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Peter McMullin Centre on Statelessness

Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

Mr Andrew Hastie MP

Chair

Parliamentary Joint Committee on Intelligence and Security

By email: pjcis@aph.gov.au

18th January 2019

Dear Chair,

We are pleased to make this submission to the Inquiry by the Parliamentary Joint Committee on Intelligence and Security into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 ('the Bill').

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.

This submission is focused on Australia's compliance with international law obligations, primarily relating to the reduction and prevention of statelessness. We explain that the new amendments, which lower the threshold for depriving dual nationals of citizenship on national security grounds and adjust the threshold for dual citizenship determination, are inconsistent with Australia's international human-rights obligations.

Specifically, we have serious concerns that the new Bill raises considerable issues relating to statelessness and is therefore incompatible with Australia's obligations not to render persons stateless. The new Bill heightens the danger of rendering persons stateless by weakening and making seriously insufficient the safeguards to ensure that a person is in fact a dual citizen before his or her citizenship is removed.

We request that the Committee recommend that the Bill not pass in its present form.

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1. State discretion in nationality matters is not absolute

a. Under international law, states have traditionally been granted broad discretion in the regulation of nationality matters. This is not, however, an absolute discretion. States' prerogative in nationality matters has been gradually limited by the evolution of human rights law; more specifically, it is subject to the individual right to a nationality[1] and the obligation not to render a person stateless.

b. In other words, 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 statelessness.

c. We have concerns that the proposed amendments to the Australian Citizenship Act raise critical issues concerning their compatibility with Australia's obligations under Article 8 of the 1961 Convention on the Reduction of Statelessness, as well as other international human rights law obligations.

2. 1961 Convention on the Reduction of Statelessness

a. Australia is party to both the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.[2] Australia has not entered any reservations or declarations in relation to these two treaties.

b. In particular, although 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.

c. 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'.**

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[1] UN Human Rights Council Resolutions 7/10 of 27 March 2008, 10/13 of 26 March 2009, 13/2 of 24 March 2010, 20/4 and 20/5 of 05 July 2012, 26/14 of 11 July 2014, 32/5 of 30th June 2016.

[2] Both the 1954 Convention, and 1961 Convention, were ratified by Australia on 13th December 1973.

d. The Statement of Compatibility with Human Rights states that it is an intention of the Bill to ensure that a dual national "would not become stateless."[3] However we note that Australia's international legal obligations to prevent statelessness are not explicitly mentioned in the terms of the proposed amendments (only 'Australia's international relations' are mentioned), and in our view the proposed amendments risk rendering the Citizenship Act inconsistent with Australia's legal obligations in several key ways.

e. 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'.

f. The terms of Article 1(1) make clear that the inquiry as to whether an individual is stateless is a present determination ('is not considered'). It is **not** an inquiry into whether a person may have a right to apply for or acquire citizenship, or otherwise at some point be 'considered as a national…' by a state.

g. This is supported by the UNHCR Handbook on Protection of Stateless Persons which clarifies that:

> An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic 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.[4]

h. The Amendment is explicitly designed to 'adjust the threshold for determining dual citizenship' (explanatory memorandum). This 'adjustment' is clearly a **lowering** of the threshold as recognised in the Statement of Compatibility with Human Rights which explains: 'the requirement that a person is a national or citizen of a country other than Australia at the time of

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[3] Explanatory Memorandum, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (Cth) at 7.

