p. 10; Islamic Council of Queensland, *Submission 33*, p. 1; Commonwealth Ombudsman, *Submission 34*, p. 2; Mr Geoffrey Kennett SC, Chair, Administrative Law Committee, Law Council of Australia, *Committee Hansard,* Canberra, 4 August 2015, p. 3; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 14; Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, pp. 25–26; Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, Canberra, 4 August 2015, p. 35. Ms Amy Lamoin, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 6; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, pp. 9, 12; Mr Guy Ragen, Government Relations Advisor, Amnesty International Australia, Committee Hansard, Canberra, 5 August 2015, p. 31.

24 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 12.

25 Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, Canberra, 4 August 2015, p. 35.

26 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard,* Canberra, 4 August 2015, p. 6.

and legally, to clarify what the decision-making process is'.[27] Dr Thwaites continued:

> [T]he reality is that there will be administrative action that underlies the operation of the new provisions, and that needs to be acknowledged and there need to be clear standards that are to be employed by the relevant decision makers to ensure that the measure as framed does not invite dysfunction and tie up valuable government resources that would otherwise be usefully addressed to keeping our fellow Australians safe. These points are not simply lawyers' points in the pejorative sense that that word sometimes is used. They lose sight of the fact that many of the legal objections, if heeded, would provide for greater clarity in decision making and accountability, curtail potential abuse of the power, minimise error and bring clarity to the purpose and goals.[28]

5.22 There was also uncertainty among stakeholders about what 'standard of proof' would need to be met in order for the Minister to become 'aware'.[29]

Is there a 'decision'?

5.23 Throughout the inquiry, stakeholders repeatedly questioned whether the administrative processes described above amounted to a 'decision' in practice.[30] How the interagency committee would make assessments about conduct is particularly important when examining the constitutionality of the proposed sections. In the absence of specific statements in the Bill or the Explanatory Memorandum that provide clarity about these administrative processes, participants speculated about whether there would be a 'decision' or 'determination'.

5.24 Responding to these concerns, the Secretary of the Department commented that 'no-one is going to be deciding whether someone has

27 Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, p. 48.

28 Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, p. 45.

29 For example, Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 25.

30 Mr Paul McMahon, *Submission 7*, p. 2; Professor Helen Irving, *Submission 15*, pp. 4–5; Dr Rayner Thwaites, *Submission 16*, p. 1; Australian Lawyers for Human Rights, *Submission 20*, p. 6; NSW Society of Labor Lawyers, *Submission 25*, p. 11; Councils for civil liberties across Australia, *Submission 31*, p. 4; John Ryan, *Submission 32*, p. 1; Commonwealth Ombudsman, *Submission 34*, p. 2; Migration Law Program, ANU College of Law, *Submission 40*, p. 7; Australian Bar Association, *Submission 43*, p. 2; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 16; Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, Canberra, 4 August 2015, pp. 35–36; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 9; Mr Guy Ragen, Government Relations Advisor, Amnesty International Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 31;

engaged in traitorous conduct from the point of view of guilt or innocence'.[31] The Secretary stated:

> [I]t is the government's contention … that in that circumstance the minister is not in fact making a decision to deprive anyone of anything. The minister is operationalising because for administrative purposes the fact of someone's renunciation of their allegiance to Australia … has already occurred.[32]

5.25 To further clarify the legal status of the administrative process, the Secretary used the following terms to characterise the findings of fact by the interagency board/committee:

> They will have to satisfy themselves that it has occurred.[33]
>
> They are pulling together an information brief that suggests that they are satisfied that the conduct has occurred.[34]
>
> … in that small 'd' sense of a decision – yes, a group of officials have to decide [whether conduct has occurred].[35]

Efficacy and appropriateness of interagency assessment of conduct

5.26 In addition to these legal and constitutional concerns, stakeholders expressed policy concerns about the efficacy and appropriateness of the interagency assessment of conduct.[36] Specifically, stakeholders were of the view that the process was unfair and arbitrary, and questioned whether it was appropriate for public servants to be making the assessments when such serious consequences would flow from that assessment.

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

32 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 4. See also Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 6.

33 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 9.

34 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 9.

35 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 9.

36 Ms Janine Truter, *Submission 1*, p. 1; Professor Ben Saul, *Submission 2*, p. 5–6; Bruce Baer Arnold, *Submission 6*, p. 4; Mr Paul McMahon, *Submission 7*, pp. 5–6; Executive Council of Australian Jewry, *Submission 9*, p. 6; Human Rights Committee, Law Society of NSW, *Submission 11*, p. 4; FECCA, *Submission 12*, pp. 2–3; Australian Human Rights Commission, *Submission 13*, pp. 9–10; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 6; Australian Lawyers for Human Rights, *Submission 20*, p. 2; NSW Society of Labor Lawyers, *Submission 25*, p. 10; Muslim Legal Network (NSW), *Submission 27*, p. 10; Councils for civil liberties across Australia, *Submission 31*, p. 4.

5.27 For example, Professor Ben Saul noted that loss of citizenship is 'amongst the most serious legal consequences for any person' and as such, argued that loss of citizenship should only occur with 'rigorous and effective procedural safeguards including due process and independent, impartial decision-makers'.[37]

5.28 The Executive Council of Australian Jewry commented that the administrative processes that would operationalise the Bill's provisions would make it possible to 'decide on a person's allegiance to Australia on the sole basis of untested interpretations of alleged evidence, with no opportunity for the accused person to … challenge the case against him'.[38] The Council argued:

> The rule of law… demands that citizens not be subjected to punishment by administrative fiat, but only through the due process of the law, which remains the most reliable method for testing the merits of allegations of wrongful conduct.[39]
>
> … [W]e have policy concerns as to whether it is appropriate for … public servants or officials behind closed doors to come to certain conclusions about somebody's conduct which have very severe consequences for that person, and which that person might not even become aware of until after the event, if at all.[40]

5.29 The Refugee Council of Australia made similar comments emphasising the importance of due process:

> [I]f we had a person in Australia, for example, who was suspected of a different kind of serious crime—if they had been suspected of multiple murders, for instance—we would not penalise them in this manner on the basis of suspicion alone. We would have to have due process, even if we had people involved who, as you suggested, witnessed what had happened or suggested that they had strong evidence of it. That evidence would have to be presented in a court of law … I do not see why we should be applying a differential standard here to different types of serious

37 Professor Ben Saul, *Submission 2*, p. 5.

38 Executive Council of Australian Jewry, *Submission 9*, p. 6.

39 Executive Council of Australian Jewry, *Submission 9*, p. 6. See also Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 25.

40 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 24.

> crimes. Especially when the penalties are so serious, I think due process becomes even more important, rather than less.[41]

5.30 Professor Saul commented that the administrative process would require the Minister to consider 'highly complex matters of fact and law':

> These include legal issues on which the jurisprudence is unsettled or contested, including how the complex, multipronged definitions of terrorist offences apply in given cases. They also include serious questions concerning the reliability of evidence or intelligence whose admissibility would ordinarily be subject to challenge in criminal proceedings. The risk of serious error is magnified by the inability of the affected person to know or challenge the Minister's legal reasoning prior to notice being given; and the absence of any right to be legally represented in the process.[42]

5.31 The Executive Council of Australian Jewry expressed concern that 'the Bill as drafted seems to presume rather than prove that the commission of a particular act [entails] a severance of the bond of citizenship and a repudiation of allegiance to Australia'.[43] The Council was of the view that if the Bill were to be enacted in its present form 'it would open the door wide to error and abuse'.[44]

5.32 Examining the administrative process more broadly, the Law Council of Australia stated that, although it appreciated the constitutional rationale for the Bill's approach, it had reservations about a self-executing model

> largely because it does not provide a process up-front where a person's status can be authoritatively determined. They may engage in conduct which may not come to anybody's attention for some years … It may then be some time before that crystallises in any sort of government action against the person.[45]

5.33 Indeed, the importance of an independent and authoritative assessment of the information was reflected on by a number of stakeholders. For example Ms Janine Truter questioned whether the Bill's current

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41 Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard,* Canberra, 5 August 2015, p. 23.

42 Professor Ben Saul, *Submission 2*, p. 6. See also Australian Lawyers for Human Rights, *Submission 20*, pp. 6–7.

43 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 24.

44 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 25.

45 Mr Geoffrey Kennett SC, Chair, Administrative Law Committee, Law Council of Australia, Committee Hansard, Canberra, 4 August 2015, pp. 3–4.

administrative process would be able to be independent: 'implementation of a law should be free from the influence of those who make the law'.[46]

5.34 As some of these concerns indicate, a large number of stakeholders were of the view that the conduct provisions should require an independent determination about the conduct in a court or tribunal.[47] This specific proposal is discussed in detail later in this chapter.

5.35 A number of stakeholders also discussed the specific administrative process to support the Bill's operation with regard to children, and whether assessments about the child's culpability could be made without speaking to that child directly.[48] These issues are discussed in detail in Chapter 8.

