Australian Government

Independent National Security Legislation Monitor

Report to the Attorney-General:

Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007

Dr James Renwick CSC SC

3RD INSLM 2019 7TH REPORT

The Independent National Security Legislation Monitor

The *Independent National Security Legislation Monitor Act 2010* (Cth) provides for the appointment of the Independent National Security Legislation Monitor (INSLM).

The INSLM independently reviews the operation, effectiveness and implications of national security and counter-terrorism laws; and considers whether the laws contain appropriate protections for individual rights, remain proportionate to terrorism or national security threats, and remain necessary.

In conducting the review, the INSLM has access to all relevant material, regardless of national security classification, can compel answers to questions, and holds public and private hearings. INSLM reports are provided to the Attorney-General and the Prime Minister and are tabled promptly in Parliament.

The INSLM does not deal with complaints but welcomes submissions on the reviews. The INSLM is a part-time role and is supported by a small permanent staff located in Canberra. More information and contact details can be found at www.inslm.gov.au.

There have been three INSLMs since the role began in 2010: Bret Walker SC, the Hon Roger Gyles AO QC and the current INSLM, Dr James Renwick CSC SC (pictured).

Independent National Security Legislation Monitor (INSLM) Report

Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the *Australian Citizenship Act 2007*.

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Australian Government
Independent National Security Legislation Monitor

15 August 2019

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra

Dear Attorney-General,

Review of ss 33AA, 35, 35A and 35AA of the *Australian Citizenship Act 2007*

On 15 February 2019 I received a request from you to review and provide a report by today under the *Independent National Security Legislation Monitor Act 2010* (the INSLM Act) concerning the operation, effectiveness and implications of the statutory provisions inserted into the *Australian Citizenship Act 2007* (the Act) by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*. This is that report. As the INSLM Act permits when I consider it appropriate, as I here do, I also provide a copy of the report to the Prime Minister.

For only the second time since the INSLM Office was established, but inevitably in view of the sensitive material involved, I am providing a classified report. A copy of the classified report will also be provided to the Prime Minister.

The unclassified report which omits the kind of material referred to in s 29(3) of the INSLM Act is suitable to be provided to both houses of Parliament. I note that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) must itself conduct a review of this legislation by 1 December 2019. In accordance with recent practice, I recommend that you provide all PJCIS members with an embargoed early copy of the unclassified report and that, should amending legislation be introduced as a result of my report, this report be tabled no later than the introduction of such legislation.

Yours sincerely

James Renwick CSC SC

cc: The Hon Scott Morrison MP, Prime Minister

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List of abbreviations

AAT	Administrative Appeals Tribunal
AGD	Attorney-General's Department
AFP	Australian Federal Police
AHRC	Australian Human Rights Commission
ALRC	Australian Law Reform Commission
ASD	Australian Signals Directorate
ASIS	Australian Secret Intelligence Service
ASIO	Australian Security Intelligence Organisation
CDPP	Commonwealth Director of Public Prosecutions
CLB	Citizenship Loss Board
Constitution	*Commonwealth of Australia Constitution Act* (Cth) (Australian Constitution)
Crimes Act	*Crimes Act 1914* (Cth)
Criminal Code	*Criminal Code Act 1995* (Cth)
Citizenship loss provisions	ss 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007* (Cth)
CRC	*Convention of the Rights of the Child* [1991] ATS 4
CVE	'Countering violent extremism'
ICCPR	*International Covenant on Civil and Political Rights* [1980] ATS 23
IGIS	Inspector-General of Intelligence and Security
INSLM	Independent National Security Legislation Monitor
INSLM Act	*Independent National Security Legislation Monitor Act 2010* (Cth)
JCTT	Joint Counter-Terrorism Team

PJCIS or 'the Committee'	Parliamentary Joint Committee on Intelligence and Security
QSA	Qualified Security Assessment
SAD	Security Appeals Division of the Administrative Appeals Tribunal
SSCSB	Senate Standing Committee for the Scrutiny of Bills

EXECUTIVE SUMMARY

My role and the review

1.1. The INSLM Act provides for the appointment of the INSLM. I independently review the operation, effectiveness and implications of national security and counter-terrorism laws, and consider whether Australia's national security and counter-terrorism laws contain appropriate protections for individual rights and remain necessary and proportionate to Australia's terrorism or national security threats. In conducting the review, I have access to all relevant material, regardless of national security classification, can compel answers to questions, and hold public and private hearings. My reports are provided to the Prime Minister and/or the Attorney-General and unclassified reports must be tabled promptly in Parliament.

1.2. By letter dated 15 February 2019, the Attorney-General, the Hon Christian Porter MP, referred for my review and report, the topic of 'the operation, effectiveness and implications' of the terrorism-related citizenship loss provisions in the *Australian Citizenship Act 2007* (the Act). He requested that the review be completed by 15 August 2019, as it has been, noting that the PJCIS is required to examine the citizenship loss laws by the 1 December 2019. This is that report.

1.3. There is no doubt that the legislation is both important, and to some extent, contentious. Because of its importance, as s 30(3) of the INSLM Act permits, this report is being provided simultaneously to the Prime Minister and the Attorney-General.

1.4. For only the second time in the history of my office, and the first time for me, I am providing both a classified and an unclassified report. In view of the sensitivity of certain matters this was inevitable. The INSLM Act specifies what should remain classified and its requirements have been complied with. Additionally, I have decided that it is proper to maintain confidentiality in legal advice where the privilege is held by the Commonwealth; so I do not disclose its contents in the unclassified report, although I have considered it. The classified report is provided by me only to the Prime Minister and the Attorney-General; the unclassified report is required under the INSLM Act to be tabled in the Parliament within 15 sitting days of its receipt.

