

## Children

- 8.1 There are two ways that the Bill may impact on children: either through a child's own conduct or through the conduct of a child's parent.
- 8.2 The Explanatory Memorandum states:
- There are documented cases of children fighting with extremist organisations overseas and being otherwise involved in terrorist activities, so the question of the cessation and renunciation power applying to minors should be addressed. The proposed amendments apply to all Australian (dual) citizens regardless of age.<sup>1</sup>
- 8.3 The following chapter considers two key issues arising during the inquiry. Firstly, the degree to which the Bill should apply to children and secondly, the extent to which it is consistent with Australia's accepted obligations to children.

### **Application of the Bill to children**

#### **Loss of citizenship through child's own conduct**

- 8.4 A child may lose their citizenship through their own conduct under proposed sections 33AA, 35 and 35A of the Bill.
- 8.5 The Explanatory Memorandum states that the restrictions under the *Criminal Code Act 1995* (the Criminal Code) relating to children will apply to proposed sections 33AA and 35A.<sup>2</sup>
- 8.6 The relevant provisions are sections 7.1 and 7.2 of the Criminal Code, which provide that:

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1 Explanatory Memorandum, p. 32.

2 Explanatory Memorandum, pp. 10, 19.

### 7.1 Children under 10

**A child under 10 years old is not criminally responsible for an offence.**

### 7.2 Children over 10 but under 14

**A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.**

The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.<sup>3</sup>

8.7 Similar provisions exist in section 4M and section 4N of the *Crimes Act 1914*.

8.8 The Explanatory Memorandum goes on to say that a child under the age of 10 years 'will not automatically renounce their Australian citizenship by engaging in the terrorist related conduct specified in new subsection 33AA(2)'.<sup>4</sup> The Explanatory Memorandum is silent however on the application of proposed section 35 to children.

8.9 Notwithstanding these statements, submitters raised concerns about the lack of clarity on the face of the Bill concerning children.<sup>5</sup>

8.10 Professor Anne Twomey of the University of Sydney argued that the Explanatory Memorandum

asserts that the restrictions upon the application of offences under the *Criminal Code* to children under the age of 14 'will apply to the application of new section 33AA'. It is not clear on the face of the legislation, however, that this is so. No express application of these restrictions is made. The most one can rely upon is the statement in proposed s 33AA(3) that 'words and expressions' in s 33AA(2) have the same meaning as in certain provisions of the *Criminal Code*. It is not at all clear that this imports a restriction on the application of proposed s 33AA to minors.<sup>6</sup>

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3 Section 7.1 and Section 7.2 of the *Criminal Code Act 1995*.

4 Explanatory Memorandum, p. 10.

5 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, Chief Technical Adviser, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 6; Ms Erin Gillen, Senior Policy and Project Officer, Federation of Ethnic Communities' Councils of Australia (FECCA), *Committee Hansard*, 4 August 2015, p. 31.

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

- 8.11 The Centre for Comparative Constitutional Studies at the University of Melbourne suggested that the intended operation of proposed section 33AA should be made clear:
- [T]he Explanatory Memorandum states that s 33AA would not apply to minors under the age of 10, and would have limited application to minors between the ages of 10 and 14, in accordance with the *Criminal Code*. Given that s 33AA(3) makes no reference to the general provisions of the *Code*, it is unclear whether the section's operation is confined in this way. If this is the intended operation of s 33AA, it should be expressly stated in the legislation.<sup>7</sup>
- 8.12 Regarding limited application to children, the Law Council of Australia similarly commented:
- We do not see any of that addressed within the bill, although the explanatory memorandum suggests it is the intention that that be here somewhere.<sup>8</sup>
- 8.13 Professor George Williams of the University of New South Wales considered the conduct provisions (proposed sections 33AA and 35) would apply to children of any age:
- There is nothing put in the bill to apply the normal rules of criminal responsibility and nor are they implicit, because the parts of the Criminal Code picked up do not include those provisions. So, yes, you could pick up children of any age and they could lose their citizenship by virtue of this.<sup>9</sup>
- 8.14 Noting that section 7.2 of the Criminal Code requires a child aged between 10 and 14 years to know that his or her conduct is wrong, UNICEF Australia outlined the difficulties associated with making this assessment:
- The question of whether or not a child knows that his or her conduct is wrong ... is a highly complex investigation, ordinarily requiring expert evidence, direct discussions with the child, a deep understanding of the evolving capacities of the child and the checks and balances of a court environment. This information must be gathered and then considered against the specific circumstances of that child including their level of maturity, their access to quality education, the countries that they have

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

8 Ms Gabrielle Bashir SC, Member, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 4 August 2015, p. 3. See also Law Council of Australia, *Submission 26*, p. 24.

