



Australian  
Human Rights  
Commission

# Review of citizenship loss provisions in the *Australian Citizenship Act 2007 (Cth)*

Australian Human Rights Commission

Submission to the Independent National Security Legislation  
Monitor

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# 1 Introduction

1. The Australian Human Rights Commission welcomes the opportunity to make this submission to the Independent National Security Legislation Monitor (INSLM) with respect to its review of the operation, effectiveness and implications of ss 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007* (Cth) (the Citizenship Act).
2. These provisions govern certain circumstances in which dual citizens can lose their Australian citizenship for particular terrorism-related conduct.
3. The provisions were inserted into the Citizenship Act by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (the Allegiance Act). The stated purpose of the Allegiance Act was to 'ensure the safety and security of Australia and its people and to ensure the Australian community is limited to those persons who continue to retain an allegiance to Australia'.<sup>1</sup>
4. The Commission acknowledges the critical importance of protecting Australia's national security, and the Australian community from terrorism. Enacting appropriate measures that achieve these goals can protect human rights, including the right to life,<sup>2</sup> and help fulfil our international law obligations.<sup>3</sup>
5. Australian's counter-terrorism framework must address the real and complex threat of terrorism, in a way that upholds the fundamental human rights of Australians and the rule of law. This can be a difficult task, but it is critical to ensuring that our laws achieve their primary aim without unintended consequences.
6. This is especially so when the provisions apply to the conduct of Australian citizens, including persons with very close ties to Australia and limited connections to other countries. These citizenship loss provisions can apply to people who are Australian by birth, who have Australian parents, and who have never lived outside Australia. Persons who solely hold Australian citizenship, rather than being dual citizens, can engage in the same conduct but not face the same consequences.
7. International human rights law requires that any limitation on rights must be reasonable, necessary and proportionate to the achievement of a legitimate objective. The Commission is concerned that numerous aspects of the citizenship loss provisions do not satisfy these requirements.

8. Involuntarily removal of citizenship is an extremely serious matter. Our law and its antecedents have long recognised this as one of the gravest administrative measures that a government can take. Roman law, for example, referred to this action as *civilitur mortuus* or 'civil death' for the affected person. Errors in the application of these provisions could mean that a person's right to enter and remain in their own country, Australia, are seriously and arbitrarily impaired,<sup>4</sup> having adverse consequences for numerous other human rights. Given these grave consequences, strong justification is needed to support the limitation on human rights.
9. The Commission is particularly concerned about the operation of ss 33AA and 35, which permit the automatic loss of citizenship based on conduct that has not been the subject of a criminal conviction. The threshold for losing citizenship under these provisions is much lower than under s 35A, which requires a conviction for a relevant offence and the imposition of a sentence of imprisonment of at least six years.
10. By contrast, the conduct-based provisions do not have any relevant objective measure of gravity attaching to them. Further, the conduct-based provisions operate automatically without any requirement for an officer of the Commonwealth to consider whether loss of citizenship is warranted in all of the circumstances. For example, some of the conduct may not necessarily demonstrate a person's repudiation of allegiance to Australia.
11. There are real problems with the certainty and transparency of the conduct-based provisions. They have the effect of automatically ceasing a person's citizenship by operation of law. Because no formal decision is ever made that citizenship has been lost, let alone following a hearing before a court, there is a lack of certainty about if and when the provisions actually apply. This means that it may be unclear for some individuals whether they, in fact, are Australian citizens or not. This uncertainty is compounded by the fact that an affected person may not be notified. To date, no person affected by these provisions has been successfully given notice of their deemed loss of citizenship.
12. The Commission is also concerned about the lack of procedural safeguards in the conduct-based provisions. Contrary to previous recommendations of the Parliamentary Joint Committee on Intelligence and Security (the Committee), and apparently contrary to the expressed intention of the Government, there is no requirement for the Minister to consider exercising their discretionary power to exempt a person from the operation of these provisions.

13. Unlike the conviction-based citizenship loss regime in s 35A, the conduct-based provisions do not require that the Minister make a decision or impose any obligation to provide procedural fairness or reasons when a person loses their citizenship. As a result, it appears on its face that the lawfulness and merits of the automatic loss of citizenship cannot be scrutinised as it is not an administrative decision.
14. The Commission is further concerned about the application of the conviction-based provisions to children as young as ten years of age and the conduct-based provisions to children as young as 14 years of age. The provisions of the Convention on the Rights of the Child (CRC)<sup>5</sup> recognise the developmental needs and vulnerabilities of children, and consequently require that children be treated differently to adults.
15. The conviction-based regime is problematic because of the very young age of the children to which it applies. The automatic conduct-based regime is particularly problematic because it does not contain any requirement to consider the best interests of the children who are affected prior to their citizenship being lost. The relevant provisions have the potential to seriously impact a child's right to nationality and their best interests, in a way that is contrary to these human rights among others.
16. In assessing the proportionality of these provisions, their operation also needs to be considered in the context of Australia's broader counter-terrorism strategy, including the tools already available to law enforcement, intelligence and security agencies to investigate, punish and prevent terrorist acts.
17. The conduct to which these provisions apply is already largely prohibited by the *Criminal Code Act 1995* (Cth) (the Criminal Code), with provision for lengthy prison sentences. The Commission considers that prosecution of offences is a better way of addressing this conduct than removal of citizenship. Perversely, removal of citizenship may in some circumstances reduce the ability of Australia to successfully prosecute alleged offenders.
18. The deterrent effect of criminal law relies, at least in part, on a system that affords an accused person a fair trial, with prosecution and sentencing conducted in open court. A focus on investigating and prosecuting relevant offences is therefore more likely to deter the commission of crime than removing citizenship from people who have not otherwise been brought to justice. For those who have been prosecuted, if there is a real risk of future terrorism offences being committed, the control order and

preventative detention regimes offer tools designed to protect public safety.

19. Violent extremism is a complex and multi-causal phenomenon. Addressing this problem effectively means addressing each of the various contributory factors that can cause such behaviour. This, in turn, requires consideration of local and national drivers of such criminal behaviour. As the UN Secretary-General observed in 2015, available research suggests that these drivers can include: poor governance; violations of human rights and the rule of law; lack of socioeconomic opportunity; and marginalisation and discrimination affecting certain groups.<sup>6</sup>
20. The Department has suggested that removal of a person's citizenship 'reduces the risk of a terrorist act being undertaken by that person in Australia'.<sup>7</sup> In particular, it noted that the citizenship loss provisions were introduced in response to an increase in 'foreign fighters' in Syria and Iraq. It says that around 80 Australians or former Australians remain in Syria and Iraq, who may seek to return to Australia.<sup>8</sup> However, expert commentary has suggested that the loss or removal of citizenship serves a largely symbolic function, rather than making a significant practical impact in protecting national security.<sup>9</sup>
21. The Commission also notes that Canadian law previously allowed for the revocation of citizenship where a dual citizen had been convicted of treason, spying and terrorism offences, depending on the sentence received. However, this conviction-based regime was repealed in 2017.<sup>10</sup> As a result, there appear to be no grounds for revocation of Canadian citizenship that relate to national security—dual citizens who commit relevant offences will be subject to the same criminal justice and other consequences as other Canadian citizens. The Canadian Government explained the reasons for the repeal as follows:

This is the nub of the point because once we say we can revoke one type of Canadian citizenship but cannot revoke another, then we have two classes of Canadians. We believe very strongly, and we fought long and hard during the election on this issue, that there is only one class of Canadian, a Canadian is a Canadian is a Canadian. All Canadians are equal and there cannot be two classes of Canadians, which is why we found this law unacceptable and why the new law would revoke that right to revoke citizenship ... It is a point of principle. When we say a Canadian is a Canadian is a Canadian, that includes good and bad Canadians.<sup>11</sup>
22. The Commission considers that the current form of ss 33AA, 35 and 35A have not been demonstrated to be a proportionate or necessary response

to the goal of reducing threats to national security, in light of the severe human rights impacts and the alternative means of addressing security concerns. Further, they do not contain appropriate safeguards to protect the rights of individuals.

23. The Commission urges reform of these citizenship loss provisions, and makes 11 recommendations to ameliorate the significant human rights concerns.

## 2 Summary of key concerns

24. The Commission is particularly concerned by the following features of ss 33AA, 35, 35AA and 35A of the Citizenship Act:
  - a. the automatic nature of citizenship loss when a person engages in certain conduct
  - b. the impacts on children, including children as young as ten years old under the conviction-based loss regime, and children as young as 14 years old under the conduct-based loss regime
  - c. the lack of procedural safeguards when a person's citizenship is automatically removed, including no requirement to: actively make an administrative decision to remove citizenship; take into account the relevant circumstances; afford natural justice including an opportunity to respond to adverse allegations; or provide reasons for removing an individual's citizenship
  - d. the lack of merits review or review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of decisions regarding citizenship loss
  - e. the ambiguity of conduct captured by the phrase 'in the service of a declared terrorist organisation under s 35(b)(ii)
  - f. the retrospective application of the conviction-based loss regime, to conduct that occurred before the passage of s 35A.

## 3 Recommendations

25. The Commission makes the following recommendations:

### **Recommendation 1**

Section 33AA and 35 of the *Australian Citizenship Act 2007* (Cth) should be repealed, with the result that loss of citizenship should be possible only under s 35A following a relevant criminal conviction and Ministerial determination, rather than by automatic operation of the law.

### **Recommendation 2**

If Recommendation 1 is not accepted, ss 33AA and 35 should be amended to provide for the same procedural safeguards that apply to conviction-based citizenship loss under s 35A. That is, loss of citizenship should not be automatic but rather require:

- a. a positive decision by an officer of the Commonwealth
- b. a requirement that the officer takes into account relevant considerations in determining whether it is in the public interest for the person to lose their Australian citizenship
- c. procedural fairness in the making of this decision, including the opportunity to make submissions and respond to adverse material
- d. a statement of reasons to be provided to the person affected if an adverse decision is made.

### **Recommendation 3**

If Recommendations 1 and 2 are not accepted, ss 33AA and 35 should be amended to ensure that the Minister is required to consider in every case whether or not to make a determination under ss 33AA(14) or 35(9) to exempt the operation of the automatic citizenship loss provisions, rather than these powers being discretionary and non-compellable.

### **Recommendation 4**

If Recommendation 1 is not accepted, ss 33AA(12) and 35(7) should be amended to require that the Minister must be satisfied that the giving of a notice 'would be likely to', rather than 'could', prejudice the security, defence or international relations of Australia, or Australian law enforcement operations, before the Minister may determine that a notice should not be given to a person. Subsection 35A(7) should be amended to achieve the same effect.

### **Recommendation 5**

Subsection 51B(1) should be amended to require more detailed reporting to Parliament on the operation and application of ss 33AA, 35 and 35A, including in relation to children.

### **Recommendation 6**

Any decision leading to loss of citizenship should be subject to independent merits review, and to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

### **Recommendation 7**

If s 35 is retained, the phrase 'in the service of a declared terrorist organisation in s 35(1)(b)(ii) should be defined to identify the proscribed conduct, and in a way that more clearly indicates that the person must necessarily have repudiated their allegiance to Australia.

### **Recommendation 8**

If retained, the conduct-based citizenship loss provisions in ss 33AA and 35 of the *Australian Citizenship Act 2007* (Cth) should not apply to children.

### **Recommendation 9**

The conviction-based loss provisions in s 35A of the *Australian Citizenship Act 2007* (Cth) should only apply to persons aged at least 14 years of age or older.

### **Recommendation 10**

Loss of citizenship under s 35A following a relevant criminal conviction should not operate retrospectively.

### **Recommendation 11**

The INSLM should seek from the Department of Home Affairs information about the number of cases to which s 35A could apply retrospectively, and the details of those cases.

