

Parliamentary Joint Committee on Intelligence and Security

PO Box 6100

Parliament House

Canberra ACT 2600

13th August 2019

Dear Committee,

Re: Review of the Australian Citizenship Renunciation by Conduct and Cessation Provisions

We are pleased to make this submission to the Inquiry by the Parliamentary Joint Committee on Intelligence and Security into the Australian Citizenship Renunciation by Conduct and Cessation Provisions.

The Peter McMullin Centre on Statelessness is an expert centre at the University of Melbourne's Law School that undertakes research, teaching and engagement activities aimed at reducing statelessness and protecting the rights of stateless people in Australia, the Asia Pacific region, and as appropriate more broadly.

We wish to consider the effectiveness, operation and implications of sections 33AA, 35, 35AA and 35A of the Australian Citizenship Act 2007 ['the provisions'] with a focus on Australia's compliance with international law obligations, primarily relating to the reduction and prevention of statelessness and the international prohibition on arbitrary deprivation of nationality.

As outlined in our previous submission to this Committee's inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, the general prohibition of arbitrary deprivation of nationality is enshrined in the Universal Declaration of Human Rights Article 15, which establishes that everyone has the right to a nationality and that 'no one shall be arbitrarily deprived of his nationality nor the right to change his nationality'.¹ The prohibition against arbitrary deprivation of nationality is also broadly acknowledged to constitute a rule of customary international law.²

¹ Universal Declaration of Human Rights, Paris, 10 December 1948, GA Res. 217A(III), UN Doc. A/810 at 71, Art. 15. An explicit prohibition against arbitrary deprivation of nationality is also contained in the Convention on the Rights of Persons with Disabilities, 13 December 2006, in force 3 May 2008, 2515 UNTS 3, Art. 18(1)(a).

² James Crawford, *Brownlie's Principles of International Law* (Oxford, 2008), 522; Universal Declaration of Human Rights 1948, article 15(1); Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed, vol II, Pearson, Delhi, 1996), 878-9.

The Human Rights Council and the UN Secretary General³ have identified a number of principles that flow from this general prohibition.⁴ To comply with the obligation not to remove citizenship arbitrarily, the deprivation of citizenship must meet a number of conditions. Any deprivation of nationality must

- a) serve a legitimate purpose;
- b) be proportionate;
- c) be the least intrusive measure possible to achieve their legitimate aim;
- d) respect procedural standards of justice that allow for it to be challenged; and
- e) not be discriminatory.⁵

On the basis of these considerations, the UN Human Rights Council concludes that

‘States must weigh the consequences of loss or deprivation of nationality against the interest that it is seeking to protect, and consider alternative measures that could be imposed. Under international law, loss or deprivation of nationality that does not serve a legitimate aim, or is not proportionate, is arbitrary and therefore prohibited’.⁶

The test for arbitrary deprivation of nationality therefore requires a balancing act between the rights of the individual and the interests that the state is seeking to protect.

We have serious concerns that the citizenship renunciation and cessation provisions in their current form breach the international prohibition on arbitrary deprivation of nationality in a number of key ways.

I. Legitimate purpose

In the first instance, it is important to note that there is little to no evidence to suggest that deprivation of nationality is an effective counterterrorism measure.

We have concerns that the provisions could in fact operate to breed social discord, which itself has been identified by primary research as a common ‘pull factor’ for terrorist activity.⁷

³ UN Human Rights Council. 2011. *Human Rights and Arbitrary Deprivation of Nationality*. Report by the Secretary-general. 19 December 2011. A/HRC/19/43

⁴ UN Human Rights Council. 2013. *Human Rights and Arbitrary Deprivation of Nationality*. Report by the Secretary-general. 19 December 2013. A/HRC/25/28

⁵ Sandra Mantu (2018) 26(1) ‘Terrorist’ citizens and the human right to nationality, *Journal of Contemporary European Studies*, 28-41.

⁶ UN Human Rights Council. 2013. *Human Rights and Arbitrary Deprivation of Nationality*. Report by the Secretary-general. 19 December 2013. A/HRC/25/28, page 16.