Oversight of the administrative processes

5.36 In a submission to the inquiry, the Commonwealth Ombudsman discussed the oversight of the administrative action that flows from the finding of fact. The Ombudsman advised that if the source of advice was the Department of Immigration and Border Protection or a Commonwealth law enforcement agency, the matters of administration associated with the provision of that advice would fall within the jurisdiction of the Ombudsman. However, if the source of the advice was an intelligence agency, the administration action would fall within the jurisdiction of the Inspector-General of Intelligence and Security.[49]

5.37 As discussed earlier in this chapter, the Department advised that the source of the advice to the Minister would be the interagency committee.

5.38 Within this structure, it is therefore reasonable to assume, as the Ombudsman identified in his submission, that 'complaints about these matters will be made to … [the Office of the Commonwealth Ombudsman] and the Inspector-General of Intelligence and Security'.[50]

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46 Ms Janine Truter, *Submission 1*, p. 1.

47 For example, Human Rights Committee, Law Society of NSW, *Submission 11*, pp. 3–4; Australian Human Rights Commission, *Submission 13*, p. 10; Law Council of Australia, *Submission 26*, p. 10; Centre for Comparative Constitutional Studies, *Submission 29*, p. 2; Immigration Advice & Rights Centre Inc., *Submission 36*, p. 3; Migration Law Program, ANU College of Law, *Submission 40*, p. 9; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 15.

48 For example, Law Council of Australia, Submission 26, p. 24; Professor Anne Twomey, Submission 10, p. 3; UNICEF Australia, Submission 24, p. 6; Centre for Comparative Constitutional Studies, Submission 29, p. 3; Australian Human Rights Commission, Submission 13, p. 12; Ms Amy Lamoin, UNICEF Australia, Committee Hansard, 5 August 2015, p. 6; Ms Erin Gillen, FECCA, Committee Hansard, 4 August 2015, p. 31.

49 Commonwealth Ombudsman, *Submission 34*, pp. 2–3.

50 Commonwealth Ombudsman, *Submission 34*, p. 3.

The Inspector-General of Intelligence and Security did not make a submission to the inquiry.

5.39 Broader issues relating to oversight of the Bill are discussed in Chapter 9.

Committee comment

5.40 Stakeholders expressed concerns that there was a lack of clarity about the nature of the administrative process that would lead to findings of fact that conduct has occurred to trigger the loss of citizenship under proposed sections 33AA and 35.

5.41 Evidence provided by the Department of Immigration and Border Protection at the final public hearing into the Bill sought to clarify the process.

Issues of procedural fairness

5.42 Although not expressly recognised in the Australian Constitution, the common law recognises a duty to accord a person procedural fairness, or natural justice, when a decision is made affecting their rights or interests.[51]

5.43 A core principle of procedural fairness was outlined by Justice Mason in *Kioa v West (1985)*:

> It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[52]

5.44 Inquiry participants, including legal and constitutional experts, raised a number of issues of procedural fairness and natural justice that they considered to flow from the 'self–executing' nature of proposed sections 33AA and 35.

5.45 Specifically, there was concern that, by omitting the role of the court, an individual's right to a fair trial would be encroached by the proposed new provisions. It was argued that the self-executing nature of the provisions

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51 Australian Law Reform Commission, *Traditional Rights and Freedoms – encroachments by Commonwealth Laws (ALRC Interim Report 127)*, p. 411.

52 *Kioa v West* (1985) 159 CLR 550, 582 (Mason J). See *Australian Law Reform Commission, Traditional Rights and Freedoms – encroachments by Commonwealth Laws (ALRC Interim Report 127)*, p. 412.

veiled a decision-making process that must occur to determine whether the provisions had been triggered.

5.46 Other issues raised included ambiguity regarding the standard of proof required to determine that conduct had occurred, and an argument that hiding the decision-making process diminished a person's rights of review.

5.47 Dr Rayner Thwaites considered that these legal objections to the Bill, if heeded, would provide for 'greater clarity in decision making and accountability, curtail potential abuse of the power, minimise error and bring clarity to the purpose and goals'.[53]

5.48 The possible consequences of including or omitting a court process in the operation of proposed sections 33AA and 35 are discussed below. A person's rights of review are discussed in detail in Chapter 7.

Cessation of citizenship by 'operation of law'

5.49 Proposed sections 33AA and 35 provide that a person's citizenship may cease by operation of law, or as self-executing provisions.[54]

5.50 The self-executing nature of the provisions means that the cessation of citizenship does not result from either a criminal conviction as determined by a Court, or an administrative decision of a Minister. Rather, the Explanatory Memorandum states that:

> [A] person's own conduct, specified in the new sections 33AA, 35 and 35A will be the cause of the person's citizenship to cease.[55]

5.51 The Commonwealth Ombudsman submitted that the notion that the cessation of citizenship occurred by operation of the statute concealed the necessary decision-making that must occur to determine the conduct had occurred. In this way, the Ombudsman considered that the self-executing nature of the provisions was a 'legal fiction'.[56]

5.52 Many submitters endorsed this characterisation and argued that it circumvented what should be a court determination of criminal conduct.[57]

5.53 The Muslim Legal Network (NSW) submitted that it was unclear why the Bill failed to recognise the role of the criminal justice system in

53 Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, p. 45.

54 Explanatory Memorandum, p. 14.

55 Explanatory Memorandum, p. 7.

56 Commonwealth Ombudsman, *Submission 34,* p. 2. See also, Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, 4 August 2015, pp. 35–36.

57 See for example, Dr Rayner Thwaites, *Committee Hansard*, 5 August 2015, p. 45; Australian Bar Association, *Submission 43*, p. 2; Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 6.

determining guilt and did not offer appropriate means of redress for incorrect findings made by the Minister, such as administrative review.[58]

5.54 UNICEF Australia raised a number of procedural concerns relating to how it would be assessed that conduct had occurred under the self-executing provisions, including the evidence that would be used, the standard of proof that would be adopted, and the rules of evidence, if any, that would be applied.[59]

5.55 The Law Council of Australia considered that the Bill effectively replaced what would ordinarily be a criminal court process with an administrative law process:

> The absence of a requirement for a conviction in proposed sections 33AA and 35 means that ASIO officials will be advising the Minister and making an assessment of whether a person has engaged in what would otherwise be unlawful conduct under the *Criminal Code*.[60]

5.56 Evidence presented to the Committee argued that the operation of law model in proposed sections 33AA and 35 failed to recognise the functions of the court, under the separation of powers. For example, Professor George Williams suggested that the proposed self-executing model bypassed the court at the critical moment of determining whether the requisite liability applied:

> It is akin to another statute that, for example, in a self-executing way says that if a person commits murder they are automatically to be jailed, without providing any mechanism for a court to determine that.[61]

5.57 The constitutional concerns raised in relation to the Bill, including issues regarding separation of powers, are discussed further in Chapter 3.

Need for Court determination

5.58 Inquiry participants raised concerns that the conduct leading to the automatic loss of citizenship under proposed section 33AA amounted to criminal conduct, which would usually be dealt with in a criminal court

58 Muslim Legal Network (NSW), *Submission 27*, p. 17.

59 UNICEF Australia, *Submission 24*, p. 4.

60 Law Council of Australia, *Submission 26*, p. 10.

61 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 12.

pursuant to procedures outlined in the *Criminal Code Act 1995* (the Criminal Code).[62]

5.59 Professor Helen Irving submitted that proposed sections 33AA could not be quarantined from a determination that certain conduct had occurred, and any attempt to take the revocation of citizenship as a consequence of conduct out of the hands of the courts would be unlikely to succeed, since the conduct was defined by reference to criminal offences.[63]

5.60 The Migration Law Program of the ANU College of Law submitted that the Bill represented a blurring of the boundaries between criminal law and citizenship law and, in particular, represented an undesirable 'increase in Executive and administrative decision-making at the expense of criminal justice due process'.[64]

5.61 The Migration Law Program noted that proposed sections 33AA and 35 in effect created new offences punishable by loss of citizenship—but without proper judicial oversight of hearing evidence according to the rules of evidence and determining guilt or innocence according to law.[65]

5.62 The Australian Human Rights Commission was concerned that a loss of citizenship could be enlivened automatically with no regard for a person's individual circumstances or the relative seriousness of their conduct.[66]

5.63 Professor Gillian Triggs, President of the Commission, stated that while there was a clear need to balance loss of citizenship with the egregious nature of terrorist acts, the question remained whether it was appropriate 'to use the penalty of loss of citizenship without proper judicial or administrative processes to ensure that the evidence upon which that loss of citizenship is based is accurate and fair'.[67]

5.64 Unlike offences in the Criminal Code, the proposed conduct-based provisions in section 33A and 35A do not require a decision to prosecute. According to the Centre for Comparative Constitutional Studies, prosecutorial discretion generated various protections for the individual, as an independent prosecutor would have to ensure there were reasonable prospects of conviction and that the conviction was in the public interest.[68]

62 See, for example, Human Rights Committee, Law Society of NSW, *Submission 11*, pp. 3–4; Australian Human Rights Commission, *Submission 13*, p. 10; Immigration Advice & Rights Centre Inc., *Submission 36*, p. 3.

63 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44.