9 Professor George Williams, *Committee Hansard*, 4 August 2015, p. 19.

predominantly resided in and their family-based environment. Again, it is unclear on the face of the Bill who will, in effect, be assessing whether a child knows that his or her conduct is wrong, what evidence the assessor will use, what standard of proof the assessor will adopt or what, if any, rules of evidence apply.<sup>10</sup>

8.15 The Law Council of Australia raised similar concerns, arguing that it is unclear in relation to proposed section 33AA and 35 as to how, with no requirement for conviction, 'the Minister will be in a position to determine whether a particular child has the capacity to know his or her conduct is wrong'.<sup>11</sup> The Law Council noted that 'capacity is usually a matter for determination by a court after psychological evaluations have been conducted and the child has been examined'.<sup>12</sup>

8.16 The Australian Human Rights Commission considered that 'loss of citizenship by conduct should not be possible in the case of children'.<sup>13</sup>

8.17 In its report on the Bill, tabled on 11 August 2015, the Parliamentary Joint Committee on Human Rights (PJCHR) stated:

[T]here is real uncertainty as to how judicial processes would determine whether the provisions apply to young people under the age of 10 and between 10 and 14 years of age and uncertainty as to how court process would work in practice.<sup>14</sup>

8.18 The PJCHR noted in particular that proposed subsection 35(1) does not reference the Criminal Code, concluding that 'accordingly the proposed section 35(1) would certainly apply regardless of age'.<sup>15</sup>

8.19 In its Alert Digest, the Senate Standing Committee for the Scrutiny of Bills similarly stated:

[I]t is unclear – on the face of the legislation – whether the general provisions in the Criminal Code which relate to children are applicable.<sup>16</sup>

8.20 The Committee sought clarification as to the application of the bill to children less than 10 years old and to children aged between 10 and 14

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10 UNICEF Australia, *Submission 24*, pp. 7–8; Ms Amy Lamoin, UNICEF Australia, *Committee Hansard*, 5 August 2015, pp. 3, 6.

11 Law Council of Australia, *Submission 26*, p. 24.

12 Law Council of Australia, *Submission 26*, p. 24.

13 Australian Human Rights Commission, *Submission 13*, p. 4.

14 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44<sup>th</sup> Parliament*, Canberra, August 2015, p. 36.

15 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44<sup>th</sup> Parliament*, Canberra, August 2015, p. 36.

16 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2015*, 12 August 2015, p. 4.

years, and questioned how a determination of a child's understanding of his or her conduct would be made. In response, the Department of Immigration and Border Protection advised:

In the event that the Minister considers it is in the public interest, he or she may rescind a notice for any person, including a child. In the case of a child, the Minister would give primary consideration to the principles in the Criminal Code relating to children. Where the Minister rescinds a notice in the public interest, this would exempt the child from the operation of the Bill.<sup>17</sup>

### Loss of citizenship through conduct of a parent

- 8.21 The second way a child may lose their citizenship is through the conduct of a parent. The Bill includes a note at the end of proposed subsections 33AA(5), 35(1) and 35A(1) that '[a] child of the person may also cease to be an Australian citizen: see section 36'.
- 8.22 Section 36 of the *Australian Citizenship Act 2007* (the Citizenship Act) allows a child's citizenship to be revoked in certain circumstances where a responsible parent's citizenship is revoked. The Bill would amend section 36 so that it applies in relation to proposed sections 33AA, 35 and 35A.
- 8.23 Specifically, under subsection 36(1), if a person ceases to be an Australian citizen at a particular time (the cessation time) and, at the cessation time, the person is a responsible parent of a child aged under 18, then the Minister may, by writing, revoke the child's Australian citizenship. The child then ceases to be an Australian citizen at the time of the revocation.
- 8.24 However, subsection 36(2) provides that if, at the cessation time, another responsible parent of the child is an Australian citizen, subsection 36(1) does not apply to the child:
- while there is a responsible parent who is an Australian citizen; and
  - if there ceases to be such a responsible parent because of the death of a responsible parent – at any time after that death.
- 8.25 This matter was addressed by a number of submitters.<sup>18</sup> The Immigration Advice and Rights Centre Inc stated:

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17 Department of Immigration and Border Protection, *Submission 37.4*, p. 7.