1.5. As the PJCIS also has a relatively short time in which to report, I recommend, consistent with recent practice, that each PJCIS member receive an early, embargoed, copy of the report for the purposes of their duties as PJCIS members. If, as was the case with my 5th report, *The prosecution and sentencing of children for terrorism offences*, a Bill is introduced to give effect to my recommendations before 15 sitting days elapse, it is important that this report be tabled no later than introduction of the Bill so that Parliament can consider my report together with the Bill.

1.6. I have consulted widely and received submissions from relevant departments and agencies, the Human Rights Commissioner, the Law Council of Australia, leading academics, and with civil society. In May 2019, I consulted in London with many people: current and former counterparts, agencies and departments, legal academics and practitioners, and members of the judiciary. In the current context, the United Kingdom faces many counter-terrorism threats similar to those faced by Australia and the consultation was invaluable.

The legislation in question

1.7. The unexpected rise of ISIL, the creation of its so-called caliphate, and the significant numbers of Australian dual nationals who fought for or supported ISIL, or otherwise were involved in its terrorist activities, led, among other legislative responses, to the enactment of the *Australian Citizenship Amendment (Allegiance to Australia)* Act *2015* (the Allegiance to Australia Act). The Minister's Second Reading Speech said one purpose of the Bill was to 'address the challenges posed by dual citizens who betray Australia by participating in serious terrorism related activities', and who represent 'a serious threat to Australia and Australia's interests'.

1.8. The relevant provisions of that Act fall into two categories. They each:

(a) only operate upon dual citizens of Australia and another country

(b) proceed on the basis that an Australian citizen owes allegiance to Australia. They then proceed to provide that specified terrorist related actions inconsistent with that allegiance permit or require citizenship to be revoked

(c) are designed to ensure that Australia complies with its obligations under the Convention on Statelessness.

1.9. However, the Act adopts two quite different approaches: one conventional, one not.

1.10. Section 35A of the Act, 'the conviction based provisions', fairly conventionally provides that, following a conviction for a federal terrorism offence in Australia, with an imposed sentence of imprisonment of six years or more, the relevant Minister (originally the Attorney-General, now the Minister for Home Affairs) has a power to revoke citizenship, having regard to the public interest, bearing in mind listed factors, as applied to the person in question.

1.11. For reasons which follow, this provision passes muster under the INSLM Act and should continue as it is or likely will be necessary.

1.12. In contrast, and less conventionally, ss 33AA and 35, 'the operation of law provisions', provide that, where the dual citizen (in this case 14 years of age or more) has in fact either:

(a) been fighting for, or been in the service of, a declared terrorist organisation (s 35A), or

(b) engages in specified forms of terrorist conduct, with terrorist like intent (s 33AA), then

by operation of law, without any further event or action such as conviction by a jury or decision by a minister, official, judge or Tribunal member, the person then and there loses their Australian citizenship.

1.13. For reasons which follow, I have concluded that these provisions do not pass muster under the INSLM Act and should, with some urgency, be repealed with retrospective effect, but be simultaneously replaced by a Ministerial decision-making model (and thus with constitutionally entrenched judicial review), coupled with merits review as to the conduct (s 33AA), fighting or service (s 35) by the Security Appeals Division of the Administrative Appeals Tribunal, and using the special advocate model which now exists for control orders. This recommendation reflects the considerable experience of that Division in passport-cancellation cases on security grounds, as well as aspects of the comparable United Kingdom review system in the Special Immigration Appeals Commission (SIAC).

1.14. I now turn to the particular questions the INSLM Act requires me to answer.

The current threat of terrorism

1.15. The current threat of a terrorist attack *in Australia* remains at the 'probable' level set at the end of 2014. More than 75 people have been convicted of terrorist offences in Australia, and more than 30 are before the courts. The threat comes mainly from radical Islamists and to a lesser, albeit increasing, extent, violent right-wing radicals.

1.16. However, the principal focus of the relevant provisions, and almost the sole focus of the operation of law provisions in ss 33AA and 35, concerns criminal activity *external to Australia*, which so far comes mainly from ISIL, its fighters and adherents.

1.17. Between 2014 and 2018, large numbers of foreign fighters and their families from both Australia and other countries travelled to Syria and Iraq. Although many have died, ISIL has produced a large, now widely dispersed, radicalised, highly trained diaspora of actual or potential terrorists, many of whom remain with their supporters and dependants including children, and most of whom remain outside of their countries of citizenship. Although ISIL's so-called 'Caliphate' is now reduced to effective territorial control of parts of refugee camps, it remains a significant source of concern.

1.18. The ISIL threat is wider than the foreign-fighters' group, large though it is, because of the effectiveness of its message, particularly over the internet, to inspire other attacks. As the then UK Home Secretary, Sajid Javid, said in a speech on 20 May 2019, 'In fact, of all the terrorist plots thwarted by the UK and our Western allies last year, 80% were planned by people inspired by the ideology of [ISIL]/Daesh, but who had never actually been in contact with the so-called Caliphate.'

1.19. The authorities estimate that about 80 Australians or former Australians remain in Syria and Iraq (together with their dependent children), some of whom no doubt wish to return to Australia, and some have already done so.

1.20. Children deserve special mention. During that same period, children and young people variously travelled to ISIL-controlled areas of their own volition (the 'jihadi brides', for example), were taken by their parents or guardians, and were, then or later, unable or unwilling to leave and were then pressed into service of ISIL.

