



Australian
Human Rights
Commission

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

Australian Human Rights Commission

Submission to the Parliamentary Joint
Committee on Intelligence and Security

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) with respect to its Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) (the Bill).
2. The Bill would amend s 35A of the *Australian Citizenship Act 2007* (Cth) (the Act), to broaden the circumstances in which a dual citizen or national could have their Australian citizenship removed.
3. The stated purpose of the Bill is to keep Australians safe from terrorist threats and to uphold the integrity of Australian citizenship.¹
4. The Commission acknowledges the critical importance of protecting Australia's national security, and the Australian community from terrorism. Enacting measures that achieve these goals can protect human rights, including the right to life,² and help fulfil Australia's international law obligations.³
5. However, to comply with international human rights law, any resulting limitations on human rights must be reasonable, necessary and proportionate. The Commission considers that the Bill does not satisfy these requirements.
6. Involuntary removal of Australian citizenship is an extremely serious matter, and imposes significant limitations on human rights for the individual whose Australian citizenship is removed. It can also have significant consequences for others in the Australian community who may rely on that individual, such as any dependants of the individual.
7. By enabling an individual's Australian citizenship to be removed following much less serious conduct than is currently provided for, the Bill risks arbitrarily interfering with the right to enter and remain in one's own country, protected under article 12(4) of the *International Covenant on Civil and Political Rights* (ICCPR).⁴
8. If passed, the Bill would also increase the risk that a person, including a child, will be rendered stateless. Such an outcome could breach Australia's obligations under the *Universal Declaration of Human Rights* (UDHR),⁵ *Convention on the Reduction of Statelessness* (Statelessness Convention)⁶ or *Convention on the Rights of the Child* (CRC).⁷
9. The proposed retrospective application of the reforms also risks offending the prohibition against retrospective penalties in article 15(1) of the ICCPR.

Recommendation 1

The Commission recommends that the Bill not be passed.

2 Background

2.1 Current citizenship removal powers for convictions

10. Prior to the passage of the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (the Allegiance Act), the circumstances in which an Australian citizen could involuntarily lose their citizenship were relatively confined. These included where a person:
 - committed or was convicted of certain migration-related fraud, and had not automatically become an Australian citizen
 - was convicted of a ‘serious offence’ after making an application, defined to mean an offence against an Australian or foreign law for which the person had been sentenced to death or to a serious prison sentence—if the offence was committed before the person became an Australian citizen
 - failed to comply with special residence requirements, and had not automatically become an Australian citizen
 - served in the armed forces of a country at war with Australia
 - was a child of a responsible parent who ceased to be an Australian citizen.
11. The Allegiance Act significantly expanded both automatic and discretionary citizenship-stripping powers in the Act.
12. In particular, it expanded the bases on which the Australian citizenship of a dual citizen or national could be removed, by reference to the person’s conduct or criminal convictions.
13. As a result, current s 35A(1) of the Act allows the Minister to determine in writing that a person ceases to be a citizen where all of the following criteria are met:
 - a. the person is convicted of specified offences, being certain terrorism-related, treason, espionage and foreign interference offences
 - 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
 - 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 the following factors:
 - 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.
14. The citizenship removal power in s 35A(1) can be applied to any Australian citizen, provided that they are a citizen or national of another country, regardless of whether their citizenship is conferred by birth or naturalisation.⁸ The person ceases to be an Australian citizen at the time a relevant Ministerial determination is made.⁹

2.2 The Bill

15. The Statement of Compatibility with Human Rights describes the purpose and context of the Bill as follows:
- The purpose of the Bill is twofold: to keep Australians safe from evolving terrorist threats, and to uphold the integrity of Australian citizenship and the privileges that attach to it.¹⁰
- ...
- Since the National Terrorism Threat Level was raised to ‘Probable’ in September 2014, seven terrorist attacks have occurred on Australian soil. Between September 2014 and November 2018, Australian agencies led 15 major disruption operations in response to potential attack planning, and charged 93 individuals with terrorism-related offences. A majority of these attacks, disruptions and arrests occurred after the passage of the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* in December 2015.
- The threat environment continues to evolve and the terrorist attack in Bourke Street, Melbourne and disruption of a further planned terrorist attack in November 2018 is evidence that the threat level remains high and has not decreased. It is therefore appropriate to keep legislative settings under constant review, and the amendments in the Bill modernise one of the important tools available to protect the Australian community from the threat of terrorism.¹¹
16. The Attorney-General further stated in the Second Reading of the Bill:
- The ability to cease the Australian citizenship of those who seek to do us harm forms an integral part of our ongoing response to international violent extremism and terrorism. It is a key part of our strategy to keep Australians safe. This bill will strengthen our ability to do precisely that. It amends the citizenship loss provisions to reflect the genuine threat posed to Australia by those who commit terrorism offences.¹²

