THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/EEas: 1680470

24 April 2019

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
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By email: christopher.brown@lawcouncil.asn.au

Dear Mr Smithers,

Review of the Citizenship Revocation Provisions by the Independent National Security Legislation Monitor

Thank you for the opportunity to contribute to a Law Council submission to the Independent National Security Legislation Monitor ("INSLM") review into the citizenship revocation provisions in the *Australian Citizenship Act 2007* (Cth).

The views of the Law Society have been informed by our Public Law and Human Rights Committees.

1. Provisions of the *Australian Citizenship Act 2007* (Cth) under review

The referral to the INSLM concerns the following sections of the *Australian Citizenship Act 2007* (Cth) ("the Act"):

- Section 33AA (renunciation by conduct);
- Section 35 (service outside Australia in armed forced of an enemy country of a declared terrorist organisation); and
- Section 35A (conviction for terrorism offences and certain other offences).

These sections ("the Citizenship Revocation Provisions") were inserted into the Act by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth). The Explanatory Memorandum accompanying the *Australian Citizenship Amendment (Allegiance To Australia) Bill 2015* (Cth) ("the Bill") stated that the desired outcome of the Bill 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."[1] The Bill, as passed by both Houses of Parliament, includes the following purpose clause:

> This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian

[1] The Parliament of the Commonwealth of Australia, '*Australian Citizenship Amendment (Allegiance to Australia) Act 2015*: Revised Explanatory Memorandum'.

> community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.[2]

The Law Society has previously made submissions on the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) and the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (Cth). We **attach** those submissions, dated 14 July 2015 and 14 January 2019 respectively, to this letter.

2. Operation, effectiveness and implications of the Citizenship Revocation Provisions

2.1 Section 33AA of the Act

a) Operation of self-executing clauses

Sections 33AA(1) and 33AA(2) of the Act operate automatically, so that if a person aged 14 or older undertakes the conduct specified at s 33AA(2) and meets the intent specified at ss 33AA(3) to (5) they automatically cease to be an Australian citizen. Section 33AA(10) of the Act requires the Minister to provide written notice to a person informing them that they have breached the Act and their citizenship has ceased – however the Act specifies that it is the person's action, not the Minister's notice that results in the revocation. The basis of the notice can be reviewed either in the High Court of Australia under s 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903* (Cth).

As the Law Council noted in its submission on the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth), s 33AA of the Act does not include a mechanism for determining whether the conduct that led to citizenship revocation occurred, or any standard of proof, and does not require a finding of guilt, either by a Court in Australia or any other jurisdiction. In addition, it is unclear how judicial review of actions taken under the Act would operate given that, as Bret Walker SC has observed, "the provision [s 33AA(1)] does not involve any exercise of discretion of a kind that can be judicially reviewed".[3] The Parliamentary Joint Committee on Human Rights, in considering the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), also queried whether "judicial review, likely restricted to errors of law, will constitute effective review for the purposes of international law."[4]

We also note that s 33AA(3) of the Act requires the conduct specified at s 33AA(2) to be paired with the requisite intention. However, pursuant to s 33AA(4), a person is deemed to have the intention referred to in s 33AA(3) by virtue of being a member of or cooperating with a declared terrorist organisation. Foster, McAdam and Wadley have argued in the *Melbourne University Law review* that:

> In light of these deeming provisions, it is difficult to ascertain how any meaningful assessment of the potentially exculpatory (mens rea) factors listed [in s 33AA(3)] could be undertaken.[5]

Although s 33AA of the Act is drafted so as to be 'self-executing', Pillai and Williams have argued that "[in] practice, it appears that such determinations [regarding the Citizenship

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[2] *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), [4].
[3] Bret Walker SC, 'Reflections of a Former Independent National Security Legislation Monitor', AIAL Forum No. 84, 76.
[4] Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Thirty-Sixth Report of the 44th Parliament* (2016), 62 [2.177]
[5] Michelle Foster, Jane McAdam and Davina Wadley, 'The Prevention and Reduction of Statelessness in Australia: an Ongoing Challenge' (2017) 40(2) *Melbourne University Law Review* 456, 491.