1.21. Australia's important obligations under international law towards children under for example the *Convention on the Rights of the Child* were considered by me in my 5th report to the Prime Minister, *The prosecution and sentencing of children for terrorism offences.* As I there wrote, and as remains the case in the context of this report:

> *There are … parallels between child soldiers and Australian children in territory controlled by ISIL: the fact that each are certainly victims does not mean they cannot also become perpetrators, and thus they remain a cohort of interest.*

1.22. It is also important to distinguish the different legal position of children depending upon their age: under 10, no criminal liability; under 14, a presumption of no criminal intent, i.e. *doli incapax*; and 14–18, where the position in our federal system is more complex (as explained in my 5th report).

1.23. There can be little doubt that some of the remaining 80, and no doubt others elsewhere abroad (for the relevant provisions are not directly limited by location) remain a terrorist threat to Australia and its people by their direct acts and by their capacity to inspire others to act.

1.24. Where the person is solely an Australian citizen, then until the very recent enactment of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*, they could not be prevented from returning to Australia where, of course, there may be no sufficient admissible evidence to criminally charge them nor obtain a control order.

1.25. However, where they are a dual citizen of Australia and another country, lawful removal of citizenship is a possible way of keeping the person out of Australia; if they are discovered to have returned, then they must be placed into immigration detention pending deportation.

Constitutional matters

1.26. For the reasons set out in Chapter 3, I am satisfied that the citizenship loss provisions (and the replacement laws I recommend in this report) are supported by the following powers in s 51 of the Constitution:

(a) the power with respect to 'naturalisation and aliens' : s 51(xix)[1]

[1] While the Constitution does not give the Commonwealth Parliament any direct power with respect to citizenship, it includes the power to determine to whom is attributed the status of alien. In that sense, citizenship is the obverse of the status of alien: *Shaw v MIMA* (2003) 2018 CLR 28 at [2] (Gleeson CJ, Gummow and Hayne JJ, with Heydon J agreeing at [190]); *Koroitamana v Commonwealth* (2006) 227 CLR 1 at [48] (Gummow, Hayne and Crennan JJ). In *Singh v Commonwealth*, Gleeson CJ said that the Commonwealth Parliament has the power 'to prescribe the conditions' on which Australian citizenship 'may be acquired and lost': (2004) 222 CLR 322 at [4]. Justices Gummow, Hayne and Heydon's reasoning was to the same effect: at [197].

(b) insofar as the provisions act, as they largely do, upon 'places, persons, matters or things physically external to Australia', the geographically external aspect of the external affairs power: s 51(xxix)[2]

(c) given the decision in *Thomas v Mowbray* (2007) 233 CLR 307, the defence power: s 51(vi)[3]

(d) insofar as loss of citizenship would be due to terrorist acts or association, the executive power of the Commonwealth which 'extends to the execution and maintenance of this Constitution, and the laws of the Commonwealth' read with the express incidental power in s 51. As *Burns v Ransley* (1949) 79 CLR 101 identified, this is a source of power to legislate against subversive or seditious conduct.

Necessity and proportionality

1.27. My conclusion as to these matters, in summary, is that citizenship loss because of terrorist conduct may be both necessary and proportionate under the conviction-based provisions.

1.28. The reasons why it may be both necessary and proportionate include the following:

(a) The 'simplified outline' in s 32A notes that citizenship can be lost under the provisions I am now considering 'by various kinds of conduct inconsistent with allegiance to Australia'.

(b) The Australian Citizenship Act accurately reflects constitutional case law and legal history by reciting that Australian citizenship is a common bond, involving reciprocal rights and obligations.

(c) Such a bond is capable of being broken by express renunciation or by renunciation implied from conduct incompatible with the continued bond.

(d) As 'a federal offence is, in effect, an offence against the whole Australian community'[4] – a serious terrorism offence is the paradigm case of an offence against the Australian community and one which may fairly be seen to break that common bond.

(e) Given the current threat level from dual citizens, especially those fighting for or supporting ISIL, it may in a particular case be necessary in the public interest to exclude such a person who can be seen to have renounced their citizenship by their conduct, from entering Australia and from other rights of citizenship.

1.29. In contrast, fundamentally, it is neither necessary, nor is it proportionate to the counter-terrorism threat, to revoke such citizenship without considering what the public interest requires in each particular case by reference to the factors which the Minister must take into account in deciding to

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[2] Section 51(xix) of the Constitution enables the Parliament to legislate with respect to things geographically external to Australia. As a majority of the High Court confirmed in XYZ v Commonwealth, that power extends to making laws with respect to 'places, persons, matters or things physically external to Australia': (2006) 227 CLR 532 at [10] (Gleeson CJ), [30] (Gummow, Hayne and Crennan JJ). The High Court has upheld the validity of Commonwealth legislation which concerns conduct outside Australia: see for example *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *XYZ v Commonwealth* (2006) 227 CLR 532; *Alqudsi v Commonwealth* (2015) 91 NSWLR 92.

[3] The defence power in s 51(vi) of the Constitution empowers the Commonwealth Parliament to make laws concerning defence against terrorist threats. In *Thomas v Mowbray* (2007) 233 CLR 307, a majority of the High Court took a broad view of the defence power and accepted that it supported Commonwealth legislation providing for interim control orders designed to protect the public from terrorist acts. A majority of the High Court considered that the defence power was not limited to making laws with respect to defence against external aggression from a foreign nation or to the protection of the Commonwealth and the States as bodies politic as opposed to the public or sections of the public which constitute those bodies politic. Chief Justice Gleeson considered that the defence power 'is not confined to waging war in a conventional sense of combat between forces of nations': *Thomas v Mowbray* (2007) 233 CLR 307, 324 [7]. Further, a law will be by the defence power if it can *reasonably be regarded* as a means towards attaining an object which is connected with defence – *Marcus Clark and Co. Ltd. V The Commonwealth* (1952) 87 CLR 177 at 256 per Fullagar J.

