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**Submission to the Parliamentary Joint Committee on Intelligence
and Security**

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

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1. Executive Summary	4
2. Background	4
3. Human Rights Analysis	4
3.1 Prohibition against arbitrary deprivation of nationality	5
3.1.1 Necessity and proportionality	5
3.1.2 Procedural standards	6
3.1.3 Discrimination.....	8
3.2 Duty to prevent statelessness	8
3.3 Freedom of movement.....	10
3.3.1 The right to enter and return to one’s own country	10
3.3.2 Other movement rights.....	11
4. Conclusion.....	11

The Castan Centre for Human Rights Law is grateful to the Parliamentary Joint Committee on Intelligence and Security (the Committee) for the opportunity to make this submission in respect of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (the Bill).

In preparing this submission, we note the documents and transcripts accompanying the Bill, including the Explanatory Memorandum and Statement of Compatibility with Human Rights. While not the subject of this review, we note and welcome the concurrent and ongoing review by the Committee of the existing terrorism-related citizenship cessation provisions. In this regard, we note in particular the report of the Independent National Security Legislation Monitor (**INSLM**) to the Attorney-General and the recommendations set out therein. Similarly, we note the relevant scrutiny reports of the Parliamentary Joint Committee on Human Rights (**PJCHR**) on existing cessation provisions.

The Castan Centre welcomes the invitation to make a submission on any or all aspects of the Bill. Due to the gravity and ramifications for identity and the enjoyment of rights, provisions on cessation must be approached carefully and with due regard for human rights.

1. Executive Summary

The Castan Centre's submission addresses human rights issues in respect of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (**the Bill**).

In the absence of an Australian charter or bill of rights, our human rights analysis of the Bill is made in the context of Australia's international human rights obligations. Contrary to the Government's Statement of Compatibility with Human Rights, we conclude that the Bill, if enacted, would contravene a number of human rights obligations, including the duty not to arbitrarily deprive persons of their nationality; the duty to prevent statelessness; the duty to respect and protect the right of persons to enter and return to their own country and the duty to afford sufficient and adequate procedural safeguards.

We submit that while there is a need for reform of existing cessation provisions, the Bill does not have due regard for international human rights law obligations.

2. Background

In May 2014, an estimated 12,000 'foreign terrorist fighters'¹ from 81 countries (including Australia) had travelled to Syria and Iraq to join the Islamic State and other terrorist groups.²

In response to the phenomenon of foreign terrorist fighters, the provisions on citizenship cessation in the *Australian Citizenship Act 2007* (Cth) were expanded in 2015 to include terrorism-related circumstances.³ Since the military defeat of the Islamic State, many foreign fighters have returned to their countries of origin. The Explanatory Memorandum of the Bill under review refers to an estimated 80 remaining foreign terrorist fighters in Syria and Iraq who may now 'seek to return to Australia'.⁴ Additionally, family members of foreign terrorist fighters, most of them women and children, remain in camps for the internally displaced in Syria.⁵

3. Human Rights Analysis

The UN Global Counter-Terrorism Strategy established a common framework for combating terrorism which underlines that any counter-terrorism measures must adhere to international law obligations, including international human rights law.⁶ This includes measures to address the phenomenon of foreign terrorist fighters.⁷ The rationale is that measures in violation of human rights undermine not merely the values they seek to protect but also risk 'fuel[ing] further violent extremism that can be conducive to terrorism'.⁸ For the reasons set out below, the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) (**the Bill**) is at odds with both human rights law obligations and the global counter-terrorism framework within which Australia has agreed to operate.

¹ The UN Security Council define such individuals as persons who 'travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training' SC Res 2178, UN Doc S/RES/2178 (24 September 2014) 2.

² Richard Barrett, 'Foreign Fighters in Syria', *Soufan Group* (June 2014) 9 < <http://soufangroup.com/wp-content/uploads/2014/06/TSG-Foreign-Fighters-in-Syria.pdf>>.

³ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth).

⁴ Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) [80].

