

### CCCS Submission to the PJCIS Inquiry

The Centre for Comparative Constitutional Studies (CCCS) is a research centre of Melbourne Law School at the University of Melbourne. The Centre undertakes research, teaching and engagement in relation to the Australian constitutional system as well as comparative constitutional law.

We welcome the opportunity to assist the PJCIS inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015. This submission begins with observations on the operation of particular aspects of the Bill that in our view present particular problems. In that context, it also deals with the additional question on which the Attorney-General has sought the committee's views, of whether proposed s 35A should apply retrospectively, to deprive Australians of citizenship by reference to offences committed before the commencement of the Act. The remainder of the submission offers further observations on the Bill by reference to the following issues:

- the availability of judicial review;
- the constitutionality of the proposed amendments;
- comparative analysis of citizenship deprivation laws in other common law jurisdictions; and
- Australia's obligations under international law.

This submission has been prepared on behalf of CCCS by the Foundation Director, Laureate Professor Cheryl Saunders AO, with the assistance of Alexandra Harrison-Ichlov and Anna Saunders. We are also grateful for contributions made by members of the CCCS Reference Group.

#### 1. Meaning and operation of the Bill

##### *Section 33AA*

Proposed section 33AA (1) provides that an Australian who also is a national or citizen of a country other than Australia will lose their Australian citizenship if they engage in specified conduct. The specified conduct is defined by reference to provisions of the *Criminal Code*. The section does not require a criminal conviction. Instead, s 33AA(5) provides that the individual's Australian citizenship ceases automatically - or effectively lapses - upon the individual engaging in the conduct prescribed in s 33AA(2). Section 33AA(7) provides that the Minister has a discretion to exempt a person from the 'effects' of the section if the Minister considers it in the public interest to do so.

It may be that the Bill relies on the device of automatic lapsing of citizenship in order to minimise the risk of invalidity arising from the constitutional prohibition of the exercise of judicial power by the Executive. It seeks to justify an automatic lapse of a person's citizenship by deeming someone who has engaged in the prescribed conduct to have 'renounced' their citizenship by acting 'inconsistently with their allegiance to Australia'. This is a novel and expansive view of the concept of allegiance, which goes to the heart of Australian nationhood and the relationship between the Australian state and its people. If the very concept of allegiance needs reconsideration in the conditions of globalisation that prevail in the 21<sup>st</sup>

century, this should take place through a careful, informed, public and deliberative process. It should not be determined incidentally, as a by-product of the enactment of a Bill of this kind.

The device of lapsing, as it is used in the Bill, creates a number of practical and legal difficulties as well.

First and most obviously, the range and nature of the matters that are deemed to trigger renunciation make the operation of the section uncertain in relation to any particular case. The Bill seeks to manage this by authorising the Minister to give 'notice' in s 33AA(6). The character of this action by the Minister is unclear, however. As the term is used in subsection (6), a 'notice' is purely informational. On the other hand, subsection (7)(a) suggests it may be something more, authorising the Minister to 'rescind' a notice if he or she decides to exercise the discretion to exempt.

Secondly, unlike the offences in the *Criminal Code* to which the provision is connected, the provision does not require a decision to prosecute. The requirement of a decision by an independent prosecutor that there are reasonable prospects of a conviction, and that the conviction is in the public interest, is an intrinsic limitation on the operation of the Australian criminal justice system. The Bill currently lacks the protection afforded by independent prosecutorial discretion, or the requirement of consent from the Commonwealth Attorney-General for prosecutions of some of the offences.<sup>1</sup> For this reason, among others, it would be desirable for the Bill to be redrafted to require conviction by a court.

Thirdly, it is unclear whether the operation of the section requires the presence of the fault elements of the offence, as well as the physical elements. This uncertainty is heightened by the device of defining the types of conduct in the section by reference to entire sections or divisions of the *Criminal Code*. While some of the words used in s 33AA(2) are defined in the *Criminal Code*, most are not. This leaves it quite unclear whether the conduct described in s 33AA will pick up only the physical elements of the corresponding offences in the *Code* (or some of them), or the fault elements too. As well, if the *Code* sets out two offences with different punishments depending on whether the fault element is knowledge or recklessness (e.g. s 101.2), it is unclear which is picked up by s 33AA. In one instance, s 33AA(2)(h) uses a term that appears only in the heading to an entire division of the *Code*,<sup>2</sup> containing over a dozen separate offences of varying seriousness, and there is no indication of which offence (and what fault elements) will trigger the consequences of s 33AA.