## 4 Operation of citizenship loss provisions

26. Sections 33AA, 35, 35AA and 35A of the Citizenship Act set out three alternate ways in which dual citizens can involuntarily lose their Australian citizenship:
  - a. if a person engages in specified conduct that is inconsistent with their allegiance to Australia while outside Australia, or a person engages in such conduct while in Australia but leaves Australia before being tried for any relevant offence (s 33AA)
  - b. if, while outside of Australia, a person (s 35):
    - i. serves in the armed forces of a country at war with Australia
    - ii. fights for, or is in the service of, a 'declared terrorist organisation' (pursuant to s 35AA)
  - c. if a person is convicted of certain terrorism or other offences, and the Minister determines that their citizenship should cease (s 35A).
27. In summary, ss 33AA, 35 and 35AA deal with conduct-based citizenship loss for conduct that has taken place outside Australia or for persons who may be outside the reach of Australian prosecution. These conduct-based provisions do not require that an individual be prosecuted or convicted before the individual's citizenship is removed. By contrast, s 35A deals with conviction-based citizenship loss for persons sentenced in Australia for certain offences.
28. Different criteria, and procedural regimes, apply to these categories. Conduct-based citizenship loss occurs *automatically* when a person engages in the prohibited conduct outside Australia. Conviction-based citizenship loss occurs by way of a Ministerial determination, which allows a measure of discretion and consideration of relevant individual circumstances.
29. Subject to some limited exceptions, the removal of citizenship is permanent. Under s 36A of the Citizenship Act, once a person's citizenship ceases under ss 33AA, 35 or 35A they can never again become an Australian citizen unless the Minister makes a decision that the person should be exempt from the effect of the citizenship loss provision.
30. Prior to the passage of the Allegiance Act, the circumstances in which an Australian citizen could involuntarily lose their citizenship were relatively confined. The Allegiance Act significantly expanded the circumstances under which both automatic and discretionary citizenship loss can occur.

31. Notably however, the initial *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) (the Allegiance Bill), introduced into Parliament on 24 June 2015, was considerably reformed before its final passage.
32. The initial Allegiance Bill was referred to the Committee for inquiry and report. The Commission made a submission to the Committee's inquiry on 16 July 2015, setting out significant human rights concerns.<sup>12</sup>
33. The Committee tabled its report on 4 September 2015 and made 27 recommendations.<sup>13</sup> In response, the Government made numerous amendments to the Allegiance Bill, stating that it had implemented the Committee's recommendations.
34. The Commission welcomes revisions made to the Allegiance Bill as a result of the Committee's review in 2015. Many of these changes reflected recommendations that the Commission had made to the Committee. In particular, the Commission had made a range of recommendations aimed at ensuring that there were procedural safeguards in the process of assessing whether a person's citizenship should cease. In this regard, the Commission had recommended that:
  - a. loss of citizenship should not be automatic
  - b. any decision or mechanism to deprive a person of citizenship should take into account the particular circumstances of the person and their conduct
  - c. the Minister should be required to notify any person who loses their citizenship of that loss, and the reasons for it
  - d. an affected person should be entitled to make submissions to the relevant decision maker
  - e. any decision leading to loss of citizenship should attract a full right of appeal.
35. Changes were made to the operation of the conviction-based loss regime in s 35A to include most of the recommended procedural safeguards. This regime was originally proposed to be automatic, similar to the operation of the conduct-based loss regime introduced at the same time. It was instead revised to require a Ministerial determination, following consideration of particular relevant factors. The Minister is bound by the rules of natural justice in considering whether to make a determination. There are notice obligations which require that the affected person be notified and provided with reasons for the determination. The determination by the Minister is subject to judicial review.

36. While these changes to the conviction-based loss regime were welcome, equivalent changes were not made to the conduct-based loss regime. The differences between these two regimes are considered in more detail in sections 4.1 and 4.2 below. In section 6.1 below, the Commission recommends the repeal of the conduct-based provisions in ss 33AA and 35. In section 6.2 below, the Commission recommends that if the conduct-based regime is retained, equivalent procedural safeguards should be inserted into it.
37. Some other recommendations made by the Commission in 2015 were wholly or partially adopted by the Committee and reflected in amendments to the Bill. First, the Commission recommended that the conduct-based citizenship loss provisions not apply to children. Following recommendations by the Committee, amendments were made to the Bill to provide that the conduct-based loss regime only applied to children 14 years of age or older.
38. No equivalent changes were made to the conviction-based loss regime, which applies to any child above the age of criminal responsibility, currently ten years of age or older. However, the Minister must take into account the best interests of the child as a primary consideration when making a determination under s 35A that citizenship has ceased for a person aged under 18 years of age. In section 6.4 below, the Commission recommends that these changes go further, to exempt children from the operation of the conduct-based citizenship loss provisions, as it previously recommended. It also recommends that the conviction-based regime only be applied to children aged at least 14 years old.
39. Secondly, the Commission recommended that children not lose their citizenship if their parent loses their citizenship under one of these citizenship loss provisions. An amendment was made to the Allegiance Bill that implemented this recommendation.
40. Thirdly, the Commission recommended that certain offences be removed from the conviction-based loss regime in s 35A, including the offence of 'destroying or damaging Commonwealth property'. Amendments were made to the Allegiance Bill to narrow the range of offences.
41. The Government's response to the Committee's report said that it had implemented the Committee's recommendations 'to the fullest extent possible'.<sup>14</sup> However, the Commission considers that the amendments to the Bill did not fully implement all of the Committee's recommendations. In particular:

- a. the Committee recommended that the Minister *be required* to consider exercising their discretion to exempt a person from the effects of the conduct-based loss regime, and that a range of specific factors be taken into account in the course of this consideration (Recommendation 15). Instead, the Bill as passed gave the Minister a *non-compellable* power to exempt a person from the effects of the conduct-based loss regime. Contrary to the Committee's recommendations, the Act explicitly provides that the Minister does *not* have a duty to consider the exercise of this power (ss 33AA(15) and 35(10)). This is a significant departure from the recommendations of the Committee and removes a very important safeguard against what is otherwise an automatic loss of citizenship.
  - b. the Committee recommended that the Bill clarify the intended scope of the term 'in the service of' a declared terrorist organisation for the purposes of s 35 (Recommendation 7). This clarification had also been recommended by the Commission. While the Bill was amended to include examples of conduct that *would not* amount to being in the service of a declared terrorist organisation (s 35(4)), it did not provide any clarification of the scope of conduct that *would* amount to being in the service of a declared terrorist organisation. This issue is considered in more detail in section 6.3 below.
42. The Commission also notes the recent proposed amendments to s 35A under the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth), to lower certain thresholds for application of conviction-based loss. The Commission made a submission in relation to this Bill, recommending that it not be passed.<sup>15</sup> This Bill was not passed and lapsed with the dissolution of the 45<sup>th</sup> Parliament.

#### **4.1 Conviction-based citizenship loss (s 35A)**

43. Any dual citizen with a relevant conviction can be subject to conviction-based citizenship loss by way of a Ministerial determination, regardless of whether their Australian citizenship is conferred by birth or naturalisation.<sup>16</sup> This power could be applied to persons aged ten years old or older, pursuant to the age of criminal responsibility in the Criminal Code. The person ceases to be an Australian citizen at the time the relevant Ministerial determination is made.<sup>17</sup>
44. Subsection 35A(1) of the Citizenship Act allows the Minister to make a determination that a person ceases to be an Australian citizen, where all of the following criteria are met:

- a. the person is convicted of specified offences, being certain terrorism-related, treason, sabotage, espionage and foreign interference offences,<sup>18</sup> mostly set out in the Criminal Code
  - b. the person has been sentenced to a period of imprisonment of at least six years for a single specified offence or six years cumulatively for a number of specified offences, not including a suspended sentence
  - c. the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination
  - d. the Minister is satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia
  - e. the Minister is satisfied that it is not in the public interest for the person to remain an Australian citizen having regard to:
    - i. the severity of the conduct
    - ii. the degree of threat posed to the Australian community
    - iii. the age of the person
    - iv. if the person is aged under 18—the best interests of the child as a primary consideration
    - v. the person’s connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person
    - vi. Australia’s international relations
    - vii. any other matters of public interest.
45. Certain notice requirements attach to the conviction-based loss process. Subsection 35A(5) of the Citizenship Act states that if the Minister makes a determination, they must give or make reasonable attempts to give written notice to that effect to the person as soon as practicable.
46. Pursuant to ss 35A(6) and 35B(2), a notice must set out the following matters:
- a. that the Minister has determined under s 35A that the person has ceased to be an Australian citizen
  - b. the reasons for the decision to make the determination
  - c. the person’s rights of review.

47. However under s 35B(3), a notice must not contain certain sensitive information. This includes information that: is operationally sensitive; would or might prejudice the performance by a law enforcement or security agency of its functions; would or might prejudice the security, defence or international relations of Australia; would or might endanger a person's safety; or would be 'likely to be contrary to the public interest for any other reason'.
48. Under s 35A(7), an exception permits the Minister to determine that a notice should not be given to the person if the Minister is satisfied that giving the notice *could* prejudice the security, defence or international relations of Australia, or Australian law enforcement operations.
49. The Minister is required to consider revoking such a determination periodically—no later than six months after making it and at least every six months thereafter until five years have passed. If a determination not to make a notice is revoked, the Minister must give a notice under s 35A(5) as soon as practicable.
50. The Explanatory Memorandum to the Allegiance Bill relevantly stated:

The purpose of this provision is to recognise that there may be instances where providing immediate notice to a person regarding the cessation of their Australian citizenship may compromise ongoing operations of national security and thereby prejudice the security, defence or international relations of Australia or Australian law enforcement operations. For example, intelligence operations may be put at risk if a person were to be notified about the cessation of their Australian citizenship.

However, the Minister must review this decision no later than 6 months after making it, and at least every 6 months thereafter until 5 years has passed. This recognises the reasonable expectation that the person is to be notified as soon as possible, until 5 years has passed. It is expected that any ongoing operation of national security would be resolved within 5 years, or alternatively that the person may make themselves known to the Minister during this period (for example, by attempting to return to Australia).<sup>19</sup>
51. The Department of Immigration and Border Protection (as it was then known) stated in a submission to the 2015 inquiry of the Committee that 'there would be no ministerial discretion not to issue a notice once the Minister has become aware of conduct, merely a discretion to delay the issuing of a notice'.<sup>20</sup>

52. There are some safeguards in s 35A that regulate the exercise of Ministerial discretion to determine that a person ceases to be an Australian citizen because of a criminal conviction:
- a. a notice must be revoked if the relevant conviction is later overturned or quashed and no appeal or further appeal can be made to a court—if this occurs, the person’s citizenship is taken never to have ceased (ss 35A(8)–(9))
  - b. the rules of natural justice apply to the Minister’s power to make a determination under s 35A(1), meaning that a person must be given an opportunity to be heard about whether the Minister should make the determination, but not to other aspects of s 35A including the notification process (s 35A(11))
  - c. the Minister’s powers can only be exercised by the Minister personally (s 35A(10)).

## 4.2 Conduct-based citizenship loss

(a) *Conduct inconsistent with allegiance to Australia (s 33AA)*

53. Section 33AA provides that a person will be deemed to have renounced their Australian citizenship if they engage in a range of specified conduct, on the basis that the conduct is inconsistent with their allegiance to Australia. The conduct is described in the same terms as certain offences set out in the Criminal Code. However, it is not necessary for a person to have been convicted of one of these offences in order for the deemed renunciation to apply.
54. The Explanatory Memorandum to the Allegiance Bill described the purpose of s 33AA as being to protect the Australian community, but acknowledged that this mechanism stands outside the criminal justice system:
38. [W]here the person engages in the specified terrorist-related conduct as prescribed in new subsection 33AA(2), and the conduct is engaged [in] with the intention as specified in new subsection 33AA(3), the person is taken to [have] repudiated their allegiance to Australia and the person will cease to be an Australian citizen. This occurs by operation of law and does not amount to an assessment of whether the person has committed a criminal offence.