⁵ See, eg, United Nations Office for the Coordination of Humanitarian Affairs, *Humanitarian Update* (29 September 2019) <https://reliefweb.int/sites/reliefweb.int/files/resources/OCHA_Syria_AI%20Hol%20camp_Snapshot_as%20of%2029%20September%202019.pdf>.

⁶ *United Nations Global Counter-Terrorism Strategy*, GA Res 60/288, UN Doc A/RES/60/288 (20 September 2006, adopted 8 September 2006) reaffirmed in 2018 United Nations General Assembly, *The United Nations Global Counter-Terrorism Strategy Review*, 2 July 2018, UN Doc A/RES/72/284.

⁷ SC Res 2178, UN Doc S/RES/2178 (24 September 2014) [5]; Fionnuala Ní Aoláin, Special Rapporteur, *Letter to the UN CTED concerning pending review of the Madrid Guiding Principles* (7 December 2018) < <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24238>>.

⁸ *The United Nations Global Counter-Terrorism Strategy Review*, GA Res 72/284, UN Doc A/RES/72/284 (2 July 2018, adopted 26 June 2018).

Our submission sets out our principal concerns with the Bill. It is not an exhaustive account of all human rights issues given the impact of citizenship cessation on the enjoyment of many other rights. Other issues mentioned but not covered in detail by our submission include, for example, the specific protections afforded to children under the *Convention on the Rights of the Child*.

3.1 Prohibition against arbitrary deprivation of nationality

It is well-established under international human rights law that no one may be arbitrarily deprived of nationality.⁹ The UN Secretary-General has underlined that arbitrariness in this context means deprivation which fails to adhere to a set of standards. The requisite standards include that the deprivation must: (i) be in accordance with domestic law; (ii) pursue a legitimate purpose; (iii) be necessary and proportionate; and (iv) adhere to procedural guarantees.¹⁰ Further, discriminatory deprivation of nationality is arbitrary.¹¹

Our main concerns with the Bill in respect of these standards relate to the requirements of necessity, proportionality, due process and discrimination.

3.1.1 Necessity and proportionality

I. Necessity

Cessation is a permanent and severe consequence which impacts on a person's fundamental rights and identity. As discussed in section 3.2 below, it may even render a person stateless. The gravity of cessation and the existence of many other counter-terrorism measures beg the question whether it is the 'least intrusive instrument' necessary to protect public safety.¹² The 2018 review of the UN Global Counter-Terrorism Strategy underlined that 'a national criminal justice system based on respect for human rights and the rule of law, due process and fair trial guarantees is one of the best means for effectively countering terrorism and ensuring accountability'.¹³

Indeed, legitimate concerns have been raised by national and international experts as to the necessity and effectiveness of citizenship cessation to address the phenomenon of foreign terrorist fighters.¹⁴ The UN Working Group on protecting human rights while countering terrorism found that deprivation of nationality may in fact 'be counterproductive by denying the opportunity for deradicalisation, reintegration and rehabilitation'.¹⁵ The Independent International Commission of Inquiry on Syria noted in September 2019 that many family members of foreign terrorist fighters held in the Al-Hol camp in

⁹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('UDHR') art 15. Article 15 of the UDHR is recognised as customary international law see, eg, *Office of the United Nations High Commissioner for Refugees: resolution / adopted by the General Assembly*, GA Res 50/152, UN Doc A/RES/50/152 (9 February 1996, adopted 21 December 1995) and *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General UN Doc*, UN Doc A/HRC/13/34 [21]. Further, Article 8(1) of the *Convention on the Rights of the Child* protects children's right to preserve their identity, including nationality from unlawful interference.

¹⁰ *Arbitrary deprivation of nationality: report of the Secretary-General*, UN Doc A/HRC/10/34 (26 January 2009) [49].

¹¹ *Ibid* [54].

¹² *Ibid* [49].

¹³ *The United Nations Global Counter-Terrorism Strategy Review*, GA Res 72/284, UN Doc A/RES/72/284 (2 July 2018, adopted 26 June 2018) 5.