For the existing uncertainty to be resolved, it would be necessary for a court to determine the proper interpretation of the section. We note that given the difficulties of obtaining judicial review of the revocation of citizenship, discussed below, any uncertainty is likely to persist unless resolved through clarity of drafting. Again, the best way to resolve these uncertainties would be the inclusion of a requirement of conviction for s 33AA is advisable.

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<sup>1</sup> *Criminal Code* (Cth) ss 72.7, 119.11.

<sup>2</sup> *Criminal Code* (Cth) div 119.

Fourthly, it is unclear how the section interacts with the general provisions in Chapter 2 of the *Criminal Code* that govern criminal responsibility. It is unclear whether s 33AA(2) picks up such requirements as voluntariness, liability for omissions, absence of defences such as mental impairment, ignorance of subordinate legislation or duress. If not, then citizenship might be automatically removed for someone who would otherwise be acquitted if they were prosecuted. Accordingly, we submit that it is desirable for these rules on criminal responsibility to be expressly included. Likewise, it is unclear whether s 33AA(2) picks up extensions to criminal responsibility in Chapter 2 of the *Code* (attempt, complicity, incitement, joint commission, and conspiracy) or its provisions for extended geographic operation.<sup>3</sup> We submit that given the impact of the revocation of citizenship on the individual, it is desirable that some or all of these extensions be expressly excluded. It is also unclear how the section interacts with provisions in the body of the *Code* that limit, extend or qualify the operation of the criminal offences. Examples include defences for service in armed forces and ADF members (e.g. ss 119.1(4) and 72.2), jurisdictional requirements (e.g. s 72.4) and proof facilitation provisions (e.g. s 101.2(3)). We submit that consideration needs to be given to whether or not any or all of these provisions should apply to s 33AA(2).

Fifthly, section 33AA does not in itself create a criminal offence. It follows, therefore, that if a court was asked to determine whether an individual had engaged in such conduct (in, for example, a challenge to the lapse of citizenship), the civil standard of proof may apply. This standard, requiring only that it be 'more likely than not' that the individual engaged in such conduct, is significantly less onerous than the requirement of proof 'beyond all reasonable doubt'. Deprivation of citizenship is an extremely serious sanction. A criminal standard of proof should apply in such cases.

Finally, the Explanatory Memorandum states that s 33AA would not apply to minors under the age of 10, and would have limited application to minors between the ages of 10 and 14, in accordance with the *Criminal Code*.<sup>4</sup> Given that s 33AA(3) makes no reference to these general provisions of the *Code*,<sup>5</sup> it is unclear whether the section's operation is confined in this way. If this is the intended operation of s 33AA, it should be expressly stated in the legislation.

#### *Section 35A*

Section 35A(1) provides that, where an Australian is a 'national or citizen' of a country other than Australia, they will cease to be an Australian citizen upon conviction for a listed offence. Section 35A(6) further provides that the Minister has a discretion to exempt a person from the consequences of the section if the Minister considers that it is in the public interest to do so.

The list of offences that would cause citizenship to lapse under proposed s 35A is overly broad. Listed offences include, for example, ss 80.2A (1) and 80.2B(1) of the *Criminal Code* which prohibit urging violence against a group or a member of a group. While such offences are significant and the conduct should be deplored, they are not of a nature that warrants the very serious sanction of loss of citizenship.

<sup>3</sup> *Criminal Code* (Cth) part 2.4.

<sup>4</sup> Explanatory Memorandum [28].

<sup>5</sup> *Criminal Code* (Cth) ss 7.1, 7.2.