18 FECCA, *Submission 12*, p. 4; UNICEF Australia, *Submission 24*, p. 12; Muslim Legal Network (NSW), *Submission 27*, p. 13; Islamic Council of Queensland Inc, *Submission 33*, p. [2]; Immigration Advice and Rights Centre Inc, *Submission 36*, p. 5; Australian Lawyers for Human Rights, *Submission 20*, p. 8; Dr Norman Gillespie, Chief Executive Officer, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 1; Ms Amy Lamoin, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 5; Ms Erin Gillen, FECCA, *Committee Hansard*, 4 August 2015, p. 31; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*,

We do not consider denying citizenship ... to children for the conduct of a parent to be reasonable, necessary or proportionate.<sup>19</sup>

8.26 Similarly, the Islamic Council of Queensland Inc considered that:

Children should be protected from losing their citizenship in instances where this proposed legislation is applied against their parents.<sup>20</sup>

8.27 UNICEF Australia concurred with this view:

In the context of the criminal justice system, it would be inconceivable for a child to be punished on the basis of the criminal conduct of a parent. Likewise, it should be inconceivable that a child should suffer very serious consequences in relation to his or her citizenship on the basis of conduct of an adult parent.<sup>21</sup>

8.28 In evidence, the Refugee Council of Australia told the Committee:

The other area where we see potential for innocent people to be penalised is in relation to family members, particularly partners and children of people who may have their citizenship ceased under these provisions. This is outlined in our submission. Just briefly, we would be very concerned if we saw people who had committed no offence whatsoever being penalised in the same manner as a relative who had actually committed an offence, especially if those people are children. So we really would like to see mechanisms included in the bill to make sure that they are not penalised unfairly.<sup>22</sup>

8.29 Australian Lawyers for Human Rights made the following observation and recommendation:

While the EM states that the Minister would take the best interests of a child into account in exercising their powers in relation to termination of a child's citizenship, there is no such requirement in the legislation. **We recommend that such a requirement be included in section 36.** For children to be penalised for crimes committed by their parents is, we submit, a form of collective punishment. Collective punishment is an intimidatory measure which penalises both the guilty and the innocent. In the context of

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5 August 2015, p. 11; Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, *Committee Hansard*, 5 August 2015, p. 23.

19 Immigration Advice and Rights Centre Inc, *Submission 36*, p. 5.

20 Islamic Council of Queensland Inc, *Submission 33*, p. [2].

21 Dr Norman Gillespie, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 1.

22 Ms Lucy Morgan, Refugee Council of Australia, *Committee Hansard*, 5 August 2015, p. 23.

armed conflict or occupation, it would be **in breach of Article 33 of the Fourth Geneva Convention** which reads as follows:

No persons may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.<sup>23</sup>

8.30 The Federation of Ethnic Communities' Councils of Australia (FECCA), in stating its opposition to section 36, drew attention to Australia's obligations to children under the *Convention on the Rights of the Child* (CRC).<sup>24</sup> In evidence, FECCA commented that

given the breadth of the provisions here and the number of people who might fall under the new provisions, we might find an increase in the number of children who could have their citizenship revoked under section 36.<sup>25</sup>

8.31 UNICEF Australia echoed this view, also noting that the Committee on the Rights of the Child has, on more than one occasion, raised concerns about section 36.<sup>26</sup>

8.32 In evidence, Professor Gillian Triggs, President of the Australian Human Rights Commission, told the Committee:

[T]here may be many instances in which a child has been born and lives in Australia but the parent has been engaged in a terrorist activity or something defined within the bill and that child would suffer significantly as a consequence of loss of citizenship. That is our primary concern.<sup>27</sup>

8.33 The Committee asked the Department of Immigration and Border Protection what would happen to a child whose parent loses their citizenship. The Department advised:

A child of a person who loses their citizenship does not automatically lose his or her citizenship. The Minister has discretion to revoke the citizenship of a child of a dual citizen who loses their citizenship under the Bill, except if the child's other responsible parent is an Australian citizen or if the revocation would render the child stateless. Any exercise by the Minister of his discretionary power to revoke the Australian Citizenship of a

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23 Australian Lawyers for Human Rights, *Submission 20*, p. 8.