17. The Bill purports to achieve these aims by expanding the circumstances under which a dual citizen can have their citizenship removed under s 35A of the Act in two ways.
18. First, it would remove the requirement that a person be sentenced to six or more years of imprisonment, if convicted of a 'relevant terrorism conviction'. It also extends the removal power to the offence of 'associating with a terrorist organisation' under s 102.8 of Pt 5.3 of the *Criminal Code* (Cth) (the Criminal Code).
19. Secondly, the Bill lowers the threshold for determining when a person is a dual citizen or national.
20. The amendments would retrospectively apply to a 'relevant terrorism conviction' of a person occurring on or after 12 December 2005 (being ten years prior to the commencement of the Allegiance Act), regardless of the length of the sentence imposed.
21. The amendments would retrospectively apply to a 'relevant other conviction' of a person occurring on or after 12 December 2005, if the person was sentenced to a period of imprisonment:
 - of at least ten years where the conviction occurred before 12 December 2015
 - of at least six years where the conviction occurred after 12 December 2015.¹³
22. A person in Australia whose citizenship is removed pursuant to proposed s 35A faces a high risk of being taken into immigration detention, pending their removal from Australia.
23. The Statement of Compatibility with Human Rights describes the likely migration consequences as follows:

A person in Australia whose citizenship ceases under the provisions would hold an 'ex-citizen visa', which would be subject to mandatory cancellation under the Migration Act if the person has a 'substantial criminal record' and is serving a sentence of imprisonment for an offence against the law of the Commonwealth. Relevantly, section 501(7)(c) states that a person has a substantial criminal record where they have been sentenced to a term of imprisonment of 12 months. Where a person has served a sentence of less than 12 months, cancellation of their visa is discretionary. The impact of cancelling a non-citizen visa is that that individual becomes an unlawful non-citizen, and subject to the removal processes in the Migration Act.¹⁴
24. Amended s 35A would continue to be subject to certain safeguards regarding the Minister's discretionary exercise of power. These include that the rules of natural justice apply to the exercise of powers under proposed s 35A(1),¹⁵ and that the Minister must give or make reasonable attempts to give written notice of the determination to the person as soon as practicable setting out certain matters including the reasons for the decision and the person's rights of review.¹⁶ Further, the determination must be revoked if a relevant conviction is overturned, in which case the person's citizenship is taken never to have ceased.¹⁷
25. As noted above, the Statement of Compatibility with Human Rights notes that 93 individuals have been charged with terrorism-related offences since September 2014.

The Commission urges the Committee to ascertain how many of these people have ‘a relevant terrorism conviction’ that occurred on or after 12 December 2005, the sentences imposed, and how many of these people who are not already covered by s 35A could retrospectively be subject to the amended s 35A if the Bill is passed. This information will help ascertain the scope of the human rights impacts of the Bill.

2.3 Summary of key concerns

26. The Commission is concerned by the following features of the Bill:
 - a. the lowering of the threshold for determining dual citizenship
 - b. the removal of the requirement for a sentence of at least six years for relevant terrorism convictions
 - c. the application of the citizenship removal power to the offence of ‘associating with a terrorist organisation’
 - d. its retrospective application.
27. The Commission considers that these reforms would increase the risk that removal of citizenship will occur where the relative seriousness of the conduct, and individual circumstances of the person, do not warrant such a grave consequence. It holds concerns that the human rights limitations in the Bill are therefore arbitrary or not reasonable, necessary or proportionate.
28. The Commission previously made a submission to the PJCIS in relation to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) (the 2015 Bill), articulating its serious human rights concerns about the expansion of citizenship removal powers (the 2015 Submission).¹⁸
29. The Commission recommended that the 2015 Bill not be passed. The Commission reiterates its ongoing concerns with the Act, including s 35A, as set out in the 2015 Submission.
30. The Commission considers that the current Bill would unjustifiably weaken the human rights protections in s 35A of the Act, with regressive outcomes for human rights.

3 Human rights and citizenship removal

3.1 The right to enter and remain in one’s own country

31. Article 12(4) of the ICCPR provides that ‘no one shall be arbitrarily deprived of the right to enter his own country’.
32. 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*.¹⁹

33. General Comment No 27 further provides that the concept of one's 'own country' is broader than that of nationality.²⁰ 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.²¹
34. It is clear that the removal of Australian citizenship interferes 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.
35. In relation to the concept of arbitrariness under article 12(4), the UN HR Committee has stated that:

[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.²²
36. 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.²³
37. 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.²⁴

3.2 Other human rights protections

38. 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'.²⁵
39. Article 15(2) of the UDHR further provides that 'no one shall be arbitrarily deprived of his nationality'.²⁶ This prohibition is considered to be a rule of general customary international law.²⁷
40. Children enjoy all rights protected by the ICCPR, as well as particular and special protections under the CRC.²⁸
41. Article 8(1) of the CRC protects the right of children to preserve 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.