In *Pham*, the plurality said (2015) 256 CLR 550, [24]. 'As Kirby J observed in *Putland v The Queen*, a federal offence is, in effect, an offence against the whole Australian community and so the offence is the same for every offender throughout the Commonwealth.'

revoke citizenship under the conviction-based provisions in s 35, but which are only taken into account, and weighed-up, in the operation of law provisions if the Minister voluntarily chooses to consider whether to restore citizenship under s 33AA or s 35. Further, those provisions do not sufficiently protect human rights and they are likely to result in breaches of international law.

1.30. In particular those provisions:

(a) operate in an uncontrolled manner so that a person who has committed the most serious of offences and is an undoubted threat to Australia while remaining a citizen is treated the same as one whose behaviour is at the lowest end of the spectrums of criminal behaviour and is no longer any threat and has other significant mitigating circumstances

(b) operate in an uncertain manner: it will often not be possible for the authorities to know when citizenship has ceased. The Minister has said as at 29 December 2018 12 persons had lost citizenship, however it is almost certain that more, perhaps many more, formerly dual Australian citizens, both adults and even children, have lost citizenship, but that significant change of status, is unknown to them or Australian authorities

(c) lack the traditional and desirable accountability which comes with a person, court or tribunal taking responsibility for a decision and being subject to constitutionally entrenched judicial review

(d) cause Australia to be in breach of its international obligations under the *Convention on the Rights of the Child* as the operation of law provisions pay no regard to the best interests of a child over 14

(e) will inevitably cause real unfairness in particular cases including because of the usual decision not to notify a former citizen they have lost Australian citizenship, even though that person may well take irrevocable and important steps, such as giving birth to more children, on the incorrect assumption they remain a citizen of Australia

(f) lack proper review rights. Although challenging a determination of dual citizenship is possible, albeit difficult in some cases, challenging the operation of the law on the conduct is likely to be very difficult; the official view expressed in hearings to me is that even a successful challenge to ASIO's qualified security assessments (QSAs) will not inevitably result in restoration of rights of citizenship, but at best a departmental recommendation for the Minister to restore citizenship, which the Minister is not bound to consider

(g) lack proper oversight in relation to allegations of maladministration because the Citizenship Review Board comprises both intelligence and non-intelligence personnel so that neither the IGIS nor the Ombudsman has sufficient jurisdiction

(h) potentially causes unintended and not easily contained effects on Australia's relations with other countries

(i) cause confusion and potential legal difficulties for ASIS and ASD because of additional safeguards in the Intelligence Services Act when those agencies seek to exercise their powers in relation to Australian citizens

(j) may impede criminal prosecutions or cause them to fail because, variously:

    i. where it is an element of the offence that an accused person was an Australian citizen (Criminal Code s 119.1–.2), or where that status is a jurisdictional requirement (Criminal Code s 15), the prosecution in a criminal trial may not be able to prove that status beyond reasonable doubt

    ii. where an offence is committed wholly overseas by a person who was not then an Australian citizen, the Attorney-General must give consent before 'proceedings are commenced': Criminal Code s 16, but if that status is not known the consent may not be obtained, potentially making the prosecution fail.

RECOMMENDATIONS

1.31. For those reasons (as further explained in the report), I conclude that:

(a) s 35A is necessary, proportionate to the counter-terrorism threat and generally contains appropriate safeguards for protecting the rights of individuals; but that

(b) ss 33AA and s 35 are neither necessary nor proportionate, nor do they contain appropriate safeguards for protecting the rights of individuals;

(c) ss 33AA and 35 should urgently be repealed and, especially because of their uncontrolled and uncertain operation, be repealed retrospectively; but that

(d) a Ministerial decision-making model with proper safeguards could take the place of ss 33AA and 35 and such a model would pass muster under the INSLM Act because it would:

i. be constitutionally valid

ii. be necessary and proportionate to threats

iii. ensure compliance with international obligations

iv. properly protect individual rights.

1.32. The recommended model has the following features:

(a) The Minister may revoke citizenship in the following circumstances, i.e. if he or she:

i. is reasonably satisfied that the physical conduct element (as it currently appears in the Act) in ss 33AA (1–9) or s 35 (1–4) exists

ii. has regard to the factors in s 33AA(17) (as currently enacted) in determining whether there is first, a repudiation of allegiance such that, second, it is not in the public interest for the person to remain an Australian citizen – this expressly requires for example, the best interests of the child to be considered.

(b) The Minister, as with other administrative decision makers, may rely on probative material which is not admissible in court under the Evidence Act, including classified material, in coming to a reasonable satisfaction as to the existence of conduct (as with 33AA), fighting or service (as with 35).

(c) Because giving prior notice to the proposed revokee or their other country of citizenship may lead to the person abandoning their other citizenship or to the other country acting to revoke citizenship before Australia does, thus rendering the scheme ineffective, the Minister is not obliged to give procedural fairness to the person before revoking their citizenship nor prior notice to the other country involved, however the Minister is bound to give the person notice of their loss of citizenship and their right to request the Minister to reconsider the decision. The Minister may determine in writing that a notice should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations; but such a determination would cease to have effect after 90 days. The Minister has a one-off option to determine in writing that a notice should not be given for a further period of 90 days. A Minister who exercises this option must provide a copy of their determination to the IGIS and the PJCIS.

