

Peter McMullin Centre on Statelessness

Melbourne Law School

The University of Melbourne

16 October 2019

Committee Secretary

Parliamentary Joint Committee on Intelligence and Security

16 October 2019

Dear Secretary,

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

Thank you for the opportunity to provide this submission to the review into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (**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.

In making this submission, we refer to our previous submission to the Committee regarding its concurrent review of the Australian Citizenship Renunciation by Conduct and Cessation Provisions (13 August 2019), annexed below.

Please do not hesitate to contact us should you have any questions about this submission. We are available to attend any proposed public hearings should it assist the Committee.

Yours sincerely,

Professor Michelle Foster

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1. Executive Summary:

1. This submission is focused on Australia's compliance with international law obligations, primarily relating to the reduction and prevention of statelessness.
2. The Bill's proposed amendments risk rendering the *Australian Citizenship Act 2007* (Cth) (**the Act**) inconsistent with Australia's international legal obligations.
3. In particular, 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.
4. We further submit that the purported 'additional safeguards' to protect against the risk of a person becoming stateless, contained in sections 36H(3)(a)(i) and 36K(1)(c) of the Bill provide inadequate protection in ensuring the reduction and prevention of statelessness.
5. The Bill amends existing sections 33AA, 35 and 35A of the Act to provide that, at the discretion of the Minister for Home Affairs (**the Minister**), a person who is a national or citizen of a country other than Australia ceases to be an Australian citizen in three circumstances:
 - (a) renunciation by conduct when a person engages in specified terrorism related activities;
 - (b) cessation of citizenship when a person fights for, or is in the service of, a declared terrorist organisation outside of Australia; or
 - (c) cessation by conviction for a specified offence with a sentencing period of at least 3 years.
6. In particular, this Bill seeks to implement a key recommendation of the Independent Security Legislation Monitor (**INSLM**) following its recent review of the citizenship loss provisions, whereby the automatic cancellation of citizenship through conduct under the existing Act (sections 33AA and 35) be replaced by a Ministerial decision model.¹
7. The Peter McMullin Centre on Statelessness submits that citizenship loss should not occur automatically as is currently the case under sections 33AA and 35 of the Act. As noted by Professor George Williams AO and Dr Sangeetha Pillai in their previous submission to this Committee, automatic revocation creates confusion and legal

¹ Australian Government, Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism related citizenship loss provisions contained in the Australian Citizenship Act 2007*, 3rd INSLM, 7th Report, 2019.

uncertainty, is arguably unconstitutional and is out of step with citizenship deprivation regimes internationally.²

8. We therefore welcome the conclusion by the INSLM that sections 33AA and 35 should be repealed with retrospective effect.³ The proposed model, in conjunction with other provisions in the Bill, however, 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.
9. We therefore recommend that the Bill not be passed in its current form.

Recommendation 1: That the Bill not pass in its current form.

10. As outlined in our previous submission to this Committee's concurrent review of the Australian citizenship renunciation by conduct and cessation provisions (dated August 2019, annexed below), the Peter McMullin Centre on Statelessness remains deeply concerned that the existing citizenship deprivation provisions in the Act breach Australia's obligations under international law, including the prohibition of arbitrary deprivation of nationality.
11. We therefore recommend that the existing citizenship revocation provisions contained in the Act be repealed.

Recommendation 2: Existing citizenship revocation provisions contained in sections 33AA, 35, 35AA and 35A of the Act be repealed with retrospective effect.

Recommendation 3: In the alternative, if the Bill does pass, we recommend the following key changes are made to the current drafting, in order to reduce the risk of individuals being made stateless by operation of its provisions –

- (i) The current threshold for determining dual citizenship contained in the Act, whereby an individual's Australian citizenship can only cease if, as a matter of fact, they are a citizen or national of another country at the time the determination is made, be retained over the proposed lower threshold contained in sections 36B(2) and 36(D) of the Bill.

² See Sangeetha Pillai and George Williams Submission to Parliamentary Joint Committee on Intelligence and Security, *Review of the Australian Citizenship renunciation by conduct and cessation provisions*, 3-6.

