

Review into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

Parliamentary Joint Committee on Intelligence and Security

Dr Paul Taylor, October 2019

I am grateful for the opportunity to contribute this submission to the *Review into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019*.

I am a Visiting Fellow at the Australian National University's Centre for International and Public Law,¹ but make this submission in a personal capacity.

The *Statement of Compatibility with Human Rights* attached to the Explanatory Memorandum identifies various provisions of the ICCPR which are liable to interference or restriction by virtue of the proposed legislation. Other submissions properly identify the standard of justification required by those ICCPR provisions. I simply wish to highlight the susceptibility to violation of those provisions where measures taken under the legislation are tainted by arbitrariness, or impermissibly rely on limitation provisions, because of their inconsistency with the ICCPR or other failure to satisfy conditions for limitation which are not apparent in the ICCPR text.

The ICCPR does not contain a guarantee against statelessness (that was the subject of specialist conventions).² However, the ICCPR's monitoring body, the Human Right Committee, has frequently expressed concern at procedures and practices which increase vulnerability to statelessness in its concluding observations,³ and this has also informed its Views when determining individual complaints.⁴ Furthermore, issues of ICCPR implementation raised with States in the periodic review process include the absence of a national mechanism and other appropriate means of preventing statelessness.⁵ In other words, statelessness as such is a matter of serious ICCPR concern. Even though the Bill contains provisions designed to militate against certain occurrences of statelessness, the risks remain of statelessness eventuating from any loss of citizenship.

I have highlighted as follows certain conditions to be satisfied when relying on limitation provisions, or when determining whether measures are arbitrary, under some of the ICCPR provisions mentioned in the *Statement of Compatibility*, where those conditions are not explicit in the ICCPR text. They have an important bearing on whether measures taken under the proposed legislation are likely to meet ICCPR standards.

¹ I recently completed a book entitled *International Covenant on Civil and Political Rights, A Commentary: The UN Human Rights' Committee's Monitoring of ICCPR Rights* (Cambridge University Press, (in print) 2020).

² *Convention Relating to the Status of Stateless Persons*, 28 September 1954; *Convention on the Reduction of Statelessness*, 30 August 1961.

³ E.g. Ghana CCPR/C/GHA/CO/1 (2016) 33; Kuwait CCPR/C/KWT/CO/3 (2016) 48; Morocco CCPR/C/MAR/CO/6 (2016) 35; South Africa CCPR/C/ZAF/CO/1 (2016) 34; Dominican Republic CCPR/C/DOM/CO/6 (2017) 25; Italy CCPR/C/ITA/CO/6 (2017) 22; Madagascar CCPR/C/MDG/CO/4 (2017) 47; Mauritius CCPR/C/MUS/CO/5 (2017) 37; Thailand CCPR/C/THA/CO/2 (2017) 41; Bahrain CCPR/C/BHR/CO/1 (2018) 61; Gambia CCPR/C/GMB/CO/2 (2018) 45; Norway CCPR/C/NOR/CO/7 (2018) 34.

⁴ *Budlakotiv v. Canada*, CCPR/C/122/D/2264/2013, 6 April 2018 [9.3] (the author's claim asserted risks of statelessness; Canada was found to be his own country in light (among other things) of the fact that his Indian nationality was not confirmed).

⁵ E.g. Mauritius CCPR/C/MUS/CO/5 (2017) 37. See also Ghana CCPR/C/GHA/CO/1 (2016) 33 (The State party should take concrete legal and administrative steps to prevent statelessness and guarantee the fundamental rights of stateless persons and persons at risk of statelessness through law and practice).

- Article 9(1) (prohibition against “arbitrary” deprivation of liberty)
 - Arbitrariness is attested by elements “inappropriateness, injustice, lack of predictability”.⁶
 - The “grounds” and the “procedures” “established by law” as required by Article 9(1) are themselves arbitrary if incompatible with another ICCPR provision, e.g. Article 15 in *Fardon v. Australia* (because imprisonment can only be imposed in the same proceedings in which the offence is tried, not on the basis of predicted future criminal conduct).⁷
 - In *David Hicks v Australia* the issue of compatibility with the ICCPR was at the fore of the Human Rights Committee’s finding of Article 9 violation. It was incumbent on Australia to show, which it failed to do, that it had done everything possible to ensure that the terms of a prisoner transfer arrangement with the US (giving effect to sentences resulting from a denial of justice) did not cause it to violate the ICCPR, particularly as the author was one of its nationals.⁸
- Article 12(3) (freedom movement)
 - The “laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution”.⁹
- Article 12(4) (prohibition against an alien arbitrarily being deprived of their right to enter their own country)
 - The reference to arbitrariness “is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”.¹⁰
- Article 13 (any expulsion of an alien must be reached “in accordance with law”)
 - The relevant provisions of domestic law “of course” “must in themselves be compatible with the provisions of the Covenant. Article 13 requires compliance with both the substantive and the procedural requirements of the law.”¹¹
- Article 15 (no heavier penalty may be imposed than applicable at the time of the offence)
 - Where this prohibition is transgressed by virtue of measures taken under sections 36B(5)(a)-(h) (for conduct from 29 May 2003) or 36D (sentences above a given threshold for terrorism offence convictions after that date) it is no answer that the relevant past conduct was “incompatible with the shared values of the Australian community” (as the “purpose” section 36A puts it) or that the measure otherwise serves a national security purpose, since the Article 15 prohibition does not admit any latitude on any such ground (or other basis).

⁶ *Van Alphen v. Netherlands*, CCPR/C/39/D/305/1988, 23 July 1990 [5.8]; *Mukong v. Cameroon*, CCPR/C/51/D/458/1991 (1994) 21 July 1994 [9.8]; *Gorji-Dinka v. Cameroon*, CCPR/C/83/D/1134/2002, 17 March 2005 [5.1].

⁷ *Fardon v. Australia*, CCPR/C/98/D/1629/2007, 18 March 2010 [7.4(2)] (detention was pursuant to proceedings incompatible with Article 15).

⁸ *Hicks v. Australia*, CCPR/C/115/D/2005/2010, 5 November 2015 [4.10].

⁹ *General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9 (GC 27) [13].

¹⁰ GC 27 [21].

¹¹ *Maroufidou v. Sweden*, CCPR/C/12/D/58/1979, 9 April 1981 [9.3].

- The strictness of the standards of Article 15 are reinforced by the fact that Article 15 is non-derogable (see Article 4(2)).
- Article 17 (arbitrary interference with family)
 - An authorised interference must only occur on the basis of law, but even interference provided for by law should be “in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”.¹²

In short, statelessness is a settled Human Rights Committee concern under the ICCPR; the requirement of ICCPR-compatibility when relying on limitation provisions or to avoid any attribution of arbitrariness is firmly established for some provisions and increasingly required for others; and the properties of the law which precondition the legitimate restriction of rights make significant demands which must be met both in the terms of the proposed legislation and accompanying administrative and judicial practice.

I would be happy to respond to any questions within my expertise in person, if the Committee wishes to hold hearings in connection with the Bill.

¹² *General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988 [4].