24 FECCA, *Submission 12*, p. 4.

25 Ms Erin Gillen, FECCA, *Committee Hansard*, 4 August 2015, p. 31.

26 Ms Amy Lamoin, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 5; UNICEF Australia, *Submission 24*, p. 12.

27 Professor Gillian Triggs, Australian Human Rights Commission, *Committee Hansard*, 5 August 2015, p. 11.

child must take into consideration all relevant circumstances, including the best interests of the child.<sup>28</sup>

## Minister's exemption

8.34 The Bill provides that, where the Minister has given a notice under proposed subsections 33AA(6), 35(5) or 35A(5), the Minister may 'if he or she considers it in the public interest to do so' rescind the notice and exempt the person from the application of the relevant section.

8.35 The Explanatory Memorandum explains that matters that may fall within the public interest include, among other things:

matters relating to minors, including the best interests of the child, any impact that cessation may have on the child and Australia's obligations to children.<sup>29</sup>

8.36 As outlined in the Bill, the Minister's power to exempt is a non-compellable, discretionary power that is not subject to the rules of natural justice.

8.37 In its submission, FECCA argued that there are not appropriate safeguards in the Bill to protect children. While noting that the Explanatory Memorandum states that

the cessation or renunciation of a child's Australian citizenship would only occur as a result of extremely serious conduct. The Minister's ability to exempt the child from the cessation of their Australian citizenship allows consideration of all the circumstances of the case in determining whether it is in the public interest to do so.<sup>30</sup>

FECCA went on to argue that

[d]espite this statement, the Minister is not under any obligation to consider the exemptions provided for in the Bill, even if they are requested to do so. In the case of children who may be considered to have renounced their citizenship, this is particularly alarming.<sup>31</sup>

8.38 Submitters also raised concerns that the Minister is not specifically required to consider the best interests of the child.<sup>32</sup> In its analysis of the exemption provision, the Parliamentary Joint Committee on Human Rights concluded that, with no specific obligation on the Minister to take

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28 Department of Immigration and Border Protection, *Submission 37.4*, p. 7.

29 Explanatory Memorandum, pp. 12, 17, 22.

30 See Explanatory Memorandum, p. 33.

31 FECCA, *Submission 12*, p. 4.

32 UNICEF Australia, *Submission 24*, p. 11.

into account the best interests of the child, 'this provision is not a sufficient safeguard for the purposes of international human rights law'.<sup>33</sup>

8.39 The implications of the Bill in terms of Australia's international obligations are discussed further below.

## Compatibility with Australia's international obligations to children

8.40 Australia has a number of international obligations that are relevant to its treatment of children, including, as noted in Chapter 4, the CRC and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (Optional Protocol).

8.41 Submitters argued that the Government's approach to children should be informed by:

- the special needs and rights of children in both process and outcome as laid down in the CRC,
- Australia's obligations under the *International Covenant on Civil and Political Rights* (ICCPR), and
- the complexities associated with children involved with armed groups and terrorism.

## CRC and ICCPR

8.42 Article 3 of the CRC provides:

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

8.43 This right will be engaged in the two broad circumstances captured by the Bill: in respect of a child directly, and in respect of their parent.

8.44 UNICEF Australia emphasised to the Committee that Article 3 of the CRC requires the best interests of the child to be taken as a 'primary consideration'.<sup>34</sup>

8.45 The Statement of Compatibility with Human Rights (attached to the Explanatory Memorandum) explains the Government's position in relation to a child's conduct, stating that:

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33 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44<sup>th</sup> Parliament*, Canberra, August 2015, p. 39.