³ Australian Government, Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism related citizenship loss provisions contained in the Australian Citizenship Act 2007*, 3rd INSLM, 7th Report, 2019, 58.

- (ii) The Bill set out a clear, fair and transparent process that must be followed to determine that a person is a dual citizen, prior to citizenship cessation occurring.

2. Summary of Recommendations:

Recommendation 1: That the Bill not pass in its current form.

Recommendation 2: Existing citizenship revocation provisions contained in sections 33AA, 35, 35AA and 35A of the Act be repealed with retrospective effect.

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- (i) The current threshold for determining dual citizenship contained in the Act, whereby an individual's Australian citizenship can only cease if, as a matter of fact, they are a citizen or national of another country at the time the determination is made, be retained over the proposed lower threshold contained in sections 36B(2) and 36(D) of the Bill.
- (ii) The Bill set out a clear, fair and transparent process that must be followed to determine that a person is a dual citizen, prior to citizenship cessation occurring.

3. The proposed amendments are inconsistent with Australia's international legal obligations:

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 nationality⁴ 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 stateless.
- c. We remain concerned that the proposed amendments to the 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.

1961 Convention on the Reduction of Statelessness

- d. Australia is party to both the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness (the **Statelessness Conventions**).⁵ Australia has not entered any reservations or declarations in relation to these two treaties.
- e. 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.
- f. 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'**.
- g. The Bill's Explanatory Memorandum states that the purpose of new section 36B is to ensure that the application of this provision "will not result in a person becoming

⁴ 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.

⁵ Both the 1954 Convention, and 1961 Convention, were ratified by Australia on 13th December 1973.

stateless.”⁶ However we note that Australia’s international legal obligations to prevent statelessness are not explicitly mentioned in the terms of the proposed Bill. We are further disappointed to note that Australia’s obligations under the Statelessness Conventions are not mentioned or considered in the Bill’s Statement of Compatibility with Human Rights.⁷

4. Lowering the threshold for determining dual citizenship is inconsistent with Australia’s international human rights obligations:

- a. Sections 36B(2) and 36D(2) of the Bill provide that a Minister must not make a determination that a person ceases to be an Australian citizen ‘if the Minister is satisfied that the person would, if the Minister were to make the determination, become a person who is not a national or citizen of any country.’
- b. The Explanatory Memorandum states that these new sections are explicitly designed to ‘adjust the current threshold’ for determining dual citizenship, differing from the existing equivalent provisions whereby currently a person’s citizenship can only cease if, ‘**as a matter of fact**’ they are a national or citizen of another country.⁸ This ‘adjustment’ is clearly, and concerningly, a **lowering** of the threshold.
- c. Invocation of the language of ‘become a person who is not a national or citizen of any country’ in sections 36B(2) and 36D(2) of the Bill hence appear 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*’, concerningly, the proposed amendment contains no such temporal reference.

⁶ Explanatory Memorandum, *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (Cth) at 60.

⁷ Statement of Compatibility with Human Rights, Explanatory Memorandum, *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (Cth).

⁸ Own emphasis added. Explanatory Memorandum, *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (Cth) at 62 and 63.

Thresholds for determining dual citizenship -

Current threshold under the Act	Proposed threshold under the Bill
‘The Minister may determine in writing that a person ceases to be an Australian citizen if...the person <i>is</i> a national or citizen of another country other than Australia <i>at the time</i> when the Minister makes the determination’ ⁹	‘the Minister must not make a determination if the Minister is <i>satisfied</i> that the person <i>would</i> , if the Minister were to make the determination, <i>become</i> a person who is not a national or citizen of any country.’ ¹⁰

- d. 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’.
- e. 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.
- f. 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.¹¹

⁹ Own emphasis added. *Australian Citizenship Act 2007* (Cth), s 35A (1)(c).

¹⁰ Own emphasis added. *Ibid*, 35B(2) and 35(D).

¹¹ 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.