(d) The decision would broaden the scope for constitutionally entrenched judicial review under s 75(v) of the Constitution and its Federal Court analogue under s 39B of the Judiciary Act. As a result, it would therefore be open for mandamus to lie to require the Minister to consider the request for reconsideration of a revocation decision.

(e) There is presently at least some merits review of the QSA in the Security Appeals Division (SAD) of the AAT. Consistent with the approach in the Migration Act, it is not appropriate for the Tribunal to review a decision made in the Minister's personal capacity (who is responsible to Parliament) in relation to the public interest. However, there should be merits review in the SAD

as to whether there could have been or is reasonable satisfaction as to the existence of the requisite conduct for citizenship loss. That would replace any right of challenge to the QSA (challenge of which would therefore be redundant). In order to provide at least some 'equality of arms' in the AAT, the special advocate legislation now in the National Security Information (Civil and Criminal Information) Act in relation to control orders would be extended to this process.

(f) There will be the normal right of appeal on questions of law to the Federal Court, which will be able to view both the open and closed reasons of the AAT, as will any special advocate on appeal.

1.33. Finally, consistent with s 6(1)(d) of the INSLM Act, I have considered whether the legislation considered in this review is being used for any matter unrelated to counter-terrorism and national security. In the conduct of this review there is no evidence to suggest this.

1.34. Further details are in the report.

Public Hearing, Canberra, 27 June 2019

1. THE THREAT LANDSCAPE

1.1. Before considering whether the laws under review remain proportionate to any threat of terrorism or threat to national security, or both, and remain necessary, I must consider the relevant threat.

1.2. The current threat of a terrorist act occurring in Australia remains at the 'probable' level, and the evidence before me suggests that this position will remain unchanged for some time. The threat is mainly from violent Islamists,[5] notably the Islamic State of Iraq and the Levant (ISIL), but there is also some radical right-wing activity. Foreign fighters and their children remain a cohort of particular significance, both because of their direct potential to be perpetrators of terrorist acts, but also because of their capacity to inspire others, including children, to act.

1.3. The external terrorist landscape continues to evolve, and more visibly than the domestic one. Violent Islamist terrorism experienced a resurgence following the rise of ISIL in 2014, but the rapid reversal of the group's fortunes, for example in Mosul and Raqqa, is again changing the nature of the threat it poses. I note that ISIL and its affiliates are not the only source of Islamist terrorism – Al Qaeda and its affiliates retain a significant global presence. In addition, there is a large constellation of organisations, networks and individuals intent on directing, inspiring and conducting violence against Australia's interests, its allies and partners.

Foreign fighters

1.4. A key focus of the operation of law provisions I review in this report concerns foreign fighters, which brings me to say something about ISIL members and supporters. The rise of ISIL, which led to the so-called Caliphate, took almost everyone by surprise; I expect its capacity to surprise will continue. ISIL has produced a large, now widely dispersed, radicalised, highly trained diaspora of actual or potential terrorists, many of whom remain with their supporters and dependants (including children), outside their countries of citizenship.

1.5. Estimates vary but various figures suggest over 40 000 foreign fighters – including around 7500 from Western countries – joined the fight. Thousands died in the fighting, others have been caught and incarcerated and small numbers have left either for their home countries or elsewhere. Foreign fighters abroad or at 'home' pose a durable threat, directly by pursuing violence or indirectly by inspiring others.[6] The formation of Al-Qaeda demonstrates ISIL's dangerous potential, as foreign fighters involved in the 1970s/1980s Afghan–Soviet conflict later formed the core of Al-Qaeda.

1.6. The ISIL threat is wider than the foreign-fighter group, large though it is, because of the effectiveness of its message, particularly over the internet, to inspire other attacks. As the UK Home Secretary, Sajid Javid, said in a speech on 20 May 2019.

> *In fact, of all the terrorist plots thwarted by the UK and our Western allies last year, 80% were planned by people inspired by the ideology of [ISIL]/Daesh, but who had never actually been in contact with the so-called Caliphate.*[7]

1.7. The likely future roles of the remnant foreign fighters of the so-called Caliphate are yet to be fully worked out. In 2017 the Director-General of Security, Duncan Lewis AO, DSC, CSC confirmed publicly the extent to which Australians were involved with ISIL as foreign fighters:

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5 Violent Islamist action is to be contrasted with the major world religion of Islam, which practices peace.

6 This has been referred to as the '*bleed-out*' effect. (see Barak Mendelson 'Foreign Fighter – Recent Trends' (2011) 55(2) Orbis.

7 The Rt Hon Sajid Javid MP 20 May 2019; https://www.gov.uk/government/speeches/homesecretary-speech-on-keeping-our-country-safe

> *We've had now just on 200 Australians in the Middle East with ISIL involved in the conflict* [around 170 as foreign fighters]. *There are currently just on 100 of them left. 64 we confirm have been killed. There are probably up to 70 or 72 who may have been killed and there are 70 children that we know of currently in the conflict zone*. [8]

The recent, rapid downfall of ISIL as a body controlling territory and its losses on the battle field mean that more foreign fighters will continue to flee as the pressure on them grows. Although there has not yet been a mass exodus, even small numbers of trained, experienced and well-connected jihadists will pose a significant global threat for years to come. AFP Deputy Commissioner Leanne Close APM noted during her evidence before me at the Public Hearing that returning foreign fighters may have increased capability and potential willingness to carry out attacks and that historically, addressing the issue of foreign terrorist fighters who wanted to return home has not been simple, and there will never be a strategy or a solution that fits all cases.[9]

Mosul and Raqqa as declared areas

1.8. I am concerned with the automatic application of the declared area provisions in the Code which make it a crime to be in Mosul or Raqqa without reasonable excuse. In particular, young Australians over 14 years of age, who may have involuntarily been present in Mosul or Raqqa after having been brought to those areas by foreign-fighter parents, could now have lost their Australian citizenship under the operation-at-law provisions. While no doubt the level of criminal culpability for minors in these areas aged 14 and above will vary, the automatic operation of these provisions raises significant questions of fairness and the extent of Australia's obligations towards children and young persons. I note that although the Minister for Foreign Affairs has since revoked (on 27 November 2017) the declaration of Al-Raqqa province in Syria as a declared area (first designated on 4 December 2014), however Mosul district in the Ninewa province of Iraq remains a declared area (first designated on 2 March 2015). The continued application of these provisions, therefore, remains significant in this review.

