



Stripping dual nationals of Australian citizenship

Parliamentary Joint Committee on Intelligence and Security
inquiry on select *Australian Citizenship Act 2007 (Cth)* provisions

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Citizenship is often regarded as the most fundamental of human rights. In addition to signifying formal membership of a national community, it is often a gateway to a host of basic entitlements, including political rights, mobility rights and rights to consular assistance. It is a concept with a strong rhetorical dimension in forging understandings of what it is to belong to a community and in shaping a country's sense of its own identity. It is for such reasons that nations have often exercised caution in respect of laws that enable people to have their citizenship revoked.

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, 888

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1. Executive summary

1. Thank you for the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) on the operation, effectiveness and implications of Australian laws that provide for the stripping of citizenship (**Citizenship Removal Provisions**) from an Australian citizen who is a citizen or national or one or more other countries (a **dual national**).¹
2. The Citizenship Removal Provisions provide for the removal of a person's citizenship in three circumstances:
 - (a) renunciation by conduct when a person engages in certain proscribed conduct such as a terrorist act;
 - (b) cessation of citizenship when a person serves in an enemy army or in a declared terrorist organisation; or
 - (c) cessation by Ministerial determination following a person's conviction for one of a number of specified offences.
3. In 2015, the HRLC opposed the introduction of the Citizenship Removal Provisions on the basis that they created an unacceptable risk that a person's citizenship would be arbitrarily removed, which could in turn potentially subject people to the devastating consequences of statelessness, family separation and indefinite detention. Amendments to the Citizenship Removal Provisions at the time were not sufficient to address our concerns. The Citizenship Removal Provisions were, and remain, excessive, unreasonable and lack effective safeguards.²
4. The HRLC strongly urges the PJCIS to recommend the repeal of the Citizenship Removal Provisions. Australia has the power to determine who its nationals are, however that power is not absolute and is subject to some important restrictions in international law. For example, Australia cannot remove a person's nationality arbitrarily, nor can Australia remove citizenship in circumstances where it would leave a person stateless.
5. The loss of Australian citizenship means the loss of the rights and protections that flow from citizenship. Most obviously, this includes the right to vote³ and run for office⁴ and the right and ability to enter and remain in Australia.⁵ People affected are also at risk of losing the basic

¹ Sections 33AA, 35, 35AA and 35A were introduced into the *Australian Citizenship Act 2007* (Cth) by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth). In these submissions, HRLC refers to nationality and citizenship interchangeably.

² Human Rights Law Centre, Submission No 39 to the Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (July 2015) 3.

³ *Commonwealth Electoral Act 1918* (Cth) s 93(1)(b)(i).

⁴ *Australian Constitution* s 44(i).

⁵ The *Migration Act 1958* (Cth) regulates rights of "non-citizens" in a number of key provisions, e.g. ss 42 and 501.

- entitlements for a dignified life, such as access to health care and social security, if they do not otherwise qualify for those benefits.⁶
6. However, of greater concern is that once their citizenship is lost, people are likely to become subject to Australia's immigration law and Australia is unlikely to grant the requisite immigration status for that person to remain in or return to Australia.
 7. While Australia has a broad margin to determine who enters and leaves the country, it is important that this is done in a considered way, with safeguards to ensure people only lose their citizenship in the most serious circumstances.
 8. There are two fundamental problems with the operation of the Citizenship Removal Provisions.
 9. First, the scheme does not guarantee that only dual nationals will be affected. There is no adequate process described in the Citizenship Removal Provisions for determining a person's dual national status before they lose their citizenship. The case of Neil Prakash (whose citizenship was stripped under this scheme) illustrates how the Citizenship Removal Provisions can be used to strip Australian citizenship based on the false and unconfirmed presumption that a person is a national of another country. Determinations of dual nationality are inherently complex and difficult, as the crisis over parliamentary eligibility under section 44 of the Constitution proved.
 10. For those located overseas whose citizenship is removed in circumstances where they do not hold another citizenship, they will be left stranded and potentially stateless, where they may be at greater risk to return to persecution or torture. Those located in Australia may also become stateless, and subject to mandatory and indefinite immigration detention.
 11. Secondly, except where citizenship is removed following conviction, people are vulnerable to removal of citizenship based on incorrect facts. The scheme does establish a fair and independent fact finding process to determine that the person engaged in a terrorist act or served with an enemy army prior to citizenship being stripped. For example, there is no requirement for a determination by a court or other independent body. In practice, we understand that the Minister makes a determination based on the recommendation of the secretive Citizenship Loss Board – a body that is not referred to in the legislation and about which little is known.
 12. These devastating consequences are compounded in their impact on children. Children as young as 10 can have their citizenship removed under the scheme, and, like adults, become

⁶ Medicare or Centrelink benefits are available to some non-citizens, but non-citizens are required to fulfil other criteria that persons affected by the Citizenship Removal Provisions may not be able to meet in particular circumstances, ie they are extremely unlikely to be given permanent residency once their citizenship is cancelled in these circumstances. See Australian Government, 'Who can get it', *Australian Department of Human Services* (Web Page) <<https://www.humanservices.gov.au/individuals/services/medicare/medicare-card/eligibility/who-can-get-it#a5>> and Australian Government, 'Make a Claim: Help for Australian Residence', *Centrelink* (Web Page) <https://www.centrelink.gov.au/onlineclaim/help/australian_residence_help.htm>.

at risk of statelessness and mandatory indefinite immigration detention. Children whose parent loses citizenship face the break-up of their family unit.