34 UNICEF Australia, *Submission 24*, p. 11.

The Government has considered the best interests of the child in these circumstances where the conduct of a minor is serious enough to engage the cessation or renunciation provisions and has assessed that the protection of the Australian community and Australia's national security outweighs the best interests of the child.<sup>35</sup>

8.46 In relation to the conduct of a parent, the Statement of Compatibility with Human Rights concludes that any exercise of the Minister of his discretionary power 'must take into consideration all relevant circumstances, including the best interests of the child'.<sup>36</sup>

8.47 Australia also has obligations under Articles 23 and 24 of the ICCPR and Article 7 of the CRC. Specifically:

⇒ Paragraph 1 of Article 23 of the ICCPR provides that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'

⇒ Article 24 of the ICCPR provides that:

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

⇒ Article 7 of the CRC provides that:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.<sup>37</sup>

8.48 The Statement of Compatibility with Human Rights indicates that the Government has assessed these matters as follows:

- The right to acquire a nationality is not the same as a right to retain a nationality. In particular, Articles 7 and 24 'do not provide a right to

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35 Explanatory Memorandum, p. 33.

36 Explanatory Memorandum, p. 33.

37 Explanatory Memorandum, p. 33.

acquire *Australian* nationality—merely to acquire *a* nationality’.<sup>38</sup> [italics in original]

- In relation to Article 24(1), cessation or renunciation of a child’s Australian citizenship would only occur as a result of extremely serious conduct and the Minister’s ability to exempt the child ‘allows consideration of all the circumstances of the case in determining whether it is in the public interest to do so’.<sup>39</sup>
- The right to be cared for by his or her parents (Article 7(1)) and right to family (Article 23(1)) would be engaged in circumstances that cast ‘serious doubt’ on the suitability of a parent. National security considerations are considered to justify limitations on this right.<sup>40</sup>

8.49 Australia’s obligations also include the right to preservation of identity (Article 8) and right to participation (Article 12) of the CRC.

8.50 The Statement of Compatibility with Human Rights indicates that the Government considers the Bill’s provisions in relation to its Article 8 obligation to be ‘reasonable, proportionate and necessary’ in relation to the serious conduct of a child.<sup>41</sup> The Statement does not offer any comment however when citizenship is lost as a result of a parent’s conduct.

8.51 Article 12 of the CRC provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

8.52 The Statement of Compatibility with Human Rights offers the following explanation in relation to Article 12:

- The exclusion of the rules of natural justice and limitation on the right to be heard is ‘necessary and proportionate’ to the circumstances in the event of a child’s conduct, with the impact on the child and the child’s best interests being considered by the Minister as part of the public interest component of any exemption consideration.

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38 Explanatory Memorandum, p. 33.

39 Explanatory Memorandum, p. 33.

40 Explanatory Memorandum, pp. 33–34.

41 Explanatory Memorandum, p. 34.

- Natural justice will apply to any revocation of a child's citizenship under section 36.<sup>42</sup>
- 8.53 The Parliamentary Joint Committee on Human Rights (PJCHR) has undertaken a detailed analysis of the Bill's implications for children against Australia's human rights obligations.<sup>43</sup> In relation to the Government's statement that Australia's national security outweighs the best interests of the child (cited in full earlier in this section), the PJCHR made the following comment:
- [t]his statement misapprehends the nature of the obligation to consider the best interests of the child. It is not possible to simply assert that this obligation has been taken into account in a global sense and considered to be outweighed by national security. The procedure for automatic loss of citizenship in the bill must, as a matter of international law, provide for a consideration of the best interests of the individual child, which may be subject only to limitations that pursue a legitimate objective, are rationally connected to that objective and otherwise proportionate to that objective.<sup>44</sup>
- 8.54 The PJCHR concluded that provisions relating to automatic loss of citizenship do not:
- provide for consideration of the best interests of the child,
  - take into account 'each child's capacity for reasoning and understanding in accordance with their emotional and intellectual maturity',
  - take account of a child's culpability, or
  - take into account whether the loss of citizenship would be in the best interests of the child given their particular circumstances.<sup>45</sup>
- 8.55 The PJCHR raised concerns about the Bill's compatibility with a series of children's rights under the CRC, ICCPR and International Covenant on Economic, Social and Cultural Rights and challenged the adequacy of the

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42 Explanatory Memorandum, pp. 34–35.