¹⁴ See, eg, Sangeetha Pillai and George Williams, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia' (2017) 41(2) *Melbourne University Law Review* 845-849; Laura van Waas and Sangita Jaghai 'All Citizens are Created Equal, but Some are More Equal Than Others' (2018) 65 *Netherlands International Law Review* 3 413-430.

¹⁵ United Nations Counter-Terrorism Implementation Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, *Guidance to States on human rights-compliant responses to the threat posed by foreign fighters* (2018) 23 < <https://www.un.org/sc/ctc/wp-content/uploads/2018/08/Human-Rights-Responses-to-Foreign-Fighters-web-final.pdf>>. 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* 845-849.

Syria are at a 'higher risk of further radicalisation'.¹⁶ Citizenship cessation laws in countries like Australia bar repatriation of persons in Syrian camps. The camps are unsafe, lack basic services and are far from sustainable solutions.¹⁷ As seen in recent days, the Kurdish-guarded camps are at risk of Turkish invasion following retreat by US troops.¹⁸ This may result in the escape of radical persons who may seek to re-establish terrorist cells.¹⁹

While the Explanatory Memorandum of the Bill mentions other counter-terrorism measures available it does not provide details as to why citizenship cessation is necessary as 'part of a suite of measures' to combat terrorism.²⁰ Risks accompanied by other measures, such as radicalisation in prisons, ought to be weighed against risks of radicalisation if individuals are not repatriated to Australia.

II. Proportionality

In respect of proportionality, the Bill includes a list of public interest considerations which the Minister must consider when making a cessation determination under ss 36B and 36D.²¹ While this list of considerations would assist the Minister in assessing the proportionality of cessation to elements such as severity of the conduct and the degree of threat posed by the individual, the list does not oblige the Minister to consider the impact on the human rights of the individual subjected to the determination.

One exception is the criterion which obliges the Minister to consider the best interest of the child as a primary consideration in a determination involving a child (as required by the *Convention on the Rights of the Child (CRC)*). However, no consideration of the best interest of the child of a relevant adult is required if the determination is in respect of such adult. Further, the Explanatory Memorandum notes that 'the best interest of the child must be considered alongside protection of the community'²² and therefore not as the primary consideration, contrary to the CRC and clarifications provided by the Committee on the Rights of the Child.²³ The very possibility of children being subject to cessation raises issues of proportionality given the gravity of cessation. As the UN has confirmed, most recently in its *Handbook on Children Affected by the Foreign-Fighter Phenomenon*, children recruited and exploited by terrorists should be treated 'primarily as victims'.²⁴

As noted in section 3.2 below, the difficulty of determining if a person is in fact a dual citizen means that cessation provisions present a risk that individuals may be rendered stateless. The gravity of such outcome questions the proportionality of citizenship cessation provisions, particularly in light of the shortcomings of procedural safeguards discussed below.

3.1.2 Procedural standards

The prohibition on arbitrary deprivation of nationality requires adherence to due process. The right to a fair hearing is protected under Article 14(1) of the *International Covenant on Civil and Political Rights (ICCPR)*, and applies in both determinations of criminal charges and in a 'suit at law'. A 'suit at law' include administrative law proceedings before judicial body.²⁵ A fair hearing is not limited to citizens,

¹⁶ *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc A/HRC/42/51 (15 August 2019) [85].

¹⁷ Vivian Yee, 'Guns, Filth and ISIS: Syrian Camp Is 'Disaster in the Making'', *The New York Times* (News article, 3 September 2019).

¹⁸ Ben Hubbard, 'Pulling of U.S. Troops in Syria Could Aid Assad and ISIS', *The New York Times* (News article, 7 October 2019) <<https://www.nytimes.com/2019/10/07/world/middleeast/trump-turkey-syria-kurds.html>>.

¹⁹ *Ibid.*

²⁰ Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) [17].

²¹ Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) s 36E(2)(a)-(h).

²² Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) [64].

²³ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1); United Nations Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc CRC/C/GC/14 (29 May 2013) [37].