...

41. The prospects of bringing a person to trial and successfully convicting that person would be more constrained if that person is outside Australia. In order to protect the Australian community, it is appropriate that there is a process for Australian citizenship to be lost based on the person's conduct repudiating their allegiance to Australia.<sup>21</sup>
55. Any dual citizen aged 14 or older can be subject to conduct-based citizenship loss, if they engage in prohibited conduct that is deemed to be inconsistent with their allegiance to Australia,<sup>22</sup> regardless of whether their citizenship is conferred by birth or naturalisation.<sup>23</sup> Some affected persons may have always lived in Australia, may have Australian parents or children, and have a limited connection with any other country.
56. The person must be outside Australia when they engage in the conduct, or have left Australia after engaging in the conduct and not been tried for any offence relating to the conduct.<sup>24</sup> Subsection 33AA(9) provides that the person ceases to be an Australian citizen immediately upon the person engaging in the relevant conduct.<sup>25</sup>
57. Section 33AA(7)(b) provides, in relation to conduct that occurs within Australia, that loss of citizenship only occurs if the person has left Australia after engaging in the proscribed conduct and before being tried for any offence in relation to the conduct.<sup>26</sup> It is immediately apparent that s 33AA(7)(b) cannot be reconciled with the natural and ordinary meaning of s 33AA(9). Nevertheless, it seems likely that Parliament's intention was that, for conduct that occurs in Australia, the person ceases to be an Australian citizen at the point in time when they leave Australia. At the very least, s 33AA is contradictory and, if it is retained, s 33AA(9) should be amended to clarify its effect. For the reasons explained in more detail below, the Commission's primary position is that s 33AA should be repealed.
58. Subsection 33AA(2) sets out the prohibited conduct as follows:
  - a. engaging in international terrorist activities using explosive or lethal devices
  - b. engaging in a terrorist act
  - c. providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act
  - d. directing the activities of a terrorist organisation
  - e. recruiting for a terrorist organisation
  - f. financing terrorism

- g. financing a terrorist
  - h. engaging in foreign incursions and recruitment.
59. Pursuant to s 33AA(6), words and expressions in s 33AA(2)(a) to (h) have the same meaning as in the Criminal Code, but the fault elements under the Criminal Code do not apply. This means that the person must have engaged in the physical elements of the offence, but need not have the relevant fault element (intention, knowledge, recklessness or negligence) in relation to each physical element.
60. Instead, the relevant intention is dealt with in s 33AA(3). The conduct must be engaged in 'with the intention of advancing a political, religious or ideological cause' and with the intention of either:
- a. coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country
  - b. intimidating the public or a section of the public.
61. A person is automatically taken to have met the s 33AA(3) test if, at the time they engaged in the conduct, the person was either:
- a. a member of a declared terrorist organisation (pursuant to a declaration made by the Minister under s 35AA, see below)
  - b. acting on instruction of, or in cooperation with, a declared terrorist organisation.
62. This means that if the person is a member of a declared terrorist organisation, or 'acting on instruction of or in cooperation' with such an organisation, there is no mental element that needs to be established. In other words, a person could have their citizenship automatically removed despite not being prosecuted for a relevant offence or meeting any criminal standard of *mens rea*.
63. Subsection 33AA(10) of the Citizenship Act states that if the Minister becomes aware of conduct that results in a cessation of citizenship, they must give or make reasonable attempts to give written notice to that effect to the person as soon as practicable.
64. Pursuant to ss 33AA(11) and 35B(1), a notice must set out certain information. However, that information is more limited than what must be provided for conviction-based citizenship loss. The notice must:

- a. state that the Minister has become aware of the relevant conduct, because of which the person has ceased to be an Australian citizen
  - b. contain a basic description of the conduct
  - c. set out the person's rights of review.
65. Notably, there is no requirement for a determination by the Minister or anyone else that the person has engaged in the relevant conduct, and therefore no requirement to provide reasons. Loss of citizenship under this section is not the result of a discretionary decision. Rather, conduct-based citizenship loss is deemed to occur automatically upon the prohibited conduct and intent provisions being satisfied.
66. Under s 35B(3), a notice must not contain certain sensitive information, as set out above.
67. Under s 33AA(12), commensurate with s 35A(7), the Minister can determine that a notice should not be given to the person if satisfied that it *could* prejudice national security or other interests. The Minister is required to consider revoking such a determination periodically. If a determination not to give a notice is revoked, the Minister must give a notice under s 33AA(10) as soon as practicable.
68. Under s 33AA(14), the Minister has a discretionary, non-compellable power to displace the automatic conduct-based citizenship loss provisions, effectively undoing the removal of a person's citizenship. The Minister may make a determination to:
- a. rescind any s 33AA(10) notice, and
  - b. exempt the person from the effect of s 33AA in relation to the relevant conduct.

A determination must be tabled in Parliament within 15 sitting days, accompanied by a statement that sets out the determination as well as the reasons for making the determination, pursuant to s 33AA(18).

69. The power is non-compellable by virtue of s 33AA(15), which provides that the Minister is not under any duty to consider whether to exercise the s 33AA(14) exemption power. As noted above, this is contrary to Recommendation 15 made by the Committee during the course of its review. The Committee said, in its unanimous report:

The Committee considers that the Minister's discretionary power to exempt the loss of citizenship is a vital safeguard in the operation of the Bill. However, the Committee considers that, to strengthen the operation

of the Bill and public confidence in the exercise of its provisions, the range of factors that the Minister is required to consider should be made explicit.

...

To ensure the appropriate operation of these safeguards, and given the seriousness of loss of citizenship, the Committee considers that the Minister should be required to consider exercising the discretion to exempt and to take into account a specified range of factors.<sup>27</sup>

70. The Government's response to the Committee's report claimed that this recommendation had been implemented in the Allegiance Bill.<sup>28</sup> In particular, it said that the Bill provided that 'the Minister must consider exempting the effect of the legislation in each case where conduct has led to automatic loss of citizenship of a dual citizen, and providing for relevant factors for that consideration'.<sup>29</sup> However, the effect of ss 33AA(15) and s 35(10), which deals with an equivalent discretion to exempt a person from automatic citizenship loss is that the Minister has no duty to consider exempting a person from the effect of the conduct-based citizenship loss provisions.
71. The power may only be exercised by the Minister personally pursuant to s 33AA(20). Under s 33AA(22), the rules of natural justice currently only apply once the Minister has decided to consider exercising the power to exempt a person from the operation of the section. This means that, if this stage is reached, the Minister is required to provide the person with an opportunity to be heard. However, the rules of natural justice do not otherwise apply to the Minister—for example, when deciding whether or not to exercise the power. There is also no need to provide notice and/or reasons when deciding whether to exercise the power.
72. If the Minister does personally decide to consider exercising the exemption power, they must have regard to the following prescribed factors pursuant to s 33AA(17):
  - a. the severity of the matters that were the basis for any notice
  - b. the degree of threat posed by the person to the Australian community
  - c. the age of the person
  - d. if the person is aged under 18—the best interests of the child as a primary consideration

- e. whether the person is being or is likely to be prosecuted in relation to the relevant matters
  - f. the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person
  - g. Australia's international relations
  - h. any other matters of public interest.
73. Under ss 33AA(21) and 47, if the Minister embarks on a consideration of whether to exempt the operation of the citizenship loss provisions, but ultimately decides not to make a determination, they must give a person notice of the adverse decision and provide reasons. However, if the Minister decides not to consider exercising this power, there is no requirement for a notice or reasons to be given.
74. Subsection 33AA(24) clarifies that a person's citizenship is taken never to have ceased in certain circumstances, including if a Minister makes an exemption determination under s 33AA(14). Other scenarios include where a person brings a successful court challenge and the court finds that the person did not engage in the relevant conduct or did not have the requisite intention, or that the person was not a national or citizen of a country other than Australia at the time of the conduct.
75. For reasons set out in more detail below, the Commission's primary position is that citizenship loss should not be automatic and s 33AA should be repealed. Rather, a positive decision based on a person's conviction should be required to effect citizenship loss, with appropriately robust procedural safeguards.
76. However, if this recommendation is not accepted, in order to fulfil the Government's stated intention with respect to the legislation, and in order to implement the recommendations of the Committee, both of which were aimed at providing appropriate safeguards around what would otherwise be the automatic loss of citizenship, the legislation should be amended to ensure that the Minister has a duty to consider exempting a person from the effect of the conduct-based citizenship loss provisions.
- (b) *Service in foreign armed forces or declared terrorist organisation (s 35)*
77. A further type of automatic conduct-based citizenship loss can occur pursuant to s 35, if, while outside of Australia, any dual citizen aged 14 years old or above:

- a. serves in the armed forces of a country at war with Australia
  - b. fights for, or is in the service of, a 'declared terrorist organisation'.
78. This provision also operates automatically, with the person ceasing to be an Australian citizen at the time they commence to 'so serve or fight'.<sup>30</sup>
79. The Explanatory Memorandum to the Allegiance Bill described the purpose of s 35 as to reduce threats to the Australian community, including through a deterrent effect:

The effect of this amendment is that in addition to the current provision which provides that a dual citizen ceases to be an Australian citizen if they serve in the armed forces of a country at war with Australia, a dual citizen's Australian citizenship will now also cease if the person fights on behalf of, or is in the service of, a terrorist organisation outside Australia.

The purpose of this provision is to deal with the threat caused by those who have acted in a manner contrary to their allegiance to Australia by removing them from formal membership of the Australian community. Cessation of citizenship is a very serious outcome of very serious conduct that demonstrates a person has repudiated their allegiance to Australia. Citizenship is a privilege not a right. The cessation of a person's formal membership of the Australian community is appropriate to reduce the possibility of a person engaging in acts or further acts that harm Australians or Australian interests. The cessation of a person's Australian citizenship will also have a deterrent effect by putting radicalised persons on notice that their citizenship is in jeopardy if they engage in terrorist-related conduct contrary to their allegiance to Australia.<sup>31</sup>

80. Pursuant to s 35AA the Minister can by way of legislative instrument declare any terrorist organisation, within the meaning of s 102.1(1)(b) of Criminal Code, a 'declared terrorist organisation'.
81. The Minister must be satisfied on reasonable grounds that the organisation 'is opposed to Australia, or to Australia's interests, values, democratic beliefs, rights or liberties, so that if a person were to fight for or be in the service of such an organisation the person would be acting inconsistently with their allegiance to Australia', and that it is either:
- a. directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or
  - b. advocates the doing of a terrorist act.
82. Under s 35(4), a person is not taken to be 'in the service of' a declared terrorist organisation to the extent that:

- a. the person's actions are unintentional
  - b. the person is acting under duress or force, or
  - c. the person is providing neutral and independent humanitarian assistance.
83. A declaration made under s 35AA is a disallowable instrument. The Committee may review a declaration and report the Committee's comments and recommendations to each House of the Parliament before the end of the period during which the House may disallow the declaration.<sup>32</sup>
84. The same notification obligations, exceptions and discretionary exemption powers and processes that apply to s 33AA also apply to s 35. That is, the Minister has a discretionary, non-compellable power to exempt a person from the operation of automatic citizenship loss under s 35.
85. For the reasons explained in more detail below, the Commission similarly considers that citizenship loss should not be automatic and s 35 should be repealed. Rather, a positive decision based on a person's conviction should be required to effect citizenship loss, with appropriately robust procedural safeguards. If this recommendation is not accepted, the legislation should be amended to ensure that the Minister has a duty to consider exempting a person from the effect of the conduct-based citizenship loss provision.