13. Another problem with the Citizenship Removal Provisions is that they apply retrospectively, to conduct engaged in before the laws even existed and before Australians knew the consequences of their actions. This offends the basic principle that laws should not apply retrospectively.
14. Somewhat perversely, the ramifications of citizenship loss only apply to dual nationals, and not Australian mono-nationals who, for instance, have been convicted of exactly the same offence as a dual national. This creates two classes of Australian citizenship where only dual nationals are subject to the harsh ramifications of citizenship loss. This puts the substantive equality between Australians in jeopardy and may institutionalise discriminatory practices.
15. This submission sets out a high-level overview of how the scheme operates to strip citizenship. We then demonstrate that the Citizenship Removal Provisions:
 - (a) **Infringe the right to citizenship** because they are not proportionate to their purpose and do not contain due process safeguards.
 - (b) **Expose people to the real risk of statelessness** as the scheme includes insufficient safeguards to ensure that a person is able to exercise their rights in their country of dual nationality.
 - (c) **Expose people to arbitrary detention** or return to a country where they are likely to face persecution, torture or inhumane treatment.
 - (d) **Separates families** and subjects children as young as 10 to significant human rights abuses.
 - (e) **Applies retrospectively** to conduct that people didn't know at the time would result in the removal of their citizenship.
 - (f) **Infringe the right to equality** by creating two classes of citizenship.

Recommendation 1

The citizenship removal provisions contained in sections 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007* (Cth) should be repealed.

Recommendation 2

In the alternative, the citizenship removal provisions contained in sections 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007* (Cth) should be amended to ensure that citizenship can only be removed by the Minister:

- a. On the basis of findings from a transparent judicial process that:
 - i. provides the person affected with notice, procedural fairness and access to review of adverse decisions; and
 - ii. determine that the person engaged in serious criminal conduct that demonstrates a repudiation of allegiance to Australia, and that the person is a dual national and can exercise the rights of their other citizenship.
- b. Where the Minister determines that revoking citizenship would be in the public interest, taking into account the persons individual circumstances and conduct, including the person's age and the degree of threat posed to the community, with the best interest of the child as the primary consideration.

The Citizenship Removal Provisions should not apply to children, and should be amended to ensure that a child's best interests are properly taken into account in each Ministerial decision, including in relation to removing citizenship from people who are parents.

The Citizenship Removal Provisions should not apply retrospectively.

2. The operation of the scheme

16. The Citizenship Removal Provisions establish a legislative framework for the removal of a dual national's Australian citizenship, irrespective of how the person became a citizen (including birth)⁷ in three circumstances:

(a) **Renunciation of citizenship immediately upon engaging in proscribed conduct:**⁸

A person renounces their citizenship when the person is a dual national that “acts inconsistently with their allegiance to Australia by engaging in [certain proscribed] conduct.”⁹ Conduct includes engaging in a terrorist act or financing terrorism, and also requires an intention element, for example engaging in conduct with the intention of advancing a political, religious or ideological cause or coercing or intimidating the Government or the public.¹⁰ A person is deemed to have engaged in conduct with the relevant intention if the person was a member of a “declared terrorist organisation” when the person engaged in the conduct.¹¹ This section applies to children as young as 14.¹² We call this **citizenship loss for proscribed conduct**.

(b) **Cessation of citizenship on commencing service or fighting in armed forces of an enemy country or for a declared terrorist organisation:**¹³ A person's citizenship ceases when:

- (i) the person is a dual national;
- (ii) the person serves in the armed forces of a country at war with Australia, or fights for (or is in the service of) a “declared terrorist organisation”; and
- (iii) the fighting or service occurs outside of Australia.¹⁴

Exceptions include where the person's acts are unintentional, or the person is acting under duress, or providing neutral, independent humanitarian assistance.¹⁵ This applies to children as young as 14.¹⁶ We call this **citizenship loss for enemy service**.

⁷ *Australian Citizenship Act 2007* (Cth) ss 33AA(8), 35(3) and 35A(3).

⁸ *Australian Citizenship Act 2007* (Cth) s 35(9).

⁹ *Australian Citizenship Act 2007* (Cth) s 33AA(1).

¹⁰ *Australian Citizenship Act 2007* (Cth) ss 33AA(2)-(3). Words and expressions used in *Australian Citizenship Act 2007* (Cth) s 33AA(6) have the same meaning as in the *Criminal Code Act 1995* (Cth) sch 1 (**Criminal Code**): *Australian Citizenship Act 2007* (Cth) s 33AA(6).

¹¹ *Australian Citizenship Act 2007* (Cth) s 33AA(4).

¹² *Australian Citizenship Act 2007* (Cth) s 33AA(1).

¹³ *Australian Citizenship Act 2007* (Cth) s 35(2).

¹⁴ *Australian Citizenship Act 2007* (Cth) s 35(1).

¹⁵ *Australian Citizenship Act 2007* (Cth) s 35(4).

¹⁶ *Australian Citizenship Act 2007* (Cth) s 35(1).

- (c) **Cessation of citizenship on determination by Minister:**¹⁷ The Minister may determine that a person's citizenship ceases if:
- (i) the person is convicted of a specified offence;
 - (ii) the person has been sentenced to at least six years' imprisonment;
 - (iii) the person is a dual national at the time of the determination;
 - (iv) the Minister is satisfied that the conduct to which the conviction relates demonstrates that "the person has repudiated their allegiance to Australia"; and
 - (v) the Minister is satisfied that it is not in the public interest for the person to remain an Australian citizen.¹⁸

Relevant factors to the exercise of the Minister's discretion on the public interest include the best interests of the child (primary consideration) if the person is under 18, the severity of the conduct, the degree of threat imposed and the person's age.¹⁹ This applies to children as young as 10.²⁰ We call this **citizenship loss following criminal conviction**.