42. Article 3 of the CRC 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.

4 Key human rights impacts

4.1 Lowering of threshold for determining dual citizenship

43. The Bill would amend s 35A(1)(b) to allow the Minister to remove a person's citizenship if, among other things, the Minister is 'satisfied' that 'the person would not ... become a person who is not a national or citizen of any country'.
44. Whether an administrative decision maker is 'satisfied' of something is largely a question of subjective fact.²⁹ That is, the person must actually be satisfied of that matter. However, as acknowledged in the Explanatory Memorandum, the state of satisfaction must also be reasonably attained.³⁰ This requires that the decision be reasonably open on the evidence before the decision maker.³¹ Further, as with all administrative decision-making, the decision must be made according to law, not be irrational or illogical, and not be affected by bias.
45. However, a requirement that a decision maker is reasonably satisfied of a particular matter is different from a requirement that the particular matter actually exists. A decision maker may be reasonably satisfied that a person is, for example, a national or citizen of another country, while at the same time being mistaken about that fact.
46. The amendment would replace 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' [emphasis added]. This revised criterion would apply to all relevant convictions covered by the Act.
47. The question of a person's foreign citizenship status can be highly complex and involve technical considerations of foreign law. Self-evidently, it is not something that can be decided solely by reference to Australian law.
48. With respect to the risk of making a person stateless, the Explanatory Memorandum states:
- Consistent with the operation of the current provisions of the Citizenship Act, including current paragraph 34(3)(b), 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.³²
49. The Statement of Compatibility with Human Rights further claims that the lowered threshold is consistent with Australia's human rights obligations not to render a

person stateless, and will be applied consistently with longstanding practice as it applies to other provisions of the Act.³³

50. It states that the test of 'satisfaction' has been used for many cases of revocation of citizenship for serious offences under s 34 of the Act and there are 'well-established practices and processes in place'.³⁴ The Statement of Compatibility also specifically addresses the risk of statelessness of a child, claiming that removal of citizenship is not available in circumstances where it would render a child stateless.³⁵
51. However, despite these stated intentions, the Commission holds serious concerns that the lowered threshold removes an important safeguard to prevent a person being rendered stateless in two ways.
52. First, it provides for a less rigorous decision-making process than is currently provided for in the Act, by lowering the administrative fact-finding requirements applicable to the decision maker. That is, the current test requires that a person *is* a dual citizen. The new proposed test would only require the Minister to reach a state of satisfaction as to a person's dual citizenship, acting reasonably.
53. Secondly and importantly, the Bill would lower the intensity of available judicial review.³⁶ Currently, the Act makes the question whether a person is a national or citizen of another country a jurisdictional fact. This means that a court in judicial review can receive evidence of whether the individual in question is indeed a dual citizen. If the Minister has wrongly found that the individual is a dual citizen, the court can correct this error.
54. By contrast, the Bill would reduce the capacity of a court to correct this error, because the court would only be able to review the *reasonableness* of the Minister's satisfaction.³⁷ If the Minister acts reasonably, but still mistakenly finds that the individual is a dual citizen, the Court would not be able to intervene and the individual would be rendered stateless.
55. The impact, therefore, is an increased risk that an error may not be corrected on review, further diluting a safeguard against statelessness. This situation might be more understandable if the Act allowed merits review via the Administrative Appeals Tribunal for decisions made under s 35A. However, no merits review is available for these decisions, thus rendering it imperative that the decision is made correctly at first instance.
56. The Explanatory Memorandum to the Bill suggests that the reason for making this change is in order to ensure 'consistency' with other provisions of the Act.³⁸ The justification of lowering the threshold for 'consistency' with the rest of the Act is highly inadequate in light of the extreme consequences. Any policy goal would need to be considerably important and well-justified to warrant removal of citizenship especially where it could result in statelessness. Reasons of legislative consistency are not persuasive.
57. The proposed amendment raises a serious risk of conflict with article 15(2) of the UDHR, the Statelessness Convention and the CRC (the human rights impacts of the Bill on children is considered further below at Part 5).

58. 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.
59. The Commission considers that the current threshold is an appropriately stringent test to meet, given the severe consequences. It provides stronger legislative protection against statelessness. The Commission considers that the current threshold increases the likelihood that a correct decision will be made as to the citizenship status of a relevant person, by virtue of the fact-finding test and the intensity of available judicial review, minimising the risk of statelessness.

4.2 Removal of requirement for sentence of six years for terrorism convictions

60. Proposed s 35(1A) would remove the current requirement that persons with a 'relevant terrorism conviction' are eligible for removal of citizenship only where they have been sentenced to a period of imprisonment of at least six years or to periods that total at least six years.
61. The effect is that a person with a 'relevant terrorism conviction' can be stripped of citizenship, regardless of the term of imprisonment imposed. This means that a person could lose their citizenship even if they have received a short sentence, a non-custodial sentence or no sentence at all.
62. The explanatory materials explain this amendment as follows:

It is no longer the intention that the minimum 6 years' sentence period applies to persons with a relevant terrorism conviction ... In light of the evolving terrorist threat, the Government considers it appropriate that the Minister be able to consider for cessation of citizenship all persons convicted of a terrorist offence after 12 December 2005, as conduct which poses harm to the Australian community.³⁹

... [The provision] only applies to terrorism offences which target behaviour that is especially harmful to community safety and amounts to a repudiation of allegiance to Australia. It does not, for instance, include contravention of preventative detention orders or control orders which are designed to enable law enforcement agencies to intervene early to protect the community and orders under these schemes are made on lower, non-criminal thresholds.⁴⁰
63. This amendment is achieved by the insertion of new s 35A(1A), categorising certain convictions as 'relevant terrorism convictions' by reference to Parts or Divisions of the Criminal Code and ss 6 or 7 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).
64. Such offences include commission of a terrorist act, providing or receiving training connected with terrorist acts, possessing things connected with terrorist acts,