Current estimates of future use of provisions under existing or proposed provisions

1.9. As the Department of Home Affairs confirmed in its submission to this review, around 80 adult Australians or former Australians remain in Syria and Iraq; about 40 Australians who travelled to Syria and Iraq have subsequently returned to Australia. The AFP also notes that some of these individuals may attempt to return to Australia and may continue to show commitment to violent extremism.[10] Appendix C (PJCIS Determination of Islamic State and Jabhat Al-Nusra as declared terrorist organisations) provides further detail of Australia's understanding of ISIS and its threat to Australia's security.

1.10. Since the national terrorism threat level was raised to 'probable' (12 September 2014), 93 people have been charged as a result of 41 counter-terrorism operations in Australia. Additionally, since 2001, 73 people have been convicted of terrorism offences in Australia, with many still serving lengthy sentences of imprisonment. The AFP has a further 39 active arrest warrants relating to alleged foreign fighters who are offshore (as of 27 June 2019).[11]

1.11. Although it is not expected that the number of Australians or former Australians travelling to, or in, Syria or Iraq to fight for ISIL or commit terrorist offences there will now increase, the fact that there

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8 Director-General of Security, Duncan Lewis AO DSC CSC – pp 30–31 Transcript of INSLM Hearing (19 May 2017, Canberra)

9 Australian Federal Police Deputy Commissioner National Security, Leanne Close APM – p 23 Transcript of INSLM Hearing (27 June 2019, Canberra)

10 Australian Federal Police Deputy Commissioner National Security, Leanne Close APM – p 23 Transcript of INSLM Hearing (27 June 2019, Canberra)

11 Ibid

are 80 presumed terrorists with previous or current connections to Australia represents an ongoing and significant threat to Australia's security. Mitigation of their risk to Australians' safety will continue to be a key priority of Australian intelligence and law enforcement agencies, through prosecution, CVE or monitoring programs, or control or detention orders. Other measures designed to mitigate threats by excluding terrorists currently include the citizenship loss provisions, and will, if enacted, include the Temporary Exclusion Orders based to some extent on the United Kingdom laws of the same name contained in the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019.

1.12. What is fundamental to all of these threats is their variability, from person to person, group to group. I agree with much of the following submission from the Department of Home Affairs:

> *Australia's counter-terrorism framework is a multi-faceted approach to managing the risk that emanates from terrorist and terrorism more generally. The framework is designed to be both preventative and responsive, and to apply to threats both offshore and onshore. It provides a range of mechanisms that operate in relation to an individual's level of risk, which can be used simultaneously or on their own. When a person's Australian citizenship ceases, they no longer have full and formal membership of Australian society. Citizenship cessation reduces the risk of a terrorist act being undertaken by that person in Australia.*[12]

1.13. I agree with this part of the submission, save that I would qualify the last sentence to read 'Citizenship cessation *[may in a particular, possibly rare, case]* reduces the risk of a terrorist act being undertaken by that person in Australia.' The submission continues:

> *At the time the terrorism-related citizenship loss provisions were inserted into the Citizenship Act, the threat environment was characterised by the danger that foreign terrorist fighters presented to Australia and its interests, particularly those who may seek to return to Australia after fighting with Islamic State in Syria and Iraq. While the number of Australians attempting to travel to the conflict zone has markedly diminished, around 80 Australians (or former Australians) remain in Syria and Iraq. Some of these individuals may attempt to leave the conflict zone and return to Australia. Amongst them, some may continue to show commitment to violent extremism, while others may no longer present security concerns. Each of these individuals' circumstances are unique and complex. In managing the risk presented by these individuals to Australia's safety and security, a suite of measures, that are sufficiently nuanced and can be applied on a case-by-case basis, is paramount.*[13]

1.14. It is in many ways because I agree with the submissions with the variations indicated, that I consider the operation of law provisions in ss 33AA and 35 are not proportionate to the threats; whereas the suggested alternative model with its individualised approach would be.

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12 Submission 4 – Department of Home Affairs, p 5

13 Submission 4 – Department of Home Affairs, p 3

2. INTERNATIONAL OBLIGATIONS

2.1. Under s 8 of the INSLM Act, I am expressly required to consider Australia's compliance with its international obligations. These obligations relate to the areas of counter-terrorism and human rights. This significantly informs my view as to whether relevant laws contain 'appropriate safeguards for protecting the rights of individuals': INSLM Act s 6(1)(b)(i).