17. For citizenship loss for proscribed conduct and enemy service, there is no requirement for an independent or judicial finding concerning the underlying conduct. This is so even in the case of citizenship loss for proscribed conduct, where the conduct in question is interpreted in line with the words and expressions used in the *Criminal Code*.
18. Instead in cases of citizenship loss for proscribed conduct and enemy service, the person's citizenship is taken to have been renounced or ceased when the relevant conduct, fighting or service *occurs*.²¹ Citizenship loss is "formalised" by the Minister giving a notice to the person or such other persons as the Minister considers appropriate when the Minister becomes aware of the proscribed conduct or enemy service.²²
19. In contrast, for citizenship loss following criminal conviction, the person must first be convicted of a relevant offence in a court. Following conviction, the Minister can determine that the person ceases to be an Australian citizen,²³ and give a notice to the person or such other persons as the Minister considers appropriate.²⁴

¹⁷ *Australian Citizenship Act 2007* (Cth) s 35A(2).

¹⁸ *Australian Citizenship Act 2007* (Cth) s 35A(1).

¹⁹ *Australian Citizenship Act 2007* (Cth) s 35A(1)(e).

²⁰ This is because a person as young as 10 can be convicted of an offence under the *Criminal Code*: *Criminal Code* ss 7.1-7.2.

²¹ *Australian Citizenship Act 2007* (Cth) s 35AA(9) and (10).

²² *Australian Citizenship Act 2007* (Cth) s 35AA(10).

²³ *Australian Citizenship Act 2007* (Cth) s 35(2).

²⁴ *Australian Citizenship Act 2007* (Cth) s 35(5).

20. In practice, we understand that a Citizenship Loss Board considers whether individuals meet the criteria set out in the Citizenship Removal Provisions and the Minister acts on the Board's advice. For instance the Board will consider a person's dual nationality status. The Board is not referred to in the legislation and very little is known about the role of the Board and its operations. The Citizenship Loss Board is comprised of senior departmental secretaries from across government, including representatives of the Department of Home Affairs, the Department of Foreign Affairs and Trade, the Attorney-General's Department, the Australian Crime Commission, the Australian Security Intelligence Service and the Australian Security Intelligence Organisation.²⁵
21. Under the scheme, the Minister is not *required* to give notice that citizenship has ceased in any of the three cases under the Citizenship Removal Provisions. The Minister is only required to make "reasonable attempts" to give notice "as soon as practicable".²⁶ There are also broad exceptions, including for reasons of national security.²⁷ This means that a person may not know that the Australian Government no longer considers that the person is not entitled to the rights and protections of Australian citizenship. If a notice is given, the notice needs to set out a basic description of the conduct or the reasons for the Minister making the determination, and the person's rights of review, but there are broad exceptions to information contained in the notice (eg "contrary to the public interest").²⁸
22. The Minister can declare that a terrorist organisation is a "declared terrorist organisation" for the purposes of the Citizenship Removal Provisions if satisfied that the terrorist organisation is involved in or advocates the doing a terrorist act, and is opposed to Australia's interests, values, democratic beliefs, rights or liberties.²⁹ Once declared, a "declared terrorist organisation" is relevant to the operation of the scheme in two ways:
- (a) In terms of citizenship loss for proscribed conduct, a person is deemed to have engaged in conduct with the relevant intention if the person was:
- (i) a member of the organisation;
 - (ii) acting on the organisation's instruction; or
 - (iii) acting in cooperation with the organisation.³⁰

²⁵ See e.g. Paul Farrell, 'Government officials of secretive Citizenship Loss Board named', *The Guardian* (online, 22 July 2016) <<https://www.theguardian.com/australia-news/2016/jul/22/government-members-of-secretive-citizenship-loss-board-named>> and Santilla Changaibe, 'What is the Citizenship Loss Board and how will it work?', *SBSNews* (online, 14 April 2016) <<https://www.sbs.com.au/news/what-is-the-citizenship-loss-board-and-how-will-it-work>>.

²⁶ *Australian Citizenship Act 2007* (Cth) ss 33AA(10), 35(5) and 35A(5).

²⁷ *Australian Citizenship Act 2007* (Cth) ss 33AA(12), 35(7) and 35A(7).

²⁸ *Australian Citizenship Act 2007* (Cth) ss 33AA(11), 35(6), 35A(6) and 35B.

²⁹ *Australian Citizenship Act 2007* (Cth) ss 35AA(1)-(2). "Terrorist organisation" has the meaning in *Criminal Code* s 102.1(1).

³⁰ *Australian Citizenship Act 2007* (Cth) s 33AA(4).

- (b) In terms of citizenship loss for enemy service, a person's citizenship ceases when they commence to fight for, or are in the service of, the organisation.³¹
- 23. The PJCIS may review and report on declarations.³² Declarations are disallowable by a House of Parliament.³³
- 24. Once removed, citizenship can only be reinstated in three ways:³⁴
 - (a) **Minister reinstates citizenship where conviction overturned.** In cases of citizenship loss following criminal conviction, the Minister is required to revoke the determination where the conviction is overturned or quashed and is final.³⁵
 - (b) **Minister reinstates the citizenship.** For citizenship loss for proscribed conduct and enemy service, the Minister has the power to reinstate the citizenship.³⁶ There are effectively two Ministerial decisions, first the decision whether to consider reinstating citizenship, which cannot be compelled, and then secondly the decision whether or not to reinstate the citizenship.³⁷ If the Minister decides *to consider* reinstating citizenship, factors relevant to deciding *whether or not to reinstate* citizenship include the best interests of the child (primary consideration) if the person is under 18, severity of conduct, degree of threat, person's age and whether the person is likely to be prosecuted.³⁸
 - (c) **Judicial review.** A person who has lost their citizenship can apply to a court to review:
 - (i) The Minister's decision to issue the notice formalising citizenship removal (for example arguing that the person did not engage in the proscribed conduct, did not have the required intention, did not serve or fight, or was not a dual national).³⁹
 - (ii) The Minister's decision not to reinstate the person's citizenship.

³¹ *Australian Citizenship Act 2007* (Cth) ss 35(1)(b)(ii) and 35(2).

³² *Australian Citizenship Act 2007* (Cth) s 35AA(4).