Revocation Provisions] will be made by the Citizenship Loss Board, an executive body created in early 2016".[6] Pillai and Williams have further raised concerns that the Citizenship Loss Board is not mentioned in Australian legislation and "operates according to its own rules, free from typical administrative law constraints such as the requirement to make decisions reasonably and without bias".[7]

The operation of the Citizenship Loss Board was illuminated somewhat through the recent case of Neil Prakash. In comments following the cessation of Mr Prakash's citizenship, the Minister for Home Affairs stated that:

> Mr Prakash's case was brought to my attention after careful consideration by the Citizenship Loss Board that Mr Prakash's Australian citizenship had ceased by virtue of his actions in fighting for Islamic State from May 2016.
>
> Neither the Citizenship Loss Board nor I make decisions on whether an individual ceases to be an Australian citizen, as the provisions operate automatically by virtue of a person's conduct.[8]

The Minister also confirmed that the Citizenship Loss Board is comprised of senior officials from several government departments, law enforcement and security agencies.

The Law Society is concerned that the activities of the Citizenship Loss Board, and the processes it follows, are not defined within the *Australian Citizenship Act 2007* (Cth), and do not appear to be subject to judicial review. Furthermore, the significant role that the Citizenship Loss Board appears to play in the operation of the Citizenship Revocation Provisions raises questions over whether the provisions are indeed 'self-executing'.

b) Unintended consequences

The Law Society supports arguments made by the Law Council in its 2015 submission on the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) with respect to the difficulties that the operation of the Citizenship Revocation Provisions may cause for subsequent criminal trials. We note that if a person loses their citizenship, this may limit the ability of the Crown to prosecute the same person under Australian law in the future. One relevant provision is s 119.1 of the *Criminal Code Act 1995* (Cth) (entering foreign countries with the intention of engaging in hostile activities) which applies only to Australian citizens, residents and visa holders.

c) Express limitation on natural justice

Sections 33AA(22) and 35(17) of the Act state that natural justice applies only when the Minister decides whether or not to grant an exemption. Natural justice does not apply for any other of the Minister's powers under these sections, and does not apply to the Minister's consideration of whether or not to exercise its exemption power. The Law Society is concerned that this leaves significant scope for arbitrary decision making in relation to the Citizenship Revocation Provisions.

d) Australia's compliance with international human rights law

The Law Society has previously raised significant concerns regarding the impact of the Citizenship Revocation Provisions on Australia's compliance with our obligations under

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[6] Sangeetha Pillai and George Williams, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia' (2017) 41 *Melbourne University Law Review* 845.
[7] Ibid.
[8] The Minister for Home Affairs, 'Media Release: Prakash citizenship' (2 January 2019).

international human rights law. Please see our **enclosed** previous submissions for an articulation of these concerns.

In addition to the concerns raised previously, the Law Society also notes that as a party to the Rome Statute of the International Criminal Court, Australia has a duty to exercise its criminal jurisdiction over those responsible for international crimes and prosecute perpetrators of genocide, crimes against humanity, war crimes, and the crime of aggression. By excluding alleged foreign fighters from re-entry, Australia cannot discharge these duties in our Court system.[9] This gives rise to so-called 'risk exportation', whereby a problem is simply shifted to the responsibility of another State, potentially compromising the international solidarity and cooperation needed to combat terrorism.[10]

2.2 Section 35 of the Act

a) Operation of self-executing clauses

Similarly to s 33AA, s 35 is purportedly self-executing. A person aged 14 or older automatically loses their Australian citizenship if they either: serve in the armed forces of a country at war with Australia; fight for, or are in the service of, a declared terrorist organisation (defined at s 35AA); and the person's service or fighting occurs outside Australia. The concerns of the Law Society regarding self-executing clauses outlined above also apply to the operation of s 35 of the Act.