⁷ Lorne L Dawson and Amarnath Amarasingam, ‘Talking to foreign fighters: Insights into the motivations for Hijrah to Syria and Iraq,’ (2017) 40(3) *Studies in Conflict & Terrorism* 191, 196; Vergani, Matteo, Iqbal, Muhammad, Ilbahar, Ekin and Barton, Greg 2018, ‘The three Ps of radicalization: push, pull and personal. A systematic scoping review of the scientific evidence about radicalization into violent extremism’ (2016) *Studies in conflict and terrorism*; Michele Grossman et al., ‘Stocktake Research Project. A Systematic Literature and Selected Program Review on Social Cohesion, Community Resilience and Violent Extremism 2011–2015’

According to counterterrorism and international law expert Christophe Paulussen, citizenship stripping

is not only moving the problem around like a hot potato, but may even make the problem worse. If people from certain (often minority) groups in the population see that only 'their' people are targeted by a specific measure, then there is a risk that these people will feel even more alienated and discriminated against ... In this regard one needs to be mindful that exclusion, marginalisation and (perceived) discrimination can be one of the many factors that can play a role in people radicalising and joining extremist groups in the first place.⁸

By politicising citizenship and using it as a tool of exclusion, these measures may have the effect of fostering, rather than deterring, extremism and radicalisation.⁹

Furthermore, several commentators argue that allowing the return of foreign fighters is not only the state's legal and moral obligation but also the safest option in terms of national security.¹⁰ The Global Counter-Terrorism Forum advises programs for rehabilitation, re-integration and criminal accountability to address radicalisation, specifically of foreign fighters¹¹ All of these recommendations are predicated on the maintenance of citizenship and active monitoring by the State.

The effectiveness of deradicalisation measures is an emerging area of research and academic study. Nonetheless 'multiple programs' have been implemented globally¹², enabling scholars to identify the attributes of a successful program.¹³ While further research is required to establish 'best practice' models of deradicalisation,¹⁴ it is clear that the alienating effect of citizenship stripping and expulsion is anathema to the integrating and rehabilitative nature of successful deradicalisation programs.

(Victoria University and Australian Multicultural Foundation, Melbourne, 2016); Radicalisation Awareness Network (2016), 'The Root Causes of Violent Extremism' European Commission. Available at: https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/whatwedo/networks/radicalisation_awareness_network/ran-papers/docs/issue_paper_rootcauses_jan2016_en.pdf

⁸ Christophe Paulussen, 'Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive' (2018). See also Sangeetha Pillai and George Williams, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia,' (2017) 41(2) *Melbourne University Law Review*, 862.

⁹ Paulussen, *Ibid*.

¹⁰ Christophe Paulussen and Tanya Mehra, 'The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking,' International Centre for Counter-Terrorism, The Hague, 6 March 2019.

¹¹ Global Counter-Terrorism Forum, Good practices on Addressing the Challenge of Returning Families of Foreign Terrorist Fighters (FTFs), 25 September 2018 <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/C/GCTF-Good-Practices-on-Returning-Families-of-FTFs_ENG.pdf?ver=2018-09-25-101427-323>. See also

¹² Daniel Koehler, *Understanding Deradicalization: Methods, Tools and Programs for Countering Violent Extremism* (Routledge, 2017).

¹³ Daniel Koehler, *Understanding Deradicalization: Methods, Tools and Programs for Countering Violent Extremism* (Routledge, 2017); Arie Kruglanski, Michele Gelfand and Rohan Gunaratna, 'Detainee Deradicalization' (2010) 23 (1) *APS Observer* and Alex Schmid, *Radicalisation, De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review* (ICCT, 2013)

¹⁴ Angel Rabasa et.al, *Deradicalizing Islamists Extremists* (RAND, 2010)

In addition, citizenship deprivation undermines Australia's capacity, and international obligation under several counterterrorism conventions,¹⁵ to prosecute terrorists. The 'risk exportation' often leaves criminal prosecution to a country with poor resources and little ability to effectively convict terrorists.¹⁶

In the absence of clear proof of the effectiveness of citizenship deprivation as a counterterrorism measure, the corrosive impact of the provisions on the rule of law and public confidence in the law outweighs its utility and throws into question its legitimacy as a counterterrorism measure.

Finally, it is clear that one of the inevitable consequences of the citizenship-stripping provisions (if not their purpose) is to permit the expulsion or refusal to re-enter of those stripped of their Australian citizenship.¹⁷ Yet the International Law Commission is unequivocal in explaining that:

A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.¹⁸

This again undermines the claim to the provisions having a legitimate purpose.

II. Proportionality

Although states have traditionally been granted broad discretion in the regulation of nationality matters, this discretion is not absolute. State regulation of nationality must be exercised in compliance with relevant provisions of international human rights law, including those relating to the right to a nationality and the obligation not to render persons stateless. As the UN Special Rapporteur on Contemporary Forms of Fascism, Racial Discrimination, Xenophobia and Related Intolerance has noted, 'any deprivation of citizenship entails

¹⁵ Under the International Convention against the Taking of Hostages, International Convention for the Suppression of Terrorist Bombings and International Convention for the Suppression of the Financing of Terrorism.