64 Migration Law Program, ANU College of Law, *Submission 40*, p. 9.

65 Migration Law Program, ANU College of Law, *Submission 40*, p. 9.

66 Australian Human Rights Commission, *Submission 13*, p. 4; p. 6.

67 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 15.

68 Centre for Comparative Constitutional Studies, *Submission 29*, p. 2.

5.65 Further, inquiry participants noted that discretionary prosecutorial independence could prevent the misapplication of criminal offence provisions for situations where it was never conceived the provisions would apply.[69]

5.66 As a court determination of guilt was not required under the proposed legislation, inquiry participants stated it was unclear what standard of proof would be applied by the Department of Immigration and Border Protection in assessing whether the conduct provisions had been triggered. It was assumed, however, that the standard of proof would be lower than would be required by a court for criminal conviction. [70]

5.67 The Law Council of Australia raised concerns that the scheme established in the Bill would avoid long-standing judicial procedures for testing and challenging evidence in criminal trials. The Law Council submitted that rather than the prosecution having to prove 'beyond reasonable doubt' that a person was guilty of an offence as is usually required for the conduct listed in proposed section 33AA, it was likely that only a civil standard of proof would apply. This would mean that it would only have to be shown on the 'balance of probabilities' that a person had engaged in certain conduct.[71]

5.68 The Centre for Comparative Constitutional Studies agreed, further arguing that as deprivation of citizenship was 'an extremely serious sanction', a criminal standard of proof should be applied in all cases.[72]

5.69 The Law Council of Australia took the view that as proposed sections 33AA and 35 operated without the need for a court determination that conduct had occurred, the individual would carry the ultimate burden of proof to show he or she had *not* ceased to be an Australian citizen.[73] The Muslim Legal Network (NSW) submitted that this would encroach on the fundamental right of a person to be presumed innocent until proven guilty.[74]

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69 See Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 40. See also Centre for Comparative Constitutional Studies, *Submission 29,* p. 2.

70 See Mr Paul McMahon, *Submission 7*, pp. 5–6; Executive Council of Australian Jewry, *Submission 9*, p. 5; Commonwealth Ombudsman, *Submission 34*, p. 2; Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 20.

71 Law Council of Australia, *Submission 26*, p. 10.

72 The Centre for Comparative Constitutional Studies, *Submission 29*, p. 3.

73 Law Council of Australia, *Submission 26*, p. 10.

74 Muslim Legal Network (NSW), *Submission 27*, p. 5. See also Amnesty International, *Submission 41*, p. 5.

5.70 In its report into the Bill, the Parliamentary Joint Committee on Human Rights (PJCHR) considered the procedural and process rights affected by the Bill's proposed powers to automatically remove citizenship, including the right to a fair trial, the right to a fair hearing and the right to an effective remedy. The PJCHR considered:

> The automatic loss of citizenship through conduct as defined by reference to the *Criminal Code* engages and limits criminal process rights, which form part of the right to a fair trial under article 14 of the ICCPR. This is because the measure does not contain the protection of any of these criminal process rights.[75]

5.71 The PJCHR sought advice from the Minister for Immigration and Border Protection on the limitation to the right to a fair trial and whether that limitation was a reasonable and proportionate measure to achieve the objective of the provisions.[76]

5.72 The human rights that would be impacted by the Bill, including the right to a fair trial, were discussed in Chapter 4.

5.73 The Committee sought advice from the Department of Immigration and Border Protection regarding the standard of proof required to provide satisfaction that the conduct had occurred pursuant to proposed sections 33AA or 35.

5.74 The Department responded that:

> [T]he starting point is: the cessation of citizenship occurs by operation of law based on the occurrence of a certain event. Then, if the next step under the legislation is that there is an obligation to issue a notice upon the minister becoming aware, the question is: what does 'awareness' mean and what do they need to be aware of? We would say that awareness is a knowledge that something has occurred. It is more than a belief or a suspicion. It does not require absolute proof. It involves a clear degree of mental apprehension. The minister needs to be satisfied by way of awareness. Before a notice can be issued that the minister is aware that the event has occurred, there needs to be that clear degree of mental apprehension—or knowledge—that it has occurred. That would be knowledge based on a high degree of probability as to the facts underpinning the assessment.[77]

75 Parliamentary Joint Committee on Human Rights, *Twenty–fifth report of the 44th Parliament*, August 2015, pp. 30–31.

76 Parliamentary Joint Committee on Human Rights, *Twenty–fifth report of the 44th Parliament*, August 2015, pp. 30–31.

77 Ms Phillipa De Veau, General Counsel/First Assistant Secretary Legal Division, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 18.

Alternative models

5.75 During the hearings, witnesses were asked to give their views on possible alternative models for revocation of citizenship that would comply with the rule of law, while still achieving its purpose of protecting the Australian community.

5.76 If the Government was to legislate for loss of citizenship, the majority of inquiry participants were in favour of a conviction-based model. However, witnesses acknowledged the challenges in gathering comprehensive intelligence and evidence that could be usefully relied upon in prosecuting people for terrorism-related offences in a court. Witnesses also recognised the need to protect both information and the source of intelligence or information from any unintended consequences that would prejudice national security.[78]

5.77 Professor Gillian Triggs of the Australian Human Rights Commission considered there were various ways to take a rule of law approach to the problem, while protecting information and sources. This might include using processes that are already used in other national security matters, such as hearing matters ex parte and in-camera, as part of a process of judicial review to test evidence obtained by ASIO or another department. Professor Triggs also flagged the possibility of temporarily suspending a person's citizenship to allow them to put their case to a court.[79]

5.78 Professor George Williams considered there were two options that could be considered as an alternative to the self-executing model proposed in the Bill in order to address constitutional and rule of law concerns. The first proposal, outlined in his submission (co-authored with Ms Sangeetha Pillai and Ms Shipra Chordia) was as follows:

- Revocation should only occur in response to conduct that involves disloyalty to Australia of a similar level of seriousness to the conduct covered by the current s 35.
- This disloyalty should be evident as a result of a finding by a fair and independent process. Hence, revocation should only arise when a person has been convicted by a court for committing a relevant offence, such as an act of terrorism.
- The required level of seriousness of the offence should not be dictated only by the nature of the offence, but also by the penalty applied. The possibility of revocation should arise in

78 See, for example, Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, pp. 15–16; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 22; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 50.

79 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, pp. 15–16.

respect of conduct that has led to a jail sentence of 10 years or more.

- Revocation should not apply to less serious convictions, including those that do not give rise to a jail term.
- Once these factors are made out, revocation should not be automatic. A person should lose their citizenship if the Minister is satisfied that revocation is in the public interest and the conduct that led to conviction was directed at Australia or Australians in a manner that suggests disloyalty or lack of allegiance to Australia. The affected person should be given the chance to be heard, and the ministerial determination should be subject to judicial review and merits review.[80]

5.79 Professor Williams also supported consideration of an alternative model by the Law Council of Australia (outlined in the following section):

> We would suggest that a model which would be worth exploring, at least, would be for the minister to seek for a court to make a declaration on the motion of the minister that a person has engaged in conduct and therefore ceased to be a citizen. That would not need to occur on the criminal standard of proof, although a court would, at least ordinarily, want to see some evidence in order to make a finding. A decision by a court under declaration, on the application of the minister, would seem to us, at least on the face of it, not to be obviously unconstitutional—other people might have different views on that—and would have the merit of providing an authoritative up-front determination of the matter.[81]

5.80 Professor Williams noted that a judicial process was the first step in both models:

> I recognise the operational concerns that have been raised here—the difficulties in getting evidence and proving these matters—but this is the inescapable nature of Australia's constitutional framework; it does not permit consequences akin to punishment to be visited upon a person unless the evidence is robust and tested in an appropriate forum.[82]

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80 Ms Shipra Chordia and Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 1-2.

81 Mr Geoffrey Kennett SC, Chair, Administrative Law Committee, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 4. See also, Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 15. Note the Law Council of Australia's primary recommendation, if the Parliament decided that a citizenship cessation scheme was necessary, was for loss of citizenship to occur only after a court conviction, followed by a decision by the Minister. See *Submission 26*, pp. 3–4.

82 See Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 15.

5.81 Professor Helen Irving also considered what alternative model might address constitutional concerns, noting that the independence of the courts has to be protected by the relevant legislation:

> The courts cannot be required to automatically act upon the advice from the executive. The courts have to have the power of independently reviewing an application and independently acting upon that application.[83]

5.82 Professor Irving continued:

> As to courts acting upon an application by the executive to order particular consequences, absent a criminal conviction, it is possible that guidance could be given. As long as there is no interference in the independence of the court and certain procedures are not denied to the court, you may well have a constitutionally sound alternative there.[84]

Application to the court for declaration

5.83 Following a request from the Committee, the Law Council of Australia gave further consideration to an alternative model, whereby the Minister would first seek a declaration from a court that a person had, on the 'balance of probabilities', engaged in certain conduct.[85]

5.84 The Law Council of Australia submitted that this model would have the merit of providing an independent up-front determination of whether the individual had engaged in the prescribed conduct. If carefully drafted, the Law Council was of the view that this model could avoid the constitutional and other legal issues raised in relation to the self-executing model.[86]

5.85 The Law Council of Australia outlined the declaration model that had been implemented in Canada as an example of how such a model might operate. Pursuant to the Canadian *Citizenship Act 1977*, a Minister may seek a declaration of revocation of citizenship from a Federal Court, if the Minister has reasonable grounds to believe that a citizen served as a member of an armed force of a country, was a member of an organised armed group and that country or group was engaged in an armed conflict with Canada.[87] A declaration would also need to be sought by the Minister

83 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 51.