43 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44<sup>th</sup> Parliament*, Canberra, August 2015, pp. 36–46.

44 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44<sup>th</sup> Parliament*, Canberra, August 2015, p. 38.

45 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44<sup>th</sup> Parliament*, Canberra, August 2015, p. 38.

assessments in the Statement of Compatibility with Human Rights. These matters are outlined in detail in the Committee's report.<sup>46</sup>

8.56 Contributors to this inquiry also raised concerns about the Bill's consistency with Australia's international obligations.<sup>47</sup> UNICEF Australia, for example, was of the view that the Bill was not in line with Australia's obligations under the CRC or the Optional Protocol, stating:

regardless of how a child's citizenship would cease or be revoked, revoking a child's citizenship under any circumstances<sup>48</sup> is inconsistent with the rights of the child.<sup>49</sup>

8.57 UNICEF Australia offered the following reasons for this conclusion:

- whether a child is in Australia or overseas, Australia owes an obligation to protect the child from all forms of violence and exploitation,
- severing a child's connection with Australia could risk rendering the child effectively stateless and without protection, as second or third states may be unwilling to permit a return or unable to provide protection and support,
- a child's other citizenship might be ceased in similar circumstances to those provided for in the Bill, effectively rendering the child without the protection of any state,
- revoking or ceasing citizenship threatens a child's connection with family, education, health, nationality, identity and standard of living, and
- the Bill fundamentally threatens a child's entire identity.<sup>50</sup>

8.58 The Australian Human Rights Commission expressed particular concern about the potential effects of the Bill on children, noting:

It is recognised in international human rights law that in light of their physical and mental immaturity, children have special need of safeguards, care and protection. In recognition of that fact,

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46 In particular, in relation to automatic loss of citizenship: Articles 3, 7, 8 and 12 of the CRC, and Article 24(3) of the ICCPR. In addition, in relation to loss of citizenship as a result of a parent's conduct: Articles 6, 7, 9, 12, 14, 15, 17, 23, 25 and 26 of the ICCPR, Articles 6, 7, 8 and 10 of the ICESCR, and the Convention Against Torture.

47 Centre for Comparative Constitutional Studies, *Submission 29*, p. 12; Law Council of Australia, *Submission 26*, p. 23.

48 Other than by a free, prior and informed decision of the parent/s or guardian/s of the child.

49 UNICEF Australia, *Submission 24*, p. 6. See also Ms Amy Lamoin, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 6.

50 UNICEF Australia, *Submission 24*, pp. 10-11.

Australia has ratified the *Convention on the Rights of the Child* (CRC).<sup>51</sup>

8.59 The Australian Human Rights Commission noted that children enjoy all the rights protected by the ICCPR, including the right to enter and remain in their own country. Further, Article 8(1) of the CRC provides:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

8.60 The Australian Human Rights Commission concluded that 'in the case of Australian children, Australia has agreed to protect their right to Australian nationality'.<sup>52</sup>

8.61 In commenting on the assessment of the best interests of the child as provided for in Article 3 of the CRC, the Australian Human Rights Commission stated:

[I]t is necessary to take into account all the circumstances of the particular child and the particular action. It is also necessary to ensure that procedural safeguards are implemented, including that children are allowed to express their views, that decisions and decision making processes be transparent, and that there be mechanisms to review decisions.<sup>53</sup>

Loss of a child's citizenship, and consequent loss of their right to enter or remain in Australia, is even more likely to be arbitrary than in the case of an adult. This is so for a range of reasons, including that a child is less culpable for wrongdoing, is more vulnerable to any adverse consequences, and may suffer loss of citizenship through no fault of their own.<sup>54</sup>

8.62 With regard to the ICCPR, the Centre for Comparative Constitutional Studies argued in relation to section 36 of the Citizenship Act that revocation of a child's citizenship 'would contravene the prohibition on arbitrary deprivation of nationality under [Article] 12(4) as it is conditioned on the conduct of another person'.<sup>55</sup>

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51 Australian Human Rights Commission, *Submission 13*, p. 12.