As with s 33AA, it is unclear whether the section's operation includes conviction of the listed offences under the extensions of criminal responsibility in the *Criminal Code* (attempt, complicity, incitement, joint commission, and conspiracy).<sup>6</sup> We again submit that given the impact of the revocation of citizenship on the individual, it is desirable that these extensions be expressly excluded.

The Explanatory Memorandum states that 'the offences are of a nature that on the face of them a person who undertakes such offences has repudiated their allegiance to Australia'.<sup>7</sup> Our earlier observations about reliance on the concept of allegiance apply also in this context. On no view could commission of some of the offences listed in 35A(3) genuinely be characterised as a 'repudiation of citizenship'. For example, s 101.5 of the *Criminal Code* would include collecting documents recklessly as to whether they are likely to facilitate terrorist acts.

The provision is conditioned solely on an individual's conviction for a listed offence, without regard to the seriousness of the behaviour or the length of any sentence imposed. This will have a detrimental impact on individuals subject to the operation of the provision. We consider that the Minister's power of exemption under s 35A(6) is insufficient to mitigate the arbitrary character of this provision.

#### *Section 35A and Retrospective Operation*

The Committee has been asked to consider whether proposed section 35A should also be triggered by conduct undertaken before the Act comes into effect and thus, in effect, apply retrospectively. As we have already argued, revocation of a person's citizenship is by any standard an extraordinary measure. Given the severe consequences of the loss of citizenship and the broad range of offences to which the provision applies, we submit that s 35A should not be retrospective. Retrospective legislation is contrary to the rule of law in any democratic society; it is more serious still when the sanction is so significant. Conceptually, it would sit rather oddly in legislation that purports to assume that persons affected have renounced their Australian citizenship. Retrospective legislation would mean that a citizen who committed any of these offences could have had no knowledge at the time of this additional consequence of their actions. So far, constitutional challenges to retrospective criminal legislation have failed in Australia. If retrospectivity remains constitutionally valid, the Parliament bears an even greater responsibility to comply with the rule of law. We note also that none of the existing case law deals with the withdrawal of citizenship on grounds that operate retrospectively and which would be a very unusual application of a power to enact retrospective law.

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<sup>6</sup> *Criminal Code* (Cth) part 2.4.

<sup>7</sup> Explanatory Memorandum [99].

## 2. Judicial Review

Judicial review offers one of the most significant checks and balances in the Australian constitutional system. It is all the more important given the absence of constitutionally protected rights and the reliance of the Australian constitutional system on the integrity of public institutions. The High Court of Australia has reinforced the existence of an entrenched minimum standard of judicial review at federal and state level.<sup>8</sup> An individual's access to judicial review is of utmost importance when such individuals are subject to the exercise of powers that have the capacity to seriously affect their rights and interests.

In our view, there are only minimal options for judicial review of the lawfulness of the operation of this Bill on persons who are presently Australian citizens.

In this regard, we acknowledge the statement made by the Prime Minister, the Minister for Immigration and Border Protection and the Attorney-General to the effect that '[t]hese provisions will not leave a person stateless and do not exclude the role of the courts. This will enable a person who has lost his or her citizenship to seek legal redress.'<sup>9</sup> This is formally correct; indeed, it would be impossible to exclude judicial review given the requirements of the Constitution. In practice, however, the opportunities for review are severely limited by the Bill, dramatically reducing the capacity of the courts to mitigate any untoward effects of the legislation.

There are two avenues pursuant to which a person might seek a form of judicial review under this Bill. First, they might challenge the automatic revocation of citizenship.<sup>10</sup> Secondly, they might seek review of the non-exercise of the powers of exemption by the Minister under sections 33AA(6) and 35A(6).

The availability of legal challenge to an automatic revocation of citizenship in practice depends on whether the individual in question is able to access legal redress in an Australian court. This would obviously be problematic if an individual's citizenship were revoked whilst they are outside of Australia, as presumably they will be unable to re-enter the country. Even if a person is able to access a court, the point made earlier about the applicable burden of proof is relevant here as well.

The Minister's powers of exemption are designed to minimise the possibility of judicial review to the maximum extent that is assumed to be consistent with the Constitution. The power is conditioned by the criterion of whether or not the Minister considers that it is in the public interest for an exemption to be granted.<sup>11</sup> These are personal and non-compellable powers that are expressed to depend on the Minister's state of mind. Both conditions complicate the court's ability to determine the limits of lawfulness.