¹⁶ Christophe Paulussen, 'Countering Terrorism Through The Stripping of Citizenship: Ineffective and Counterproductive,' 2018 Annual Conference 'Inequality' of the Knowledge Platform Security & Rule of Law, The Hague, 13 September 2018.

¹⁷ The Explanatory Memorandum to the 2015 Act which introduced these provisions states that 'While technically the amendments would not result directly in the expulsion of a person from Australia, as outlined above, expulsion (most likely removal under section 189 of the Migration Act) may be the outcome of the process which begins with cessation or renunciation.'

¹⁸ International Law Commission, Report on the Work of Its Sixty-Sixth Session, 44, U.N. Doc. A/69/10 (2014) ILC Draft Articles on the expulsion of aliens, Article 8. In the Commentary, the ILC further notes that 'deprivation of nationality, insofar as it has no other justification than the State's desire to expel the individual, would be abusive, indeed arbitrary within the meaning of article 15, paragraph 2, of the Universal Declaration of Human Rights.' United Nations, *Draft articles on the expulsion of aliens, with commentaries*, 2014, available at: <https://www.refworld.org/docid/5539ef8e4.html>

considerable interference with one's enjoyment of human rights,'¹⁹ including the right to an effective remedy and to equality before the law, the right to be free from exposure to risk of torture and ill-treatment, the right to freedom of movement and the right to return to one's own country.²⁰

The Statement of Compatibility with Human Rights that accompanied the 2015 amendments states that 'should circumstances arise where a person whose citizenship has ceased or has been renounced can properly consider Australia to be "his [or her] country", depriving them of the right to enter Australia would not be arbitrary. It would be based on a genuine threat to Australia's security'.²¹ It is important to recall, however, that the right to return to one's own country, enshrined in Article 12(4) of the International Covenant on Civil and Political Rights, is not subject to any limitation, even on national interest or security grounds.²² As noted in our previous submission, in *Nystrom v Australia* the UN Human Rights Committee reiterated that 'there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.²³

Deprivation of nationality resulting in statelessness or affecting the rights of a child is particularly concerning.

Disproportionality with respect to risk of rendering persons stateless

We are particularly concerned that the provisions in their current form risk rendering persons stateless. The Human Rights Council states that '[d]eprivation of citizenship that does lead to statelessness, or that increases the risk of rendering persons stateless, will generally be considered arbitrary 'because the impact on the individual far outweighs the interests the state seeks to protect'.²⁴

Australia is party to both the 1954 Convention Relating to the status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.²⁵ Article 8(1) of the 1961 Convention provides the general rule that a state 'shall not deprive a person of its nationality if such deprivation would render him stateless'.

¹⁹ UN High Commissioner for Human Rights (2018) Amicus Brief presented by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance before the Dutch immigration and naturalisation service, at page 9. See also E/CN.4/Sub.2/ 1988/35, para. 107 ("In view of Human Rights law, denationalisation should be abolished. It constitutes a breach of international obligations, in particular, if it is based on racial or religious discrimination.")

²⁰ Article 12(4) ICCPR

²¹ Explanatory Memorandum, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), para 18

²² Michelle Foster, Jane McAdam, Davina Wadley 'Part Two: Prevention and Reduction of Statelessness in Australia – An Ongoing Challenge' (2016) 40 *Melbourne University Law Review* at 497.

²³ Human Rights Committee, Views: Communication No 1557/2007, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) '*Nystrom v Australia*'

²⁴ UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28, 5. See Court of Justice of the European Union, Case No. C-135/08, *Rottmann v. Freistaat Bayern*, 2 March 2010.

²⁵ UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117; UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175

While Article 8(3) of the 1961 Convention contains a narrow set of exceptions under which a state may deprive a person of nationality even where that may render the person stateless, the exclusion clause is applicable only if the state made a declaration to that effect at the time of accession to the treaty. Australia did not make such a declaration.

We are concerned that although they apply only to dual nationals, the provisions carry the real risk of rendering persons stateless because they contain insufficient safeguards to ensure that a person is in fact a dual citizen before his or her citizenship is revoked.

The term 'stateless' is defined in Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons as a person 'who is not considered as a national by any State *under the operation of its law*'. The UNHCR states that 'a Contracting State cannot avoid its obligations based on its own interpretation of another State's nationality laws' and that the burden of proof 'lies primarily with the authorities of a State...to show that the person affected has another nationality'.

The UNHCR Handbook further explains that 'establishing whether an individual is not considered as a national under the operation of its 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 had an impact on the individual's status. This is a mixed question of fact and law'.