- g. Accordingly, it may be open on these amendments as currently drafted 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.
 - h. 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*’.¹²
 - i. We briefly note that both the Act and Bill in its current form also create a real risk that even if a person is a dual national, he or she may be rendered *de facto* stateless, whereby a person who is nominally a citizen in a country other than Australia may not be able to exercise rights associated with citizenship in practice. They may also be unable to return to their country of citizenship, if they are, for example, a refugee due to a well-founded fear of persecution. There is therefore a real possibility that the revocation of citizenship under these amendments may result in lengthy, if not indefinite detention, in violation of Australia’s obligations under Article 9 of the International Covenant on Civil and Political Rights.
 - j. The new amendments, which lower the threshold for depriving dual nationals of citizenship are therefore inconsistent with Australia’s international human rights obligations.
5. **Determining dual citizenship is complex:**
- a. It is widely recognised that statelessness determination is complex.
 - b. Hence, the determination of 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.
 - c. As noted by the INSLM in its recent report, failure to consult with foreign law experts may lead to the ‘wrong conclusion’ that a person has dual nationality when they do not.¹³

¹² Ibid.

¹³ Australian Government, Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism related citizenship loss provisions contained in the Australian Citizenship Act 2007*, 3rd INSLM, 7th Report, 2019, 13.

- d. The 2017-2018 Australian parliamentary eligibility crisis surrounding Section 44(i) of the *Commonwealth Constitution*¹⁴ and the relevant High Court judgment in *Re Canavan*¹⁵ 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 through the judicial process.
 - e. In this context 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 (see table at 4(c) above).
 - f. 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.
 - g. 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.
6. **Dual citizenship determination procedures should be formalised in law:**
- a. 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 involve a non-statutory Citizenship Loss Board (the CSB).
 - b. 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

¹⁴ *Commonwealth Constitution* s44(i).

¹⁵ *Re Canavan* [2017] HCA 45.

citizenship.¹⁶ The Board operates despite its lack of legislative foundation, and neither its procedures, nor decisions, are required to be made public.¹⁷

- c. As noted by the INSLM in its recent report, there has been a ‘substantial lack of clarity as to the administrative procedures’ underpinning the operation of provisions governing citizenship loss to date.¹⁸ It further notes that there has been ‘conjecture and some criticism about the role played by the CLB in the citizenship process,’ namely that although the board has no legal identity as such, its advisory role can exert decisive influence in citizenship loss cases.¹⁹
- d. 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’. Furthermore, ‘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.’²⁰
- e. The CLB 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’.
- f. The reliability and fairness of the Board’s determinations was questioned earlier this year after the Fijian Government disputed the Board’s findings that Neil Prakash was a Fijian citizen.²¹

¹⁶ 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>>

¹⁷ 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>>

¹⁸ Australian Government, Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism related citizenship loss provisions contained in the Australian Citizenship Act 2007*, 3rd INSLM, 7th Report, 2019, 36.

¹⁹ Australian Government, Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism related citizenship loss provisions contained in the Australian Citizenship Act 2007*, 3rd INSLM, 7th Report, 2019, 37.

²⁰ UNHCR, *Handbook on Protection of Stateless Persons*, above note 4.

²¹ Helen Davidson and Amy Remeikis ‘Neil Prakash ‘not a Fiji citizen’: Dutton move to strip Australian citizenship in doubt’ *The Guardian*, 2 January 2019

- g. The Bill should be amended to provide for a clear, fair and transparent process that must be followed to determine that a person is a dual citizen, prior to citizenship cessation occurring.

7. Lack of adequate procedural safeguards:

- 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 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, where free legal assistance is available, it is to be offered to applicants without financial means’.
- c. The only available review mechanism in the existing Act is judicial review in the High Court of Australia pursuant to section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*. 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.²²
- d. These concerns are exacerbated by the unavailability of merits review of revocation decisions by the Administrative Appeals Tribunal (**the AAT**). While other decisions concerning citizenship can be reviewed by the AAT, including decisions to revoke citizenship in the case of fraud or misrepresentation, those made pursuant to s 35A are not listed as reviewable decisions in s 52 of the Citizenship Act.
- e. These inadequate procedural safeguards are also out of step with those in other states, including the United States, whereby 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.²³

<<https://www.theguardian.com/australia-news/2019/jan/02/neil-prakash-not-a-fiji-citizen-dutton-move-to-strip-australian-citizenship-in-doubt>>

²² The Senate, Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, 1 of 2019, 13 February 2019.