### **4.3 Reporting and review**

86. Under s 51B, the Minister must table a report in both houses of Parliament every six months which shows the number of notices given, or attempted to be given, under these provisions. The report must include a brief statement of the matters that are the basis for the notice or the determination to which the notice relates.
87. According to a statement given on 2 January 2019 by the Hon Peter Dutton MP, Minister for Home Affairs, at least 12 cancellations of citizenship have occurred to date.<sup>33</sup> Based on the Minister's comments, and previous press releases,<sup>34</sup> it appears that in each of these cases, the citizenship loss has occurred automatically and predominantly by reason of s 35. The Department of Home Affairs (the Department) has stated in its submission to the INSLM for this inquiry that, to date, no person has lost their citizenship under s 35A.<sup>35</sup>
88. Five reports have been tabled in Parliament under s 51B. These reports record only one instance of notice, during the period from 12 June 2017 to

11 December 2017, being an attempted but unsuccessful notification to an affected person under s 35(5)(a).<sup>36</sup>

89. Section 51C requires the Minister to brief the Committee within 20 sitting days whenever a notice has been given or attempted to be given. The Minister must also inform the Committee when a determination is made not to provide a notice. These briefings can be provided orally or in writing. Records of these briefings are not publicly available.
90. Merits review is not available for any decision under ss 33AA, 35A and 35, nor is judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). A note in s 35A states that a person may seek judicial review of a determination made under that section, in the original jurisdiction of the High Court or Federal Court. A note in ss 33AA(10) and s 35(5) states that a person may seek judicial review of the basis on which a notice of citizenship loss is given under those sections, in the original jurisdiction of the High Court or Federal Court. As discussed below in section 6.2(c), the Commission is concerned that the automatic revocation of citizenship is only amenable to a very limited form of judicial review.

## 5 Relevant human rights

### 5.1 The right to enter and remain in one's own country

91. Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) provides that 'no one shall be arbitrarily deprived of the right to enter his own country'.<sup>37</sup>
92. In its General Comment No 27, the United Nations Human Rights Committee (UN HR Committee) has stated that this right implies the right to *remain in one's own country*.<sup>38</sup>
93. General Comment No 27 further provides that the concept of one's 'own country' is broader than that of nationality.<sup>39</sup> The concept includes non-nationals who have special ties or an enduring connection to a particular country. Relevant factors will include a person's length of residence, personal and family ties, intention to remain, and lack of these ties to other countries.<sup>40</sup>
94. Deprivation of Australian citizenship does not sever a person's connection with Australia as their 'own country', including those who acquired their citizenship by birth.

95. The cessation provisions can be applied to conduct of Australians that occurs either domestically or overseas. A person who loses their Australian citizenship while abroad would lose the right to re-enter Australia. A person who loses their Australian citizenship while in Australia would face immigration consequences, including likely mandatory detention until they are removed from Australia.<sup>41</sup> This issue is dealt with in more detail below.
96. These provisions therefore clearly interfere with the right of an affected person to enter and remain in their own country, Australia. The critical question then becomes whether the limitation is an arbitrary interference.
97. In relation to the concept of arbitrariness under article 12(4), the UN HR Committee has stated:

[A]rbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interferences provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.<sup>42</sup>

98. Under international human rights law, any limitation on human rights must also:
  - a. be lawful, meaning that any limitations on a human right must be provided for by law—legislation must be sufficiently specific and detail the precise circumstances in which interferences with rights may be permitted; laws must be precise and clear enough to allow individuals to regulate their conduct and should provide effective remedies in the case of abuse
  - b. be necessary to achieve a legitimate objective, consistent with the provisions and aims of the ICCPR
  - c. be proportionate to achieving the legitimate objective.<sup>43</sup>
99. In relation to the concept of reasonableness under article 12(4), the UN HR Committee has stated:

[T]he Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.<sup>44</sup>

## 5.2 Other protections

100. Children enjoy all rights protected by the ICCPR, as well as particular and special protections under the CRC.<sup>45</sup>

101. Article 8(1) of the CRC protects the right of children to preserve their identity, which includes their nationality and family relations:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

102. Article 3 of the CRC also protects the best interests of the child:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

103. Children are also protected against arbitrary or unlawful interferences with their privacy, family and home under article 16(1) of the CRC.

104. Australia has also assumed obligations under the Statelessness Convention. Article 8(1) of the Statelessness Convention provides that a state 'shall not deprive a person of its nationality if such deprivation would render him stateless'.<sup>46</sup>

105. Article 15(2) of the Universal Declaration of Human Rights (UDHR) further provides that 'no one shall be arbitrarily deprived of his nationality'.<sup>47</sup> This prohibition is considered to be a rule of general customary international law.<sup>48</sup>

106. If a person's Australian citizenship is removed on the incorrect understanding that they are the citizen of another country, they may be made stateless in contravention of these obligations. The current legislative scheme provides a safeguard to statelessness—the question whether a person is a national or citizen of another country is a jurisdictional fact.

107. This means that a court exercising judicial review can receive evidence of whether the individual in question is indeed a dual citizen. If the Minister has wrongly made a determination under s 35A(1) in respect of a person who was not a dual citizen, the court can correct this error based on the court's own assessment of the relevant evidence. In the case of the conduct-based automatic loss provisions, if a court finds that the person was not a national or citizen of a country other than Australia at the time of the relevant conduct, the person's Australian citizenship is taken never to have ceased.<sup>49</sup>

108. The Commission reiterates its previously articulated concern that any lowering of this threshold, as proposed in the Australian Citizenship

Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) with respect to s 35A, would impermissibly increase a person's risk of statelessness.<sup>50</sup>

109. Removal of citizenship is likely to significantly limit numerous other human rights protected in the ICCPR and other human rights conventions to which Australia is a signatory.
110. Without undertaking a comprehensive analysis of the consequences of removal of citizenship, it suffices for present purposes to observe that the resulting human rights implications may be extensive and not immediately apparent.
111. For example, removal of citizenship may lead to loss of a passport,<sup>51</sup> removal from the electoral roll,<sup>52</sup> and loss of entitlement to social security benefits.<sup>53</sup> It would change the activities that intelligence organisations such as the Australian Secret Intelligence Service and the Australian Signals Directorate can undertake with respect to a person.<sup>54</sup>
112. Further, a person who has their Australian citizenship removed while in Australia would automatically be granted an ex-citizen visa.<sup>55</sup> However, that visa could be revoked at the discretion of the Minister. The circumstances which led to the loss of citizenship would almost certainly mean that the person fails the 'character test', enlivening the Minister's powers of visa cancellation. In the case of loss of citizenship on the basis of a conviction, the conviction would enliven the automatic visa cancellation provision in s 501(3A) of the *Migration Act 1958* (Cth) because the person would have a 'substantial criminal record'.
113. The result would be that, unless the Minister decided to revoke the mandatory visa cancellation, a person who lost their citizenship while in Australia would likely be subject to immigration detention until such time as they were removed from Australia.
114. Australia's mandatory immigration detention policy has been found by the UN HR Committee to give rise to arbitrary detention, contrary to articles 9(1) and 9(4) of the ICCPR.<sup>56</sup> Under article 9 of the ICCPR, detention will become arbitrary when it is not necessary and proportionate to achieving a legitimate objective, and is not subject to periodic review.
115. There is also the prospect of lengthy or even indefinite immigration detention. For example, a person whose citizenship is removed could be a refugee, and would be unable to be returned to their country of origin

consistently with Australia's *non-refoulement* obligations. As a result, they could be detained for a very long or indefinite period.

116. In another scenario, a person's ability to leave Australia may depend on a foreign government agreeing to admit them or to issue relevant documents such as a passport. If these steps do not eventuate, or are subject to lengthy delays, the person could be unable to be removed. Indefinite detention is inconsistent with a person's right to protection against cruel, inhuman and degrading treatment in article 7 of the ICCPR.<sup>57</sup>
117. Immigration detention, or an inability to re-enter Australia, may in turn interfere with a person's family life contrary to articles 17 and 23 of the ICCPR. Removal of a person who was born, raised, or who has spent a long period of their life in Australia could result in forced relocation to a country where they have no family or social connections and that is entirely culturally or otherwise unfamiliar.

## 6 Key human rights issues

### 6.1 Automatic loss of citizenship

(a) *Citizenship loss should only be possible following a relevant criminal conviction and Ministerial determination*

118. The automatic nature of the conduct-based provisions in ss 33AA and 35 risk seriously breaching a person's human rights. Two of the key reasons for this are: first, the threshold for triggering the loss of citizenship is much lower than for the conviction-based loss provisions; and secondly, there is no requirement to take into account a person's individual circumstances prior to citizenship being lost.
119. The Commission considers that loss of citizenship should never be automatic. These provisions should be strictly delimited to ensure use in only the most exceptional circumstances—and as a last resort where the gravest criminal conduct also repudiates one's allegiance to Australia—after careful consideration, reasonable justification and due process. They should also be subject to robust review and oversight mechanisms.
120. Section 33AA provides that a person will be deemed to have renounced their Australian citizenship if they engage in a range of specified conduct, on the basis that the conduct is inconsistent with their allegiance to Australia. The conduct is described in the same terms as certain offences

contained in the Criminal Code. However, it is not necessary for a person to have been convicted of one of these offences in order for the deemed renunciation to apply. In addition to the fact that the conduct in question need not necessarily be criminal, there is no assessment of the degree of seriousness of the conduct.

121. Section 35 provides that a person loses their Australian citizenship if, while outside Australia, they serve in the armed forces of a country at war with Australia, or fight for or are 'in the service' of a declared terrorist organisation. While this proscribed conduct does not exactly mirror the wording of particular offences in the Criminal Code, the Commission understands that various provisions of the Criminal Code, including those under the headings of 'terrorism', 'terrorist organisation', 'foreign incursions and recruitment' and 'treason', would make levying war against Australia or fighting for a terrorist organisation a criminal act.<sup>58</sup>
122. Conduct that meets the definition of being 'in the service' of a declared terrorist organisation may not rise to the level of any offence in the Criminal Code. The vagueness of this phrase is discussed further below in section 6.3. In the Commission's view, conduct that is not an offence should not be a basis for the loss of citizenship.
123. Currently, no criminal conviction is required to enliven citizenship loss under these conduct-based cessation provisions. Rather, upon the relevant conduct occurring with the requisite intention, the deeming provisions work immediately and automatically. No positive decision needs to be made to 'cancel' or 'revoke' a person's Australian citizenship.
124. The individual circumstances of the affected person cannot be taken into account prior to citizenship being lost. There is no opportunity for a person to be given a hearing, to be informed of the evidence against them, or to respond to adverse allegations. There is no requirement for a decision-maker, let alone a court, to consider all the relevant circumstances and exercise discretion in the application of the automatic provisions. There is only a non-compellable Ministerial discretion, once citizenship has already been lost, to consider exempting a person from the effect of the provisions.
125. The conduct-based provisions operate regardless of the relative seriousness of the relevant conduct. For example, a minor who 'finances terrorism' by donating a single dollar to a terrorist cause—even if the money is not used for a terrorist act<sup>59</sup>—is affected in exactly the same way as an adult who travels overseas to fight for a declared terrorist

organisation. Both are at risk of automatically losing their Australian citizenship.