[4] Part One of UNHCR, Handbook on Protection of Stateless Persons (UNHCR Handbook), 30 June 2014, paragraph 50, emphasis added. See also UNHCR Expert Meeting (Tunis): '[S]tates are required to examine whether the person possesses another nationality at the time of […] deprivation, not whether they could acquire a nationality at some future date'. 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.

a Ministerial determination will be amended to require **only** that the Minister be satisfied that the person would not, if the Minister were to determine that the person ceases to be an Australian citizen, **become** a person who is not a national or citizen of any country' (see [11], emphasis added).

i. Invocation of the language of 'become a person who is not a national or citizen of any country' in 35A(1)(b) hence appears intentionally designed to permit a **temporal gap and predictive element** to the minister's discretionary powers. While the current s 35A(1)(c) states the test as being whether the person is a national or citizen of a country other than Australia '*at the time when the Minister makes the determination*', the proposed amendment contains no such temporal reference.

j. Accordingly, it may be open on this amendment for the Minister to find that an individual will not 'become' stateless because the individual (in the Minister's view) may have the opportunity or right to apply for citizenship elsewhere despite not currently possessing a second citizenship. **This conflicts both with the plain meaning of Article 1(1) of the 1954 Convention and UNHCR's authoritative guidance.**

k. 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*'.[5]

l. This proposed amendment is claimed to be justified also on the basis that any adjustment of the threshold would be consistent with s 34(3)(b) of the Citizenship Act which engages similar language in the context of revocation by fraud. However, Article 8(2)(b) of the 1961 Convention provides that notwithstanding the prohibition on deprivation resulting in statelessness, a person may be deprived of his or her nationality, 'where the nationality has been obtained by misrepresentation or fraud'. Hence this is not a valid justification as the two situations are subject to different legal obligations and are thus not comparable.

3. Inadequate statelessness determination mechanism: standard of proof

a. Australia made a pledge to the United Nations in 2011 'to better identify stateless persons and assess their claims',[6] yet there still exists a 'lack of

[5] Ibid

[6] See UNHCR, *Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons (Geneva, Palais de nations, 7-8 December 2011)* (2012), 49.

consistency and clarity concerning the methods for ascertaining whether a person is indeed a citizen of another state'.[7]

b. It is widely recognised that statelessness determination is complex. According to the UNHCR Handbook, the reference to "law" in Article 1(1) of the 1954 Convention should be read broadly to 'encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice'.[8]

c. 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'.[9]

d. Hence, the determination whether an individual is currently a national of another state, which involves an examination of foreign nationality law, including its implementation in practice, must be undertaken carefully and thoroughly.

e. The 2017-2018 Australian parliamentary eligibility crisis surrounding Section 44(i) of the *Commonwealth Constitution*[10] and the relevant High Court judgment in *Re Canavan*[11] highlight the fact that dual citizenship determination is often an uncertain and complex process, even for individuals who personally seek to verify their own status.

f. Among the seven parliamentarians whose dual-citizenship status was in question, one of the examples was that of Senator Matt Canavan. Prior to 2017, Canavan believed that he did not have any citizenship aside from Australian citizenship. In 2017 he discovered that his mother had registered him with Italian authorities in 2006 as an Italian resident abroad. Given that, as a parliamentarian, he was restricted to Australian citizenship, Canavan

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[7] Michelle Foster, Jane McAdam and Davina Wadley, 'The Protection of Stateless Persons in Australian Law: Part 2' (2016) 40(2) *Melbourne University Law Review*, at 497.

[8] UNHCR, *Handbook on Protection of Stateless Persons*, above note 4.

[9] Ibid

[10] *Commonwealth Constitution* s44(i)

[11] [2017] HCA 45

confirmed this issue with Italian authorities. To his surprise, they responded that he had indeed been a citizen since 2006. He thus resigned from his position as Commonwealth Senator. However, it was later discovered per the High Court's judgment on this case that Canavan was never a citizen of Italy.[12] A similar finding was made with respect to the case of Senator Nick Xenophon.[13]

g. Against this background, it is extremely concerning that while the existing legislation requires the Minister to determine whether 'the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination', the proposed amendment lowers this standard to simply a question of whether 'the Minister *is satisfied* that the person would not….become a person who is not a national or citizen of any country'.

h. Determinations based on the 'satisfaction' of the Minister would be a matter of 'reasonableness'. Yet such a determination does not operate on a factually certain basis. A reasonably 'satisfactory' determination could be made in cases where information indicates that the person is a dual-national, even if that is not entirely certain. Accordingly, the accuracy of the Minister's decision under the proposed amendments may be less robust, and as discussed below, the extent to which a Minister's 'reasonableness' is challengeable through judicial review is significantly more limited than a challenge on jurisdictional fact.

