



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

Parliamentary Joint Committee on Intelligence and Security

Submission by the Office of the United Nations High Commissioner for Refugees

14 October 2019

I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide this submission to the Joint Committee on Intelligence and Security in respect of its inquiry into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (the Bill).
2. The Bill proposes to amend Division 3 of Part 2 of the *Australian Citizenship Act 2007* (Cth) (the Act) to provide that, at the discretion of the Minister, a person who is a national or citizen of a country other than Australia, ceases to be an Australian citizen if they engage in certain conduct or they are convicted of a specified offence. In making a determination with respect to cessation, the Minister must be satisfied that to do so would not result in the person becoming a person who is not a national or citizen of any country. UNHCR considers that this represents a lowering of the existing threshold to be applied and would create a heightened risk that an individual could be rendered stateless, contrary to Australia's international obligations.
3. In addition to undermining Australia's ability to fulfil its obligations with respect to the prevention and reduction of statelessness, the prospect of the cessation of Australian citizenship in turn gives rise to a range of additional concerns associated with international legal obligations to protect against arbitrary and indefinite detention as well as *refoulement*. In the context of Australia's support for the #IBelong Campaign to End Statelessness by 2024, it is important that Australia not weaken its commitment to obligations it has accepted under relevant international instruments.

II. UNHCR'S AUTHORITY

4. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.¹ As set forth in the *Statute*

¹ See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 (Statute).

of the Office of the United Nations High Commissioner for Refugees, UNHCR fulfils its international protection mandate by, inter alia, '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.'² UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees*,³ according to which State Parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention." The same commitment is included in Article II of the *1967 Protocol relating to the Status of Refugees* (1967 Protocol).⁴

5. UNHCR has specific additional international responsibilities for refugees who are stateless, pursuant to paragraphs 6(A)(II) of the Statute and Article 1(A)(2) of the Refugee Convention, both of which specifically refer to stateless persons who meet the refugee criteria. Moreover, in accordance with UN General Assembly resolutions 3274 XXIX⁵ and 31/36,⁶ UNHCR has been designated, pursuant to Articles 11 and 20 of the 1961 Statelessness Convention,⁷ as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities. In resolutions adopted in 1994 and 1995, the UN General Assembly entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.⁸ UNHCR's statelessness mandate has continued to evolve as the UN General Assembly has endorsed the Conclusions of UNHCR's Executive Committee.⁹

² Statute, para. 8(a).

³ UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

⁴ UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

⁵ UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 10 December 1974, A/RES/3274 (XXIX).

⁶ UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 30 November 1976, A/RES/31/36.

⁷ UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

⁸ UN General Assembly resolutions A/RES/49/169 of 23 December 1994 and A/RES50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 20 October 1995.

⁹ Executive Committee Conclusion No. 90 (LII), Conclusion on International Protection, 5 October 2001, para. (q); Executive Committee Conclusion No. 95 (LIV), General Conclusion on International Protection, 10 October 2003, para. (y); Executive Committee Conclusion No. 99 (LV), General Conclusion on International Protection, 8 October 2004, para. (aa); Executive Committee Conclusion No. 102 (LVI), General Conclusion on International Protection, 7 October 2005, para. (y); Executive Committee Conclusion No. 106 (LVII), Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 6 October 2006, paras. (f), (h), (i), (j) and (t); all of which are available in: [Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 \(Conclusion No. 1 – 114\)](#), October 2017.

6. Australia is a Contracting Party to the *1951 Convention relating to the Status of Refugees* and its 1967 Protocol (together, the Refugee Convention), as well as the *1954 Convention relating to the Status of Stateless Persons* (the 1954 Convention), and the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention),¹⁰. Through accession to these instruments, Australia has assumed international legal obligations in relation to refugees, asylum-seekers and stateless persons in accordance with their provisions.
7. UNHCR's submission focuses on the implications of the Bill for Australia's international legal obligations with respect to the prevention and reduction of statelessness, and the rights of refugees and stateless persons.