³³ This is because the declaration is a legislative instrument which is disallowable under *Legislation Act 2003* (Cth) s 42: see *Australian Citizenship Act 2007* (Cth) s 35AA(1).

³⁴ *Australian Citizenship Act 2007* (Cth) ss 29-32 and 36A.

³⁵ *Australian Citizenship Act 2007* (Cth) s 35A(8).

³⁶ *Australian Citizenship Act 2007* (Cth) ss 33AA(14), 33AA(24)(c), 35(9), 35(19)(c) and 35A(8)-(9).

³⁷ The Minister has no duty to rescind a notice or exempt a person from citizenship loss for proscribed conduct and enemy service: *Australian Citizenship Act 2007* (Cth) ss 33AA(15) and 35(10).

³⁸ *Australian Citizenship Act 2007* (Cth) ss 33AA(17) and 35(12).

³⁹ See *Australian Citizenship Act 2007* (Cth) ss 33AA(24)(a)-(b) and 35(a)-(b). These are jurisdictional facts subject to judicial review under the High Court's original jurisdiction: *Australian Constitution* s 75(v), *Judiciary Act 1903* (Cth) s 39B(1).

25. We do not have a clear sense of how many people have been subject to the operation of the Citizenship Removal Provisions since 2015. However, it has been reported that about a dozen dual nationals have lost their Australian citizenship under the scheme.⁴⁰

3. The right to citizenship in international law

3.1 Citizenship cannot be arbitrarily removed

26. Under the Citizenship Removal Provisions, dual nationals are unfairly exposed to the arbitrary deprivation of their Australian citizenship and the rights and protections that go along with it.
27. Australia has a broad margin to determine who enters and leaves the country, but this is not unlimited. It is important that this is done in a considered way, with safeguards to ensure people only lose their citizenship in the most serious circumstances.
28. The right to a nationality (citizenship) is a fundamental human right. Article 15(1) of the *1948 Universal Declaration of Human Rights* declares that “Everyone has the right to a nationality”. Citizenship is a “right to have rights”.⁴¹ Without citizenship, a person can be denied the rights or protections entailed in nationality.
29. Under international law, the right to a nationality is not absolute and can be limited in certain circumstances. However, a state must not arbitrarily deprive a person of their nationality.⁴² To comply with the obligation not to remove citizenship arbitrarily, the removal of citizenship must serve a legitimate purpose, it must be proportionate to that purpose (being the least intrusive way of achieving the desired result) and the removal must be accompanied by due process protections.⁴³
30. Under the *International Covenant on Civil and Political Rights (ICCPR)*, to which Australia has voluntarily agreed to be legally bound, no one shall be arbitrarily deprived of the right to enter their own country (article 12(4)). A person’s “own country” is broader than “the country of his or her nationality”.⁴⁴ The United Nations Human Rights Committee has stated that arbitrariness requires that legal interferences with the right should be reasonable in the circumstances and should not prevent a person from returning to this or her own country:

In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context [...] guarantees that even interference

⁴⁰ See Melissa Clarke, ‘Stripping Australian citizenship from terrorists could hamper prosecutions, watchdog says’, *ABC News* (online, 28 June 2019) <<https://www.abc.net.au/news/2019-06-28/laws-stripping-terrorists-citizenship-could-hamper-prosecutions/11259074>>.

⁴¹ Hannah Arendt, *Origins of Totalitarianism* (Harcourt Brace Jovanovich, 1948).

⁴² *1948 Universal Declaration of Human Rights* article 15(2).

⁴³ Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, UN Doc A/HRC/25/28 (19 December 2013) [4]-[5] and [31]-[34].

⁴⁴ Human Rights Committee, *General Comment No. 27: Freedom of Movement (article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) [20] (it includes “nationals of a country who have there been stripped of their nationality in violation of international law”).

provided for by law should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. **A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.**⁴⁵

31. The Citizenship Removal Provisions create an unacceptable risk of arbitrary removal of citizenship in contravention of international law because they:
- (a) are not proportionate to their objectives (see section 3.2 below); and
 - (b) do not contain appropriate safeguards or due process (see section 3.3 below).

3.2 The Citizenship Removal Provisions are not proportionate

32. The two purposes of the Citizenship Removal Provisions might be expressed as protecting the community and upholding the value of allegiance to Australia.⁴⁶ The protection of the community is legitimate and the *raison d'être* of the State.⁴⁷
33. Nonetheless, the Citizenship Removal Provisions are disproportionate to those purposes because:
- (a) **Some triggering and conduct offences are less serious:** Perhaps of greatest concern is that the loss of citizenship is triggered by an excessively broad range of offences and conduct, some of which do not demonstrate any significant risk to the Australian community or a repudiation of allegiance to Australia. For example, citizenship loss could be triggered for “possessing things” connected with terrorist acts⁴⁸ or intending to coerce or influence the government of a foreign country.⁴⁹ The drafting of many of these terrorism offences has been criticised by a range of UN human rights experts and the Australian Human Rights Commission as being vague, too broad and breaching human rights.⁵⁰

⁴⁵ Human Rights Committee, *General Comment No. 27: Freedom of Movement (article 12)*, CCPR/C/21/Rev.1/Add.9 (1 November 1999) [21].

⁴⁶ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) s 4 (the purpose for the Citizenship Removal Provisions is “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 community, demonstrate that they have severed that bond and repudiated their allegiance to Australia”); Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7369 (Peter Dutton, Minister for Immigration and Border Protection) (in his second reading speech, the Minister stated the intention of the Citizenship Removal Provisions “is the protection of the community and the upholding of its values, rather than punishing people for terrorist or hostile acts” and “emphasises the central importance of allegiance to Australia in the concept of citizenship”); see Human Rights Law Centre, Submission No 39 to the Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (July 2015) [12]-[14] which draws this conclusion.