2.2. In its *Statement of Compatibility* to the Bill the Government indicated that the provisions were compatible with Australia's international and human rights obligations.[14]

2.3. That position was reiterated by the government agencies at the INSLM Public hearing.

International obligations to combat terrorism

2.4. International law expects states to undertake counter-terrorism measures.

2.5. As Professor Clive Walker submitted:

> *This demand has been the order of the day since UNSCR 1373 of 28 September 2001. The Resolution makes no mention of citizenship but has plenty to say about safe havens, movement, border controls and identity checks. This harsh environment was ramped up with the advent of Islamic State, as reflected in UNSCR 2178 of 24 September 2014 onwards. Only recently has it been possible to detect some softening of the stance by way of the fuller appreciation and recognition of the humanitarian and human rights implications of the conflict in Syria and Iraq. Thus in UNSCR 2396 (21 December 2017), article 29 mentions not only 'appropriate prosecution' but also 'rehabilitation, and reintegration measures'. Article 31 goes further and 'Emphasizes that women and children associated with foreign terrorist fighters … may have served in many different roles … and require special focus … and stresses the importance of assisting women and children associated with foreign terrorist fighters who may be victims of terrorism, and to do so taking into account gender and age sensitivities'. Likewise the Madrid Guiding Principles of 2015, which were to guide states on the implementation of UNSCR 2178 in order to deal with FTFs,[1] were softened by the 2018 Addendum to the 2015 Madrid Guiding Principles.[2] Thus, the 2018 Addendum points not only to bringing terrorists to justice (Guiding Principle 11) but also to taking account of the interests of children (Guiding Principle 12).*[15]

2.6. In submissions to this review, both the Law Council of Australia and the Australian Human Rights Commission provided reasoned insight into the international law complexities generated by the operation of the citizenship loss provisions. The Law Council relevantly stated (paras 81, 83, 84, 85–87; (pp 21–22 of submission):

> *A requirement to pursue a conviction would also more readily accord with Australia's obligations under the United Nations Security Council Resolution 1566 (2004). This requires Member States (including Australia) to cooperate fully to combat terrorism and to deny safe haven and bring to justice through prosecution and extradition any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe haven. … However, if they are stripped of their citizenship, the person is simply free*

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14 Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2016 (Cth) 27–35.

[1] S/2015/93923 December 2015, https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Madrid-Guiding-Principles_EN.pdf

[2] https://www.un.org/sc/ctc/wp-content/uploads/2018/12/2018-Addendum-to-the-2015-Madrid-Guiding-Principles_as_adopted.pdf S/2018/1177

15 Submission 1 – Professor Emeritus Clive Walker, School of Law, University of Leeds pp 7–8. Bingham Centre paper also cites these resolutions.

to pursue acts of terrorist related activity overseas, including engaging with organisations that may be planning acts of terrorism against Australia and its allies. It may be more effective to arrest the person at the border upon their return to Australia, as is the case of persons with outstanding arrest warrants. Alternatively, a prosecution could be commenced in Australia and upon arrest elsewhere extradition proceedings could be pursued. The alternative is that the person is precluded entry into Australia and the person is left to be dealt with overseas in countries that may not have laws as robust as Australia or the resources, or willingness to deal with terrorist suspects in the same way that Australia can. This gives rise to so called 'risk exportation', whereby a problem is simply shifted to the responsibility of another State, potentially compromising the international solidarity and cooperation needed to combat terrorism. The danger also remains for those Australians abroad who are at risk from the person remaining overseas.

As a signatory to the international treaty to establish the International Criminal Court (the Rome Statute), Australia has a duty to exercise its criminal jurisdiction over those responsible for international crimes and prosecute perpetrators of genocide, crimes against humanity, war crimes and the crime of aggression as defined. However, by excluding alleged foreign fighters from re-entry, Australia cannot discharge these duties in the Australian judicial system. The Law Council also considers it is preferable for people who are suspected of engaging in terrorism related offences to be arrested overseas and extradited here or arrested upon their entry to Australia and subjected to the process and sanction of the criminal justice system. This would be more effective in deterring and incapacitating the individual from being able to participate in terrorism related activities in both Australia and abroad. A consequence of the scheme is that if a person ceases to be a citizen because they have engaged in certain conduct, this may provide the person with a technical defence in any extradition proceeding for terrorism offences that could result in a conviction for one or more of the offences listed in section 35A. Such an outcome is clearly not in the public interest.

2.7. The Australian Human Rights Commission similarly commented (paras 144–145 (p 33) of their submission):

Under international law, Australia has an obligation to prosecute gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law, which can include terrorism-related acts, or to extradite alleged offenders to jurisdictions where prosecution can occur. The UN General Assembly has also recognised a further obligation on states to ensure full and effective redress for victims of such violations and non-recurrence. By removing a person's citizenship in these circumstances, Australia is acting inconsistently with these international law requirements and its obligation to be a responsible and cooperative member of the international community in the fight against terrorism and in the prosecution of certain international crimes. It is effectively declining to fulfil this responsibility and passing on risk to other nation states, including for alleged offenders who may have been born, raised and radicalised in Australia. Some of these other states are less equipped to carry out effective investigations and prosecutions.

International obligations in the area of human rights

2.8. In its extensive review of the human rights implications of the Allegiance to Australia Bill, the Parliamentary Joint Committee on Human Rights (PJCHR) drew attention to a number of issues, including:

(a) If a person's citizenship is revoked while they are overseas in a country in which they do not hold nationality, this may make it difficult for them to move around in the absence of any valid travel documents, impacting their right to freedom of movement under art 12 of the *International Covenant on Civil and Political Rights* (ICCPR).

(b) Article 12 of the ICCPR protects a person's ability to enter their 'own country', with the notion of a person's 'own country' extending beyond mere citizenship — ss 33AA, 35, and 35A, and their consequential effects, may likely inhibit the exercise of this right under art 12.

(c) The revocation of citizenship may disproportionately limit the right to a private life provided by art 17 of the ICCPR.