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<sup>8</sup> *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.

<sup>9</sup> Joint Media Release: The Hon Tony Abbott MP, Prime Minister, the Hon Peter Dutton MP, Minister for Immigration and Border Protection and Senator the Hon George Brandis QC, Attorney-General (Tuesday, 23 June 2015) <<http://www.minister.border.gov.au/peterdutton/2015/Pages/legislation-to-strip-terrorists-of-citizenship.aspx>>.

<sup>10</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 ss 33AA(5), 35(1).

<sup>11</sup> Explanatory Memorandum [41], [112].

To further restrain the potential for judicial review, the Bill provides, in relation to each of the operative sections, that the rules of natural justice do not apply in relation to the exercise of the Minister's powers.<sup>12</sup> Natural justice is a fundamental principle of law that governs the exercise of public power that impacts on individuals. The courts tailor the specific requirements of natural justice to the circumstances of each case, in the light of the legislative scheme. It is not necessary to exclude it and there are additional reasons against excluding it when an exercise of public power produces consequences that are severe. Restrictions on judicial review limit an important avenue for checking executive power and upholding individual rights. Natural justice has practical advantages as well; the opportunity for a 'hearing' that it provides is valuable to inform the decision-maker as well as treating an individual in a way that is fair.<sup>13</sup> It ought not to be excluded in relation to an exercise of public power of this kind.

In evaluating the provisions of the Bill, the Committee therefore should bear in mind that judicial review is likely to have minimal effect in stemming its arbitrary operation.

### 3. Constitutional Validity

The Commonwealth Parliament clearly has power to make laws in relation to citizenship. Its source, however, and therefore its scope, is far less clear, in the absence of an explicit head of constitutional power with respect to citizenship. Whatever its derivation, there can be no doubt that it supports legislation providing for and structuring Australian citizenship. The extent to which it also supports withdrawal of citizenship in novel circumstances, including from persons who were born Australian citizens or with retrospective operation, cannot readily be assumed.

The Explanatory Memorandum states that the Bill relies on the power to make laws with respect to 'naturalisation and aliens' in section 51(xix) as the principal source of legislative power for the deprivation of citizenship. To this end, it claims that the concept of 'allegiance' is central to the constitutional definition of 'aliens'.<sup>14</sup> In order to establish the link with the aliens power, section 4 of the Bill states that:

This Act is enacted because the Parliament recognises that....citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.

The unusual, extended use of the notion of allegiance here was noted earlier in this submission.

The High Court has repeatedly emphasised that the definition of 'aliens' for the purposes of s 51(xix) is not 'at large':

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<sup>12</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 ss 33AA(10), 35(9), 35A(9).

<sup>13</sup> Statement of Compatibility [27].

<sup>14</sup> Explanatory Memorandum [10].

Parliament cannot, simply by giving its own definition of "alien", expand the power under s 51 (xix) to include persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word.<sup>15</sup>

Nevertheless, previous case law contains a number of statements by individual Justices of the High Court on the extent of the power to make laws for the renunciation of allegiance. Some of these statements, read in isolation, might be thought to suggest that the Parliament has unlimited power to legislate the terms on which a person can be said to have renounced their allegiance to Australia. However, these statements have been made in entirely different factual contexts from that which the proposed Act would present.<sup>16</sup> As Kirby J noted in one such case, statements of this kind do not provide a precedent for the deprivation of nationality if the context is significantly different.<sup>17</sup>

This Bill extends well beyond any other legislation based on section 51(xix) that has previously been considered by the High Court. Its constitutional validity should not be regarded as assured in these circumstances.

#### 4. Comparative Analysis

In this part, we draw the Committee's attention to the scope and operation of citizenship deprivation schemes in other broadly comparable countries: Canada, the United States and the United Kingdom. We do so in order to compare the reach of the Australian scheme with other countries facing similar problems. We note that the schemes in each of the comparator countries also depend in part on their constitutional framework, much in the way that is likely to be the case in Australia.