84 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 51.

85 Law Council of Australia, *Submission 26.1*, p. 7.

86 Law Council of Australia, *Submission 26.1*, p. 7.

87 Law Council of Australia, *Submission 26.1*, p. 7.

if an individual was accused of acquiring citizenship in false, fraudulent or otherwise deceptive circumstances.[88]

5.86 In the Canadian model, the question determined by the Court is whether the person, while a Canadian citizen, 'served as a member of an armed force of a country or as a member of an organised armed group and that country or group was engaged in an armed conflict with Canada'[89]. The declaration has the effect of revoking citizenship, rendering the person a foreign national.[90]

5.87 The Canadian model also allows for the Canadian citizenship of a dual citizen to be revoked by the Minister if the individual is convicted of certain 'national security' offences in Canada or abroad with a minimum sentence applied of between five years and life imprisonment, depending on the offence.[91]

5.88 In its supplementary submission, the Department of Immigration and Border Protection included information on Canada's laws. In relation to the Canadian model, the submission stated:

> The Federal Court will decide on cases of fraud involving concerns related to security, organized criminality, war crimes and crimes against humanity, and also cases involving serving as a member in an armed force or organized armed group engaged in armed conflict with Canada, given that such cases raise complex issues of fact and law.[92]

5.89 The Law Council suggested that this model could be applied in an Australian context, where the court might instead determine, on the balance of probabilities, whether an individual engaged in the prescribed conduct. The Law Council proposed that a court determination could be combined with Ministerial discretion to revoke an individual's citizenship if it was in Australia's interests.[93]

5.90 This model would have the advantage of allowing an independent process for determining conduct, without engaging a criminal standard of proof, or requiring a full criminal conviction.[94]

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88 See Centre for Comparative Constitutional Studies, *Submission 29*, p. 7; Department of Immigration and Border Protection, *Submission 37.3*, p. 4.

89 Section 10.1(2), *Citizenship Act 1977* (Canada). See Law Council of Australia, *Submission 26.1*, p. 7.

90 Law Council of Australia, *Submission 26.1*, p. 7.

91 See Centre for Comparative Constitutional Studies, *Submission 29*, p. 7; Department of Immigration and Border Protection, *Submission 37.3*, p. 4.

92 Department of Immigration and Border Protection, *Submission 37.3*, p. 4.

93 Law Council of Australia, *Submission 26.1*, p. 7.

94 Law Council of Australia, *Submission 26.1*, p. 8.

5.91 The Law Council noted:

> Should a declaration model be explored, it would be important to allow the court sufficient discretion in making an order and to allow the appropriate testing of evidence. That is, the Constitutional integrity of the court would need to be maintained. The court cannot be used to rubber stamp the objectives of the executive.[95]

5.92 The Centre for Comparative Constitutional Studies noted that a constitutional appeal had been lodged in relation to the Canadian legislation. Nevertheless, the Centre submitted that the declaration model provided an important safeguard:

> The test for a making of a threshold determination by a court prior to the Minister's exercise of the revocation power provides a form of safeguard that is notably absent in the Bill. Secondly, the rules of natural justice are not entirely excluded under the Canadian legislation. As previously discussed, providing individuals with the opportunity of a 'fair hearing' is of fundamental importance within a legislative scheme that involves the exercise of public power that carries severe consequences.[96]

5.93 Sensitive security information could retain a level of protection under the model through the application of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSI Act), and through other common legal procedures such as allowing matters to be heard ex parte, where necessary.[97]

Response from the Department of Immigration and Border Protection

5.94 The Committee asked the Department of Immigration and Border Protection (the Department) whether a court declaration model could be used in place of the self-executing provisions.

5.95 The Department indicated that this was a policy question and a matter for Government.[98]

5.96 The Committee also sought further information regarding how the NSI Act might apply in court proceedings relating to a loss of citizenship, to protect sensitive information.

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95 Law Council of Australia, *Submission 26.1*, p. 8.

96 Centre for Comparative Constitutional Studies, *Submission 29*, p. 8.

97 Law Council of Australia, *Submission 26.1*, p. 8.

98 Department of Immigration and Border Protection, *Submission 37.4*, p. 6.

5.97 The Department explained that in proceedings relating to the cessation of citizenship, the Commonwealth could have recourse to the NSI Act and public interest immunity claims under the common law.[99]

5.98 The NSI Act is triggered by the Attorney–General (or another minister) giving written notice to the parties and the court that the NSI Act applies to the proceedings. The Attorney–General may issue a civil non–disclosure certificate or witness exclusion certificate if it is expected that the disclosure of information during the course of proceedings or by a witness may relate to or affect national security. Such a certificate triggers a requirement for the court to hold a closed hearing at which parties and their legal representatives may be present, subject to their exclusion by the court. The court may make an order in relation to the disclosure of information, however in doing so must give the greatest weight to the risk of prejudice to national security if the information was disclosed or the witness was called.[100]

5.99 A claim for public interest immunity might also be made under the common law, and is also available under section 130 of the uniform Evidence Acts. Claims are most commonly made by the Government in relation to national security and the activities of ASIO officers, police informers and other types of informers or covert operatives.

5.100 The Department noted that where a claim of public interest immunity is made, the court is expected to give 'great weight' to the claim; however it will need to reach its own conclusions. It is therefore not absolute that the information pursuant to the claim will remain protected.[101]

Committee comment

5.101 The Committee notes evidence from participants in the inquiry that the Bill, through the self-executing nature of proposed sections 33AA and 35, lacks procedural fairness and circumvents the role of the court in decision-making. In addition, assertions were made that the self-executing provisions were a 'legal fiction' and thus could attract legal challenge. Some participants outlined possible alternative approaches to address these perceived flaws.

5.102 The Committee also notes the Government's view, based on advice, that the Bill is 'constitutionally sound' and 'constructed in the best way possible that has regard to both the separation of powers concerns … and

99 Department of Immigration and Border Protection, *Submission 37.4*, pp. 3–4.

100 Department of Immigration and Border Protection, *Submission 37.4*, pp. 3–4.

101 Department of Immigration and Border Protection, *Submission 37.4*, p. 4.

other matters'.[102] The Committee reiterates that it is not its role to determine matters of constitutionality.

5.103 The Committee's view is that proposed sections 33AA and 35 should continue to operate by law. The Committee notes these provisions would be an extension of the existing section 35 of the *Australian Citizenship Act 2007*, which serves as a precedent that loss of citizenship can occur by operation of law on the basis of conduct.

5.104 The Committee considers that these provisions are likely to be used only rarely and in circumstances where criminal prosecution, which could otherwise lead to loss of citizenship under proposed section 35A, is not possible. Given the intended exceptional nature of these provisions, the Committee has determined to support the approach proposed in the Bill for sections 33AA and 35.

5.105 However, given the seriousness of the measures and the extraordinary nature of their operation, the Committee has made a number of recommendations in Chapter 9 to provide a robust system of oversight and monitoring. This will ensure they operate in the circumstances required and only as intended.

Proposed section 33AA – specific issues

Overlap with 35A

5.106 There are a number of items of conduct listed in proposed section 33AA of the Bill that are also offences under the Criminal Code for which a person, if convicted, would lose their citizenship under proposed section 35A. The items referenced in both sections are:

- engaging in international terrorist activities using explosive or lethal devices,
- engaging in a terrorist act,
- providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act,
- directing the activities of a terrorist organisation,
- recruiting for a terrorist organisation,
- financing terrorism,
- financing a terrorist, and

102 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 5 August 2015, p. 59.

- engaging in foreign incursions and recruitment.