- collecting or making documents likely to facilitate terrorist acts, membership of a terrorist organisation, getting funds to, from or for a terrorist organisation, providing support to a terrorist organisation, financing terrorism and entering or remaining in a declared area.
65. The scope of some of these offences covers acts connected with preparation for the engagement of a person in or assistance in a terrorist act, and have a mental element of recklessness rather than intention.⁴¹
 66. For example, a conviction for ‘possessing things connected with terrorist acts’ under s 101.4 of the Criminal Code falls within the definition of a ‘relevant terrorism conviction’.
 67. This offence covers a situation where a person possesses a thing, and the thing is ‘connected with’ preparation for, the engagement of a person in, or assistance in a terrorist act and the person is reckless as to the existence of the connection.⁴² The definition of a ‘thing’ is broad, and could include documents, a computer or mobile phone. A person commits an offence even if a terrorist act does not occur.⁴³
 68. The Commission considers that circumstances could arise where the possession of a thing ‘connected with’ the preparation of a terrorist act could occur for reasons other than an intention to undertake a terrorist attack. For example, a family member or friend of a relevant person could come into possession of a ‘thing’ in contravention of s 101.4.
 69. If a person is convicted of this offence where the surrounding circumstances reduced their level of culpability, a court may impose a sentence lower than the current six year threshold that triggers potential removal of citizenship.
 70. Proposed s 35A(1A)(d) also includes the offence of ‘entering, or remaining in, declared areas’ under s 119.2 of the Criminal Code, which is an offence of absolute liability (subject to certain exceptions). This offence applies where a person enters or remains in an area of a foreign country declared by the Minister as a declared area.
 71. The Commission has previously expressed its concern that the declared areas provisions cast a wider net than is necessary, also criminalising conduct unrelated to terrorism, and are therefore not necessary and proportionate to addressing their stated goal.⁴⁴
 72. In particular, while some exceptions exist in s 119.2(3), a person could travel to a declared area for purposes other than engaging in hostile activity but still commit an offence. For instance, a person could be visiting friends, transacting business, retrieving personal property or attending to personal or financial affairs. Further, a parent could take their child into a declared area, making the child subject to the offence.
 73. The amendment also extends the citizenship removal power to the offence of ‘associating with a terrorist organisation’ under s 102.8 of Pt 5.3 of the Criminal Code. This offence carries a maximum penalty of 3 years’ imprisonment.

74. Subsection 102.8(1) of the Criminal Code relevantly provides as follows:
- (1) A person commits an offence if:
- (a) on 2 or more occasions:
- (i) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
- (ii) the person knows that the organisation is a terrorist organisation; and
- (iii) the association provides support to the organisation; and
- (iv) the person intends that the support assist the organisation to expand or to continue to exist; and
- (v) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and
- (b) the organisation is a terrorist organisation because of paragraph (b) of the definition of **terrorist organisation** in this Division (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).
75. Conduct captured by s 102.8(1) of the Criminal Code includes communicating or meeting with a member of a terrorist organisation.⁴⁵ ‘Terrorist organisation’ is defined to include an ‘organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’.⁴⁶
76. The Statement of Compatibility with Human Rights explains the inclusion of the ‘associating’ offence as follows:
- ... This offence is currently excluded from the list of terrorism offences to which the citizenship loss provisions apply. It is appropriate that persons convicted of this offence be eligible for cessation of citizenship on conviction, as the offence addresses the fundamental unacceptability of the terrorist organisation itself, by making meeting or communicating (“associating”) with its members in a manner which assists its continued existence or expansion, illegal. In light of the risk to community safety that terrorist organisations pose, it is reasonable, necessary and proportionate for the cessation of Australian citizenship to individuals convicted of supporting the very existence of these organisations.⁴⁷
77. However, circumstances can be contemplated where a person communicates with a member of an organisation with no intention to support an act of terrorism, and in a manner that does not necessarily pose a risk to community safety—for example, through a casual communication on the street—but contravenes s 102.8(1). Notably, the conduct only appears to need to support the existence of such an organisation, not the actual doing of a terrorist act by the organisation.
78. In a 2006 report by the Security Legislation Review Committee, the Committee found that s 102.8 was unclear, duplicative, and a disproportionate interference with

human rights, including the right to freedom of association.⁴⁸ The Committee recommended its repeal.

79. The three year maximum penalty for committing the offence of associating with a terrorist organisation also indicates that Parliament considers it a much lower order offence than the other offences set out in proposed s 35A(1A) which could result in up to ten years' imprisonment.⁴⁹
80. The Commission considers that the inclusion of the less serious offence of 'associating', within the ambit of the citizenship-stripping powers, has not been demonstrated to be reasonable, necessary or proportionate.
81. By way of contrast, the offence of preparing for or planning sabotage under s 82.9 of the Criminal Code does *not* give rise to a potential loss of citizenship,⁵⁰ despite arguably encompassing more serious conduct. That offence carries a maximum penalty of 7 years' imprisonment. Both that offence and the 'associating' offence have a potentially broad scope of relevant prohibited actions and levels of culpability.
82. The current six year imprisonment requirement was implemented in accordance with a previous recommendation of the PJCS in respect of the 2015 Bill. This recommendation is even acknowledged in the Statement of Compatibility with Human Rights.⁵¹
83. This recommendation by the PJCS was made on the basis that, even following a conviction for a relevant offence:

[T]here are still degrees of seriousness of conduct and degrees to which conduct demonstrates a repudiation of allegiance to Australia ... loss of citizenship should be attached to more serious conduct and a greater severity of sentence, and it was considered that a six year sentence would appropriately reflect this.⁵²
84. It is unclear why implementation of the PJCS recommendation is now being reversed.
85. In contrast, if a person is convicted of a 'relevant *other* conviction' under proposed s 35A(1B), the six year imprisonment requirement continues to apply. Such 'other' convictions include the offences of sabotage, espionage and foreign interference. It is unclear why terrorism related offences will no longer require a minimum level of sentence to be sufficiently serious to warrant removal of citizenship, while the six year threshold for these other serious offences remains.
86. Overall, it is not clear that the selective lowering of relevant thresholds is reasonable, necessary and proportionate. The justification of an 'evolving terrorist threat' does not disclose any higher level of risk, or how the removal of citizenship would effectively address the threat—in particular when compared to the existing powers.
87. It is questionable in any event whether the stripping of citizenship is a measure that effectively enhances public safety and national security, as purported in the explanatory materials to the Bill.⁵³
88. Violent extremism is a complex and multi-causal phenomenon, and needs to be addressed in a multidisciplinary manner that heeds local and national drivers.⁵⁴

Expert commentary has suggested that the stripping of citizenship serves a largely symbolic function that does not justify the enactment of such powers, rather than serving any clear national security purpose.⁵⁵

89. The criminal justice system, and sentences served for relevant convictions, is itself designed to act as a deterrent to the commission of crime.
90. If there is a real risk of future terrorism offences being committed, control orders and preventative detention powers are in place specifically to protect public safety.
91. Further, the Commission considers that the stated purpose of 'upholding the integrity of Australian citizenship' is too general or vague, and in any event not sufficient, to justify the potential extreme consequences of the reforms.
92. The Commission considers that citizenship stripping should only occur in the most exceptional circumstances, where the gravest criminal conduct also repudiates one's allegiance to Australia.
93. The seriousness of the degree of conduct is more appropriately determined by reference to the criminal sentence imposed by a court, rather than a whole category of offence as proposed in amended s 35A(1A).
94. A court imposing a sentence is expressly required, and is uniquely well placed, to assess the risk posed by an individual to the Australian community.
95. Where a court imposes a heavy sentence, this signals, among other things, that the conduct is serious and that the person is a risk to the community. By contrast, a lighter sentence can signify a lower risk to the community, or even that the individual may have committed a technical or otherwise less culpable contravention of the criminal law.
96. The Commission considers that the Act's current minimum criminal sentence requirement, reflecting the court's assessment of the seriousness of conduct, rightly forms part of the decision-making criteria in the Act and should not be diluted.
97. Maintaining the six year imprisonment requirement helps ensure that only conduct with a higher degree of culpability, and therefore also a likely closer nexus to conduct that repudiates allegiance to Australia, is eligible for removal of citizenship. The offences discussed above are examples of where conduct of a lower degree does not rise to this level. They sit at a lower end of the range of seriousness, and do not necessarily constitute disavowal of allegiance to Australia.
98. Without the six year imprisonment requirement, greater discretion is afforded to the Minister to determine whether certain conduct warrants the removal of citizenship. This increases the risk of arbitrary decision-making.
99. While conviction-based removal of citizenship under s 35A is not automatic, and proposed s 35A(1) provides some constraints on the exercise of the Minister's discretionary power, the Commission is concerned that these safeguards are not sufficient to ensure that removal of citizenship only occurs as a last resort in the most extreme instances.

100. Proposed s 35A(1)(c) and current s 35A(1)(d) require the Minister to be satisfied that the conduct of the person to which the conviction/s relate demonstrates that the person has repudiated their allegiance to Australia. Again, the Commission considers it more fitting for Parliament to determine the appropriate threshold of seriousness of conduct by way of sentence applied by a court, reflected in prospective and clear legislative requirements, rather than this being solely a matter of discretion.
101. The decision-making criteria in proposed s 35A(1)(d), and current s 35A(1)(e), require the Minister to be satisfied that it is not in the public interest for the person to remain an Australian citizen 'having regard' to certain factors.
102. These factors include the severity of the relevant conduct, degree of threat posed, the age of the person, the best interests of the child and the person's connection to the other country and the availability of the rights of citizenship of that country to the person. Notably, it does not expressly require consideration of a person's connection to Australia.⁵⁶
103. Circumstances may arise where a person has a strong connection to Australia, for example where they have lived in Australia for a long period and have dependent children who are Australian citizens. While courts have found that legislative provisions should be interpreted consistently with Australia's international obligations,⁵⁷ this does not afford the same level of protection as statutory decision-making criteria.
104. Further, this provision operates to require the Minister to turn their mind to the specified factors; it does not require that a balancing exercise be conducted. Nor does it prevent the exercise of the power where human rights will be breached. It therefore risks a 'check box' approach. Again, in the absence of a minimum threshold of seriousness, there is an increased risk of disproportionate or arbitrary decision-making.