²⁴ United Nations Office of Counter-Terrorism, *Handbook Children affected by the foreign-fighter phenomenon: Ensuring a child rights-based approach* (October 2019) 35 [78]. See also, United Nations Office on Drugs and Crime (UNODC), *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System* (Vienna, 2017), ch 2.

²⁵ *Ibid* [16].

but must be available to all individuals, regardless of nationality or statelessness.²⁶ Given the severity of citizenship cessation for the enjoyment of rights and a person's identity, the UN Secretary-General has underlined that it must be possible for citizenship deprivation to be reviewed by a court or other independent body.²⁷

Nevertheless, several shortcomings of the Bill place significant limitations on procedural safeguards:

- **Notice of cessation:** Cessation determinations under the Bill are exempt from principles of natural justice.²⁸ Even though the 'starting presumption' (as expressed in the Explanatory Memorandum)²⁹ is that the Minister must give notice of a cessation determination, the broadly worded discretion of the Minister to withhold notice means that there may be many instances where notice is not provided:
 - Discretion to withhold: To withhold notice, the Minister must only be 'satisfied' that notice 'could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations'.³⁰ The Explanatory Memorandum explains that withholding notice does not prevent a person seeking judicial review of the determination 'should they become aware of the cessation determination through another means'.³¹ This circumstance seems unlikely and no explanation is provided as to such other means.
 - Duration of withheld notice: Notice may be withheld (subject to review) for up to a total of six years during which time a person would be unaware that their citizenship has been ceased and therefore unable to challenge the determination.³²
 - Content of a notice: Even if notice is provided, the Minister must only provide the 'basic description of the conduct' and may withhold content for similarly broad reasons as withholding notice: 'could prejudice security [...]'; and 'would be likely to be contrary to the public interest for any other reason'.³³
- **Practical ability to access courts:** Given that the Bill seeks to target foreign terrorist fighters, cessation determinations will likely be made when the individual in question is overseas. The impact which cessation has on other human rights, such as movement rights discussed in section 3.3 below, means that it may be very difficult for a person to move from one place to another, let alone access a relevant court to challenge the determination or apply to the Minister for a revocation of the determination. The UN Secretary-General has noted that during an appeal process, a cessation determination should be suspended to facilitate access to review.³⁴
- **Scope of review:** Even if a person manages to access court and file for judicial review of a cessation determination, the scope of review is limited:
 - Limited scope of judicial review: The Bill notes only the possibility for judicial review of a cessation determination under ss 36B(1) or 36D(1) (or a decision on revocation of a determination) in respect of the original jurisdiction of the High Court and Federal Court.³⁵

²⁶ United Nations Human Rights Committee, *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) [9].

²⁷ *Arbitrary deprivation of nationality: report of the Secretary-General*, UN Doc A/HRC/10/34 (26 January 2009) [56].

²⁸ Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) ss 36B(11), 36D(9)

²⁹ Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) [38].

³⁰ Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) s 36G(1).

³¹ Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) [38].

³² Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) ss 36G(3)-(4).

³³ *Ibid* 36F(5)-(6).

³⁴ *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, UN Doc A/HRC/25/28 (19 December 2013) [33].

³⁵ See notes pertaining to ss 36B, 36D and 36H Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth), referring to review under *Australian Constitution* (Cth) s 75(v); *Judiciary Act 1903* (Cth) s 39B. The Bill does not mention review pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

A reasonable, yet erroneous determination that a person was a dual citizen, the consequence of which may render a person stateless, is not subject to review given that the Bill does not require the Minister to be satisfied as a matter of fact that a person is not a national or citizen of any other country (see section 3.2 below on the duty to prevent statelessness).