Section 35(4) of the Act provides a defence for a person who is deemed to be in the service of a declared terrorist organisation if: the person's actions are unintentional; the person is acting under duress or force; or if the person is providing neutral and independent humanitarian assistance. As Foster et al have argued, however, "given the lack of a clear procedure to make such determinations... it is unclear how effective these potential defences could be in practice".[11]

b) Australia's compliance with international human rights law

The concerns of the Law Society with regarding to Australia's compliance with the *UN Convention on the Reduction of Statelessness*, the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*, outlined in the attached prior submissions, also apply with respect to s 33AA.

2.3 Section 35A of the Act

a) Procedural fairness

Section 35A of the Act differs from ss 33AA and s 35 as it is not self-executing, and requires the Minister to make a determination in writing in order to revoke citizenship. The Minister may make such a determination if a person has been convicted of certain offences in the Criminal Code including treason, international terrorist activities using explosives or lethal devices, espionage, foreign interference and recruitment for terrorism. The person must have been sentenced to imprisonment for that conduct for at least six years, and the Minister

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[9] Shiva Jayaraman, 'International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters' (2016) 17 *Chicago Journal of International Law* 178, 212; Susan Hutchinson, *The Debate over Australia Stripping Citizenship from Terrorists*, Lowy Institute (21 December 2018).

[10] Dr Christophe Paulussen, 'Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive' (17 October 2018). International Centre for Counter-Terrorism: The Hague.

[11] Michelle Foster, Jane McAdam and Davina Wadley, 'The Prevention and Reduction of Statelessness in Australia: an Ongoing Challenge' (2017) 40(2) *Melbourne University Law Review* 456, 491.

must be satisfied that it is not in the public interest for the person to remain a citizen, having regard to the factors outlined at s 35A(e).

Section 35A of the Act provides a higher degree of procedural fairness than the two other Citizenship Revocation Provisions under review. The section requires a determination of guilt by a Court, a custodial sentence, does not deny natural justice to the Minister's determination, and requires consideration of the best interests of the child as a primary consideration at the stage of revocation.

b) The power to determine that a person ceases to be a citizen

With regard to the powers in s 35A of the Act – and the Citizenship Revocation Provisions as a whole – we note that the High Court of Australia has determined that Parliament can, within limits, determine the circumstances in which citizenship may be lost. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [2002] HCA 48 Gleeson CJ identified that Parliament has the power to "create and define the concept of Australian citizenship [and] to prescribe the conditions on which it may be acquired and lost".[12] In *Hwang v The Commonwealth* [2005] HCA 66 McHugh J identified that while Parliament has power to "define the conditions on which membership of the Australian community – that is to say, citizenship – depends", that power is not unlimited. The High Court has provided little guidance on what those limits may be.[13]

3. Additional comments on the Citizenships Revocation Provisions

3.1 The risk of marginalisation and further radicalisation

The Law Society is concerned that the operation of the Citizenship Revocation Provisions does not allow for consideration of a person's prospects of rehabilitation, or indeed their demonstrated rehabilitation and remorse. As the Law Council noted in its 2015 submission on the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), this is inconsistent with Australia's justice system, which recognises the potential for offenders to be reformed.

We further note the observations of Dr Christophe Paulussen, a Research Fellow at the International Centre for Counter-Terrorism, who has argued that provisions allowing for deprivation of nationality are more likely to affect people from minority groups because they more often hold two nationalities, whereas states cannot deprive citizens that have only one nationality, to avoid statelessness.[14]

> In this regard one needs to be mindful that exclusion, marginalisation and (perceived) discrimination can be one of the many factors that can play a role in people radicalising and joining extremist groups in the first place.[15]

In a similar vein, Pillai and Williams have argued that "singling out dual citizens for citizenship revocation is 'counter-productive' to domestic national security objectives" as it "undermines key counter-radicalisation measures aimed at building community cohesion and social harmony".[16]

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[12] *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [2002] HCA 48, 31.
[13] *Hwang v The Commonwealth* [2005] HCA 66, 18.
[14] Dr Christophe Paulussen, 'Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive' (17 October 2018). International Centre for Counter-Terrorism: The Hague.
[15] Ibid.
[16] Sangeetha Pillai and George William, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia' (2017) 41 *Melbourne University Law Review* 845.