126. By contrast, the conviction-based provisions in s 35A require not only an assessment to a criminal standard that a person has committed a crime, but also that a sentence of at least six years has been imposed by a judge. This immediately imports a degree of seriousness to the conduct commensurate with the potential impact to the individual of the loss of citizenship.
127. Our laws generally operate to ensure that any consequences of offending are proportionate to the seriousness of the relevant conduct. For every criminal offence, Parliament sets a penalty range that takes into account the relative seriousness of the offence in question. When an individual is convicted of an offence, the penalty imposed will be determined by reference to the legislated penalty range and, almost always, with provision to consider the particular circumstances of the individual's offending. In this way, our criminal law system aims to adhere to the fundamental legal principle of proportionality between severity of outcome and the seriousness of a crime.
128. Under the conduct-based cessation provisions in ss 33AA and 35, there is no requirement to consider factors that bear on the seriousness of the proscribed behaviour or the impact on the individual, before an individual's citizenship is removed. Such factors would include, as prescribed by s 35A(1)(e) for the conviction-based loss regime, the degree of threat posed to Australia; the impact of the behaviour on Australia's international relations; the age of the individual or their connection to Australia or another country.
129. A person could pose no ongoing threat, but still lose their citizenship. This raises serious questions about the necessity and proportionality of automatic citizenship loss to address the stated goals of public safety and national security. Without a requirement to take into account relevant circumstances to assess whether citizenship loss is warranted in any particular case, there is a real risk that the grave consequences of citizenship loss will not be proportionate to any safety or security risk faced.
130. Further, a range of other legal and operational measures are available to combat real risks to the community posed by terrorists, including cancellation of passports, control orders, and imprisonment following conviction.

131. The Commission considers that our criminal justice system is best placed to establish that criminal conduct has occurred, and to assess its seriousness. Loss of citizenship, being one of the most severe possible civil consequences, is also best justified by reference to the findings of a court.
132. There are particular additional concerns when the affected person is a child. For example, criminal standards of intent are particularly important in relation to children, whose understanding and knowledge are necessarily limited. Despite engaging in the relevant conduct, there are risks that a child who engages in proscribed conduct could be in reality a victim who has been manipulated or exploited by an adult.
133. Further, the criminal justice system has many safeguards relating to children at all stages of the process. For example, the common law protective presumption of *doli incapax* assumes that children aged 10 to 14 years are 'criminally incapable' unless proven otherwise. By way of further example, some diversion programs are only available to children, and are premised on rehabilitation rather than punishment. Such programs mean that, despite committing a relevant crime, a child may never end up with a conviction. For the automatic conduct regime, such standards and safeguards are evidently not available.

(b) *Problems with certainty and transparency*

134. From a rule of law perspective, the use of an automatic regime is also problematic for legal certainty. The operation of anti-terror laws can be complex. A person may not be certain whether or not their conduct is captured by the relevant provisions.
135. There could be scope for disagreement about whether or not the particular facts have occurred to trigger the automatic revocation, including the question of a person's intention. This is especially so given that no decision is made, whether by a departmental officer, the Minister or a court, so there is never any authoritative determination of the facts. This uncertainty is compounded by inadequate procedural safeguards as discussed below, including exceptions to the notice provisions which mean that a person may never be made aware that the Government considers that their citizenship has ceased.
136. The Commission understands that, in practice, the Citizenship Loss Board reviews individual cases and advises the Minister about whether the conditions giving rise to citizenship loss may be established. There is little publicly available information about the operation of this Board. Advice

provided by the Board is not made public and what is known about its operations arises largely from responses to freedom of information requests, noting that in a submission made by the Department to this INSLM review there is some detail about the Board's processes.<sup>60</sup>

137. Terms of Reference for the Board note that it is responsible for supporting the Secretary of the Department and the Minister in 'administering the new citizenship loss provisions'.<sup>61</sup> This includes 'review[ing] the supporting information for citizenship loss cases that will be provided to the Minister' and 'provid[ing] general advice to the Secretary ... on the implementation of the citizenship loss provisions'. Minutes created by the Board also emphasise that it is 'an inter-departmental committee providing advice, not a decision-making body'.<sup>62</sup>
138. It appears that the Board is the mechanism by which the Minister 'becomes aware' of conduct that may fall within the terms of the conduct-based citizenship loss provisions.<sup>63</sup> The assessment of whether the conduct triggers citizenship loss appears to be based on information from different Commonwealth agencies, including a security assessment from the Australian Security Intelligence Organisation. The effect of this is that the Minister must then give notice to the person that their citizenship 'has ceased', unless an exemption applies, and may consider exempting the person from the operation of the provisions.
139. However, although the Minister may be provided with advice by the Citizenship Loss Board, neither the Board nor the Minister makes any authoritative decision that citizenship has been lost. The Minister may therefore be acting on a misapprehension of the facts when deciding whether or not to give a notice to the affected person, or to consider exempting them from the operation of the automatic provisions.
140. This lack of certainty is compounded by at least three different fact-finding thresholds which appear to be used in the administrative processes in relation to the conduct-based citizenship loss provisions. According to information provided by the Department,<sup>64</sup> an early step is for the Board to endorse an issues paper to the effect that it has reached an 'awareness of likely citizenship loss' (a question of probability). The issues paper is then used as a basis for preparing a Ministerial submission. Upon consideration of the submission, the Minister appears to decide whether they are 'not satisfied' that a person's citizenship has ceased (a question of satisfaction), or whether they have 'become aware' that citizenship has ceased (a question of fact). These differing thresholds suggest inconsistent and uncertain policy processes.

141. The lack of certainty then flows through to any other administrative actions that may be taken as a consequence, for example, the cancellation of a passport.
142. It appears that the onus is put on the person considered to have automatically lost their citizenship to demonstrate that this is not the case, for example, by seeking a declaration to that effect from a court. Again, this raises real rule of law issues because it allows for a presumption that a person has lost vital civil rights without any legal determination to that effect.
- (c) *Automatic loss provisions are inconsistent with Australia's obligations to prosecute international crimes*
143. The conduct-based loss provisions apply to conduct that occurred outside Australia, or to conduct that occurred within Australia by a person who left Australia before they had been tried for any offence. The effect of these provisions is that a person will be outside Australia at the time that they lose their Australian citizenship and will not yet have been tried for any relevant offence.
144. Under international law, Australia has an obligation to prosecute gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law,<sup>65</sup> which can include terrorism-related acts, or to extradite alleged offenders to jurisdictions where prosecution can occur. The UN General Assembly has also recognised a further obligation on states to ensure full and effective redress for victims of such violations and non-recurrence.<sup>66</sup>
145. By removing a person's citizenship in these circumstances, Australia is acting inconsistently with these international law requirements and its obligation to be a responsible and cooperative member of the international community in the fight against terrorism and in the prosecution of certain international crimes. It is effectively declining to fulfil this responsibility and passing on risk to other nation states, including for alleged offenders who may have been born, raised and radicalised in Australia. Some of these other states are less equipped to carry out effective investigations and prosecutions.
146. There are two ways in which the conduct-based citizenship loss provisions make it more difficult for Australia to adhere to its international law responsibilities. First, at a practical level, the loss of citizenship makes it less likely that the alleged offender will return to Australia voluntarily and

be available for prosecution. An ex-citizen will lose their entitlement to a passport, and it is unlikely that they will qualify for a visa because they will not satisfy the character requirements of the Migration Act.

147. Secondly, removing Australian citizenship may remove legal liability under Australian law for future conduct by the same person, including for some future terrorism-related offences. Many offences in the Criminal Code extend to certain conduct outside Australia only if engaged in by an Australian citizen.<sup>67</sup> When a person's Australian citizenship is lost, Australia also loses the ability to prosecute certain subsequent offences committed overseas. If an Australian citizen has engaged in a course of criminal conduct overseas, including some terrorist conduct, they may effectively obtain an immunity from prosecution by Australian authorities for certain offences after their Australian citizenship is lost.
148. Indeed, the Department has acknowledged this risk of impunity and potential loss of ability to use domestic criminal processes to protect the safety of Australians. In its submission to this INLSM review, the Department identified one of the 'challenges' of an automatic 'operation of law' model as follows:
- Citizenship cessation applies automatically and may impact other mechanisms, such as criminal justice processes, that can be used to manage the level of risk an individual poses to the Australian community.<sup>68</sup>
149. Most of the offences in the Criminal Code which form the basis for the conduct described in s 33AA(2) are an exception to this issue. All but one of these offences have extra-territorial application regardless of whether or not the person engaging in the conduct was an Australian citizen.<sup>69</sup> Similarly, conduct proscribed under s 35 that also repudiates allegiance to Australia is also likely captured by criminal offences that have extra-territorial application.<sup>70</sup> Accordingly, for these offences it does not matter whether or not a person is an Australian citizen—they can still be prosecuted in Australia for conduct such as engaging in a terrorist act, receiving training connected with preparation for a terrorist act, and financing terrorism.
150. The one offence relevant to s 33AA(2) with a different extra-territorial application is 'engaging in international terrorist activities using explosive or lethal devices'. The offence in the Criminal Code has more limited extra-territorial application, which can depend on whether a person is an Australian citizen.<sup>71</sup> This means that a person could lose their citizenship automatically for engaging in some other conduct—for example, receiving training connected with preparation for a terrorist act—and then not be

liable under Australian law for subsequent conduct of engaging in international terrorist activities using explosive or lethal devices.

(d) *Repeal of automatic citizenship loss provisions*

151. For the reasons above, the Commission recommends that citizenship loss not operate automatically, but rather it should be possible only following a positive decision by reference to a serious criminal conviction that also repudiates a person's allegiance to Australia, and ensuring that appropriate procedural safeguards are in place to protect a person's human rights.
152. The Commission appreciates that there may be practical difficulties in establishing that the prohibited conduct has occurred overseas, prosecuting a person for a criminal offence that occurred abroad, and in effecting notification to persons who are overseas. This includes the difficulties faced in gathering foreign evidence, sometimes in fragile states or war zones.
153. However, given the severe human rights and other impacts on the affected person of citizenship loss, the indeterminate national security benefits, and traditional standards of criminal justice, it considers that these provisions should not operate automatically and that procedures should be in place to ensure that this power is used only in the most exceptional circumstances, observing human rights and the rule of law.
154. For those outside Australia, a person suspected of committing a relevant crime could be apprehended on their return to Australia, or could be extradited, and face the criminal justice system to establish their guilt before a court. Upon relevant conviction, their citizenship status could then be considered in light of all of the relevant circumstances.
155. Any risk to public safety involved in prosecuting alleged offenders in Australia could be managed through usual criminal justice and law enforcement processes, as it is with people who hold only Australian citizenship and are alleged to have committed terrorism offences.
156. This approach would better uphold the separation of powers, presumption of innocence, procedural fairness, usual standards of criminal justice and Australia's international law obligations.

## Recommendation 1

Section 33AA and 35 of the *Australian Citizenship Act 2007* (Cth) should be repealed, with the result that loss of citizenship should be possible only under s 35A following a relevant criminal conviction and Ministerial determination, rather than by automatic operation of the law.