Without a clear and formalised process of liaison between nations, many citizens may notionally hold citizenships elsewhere but in practice are forced into statelessness by the operation of these provisions.²⁶ This is particularly concerning with respect to the renunciation provisions, which provide no guidance as to how the Government will determine whether a person is a dual national.

Indeed, the 2017-2018 Australian parliamentary eligibility crisis surrounding Section 44(i) of the *Commonwealth Constitution*²⁷ and the relevant High Court judgment in *Re Canavan*²⁸ highlight the fact that dual citizenship determination is often an uncertain and complex process.

Such a process opens up a global 'race to see which country can strip citizenship first ... To the loser goes the citizen'.²⁹ Making a determination regarding dual citizenship based on legislative text alone, without consultation with the relevant government, is likely to result in error.

²⁶ 'No person deprived of their British citizenship should be removed or threatened with removal unless another State has formally agreed to admit that person.' Professor Guy Goodwin-Gill, "Mr. Al-Jedda, Deprivation of Citizenship, and International Law", February 2014, paper submitted to the Joint Committee on Human Rights.

²⁷ *Commonwealth Constitution* s44(i)

²⁸ [2017] HCA 45

²⁹ Christian Joppke, 'Terror and the Loss of Citizenship' (2016) 20 *Citizenship Studies* 728, 743.

An in-depth analysis of the statelessness risks associated with the current provisions can be found in the article by Foster, McAdam and Wadley, entitled 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge'.³⁰

Disproportionality with respect to Impact on Children

The revocation of citizenship can have further unintended consequences for children. As only twelve Australians have been stripped of their citizenship under these provisions, it is difficult to assess the detriment to family or dependents. However, in the absence of a statutory requirement to consider the best interests of any children affected under the renunciation provisions before a person is deemed to have renounced their citizenship, it is likely that Australia is in breach of Article 3(1) of the Convention on the Rights of the Child.³¹ Renunciation under Articles 33AA(1) and 35(1)(b)(i) may result in separation of children from their family unit, deportation to unsafe countries or immigration detention.

There are currently an estimated forty Australian children of foreign fighters in Al-Hawl refugee camp in Syria.³² Children of foreign fighters are at risk of following a parent into statelessness or uncertain citizenship status. Given that the 'overall negative impact of statelessness on children cannot be overemphasised', the lack of specific procedures for taking into account the impact on children when a person is deprived of citizenship is deeply concerning.³³

IV Procedural standards of justice

The UNHCR states that 'loss and deprivation of nationality may only take place in accordance with law and accompanied by full procedural guarantees, including the right to a fair hearing by a court or other independent body'.³⁴

The non-statutory and non-transparent nature of the Citizenship Loss Board is concerning. With little to no public information about its constitution or its powers, there appear to be few safeguards to ensure due process.

It is questionable whether an undisclosed non-statutory body, operating *ex parte* with no opportunity afforded to respond to adverse evidence, meets the standards of procedural fairness. This is especially problematic given the wide range of conduct triggering automatic citizenship renunciation under Australia's renunciation provisions.³⁵

³⁰ (2016) 40(2) *Melbourne University Law Review* 456

³¹ UN General Assembly, Convention on the Rights of the Child 20 November 1989 (entry into force 2 September 1990).

³² 'Families of ISIS fighters to sue Australia over repatriation,' *Straits Times*, July 25, 2019 <<https://www.straitstimes.com/asia/australianz/families-of-isis-fighters-to-sue-australia-over-repatriation>>

³³ Report of the Secretary General, *Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless* (United Nations General Assembly 2015) [29].

³⁴ *Ibid.*

³⁵ Shipra Chordia, Sangeetha Pillai and George Williams, Submission to Parliamentary Joint Committee on Intelligence and Security, Review of Australian Citizenship Amendment (Allegiance to Australia) Bill 2015.

Although §§ 33AA(11)(b) and 35(6)(b) provide for notification of the right of review, in practice it is uncertain whether this provides a viable avenue for review. Indeed, there is no indication that any of the 12 persons who have had their citizenship renounced have lodged an application for review. Practically speaking, where the Minister has discretion to withhold notice of the renunciation of citizenship under § 33AA(10), there is a real risk that the person affected may not know of their deprivation of citizenship and will be unable to lodge an application for judicial review.

Even if a person is notified regarding their revocation, judicial review is nevertheless tightly constrained for a number of related reasons. First, persons deprived of citizenship are likely to be outside Australia; second, judicial review is prohibitively expensive; and finally, the requirements for judicial review are far stricter than merits review.