3.2 Suitability of other legislation

Prior to the Citizenship Revocation Provisions coming into effect, Australia had stringent legislation to address terrorism-related activities performed in other countries. Part 5.5 of the *Criminal Code Act 1995* (Cth) contains offences relating to foreign incursions and recruitment, with a maximum penalty of imprisonment for life. In cases where sufficient admissible evidence cannot be obtained to secure a conviction Under Part 5.5, Divisions 104 and 105 of the *Criminal Code Act 1995* (Cth) allow considerable obligations, prohibitions and restrictions to be imposed on a person in the form of a Control Order or Preventative Detention Order to achieve the purpose of protecting the public from a terrorist act or preventing the provision of support for a terrorist act.

Thank you for the opportunity to provide comments on this issue. Questions may be directed to Andrew Small, Policy Lawyer, at (02) 9926 0252 or andrew.small@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/EEas: 1629295

14 January 2019

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
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By email: natasha.molt@lawcouncil.asn.au

Dear Mr Smithers,

Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

Thank you for the opportunity to contribute to a Law Council submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* ("the Bill).

The views of the Law Society have been informed by our Human Rights Committee. Given the short timeframe available for review, we provide brief comments.

The intention of the Bill

The Bill seeks to amend the *Australian Citizenship Act 2007* ("the Act") with a view to:

- removing the current requirement for "cessation of citizenship on determination by the Minister" under s 35A(1) of the Act that a person has been sentenced to 6 years or more for terrorism offences; and
- allowing the Minister to make a determination if they are satisfied that the person would not, if the Minister were to determine that the person ceases to be an Australian citizen, become a person who is not a national or citizen of any country. This would lower the threshold as it currently stands in the Act, which at s 35A(1)(c) requires that "the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination".

The UN Convention on the Reduction of Statelessness

The *UN Convention on the Reduction of Statelessness* ("the Convention"), to which Australia has acceded[1], allows for loss of nationality where the Contracting State has specified its right to deny nationality in circumstances where the person, inconsistently with his or her duty of loyalty to the Contracting State, has:

[1] Accession has the same legal effect as ratification: Articles 2(1)(b) and 15, *Vienna Convention on the Law of Treaties 1969*.

- conducted him or herself in a manner seriously prejudicial to the vital interests of the State (Article 8(3)(a)(ii)); or
- taken an oath, or made a formal declaration of allegiance to another State, or given definite evidence of his or her determination to repudiate his or her allegiance to the Contracting State (Article 8(3)(b)).

With respect to the deprivation of citizenship, Article 8(4) of the Convention provides that:

> A Contracting State shall not exercise a power of deprivation permitted by... this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

We note that Australia did not specify its right to deny nationality at the time of accession to the Convention.

The power to determine that a person ceases to be a citizen

With regard to the powers provided for in the Bill, we note that the High Court of Australia has determined that Parliament can, within limits, determine the circumstances in which citizenship may be lost. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [2002] HCA 48 Gleeson CJ identified that Parliament has the power to "create and define the concept of Australian citizenship [and] to prescribe the conditions on which it may be acquired and lost".[2] In *Hwang v The Commonwealth* [2005] HCA 66 McHugh J identified that while Parliament has power to "define the conditions on which membership of the Australian community – that is to say, citizenship – depends", that power is not unlimited. The High Court has provided little guidance on what those limits may be.[3]

Adjusting the threshold for determining dual citizenship

The Explanatory Memorandum to the Bill states that the Bill seeks to:

> Adjust the threshold for determining dual citizenship, from the current requirement that the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination that a person ceases to be an Australian citizen, and replace it with a requirement that the Minister is satisfied the person will not become a person who is not a national or citizen of any country.

The Explanatory Memorandum further states that "this [threshold] is consistent with other provisions of the Citizenship Act" and that:

> It is well-established under case law that where statute provides a Minister must be 'satisfied' of a matter, it is to be understood as requiring the attainment of that satisfaction reasonably.