52 Australian Human Rights Commission, *Submission 13*, p. 12.

53 Australian Human Rights Commission, *Submission 13*, p. 12, citing United Nations Children's Rights Committee, *General Comment 14*, UN Doc. CRC/C/GC/14, pp [46]-[51], [87], [89]-[91], [98].

54 Australian Human Rights Commission, *Submission 13*, p. 12. See also Professor Gillian Triggs, Australian Human Rights Commission, *Committee Hansard*, 10 August 2015, p. 28; Mr John Howell, Lawyer, Australian Human Rights Commission, *Committee Hansard*, 10 August 2015, p. 28; UNICEF Australia, *Submission 24*, pp. 9-10.

55 Centre for Comparative Constitutional Studies, *Submission 29*, p. 12.

8.63 Contributors sought additional safeguards in the Bill to ensure that the best interests of the child are a primary consideration.<sup>56</sup> UNICEF Australia, for example, sought the inclusion of general obligations to take into account the best interests of children as the primary consideration in all decisions affecting children under the scope of the Bill.<sup>57</sup> Professor Gillian Triggs of the Australian Human Rights Commission told the Committee:

[W]e are really asking for a process, and that during that process the interests of the child would be taken into account as a primary consideration.<sup>58</sup>

### Involvement of children with armed groups and terrorism

8.64 The CRC and the Optional Protocol impose obligations upon States Parties to protect citizens aged 18 and under who are affected by armed conflict, to rehabilitate child victims, and to provide social reintegration.<sup>59</sup>

8.65 In evidence to the Committee, UNICEF Australia noted that ‘children and young people are both targets and tools of war and terrorism’.<sup>60</sup> It is estimated that 300 000 children worldwide are involved in armed conflict, approximately 40 per cent of whom are girls.<sup>61</sup> These children are recruited for a range of purposes, including as fighters, human shields, porters, cooks, messengers, and for sexual exploitation and forced marriage.<sup>62</sup> UNICEF Australia argued that children and young people who have been radicalised or associated with armed groups must be treated, first and foremost, as children.<sup>63</sup>

8.66 The Refugee Council of Australia advocated that in cases where Australian children are suspected of having committed terrorist offences, ‘any response must be strongly guided by child protection considerations’.<sup>64</sup>

8.67 In evidence, the Refugee Council of Australia explained that:

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56 Professor Gillian Triggs, Australian Human Rights Commission, *Committee Hansard*, 5 August 2015, p. 29; Ms Erin Gillen, FECCA, *Committee Hansard*, 4 August 2015, p. 31.

57 Ms Amy Lamoin, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 2.

58 Professor Gillian Triggs, Australian Human Rights Commission, *Committee Hansard*, 5 August 2015, p. 29.

59 Articles 38 and 39 of the CRC; Articles 6(3) and 7(1) of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (2000).

60 Dr Norman Gillespie, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 1.

61 Dr Norman Gillespie, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 1.

62 Dr Norman Gillespie, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 1.

63 Dr Norman Gillespie, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 1.

64 Refugee Council of Australia, *Submission 22*, p. [6].

We see quite a disconnect between the way Australia would support and protect children who had been involved in other serious crimes at a very young age and the way it seems to treat children under this legislation. We have people living in Australia right now who were resettled in Australia as refugees because they were forcibly recruited as child soldiers or at risk of recruitment. In those cases our response has taken much more of a child protection focus to look at what we can do to protect children who, in those circumstances, should primarily be seen as victims rather than perpetrators of crimes. We believe the same sorts of considerations really should be more strongly informing this legislation.<sup>65</sup>

8.68 The Muslim Legal Network (NSW) similarly noted that '[i]n Australia, the Children's courts and sentencing principles in relation to juveniles prioritise rehabilitation'.<sup>66</sup>

8.69 Professor Ben Saul of the University of Sydney described the Bill's treatment of children as 'unreasonable', and considered it inconsistent with Australia's international human rights obligations. Professor Saul stated:

Child terrorists are victims and deserve protection and rehabilitation not banishment.<sup>67</sup>

8.70 Professor Saul went on to note that Article 7(1) of the Optional Protocol to the CRC provides for the cooperation between States parties in the rehabilitation and social integration of persons who are victims of acts contrary to the Protocol, including child soldiers.<sup>68</sup>

8.71 Both Professor Saul and the Law Council of Australia considered that children engaged in hostilities with armed groups in places such as Syria and Iraq would be child soldiers and therefore entitled protection consistent with the Optional Protocol.<sup>69</sup>

## Committee comment

8.72 The Committee considers ceasing or revoking a child's citizenship to be a serious matter, with significant consequences for a child and their family.