4. Inadequate statelessness determination mechanism: procedural requirements

a. In light of the complexity of statelessness determination, and particularly the potentially dire consequences of incorrectly assessing statelessness, it is well understood that procedural safeguards are vital.

b. The UNHCR handbook states that statelessness determination procedures 'should be formalized in law'. This is because, 'establishing procedures through legislation ensures fairness, transparency and clarity'. Further, 'procedural guarantees are fundamental elements of statelessness determination procedures. The due process guarantees that are to be integrated into administrative law procedures, including refugee status determination procedures, are necessary in this context.' [14]

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[12] *Re Canavan* [2017] HCA 45

[13] Ibid

[14] UNHCR, *Handbook on Protection of Stateless Persons*, above note 4.

c. The proposed amendments must be understood in the context of existing problems with citizenship revocation determinations. In particular, the process by which determinations are currently made to revoke citizenship are unclear due to the fact that they appear to involve a non-statutory Citizenship Loss Board. This body, comprising representatives from a number of Government departments and organisations, apparently possesses the de facto power to determine whether the minister should employ his or her powers and if a person should be stripped of citizenship.[15] The Board operates despite its lack of legislative foundation, and neither its procedures, nor decisions, are required to be made public.[16]

d. The Board clearly does not meet the UNHCR requirement that statelessness determination procedures 'should be formalized in law'; indeed, it rather supports UNHCR's concern that formalization in law is important because 'establishing procedures through legislation ensures fairness, transparency and clarity'.

e. The reliability and fairness of the Board's determinations has recently been questioned after the Fijian Government disputed the Board's findings that Neil Prakash was a Fijian citizen.[17]

f. These concerns are exacerbated by the unavailability of merits review of revocation decisions by the Administrative Appeals Tribunal. While other decisions concerning citizenship can be reviewed by the AAT, including decisions to revoke citizenship in the case of fraud or misrepresentation discussed above, those made pursuant to s 35A are not listed as reviewable decisions in s 52 of the Citizenship Act.

g. The UNHCR Handbook states that an 'effective right to appeal against a negative first instance decision is an essential safeguard in a statelessness determination procedure. The appeal procedure is to rest with an independent body. The applicant is to have access to legal counsel and,

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[15] Paul Farrell, 'Government Officials of Secretive Citizenship Loss Board Named' *The Guardian,* 22 July 2016 <https://www.theguardian.com/australia-news/2016/jul/22/government-members-of-secretive-citizenship-loss-board-named>

[16] George Williams, 'Stripping of citizenship a loss in more ways than one' *The Sydney Morning Herald* 17 April 2016 <https://www.smh.com.au/opinion/stripping-of-citizenship-a-loss-in-more-ways-than-one-20160417-go87as.html>

[17] Helen Davidson and Amy Remeikis 'Neil Prakash 'not a Fiji citizen': Dutton move to strip Australian citizenship in doubt' *The Guardian,* 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>

where free legal assistance is available, it is to be offered to applicants without financial means.'

h. The only available review mechanism is judicial review pursuant to 75 of the Constitution. However, the effectiveness of this remedy would be diluted by the proposed amendments. Under the current statute, dual citizenship determinations can be reviewed by courts as a matter of jurisdictional fact given that the question is whether an individual 'is a national or citizen of a country other than Australia'. However, as the Senate Standing Committee for the Scrutiny of Bills has observed, these amendments would mean that 'the intensity of permissible judicial review would be considerably lower'.

i. These inadequate procedural safeguards are also out of step with those in other states. For example, under the relevant UK legislation, an individual subject to revocation of citizenship possesses a right to appeal firstly to the First Tier Tribunal (Immigration and Asylum Chamber)[18] with further appeals made to the Upper Tribunal or the Court of Appeal.[19] In the United States citizenship is protected by the 14th Amendment, which bars the revocation of citizenship through legislative instrument.[20] Instead parties may be seen to voluntarily revoke citizenship through a number of 'potentially expropriating acts.'[21] 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.[22]

j. The proposed amendment to the legislation creates an unnecessary and unwarranted risk of stripping a person's citizenship where that would render an Australian citizen stateless as a result.