²³ Submission 29. CCCS Submission to the PJCIS Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at 8-9.

- f. 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.

8. Inadequate 'safeguards' to protect against statelessness:

- a. The Explanatory Memorandum states that the Bill inserts 'additional safeguards' to protect against statelessness, namely that:
 - (i) the Minister must revoke his decision on application by a person, under new subparagraph 36H(3)(a)(i) if he is satisfied that a person is not a national or citizen of any country; and
 - (ii) the determination will be automatically revoked under new paragraph 36K(1)(c) if a court finds that the person was not a national or citizen of any country other than Australia at the time the determination was made.²⁴
- b. We submit that these 'additional safeguards' provide inadequate protection against statelessness. As discussed above, statelessness determination is complex. It is likely to be extremely difficult for a person who has received a determination by the Minister that their Australian citizenship has ceased to successfully apply to the Minister under s 36H(3)(a)(i), which places the onus on the person to demonstrate that they are not a national or citizen of any other country.
- c. It is furthermore likely to be extremely difficult, in practice, for a person who has received a determination by the Minister that their Australian citizenship has ceased to successfully apply through the courts for a determination that they were not a national or citizen of any country other than Australia at the time the determination was made. Australia made a pledge to the United Nations in 2011 'to better identify stateless persons and assess their claims',²⁵ yet there still exists a 'lack of consistency and clarity concerning the methods for ascertaining whether a person is indeed a citizen of another state'.²⁶
- d. Even where a person may successfully have the determination revoking their citizenship overturned (by operation of either proposed provision), that person will

²⁴ Explanatory Memorandum, *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (Cth) at 60.

²⁵ See UNHCR, *Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons (Geneva, Palais de nations, 7-8 December 2011)* (2012), 49.

²⁶ Michelle Foster, Jane McAdam and Davina Wadley, 'The Protection of Stateless Persons in Australian Law: Part 2' (2016) *Melbourne University Law Review*, at 497.

be rendered stateless in the interim. The Bill in its current form is therefore incompatible with Australia's obligations not to render a person stateless.

- e. This Bill places people affected at real risk of becoming stateless. Rather than rely on the proposed 'additional safeguards' outlined above, the Bill should be amended to ensure sufficient protections against rendering an individual stateless at first instance, by providing for a fair and transparent process of ensuring that a person is in fact a dual citizen before his or her citizenship is removed.

9. Conclusion:

- a. The Bill risks further rendering the Act inconsistent with Australia's international legal obligations by weakening already inadequate protections against statelessness.
- b. As outlined in our previous submission to this Committee (dated 13 August 2019, annexed below), the Peter McMullin Centre on Statelessness remains deeply concerned that the existing citizenship deprivation provisions in the Act breach Australia's obligations under international law, including the prohibition of arbitrary deprivation of nationality.
- c. Under the existing regime individuals are already rendered vulnerable due to a lack of legislative guidance and adequate checks and oversight of the status of dual nationals within Australia, giving rise to the real risk of rendering individuals stateless. Such risks would only be enhanced should the proposed amendments become law.
- d. The proposed amendments contained in the Bill therefore weaken already inadequate protections against statelessness as required by Australia's obligations under international law.
- e. Any amendments to the power of the minister to revoke citizenship should be aimed at strengthening, not weakening, protections against statelessness.
- f. While we welcome the conclusion by the INSLM that citizenship loss should not occur automatically as is currently the case under sections 33AA and 35 of the Act, the proposed model for addressing this issue, combined with other provisions in the Bill, unreasonably heighten the risk that individuals will be rendered stateless.
- g. For the reasons set out in this submission, we respectfully recommend that the Bill not pass in its current form.