⁴⁷ See eg Lucia Zedner, “Citizenship Deprivation, Security and Human Rights” (2016) *European Journal of Migration and Law* 1 <https://ora.ox.ac.uk/objects/uuid:ffd1a508-0274-423b-b49f-2cd27a49a90f/download_file?file_format=pdf&safe_filename=Zedner%2BCitizenship%2BDeprivation%252C%2BSecurity%2B%2526%2BRights.pdf&type_of_work=Journal+article>.

⁴⁸ E.g. *Criminal Code* ss 72.15 (possession of unmarked plastic explosives), 80.2C (advocating terrorism), 91.11 (soliciting or procuring an espionage offence or making it easier to do so).

⁴⁹ *Australian Citizenship Act 2007* (Cth) ss 33A(2)-(3).

⁵⁰ See Human Rights Committee, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009) [11] and Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms*

- (b) **Less severe powers are available:** There is a separate suite of powers and offences available to authorities to protect the community against the threat of terrorism, including broad powers to cancel the passport of a person to prevent their return to Australia where it would pose a national security risk.⁵¹ Alternatively, the conventional approach to criminal actions is to deal with them through the criminal law, which provides all the ordinary criminal law safeguards.
- (c) **Minister is not required to take individual circumstances into account:** For citizenship loss for proscribed conduct and enemy service, the Citizenship Removal Provisions revoke a dual national's Australian citizenship at the point in time when the relevant conduct, fighting or service occurs.⁵² The Minister is not required to take into account the person's individual circumstances. In contrast, for citizenship loss following criminal conviction, the person's citizenship ceases when the Minister makes the determination, and only after considering the person's individual circumstances.⁵³ These factors include the best interests of the child (primary consideration) if the person is under 18, severity of the conduct and the degree of threat posed to the community.⁵⁴

While the Minister can take individual circumstances and considerations into account in deciding whether or not to reinstate the person's citizenship, this approach is clearly not proportionate to the purposes of the scheme because:

- (i) these factors are not relevant to whether citizenship is lost in the first place;
- (ii) the consequences of citizenship loss are serious; and
- (iii) there is no way to compel the Minister to consider whether or not to reinstate the person's citizenship.

3.3 Due process concerns

34. The Citizenship Removal Provisions do not provide adequate procedural safeguards to protect citizens from arbitrary deprivation of their nationality. This exposes people to the loss of rights and protections, arbitrary detention and being separated from their families.
35. The UN Human Rights Council notes that procedural safeguards are essential to prevent abuse of laws in relation to the deprivation of citizenship.⁵⁵ In particular, nationality decisions

while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism, UN Doc A/HRC/4/26/Add.3 (2006) [15] and Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism laws* (2008) <https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws>.

⁵¹ E.g. *Australian Passports Act 2005* (Cth) ss 14 and 22A.

⁵² *Australian Citizenship Act 2007* (Cth) ss 33AA(9) and 35(2).

⁵³ *Australian Citizenship Act 2007* (Cth) s 35A(2).

⁵⁴ *Australian Citizenship Act 2007* (Cth) s 35A(1)(e).

⁵⁵ Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, UN Doc A/HRC/13/34 (14 December 2009) [43].

should be issued in writing and be open to administrative or judicial review.⁵⁶ Under international law, as a general principle, all persons must be guaranteed a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of their rights at law.⁵⁷

36. The Citizenship Removal Provisions do not contain adequate safeguards, illustrated by the following:
- (a) **No notice requirement or opportunity to respond:** A dual national's citizenship can be removed without proper notice or a reasonable opportunity for them to present their case and respond to any adverse findings prior to their citizenship being stripped (except where the Minister determines that their citizenship ceases following criminal conviction).⁵⁸
 - (b) **No transparent, independent, rigorous fact-finding process:** For citizenship loss for proscribed conduct and enemy service, a person's citizenship ceases automatically when the relevant conduct, fighting or service occurs. This follows consideration by the Minister and the Citizenship Loss Board entirely in private and without a determination from a court that the relevant conduct occurred. The Citizenship Loss Board is not referred to in the scheme.⁵⁹
 - (c) **Standard of proof:** The Citizenship Removal Provisions do not specify what standard of proof is required to be met to ensure that the relevant conduct actually occurred, despite drawing categories of proscribed conduct from the criminal law. The protections of the criminal standard of proof are not accorded.
 - (d) **Reversal of onus of proof:** The onus of proof is effectively reversed for citizenship loss for proscribed conduct and enemy service. Because the person's citizenship "automatically" ceases based on conduct, it is for the person whose citizenship is removed to convince the Minister or a court that the Citizenship Removal Provisions were incorrectly applied to them.
 - (e) **Minister cannot be compelled to consider whether or not to reinstate a person's citizenship:** For citizenship loss for proscribed conduct and enemy service, the Minister's decision to review is non-compellable.

⁵⁶ Ibid; Human Rights Committee, *General Comment No. 27: Freedom of Movement (article 12)*, CCPR/C/21/Rev.1/Add.9 (1 November 1999) [31].

⁵⁷ ICCPR art 14(1); see also *Convention on the Rights of the Child (CROC)* art 12 (opportunity to be heard in judicial and administrative proceedings affecting the child); *1954 Convention relating to the Status of Stateless Persons* art 16(1) (free access to courts).

⁵⁸ *Australian Citizenship Act 2007* (Cth) ss 33AA(10), 35(5) and 35A(5).

⁵⁹ See Law Council of Australia, Submission No 14 to the Parliamentary Joint Committee on Intelligence and Security, House of Representatives, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (1 February 2019) [3]-[4], where the Council noted that the Citizenship Loss Board may operate under *ex parte* procedures and noted the Board "[...]makes decisions regarding whether dual nationals can be stripped on their Australian citizenship [...]. The Society considers that the ability of public servants to make decisions concerning an individual's citizenship status is very concerning and has serious implications for the separation of powers."