5. Arbitrary Deprivation of Nationality

a. 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

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[18] *Special Immigration Appeals Commission Act 1997* (UK) s 2B

[19] *British Nationality Act 1981* (UK) s 40A(1)

[20] *The United States Constitution*, 14th Amendment

[21] 8 U.S Code 1481(a)

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

deprived of his nationality nor the right to change his nationality'.[23] It is also acknowledged to constitute a rule of customary international law.[24] **The prohibition against deprivation of nationality applies whether or not it results in statelessness.**

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

i. serve a legitimate purpose

ii. be proportionate to that purpose

iii. the removal must be non-discriminatory.[25]

c. Serves a legitimate purpose and is proportionate

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

ii. In the 'Statement of Compatibility with Human Rights' it is asserted that the Bill's purpose is 'to keep Australians safe from evolving terrorist threats, and to uphold the integrity of Australian citizenship and the privileges that attach to it'. The Statement further claims that '[i]t is appropriate that the relevant Minister is able to determine that it is not in the public interest for a person to remain an Australian citizen.'

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[23] 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).

[24] Universal Declaration of Human Rights 1948, article 15(1). See discussion in See Jorunn Brandvoll, 'Deprivation of Nationality' in Laura van Waas and Alice Edwards (eds.) *Nationality and Statelessness Under International Law* Cambridge University Press, 2014) 194.

[25] UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General,* 19 December 2013, A/HRC/25/28; 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.

iii. The Human Rights Council states that in order to satisfy the test for proportionality and legitimacy, the action must represent 'the least intrusive means to achieve the desired result' even if the actions do not lead to statelessness.[26] Deprivation 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'.[27]

iv. It is also worth noting that several recent studies have disputed the utility and effectiveness of citizenship stripping as a counter-terrorism measure.[28] In the absence of evidence that it is an effective measure, coupled with an increased risk of creating instances of statelessness, it is difficult to justify the lowered threshold for citizenship deprivation as a proportionate measure.

v. In terms of the requirement of proportionality, we note that the Bill proposes to apply citizenship revocation where the level of criminality is **less not more serious**. For example, the Statement of Compatibility explains that the amendment will extend the revocation power to cases where a person has been convicted of 'associating with a terrorist organisation' an offence which is currently excluded from the list of terrorism offences for which the citizenship loss provisions apply. Further the removal of the requirement that a person has been sentenced to at least 6 years imprisonment means that an individual who has a lower level of culpability may

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[26] UN Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General,* 19 December 2013, A/HRC/25/28, at 4.

[27] 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, 6. See UN Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General,* 19 December 2013, A/HRC/25/28: 'The consequences of any withdrawal of nationality must be carefully weighed against the behaviour of offence for which the withdrawal of nationality is prescribed. Given the severity of the consequences where statelessness results, it may be difficult to justify loss or deprivation resulting in statelessness in terms of proportionality.' It has been argued among academics that deprivation of nationality is arbitrary if it results in statelessness. See Jorunn Brandvoll, 'Deprivation of Nationality' in Laura van Waas and Alice Edwards (eds.) *Nationality and Statelessness Under International Law* Cambridge University Press, 2014) 194.