4.3 Retrospectivity

105. The Bill expands the scope of the citizenship removal provisions to any individual with a relevant terrorism conviction that occurred on or after 12 December 2005, capturing conduct and convictions that occurred long before the passage of the Bill.
106. The Minister already enjoys powers to strip citizenship from persons with relevant terrorism convictions. Current s 35A was passed with retrospective operation, applying to convictions that occurred no more than ten years before the commencement of that section, and where the person was sentenced to a period of imprisonment of at least ten years in respect of the conviction.⁵⁸
107. The practical effect of the reforms would be to remove the requirement that a person be sentenced to at least ten years in respect of a relevant historical terrorism related offence, in order to be eligible for removal of citizenship.⁵⁹ That is, dual citizens or nationals convicted up to 13 years ago could now have their citizenship removed regardless of the length of their sentence.

108. The Explanatory Memorandum to the Bill states that the expansion of retrospective operation is appropriate to respond to terrorist threats:
- In order to respond to the evolving threat environment, this Bill proposes to broaden the threshold for retrospective application to individuals with a relevant terrorism conviction, regardless of the length of the sentence of imprisonment imposed.⁶⁰
109. The Statement of Compatibility with Human Rights states that proposed s 35A does not create a criminal offence, but rather allows for the imposition of a ‘civil consequence’ by discretion, ‘in respect of a conviction and penalty that occurred prior to commencement’.⁶¹
110. It further states that the measure does not impose a penalty or amount to a punitive measure, as the purpose is to ‘ensure the safety and security of Australia, and to ensure that the community of Australian citizens comprises persons who have an allegiance to Australia’.⁶²
111. However, in effect, applying the removal of citizenship provisions to persons with historic convictions would amount to retrospectively imposing a ‘heavier penalty’ for criminal conduct than that applicable at the time the crime was committed.
112. Article 15(1) of the ICCPR prohibits retrospective criminal laws, including the imposition of heavier penalties than the one applicable at the time the offence was committed.
113. Whether a measure will constitute a ‘penalty’ is not to be determined purely by the way the measure is characterised in domestic law.⁶³ Were that not the case, states could circumvent their obligations simply by describing penalties in some other way. For instance, a financial penalty could be described as a ‘tax’, or punitive detention as serving a purely protective function.
114. Relevant factors to ascertaining whether a measure is a penalty include whether it attaches to criminal conduct, the severity of the measure and its purpose.⁶⁴ The international human rights law expert, Professor Nowak, has stated that ‘every sanction that has not only a preventive but also a retributive and/or deterrent character is ... to be termed a penalty’.⁶⁵
115. In the present context, the following factors are of particular relevance:
- a. the Bill will result in Australians who are convicted of relevant offences losing their citizenship and likely being detained in immigration detention until if and when they are removed from Australia; these are extremely severe consequences
 - b. the relevant convictions are all the result of the commission of a criminal offence under Australian law; the removal of citizenship will follow from a criminal conviction that has already been finally disposed of including by service of a criminal sentence
 - c. the consequence would not have flowed at the time the person committed the offence, or at the time they were convicted and sentenced

- d. while the purported aim of this Bill is protective, the purpose of the Allegiance Act which expanded the citizenship stripping powers, including by introduction of s 35A, was to deter people from engaging in relevant types of conduct by making them aware ‘that their Australian citizenship is in jeopardy’⁶⁶
 - e. the reforms may apply to a narrow group of convictions, affecting only a small class of people. Despite the Statement of Compatibility with Human Rights stating that the amendments do not constitute a ‘bill of attainder’, the Commission queries how many individuals would be additionally eligible for removal of their citizenship should the Bill pass.
116. Retrospective laws, and in particular criminal laws, are also 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.⁶⁷
 117. That presumption exists because such laws are generally unfair—they falsify laws on the basis of which ‘people have ordered their affairs, exercised their rights and incurred liabilities and obligations’.⁶⁸ It also prevents the risk of abuse of the law, in particular the criminal law, for unjustified means such as the politically motivated punishment of individuals.
 118. In the alternative, if Parliament deems retrospective application of the powers is warranted, the Commission queries the need for extended retrospective operation beyond the current application of the Act.
 119. The retrospective application of the citizenship removal powers in the Allegiance Act was restricted to individuals who had been convicted of a relevant offence, with a term of at least ten years imprisonment in the ten years prior to the passage of that Act. This implemented a recommendation made by the PJCIS.⁶⁹ It is unclear why the implementation of that PJCIS recommendation is now being reversed.
 120. Removing the ten year imprisonment requirement risks lessening the proportionality of the limitation on human rights, given that the severe consequences of citizenship removal could be applied to persons who have been assessed by a court as having comparatively lower culpability.
 121. Again, the Commission is concerned that the scope of the relevant crimes is not sufficiently circumscribed, and holds concerns that the decision-making criteria are inadequate to ensure the appropriate protection of human rights. While some past convictions within the Bill’s ambit may constitute repugnant conduct, the Bill could also apply to include lesser order crimes or crimes committed with a comparatively low degree of culpability, and not be adequately serious for the grave consequences of removal of citizenship.
 122. Along with the current citizenship stripping powers, law enforcement and national security powers are in place to alleviate risks of reoffending, as discussed above. The Commission considers that the scarce reasoning provided is inadequate to justify the serious impacts on the human rights of affected persons.