III. THE NATURE OF THE PROPOSED AMENDMENTS

8. The Bill would, amongst other things, repeal existing sections 33AA and 35 to 35B of the Act. The matters dealt with in those sections are to be dealt with in proposed new sections 36B, 36D and 36E. Proposed subsection 36B(1) will enable the Minister to make a decision to cease the Australian citizenship of a person aged 14 years or older, if they engage in certain prescribed conduct. Proposed subsection 36D(1) sets out the circumstances in which the Minister may make a determination to cease a person's citizenship where they are convicted of a specified offence. Proposed section 36E specifies matters the Minister must have regard to when considering the public interest for the purposes of making or revoking a determination.
9. Proposed sections 36B and 36D provide that the Minister must not make a determination that a person ceases to be an Australian citizen if the Minister is satisfied that such a determination would result in the person becoming stateless. The Bill proposes to retrospectively change the threshold from the existing requirement that the person *is* a national or citizen of a country other than Australia at the time when the Minister makes the determination that a person ceases to be an Australian citizen. This provision is to be replaced with a requirement that the Minister need only be *satisfied* that the person would, if the Minister were to make the determination, *become* a person who is not a national or citizen of any country.
10. The Bill provides for a period in which the individual subject to a determination resulting in the cessation of their citizenship can apply to the Minister to have a determination revoked.¹¹ The Bill also provides for the Minister to revoke a determination on his or her own initiative, or for a determination to be automatically revoked in certain circumstances, including when a court finds that the person was not a national or citizen of a country other than Australia at the time the determination was made.¹²
11. If a person is outside Australia when their citizenship ceases, they will be required to apply for a visa to re-enter Australia. A person in Australia whose citizenship

¹⁰ UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

¹¹ Proposed section 36H.

¹² Proposed sections 36J; 36K.

ceases, acquires an ex-citizen visa by operation of law under the *Migration Act 1958* (Cth) (Migration Act).¹³

IV. CONSIDERATION WITH RESPECT TO INTERNATIONAL LEGAL OBLIGATIONS TO PREVENT AND REDUCE STATELESSNESS

12. Article 15 of the 1948 Universal Declaration of Human Rights establishes the right of every person to a nationality.¹⁴ The right to a nationality is fundamental for the enjoyment in practice of the full range of human rights. This right is particularly important because it provides a sense of identity and inclusion in society and those without a nationality are often made more vulnerable to a range of human rights violations.

13. The 1954 Convention establishes the international legal definition of stateless person and the standards of treatment to which such individuals are entitled. Article 1(1) of the 1954 Convention sets out the definition of a “stateless person” as follows:

For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.¹⁵

14. An individual is a stateless person from the moment that the conditions in Article 1(1) of the 1954 Convention are met. The object and purpose of the 1961 Convention is to prevent and reduce statelessness, thereby ensuring every individual’s right to a nationality, including children.¹⁶ Article 8(1) of the 1961 Convention sets out the general rule that a Contracting State shall not deprive a person of his or her nationality if such deprivation renders him or her stateless. Paragraphs (2) and (3) of Article 8 set out an exhaustive list of exceptions to this rule. Article 8(3) allows States to retain the right to deprive persons of their nationality on the grounds listed exhaustively in the paragraph, even if this results in statelessness. Specifically, these exceptions include where a national behaved inconsistently with the duty of loyalty to the State concerned or has taken an oath or made a formal declaration, or otherwise given definite evidence of allegiance to another State. However, a State may only use one or more of these exceptions if a declaration is made to that end at the time of signature, ratification or accession *and* the ground(s) concerned already exist(s) at that time in the nationality legislation of the State. Australia acceded to

¹³ *Migration Act 1958*, section 35.

¹⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html>.

¹⁵ The International Law Commission has concluded that the definition in Article 1(1) of the 1954 Convention is part of customary international law. See page 49 of the International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, which states that the Article 1 definition can ‘no doubt be considered as having acquired a customary nature’: <https://www.refworld.org/docid/525e7929d.html>. See also United Nations High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 30 June 2014, available at: <https://www.refworld.org/docid/53b676aa4.html>.