Indeed, Australia appears to be an outlier with respect to procedural safeguards. It is worth noting that most jurisdictions with citizenship revocation powers require a court determination.³⁶ In the United States citizenship is protected by the 14th Amendment, which bars the revocation of citizenship through legislative instrument.³⁷ Instead parties may be seen to voluntarily revoke citizenship through a number of ‘potentially expropriating acts’.³⁸ Determination of the question of whether an individual intended to relinquish citizenship rests in the hands of the court, not the executive, with the onus of proof lying with the Government.³⁹ Likewise, Belgium and Israel require a court conviction before citizenship is stripped.⁴⁰ Under the relevant UK legislation, which has received significant criticism for its expansive deprivation powers,⁴¹ an individual subject to revocation of citizenship possesses an automatic right of appeal.⁴²

V. Discrimination

As outlined in our previous submission, the current laws subject Australian citizens to differential treatment on the basis of their mono or dual citizenship. This raises the real concern that the provisions will be considered arbitrary and place Australia in violation of its

³⁶ UNHCR Expert Meeting, ‘Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality: Summary conclusions,’ Expert meeting convened by the Office of the United Nations High Commissioner for Refugees, Tunis, Tunisia, 31 October - 1 November 2013, T 19.

³⁷ *The United States Constitution*, 14th Amendment

³⁸ 8 U.S Code 1481(a)

³⁹ Submission 29. CCCS Submission to the PJCIS Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at 8-9.

⁴⁰ Michelle Foster, Jane McAdam and Davina Wadley, ‘The Protection of Stateless Persons in Australian law: Part 2- (2016) 40(2) *Melbourne University Law Review*.

⁴¹ Sangeetha Pillai and George Williams, ‘The Utility of Citizenship Stripping Laws in the UK, Canada and Australia,’ (2017) 41(2) *Melbourne University Law Review*; Michelle Foster, Jane McAdam and Davina Wadley, ‘The Protection of Stateless Persons in Australian law: Part 2- (2016) 40(2) *Melbourne University Law Review*.

⁴² *Special Immigration Appeals Commission Act 1997* (UK) s 2B; *British Nationality Act 1981* (UK) s 40A(1). See Sandra Mantu ‘Citizenship deprivation in the United Kingdom: Statelessness and terrorism’ (2014) *Tilburg Law Review*, 19 (Issues 1-2), 163-170.

other international law obligations not to discriminate on the basis of race, ethnicity, national origin or descent.⁴³

The principles of equality and non-discrimination are enshrined in all core human rights treaties and Australia is party to all of these.⁴⁴ The UN Rapporteur on Contemporary forms of Racism highlights that States' obligations to ensure equality and non-discrimination with regard to the enjoyment of nationality 'apply with regard to all citizenship deprivation decisions, not only in case where deprivation of citizenship might result in statelessness'.⁴⁵

For an identical act, the provisions impose a severe penalty on dual citizens which does not apply to mono citizens. In practice, the provisions are likely to have a disproportionate impact on migrants and/or racial minorities. As noted by Professor Gibney, 'denaturalization has been almost exclusively on citizens originally from Muslim-majority countries'.⁴⁶

Conclusion

We concluded our previous submission with the following question which applies with equal force to the provisions in their current form: If we can find in the context of mono-citizens alternatives to citizenship deprivation, on what basis can the government justify the deprivation of citizenship of dual citizens, especially when the measure risks rendering them stateless?

The questionable motivations animating the deprivation provisions, combined with the absence of any evidence that points to the effectiveness of citizenship stripping as a counterterrorism measure, makes it difficult to sustain an argument that the deprivation provisions serve a legitimate purpose. This concern, together with the real risk that individuals will be rendered stateless in the absence of legislative guidance and adequate checks and oversight, throws into sharp relief the disproportionality of the current legislative framework, placing Australia in breach of the international prohibition of arbitrary deprivation of nationality.

⁴³ Amicus Brief Presented by the UN Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance Before The Dutch Immigration and Naturalization Service

⁴⁴ See ICERD arts 1 and 2; see also ICCPR arts 2(1) and 26; ICESCR art 2(2); CEDAW art. 1; CRC art 2(1)-(2). Art 9 of the 1961 Statelessness Convention also prohibits deprivation of nationality 'on racial, ethnic, religious or political grounds'.

⁴⁵ UN High Commissioner for Human Rights (2018) Amicus Brief presented by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance before the Dutch immigration and naturalisation service.

⁴⁶ Matthew J Gibney, 'Denationalisation and discrimination' (2019) Journal of Ethnic and Migration Studies.

Please do not hesitate to contact us should you have any questions about this submission or require further information.

Yours sincerely,

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