The Law Society is concerned that, under the Bill, a person could be lose their citizenship on the basis of the Minister's state of satisfaction as opposed to whether they will, as a matter of fact, be rendered stateless. The threshold could also be lawfully achieved without the Minister initiating inquiries to determine whether the other country recognises the person as a citizen. The recent case of Neil Prakash highlights the potential for the exercise of powers under s 35A of the Act to render a former Australian citizenship stateless, and casts doubt on the assertion in the Explanatory Memorandum that:

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[2] *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [2002] HCA 48, 31.
[3] *Hwang v The Commonwealth* [2005] HCA 66, 18.

> it is not the intention that new paragraph 35A(1)(b) would allow the Minister to determine that a person ceases to be an Australian citizen in breach of Australia's international obligations regarding statelessness.

It is the view of the Law Society that any decision regarding cessation of citizenship should be subject to merits review before the Administrative Appeals Tribunal. We note that this would require amendments to s 52 of the Act.

Thank you for the opportunity to provide comments on this issue. Questions may be directed to Andrew Small, Policy Lawyer, at (02) 9926 0252 or andrew.small@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRightsJFEvk:1037320

14 July 2015

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
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By email: pjcis@aph.gov.au

Dear Committee Secretary,

The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee") which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee thanks the Parliamentary Joint Committee on Intelligence and Security for the opportunity to comment on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the "Bill"). Given the short timeframe available for review and despite the complexity of the issues, the Committee provides brief comments.

1. Three new ways a person might cease to be an Australian citizen

In the Committee's analysis, the Bill introduces three new ways in which a person, who is a national or citizen of a country other than Australia, can cease to be an Australian citizen. They are:

1) Renunciation by conduct

Proposed s 33AA provides that a person who is also a national or citizen of another country renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in certain conduct, including:

- Engaging in international terrorist activities using explosive or lethal devices;
- Engaging in a terrorist act;
- Providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
- Directing the activities of a terrorist organisation;
- Recruiting for a terrorist organisation;
- Financing terrorism;
- Financing terrorists;
- Engaging in foreign incursions and recruitment.

New subsection 33AA(5) provides that the renunciation takes effect and the Australian citizenship of the person ceases immediately upon the person engaging in the conduct. There is no requirement for a conviction, and it is not clear what standard of proof for any such allegation is required.

2) Service outside Australia

Proposed s 35 provides that a person who is also a national or citizen of another country ceases to be an Australian citizen if the person serves in the armed forces of a country other than Australia or fights for, or is in the service of, a declared terrorist organisation and the service or the fighting occurs outside Australia. The Committee notes that what amounts to "service" is not defined.

3) Conviction for terrorism offences and certain other offences

Proposed s 35A provides that a person, who is a national or citizen of another country, ceases to be an Australian citizen if the person is convicted of certain offences under the *Criminal Code Act 1995* or the *Crimes Act 1914*.

2. Convention on the Reduction of Statelessness

The *Convention on the Reduction of Statelessness*, to which Australia has acceded[1], allows for loss of nationality where the Contracting State has, at the time of signature, ratification or accession, specified its retention of such a right to deny nationality, where the person, inconsistently with his or her duty of loyalty to the Contracting State, has:

- conducted him or herself in a manner seriously prejudicial to the vital interests of the State (Article 8(3)(a)(ii)); or
- taken an oath, or made a formal declaration of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State (Article 8(3)(b)).

The Committee notes that Australia had not made the required reservations or declarations with respect to the Convention at the time of accession.

With respect to deprivation of citizenship the Committee notes that Article 8(4) provides:

> A Contracting State shall not exercise a power of deprivation permitted by paragraph 2 or 3 of this Article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

3. Obligations under the International Covenant on Civil and Political Rights

The Committee's view is that the Bill is likely to breach a number of Australia's international human rights obligations under the *International Covenant on Civil and Political Rights* ("ICCPR"), a treaty which a Coalition Government ratified in 1980. By doing so, it adopted for Australia an obligation to implement its terms into our domestic laws. The Committee identifies the following problems arising from provisions of that treaty:

(a) Article 12(4) of the ICCPR is as follows:

> No one shall be arbitrarily deprived of the right to enter his own country

[1] Accession has the same legal effect as ratification: Articles 2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969.