5.107 A number of submissions raised concerns about the overlap between proposed sections 33AA and 35A, where the same conduct could lead to loss of citizenship at the time when it was done or when a conviction is entered in relation to the conduct. This was said to undermine the protections of the criminal law given by proposed 35A.[103]

5.108 Councils for civil liberties across Australia submitted:

> The Bill presents a fundamental threat to the rule of law. It is entirely possible that a person may be acquitted by a jury of his or her peers of terrorism offences (and therefore proposed s.35A of the Act would have no work to do), but the Minister may be satisfied—at a lesser standard than the criminal standard of beyond reasonable doubt—that the person has engaged in prohibited conduct pursuant to section 33AA or section 35 of the Act and has renounced his or her citizenship notwithstanding the acquittal. It should be for the courts and not the executive branch of government to make decisions that are so fundamental to a person's rights and freedoms.[104]

5.109 Dr Rayner Thwaites and Professor Helen Irving suggested that the conflict between the two provisions could be resolved by providing that proposed section 33AA only operates in relation to conduct offshore, which would therefore be beyond the reach of proposed section 35A.[105] In this way, Dr Thwaites submitted that proposed section 33AA would

> circumvent anticipated practical and legal difficulties that might attend an attempt to convict an Australian in another country of conduct that occurred in a country other than Australia.[106]

5.110 Following their appearance at a public hearing, the Law Council of Australia provided a supplementary submission that identified a further possible unintended consequence of overlap between the provisions, namely, that a person might be able to evade prosecution for certain offences. The Law Council submitted:

> Section 33AA would have the effect that a person would cease to be an Australian citizen upon engaging in the relevant prescribed conduct. A person may engage in further conduct which the

103 Dr Rayner Thwaites, *Submission 16*, p. [8]. See also NSW Society of Labor Lawyers, *Submission 25*, p. 7; Ms Shipra Chordia, Ms Sangeetha Pillai and Professor George Williams, *Submission 17*, p.6; Muslim Legal Network (NSW), *Submission 27*, p.8.

104 Councils for civil liberties across Australia, *Submission 31*, p. 6.

105 Professor Helen Irving, *Submission 15*, p. 5; Dr Rayner Thwaites, *Submission 16*, p. [8].

106 Dr Rayner Thwaites, *Submission 16*, p. [8]; Professor Helen Irving, *Submission 15*, p. 5.

> Crown may wish to bring to trial and obtain a conviction for (such as a different offence prescribed by section 35A or another offence under Commonwealth legislation). It may be that, unwittingly, because the person is not a citizen, they cannot be tried for the further offence either because the fact of not being a citizen either provides a defence to the criminal offence or attracts some kind of constitutional argument or generally creates difficulties with jurisdiction in trying the person for the further and potentially more serious offence.
>
> For example, offences relating to cluster munitions under s72.38 of the Criminal Code have a category B jurisdiction (s72.38(3) of the Criminal Code). Category B jurisdiction requires that the person who engaged in the relevant conduct was an Australian citizen, Australian resident or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory. Under the self-executing scheme proposed by the Bill, a person who ceases to be an Australian citizen under s33AA may evade prosecution under an offence such as s 72.38(3), which is currently proposed to be captured by s35A.[107]

5.111 In evidence, the Secretary of the Department admitted it would be possible that the same conduct that gave rise to a prosecution and resulted in an acquittal may be examined and found to have led to loss of citizenship under proposed section 33AA.[108] He noted that a reason why a person may be acquitted of the offence may be that the conduct occurred offshore and there were difficulties with acquiring foreign evidence that could be admitted in an Australian prosecution.[109]

5.112 The Department confirmed that the level of awareness that the Minister would need, in order to issue a notice that a person had lost citizenship under proposed section 33AA, would not be the standard of 'beyond reasonable doubt', which would be required for a conviction for the same conduct. The General Counsel advised that:

> We would say that awareness is a knowledge that something has occurred. It is more than a belief or a suspicion. It does not require absolute proof. It involves a clear degree of mental apprehension. The Minister needs to be satisfied by way of an awareness. Before

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107 Law Council of Australia, *Submission 26.1*, pp. 6–7.

108 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 16.

109 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, pp. 15–16.

> a notice can be issued that the Minister is aware that the event has occurred, there needs to be that clear degree of mental apprehension—or knowledge—that it has occurred. That would be knowledge based on a high degree of probability as to the facts underpinning the assessment.[110]

5.113 In evidence, the Department identified possible practical difficulties where a loss of citizenship under proposed section 33AA relied on the same facts as proposed section 35A. The General Counsel submitted:

> It might be that, having been made aware that the charges have been laid and the prosecution is proceeding before the courts, it would be appropriate for the minister to say, 'I'm going to forestall issuing a notice until such time as we find out the outcome of the charges before the court and proceed to consider use of the other provisions that hinge upon a conviction'—if indeed the same conduct is caught in those provisions.[111]

5.114 In a supplementary submission, the Department stated that the question of whether proposed section 33AA could be limited to overseas conduct is a policy question and a matter for government. The Department did not identify any legal impediments to the use of this model.[112]

Committee comment

5.115 The Committee notes the various concerns expressed about the overlap of conduct covered by proposed sections 33AA and 35A, which were well documented in written submissions and at the hearing. The primary concern was that, due to the self-executing nature of the conduct-based section 33AA, this provision would 'take effect' immediately for conduct that could also be subject to prosecution and conviction-based revocation under section 35A. For the overlapping offences, there would be no opportunity for the outcomes of any prosecution to be taken into account. Further, the additional safeguards built into the conviction-based section 35A would not be able to apply, and, conceivably, a person could lose their citizenship by operation of law under section 33AA even if they were acquitted of the offence in a Court.

5.116 The Committee notes that, where the conduct occurs in Australia, it is expected that citizenship revocation would occur following conviction and subject to Ministerial discretion. However, the Committee recognises that

110 Ms Philippa De Veau, General Counsel, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 18.

111 Ms Philippa De Veau, General Counsel, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 15.

112 Department of Immigration and Border Protection, *Submission 37.4*, p. 5.

there are likely to be instances where a person engages in conduct that breaches their allegiance to Australia, but it is either not feasible to bring a person to trial (for example, because they remain offshore) or a person is not able to be convicted because of difficulties in gathering foreign evidence.

5.117 There were differing views on the Committee as to whether proposed section 33AA should be applied to conduct both inside and outside Australia, as currently drafted, or whether its operation should be limited to conduct that has occurred offshore.

5.118 On balance, after detailed discussion, the Committee considers that the Bill should be amended to operate so that:

- proposed section 33AA is limited to:
  - ⇒ persons who have engaged in relevant conduct offshore, or
  - ⇒ persons who have engaged in relevant conduct onshore and left Australia before being charged and brought to trial for that conduct, and
- proposed section 35A applies to conduct occurring onshore, where the person remains onshore and is convicted of a relevant offence.

5.119 The Committee considers that section 33AA should not apply to cases where a prosecution has not been successful in respect of the same conduct.

5.120 This distinction would allow Australia to maintain the long held standards of criminal justice that apply within its domestic jurisdiction.

5.121 Applying proposed section 33AA to conduct offshore would be consistent with the advice received from eminent constitutional law expert Professor Helen Irving and her colleague Dr Rayner Thwaites from the University of Sydney, who argued it would 'circumvent the practical and legal difficulties that might attend an attempt to convict an Australian in another country of conduct that occurred in a country other than Australia'. Offshore application would also be consistent with the Bill's other conduct-based provision, proposed section 35.

5.122 The Committee considers that the prospects of bringing a person to trial and successfully convicting that person would be more constrained if that person is offshore. In order to protect the community, it is appropriate in these circumstances that there is a process for citizenship to be lost based on conduct that has been found to have occurred.

5.123 The Committee recommends a number of oversight mechanisms in Chapter 9 to monitor the frequency and circumstances in which each of the provisions are used and to ensure the Bill operates as intended.

Recommendation 1

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to limit the operation of proposed section 33AA to individuals who have:

- **engaged in relevant conduct offshore; or**
- **engaged in relevant conduct onshore and left Australia before being charged and brought to trial in respect of that conduct.**

Relationship between conduct under proposed section 33AA and the Criminal Code

5.124 Legal experts told the Committee that there were potential legal problems associated with transferring a list of conduct that was contained in the Criminal Code into the Bill, without also engaging the criminal law process for determining whether the conduct had occurred.

5.125 Subsection 33AA(3) of the Bill states:

> Words and expressions used in paragraphs (2)(a) to (h) have the same meanings as in Subdivision A of Division 72, sections 101.1, 101.2, 102.4, 103.1 and 103.2 and Division 119 of the *Criminal Code*, respectively.

5.126 Professor Anne Twomey observed that while it may have been intended that all aspects of meaning of the relevant terms, as set out in the Criminal Code, were picked up in the interpretation of proposed section 33AA, it was not clear if the qualifications attached to equivalent offences in the Criminal Code also applied in the operation of the Bill.[113]

5.127 Professor Helen Irving submitted that it was implausible that the conduct in proposed section 33AA, which is defined by reference to particular offences in the Criminal Code and attracts very serious penalties (but was also subject to defences), could be treated as distinct from the relevant offences in the Code.[114]

5.128 Professor Jeremy Gans, of the Centre for Comparative Constitutional Studies, considered that a number of problems arose from including a list of conduct in proposed section 33AA, which was not further defined:

> The particular problem that you have raised is one of a set of problems that comes from the fact that, when these words were

113 Professor Anne Twomey, *Submission 10*, pp. 1–4.

114 Professor Helen Irving, *Submission 15*, p. 4.

> put into the *Criminal Code*, they were inserted into a context where there was a criminal process in place and principles of criminal responsibility and interpretation were in place that restrain or combine or sometimes expand the meaning of ordinary words.[115]

5.129 Professor Gans stated that it was unclear how issues that would normally arise in a criminal trial would be resolved under section 33AA.[116]

5.130 Concerns were raised as to whether the conduct in proposed section 33AA also captured the general principles of criminal responsibility that exist in the Criminal Code, including the requirement to prove fault elements such as voluntariness and the absence of mistake and duress.[117]

5.131 Specifically, questions arose regarding whether the assessment of conduct pursuant to proposed section 33AA would include considering all elements of the conduct as per the definitions contained in the Criminal Code.

