

19 July 2019

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security

Dear Secretary,

Re: Review of the Australian Citizenship renunciation by conduct and cessation provisions of the Australian Citizenship Act 2017

Thank you for the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security, in relation to the Review of the operation, effectiveness and implications of sections 33AA ('renunciation by conduct'), 35 ('service outside Australia in armed forces of an enemy country or a declared terrorist organisation') 35A ('conviction for terrorism offences and certain other offences') and 35AA ('declared terrorism organisation') of the Australian Citizenship Act 2007. These provisions were introduced through the Citizenship Act by the Australian Citizenship Amendment (Allegiance to Australia) 2015 (Cth) (the Allegiance Act) to govern certain circumstances in which dual citizens can lose their Australian citizenship for particular terrorism-related conduct.

These citizenship loss provisions inserted into the Australian Citizenship Act 2007 may breach a range of international legal instruments and human rights laws that look to safeguard individual rights to nationality. The Human Rights Council and other UN bodies have stated that measures to deprive citizenship must meet key "standards of necessity, proportionality, and reasonableness in order to not be seen as arbitrary".¹ There is concern that aspects of the citizenship loss provisions do not satisfy these requirements. For example, these provisions could apply to individuals who are Australian by birth, who have Australian parents, and who have never lived outside Australia. It is critical to ensure that our laws achieve their primary aim without unintended consequences.

Save the Children is a leading independent international organisation for children and child rights. Our vision is a world in which every child attains the right to survival, protection, development and participation. Our purpose is to inspire breakthroughs in the way the world treats children and to achieve immediate and lasting change in their lives. Save the Children's submission, while covering the rights of all individuals to protection from statelessness, calls specific attention to the rights of children, particularly directed at s 33AA, 35 and 35A² of the Citizenship Act as they pertain to

¹ Sandra Mantu, 2018. Terrorist' citizens and the human right to nationality, *Journal of Contemporary European Studies*, 26:1, 28-4, p.30

² Australian Citizenship Act 2007, Federal Register of Legislation, <https://www.legislation.gov.au/Details/C2019C00040/Download>

children. The provisions as they stand have the potential to seriously impact a child's right to nationality and their best interests, in a way that is contrary to human rights instruments and legal frameworks, inclusive of the following.

Key Human Rights Instruments and Legal Frameworks

1. Universal Declaration of Human Rights

Article 15 of the declaration outlines central rights in relation to nationality, including³;

- (1) Everyone has the right to a nationality.
- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

This right to nationality is a fundamental human right and States must abide by these international obligations in the granting and loss of nationality. The right to nationality is a central tenant of human rights law as it corresponds to the prohibition of arbitrary deprivation of nationality. Such deprivation can leave children and their families more vulnerable to a range of human rights abuses including; risks of being trafficked, lack of access to education and healthcare and the freedom of movement.⁴

2. Convention relating to the Status of Stateless Persons (1954 Convention) and the Convention on the Reduction of Statelessness (1961 Convention)

The 1954 Convention defines "stateless person" as "a person who is not considered as a national by any State under the operation of its law".⁵ The Convention establishes a framework for the international protection of stateless persons and is a comprehensive codification of the rights of stateless persons at the international level and provides important minimum standards of treatment.

The 1961 Convention notes that States shall introduce safeguards to prevent statelessness by granting their nationality to persons who would otherwise be stateless and are either born in their territory or are born abroad to one of their nationals. States shall also prevent statelessness upon loss or deprivation of nationality.⁶

The 1961 Convention in its Article 8 (1) reaffirms that states should not deprive persons of nationality if that results in them becoming stateless. Article 8 (3) does allow a State to retain the right to deprive nationality under a very narrow set of criteria if this was stipulated during the time

³ UN General Assembly, 10 December 1948. Universal Declaration of Human Rights, Article 15.

⁴ UNHCR, 2013. Ensuring the right of all children to acquire a nationality: Connecting the Dots between the Convention on the Rights of the Child and the Convention on the Reduction of Statelessness, <https://www.refworld.org/docid/52206aa54.html>

⁵ UN General Assembly, 28 September 1954. Convention Relating to the Status of Stateless Persons, United Nations UN

⁶ UN General Assembly, August 1961. Convention on the Reduction of Statelessness, 30 August 1961, United Nations

of ratification.⁷ Australia ratified both conventions on 13 December 1973 without any declarations or reservations relating to Article 8 (3).