##### *Canada*

The *Strengthening Canadian Citizenship Act* (Bill C-24) of 2014 amended the Canadian *Citizenship Act* in several ways. Notably, the Act establishes a system of revocation of citizenship for dual citizens who engage in actions that are adverse to the Canadian national interest. A constitutional challenge to this legislation is reserved for decision in the Canadian Supreme Court.

The Act provides that a dual citizen may have their Canadian citizenship revoked by the Minister in three circumstances: if an individual acquired citizenship in false, fraudulent or otherwise deceptive circumstances;<sup>18</sup> if the individual is convicted for 'national security' offences in Canada or abroad, attracting a sentence of at least five years' imprisonment;<sup>19</sup> and if the individual has served in the armed forces or is a member of a group engaged in armed conflict with Canada.<sup>20</sup>

<sup>15</sup> *Re Minister for Immigration and Agricultural Affairs; Ex Parte Te* (2002) 212 CLR 162 [31]. See also *Pochi v Macphee* (1982) 151 CLR 101 [9] (Gibbs CJ); *Shaw v Mima* 218 CLR 28 [9] (Gleeson CJ, Gummow and Hayne JJ).

<sup>16</sup> See, for example, *Singh*, in which the plaintiff was not a citizen of Australia.

<sup>17</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Ame* [2005] HCA 36, [101]-[106] (Kirby J).

<sup>18</sup> *Strengthening Canadian Citizenship Act* s 10(1) ('Bill C-24').

<sup>19</sup> Bill C-24 s 10(2).

<sup>20</sup> Bill C-24 s 10.1(2).

Revocation of citizenship in the first and third circumstances requires the Minister to first obtain a declaration from a court that the circumstances that form the subject of the revocation order have been met and are applicable to the individual in question. In the second circumstance, relating to conviction for prescribed 'national security' offences under section 2 of the Canadian *Criminal Code* or an equivalent offence in a foreign jurisdiction - in addition to the requirement of a conviction - there are provisions in the legislation requiring the Minister to afford an individual an opportunity to make written representations in response to the Minister's provision of notice of an intent to revoke their citizenship.<sup>21</sup> Furthermore, the Minister is granted discretion to determine whether it is necessary for a hearing to be held prior to the making of the final decision.<sup>22</sup>

The Bill under consideration by the Committee in Australia differs from the Canadian legislation in two key respects. First, whilst the Canadian provisions confer substantial discretionary power on the Minister to determine whether to revoke the citizenship of a dual citizen, the exercise of this discretionary power is conditioned by either the making of a declaration by a Court, or the individual's conviction for a relevant terrorism offence. The test for a making of a threshold determination by a court prior to the Minister's exercise of the revocation power provides a form of safeguard that is notably absent in the Bill. Secondly, the rules of natural justice are not entirely excluded under the Canadian legislation. As previously discussed, providing individuals with the opportunity of a 'fair hearing' is of fundamental importance within a legislative scheme that involves the exercise of public power that carries severe consequences.

#### *United States*

In the United States, citizenship rights are protected by the Fourteenth Amendment to the US Constitution. As a result of this constitutional protection of citizenship, an individual's US citizenship cannot be revoked by legislative enactment. Instead, the US Code prescribes a list of 'potentially expatriating acts' that, if performed voluntarily, would result in a court deeming that the individual intended to relinquish their US citizenship.<sup>23</sup> This includes, *inter alia*, entering and serving in the armed services of a foreign state, committing acts of treason or conspiring to overthrow or wage war against the US Government.<sup>24</sup>

The case of *Vance v Terrazas*<sup>25</sup> concerned the question of whether a dual American-Mexican citizen had renounced his US citizenship by formally swearing allegiance to Mexico. The US Supreme Court held that this conduct alone was insufficient for an individual to have committed one of the 'potentially expatriating acts' under the US Code. Rather, the onus is on the Government to prove to a court that the individual concerned performed an expatriating act voluntarily with the intention of relinquishing their US

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<sup>21</sup> Bill C-24 s 10(3).

<sup>22</sup> Bill C-24 s 10(4).