5.132 For example, 'financing terrorism',[118] when defined as an offence in the Criminal Code, covers conduct, circumstances, results, fault elements, exceptions, limiting principles and extension principles. Professor Gans said it was 'completely unclear' whether the qualifiers that existed in the Criminal Code for this offence also applied to the conduct in proposed section 33AA.[119]

5.133 In another example highlighted to the Committee, subsection 33AA(2)(c) of the Bill provides that citizenship be automatically renounced if a person was found to be 'providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act'. This conduct, when listed as an offence pursuant to section 101.2 of the Criminal Code, requires that a person either knew the training was 'connected with preparation for, the engagement of a person in, or assistance in a terrorist act', or was reckless as to that fact.[120]

5.134 If, as the Explanatory Memorandum suggests, the qualifications contained in the criminal provisions were included in the interpretation of proposed

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115 Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 39.

116 Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 40.

117 Professor Anne Twomey, *Submission 10*, pp. 1–4; Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 39; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44.

118 Proposed subsection 33AA(2)(f) of the Bill.

119 Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 39.

120 Dr Rayner Thwaites, *Submission 16*, pp. 3–4.

subsection 33AA(2)(c), Dr Rayner Thwaites submitted that the immediate issue was how the qualifications would be established if the provisions were self–executing.[121]

5.135 Similarly, in the Criminal Code, there is an exemption for members of the Australian Defence Force in relation to conduct that amounts to 'engaging in international terrorist activities using explosive or lethal devices'. Professor Gans submitted that it was unclear whether this exemption also existed under proposed section 33AA(2)(a).[122]

5.136 Professor Helen Irving considered that without the elements of knowledge and intention, which are found in the Criminal Code provisions, and a corresponding criminal trial, the Bill could automatically capture innocent acts. Accordingly, Professor Irving argued that determinations as to knowledge and intent would need to be determined in a court of law:

> If, as I suggest, it is implausible that the definition and the offence should be legitimately detached from each other, and if these forms of conduct that are referred to in proposed section 33AA are an offence—which they are—then that needs to be determined in a court of law, with the element of intention and the defences, exceptions and so on that are found in the *Criminal Code*.[123]

5.137 Professor Twomey agreed that without the relevant elements of knowledge and intention, the provisions might capture innocent conduct where a person did not have the relevant knowledge and intention to achieve an end such as terrorism. Questions of personal intention and knowledge were matters that would normally require proof before any action could be taken.[124]

5.138 Professor Twomey submitted:

> If intention and knowledge are required before citizenship is 'renounced' (and it would seem to be logically difficult to 'renounce' one's citizenship if one had no idea that one's conduct had anything to do with actions inconsistent with allegiance to Australia and had any effect upon one's citizenship status) then this gives rise to difficulties with the automatic application of the termination of citizenship.[125]

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121 Dr Rayner Thwaites, *Submission 16*, pp. 3–4.

122 Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 39. See also, Centre for Comparative Constitutional Studies, *Submission 29*, p. 3.

123 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44.

124 Professor Anne Twomey, *Submission 10*, p. 3.

125 Professor Anne Twomey, *Submission 10*, p. 3.

5.139 Professor Gans considered that the only way to resolve all of the issues associated with the inclusion of criminal conduct in proposed section 33AA would be to require a court conviction:

> Once you require a conviction you bring in the process, which has existed for so long, to try and deal with all of these issues in a sensible way with people being warned of particulars, methods to resolve questions and a standard of proof. It would also pick up the usual protections of criminal law.[126]

5.140 The Committee sought advice from the Department regarding whether the defences, fault elements, exemptions and extensions included in the Criminal Code were intended to apply to conduct under proposed section 33AA, and how this would be determined.

5.141 The Department responded as follows:

> Whether the person engages in the relevant conduct outlined in section 33AA(2) will be a matter of fact. The phrase used in the Bill 'a person engages in the relevant conduct' must necessarily mean conduct as a whole, and not restricted to meaning only the physical elements of the provisions in the *Criminal Code*.
>
> The meaning of engaging in any of the conduct listed in the sub–paragraphs of 33AA(2) is to be considered in light of the whole meaning of the listed phrases.[127]

Committee comment

5.142 Inquiry participants highlighted a lack of clarity as to whether the qualifiers attached to the Criminal Code offences referenced in proposed section 33AA were intended to apply.

5.143 The Committee notes the clarification provided by the Department of Immigration and Border Protection that such conduct should be considered in light of the meaning of the listed phrases outlined in the Criminal Code, and should not be restricted to meaning only the physical elements of the provisions. Noting the confusion expressed by inquiry participants, the Committee considers it would be helpful if the Bill and its Explanatory Memorandum were amended to clarify this intention.

126 Professor Jeremy Gans, member, Centre for Comparative Constitutional Studies, *Committee Hansard,* Canberra, 5 August 2015, p. 41.

127 Department of Immigration and Border Protection, *Submission 37.4*, p. 5.

Recommendation 2

The Committee recommends that changes be made to clarify that the conduct leading to loss of citizenship listed in proposed section 33AA of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 is intended to be considered in light of the meaning of the equivalent provisions in the *Criminal Code Act 1995*, and is not intended to be restricted to the physical elements.

The Committee recommends that, if possible, these amendments be made in the Bill, with additional amendments to the Explanatory Memorandum where necessary.

Proposed section 35 – specific issues

5.144 A number of participants in the inquiry expressed support for the concept of 'modernising' the existing section 35 of the *Australian Citizenship Act 2007* (the Citizenship Act) in response to the current international security environment.[128] Other participants expressed concerns with both the existing section and its proposed extension.[129]

5.145 Proposed section 35 of the Bill provides that, in addition to the existing provision under the Citizenship Act for service in the armed forces of a country at war with Australia, a dual national loses their Australian citizenship if he or she 'fights for, or is in the service of, a declared terrorist organisation' outside Australia.[130]

'Declared terrorist organisations'

5.146 'Declared terrorist organisation' is defined in the Bill as being any of the existing terrorist organisations listed under subsection 102.1(1) of the Criminal Code that are declared by the Immigration Minister for the purposes of the proposed section.[131]

128 See, for example, Executive Council of Australian Jewry, *Submission 9*, p. 3; Australia Defence Association, *Submission 8*; Professor George Williams, Ms Shipra Chordia and Ms Sangeetha Pillai, *Submission 17*, p. 1; Pirate Party Australia, *Submission 28*, p. 4; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 14.

129 See, for example, Muslim Legal Network (NSW), *Submission 27*, p. 9; Councils for civil liberties across Australia, *Submission 31*, pp. 2–3; Professor Kim Rubenstein, *Submission 35*, pp. 3, 4.

130 Proposed subsection 35(1).

131 Proposed subsection 35(4).

5.147 There are currently 20 terrorist organisations listed under subsection 102.1(1) of the Criminal Code.[132] These organisations are listed, or re-listed, in regulations that expire after three years. To qualify for listing, the Attorney-General must be 'satisfied on reasonable grounds that the organisation: (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or (b) advocates the doing of a terrorist act'.[133] A regulation listing a terrorist organisation is a disallowable instrument, and the Parliamentary Joint Committee on Intelligence and Security may review the listing and report the Committee's comments and recommendations to each House of the Parliament before the end of the applicable disallowance period.[134]

5.148 The Bill does not explicitly provide any additional criteria that must be met for a terrorist organisation to be made a 'declared terrorist organisation' by the Minister for the purposes of proposed section 35. The Bill specifies that the declaration would *not* be a legislative instrument.[135]

5.149 The Explanatory Memorandum provides some additional information on the intended interaction between 'declared terrorist organisations' for the purposes of the Bill and the terrorist organisations listed under the Criminal Code:

> It is intended that the Minister rely upon the terrorist organisation list under the Criminal Code because fighting for, or being in the service of, a terrorist organisation in this list demonstrates a repudiation of allegiance to Australia. This amendment reflects the policy intention that only terrorist organisations that are opposed to Australia or are opposed to any of Australia's values, democratic beliefs, rights or liberties.
>
> … 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.[136]

Criteria for declaration

5.150 A number of participants in the inquiry submitted that fighting for or serving a 'declared terrorist organisation' may not always be connected to the Bill's purpose of removing citizenship from persons who no longer

132 See 'Australian National Security – Listed Terrorist Organisations', *Australian Government*, <www.nationalsecurity.gov.au/ListedTerroristOrganisations> viewed 9 August 2015.

133 *Criminal Code Act 1995*, subsections 102.1(2) and (3).

134 *Criminal Code Act 1995*, section 102.1A.