## 6.2 Procedural safeguards

### (a) *Ensuring consistent and robust legislative safeguards*

157. If the Commission's Recommendation 1 is not accepted, the Commission considers that s 33AA and 35 should be amended to ensure that a person who is at risk of losing their citizenship as a result of engaging in the proscribed conduct is provided with the same or strengthened procedural safeguards that apply to the conviction-based citizenship loss provisions.
158. This includes a positive decision by a decision maker that takes into account relevant considerations, requirements on the decision maker to afford procedural fairness and provide reasons for decisions, a higher threshold to displace the giving of a notice, and avenues to have those decisions subject to appropriate review.
159. The Commission considers that the current legislative safeguards in the conduct-based citizenship loss provisions are inadequate to protect individual rights and ensure that correct, fair and just outcomes are reached, especially in light of the harsh consequences.
160. The most significant of the current safeguards is the Minister's personal, non-compellable, discretionary power to exempt individuals from the operation of automatic cessation of citizenship, by determination made under ss 33AA(14) or 35(9). However, the current protections are inadequate for a number of reasons:
  - a. there is no decision by an officer of the Commonwealth that the person's citizenship should cease, and there is therefore no requirement for reasons or the possibility of merits review of a 'decision' to remove citizenship
  - b. there is a requirement to notify a person that a relevant section applies to them and therefore that their citizenship has been lost, but no notice has to be given if the Minister is satisfied that giving the notice *could* prejudice national security or other interests

- c. there is also no requirement for any notice to set out anything more than a 'basic description' of the relevant conduct
  - d. there is no opportunity for a person affected to make submissions to the Minister in favour of the exercise of the Minister's discretionary power to rescind the notice and exempt the person from the operation of the relevant section unless the Minister decides to consider exercising this power
  - e. the Minister is not required to consider exercising this discretionary power, regardless of the merits of a particular case
  - f. there is no possibility of judicial review of a decision of the Minister not to consider exercising this discretionary power, because there is no duty that can be enforced
  - g. natural justice only applies if the Minister decides to consider exercising the discretionary power
  - h. if the Minister decides to consider exercising the discretionary power any determination by the Minister not to exercise that power is not amenable to merits review
  - i. any opportunity for judicial review of a determination not to exercise the relevant power (following a decision to consider exercising the power) will be extremely limited.
161. The combined effect of this process is that: a person could lose their citizenship automatically, they may not be notified because of an exemption to notification, even if they are notified they may not be provided with more than 'a basic description' of the relevant conduct, and they would not be given the opportunity to make submissions or respond to adverse allegations prior to their citizenship being lost.
162. Even if there are disputed facts and a lack of clarity about whether in fact the prohibited conduct has occurred, which is likely if the acts occurred outside Australia, in practical terms once citizenship is lost and the Minister has decided not to consider exercising the discretion to exempt the person from the operation of the section, this would likely be the end point of the process.
163. A person may also never be notified that their citizenship has been lost. Subsections 35(7) and 33AA(12) provide that a Minister may determine in writing that notice should not be given, if satisfied that giving notice to a person *could* prejudice national security, defence or the international relations of Australia or Australian law enforcement operations. The threshold of 'could' is a very low bar.

164. In practice, this means that a trivial or purely hypothetical risk to national security or Australia's international relations could be sufficient to deny an individual notice of the fact that their citizenship has been lost. This threshold makes it more likely that a disproportionate weight will be placed on the low risk to national security (or the other named factors) to the detriment of an individual whose rights will be seriously diminished by their citizenship being lost without notice.
165. The Commission is not aware of any publicly-available material that explains how the weighing process has been carried out in determining whether to issue a notice in individual cases to date. However, it is clear that the exemptions from the notice requirements have been frequently relied upon to prevent the giving of notices.
166. The parliamentary reports and Ministerial statements discussed in section 4.3 above suggest that in 11 out of 12 instances of citizenship loss, the Minister has determined that a notice should not be given to the affected person, and that in the remaining instance the attempted notification was unsuccessful.<sup>72</sup>
167. Presumably, the exemption in s 51B(2), which allows the Minister to exclude certain operationally sensitive or national security information from periodic reports to Parliament, would not prevent the reports disclosing the number of notifications sought to be given as required by ss 51B(1)(a) and (b). If this is correct, there are two conclusions that can be drawn.
168. First, despite the Government stating that 12 people have lost their citizenship under these provisions, none of the affected persons has been successfully notified of that fact. On this basis, the notification regime has not been shown to be an effective safeguard. Secondly, the regime of notification to Parliament is a weak accountability mechanism, because it has failed to provide the public with a realistic picture of the application of the citizenship loss provisions in a manner that promotes oversight.
169. While the requirements on the Minister to periodically review a determination not to give a notice provide some protection, the Commission considers that a higher bar should apply before the Minister may decide not to give notice to an affected individual. If the automatic loss regime is not repealed, the Minister should need to be satisfied that giving of a notice 'would be likely' to prejudice national security, defence or the international relations of Australia or Australian law enforcement operations before determining not to give a notice. This provides a more

robust, objective standard that is familiar to administrative decision-making. The same requirement should apply to the conviction-based loss notification in s 35A(7).

170. There is a very limited prospect of judicial review in the unusual case where the Minister decides to consider exercising the power to exempt the person from the operation of the section but then decides not to do so. Similarly, with respect to the automatic loss provisions, there may be a limited prospect of a person obtaining declaratory relief from a court that the relevant section does not apply to them. However, in practice such an action is likely to be extremely difficult for a non-citizen outside of Australia to bring.
171. Overall, these safeguards are wholly inadequate. In addition to failing to protect against arbitrary violations of article 12(4), these factors may well also be inconsistent with an individual's rights to a fair hearing and an effective remedy under articles 14(1) and 2(3) of the ICCPR respectively.
172. In the alternative to the conviction-only based model discussed above, the Commission considers that removal of citizenship under ss 33AA or 35 should only occur through a similar Ministerial determination process that exists for s 35A.
173. That is, an active decision by an officer of the Commonwealth should be required by reference to prescribed public interest factors and all the relevant circumstances, before a revocation occurs. This should be accompanied by a requirement to take into account particular circumstances prior to citizenship being lost, to notify a person of proposed citizenship removal and provide reasons, to apply natural justice including the ability of the affected person to make submissions, and to provide a structured process to appeal against or review decisions made to remove citizenship.

## **Recommendation 2**

If Recommendation 1 is not accepted, ss 33AA and 35 should be amended to provide for the same procedural safeguards that apply to conviction-based citizenship loss under s 35A. That is, loss of citizenship should not be automatic but rather require:

- a. a positive decision by an officer of the Commonwealth

- b. a requirement that the officer takes into account relevant considerations in determining whether it is in the public interest for the person to lose their Australian citizenship
  - c. procedural fairness in the making of this decision, including the opportunity to make submissions and respond to adverse material
  - d. a statement of reasons to be provided to the person affected if an adverse decision is made.
174. In the further alternative, if the automatic nature of cessation is not reformed, it would be more consistent with human rights for the Minister to be required to consider in every case whether or not to make a determination under ss 33AA(14) or 35(9) that the person be exempt from the effect of the relevant section, rather than these powers being discretionary and non-compellable. This consideration and decision-making should be subject to similar notification requirements, to procedural fairness obligations, and review processes.
175. This approach would be consistent with Recommendation 15 made by the Committee with respect to the initial Allegiance Bill, and with the approach that the Government said that it was taking in response to that recommendation. As discussed at [68]–[75] above, the Committee recommended that the Minister be *required* to consider whether to exempt a person from the otherwise automatic cessation of citizenship by reference to public interest factors, ‘to ensure the appropriate operation of these safeguards, and given the seriousness of loss of citizenship’.<sup>73</sup>
176. The Government, in its response to the Committee’s report, stated that this recommendation had been ‘implemented’. However, to the contrary, the amendments made to these sections explicitly provided that the Minister had no duty to consider whether to exercise these powers.
177. The Commission also considers that more detailed reporting to Parliament should be required on the operation and application of ss 33AA, 35 and 35A. The current requirements to report only on the giving or attempted giving of notices do not meaningfully promote public or other oversight of the application of the provisions.
178. The flow chart attached to the Department’s submission, setting out relevant administrative steps under the conduct-based provisions, provides a useful basis for identifying the kinds of information that should be reported on. Reporting could include information such as: the number of issues papers considered for endorsement by the Citizenship Loss Board; the number of issues papers endorsed; the number of Ministerial

submissions developed and provided to the Minister; the number of cases in which the Minister has become aware that a person's citizenship 'has ceased'; and the number of cases in which the Minister has considered rescinding a person's cessation of citizenship.<sup>74</sup> Reporting should also specifically be required on the number of affected children in each category.

### **Recommendation 3**

If Recommendations 1 and 2 are not accepted, ss 33AA and 35 should be amended to ensure that the Minister is required to consider in every case whether or not to make a determination under ss 33AA(14) or 35(9) to exempt the operation of the automatic citizenship loss provisions, rather than these powers being discretionary and non-compellable.

### **Recommendation 4**

If Recommendation 1 is not accepted, ss 33AA(12) and 35(7) should be amended to require that the Minister must be satisfied that the giving of a notice 'would be likely to', rather than 'could', prejudice the security, defence or international relations of Australia, or Australian law enforcement operations, before the Minister may determine that a notice should not be given to a person. Subsection 35A(7) should be amended to achieve the same effect.

### **Recommendation 5**

Subsection 51B(1) should be amended to require more detailed reporting to Parliament on the operation and application of ss 33AA, 35 and 35A, including in relation to children.

#### *(b) Merits review*

179. Given the evident importance of making fair, principled, lawful and correct decisions on a matter as serious as citizenship removal, the Commission considers that merits review of all decisions made under ss 33AA, 35 and 35A should be available.
180. The following relevant principles have been identified by the Administrative Review Council (ARC), to guide what decisions should be subject to merits review:<sup>75</sup>
  - a. as a matter of principle an administrative decision that will 'affect the interests of a person' should be subject to merits review

- b. the fact that a decision-making power involves matters of national sovereignty, such as the question of who is admitted to enter the country, does not, alone, mean that decisions made under the power should be excluded from review
  - c. a decision is not inappropriate for merits review merely because that decision may also be the subject of judicial review.
181. Balanced against these factors are the arguments that decisions of high political content including those relating to national security, and particularly decisions of this kind made personally by a Minister, may justify excluding merits review.
182. In seeking to evaluate these conflicting positions, the Commission's view is influenced by the fact that these decisions have the potential to gravely affect a person's interests and basic human rights.
183. While the decisions also raise national security issues, there are other mechanisms available through the criminal justice system and the control order regime to ensure that the public is kept safe from people who are at risk of losing their citizenship. Where the citizenship loss provisions are applied to people who are already outside Australia—which the Commission understands has been universally the case to date—the arguments that this provides some additional benefit in terms of increased safety to the Australian community are less persuasive.
184. On balance, this suggests that a broader approach should be applied and that these decisions should be subject to merits review. As stated by the ARC:
- If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by a decision. Further, there is a risk of losing the broader and beneficial effects that merits review is intended to have on the overall quality of government decision-making.<sup>76</sup>
185. One possibility is for merits review to be available through the Security Appeals Division of the Administrative Appeals Tribunal, which is already uniquely placed to independently consider afresh administrative decisions that relate to potentially sensitive national security matters. In addition, it could assist in balancing the rights of an affected person and the public interest in the non-disclosure of classified information to use special advocates for such an appeals process. A special advocate is a lawyer who has been security cleared. They represent an affected person and are privy to confidential information that cannot be disclosed to their client.

(c) *Judicial review*

186. The Commission is also concerned that the automatic revocation of citizenship is only amenable to a very limited form of judicial review. This is because the revocation occurs by operation of the law, without a ‘decision’ being made, and without any positive duty on the Minister to consider exercising the exemption power. It is therefore unlikely that this outcome could be challenged through a writ of mandamus.<sup>77</sup> It appears that one potential narrow avenue is seeking declaratory relief from the court, to the effect that the automatic provisions do not apply to their circumstances.
187. Making judicial review available under the ADJR Act would provide a clearer, more straightforward and accessible means of review when compared with the original jurisdiction of the High Court or Federal Court.<sup>78</sup> This would require the legislation to be amended such that there is always a positive ‘decision’, within the meaning of the ADJR Act, which could be reviewed.