<sup>23</sup> 8 U.S. Code § 1481 (a).

<sup>24</sup> 8 U.S. Code § 1481 (a)(3),(6).

<sup>25</sup> 444 U.S. 252 (1980).

citizenship. This requires the Government to adduce evidence in order to satisfy the court that an individual possessed the requisite intention to relinquish their US citizenship.

Of significance in the US context is the fact that the ultimate question of whether a person relinquishes their US citizenship rests with the court, and is based on an evidence-based judicial process. We submit that the requirement for an individual to have evinced an intention to relinquish citizenship is an important factor that is lacking in the Australian Bill, particularly in relation to s 33AA concerning renunciation of citizenship by conduct.

### *United Kingdom*

In the United Kingdom, the absence of a written constitution and adherence to the overarching principle of parliamentary sovereignty confers a greater degree of discretion on the legislature to determine the rules of citizenship acquisition, and under what circumstances citizenship deprivation can occur.<sup>26</sup>

At present, two methods of citizenship deprivation operate under UK law. First, applying to dual citizens, a citizenship deprivation order can be issued if it is considered 'conducive to the public good'.<sup>27</sup> Second, pursuant to the recent *Immigration Act 2014* (UK), a citizenship deprivation order can be issued to a person who has acquired citizenship by naturalisation if the Secretary of State believes that such an order is 'conducive to the public good' due to the person having engaged in conduct that is 'seriously prejudicial to the vital interests of the United Kingdom'.<sup>28</sup> The effect of permitting deprivation orders to be made in respect of individuals who acquire UK citizenship through naturalisation is that it may, in some cases, render a person stateless. In response to this concern, the legislative provision includes a mitigating factor that must be taken into account by the Secretary of State, namely whether there are 'reasonable grounds' to support the belief that the individual is able to become a national of a country other than the UK.<sup>29</sup>

The operation of deprivation orders in relation to naturalised citizens who may possess no other citizenship places the UK legislation on a unique footing within the European Union, in which citizenship deprivation regimes commonly apply to dual citizens only.<sup>30</sup> The EUDO Citizenship Observatory has made

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<sup>26</sup> Rainer Bauböck and Vesco Paskalev, 'Citizenship Deprivation: A Normative Analysis' (2015) 82 *CEPS Paper in Liberty and Security in Europe*. According to Bauböck and Paskalev, the United Kingdom context constitutes an example of a 'state discretion' theory of citizenship deprivation. They state at p 10 of the paper: 'State discretion means therefore primarily legislative discretion: a democratically legitimate legislature should be broadly free to set the rules not only for citizenship acquisition but also for deprivation in accordance with its political goals and in a way that it considers conducive to the public good, within constraints of constitutional and international law that the legislature has itself freely accepted.'

<sup>27</sup> *Immigration, Asylum and Nationality Act 2006* (UK) s 56.

<sup>28</sup> *Immigration Act 2014* (UK) s 66(4A)(b).

<sup>29</sup> *Immigration Act 2014* (UK) s 66(4A)(c). The inclusion of this mitigating factor was triggered primarily by the UK Supreme Court decision *Secretary of State for the Home Department v Al-Jedda* [2013] UKSC 62 (9 October 2013).

<sup>30</sup> Bauböck and Paskalev state at p 3: "The obvious link between this global trend and the strengthening of deprivation powers is that multiple nationality allows States to withdraw citizenship without creating statelessness. As international law aims to proscribe deprivation when the person concerned has no other citizenship, the new powers of deprivation generally apply to dual nationals only."

a number of criticisms concerning the *Immigration Act 2014* (UK) provisions. These include that the legislation may force other countries to bear responsibility for individuals who lose their citizenship whilst outside of the UK and are thereby unable to return; and the effect that the provision of citizenship deprivation procedures has on the security and permanence of the citizenship of dual nationals and naturalised citizens in the UK.<sup>31</sup>

Under the UK citizenship deprivation scheme, the power is conditioned on the Secretary's judgment as to what is 'conducive to the public good' or their satisfaction that a person's conduct will have a 'prejudicial effect' on the UK's vital interests. This is a highly subjective inquiry, with far-reaching and detrimental consequences for affected individuals. Further, citizenship deprivation may occur in the absence of a conviction or a court's examination of the relevant factual circumstances supporting a deprivation order. It is important to recognise that the taking of such extreme measures in the UK is facilitated to a large extent by the absence of a written Constitution. In this respect there is a significant contrast between the scope of legislative power between the UK and Australia.