It is submitted that in relation to the proposed ss 33AA and 35, reliance on the following matters without regard to individual circumstances is likely to result in the arbitrary deprivation of the right to enter one's country within the meaning of Article 12(4):

- Alleged conduct rather than convictions,
- The lack of a Court hearing on the merits and
- The nature of the penalty, which is effectively banishment from the country.

The same objections could be taken to the proposed s 35A, although to a lesser extent. The fact that there is at least a Court process may lessen the possibility of the action being "arbitrary", but the possibility of trivial conduct (such as a threat of damage to property) or admirable conduct (such as providing medical assistance) grounding these offences, together with the same mandatory penalty applying, means that the objections in respect of arbitrariness remain.

(b) Article 14(7) of the ICCPR is relevantly as follows:

> No one shall be liable to be...punished again for an offence for which he has already been finally... acquitted in accordance with the law and penal procedure of each country.

The possibility exists under this Bill that a person could be acquitted of a criminal offence, but the Minister could still, on the balance of probabilities, come to the conclusion that the conduct concerned had occurred. Under those circumstances the citizenship could still be removed and be regarded as a "punishment" within the meaning of Article 14(7).

(c) Article 15 of the ICCPR is relevantly as follows:

> Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

Under proposed s 35A citizenship can be removed based on commission of one or more of a long list of criminal convictions. The provision also applies to conduct occurring before its commencement. As such, it is likely to be regarded as a "heavier penalty" than that "applicable when the criminal offence was committed" within the meaning of Article 15.

4. The Committee's observations about the power to legislate on citizenship

The Committee notes that currently, Parliament has the power to "create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode."[2]

The Committee further notes that while Parliament is authorised to "define the conditions on which membership of the Australian community – that is to say, citizenship – depends", that power is not unlimited.[3]

5. The Committee's submissions

The Committee does not support the introduction of proposed s 33AA. Proposed s 33AA seeks to deny a dual citizen of their Australian citizenship for criminal conduct. This revocation would be automatic and without the requirement that guilt be determined by a

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[2] Re Minister for Immigration and Multicultural Affairs; Ex parte Te (2002) 212 CLR 162 per Gleeson CJ at [173]
[3] *Hwang v Commonwealth* (2005) ALR 83

court. That is to say, the new provision would in effect deny citizenship to a person on the basis of no more than an allegation of criminal conduct that has yet to be adequately tested. This approach is inconsistent with the presumption of innocence and the *Convention on the Reduction of Statelessness*. That Convention requires that deprivation of citizenship only occur in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

The Committee considers that any proposed amendment to the Act which seeks to deprive a person of their citizenship on the basis of criminal conduct should only do so following a determination of guilt by a court and only once the person concerned has had a fair opportunity to be heard against the reasons for revocation.

The Committee further considers that proposed s 35 should only operate to deny a person of their Australian citizenship where that person has conducted him or herself in a manner seriously prejudicial to the vital interests of Australia or has taken an oath, or made a formal declaration, of allegiance to another State (or terrorist organisation), or given definite evidence of his determination to repudiate his allegiance to Australia. To this end, the Committee considers that the term "service" requires clarification.

In respect of proposed s 35A, the Committee queries whether some of the named offences would be sufficient to demonstrate a person's determination to repudiate his or her allegiance to Australia.

The Committee queries also whether Parliament has the power to legislate to deny a child of citizenship because of the conduct of a parent.[4] As noted above, the power to legislate is not unlimited. It may well be the case that a child would not cease to be a "member of the Australia community" simply because of the conduct of a third party (albeit a parent).

Thank you for the opportunity to provide comments. Any questions may be directed to Vicky Kuek, policy lawyer for the Committee, on or

Yours sincerely,

John F Eades
President

[4] See notes to proposed ss 33AA, 35 and 35A referring to s 36 of the *Australian Citizenship Act 2007*.