### **Recommendation 6**

Any decision leading to loss of citizenship should be subject to independent merits review, and to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

## **6.3 Ambiguity of prohibited conduct—‘in the service of’**

188. Section 35(b)(ii) of the Citizenship Act provides that a person automatically loses their Australian citizenship if they are a national or citizen of another country and they fight for, or are in the service of, a ‘declared terrorist organisation’.
189. The phrase ‘in the service of’ is not defined in the Act. When the Allegiance Bill was first introduced, the Commission recommended that this phrase be defined. Following its inquiry, the Committee recommended that the intended scope of the phrase be clarified. In particular, it recommended that the Bill make explicit that the provision of neutral and independent humanitarian assistance, and acts done unintentionally or under duress, are not considered to be ‘in the service of’ a declared terrorist organisation for the purposes of s 35.<sup>79</sup>
190. Section 35(4) was amended to include the specific exceptions recommended by the Committee. However, the phrase itself remains undefined. That is, while there is some increased certainty about what is

excluded from the scope of the phrase, there is no greater certainty about what is included.

191. The Explanatory Memorandum to the amended Allegiance Bill relevantly provided:

The provision does not define ‘is in the service of’. As the phrase is not defined it should be given its ordinary meaning. In the Macquarie Dictionary “service” is an act of helpful activity or the supplying of any articles, commodities, activities etc., required or demanded. In this context the term, “in the service of” is intended to cover acts done by persons willingly and is not meant to cover acts done by a person against their will (for example, an innocent kidnapped person) or the unwitting supply of goods (for example, the provision of goods by innocent persons following online orders). This is further clarified in new subsection 35(4).

...

The purpose of this provision is to clarify the circumstances in which a person would not be ‘in the service of’ a declared terrorist organisation, including where the person’s conduct takes place unwittingly or against the person’s will. The provision also clarifies that section 35 would not apply to the type of impartial, independent humanitarian assistance provided by organisations such as International Red Cross and Red Crescent Movement, UNICEF or Médecins Sans Frontières. However, the provision of medical services in a hospital run by a declared terrorist organisation would be conduct in the service of a declared terrorist organisation.<sup>80</sup>

192. The Commission considers that the precise scope of conduct captured by being ‘in the service of’ a declared terrorist organisation is still ambiguous.
193. The consequences of this ambiguity are severe. This term could apply to a wide range of conduct, to highly differing degrees of association with a terrorist organisation, that do not amount to repudiation of allegiance.
194. For example, a civilian who cooks or cleans for the organisation may meet this definition. They are not fighting for or members of a declared terrorist organisation. They may pose no security threat to Australia. Under the ordinary meaning of ‘service’, a one-off contact might also be captured, as opposed to a relationship in any ongoing capacity.
195. Further, the exceptions could be interpreted as not applying to humanitarian assistance that is supplied to persons who are not acting for an independent humanitarian organisation. A doctor who provides medical assistance to an injured person who is a member of a declared

terrorist organisation is not necessarily repudiating their allegiance to Australia.

196. In such cases, it is not clear that the association necessarily reveals a person's alignment with the goals of the terrorist organisation, or that it rises to a level of repudiating their allegiance to Australia. However, it will result in automatic loss of citizenship. This blanket outcome raises concerns about proportionality.
197. The phrase 'in the service of' should be defined to identify the proscribed conduct, and in a way that more clearly indicates that the person must necessarily have repudiated their allegiance to Australia. In line with Recommendation 1, the conduct should only be able to result in citizenship loss when it also amounts to a criminal offence under Australian law.

### **Recommendation 7**

If s 35 is retained, the phrase 'in the service of' a declared terrorist organisation in s 35(1)(b)(ii) should be defined to identify the proscribed conduct, and in a way that more clearly indicates that the person must necessarily have repudiated their allegiance to Australia.

## **6.4 Impact on children**

198. The Commission is particularly concerned about the potential human rights impacts of citizenship loss on children.
199. The citizenship loss provisions apply to children in two ways:
- a. children as young as ten years of age who have relevant criminal convictions could lose their citizenship by way of Ministerial determination in the same way as adults<sup>81</sup>
  - b. children as young as fourteen who engage in relevant conduct could automatically lose their citizenship in the same way as adults.<sup>82</sup>
200. International human rights law recognises that, in light of their physical and mental immaturity, and developing neurological makeup, children have special need of safeguards, care and protection and should therefore be treated differently to adults.<sup>83</sup>
201. In recognition of that fact, Australia has ratified the CRC, which protects the best interests of the child (article 3) and the right of children to preserve their identity including their nationality (article 8(1)).

202. Overall, removal of a child's citizenship is extremely difficult to justify under international law. The Committee on the Rights of the Child, in concluding observations made with respect to Australia, stated:

With reference to article 8 of the Convention, the Committee further recommends that the State party undertake measures to ensure that no child is deprived of citizenship *on any ground* regardless of the status of his/her parents. [emphasis added]

203. The Commission notes that amendments made to the Allegiance Bill prior to its passage enhanced the protection of children to some extent. The automatic conduct-based provisions were limited to persons aged 14 or older. For conviction-based loss, a child as young as 10 years old might have their citizenship removed, but the Minister is required to take into account the best interests of the child as a primary consideration before determining to remove their citizenship if the affected person is aged under 18.<sup>84</sup>

204. A proposed amendment to s 36 was also abandoned, in accordance with a recommendation made by the Committee,<sup>85</sup> with the result that a child's citizenship cannot be removed by way of Ministerial determination only on account of their responsible parent's citizenship ceasing by operation of ss 33AA, 35 or 35A.

205. However, loss of a parent's Australian citizenship will evidently have adverse impacts even if the child retains their own Australian citizenship. A parent who is denied entry into Australia, taken into immigration detention or deported, may be separated from their child or in effect be forced to remove their child from Australia to stay together or to organise alternative care.

206. The Commission considers that the citizenship loss provisions do not adequately protect the best interests and right to nationality of Australian children.

207. Removal of a child's citizenship, and consequent loss of their right to enter or remain in Australia, is even more likely to be arbitrary in contravention of article 12(4) of the ICCPR than in the case of an adult. That is so for a range of reasons, including that a child is less culpable for wrongdoing and is more vulnerable to any adverse consequences. While already an acute risk for adults, the risk of breaching a child's human rights by automatic cessation of their citizenship is even more likely. Again, a child is also at risk of exploitation or manipulation by adults.

208. In assessing the best interests of a child under article 3 of the CRC, it is also necessary to take into account all the circumstances of the particular child and the particular action.<sup>86</sup> This right also requires that procedural safeguards are implemented, to allow children to express their views,<sup>87</sup> to ensure that decisions and decision-making processes are transparent,<sup>88</sup> and that there are mechanisms to review decisions.<sup>89</sup>
209. The automatic nature of the conduct-based regime manifestly fails to meet these criteria. In particular, because the Allegiance Bill did not implement Recommendation 15 of the Committee by requiring the Minister to consider exempting a person from the effect of the conduct-based citizenship loss provisions, there is currently no requirement to take the best interests of children into account in the application of these provisions. The Commission recommends that automatic loss of citizenship by conduct should not be possible in the case of children.

### **Recommendation 8**

If retained, the conduct-based citizenship loss provisions in ss 33AA and 35 of the *Australian Citizenship Act 2007* (Cth) should not apply to children.

210. Should Recommendation 8 not be accepted, in the alternative and as recommended above, removal of a child's citizenship under ss 33AA or 35 should only occur following a process in which the same procedural safeguards that apply to conviction-based citizenship loss under s 35A are applied. In the further alternative, the Minister should be required to consider exercising their powers to exempt a child from the operation of the relevant section in every instance.
211. With respect to s 35A, the Commission considers that it is inappropriate for younger children to be subject to citizenship loss under the conviction-based regime. This accords with previous calls made by the Commission to raise the age of criminal responsibility to at least 14 years of age.
212. Currently, the minimum age of responsibility in all states and territories in Australia is 10 years of age, mitigated by the principle of *doli incapax*.
213. The minimum age of criminal responsibility in Australia is comparatively low compared with many other countries.<sup>90</sup> There have been increasing and repeated calls for raising this age, including by expert bodies.
214. The United Nations Committee on the Rights of the Child, in its Draft General Comment No 24, has stated that the desirable minimum age of criminal responsibility is at least 14 years old. However, it has commended

states to adopt a higher minimum age, for instance at least 15 or 16 years old. The Commission has expressed its support for this position,<sup>91</sup> along with the preservation of *doli incapax*, and the availability of appropriate diversionary programs for children.

215. Reasons for raising the age of criminal responsibility, and the application of s 35A to persons aged at least 14 years or older, include that:
- a. many children involved in the criminal justice system come from disadvantaged backgrounds and have complex needs better addressed outside the criminal justice system<sup>92</sup>
  - b. research on brain development shows that 10 and 11 year olds have not developed the requisite level of maturity to form the necessary intent for full criminal responsibility<sup>93</sup>
  - c. younger children, particularly under the age of 12 years, lack the capacity to properly engage in the criminal justice system, resulting in a propensity to accept a plea bargain, give false confessions or fail to keep track of court proceedings<sup>94</sup>
  - d. studies have shown that the younger the child is when encountering the justice system, the more likely they are to reoffend<sup>95</sup>
  - e. it would bring Australia into line with its obligations under the CRC.<sup>96</sup>

The Commission considers that young children, aged below 14 years old if not older, should not be subject to criminal responsibility or the related result and adverse impacts of citizenship removal. The other safeguards currently in place to protect children should also continue to apply.

### **Recommendation 9**

The conviction-based loss provisions in s 35A of the *Australian Citizenship Act 2007* (Cth) should only apply to persons aged at least 14 years of age or older.

## **6.5 Retrospectivity**

216. Section 35A applies to convictions that occurred no more than ten years before the commencement of that section, and where the person is sentenced to a period of imprisonment of at least ten years in respect of the conviction.<sup>97</sup> In effect, this means that an offence that was committed prior to the passage of s 35A may nonetheless result in loss of citizenship.

217. While some time has passed since the passage of s 35A in 2015, the Commission continues to hold concerns that its retrospective application has not been adequately justified.
218. Retrospective laws are generally contrary to the rule of law. It is a fundamental principle that the existence of an offence and penalty be established prospectively, as reflected in the common law presumption against retrospectivity.<sup>98</sup>
219. Article 15(1) of the ICCPR also prohibits retrospective criminal laws, including the imposition of heavier penalties than the one applicable at the time the offence was committed.
220. The Commission notes its previously expressed view that the removal of citizenship can be characterised as a penalty, and is therefore inconsistent with article 15(1) if retrospectively applied.<sup>99</sup>
221. It further notes potential Ch III constitutional concerns, given that this power is exercisable by the Minister (or automatically effected by operation of law), rather than by a judge.

### **Recommendation 10**

Loss of citizenship under s 35A following a relevant criminal conviction should not operate retrospectively.

222. As noted earlier, it appears that the conviction-based regime in s 35A had not as yet been used to remove the Australian citizenship of any person. The Commission is not aware of whether there are any people with prior relevant offences to whom the section could be retrospectively applied. The Commission recommends that the INSLM seek this information from the Department.

### **Recommendation 11**

The INSLM should seek from the Department of Home Affairs information about the number of cases to which s 35A could apply retrospectively, and the details of those cases.

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<sup>1</sup> Revised Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 2.

<sup>2</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6.