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65 Ms Lucy Morgan, Refugee Council of Australia, *Committee Hansard*, 5 August 2015, p. 21.

66 Muslim Legal Network (NSW), *Submission 27*, p. 13.

67 Professor Ben Saul, *Submission 2*, p. 8.

68 Professor Ben Saul, *Submission 2*, p. 8.

69 Professor Ben Saul, *Submission 2*, p. 8; Law Council of Australia, *Submission 26*, p. 23. See also Refugee Council of Australia, *Submission 22*, p. 6.

- 8.73 The Committee notes that a number of submitters considered the measures proposed in the Bill to be neither reasonable, necessary nor proportionate in relation to children. Further, concerns were raised about the Bill's compatibility with Australia's international obligations. This is a matter that has been addressed in some detail by the Parliamentary Joint Committee on Human Rights.
- 8.74 It is the Committee's view that the Bill should operate in a manner that is consistent with the Criminal Code provisions relating to children and that this should be made explicit on the face of the Bill.
- 8.75 Accordingly, the Committee considers the Bill should be amended to state that it does not, in any circumstances, apply to children aged under 10 years.
- 8.76 For children aged under 14 years, the Committee considers the Bill should be amended so that the self-executing conduct provisions in proposed sections 33AA and 35 do not apply.
- 8.77 The Committee acknowledges that because the proposed section 35A hinges on a conviction, its application to a child aged between 10 and 14 years will be consistent with either the Criminal Code or *Crimes Act 1914*. This means that a child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.
- 8.78 The Committee notes that even for adolescent children, the capacity of the individual should be considered.<sup>70</sup> For this reason, the Committee is also concerned about the breadth of offences for which a child aged between 14 and 18 could lose their citizenship through the self-executing provisions. The Committee is of the view that in circumstances where the Minister considers rescinding a notice or exempting a child from proposed section 33AA or section 35, then the Minister should consider the best interests of the child as a primary consideration.
- 8.79 In addition, the Committee considers that, in making a decision about revocation of a child's citizenship under proposed section 35A, the Minister must consider all matters affecting the child including, as a primary consideration, their best interests. The Bill should be amended as recommended in Chapter 6 to require the Minister to consider the best interests of the child in reaching this decision.
- 8.80 The Committee notes concerns expressed by contributors that section 36 of the Citizenship Act is inconsistent with Australia's international obligations. Some submitters argued that the loss of a child's citizenship as

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70 UNICEF Australia, *Submission 24*, p. 18; Ms Amy Lamoin, UNICEF Australia, *Committee Hansard*, 5 August 2015, p. 3.

a result of the conduct of a parent is neither reasonable nor proportionate. Indeed, it could be argued that, as the Bill is premised upon a person's repudiation of allegiance, section 36 should not apply given it is contingent upon the conduct of another person. A parent's actions do not indicate that a child under the age of 18 has repudiated his or her allegiance to Australia.

- 8.81 The Committee considers that the Bill should be amended so that section 36 of the Citizenship Act does not apply to loss of citizenship under the provisions proposed in the Bill.

### **Recommendation 20**

**The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to limit the extent of its application to children. The amendments should provide:**

- that no part of the Bill applies to conduct by a child aged less than 10 years, and
- that proposed sections 33AA and 35 do not apply to conduct by a child aged under 14 years.

**The amendments should make the Bill's application to children explicit on the face of the legislation.**

**The Committee notes that in relation to proposed section 35A, section 7.2 of the *Criminal Code Act 1995* or section 4N of the *Crimes Act 1914* will apply to a child aged 10 to 14 years.**

### **Recommendation 21**

**The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended so that section 36 of the *Australian Citizenship Act 2007* (which enables the Minister to revoke a child's citizenship following revocation of a parent's citizenship) does not apply to proposed sections 33AA, 35 and 35A.**