- (f) **Access:** It may be difficult for the person to obtain access to the courts when their citizenship has been revoked, particularly in circumstances where they are no longer in Australia and not permitted to return.

4. Statelessness

... rendering people stateless is never an acceptable option. But the measures taken by some States of origin to strip individuals of their nationality, in order to prevent their return, run the risk of exactly that result. Children who are stateless are often deprived of education, access to health care and other basic elements of dignity. To inflict statelessness on children who have already suffered so much is an act of irresponsible cruelty.

Opening statement by UN High Commissioner for Human Rights Michelle Bachelet, 41st session of the Human Rights Council, 24 June 2019

- 37. The Citizenship Removal Provisions put people affected at a real and unacceptable risk of being stateless and unable to access the rights and protections afforded by belonging to a state.
- 38. Australia is bound to ensure that no person shall be permitted to renounce or be deprived of their nationality if it would render that person stateless.⁶⁰ The *1961 Convention* contains a narrow list of exceptions where loss of nationality resulting in statelessness is permitted. These exceptions are clearly not applicable in respect of the Citizenship Removal Provisions for the reasons set out in the table below.
- 39. Statelessness has radical consequences that undermine peoples’ enjoyment of their human rights. As the Australian Human Rights Commission has stated:

The consequences of statelessness are severe. A stateless person is denied all the privileges and protections of citizenship. They face marginalisation, disempowerment and limitations upon many of their civil, political, economic and social rights, including the right to vote, freedom of movement, property ownership, healthcare, work and education. The family of a stateless person, and especially any dependants, will likely also be subject to diminution of their human rights.⁶¹

WHY STATELESSNESS EXCEPTIONS DO NOT APPLY

Exception	Reasons clearly not applicable
On the basis of dual nationality: A law permitting the renunciation of nationality only where the person	The basis of the renunciation of citizenship under the Citizenship Removal Provisions is not merely that

⁶⁰ *1961 Convention on the Reduction of Statelessness* arts 7.1(a) and 8.1.

⁶¹ Australian Human Rights Commission, Submission No 4 to the Parliamentary Joint Committee on Intelligence and Security, House of Representatives, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (10 January 2019) [58].

Exception	Reasons clearly not applicable
possesses or acquires another nationality, but only if its application is consistent with the principles of freedom of movement and the right to seek asylum (art 7.1(b)).	the individual has a dual nationality, but also that a dual national has engaged in conduct or committed offences.
Nationality loss on the ground of departure, residence abroad, failure to register or on a similar ground is prohibited (art 7.3), but is permitted in the limited circumstances set out in articles 7.4 and 7.5 (see also art 8.2(a)).	The Citizenship Removal Provisions are not directed to departure, residence abroad, failure to register or similar grounds, but to the allegiance of a person to Australia. The exemptions are not relevant.
Nationality obtained by misrepresentation or fraud (art 8.2(b)).	The Citizenship Removal Provisions are not directed to misrepresentation or fraud, but to the allegiance of a person to Australia.
A number of grounds on which a State may deprive a person of their nationality if the grounds existed in the national law at the time of accession to the <i>1961 Convention</i> (art 8.3), including the person: <ul style="list-style-type: none"> • acting inconsistently with a duty of loyalty; or • having given definite evidence of a determination to repudiate their allegiance. 	Australia acceded to the <i>1961 Convention</i> in 1973. The Citizenship Removal Provisions did not exist in the Citizenship Act in 1973. HRLC acknowledges that these exceptions have thematic overlap with the purpose of the Citizenship Removal Provisions, but these exceptions are not available given that the Citizenship Removal Provisions were included in the Citizenship Act in 2015.

40. The Citizenship Removal Provisions are said to only apply to dual nationals. While this reduces the risk that a person will be rendered stateless, there are insufficient safeguards in the Citizenship Removal Provisions to prevent them from inadvertently stripping a mono national of their Australian citizenship.
41. First, there is no guarantee that the Minister will correctly determine whether a person is a dual national. Dual nationality determinations are inherently complex, controversial and difficult. As we have seen with the recent Australian parliamentary eligibility crisis, determining whether a person is a dual national is a difficult question to unequivocally answer. This is further complicated as it is ultimately a matter for the other country's law whether the person is considered a national of that country.⁶²
42. If a Minister incorrectly issues a notice removing citizenship in circumstances where the person was not a dual national, this would render the person stateless at law. This is a real risk and has happened at least once under this scheme. In 2018, the Home Affairs Minister revoked Neil Prakash's Australian citizenship without consulting with Fiji. This was in the face of purported evidence that Prakash did not have Fijian citizenship. The Australian Government

⁶² 1954 *Convention relating to the Status of Stateless Persons* art 1.1.

merely informed Fiji of the decision.⁶³ The only option for the person affected is limited access to judicial review, if they even receive a notice that this has occurred.⁶⁴

43. Even if the person is in fact a dual national, the risk of becoming *de facto* stateless remains because there are many legitimate reasons why a person may not be able to enjoy the benefits of their other nationality, including:
- (a) **The person may be unable to exercise citizenship rights in the other country:** While a person may nominally hold citizenship of another country, the extent to which the person is able to exercise the rights associated with citizenship in that country may vary (particularly if the person has resided in Australia for most or all of their lives).
 - (b) **The person may be unable to obtain travel documents from the other country:** This would ultimately be the prerogative of the other country, and Australia would not be in a position to compel the other country to issue such documents. Presumably Australian travel documents would similarly be confiscated or not effective. This would leave the person unable to access their basic rights in the other country.
 - (c) **The person may be left in limbo if travelling on an Australian passport:** Any State that has admitted a person on the basis of an Australian passport may ignore Australia's revocation of the person's citizenship and seek to return the person to Australia. Australia could refuse readmission.⁶⁵
 - (d) **Other countries may also revoke citizenship from dual nationals on security grounds:** A person suspected of involvement in terrorist activities who was a dual national of both Australia and another country which includes similar citizenship stripping provisions, such as the UK,⁶⁶ would also be at risk of having their second citizenship revoked too.
 - (e) **A person may be unable to return to the other country of citizenship:** For example, refugees may have a well-founded fear of persecution or other serious harm preventing them from returning to the country.⁶⁷

⁶³ Paul Karp, 'Peter Dutton revoked Neil Prakash's Australian citizenship without consulting Fiji', *The Guardian* (online, 30 January 2019) <<https://www.theguardian.com/australia-news/2019/jan/30/peter-dutton-revoked-neil-prakashs-australian-citizenship-without-consulting-fiji>>.