<sup>3</sup> See, eg, *Threats to international peace and security caused by terrorist acts*, SC Res 1373, UN

- SCOR, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (28 September 2001).
- 4 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(4).
- 5 *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).
- 6 See for example UN Secretary-General, *Plan of Action to Prevent Violent Extremism*, UN Doc A/70/674 (24 December 2015) 7.
- 7 Department of Home Affairs, Submission to the Independent National Security Legislation Monitor, *Inquiry into Terrorism-Related Citizenship Loss Provisions in the Australian Citizenship Act 2007 (Cth)* (7 June 2019) 5.
- 8 Department of Home Affairs, Submission to the Independent National Security Legislation Monitor, *Inquiry into Terrorism-Related Citizenship Loss Provisions in the Australian Citizenship Act 2007 (Cth)* (7 June 2019) 9.
- 9 Sangeetha Pillai and George Williams, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia' (2017) 41(2) *Melbourne University Law Review* 845, 881, 885.
- 10 *Act to amend the Citizenship Act and make consequential amendments to another Act*, S.C. 2017, c 14.
- 11 Canada, *Parliamentary Debates*, House of Commons, 9 March 2016, 1604 (John McCallum, Minister of Immigration, Refugees and Citizenship).
- 12 Australian Human Rights Commission, Submission No 13 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)*, 16 July 2015.
- 13 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).
- 14 Revised Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 1.
- 15 Australian Human Rights Commission, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth)*, 10 January 2019.
- 16 *Australian Citizenship Act 2007 (Cth)* s 35A(3).
- 17 *Australian Citizenship Act 2007 (Cth)* s 35A(2).
- 18 In 2018, amendments were made to s 35A by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 (Cth)* to expand the types of offences for which conviction-based citizenship loss could occur. The Commission made a short submission to the Committee in relation to this Bill, but did not deal with the human rights impacts of citizenship loss: Australian Human Rights Commission, Submission to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth)*, 24 January 2018.
- 19 Revised Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015.
- 20 Parliamentary Joint Committee on Intelligence and Security, *Committee Hansard*, 10 August 2015, 14 (Philippa De Veau, General Counsel/First Assistant Secretary Legal Division, Department of Immigration and Border Protection).
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- 26 *Australian Citizenship Act 2007 (Cth)* s 33AA(7)(b).

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- 36 Department of Home Affairs, *Report to Parliament for tabling under s 51B of the Australian Citizenship Act 2007, Reporting period: 12 June 2017 – 11 December 2017* [tabled in House of Representatives 26 March 2018, tabled in Senate 26 March 2018].
- 37 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 38 United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)* 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [19].
- 39 United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)* 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [20].
- 40 See for example United Nations Human Rights Committee, *Views: Communication No. 1557/2007*, 102<sup>nd</sup> sess, UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) 18 [7.4] ('Nystrom v Australia').
- 41 *Migration Act 1958* (Cth) ss 189, 198.
- 42 United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)* 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [21].
- 43 See for example United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985) 3 [10].
- 44 United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)* 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [21].
- 45 *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) arts 3, 8(1).
- 46 Relevant exceptions to article 8(1) of the *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) include where a person has conducted himself in a manner seriously prejudicial to the vital interests of the State, or where the person has given definite evidence of his determination to repudiate his allegiance. However, for a state to rely on these exceptions, article 8(3)

- provides that the State must specify that it retains the right to deprive a person of his nationality on those grounds, as at the time of signature, ratification or accession of the Convention, and that the grounds need to exist in domestic law at the relevant time. Australia has made no such declaration.
- 47 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg UN Doc A/810 (10 December 1948) art 15.
- 48 See for example Michelle Foster and Hélène Lambert, 'Statelessness as a human rights issue: a concept whose time has come' (2016) 28(4) *International Journal of Refugee Law* 564, 578; United Nations Human Rights Council, Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General, 13th sess, Agenda item 3, UN Doc A/HRC/13/34, (14 December 2009) 5–6 [19–22].
- 49 *Australian Citizenship Act 2007* (Cth) ss 33AA(24)(b), 35(19)(b).
- 50 Australian Human Rights Commission, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (Cth) (10 January 2019) 10–13.
- 51 *Australian Passports Act 2005* (Cth) ss 8, 22.
- 52 *Commonwealth Electoral Act 1918* (Cth) ss 93, Parts VI-X.
- 53 *Social Security Act 1991* (Cth) s 7 and various other provisions. Australian residence is generally a precondition of receipt of social security payments.
- 54 See for example *Intelligence Services Act 2001* (Cth) s 15.
- 55 *Migration Act 1958* (Cth) s 35.
- 56 See for example United Nations Human Rights Committee, *Views: Communication No. 560/1993*, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997) ('*A v Australia*'); United Nations Human Rights Committee, *Views: Communication No. 2094/2011*, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) ('*F.K.A.G. et al v Australia*'); United Nations Human Rights Committee, *Views: Communication No. 2136/2012*, UN Doc CCPR/C/108/D/2136/2012 (20 August 2013) ('*M.M.M. et al v Australia*').
- 57 See for example, United Nations Human Rights Committee, *Views: Communication No. 2094/2011*, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) ('*F.K.A.G. et al v Australia*'); United Nations Human Rights Committee, *Views: Communication No. 2136/2012*, UN Doc CCPR/C/108/D/2136/2012 (20 August 2013) ('*M.M.M. et al v Australia*').
- 58 See *Criminal Code* (Cth) Pts 5.1, 5.3 and 5.5.
- 59 *Criminal Code* (Cth) s 103.1(2).
- 60 Department of Home Affairs, Submission to the Independent National Security Legislation Monitor, *Inquiry into Terrorism-Related Citizenship Loss Provisions in the Australian Citizenship Act 2007* (Cth) (7 June 2019) Attachment B.
- 61 Citizenship Loss Board (2016), draft minutes of the Citizenship Loss Board meeting 23 February 2016, Canberra (released under the *Freedom of Information Act 1982* (Cth)).
- 62 Citizenship Loss Board (2016), draft minutes of the Citizenship Loss Board meeting 23 February 2016, Canberra (released under the *Freedom of Information Act 1982* (Cth)).
- 63 *Australian Citizenship Act 2007* (Cth) ss 33AA(10) and 35(5); Citizenship Loss Board (2016), draft minutes of the Citizenship Loss Board meeting 9 September 2016, Canberra (released under the *Freedom of Information Act 1982* (Cth)).
- 63 *Australian Citizenship Act 2007* (Cth) ss 33AA(10) and 35(5).
- 64 Department of Home Affairs, Submission to the Independent National Security Legislation Monitor, *Inquiry into Terrorism-Related Citizenship Loss Provisions in the Australian Citizenship Act 2007* (Cth) (7 June 2019) Attachment B.
- 65 The duty to extradite or prosecute is established by numerous international treaties to which Australia is a signatory, including the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75

- UNTS 31 (entered into force 21 October 1950) (and other Geneva Conventions), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) and the *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 256 (entered into force 23 May 2001). With respect to genocide, grave breaches of the Geneva Conventions, war crimes and crimes against humanity, the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) further obliges Australia to either to prosecute or surrender persons to the International Criminal Court. Some commentators consider that the duty to extradite or prosecute can also be established by customary international law, see: Michael P Scharf, Oxford University Press, *Max Planck Encyclopedia of Public International Law* (at June 2018) 'Aut dedere aut iudicare'.
- 66 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, 60<sup>th</sup> sess, UN Doc A/RES/60/147 (16 December 2005).
- 67 See for example *Criminal Code* (Cth) s 15.1(1)(c) 'extended geographical jurisdiction—category A'; s 15.2(1)(c) 'extended geographical jurisdiction—category B' and ss 15.3(2) and (4) defences to 'extended geographical jurisdiction—category C' of the *Criminal Code* (Cth).
- 68 Department of Home Affairs, Submission to the Independent National Security Legislation Monitor, *Inquiry into Terrorism-Related Citizenship Loss Provisions in the Australian Citizenship Act 2007 (Cth)* (7 June 2019) 9.
- 69 The conduct described in s 33AA(2)(b)–(h) is based on offences in respect of which the 'extended geographical jurisdiction—category D' described in s 15.4 of the *Criminal Code* (Cth) applies.
- 70 See for example *Criminal Code* (Cth) ss 80.1 and 80.1AA (treason and related offences) have 'extended geographical jurisdiction—category D' pursuant to s 80.4.
- 71 *Criminal Code* (Cth) s 72.4.
- 72 *Australian Citizenship Act 2007* (Cth) ss 33AA(12) or 35(7).
- 73 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015), Recommendation 15.
- 74 By reference to Attachment B: Citizenship Loss Board flowchart in Department of Home Affairs, Submission to the Independent National Security Legislation Monitor, *Inquiry into Terrorism-Related Citizenship Loss Provisions in the Australian Citizenship Act 2007 (Cth)* (7 June 2019).
- 75 Administrative Review Council, *What decisions should be subject to merit review?* (Report, 1999) [2.1].
- 76 Administrative Review Council, *What decisions should be subject to merit review?* (Report, 1999) [2.5].
- 77 *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319 [9(d)].
- 78 Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, September 2012) 72–73 [4.4].
- 79 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) 105–106.
- 80 Revised Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 20 [85], 22 [95].
- 81 *Criminal Code* (Cth) Division 7; *Australian Citizenship Act 2007* (Cth) s 35A.
- 82 *Australian Citizenship Act 2007* (Cth) ss 33A, 35.
- 83 *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) preamble; *Universal Declaration of Human Rights*, GA

- Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg UN Doc A/810 (10 December 1948) article 25(2).
- <sup>84</sup> *Australian Citizenship Act 2007* (Cth) s 35A(1)(e)(iv).
- <sup>85</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) Recommendation 21.
- <sup>86</sup> United Nations Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62<sup>nd</sup> sess, UN Doc. CRC/C/GC/14 (29 May 2013) 12 [46]–[51].
- <sup>87</sup> United Nations Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62<sup>nd</sup> sess, UN Doc. CRC/C/GC/14 (29 May 2013) 18–19 [89]–[91].
- <sup>88</sup> United Nations Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62<sup>nd</sup> sess, UN Doc. CRC/C/GC/14 (29 May 2013) 18 [87].
- <sup>89</sup> United Nations Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62<sup>nd</sup> sess, UN Doc. CRC/C/GC/14 (29 May 2013) 20 [98].
- <sup>90</sup> Australian Human Rights Commission, *Children's Rights Report 2016* (2016) 189 <<https://www.humanrights.gov.au/our-work/childrens-rights/projects/childrens-rights-reports>>.
- <sup>91</sup> Australian Human Rights Commission (National Children's Commissioner), Letter to the United Nations Committee on the Rights of the Child, *Call for comments on Draft Revised General Comment No 10 (2007)* (7 January 2019) 3.
- <sup>92</sup> Sally Parnell, Jesuit Social Services, Too Much Too Young: Raise The Age of Criminal Responsibility, Letter to Attorneys– General (2015) <[http://jss.org.au/wp-content/uploads/2016/01/Letter\\_to\\_AGs\\_Age\\_of\\_Criminal\\_responsibility.pdf](http://jss.org.au/wp-content/uploads/2016/01/Letter_to_AGs_Age_of_Criminal_responsibility.pdf)>.
- <sup>93</sup> Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives' (2011) 6(2) *Journal of Children's Services*, 86, 87.
- <sup>94</sup> Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives' (2011) 6(2) *Journal of Children's Services* 86, 86-95.
- <sup>95</sup> Australian Institute of Health and Welfare, Young people aged 10–14 in the youth justice system 2011–2012 (2013) vi <<http://www.aihw.gov.au/publication-detail/?id=60129543944>>.
- <sup>96</sup> See generally, Australian Human Rights Commission, *Children's Rights Report 2016* (2016) Part 4.3.2 <<https://www.humanrights.gov.au/our-work/childrens-rights/projects/childrens-rights-reports>>.
- <sup>97</sup> Introduced through the passage of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) Item 8(4).
- <sup>98</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129, 2016) 362.
- <sup>99</sup> Australian Human Rights Commission, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth)* (10 January 2019) 19–22.