- Lack of merits review: Despite the gravity of citizenship cessation and limited scope of judicial review, the Bill does not propose to allow for merits review of a determination before the Administrative Appeals Tribunal. We agree with the Australian Human Rights Commission's submission in respect of the existing citizenship loss provisions that cessation determinations, given their serious consequences, ought to be subject to merits review.³⁶
- **Determination of conduct which reflect criminal offences**: The Bill retains the possibility for cessation on the basis of conduct.³⁷ The cessation determination for the Minister is whether or not a person engaged in certain conduct (effectively the *actus reus* of a criminal offence).³⁸ Such a determination is made without natural justice and the extensive safeguards available in the determination of a criminal charge.³⁹

3.1.3 Discrimination

As noted above, discriminatory deprivation of nationality is considered arbitrary and therefore contrary to the prohibition on arbitrary deprivation of nationality.⁴⁰ More broadly, international law protects against discrimination on a comprehensive list of grounds, including national origin, race and ethnicity.⁴¹

Cessation determinations under the proposed ss 36B and 36D are only possible in respect of dual citizens due to the need to prevent statelessness discussed further in section 3.2 below. The effect of the measure would be to place dual citizens at a particular disadvantage. The majority of dual citizens tend to belong to ethnic and religious minorities and acquire dual citizenship at birth or through naturalisation while maintaining the first citizenship.⁴² As such, measures which directly discriminate against dual citizens may also be indirectly discriminatory on grounds such as ethnicity and religion.

It is worth noting that discriminatory intent is not relevant as to whether discrimination has taken place.⁴³ For this reason, applying the measure only to dual citizens to prevent statelessness rather than to discriminate does not prevent it from being discriminatory.

Differential treatment is only justified if it is for a legitimate purpose and necessary and proportionate in the pursuit of that legitimate purpose.⁴⁴ As noted above, the proposed cessation measures appear neither necessary nor proportionate.

3.2 Duty to prevent statelessness

³⁶ Australian Human Rights Commission, *Submission to the Independent National Security Legislation Monitor*, (14 June 2019) <https://www.humanrights.gov.au/our-work/legal/submission/review-citizenship-loss-provisions-australian-citizenship-act-2007-cth#_edn43>.

³⁷ Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) s 36B.

³⁸ *Ibid* s 36B(6).

³⁹ *Ibid* s 36B(11); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 14-15.

⁴⁰ *Arbitrary deprivation of nationality: report of the Secretary-General*, UN Doc A/HRC/10/34 (26 January 2009) [54].

⁴¹ See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 26.

⁴² Laura van Waas and Sangita Jaghai 'All Citizens are Created Equal, but Some are More Equal Than Others' (2018) 65 *Netherlands International Law Review* 413, 420.

⁴³ Committee on the Rights of Persons with Disability, *General comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [18].

⁴⁴ See, eg, UN Committee on Economic, Social and Cultural Rights, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/20 (2 July 2009) [13].

The 1961 *Convention on the Reduction of Statelessness* prohibits States parties from depriving a person of nationality if this would result in the person being stateless, save for a few narrow exceptions or if a country retains their right to deprive a person of nationality despite the prohibition.⁴⁵ Australia did not retain such right upon ratification of the Convention.⁴⁶ The 1954 *Convention relating to the Status of Stateless Persons* defines a 'stateless person' as 'a person who is not considered as a national by any State under the operation of its law'.⁴⁷

To protect against statelessness, the Bill includes a provision that a determination to cease citizenship must not be made unless the Minister is 'satisfied' that the person would not 'become a person who is not a national or citizen of any country'.⁴⁸ This amends existing provisions where the Minister may make a determination only if satisfied that a person is in fact a national or citizen of a country other than Australia.⁴⁹ The Castan Centre expresses concerns over the proposed change of wording as it may increase the risk of persons being rendered stateless as a determination may be made by the Minister even if the Minister is incorrect.

The difficulty of determining whether a person is in fact a dual citizen is illustrated by a number of recent cases involving efforts to keep persons involved in terrorism from returning to their country of origin.