⁶⁴ The existence of dual nationality is a jurisdictional fact subject to judicial review under the High Court's original jurisdiction: *Australian Constitution* s 75(v), *Judiciary Act 1903* (Cth) s 39B(1).

⁶⁵ Guy S Goodwin-Gill, *Mr Al-Jedda, Deprivation of Citizenship, and International Law* (revised draft of a paper presented at a seminar in Middlesex University on 14 February 2014), citing P Weis, *Nationality and Statelessness in International Law* (Alphen aan den Rijn: Sijthoff & Noordhoff, 2nd ed, 1979) 55, cited in Kim Rubenstein, Matthew Zagor and Domonique Dalla-Pozza, Submission No 13 to the Parliamentary Joint Committee on Intelligence and Security, House of Representatives, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (15 January 2019) 12.

⁶⁶ Sangeetha Pillai and George Williams, 'The utility of citizenship stripping laws in the UK, Canada and Australia' (2017-18) 41 *Melbourne University Law Review* 845, 851-855, referring to UK legislation including *Nationality, Immigration and Asylum Act 2002* (UK) s 4, *Immigration, Asylum and Nationality Act 2006* (UK) s 56 and *Immigration Act 2014* (UK) s 66.

⁶⁷ Refugee Council of Australia, Submission No 22 to the Parliamentary Joint Committee on Intelligence and Security, House of Representatives, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (July 2015) [5.2].

5. Non-refoulement and indefinite detention

44. The deprivation of a person's citizenship may result in their arbitrary detention or refoulement (return) to a country where they are likely to face persecution, torture or inhuman treatment. These are unacceptable outcomes and in breach of international law.
45. Australia has a number of obligations to ensure that a person is not refouled.⁶⁸ Where a person is outside Australia when their citizenship is revoked, Australia will not have the ability to control where the person is sent. A person could be sent by the third country to a place where they face persecution.
46. If a person is in Australia when their citizenship is revoked then they are likely to be subject to Australia's immigration system. This could occur for example, when citizenship is stripped on the basis of conviction for an offence, or where citizenship is automatically stripped based on conduct overseas, but there is a delay in the Minister becoming aware of that conduct in which time the person has returned to Australia.
47. If a person's Australian citizenship is revoked in these circumstances, they are likely to have their ex-citizenship visa cancelled on character grounds.⁶⁹ The ex-citizenship visa applies automatically when a person ceases to be an Australian citizen in Australia, and permits the person to remain in Australia.⁷⁰
48. If Australia is unable to return a person to their country of citizenship, and if the person has no ex-citizenship visa giving them a right to stay in Australia, such a person would be at risk of prolonged indefinite detention under the *Migration Act*,⁷¹ contrary to international law. These people are at risk of being effectively stateless and unable to access the rights and protections of citizenship in Australia or elsewhere. The UN Human Rights Committee has indicated its concerns that Australia's mandatory immigration regime is inconsistent with international law.⁷²

6. Impact on children and families

49. Citizenship Removal Provisions can have a devastating impact on the lives of children. Children as young as 10 can have their citizenship removed.⁷³ If a parent's citizenship is removed, there is a risk that the child will be separated from their family or returned to a country with their parents where they face danger.

⁶⁸ Eg the *1951 Refugee Convention* (art 33), the *ICCPR* (art 7 and 9) and the *Convention against Torture* (art 3).

⁶⁹ Supplementary Explanatory Memorandum (Revised EH190), Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 51-52 and 54.

⁷⁰ *Migration Act 1958* (Cth) s 35.

⁷¹ *Migration Act 1958* (Cth) ss 189-197.

⁷² Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [37].

⁷³ Under the *Australian Citizenship Act 2007* (Cth) s 35A, where the child is convicted of a specified offence.

50. The operation of the Citizenship Removal Provisions can result in:
- (a) the separation of families;⁷⁴
 - (b) interference with families in a way that is arbitrary or unlawful;⁷⁵
 - (c) the family unit not being protected;⁷⁶
 - (d) the child's nationality and family relations being removed;⁷⁷
 - (e) the child not knowing or being cared for by their parents;⁷⁸
 - (f) the child not being able to express their views in matters affecting them;⁷⁹
 - (g) not rehabilitating and protecting children affected by armed conflict.⁸⁰ UNICEF has highlighted that children associated with armed forces and groups "are first and foremost children, and victims of grave human rights abuses"⁸¹ and that stripping a child's citizenship is likely to increase the child's risk of exposure to violence and exploitation.⁸²
51. We acknowledge that the Citizenship Removal Provisions do not automatically remove a child's citizenship where the parent's citizenship has been removed.⁸³ This is welcome and should be retained. Loss of a child's citizenship in these circumstances would not be in their best interests as it would expose them to the potential of arbitrary detention or being returned to somewhere that they faced harm.
52. The Citizenship Removal Provisions limit the decision in which the best interests of the child are the primary consideration.⁸⁴ The best interests of the child are not required to be taken into account when the Minister issues a notice formalising for citizenship loss for proscribed conduct and enemy service or in the Minister's decision whether to *consider* reinstating a child's citizenship. Nor are they required to be taken into account in relation to a parent's citizenship ceasing under the scheme.
53. Additionally, even where the Minister is required to take into account the child's best interests, the Minister is not expressly required to take into account the child's individual circumstances,

⁷⁴ Child's right not to be separated from their parents: *CROC* art 9.1.