[28] See for example Sangeetha Pillai and George Williams, 'The Utility of Citizenship Stripping in the UK, Canada and Australia. (2017) *Melbourne University Law Review (advance);* Christophe Paulussen, 'Countering terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive' (2018).

nonetheless have his or her citizenship revoked. **This calls into question the proportionality of any citizenship deprivation effected as a result of these amendments.**

d. The deprivation must be non-discriminatory

i. The current laws subject Australian citizens to differential treatment on the basis of their mono or dual citizenship. The proposed amendments will compound the bifurcation between mono and dual citizens by making it even easier to strip dual nationals of their Australian citizenship and impermissibly according different rights and distinguishing between mono and dual citizens on the basis of national origin or perceived national origin. This raises the real concern that deprivation of citizenship will be considered arbitrary and a violation of other international law obligations not to discriminate on the basis of race, ethnicity, national origin or descent.[29]

ii. The principles of equality and non-discrimination are enshrined in all core human rights treaties.[30] Australia is party to several of these, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Rights of the Child (CRC).

iii. The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as:

> 'Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms

[29] 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

[30] 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'.

> in the political, social, cultural or any other field of public life.[31]

iv. States are required to eliminate discrimination in purpose or effect,[32] as well as discrimination that occurs in the absence of discriminatory intent.[33] Moreover, as a norm of customary international law, the prohibition of racial discrimination is absolute and cannot be restricted under any circumstances.[34]

v. The Bill's exclusive application to dual citizens is potentially discriminatory given that many dual citizens are of migrant and/or minority background.

6. Right to enter one's own country

a. To the extent that the threshold for citizenship deprivation is relaxed under the proposed amendments, and that deprivation of citizenship may result in removal, it is important to recall that while a person whose citizenship has ceased would no longer be a citizen under Australian law, Australia may still be considered his or her 'own country' for the purposes of Article 12(4) ICCPR. The phrase 'his own country' has been interpreted broadly by the UN Human Rights Committee and the drafting history of the provisions supports the interpretation that 'own country' goes beyond mere nationality.

b. The right to enter one's own country applies regardless of whether a person has another nationality.[35]

c. The UN Human Rights Committee has unequivocally stated:

> 'The scope of 'his own country' is broader than the concept of 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least,

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[31] ICERD, art. 1(1).

[32] ICERD, art. 1(1): Any distinction . . . must be considered as racial discrimination when it has 'the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms'. See also Committee on the Elimination of Racial Discrimination general recommendation No. 32`, paras. 6-10; Committee on the Elimination of Racial Discrimination general recommendation No. 31 para4(b)

[33] CERD/C/89/D/52/2012, para 7(2).

[34] See Human Rights Committee general comment No. 29

[35] See, eg, *Nystrom v Australia,* UN Doc CCPR/C/102/D/1557/2007, 18 [7.4].

> an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied to them…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'.[36]

d. In terms of determining whether Australia is an individual's 'own country', the Human Rights Committee identified the following relevant factors in concluding that Australia was Mr Nystrom's 'own country': 'the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden'.[37] Yet the full range of relevant factors are not listed in the proposed s 35A(1), which explicitly mentions only 'the person's connection to the other country….' but not the attachment to Australia.

e. The Statement of Compatibility with Human Rights asserts that depriving a person whose citizenship has been removed of their right to enter Australia would not be arbitrary, as it 'would be based on a legitimate threat to Australia's security . . . and a determination that it is in the public interest for their citizenship to be ceased'. This subsection of the Statement concludes with the dubious assertion that '[t]he cessation of Australian citizenship (thereby preventing return to Australia) is proportionate to the legitimate goal of ensuring the security of the Australian community'.

f. It is important to recall that **Article 12(4) is not subject to any limitation**, even on national interest or security grounds. [38] While Article 12(3) of the ICCPR allows for limits to Articles 12(1)-(2), they do not apply to 12(4).

g. 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

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[36] Human Rights Committee, *General Comment No 27; Article 12 (Freedom of Movement),* 67th sess, UN Doc CCPR/C/21?Rev.1/Ass.9 (2 November 1999) [20]-[21]. See also Human Rights Committee, Views: Communication No 1557/2007, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) '*Nystrom v Australia'). Emphasis added*

[37] *Nystrom*, Ibid, at para 7.5.