For example:

- December 2018 **Neil Prakash:** Australia argued that Neil Prakash had dual Australian and Fijian citizenship, which is disputed by Fiji.⁵⁰ Despite the ongoing dispute, his citizenship was ceased under the existing provisions in 2018.⁵¹
- February 2019 **Shemima Begum:** A similar disagreement arose between the UK and Bangladesh in respect of Shemima Begum, the teenager who travelled to Syria to join the Islamic State and was stripped of her British citizenship by UK authorities, despite the insistence by Bangladesh that she never applied for dual citizenship.⁵²
- October 2019 **Zehra Duman:** The New Daily reported that the Australian Government has ceased the citizenship of dual Australian-Turkish citizen Zehra Duman, another teenager who travelled to Syria to join the Islamic State.⁵³ Another article noted that it is not clear if the cessation happened before or after the birth of her two children which means that they may or may not be stateless.⁵⁴

⁴⁵ *Convention on the Reduction of Statelessness* 1961, opened for signature 30 August 1961 989 UNTS 175 (entered into force 13 December 1975) arts 8(1),(2)(a)-(b), (3).

⁴⁶ 'Convention on the Reduction of Statelessness' *United Nations Treaty Collection (Web Page)* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5#EndDec>.

⁴⁷ *Convention relating to the Status of Stateless Persons* 1954, opened for signature 28 September 1954 360 UNTS 117 (entered into force 6 June 1960) art 1(1).

⁴⁸ Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) ss 36B(2) 36D(2).

⁴⁹ *Australian Citizenship Act 2007* (Cth) s 35A(1)(c).

⁵⁰ Helen Davidson and Amy Remeikis, 'Neil Prakash 'not a Fiji citizen': Dutton move to strip Australian citizenship in doubt', *The Guardian* (News article, 2 January 2019) <<https://www.theguardian.com/australia-news/2019/jan/02/neil-prakash-not-a-fiji-citizen-dutton-move-to-strip-australian-citizenship-in-doubt>>.

⁵¹ *Ibid.*

⁵² Charles Hymas, 'Sajid Javid's decision to strip Shamima Begum of her citizenship questioned by one of UK's most senior judges', *The Telegraph* (News article, 9 June 2019) <<https://www.telegraph.co.uk/news/2019/06/09/sajid-javids-decision-strip-shamima-begum-citizenship-questioned/>>.

⁵³ Samantha Maiden, 'Morrison government strips jihadi bride Zehra Duman of Australian citizenship', *The New Daily* (News article, 7 October 2019) <<https://thenewdaily.com.au/news/national/2019/10/07/morrison-government-strips-zehra-duman-australian-citizenship/>>.

⁵⁴ Samantha Maiden, 'Kids of jihadi bride Zehra Duman may have lost right to claim Australian citizenship', *The New Daily* (News article, 9 October 2019) <<https://thenewdaily.com.au/news/national/2019/10/09/kids-zehra-duman-citizenship-doubt/>>.

The purpose behind the lower threshold in the Bill is to ‘facilitate the Minister’s power to make a determination’.⁵⁵ On the contrary, we consider that it is precisely because of the difficulty of establishing whether a person has dual citizenship that the threshold should not allow for reasonable but erroneous determinations.

The Bill contains two added safeguards against statelessness: (i) a mandatory revocation of the Minister’s determination (if satisfied that a person is, in fact, stateless); and (ii) automatic revocation if established through judicial review.⁵⁶ For the reasons discussed in section 3.1.2 above, the Castan Centre considers that these additional safeguards do not provide sufficient protection to remedy the risk that a person may be rendered stateless as a result of the operation of the citizenship cessation provisions.

3.3 Freedom of movement

3.3.1 The right to enter and return to one’s own country

Article 12(4) of the ICCPR prohibits arbitrary deprivation of the right to enter one’s ‘own country’. The UN Human Rights Committee has confirmed that this also covers the right to return to one’s own country.⁵⁷

As acknowledged by Government in the Statement of Compatibility with Human Rights, the UN Human Rights Committee has interpreted ‘own country’ as going beyond nationality or citizenship.⁵⁸ Indeed, it extends to a country where a person has ‘special ties’ (e.g. long duration of stay in the country, the presence of family and ‘lack of any other ties with another country other than at best formal nationality’⁵⁹) and therefore cannot be considered a mere alien.⁶⁰ For this reason, there may be instances where a person deprived of Australian citizenship may still consider Australia their ‘own country’.⁶¹

In the context of the Bill, the Government considers that through certain behaviour and criminal convictions which ‘repudiates allegiance to Australia’, a person has voluntarily severed ties with Australia.⁶² Yet this may not be the case. For example, a dual citizen may have lived most if not all their life in Australia, have all of their family in Australia, and may never even have been to their other country of citizenship. We therefore consider that it is incorrect to conclude that Article 12(4) is never applicable to persons covered by the Bill’s provisions. A case-by-base assessment of whether the person has ‘strong ties’ with Australia must be undertaken.