Both conventions have safeguards for the prevention of statelessness, including among children. The 1961 Convention notes that states must grant nationality to children who would otherwise be stateless and have ties with them through either birth on the territory or descent, through provision in Articles 1-4.⁸ UNHCR estimates that there are at least 10 million stateless persons globally, of which approximately one third are children.⁹

3. *Convention of the Rights of the Child (UNCRC), International Covenant on Civil and Political Rights (ICCPR) and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*

Specific provisions relating to the protection of nationality rights of children and women is outlined in the following human rights frameworks:

- UNCRC:¹⁰
 - Every child shall be registered immediately after birth and shall have the right from birth to a name and the right to acquire a nationality (Article 7)
 - 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. (Article 8)
- ICCPR: Every child has a right to a nationality, registration immediately after birth (Article 24)¹¹
- CEDAW: Ensure gender equal nationality laws are applied (Article 9)¹²

Key Human Rights that may be violated by the provisions introduced into the Citizenship Act by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*

According to the Australian Human Rights Commission, the citizenship loss provisions could apply to children as young as 10 who have relevant criminal convictions. In such cases, children could lose their citizenship by way of Ministerial determination in the same way as adults, and could

⁷ UN General Assembly, August 1961. Convention on the Reduction of Statelessness, United Nations

⁸ UNHCR, 2013. Ensuring the right of all children to acquire a nationality: Connecting the Dots between the Convention on the Rights of the Child and the Convention on the Reduction of Statelessness, <https://www.refworld.org/docid/52206aa54.html>

⁹ Statelessness Around the World, UNHCR, <https://www.unhcr.org/statelessness-around-the-world.html>

¹⁰ UN General Assembly, September 1990. Convention on the Rights of the Child, United Nations, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

¹¹ UN General Assembly, March 1976. International Covenant on Civil and Political Rights, United Nations, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

¹² UN General Assembly, September 1981. Convention on the Elimination of All Forms of Discrimination against Women, <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article9>

have their citizenship revoked and become stateless.¹³ This is an extremely young age to which conviction-based provisions can be applied .

Children are also impacted if their parents are stripped of their citizenship. This can lead to a range of unintended consequences with children being separated from families, children being sent back to dangerous circumstances or children being cared for by non-family members.

We note that s35A of the Act requires the Minister, in making a determination that a person ceases to be an Australian citizen, to be satisfied that it is not in the public interest for the person to remain an Australian citizen, and in doing so, to have regard (amongst other things) to the best interest of the child as a primary consideration.

In contrast, s33AA and 35 provide for an automatic cessation of citizenship, effective upon the occurrence of the contravening conduct. These sections effectively only require the Minister to have regard to the best interests of a child to the extent that:

- the Minister has decided to consider whether to exercise the power (under s33AA(14) or s35(9)) to *rescind* a notice of cessation of citizenship already issued to a person under s33AA(10) or s35(5)); and
- the child is *the person* who has been stripped of his or her citizenship.

The Minister does not have *any duty* to consider whether to exercise his power to make a determination to rescind a notice issued in respect of the cessation of citizenship (see s33AA(15) and s35(10)). Even in “deciding whether to consider exercising” such a power, the Minister does not have to take into account the best interests of the child or indeed any of the factors set out in s33AA(17) or s35(12).

In other words, in the context of ss 33AA and 35 the best interest test simply does not apply in respect of the cessation of citizenship itself, which is automatic, irrespective of the impact (however severe) on the person whose citizenship has ceased (who may be a child), on that person’s children or on children otherwise affected by the cessation. Rather, it only applies in the limited circumstance where the Minister positively *decides* to consider whether to exercise his or her power to rescind a notice of cessation of citizenship. The consequence of this is that the automatic cessation provisions of s33AA and 35 effectively offer no protection to children affected

¹³ Submission to the Senate Legal and Constitutional Affairs Legislation Committee’s inquiry into the Australian Citizenship Legislation (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, Australian Human Rights Commission, <https://www.humanrights.gov.au/our-work/legal/submission/australian-citizenship-legislation-strengthening-requirements-australian#Heading398>

by the cessation of citizenship, and their interests may indeed never be considered under the Act following the automatic cessation of citizenship.

Even to the extent the best interest test applies in s35A (in the context of the public interest test) or in ss 33AA or 35 (as to the Minister's consideration as to whether a notice of cessation of citizenship is to be rescinded), the test as set out fails explicitly require the Minister to take into consideration individual capacity, maturity and cognitive development to determine if a child is able to understand the consequences of their conduct.

These provisions are in contravention to provisions under the UNCRC¹⁴ that recognise the developmental needs and vulnerabilities of children, and consequently require that children be treated differently to adults. Australia has ratified the CRC, which protects the best interests of the child (article 3) and the right of children to preserve their identity including their nationality (article 8(1)). The automatic nature of the conduct-based regime manifestly fails to meet the provisions under the UNCRC, with minimal guidance on what criteria would be utilised to derive this threshold to prevent misuse. The provisions as they currently stand do not adequately protect the best interests and right to nationality of Australian children.

Save the Children are also concerned at the lack of procedural safeguards when a person's citizenship is automatically removed, including no requirement to: actively make an administrative decision to remove citizenship; take into account the relevant circumstances; afford natural justice including an opportunity to respond to adverse allegations; or provide reasons for removing an individual's citizenship. Such ambiguities increase the probability of statelessness for men, women and children and undermines the obligations to children, and their best interests, across a range of human rights frameworks (as noted above).

In conclusion, Save the Children urges that citizenship loss provisions should not apply to children. Provisions should also ensure that the best interest of the child is considered in all Ministerial decision, across all conduct and crime based- provisions and in relation to decisions pertaining to the removal of citizenship of individuals who are parents or care takers.

Yours Sincerely,



Archie Law
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¹⁴ Convention on the Rights of the Child, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