[38] 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.

one's own country could be reasonable.'[39] As one leading deportation scholar notes 'in such circumstances, deportation is inherently arbitrary and thus illegal.'[40] The consequences of removal following citizenship deprivation, and especially where a person's second nationality has not been adequately determined and may be ineffective, are equally if not more severe.

h. The Human Rights Statement is correct to refer to the broad interpretation of one's own country for the purposes of 12(4). However, its following assertion is dubious in that it claims:

> [W]here a person has repudiated their allegiance to Australia, resulting in cessation of their Australian citizenship, any ties they may have to Australia, for the purposes of Article 12(4) have been voluntarily severed by their own actions, and the person should not be entitled to gain any advantage for a relation they are responsible for breaking.

i. The reference to repudiation of one's citizenship appears to be invoking the exception to the bar on deprivation of citizenship under Article 8(3)(b) of the 1961 Convention.

j. Article 8(3)(b) provides that a state may revoke citizenship notwithstanding Article 8(1) on the basis:

> that a person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.

k. Aside from the fact Australia did not make a declaration to Article 8(3) at the time of accession, and hence the exception in Article 8(3) may not be relied upon by Australia, this reference to 8(3) is out of context as it disregards the first component of the Article (declaration of allegiance *to another state*) and focuses solely on repudiation.

l. Furthermore, such a statement ignores current UN Guidelines which note that 8(3) has become almost obsolete in operation.[41]

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

[40] Daniel Kanstroom, 'The Right to Remain Here as an Evolving Component of Global Refugee Protection: Current Initiatives and Critical Questions' (2017) 5(3) *Journal on Migration and Human Security* at 614, 630.

[41] UNHCR Expert Meeting, 'Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality: Summary Conclusions,' Expert

7. Indefinite Detention

a. There is a real possibility that the revocation of citizenship under these amendments may result in lengthy, if not indefinite, detention. The Bill's Human Rights Compatibility Statement itself implicitly contemplates this possibility, when it states that a person's "ex-citizen visa … would be subject to mandatory cancellation under the *Migration Act*" and accordingly "the impact of cancelling a non-citizen visa is that that individual becomes an unlawful non-citizen, and subject to the removal processes in the *Migration Act*" which includes "measures restricting freedom of movement and the ability to choose a residence." [42]

b. If another country refuses to recognise or acknowledge the finding of the Australian government regarding an individual's alleged foreign citizenship (as in the case of Mr Prakash), then indefinite detention is very likely. This would violate Australia's obligations under Article 9 of the ICCPR as has been established by the Human Rights Committee on numerous occasions.

8. Conclusion

a. If we can respond to mono nationals who have been convicted of terrorism offences with alternative means to citizenship deprivation, it is difficult to see how the government can justify the deprivation of citizenship of dual citizens, especially when the measure risks rendering them stateless by weakening an already inadequate statelessness/dual citizenship determination mechanism.

b. Any such amendments to the power of the minister to revoke citizenship should be aimed at strengthening, not weakening, protections against statelessness. Under the existing regime individuals are already rendered vulnerable due to a lack of legislative guidance, census data and adequate checks and oversight of the status of dual nationals within Australia, giving rise to the risk of rendering individuals stateless. Such risks would only be enhanced should the proposed amendments become law.

c. For the reasons set out in this submission, we respectfully request the Committee to recommend that the Bill not pass in its current form.

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meeting convened by the Office of the United Nations High Commissioner for Refugees, Tunis, Tunisia, 31 October-1 November 2013, T 19.

[42] Explanatory Memorandum, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (Cth) at 10.

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d. Please do not hesitate to be in touch should you have any questions about this submission. We are available and willing to attend the public hearings on 30th January 2019.

Yours sincerely,

[redacted]

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