¹⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 8, available at: <https://www.refworld.org/docid/3ae6b38f0.html>.

the 1961 Stateless Convention on 13 December 1973 and made no declarations or reservations upon accession or thereafter.¹⁷

15. The Bill proposes to lower the threshold applicable to determining whether a person is a national or citizen of another country. The Bill will require the Minister be satisfied that the person will not become stateless, rather than in fact being a national of another country at the time of the determination, as is currently the case. This temporal shift may result in consideration of what a person's nationality status may *become* rather than what it is at the time the determination to deprive nationality is made.
16. Statelessness could result if the Minister takes the view that an individual would not become stateless, provided they take steps to confirm or claim an entitlement to another nationality. An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historical nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures are yet to be completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention.¹⁸
17. UNHCR considers that the proposed threshold which would only require the Minister's satisfaction, albeit reasonably attained, creates a heightened risk that an individual may be rendered stateless. For example, the Minister may base his or her satisfaction that a person will not become stateless on an incorrect interpretation of another country's nationality law or fail to consider how that country regards an individual's entitlement to nationality in practice.
18. Establishing whether an individual is considered a national under the operation of law requires a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have an impact on the individual's status. This is a mixed question of fact and law. Examining an individual's position in practice may lead to a different conclusion than one derived from a purely formalistic analysis of the application of nationality laws of a country to an individual's case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to "law" in the definition of statelessness in Article 1(1) of the 1954 Convention therefore covers situations where the written law is substantially different when it comes to its implementation in practice.
19. The Parliamentary Joint Committee on Human Rights has previously observed that lowering the threshold applicable to determining dual citizenship may increase the risk of statelessness:

¹⁷ UN General Assembly, *1961 Signatory States, Declarations and Reservations on the Reduction of Statelessness*, 30 August 1961, available at: <https://www.refworld.org/docid/4fa368ea2.html>.

¹⁸ UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, para. 50.

By proposing that the minister only need to be 'satisfied' of this status, this may create a greater risk that a person is not actually a citizen of another country such that they may be unable to obtain travel documents and may be rendered stateless. This is because while the minister may be 'satisfied' about a person's citizenship, they may still be mistaken about this as a factual matter.¹⁹

20. The Bill establishes a period in which an individual can apply to the Minister to have a determination revoked. A decision of the Minister to refuse the application for revocation can be subject to judicial review, and a determination that a person has ceased to be an Australian citizen will be automatically revoked in prescribed circumstances, including where a court finds that the person was not a national or citizen of a country other than Australia at the time the determination was made.²⁰
21. Such avenues of appeal would appear to shift the onus onto the individual to establish the absence of a particular nationality or citizenship following cessation of their Australian citizenship.²¹ An individual may experience significant difficulties seeking clarification of their nationality status with the competent authorities of other countries, particularly in the absence of any documentary proof. Children, especially unaccompanied children, may face acute challenges in this respect. Such enquiries may be met either with silence or a refusal to respond. Alternatively, a competent authority may issue a pro forma response which might suggest that the authority has not examined the particular circumstances of an individual's position.²² As a general rule, the burden of substantiating a claim should rest primarily with the authorities of a State that is seeking to apply rules for deprivation of nationality to show that the person affected has another nationality, or that the person is covered by one of the exceptions allowed for in Article 8 with respect to deprivation of nationality.²³

V. CONSEQUENCES FOLLOWING CESSATION OF AUSTRALIAN CITIZENSHIP

22. If a person is outside Australia when their citizenship ceases, they will not be able to re-enter Australia without a visa and would be unlikely to pass the character test contained in subsection 501(6) of the Migration Act in order to be granted a visa.²⁴ Visa refusal in such circumstances results in deprivation of the affected person's

¹⁹ Parliamentary Joint Committee on Human Rights, Second Report of 2019, 2 April 2019, para. 2.72, available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_2_of_2019.

²⁰ Proposed section 36H; para. 36K(1)(c).

²¹ This is so, notwithstanding the existence of a non-compellable power for the Minister to personally revoke a determination on his or her own initiative, where he or she considers it in the public interest to do so under proposed section 36J.

²² UNHCR, Handbook on Protection of Stateless Persons, 30 June 2014, para. 41.

²³ UNHCR, *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality* ("Tunis Conclusions"), March 2014, available at: <https://www.refworld.org/docid/533a754b4.html>.