⁷⁵ *ICCPR* art 17.1.

⁷⁶ *ICCPR* art 23.1; *ICESCR* art 10.1 (protection of the family).

⁷⁷ Child's right to have their nationality and family relations preserved: *CROC* art 8.1;

⁷⁸ Child's right to know and be cared for by their parents: *CROC* art 7.1.

⁷⁹ Child's right to be heard: *CROC* art 12.

⁸⁰ *CROC* arts 38 and 39; *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* art 7(1).

⁸¹ UNICEF Australia, Submission No 24 to the Parliamentary Joint Committee on Intelligence and Security, House of Representatives, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (July 2015) [5.5].

⁸² *Ibid* [6.4].

⁸³ Cf *Australian Citizenship Act 2007* (Cth) s 36.

⁸⁴ *CROC* art 3.1. See also Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as primary consideration* (art. 3, para. 1), UN Doc CRC/C/GC/14 (29 May 2013) [6] (this is a substantive right, interpretative legal principle or a rule of procedure).

capacity and maturity. Whether a child aged between 10 and 14 knows that their conduct is wrong is relevant prior to convicting a child of a crime.⁸⁵ However, there is no requirement for the Minister to consider whether a child understood the consequences of their conduct, service or fighting prior to removing their citizenship.

54. The Citizenship Removal Provisions might also have an unintended effect on other family members. Apart from separating families, other family members can lose the key rights protections of the state. As noted by the Refugee Council of Australia:

if a partner or child of a former Australian citizen has not yet obtained Australian citizenship in their own right, he or she may be in danger of losing their right of residency in Australia or access to basic services (such as Medicare or income support) if their relative's citizenship ceases.⁸⁶

7. Retrospectivity

55. People can suffer the devastating impacts of arbitrary citizenship loss for conduct which occurred years before the Citizenship Removal Provisions existed. An Australian dual national's citizenship can be stripped on the basis of a criminal conviction that was received up to 10 years prior to the entry into force Citizenship Removal Provisions entered into force, if it carries a sentence of at least 10 years imprisonment.⁸⁷
56. Citizenship is a fundamental right. It is a basic presumption of the common law that legislation limiting fundamental rights should not apply retrospectively.⁸⁸ People should be able to know the extent of potential liability arising from conduct at the time the conduct is engaged in. In addition to being contrary to fundamental human rights principles, this is contrary to everyone's right to have no heavier criminal penalty imposed than existed when the offence was committed.⁸⁹ The common law presumption against retrospectivity is available to citizens and non-citizens alike.⁹⁰

⁸⁵ Cf *Criminal Code* s 7.2, which requires proof that a child knows that their conduct is wrong.

⁸⁶ Refugee Council of Australia, Submission No 22 to the Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (July 2015) [7.4].

⁸⁷ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) Schedule 1, item 8.

⁸⁸ *Maxwell v Murphy* (1957) 96 CLR 261, 267 (The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events").

⁸⁹ ICCPR art 15.1. This reflects a rule of customary international law: *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 574 (Brennan CJ). See *University of Wollongong v Metwally* (1984) 158 CLR 447, 472 ("Despite the capacity of the power of the Commonwealth Parliament to legislate retrospectively, the general principle is that 'retrospective legislation which has the effect of subjecting to penalty actions which at the time of their commission were not so subject will often be abhorrent to those who are concerned to maintain a just society governed by the rule of law').

⁹⁰ *Bradley v The Commonwealth* (1973) 128 CLR 557, [26].

8. Two classes of citizenship

57. The Citizenship Removal Provisions directly discriminate between mono nationals and dual nationals. The scheme effectively creates a two-tiered regime where a person with only Australian citizenship is not subject to the harsh penalties under the Citizenship Removal Provisions, whereas a person with citizenship of another country or countries may be subject to these harsh penalties, including the arbitrary application of the law.
58. Equality and non-discrimination are fundamental human rights that are protected in the majority of human rights treaties and recognised in the *Universal Declaration of Human Rights*.⁹¹ It is important that the Australian Government's legislation, regulation and practice reflects a focus on achieving both formal and substantive equality – being equality in terms of the form and the impact of its laws, policies and practices.⁹² In the context of citizenship removal, article 9 of the *1961 Convention on the Reduction of Statelessness (1961 Convention)* recognises that a person cannot be deprived of their nationality on racial, ethnic, religious or political grounds.⁹³
59. The Citizenship Removal Provisions do not discriminate on their face. However, there is a real risk that the Citizenship Removal Provisions indirectly discriminate on the basis of race or religion in their application. To date, only two organisations have been declared to be “declared terrorist organisations” for the purposes of the Citizenship Removal Provisions – Islamic State and Jabhat Al-Nusra.⁹⁴ They are both Syrian-based organisations seeking to establish an Islamic state or caliphate. The implications of the Citizenship Removal Provisions may be to establish a scheme which puts the substantive equality between Australians in jeopardy and institutionalises discriminatory practices.

⁹¹ For instance, obligations arise under the *ICCPR*, *CROC*, *International Covenant on Economic, Social and Cultural Rights (ICESCR)*; *International Convention on the Elimination of All Forms of Racial Discrimination*, *Convention on the Elimination of All Forms of Discrimination against Women* and *Convention on the Rights of Persons with Disabilities*.

⁹² Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009) [7].

⁹³ See also *ICCPR* arts 2 (obligation to ensure individuals rights without distinction of any kind) and 26 (equality before the law and equal protection of the law without discrimination).

⁹⁴ *Australian Citizenship (IMMI 17/073: Declared Terrorist Organisation—Jabhat Al-Nusra) Declaration 2017* (Cth) and *Australian Citizenship (Declared Terrorist Organisation—Islamic State) Declaration 2016* (Cth).