135 Proposed subsection 35(10).

136 Explanatory Memorandum, p. 16.

have allegiance to Australia. For example, the Law Council of Australia pointed out that

> [t]here is no requirement for the declared terrorist organisations under proposed section 35 to pose a direct threat to Australia's interests or the health or safety of Australians or the maintenance of Australian values against committing war crimes or crimes against humanity.
> … It is conceivable that some listed terrorist organisations do not identify Australia or Australian interests as targets.[137]

5.151 The Law Council of Australia supported the insertion of criteria into the Bill to ensure that only organisations that posed such a threat could be declared.[138]

5.152 The Executive Council of Australian Jewry discussed the example of the Kurdistan Workers Party (PKK) in its submission and in oral evidence:

> [T]he fact that a person is a member of, or has fought on the side of, an organisation that is listed as a terrorist organisation under the *Criminal Code* does not necessarily mean that that person has been disloyal to Australia. One of those organisations is the Kurdistan Workers Party (PKK), whose members have been engaged, directly or indirectly, in combat in Syria and Iraq against another listed terrorist organisation, Islamic State. Arguably, the Kurds' military successes against Islamic State have been consistent with Australia's national interests, especially as Australian forces themselves have been involved in assisting the Iraqi army to combat Islamic State in Iraq.[139]
>
> … Mere service with that organisation, even fighting with that organisation, in our view does not necessarily entail a severance of the bond of citizenship and a repudiation of allegiance to Australia. We would take the view that, on the contrary, somebody fighting in that organisation may well feel a degree of sympathy with other Western countries, including Australia, and therefore it should not automatically be presumed that that person is hostile to Australia.[140]

137 Law Council of Australia, *Submission 26*, p. 13.

138 Law Council of Australia, *Submission 26*, p. 13; Dr Natasha Molt, Senior Policy Lawyer, Criminal and National Security Law, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 6.

139 Executive Council of Australian Jewry, *Submission 9*, pp. 1–2

140 Mr Peter Wertheim AM, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 24.

5.153 The Muslim Legal Network (NSW) similarly used the PKK as an example to demonstrate that not all of the 20 terrorist organisations currently listed under the Criminal Code 'pose a threat to Australia or its citizens'.[141]

5.154 Professor Ben Saul of the University of Sydney argued against the creation of 'conflicting lists' of terrorist organisations altogether, indicating that this would create 'confusion about legal liabilities' and suggest to Australians that 'some listed terrorist organisations deserve loss of citizenship but not others'.[142]

5.155 The Australian Human Rights Commission, on the other hand, noted at a public hearing that it was not clear whether 'declared terrorist organisations' would in fact be a subset of the currently listed terrorist organisations. The Commission echoed concerns raised by other submitters that there would not necessarily be a 'nexus' between service with a declared terrorist organisation and activities 'directed against Australia or Australian sovereignty'.[143]

Process for declaration

5.156 The NSW Society of Labor Lawyers submitted that the existing process for listing of terrorist organisations was a 'decision of the relevant Minister only with no independent or court process involved'. It raised concerns that lack of transparency for the additional 'declared terrorist organisation' process would compound concerns about the initial listing:

> Here the Minister is given the discretion to further declare which of the previously declared terrorist bodies is caught by this section, presumably to avoid involving organisations with no connection to Australia. As such, we are dealing with an opaque administrative process overlaid on the earlier opaque, much-criticised declaration process.[144]

5.157 When asked by the Committee whether criteria could be included in the Bill that the Minister would have to be satisfied of before declaring a terrorist organisation for the purpose of section 35, and whether the declaration could be made a disallowable instrument, the Department of Immigration and Border Protection responded that this 'is a policy question and a matter for government'. The Department did not identify any legal impediments or unintended consequences in its response, but explained that

141 Muslim Legal Network (NSW), *Submission 27*, p. 9.

142 Professor Ben Saul, *Submission 2*, p. 7.

143 Mr John Howell, Lawyer, Australian Human Rights Commission, *Committee Hansard,* Canberra, 5 August 2015, p. 14.

144 NSW Society of Labor Lawyers, *Submission 25*, p. 8.

> the Minister will declare those organisations that are opposed to Australia or Australia's values, democratic beliefs, rights and liberties. This provision has been deliberately tied to the definition of 'terrorist organisation' in the Criminal Code to limit its operation to those falling within that definition, that are so declared by the Minister.[145]

Committee comment

5.158 The Committee notes concerns raised by participants in the inquiry that there are organisations that are listed as terrorist organisations under the Criminal Code but do not necessarily pose any direct threat to Australia or its interests. Support for such organisations, while a criminal offence, may not necessarily entail a repudiation of allegiance to Australia.

5.159 Concerns were also raised that the introduction of an additional list of 'declared terrorist organisations'—as a subset of the existing list of terrorist organisations proscribed under the Criminal Code—risks sending a confusing message to the public. Some members of the Committee felt that it would be preferable for there to be a single list of proscribed terrorist organisations, with equal consequences for supporting any organisation on the list.

5.160 The Committee understands that the intent of the 'declared terrorist organisation' provision is to enable the Minister for Immigration and Border Protection to declare a subset of listed terrorist organisations to which support for would entail a repudiation of allegiance to Australia. The Committee agrees with inquiry participants that this intent could be made clearer in the Bill and its Explanatory Memorandum. This could be achieved by including explicit criteria in the Bill that the Minister must be satisfied of before making a declaration.

5.161 The Committee considers the criteria for a terrorist organisation to be 'declared' should clearly connect to the Bill's purpose, which states that citizens 'may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed [the common bond of citizenship] and repudiated their allegiance to Australia'. Providing such criteria would also more directly link the provision to the 'aliens' power under the Constitution.

5.162 The Committee further considers that, given the distinct purpose of the subset list of 'declared terrorist organisations' compared to the complete list of terrorist organisations under the Criminal Code, it is appropriate that declarations be subject to at least the same procedural safeguards as

145 Department of Immigration and Border Protection, *Submission 37.4*, p. 5.

the current listing process.[146] The Committee is therefore of the view that declarations should be considered disallowable legislative instruments and be reviewable by this Committee.

Recommendation 3

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to include explicit criteria that the Minister must be satisfied of before declaring a terrorist organisation for the purpose of proposed section 35. The criteria should make clear the connection between proposed section 35 and the purpose of the Bill.

Recommendation 4

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to make the Minister's declaration of a 'declared terrorist organisation' for the purpose of proposed section 35 a disallowable instrument.

Further, the Committee recommends that the Bill be amended to enable the Parliamentary Joint Committee of Intelligence and Security to conduct a review of each declaration and report to the Parliament within the 15 sitting day disallowance period.

Definition of 'in the service of'

5.163 The Bill does not further define what is to be considered activity 'in the service of' a declared terrorist organisation for the purposes of proposed section 35. The Explanatory Memorandum, however, states:

> In this context the term, 'in the service of' is intended to cover acts done by persons willingly and is not meant to cover acts done by a person against their will (for example, an innocent kidnapped person) or the unwitting supply of goods (for example, the provision of goods following online orders by innocent persons). A person may act in the service of a declared terrorist organisation if they undertake activities such as providing medical support, recruiting persons to join declared terrorist organisations,

146 See section 102.1A of the *Criminal Code Act 1995*.

> providing money or goods, services and supplies to a declared terrorist organisation.[147]

5.164 A number of participants in the inquiry raised concerns about the breadth of conduct that could fall under the term 'in the service of'.[148] In particular, as a result of the reference to 'medical support' in the Explanatory Memorandum, participants were concerned as to whether the delivery of impartial, humanitarian medical assistance to a member of a declared terrorist organisation would lead to automatic loss of citizenship. For example, the Law Council of Australia submitted that a Red Cross worker assisting an injured jihadist in Syria could potentially be considered to have lost their citizenship.[149]

5.165 The Muslim Legal Network (NSW) submitted that even trivial associations with an element of a declared terrorist organisation could jeopardise a person's citizenship, including 'the donation of aid in conflict zones' that is 'distributed only by limited means or through organisations not overtly related to the declared terrorist organization':

> This could prove problematic for aid workers who are subject to varying regions of control in conflict areas, particularly where it is unclear which particular group is providing protection to a hospital or similar unconventional aid facility. An interesting example is that of the International Red Cross or Médecins Sans Frontières (Doctors without borders) who have historically provided assistance and aid to any injured persons during times of conflict.[150]

5.166 Professor Ben Saul of the University of Sydney argued that the Bill would 'criminalise' conduct that was 'highly desirable in armed conflict and protected under the Geneva Conventions of 1949':

> All wounded people hors de combat ('out of combat'), whether Nazi soldiers or so-called 'terrorists', have a right to basic medical care because they are human beings entitled to humane treatment.

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147 Explanatory Memorandum, p. 14.

148 Professor Ben Saul, *Submission 2*, p. 3; Human Rights Committee, Law Society of NSW, *Submission 11*, p. 4; Australian Human Rights Commission, *Submission 13*, p. 4; Professor Helen Irving, *Submission 15*, p. 6; Dr Rayner Thwaites, *Submission 16*, p. 7; Professor George Williams, Ms Shipra Chordian and Ms Sangeetha Pillai, *Submission 17*, p. 5; Law Council of Australia, *Submission 26*, p. 15; Muslim Legal Network (NSW), *Submission 27*, pp. 9–10; Ms Amy Lamoin, Chief Technical Advisor, UNICEF Australia, *Committee Hansard*, Canberra, 5 August 2015, p. 5.