In cases where Article 12(4) applies, we are concerned that the Bill may risk arbitrary deprivation of the right to enter/return. The Government considers that the proposed measures are ‘proportionate to the legitimate goal of ensuring the security of the Australian community’.⁶³ However, such considerations seem to disregard the fact that Article 12(4) is not subject to the limitation criteria set out in Article 12(3), e.g. that restrictions must be provided by law and necessary to protect (inter alia) national security and public order (*ordre public*).⁶⁴ Rather, ‘arbitrary’ for the purpose of Article 12(4) is deprivation which is

⁵⁵ Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) [119].

⁵⁶ Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) ss 36H(3)(i), 36K(1).

⁵⁷ United Nations Human Rights Committee, *General comment no. 27, Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21 (2 November 1999) [19], [21].

⁵⁸ *Ibid* [20]; Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) [30].

⁵⁹ See, eg, Human Rights Committee, Views: Communication No 1557/2007, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) 18 [7.4] (*Nystrom v Australia*); Human Rights Committee, Views: Communication No 1959/2010, 102nd sess, UN Doc CCPR/C/102/D/1959/2010 (1 September 2011) 17 [8.5] (*Warsame v Canada*); Human Rights Committee, Views: Communication No 2264/2013, 122nd sess, UN Doc CCPR/C/122/D/2264/2013 (29 August 2018) 11-12 [9.3] (*Budlakoti v Canada*).

⁶⁰ United Nations Human Rights Committee, *General comment no. 27, Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21 (2 November 1999) [20].

⁶¹ *Ibid*.

⁶² Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) [30].

⁶³ *Ibid* [31].

⁶⁴ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, 2013) [12.27].

not in accordance with the provisions, aims and objectives of the Covenant and not reasonable in particular circumstances.⁶⁵ Further, the UN Human Rights Committee has confirmed that it includes elements such as due process of law, necessity and proportionality.⁶⁶

Given the issues concerning due process, necessity and proportionality in respect of other rights (including other Covenant rights) set out in sections 3.1 and 3.2 of our submission, we consider that the Bill does not protect against arbitrariness in respect of Article 12(4). This is particularly so as the UN Human Rights Committee has underlined that in ‘few, if any, circumstances’ is deprivation of this right reasonable.⁶⁷

3.3.2 Other movement rights

While not addressed in this submission, we note the possibility that citizenship cessation impacts on other movement rights protected under the ICCPR, namely Article 12(1) the right to freedom of movement within a country and Article 12(2) the freedom to leave any country. In this regard, we support the analysis in the relevant paragraphs of Report 1 of 2019 of the Parliamentary Joint Committee on Human Rights.⁶⁸

4. Conclusion

For the reasons set out in this submission, we find that the proposed measures in the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 do not have due regard for human rights. While not an exhaustive account of all human rights issues surrounding citizenship cessation, the Bill contravenes:

- The prohibition on arbitrary deprivation of nationality;
- The right to a fair hearing;
- The right to non-discrimination;
- The duty to prevent statelessness; and
- Freedom of movement (notably the right to enter and return to one’s own country).

⁶⁵ United Nations Human Rights Committee, *General comment no. 27, Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21 (2 November 1999) [21].

⁶⁶ Human Rights Committee, Views: Communication No 2264/2013, 122nd sess, UN Doc CCPR/C/122/D/2264/2013 (29 August 2018) 12 [9.4] (*Budlakoti v Canada*).

⁶⁷ United Nations Human Rights Committee, *General comment no. 27, Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21 (2 November 1999) [21].

⁶⁸ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 1 of 2019* (12 February 2019) [1.20]-[1.22].