The criticisms of the UK legislation also apply to the Australian Bill, and in particular s 33AA which provides for renunciation of citizenship by conduct. We submit that the Committee take account of the concerns associated with the Bill in light of the legislative developments in the UK. It is also necessary to consider the effect of the Bill's exclusive application to dual citizens, in particular the notion that it creates a status of 'second class citizenship'. This is a pertinent consideration in the Australian context, given the large proportion of the Australian population who are of migrant background, and who may feel threatened by a law that applies solely to dual citizens.

## 5. International Law

CCCS draws attention to the ways in which the Bill is contrary to Australia's obligations under international law. We note that, as set out in the Statement of Compatibility, the Government's position is that Australia has complied with these obligations. We consider this analysis to be flawed, however. The Bill presents a number of issues that warrant further consideration by the Committee in this context.

### *Arbitrary Deprivation of Nationality*

Australia has an obligation to refrain from arbitrarily depriving an individual of their nationality. Article 15 of the *Universal Declaration of Human Rights* provides that everyone has a right to a nationality and that no one shall be arbitrarily deprived of their nationality. This is also considered to be a codification of customary international law, to which Australia is subject.

Australia is also a party to the *International Covenant on Civil and Political Rights*. Article 12(4) of the *ICCPR* provides that 'no one shall be arbitrarily deprived of the right to enter his own country'. Article 12(3) provides the rights contained in arts 12(1) and (2) may be subject to necessary limitations on

<sup>31</sup> Caroline Sawyer and Helena Wray, 'EUDO Citizenship Observatory: Country Report, United Kingdom' <[http://cadmus.eui.eu/bitstream/handle/1814/33839/EUDO-CIT\\_2014\\_01\\_UK.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/33839/EUDO-CIT_2014_01_UK.pdf?sequence=1)>.

grounds of national security or public order. However, we note that no such limitation is permissible in the case of the right contained in art 12(4).

The concept of 'own country' evidently applies to citizens. The Human Rights Committee held in *Nystrom v Australia* that the concept of 'own country' for the purposes of art 12(4) is broadly defined and not confined only to nationality in a formal sense:

it embraces, at the very least, 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. In this regard, it finds that there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words "his own country" invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.<sup>32</sup>

We note that the Statement of Compatibility considers that conviction of one of the offences listed in s 35A or conduct listed in s 33AA amounts to a voluntary severance of nationality.<sup>33</sup> However, as stated above, we believe that the grounds on which citizenship may be revoked are overly broad and cannot fairly be considered to amount to severance in all circumstances. The breadth of offences listed in s 35A also means that the Act goes beyond what might be considered 'proportionate to... ensuring the security of the Australian community'.<sup>34</sup> As *Nystrom* makes clear, there are 'few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.<sup>35</sup>

We further consider that the concept of 'voluntary severance' for such a broad range of offences is not sanctioned by existing international law. As *Nystrom* makes clear, even a person's conviction for serious offences does not diminish the fact that Australia may remain a citizen's 'own country' for the purposes of art 12(4). In particular, since the conduct listed in s 33AA includes no express reference to a requirement of a mental element, there is no objective evidence of such a 'repudiation of allegiance'.

Deprivation of citizenship in these circumstances, although in accordance with the Act, would be nevertheless arbitrary and therefore contrary to Australia's obligations under international law. The absence of the requirement of a conviction under s 33AA and, in particular, the retrospectivity of s 35A further reinforce this conclusion. Finally, the lack of due process or natural justice afforded to individuals who are deprived of their nationality demonstrates that such a deprivation would be arbitrary and not conducted according to law.

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<sup>32</sup> *Nystrom v Australia*, Communication No 1557/2007 (1 September 2011) [7.4].

<sup>33</sup> Statement of Compatibility [17].