123. The Commission opposes any extension of the retrospective application of the citizenship removal power.

5 Other human rights issues

124. Removal of citizenship is likely to significantly limit numerous other human rights protected in the ICCPR and other international human rights conventions.
125. This submission does not purport to comprehensively analyse the consequences of removal of citizenship or resulting human rights implications. These may be extensive and not immediately apparent.
126. By way of example, removal of citizenship may lead to loss of a passport,⁷⁰ removal from the electoral roll,⁷¹ and loss of entitlement to social security benefits.⁷² It will 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.⁷³
127. Further, in the event a person who loses their citizenship is arbitrarily prevented from re-entering Australia, it is likely there will be an interference with their family and family life. These rights are protected under articles 17 and 23 of the ICCPR.
128. A non-citizen in Australia who does not have a valid visa will be subject to mandatory immigration detention. 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.
129. Australia's mandatory immigration detention policy has been found by the UN HR Committee to have led to the arbitrary detention of numerous complainants, contrary to articles 9(1) and 9(4) of the ICCPR.⁷⁴
130. Indefinite detention may also be inconsistent with the right to protection against cruel, inhuman and degrading treatment in article 7 of the ICCPR.⁷⁵ This could occur in certain circumstances. For example, a person could be detained pending a foreign government agreeing to admit them or issuing relevant documents such as a passport. If these steps fail to occur, or are subject to lengthy delays, the person could be detained for a long or indefinite period of time.
131. Detention may in turn interfere with family life contrary to articles 17 and 23 of the ICCPR. Removal of a person who was born and/or raised in Australia, or 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 unfamiliar.
132. The Commission is also particularly concerned about the potential effects of the Bill on children. International human rights law recognises that, in light of their physical and mental immaturity, children have special need of safeguards, care and protection.⁷⁶ In recognition of that fact, Australia has ratified the CRC.
133. The Bill would potentially affect children in two ways:

- a. children as young as ten years of age who engage in relevant conduct could lose their citizenship in the same way as adults⁷⁷
 - b. children whose parents have their citizenship removed may consequently have their own citizenship cancelled by the Minister.⁷⁸
134. Children enjoy all the rights protected by the ICCPR, including the right to enter and remain in their own country. In addition, article 8(1) of the CRC protects the right of children to preserve their nationality and family relations and article 3 protects the best interests of the child.
135. In assessing the best interests of a child, it is necessary to take into account all the circumstances of the particular child and the particular action.⁷⁹
136. It is also necessary to ensure that procedural safeguards are implemented, including that children are allowed to express their views,⁸⁰ that decisions and decision-making processes be transparent,⁸¹ and that there be mechanisms to review decisions.⁸²
137. The Commission holds concerns that these criteria will not be met by the proposed removal of citizenship provisions contained in the Bill.
138. 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 than in the case of an adult. That is so for a range of reasons, including that a child is less culpable for wrongdoing, is more vulnerable to any adverse consequences, and may suffer removal of citizenship through no fault of their own.

¹ Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 7 [1].

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

³ See for example, *Threats to international peace and security caused by terrorist acts*, SC Res 1373, UN SCOR, 4385th 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).

⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg UN Doc A/810 (10 December 1948) article 15.

⁶ *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) articles 3, 8(1).

⁸ *Australian Citizenship Act 2007* (Cth) s 35A(3).

⁹ *Australian Citizenship Act 2007* (Cth) s 35A(2).

¹⁰ Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 7 [1].

¹¹ Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 7–8 [4]–[5].

¹² Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2018, 9 (Christian Porter, Attorney-General).

¹³ These thresholds related to 'other relevant convictions' are consistent with the operation of current s 35A of the *Australian Citizenship Act 2007* (Cth).

- ¹⁴ Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 10 [17].
- ¹⁵ *Australian Citizenship Act 2007* (Cth) s 35A(11).
- ¹⁶ *Australian Citizenship Act 2007* (Cth) ss 35A(6) and 35B.
- ¹⁷ *Australian Citizenship Act 2007* (Cth) ss 35A(8) and 35A(9).
- ¹⁸ 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*, 16 July 2015.
- ¹⁹ UN Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)* 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [19].
- ²⁰ United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)* 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [20].
- ²¹ See for example UN Human Rights Committee, *Views: Communication No. 1557/2007*, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) 18 [7.4] ('Nystrom v Australia').
- ²² United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)* 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [21].
- ²³ 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].
- ²⁴ United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)* 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [21].
- ²⁵ 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.
- ²⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg UN Doc A/810 (10 December 1948) article 15.
- ²⁷ 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; UN 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].
- ²⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) articles 3, 8(1).
- ²⁹ See for example, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 277 (Brennan CJ, Toohey, McHugh and Gummow JJ).
- ³⁰ Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 5 [19];
- ³¹ See for example *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 150 [34] (Gleeson CJ, Gummow, Kirby, and Hayne JJ), 158 [59] (Gaudron J); *Minister for Immigration v Eshetu* (1999) 197 CLR 611, 651–657 [131]–[147] (Gummow J).
- ³² Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 5 [20].
- ³³ Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 9 [12].
- ³⁴ Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 9 [12].
- ³⁵ Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 16 [49].