²⁴ See also Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, para. 8.

right to return to their own country.²⁵ The United Nations Human Rights Committee has observed that “there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable” and a “State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country”.²⁶

23. A person in Australia, whose citizenship ceases, acquires an ex-citizen visa by operation of law under the Migration Act.²⁷ However, they simultaneously become subject to visa cancellation, detention and removal powers under the Migration Act. Where a former-citizen who is detained cannot be removed from Australia, for instance, in circumstances where there is no State to which they can be returned, or where removal would engage Australia’s *non-refoulement* obligations, Australian law allows them to be held in detention indefinitely, contrary to international legal standards.
24. With respect to the removal of a former-citizen who is in detention, UNHCR remains deeply concerned by section 197C of the Migration Act, which provides that Australia’s *non-refoulement* obligations are irrelevant for the purposes of exercising removal powers. The principle of *non-refoulement* is a norm of customary international law and is the cornerstone of international refugee protection.²⁸ It is enshrined in Article 33 of the Refugee Convention.²⁹ Article 33(1) provides:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.

25. Section 197C, by expressly permitting the removal of persons from Australia notwithstanding the country’s binding *non-refoulement* obligations, is incompatible with Australia’s international legal commitments, including under Article 33 of the Refugee Convention. UNHCR notes that the Parliamentary Joint Committee on Human Rights has previously made the same observation in relation to Australia’s *non-refoulement* obligations under the *International Covenant on Civil and Political*

²⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 12(4) available at:

<https://www.refworld.org/docid/3ae6b3aa0.html>.

²⁶ UN Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)*,

CCPR/C/21/Rev.1/Add.9 (1999), para. 21: <http://www.refworld.org/docid/45139c394.html>.

²⁷ *Migration Act 1958*, section 35.

²⁸ UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at:

<https://www.refworld.org/docid/438c6d972.html>.

²⁹ International human rights law provides additional forms of protection in this area. For instance, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Similarly, Art. 7 of the International Covenant on Civil and Political Rights has been interpreted as prohibiting the return of persons to places where torture or persecution is feared. While Art. 33 (2) of the Refugee Convention foresees exceptions to the principle of *non-refoulement*, international human rights law set forth an absolute prohibition, without exceptions of any sort.

*Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*³⁰

26. Where visa cancellation does not result in a former-citizen's removal from Australia, it renders that person subject to indefinite immigration detention. Detention is an exceptional measure and any decision to detain should be strictly limited to the purposes authorized by international law.³¹ Among other requirements, detention must be demonstrated to be necessary, proportionate to any threat, non-discriminatory, and subject to judicial oversight.³² In cases where removal is not permissible due to the principle of *non-refoulement* or certain other factors, the person must be released in order to avoid arbitrary detention.³³ Indefinite detention is arbitrary, and maximum limits on periods of detention should be established in law.³⁴

VI. CONCLUDING REMARKS

27. UNHCR considers that lowering the existing threshold to be applied when the Minister makes a determination with respect to cessation of Australian citizenship under proposed sections 36B and 36D of the Act would create a heightened risk that an individual could be rendered stateless, contrary to Australia's obligations under the 1961 Statelessness Convention.
28. The prospect of the cessation of Australian citizenship in turn gives rise to a range of additional concerns associated with the risk of contravention of Australia's international legal obligations to protect against arbitrary and indefinite detention as well as *refoulement*.
29. Accordingly, UNHCR recommends that the threshold for determining dual nationality or citizenship not be lowered.

³⁰ Parliamentary Joint Committee on Human Rights, Fourteenth Report of the 44th Parliament, October 2014, pp. 77-78 available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2014/Fourteenth_Report_of_the_44th_Paliament; Twelfth Report of the 45th Parliament, November 2018, pp. 4-7, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_12_of_2018.

³¹ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <https://www.refworld.org/docid/503489533b8.html>. See also UNHCR, *Stateless Persons in Detention: A Tool for their Identification and Enhanced Protection*, June 2017, available at: <https://www.refworld.org/docid/598adacd4.html>.

³² Ibid.

³³ United Nations Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, available at: https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf

³⁴ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.