<sup>34</sup> Statement of Compatibility [18].

<sup>35</sup> *Nystrom v Australia*, [7.6] (emphasis added).

### *Best Interests of the Child*

We note that the Statement of Compatibility recognises that Australia is bound by its obligations under the *Convention on the Rights of the Child*.<sup>36</sup> Article 3 of the *Convention* requires, when enacting legislation concerning children, that the best interests of the child be a primary consideration.

As the Statement of Compatibility notes, this right is engaged in legislation concerning both minors and parents of a minor.<sup>37</sup> However, the automatic operation of s 35A means that it is impossible to give proper consideration at that point to the best interests of a child of the person whose citizenship is revoked.

Article 8 of the *Convention* provides that states shall respect the right of a child to preserve his or her identity, including nationality. Section 36 of the *Citizenship Act 2007* (Cth) currently provides that where a person who is a parent of a child aged under 18 has their citizenship revoked, the Minister may also revoke the child's citizenship. Under the proposed Act, this would include revocation under new sections 33AA and 35A.

The revocation of the citizenship of a child under s 36 would contravene the prohibition on arbitrary deprivation of nationality under art 12(4), as it is conditioned on the conduct of another person.

Although the Statement of Compatibility makes clear that an exercise of the power under s 36 must take the best interests of the child into consideration, there is no legislative requirement to do so. While we oppose the revocation of the citizenship of minors, we consider that the insertion of such a requirement into the legislation would at least assist Australia in conforming to its international obligations.

The Explanatory Memorandum states that s 33AA is not intended to apply to minors under 10, and to have limited application to minors between 10 and 14. However, it is not clear that this limitation will be effected by the proposed legislation. We further note that the Statement of Compatibility clearly states, when discussing the cessation and renunciation powers, that the proposed amendments are to apply to all citizens '*regardless of age*'.<sup>38</sup>

Particularly given that s 33AA is not expressed to require a mental element, we do not consider that the protection of Australia's national security is sufficient to outweigh the best interests of the child. CCCS considers that the proposed amendments in their current form are contrary to Australia's obligations under international law.

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<sup>36</sup> Statement of Compatibility [34].

<sup>37</sup> Statement of Compatibility [36].

<sup>38</sup> Statement of Compatibility [37].

### *Statelessness*

Australia is a party to the *Convention on the Reduction of Statelessness*. Article 8(1) of the *Convention* provides that no state shall deprive a person of its nationality if such deprivation would render the individual stateless.

However, if the amendment is to proceed, we would support the limitation of these provisions to dual citizens. This ensures that persons subject to the proposed provisions will not be rendered stateless, contrary to our obligations under international law.

### **6. Concluding Statement**

In this submission, we have identified a number of areas of concern with the Bill. First, the drafting of ss 33AA and 35A in relation to the provisions' interaction with the *Criminal Code* raise significant uncertainties about its operation and scope. Secondly, the express exclusion of the rules of natural justice and the minimal options for judicial review available to those affected by the operation of the Bill are of concern given the significant consequences of the revocation of citizenship. These concerns are particularly strong where the power is exercised in the absence of a conviction. Thirdly, the constitutional validity of the Bill is not assured given the uncertainty of the scope of s 51(xix) (the 'aliens power') in relation to revocation of citizenship and the unusual reference to the concept of 'allegiance', and the lack of judicial authority to support an extension of s 51(xix) to the novel context contemplated by the Bill. This uncertainty is heightened by the proposed retrospective operation of s 35A. Fourthly, when compared with citizenship deprivation schemes in operation in other common law jurisdictions, the scheme provided for in this Bill is undoubtedly 'extreme' and lacks some of the safeguards that feature in other countries. Finally, there are sufficient grounds to suggest that enactment of the Bill will place Australia in breach of its obligations under international law.

More generally, the Bill undermines the nature of citizenship as a secure and permanent bond between an individual and the state, as traditionally understood. The enactment of the Bill would signal a fundamental shift in the understanding of what it means to be an Australian citizen. CCCS emphasises the need for the Committee to carefully scrutinise the Bill given its implications for both Australian law and Australian society.