149 Law Council of Australia, *Submission 26*, p. 15.

150 Muslim Legal Network (NSW), *Submission 27*, pp. 9–10.

> Stripping citizenship from those who provide medical care is entirely indefensible.[151]

5.167 UNICEF Australia told the Committee that some of UNICEF's own humanitarian work in conflict zones could also potentially fall under the term 'in the service of':

> [A]s part of UNICEF's work globally there are times when we have to educate armed groups in relation to child protection as part of their being released—actually outlining international law to members of armed groups and explaining the serious consequences for children. Would I then qualify as being 'in the service', even though I am firmly in the service of UNICEF globally and in the service of children?[152]

5.168 The Australian Human Rights Commission suggested there was a general need to clarify what is intended by the term 'in the service of':

> The primary concern is the phrase is one that does not have any established jurisprudence. It is very unclear exactly what it means. It is not as simple, as you would appreciate, as saying 'whether one is part of the armed forces of a body'. This is the complexity of creating new laws that recognise that we do not have insignia for Army or hierarchies. We do not have that kind of clarity with an army. It is obvious that one has to come up with different tests for what can often be just singular actions. But I think 'in the service of' is a very broad term and, if it were to be retained, it would be helpful if it could be explained what exactly that means.[153]

5.169 In a supplementary submission, the Commission noted concerns that the existing section 35 of the Citizenship Act relating to serving in the armed forces of a country at war with Australia 'may not be entirely consistent with international human rights norms' because, for example, it could apply to 'a person forcibly conscripted to serve in the armed forces of another nation in a non-combat role'. It argued, however, that the proposed amendments to section 35 were 'more likely to limit the human rights of Australians in an arbitrary way' for a number of reasons:

- there was likely to be 'significantly less doubt' about whether a person had served in the armed forces of another country than about whether they had fought for or been in the service of a terrorist group,

151 Professor Ben Saul, *Submission 2*, p. 3.

152 Ms Amy Lamoin, Chief Technical Advisor, UNICEF Australia, *Committee Hansard,* Canberra, 5 August 2015, p. 5.

153 Professor Triggs, *Committee Hansard*, Canberra, 10 August 2015, p. 28.

- the content of the phrase 'is in the service of … a terrorist organisation' was less clear than the phrase 'serves in the armed forces of a country at war with Australia',
- the connection between being in the service of a terrorist organisation and a person's allegiance to Australia was 'less clear' than the connection between serving in the armed forces of a country at war with Australia and their allegiance to Australia, and
- under proposed section 36A of the Bill, a person who lost their Australian citizenship under section 35 would no longer be able to become a citizen again.[154]

5.170 The Human Rights Committee of the Law Society of NSW submitted that the term 'in the service of' should be clarified to

> only operate to deny a person of their Australian citizenship where that person has conducted him or herself in a manner seriously prejudicial to the vital interests of Australia or has taken an oath, or made a formal declaration, of allegiance to another State (or terrorist organisation), or given definite evidence of his determination to repudiate his allegiance to Australia.[155]

5.171 In its submission, the Law Council of Australia additionally recommended that an exception should be provided in proposed section 35 (and 33AA) for conduct that takes place under duress, and that it should be a requirement that a person has *voluntarily intended* to engage in the applicable conduct before their citizenship is ceased.[156]

5.172 The Executive Council of Australian Jewry similarly argued that the legislation had to be 'sufficiently sophisticated' to take into account situations like the case of a person who was 'kidnapped by a terrorist organisation and, under threat of their own life … is thereby induced to serve with that terrorist organisation'.[157]

5.173 The Department of Immigration and Border Protection was asked whether the term 'in the service of' could be clarified in respect to the provision of neutral humanitarian assistance. The Department did not offer any further clarification, but re-iterated advice from the Explanatory Memorandum that the phrase 'in the service of' should be given its ordinary meaning, and that it is only intended to cover acts done willingly and knowingly.[158]

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154 Australian Human Rights Commission, *Submission 13.1*, pp. 1–2.

155 Human Rights Committee, Law Society of NSW, *Submission 11*, p. 4.

156 Law Council of Australia, *Submission 26*, p. 15.

157 Mr Peter Wertheim AM, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 24.

158 Department of Immigration and Border Protection, *Submission 37.4*, p. 6.

Committee comment

5.174 The Committee notes concerns that the term 'in the service of' a declared terrorist organisation could be interpreted to apply to neutral and independent humanitarian assistance, such as that provided by the Red Cross or Médecins Sans Frontières. The Committee does not believe this is the intent of the provision.

5.175 The Committee notes the substantial funding provided by the Australian Government to the International Committee of the Red Cross (ICRC), for example, in support of its mandate under the Geneva Conventions to help victims of armed conflict on 'both sides of the battlefield' with neutrality and independence.[159] This support includes being a key partner in the ICRC's 'Health Care in Danger' initiative to improve the delivery of health care in conflict zones.[160]

5.176 While it would not be desirable to entirely exclude medical support from the definition of 'in the service of a declared terrorist organisation', the Committee agrees with inquiry participants that more could be done to clarify that section 35 is not intended to apply to the type of impartial, independent humanitarian assistance provided by organisations such as the ICRC, Médecins Sans Frontières and UNICEF. Given the self-executing nature of the Bill, it is essential that it be made readily apparent in the text of the Bill that proposed section 35 does not apply to this assistance.

5.177 The Committee notes that the Explanatory Memorandum clearly states that the term 'in the service of' is not intended to apply to conduct that takes place unwittingly or against a person's will (for example, through kidnapping).[161] However, as the loss of citizenship under section 35 is proposed to be a self-executing provision, the Committee considers that this intention should also be made clear in the text of the Bill.

5.178 The Committee notes that the concerns expressed in relation to humanitarian work may also extend to other types of legitimate conduct. This may include activities undertaken by Australian law enforcement and intelligence officers or their agents as part of national security operations. The proposed section is clearly not intended to apply in such

159 Department of Foreign Affairs and Trade Annual Report 2013–14, p. 179; International Committee of the Red Cross, 'The ICRC: Its mission and its work', 2009, pp. 3–4, 6–7, <https://www.icrc.org/eng/resources/documents/publication/p0963.htm> viewed 9 August 2015.

160 AusAID Annual Report 2012–13, p. 148; International Committee of the Red Cross, 'Health Care in Danger' <https://www.icrc.org/eng/what-we-do/safeguarding-health-care> viewed 9 August 2015.

161 Explanatory Memorandum, p. 14.

circumstances and this should be clarified in the Bill. A similar exemption should be included for proposed section 33AA.

Recommendation 5

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and the Explanatory Memorandum be amended to clarify the intended scope of the term 'in the service of' a declared terrorist organisation.

In particular, the Bill should be amended to make explicit that the provision of neutral and independent humanitarian assistance, and acts done unintentionally or under duress, are not considered to be 'in the service of' a declared terrorist organisation for the purposes of proposed section 35.

Recommendation 6

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and the Explanatory Memorandum be amended to provide that staff members or agents of Australian law enforcement or intelligence agencies are exempted from sections 33AA and 35 of the Bill when carrying out actions as part of the proper and legitimate performance of their duties.

Other suggested amendments to section 35

5.179 The existing section 35 of the Citizenship Act has never been used since its enactment in 1949. In part, this is because Australia has never been in a formally declared state of war since 1949.[162]

5.180 Professor Anne Twomey of the University of Sydney noted that '[t]hese days, it is rare for countries to declare war' and that Australia 'may be involved in armed conflicts without any declaration of war'. Professor Twomey suggested an amendment to proposed section 35 to address this issue:

> Section 80.1AA of Criminal Code accommodates this problem by referring to circumstances where the 'Commonwealth is at war

162 Professor Kim Rubenstein, *Submission 3*, p. 3.

> with an enemy (whether or not the existence of a state of war has been declared)' and provides for the enemy to be specified by Proclamation as an enemy at war with the Commonwealth. It may be helpful to pick up such an approach (if it is not done elsewhere).[163]

5.181 The Australia Defence Association noted in its submission that treachery occurs 'whenever an Australian chooses to fight our defence force when it is deployed overseas' and that the Bill 'fails to account for situations where the armed group may not be a terrorist one'. The Association recommended that proposed section 35 be expanded to also include loss of citizenship for persons who fight for, or are in the service of, 'any armed group fighting the Australian Defence Force'.[164]

Committee comment

5.182 The Committee notes suggestions that proposed section 35 of the Bill be extended further to apply to countries at war with Australia where that state of war is not formally declared; and to apply to any armed group fighting the Australian Defence Force. The Committee considers that these suggestions may have merit and deserve further consideration by the Government. However, neither extension was included within scope of Bill presented to the Parliament and, as such, the Committee has not received sufficient evidence on these matters to form a recommendation.

163 Professor Anne Twomey, *Submission 10*, p. 4.

164 Australia Defence Association, *Submission 8*, pp. 4, 11.