- ³⁶ This issue was also identified by the Senate Standing Committee for the Scrutiny of Bills in its review of the Bill Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 15 of 2018* (5 December 2018) 5.
- ³⁷ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2018* (5 December 2018) 5.
- ³⁸ Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 5 [19].
- ³⁹ Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 6 [23].
- ⁴⁰ Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 13–14 [29]–[33].
- ⁴¹ See for example *Criminal Code* (Cth) s 101.5(2)(b).
- ⁴² *Criminal Code* (Cth) s 101.4(2).
- ⁴³ *Criminal Code* (Cth) s 101.4(3).
- ⁴⁴ See Australian Human Rights Commission, Submission No 3 to Parliamentary Joint Committee on Intelligence and Security, *Review of the ‘declared areas’ provisions*, 3 November 2017; Australian Human Rights Commission, Submission No 11 to Independent National Security Legislation Monitor, *Statutory Deadline Review*, 15 May 2017; Australian Human Rights Commission, Submission No 7 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 2 October 2014.
- ⁴⁵ *Criminal Code* (Cth) s 102.1(1).
- ⁴⁶ *Criminal Code* (Cth) s 102.1(1).
- ⁴⁷ Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 8 [6].
- ⁴⁸ Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (June 2006) 124–133 [10.56]–[10.77].
- ⁴⁹ Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 4 [12].
- ⁵⁰ Section 82.9 of the *Criminal Code* (Cth) is excluded from the definition of ‘relevant other conviction’ pursuant to proposed s 35A(1B)(a)(i).
- ⁵¹ Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 8 [8].
- ⁵² Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (September 2015) 115–116.
- ⁵³ For example, see the Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 15 [41].
- ⁵⁴ See for example UN Secretary-General, *Plan of Action to Prevent Violent Extremism*, UN Doc A/70/674 (24 December 2015).
- ⁵⁵ 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.
- ⁵⁶ This can be contrast with the exercise of other powers in the migration context. For example, when deciding whether to refuse or cancel a visa under s 501 or 501CA of the *Migration Act 1958* (Cth), a Ministerial Direction requires decision-makers to have regard to the ‘strength, nature and duration’ of a person’s ties to Australia. See Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014) [10.2].
- ⁵⁷ *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 287, 291.
- ⁵⁸ Introduced through the passage of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) Item 8(4).
- ⁵⁹ With respect to ‘relevant other convictions’, the amendments would apply to convictions on or after 12 December 2005, if the person was sentenced to a period of imprisonment of at least 10 years where the conviction occurred before 12 December 2015. This maintains the current operation of the legislation as relates to sentencing and date thresholds.
- ⁶⁰ Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 13 [31].

- 61 Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 14 [33].
- 62 Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 14 [35]–[36].
- 63 UN Human Rights Committee, *Views: Communication No. 1015/2001*, 81st sess, UN Doc CCPR/C/81/D/1015/2001 (20 July 2004) 13 [9.2] ('Perterer v Austria'); see also Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (2nd ed 2005) 363; in the context of the European Convention on Human Rights see for example *Welch v United Kingdom*, ECHR, Application No. 17440 of 1990, (9 February 1995) 9–10 [27].
- 64 UN Human Rights Committee, *General Comment No 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 4 [15]. While made in the context of article 14, the discussion of the nature of what makes a sanction 'penal' is also relevant to the characterisation of a 'penalty' for the purposes of article 15.
- 65 Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (2nd ed 2005) 363.
- 66 Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 28 [10].
- 67 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No 129 (2016) 362.
- 68 *Australian Education Union v General Manger of Fair Work Australia* (2012) 246 CLR 117, 134 [30] French CJ, Crennan and Kiefel JJ.
- 69 Statement of Compatibility with Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) 13 [29].
- 70 *Australian Passports Act 2005* (Cth) ss 8, 22.
- 71 *Commonwealth Electoral Act 1918* (Cth) ss 93, Parts VI-X.
- 72 *Social Security Act 1991* (Cth) s 7 and various provisions. Australian residence is generally the precondition of receipt of social security payments.
- 73 See for example *Intelligence Services Act 2001* (Cth) s 15.
- 74 See for example UN Human Rights Committee, *Views: Communication No. 560/1993*, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997) ('A v Australia'); UN 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'); UN 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').
- 75 For example see UN 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'); UN 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').
- 76 *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).
- 77 *Criminal Code* (Cth) Division 7.
- 78 *Australian Citizenship Act 2007* (Cth) s 36.
- 79 UN 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)*, 62nd sess, UN Doc. CRC/C/GC/14 (29 May 2013) 12 [46]–[51].
- 80 UN 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)*, 62nd sess, UN Doc. CRC/C/GC/14 (29 May 2013) 18–19 [89]–[91].
- 81 UN 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)*, 62nd sess, UN Doc. CRC/C/GC/14 (29 May 2013) 18 [87].
- 82 UN 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)*, 62nd sess, UN Doc. CRC/C/GC/14 (29 May 2013) 20 [98].