(d) Sections 33AA, 35, and 35A, have the capacity to result in direct discrimination, by treating those of dual citizenship engaging in terrorist acts differently to those of singular citizenship, as well as indirect discrimination on the basis of race or religion, potentially contrary to arts 2, 16 and 26 of the ICCPR. Citizenship revocation provisions targeting possible dual nationals may also have the capacity to be classified as a form of 'discrimination based on national origin,' which is prohibited under the *Racial Discrimination Act 1975* (Cth).

(e) If a person's citizenship is revoked, then they may be subject to immigration detention pending their deportation, thereby impeding their right to liberty under art 9 of the ICCPR (particularly if the person seeks to challenge the bases upon which their citizenship has purportedly been revoked).

(f) The automatic operation of the legislation in revoking a person's citizenship has the potential to impede their right to a fair trial under art 14 of the ICCPR.

(g) Sections 33AA, 35, and 35A apply sanctions which may be considered 'criminal' under international human rights law (despite being considered 'civil' under Australian law), without providing the safeguards usually afforded as part of criminal law procedures, thereby potentially undermining the rights afforded by arts 14 and 15 of the ICCPR.

(h) Making people subject to a loss of citizenship following a criminal conviction and punishment may constitute double punishment, thereby being inconsistent with the prohibition against double punishment established by Art 14 of the ICCPR.

(i) The automatic revocation of citizenship under ss 33AA and 35 does not appear to give any consideration to the best interests of minors caught by the provision, potentially rendering them inconsistent with art 3 of the *Convention on the Rights of the Child* (CRC).

2.9. Professor Walker's submission[16] also highlighted that international law has explicitly prohibited, in multiple instruments, the 'arbitrary deprivation of nationality'.[17] According to Professor Walker, the key values underpinning this prohibition are recognition and observance of:

a) non-discrimination

b) legal basis and due process

c) legitimate purpose, necessity and proportionality

d) the avoidance of statelessness.

These norms are enshrined in multiple global statements and conventions that Australia has acceded to at various times.

2.10. A key convention for this review is the *Convention on the Reduction of Statelessness 1961*, which come into force in 1975. Australia acceded to the convention in 1973.[18] Relevant clauses include: Article 6:

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16 Professor Walker also submitted that the following articles of international law may also be relevant to the INSLM's review: the *Universal Declaration of Human Rights*, the *Convention on the Rights of Persons with Disabilities*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Geneva Convention of 1949*.

17 Submission 1 – Professor Emeritus Clive Walker, School of Law, University of Leeds, p 4.

18 Submission 6 – Law Council of Australia, p 10; Submission 6 – Dr Rayner Thwaites, University of Sydney, p 8.

If the law of a Contracting State provides for loss of its nationality by a person's spouse or children as a consequence of that person losing or being deprived of that nationality, such loss shall be conditional upon their possession or acquisition of another nationality.

Article 8:

1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless; […]

3. Notwithstanding the provisions of paragraph 1 of this Article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:

(a) that, inconsistently with his duty of loyalty to the Contracting State, the person

(i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or

(ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State;

(b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.

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

Article 9:

A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

2.11. Although the United Kingdom has laws in place allowing for the revocation of citizenship from both dual-nationals and single nationals, such powers are not available to the Australian government, due to a reservation invoked by the United Kingdom under this convention.[19]

2.12. Under the Statelessness Convention, states can deprive nationality where a person has committed acts seriously prejudicial to the vital interests of the state even if it leads to statelessness, providing the state's law already provided for such revocation at the time of accession to the Convention. Australia made no such reservation to the Convention at the time of accession.

2.13. The Law Council submitted that indefinite detention was a possibility in the event of statelessness:

While international law dictates that everyone has the right to a nationality and that no-one shall be arbitrarily deprived of their nationality, there is no guarantee that a person will acquire citizenship/nationality of another country. In such circumstances, a person who is in Australia at the time when his or her Australian citizenship is removed may, if the Minister's state of satisfaction as to some other citizenship or nationality is erroneous, be left stateless and subject to indefinite immigration detention. This is because if the person was not a dual citizen, the person would become an unlawful non-citizen, have no country to which the person could be removed and face the possibility of indefinite detention. This is inconsistent with international

[19] Submission 6 – Dr Rayner Thwaites, University of Sydney, p 10.

> *law, which holds that all individuals, including non-citizens, must be protected from arbitrary indefinite detention*.[20]

2.14. Fortunately, one matter which is satisfactorily dealt with in the laws under review is the prevention of statelessness. The Law Council pointed to two cases from the United Kingdom where an individual lost their foreign citizenship after the determination was made to strip them of their British citizenship:

> *…This had the effect of rendering the decision of the Minister unlawful. The change of status from dual to single citizenship status occurred after the Minister's determination but prior to the appeal being determined. This illustrates that dual citizenship is not a fixed status of sufficient certainly to render loss of citizenship with any certainly that it will not result in statelessness.*[21]

2.15. The consequences of statelessness for a former Australian citizen could be severe, as identified by the Law Council:

> *Under the Act, a person is deemed to have renounced or had their citizenship cease at the time they engage in the specified conduct or are convicted of a prescribed offence. The person is then be* [sic] *deemed to be an unlawful non-citizen if they do not hold a valid visa and subject to mandatory immigration detention. One of the most significant consequences of being a non-citizen who does not hold a valid visa is that the power, and duty, to detain under the Migration Act is engaged … An Australian citizen who is outside of Australia at the time their citizenship ceases will immediately become an unlawful non-citizen, as the section 35 ex-citizen visas do not apply when citizenship ceases outside of Australia. Sections 33AA and 35 (if the person is able to return to Australia prior to becoming aware that their citizenship had ceased), in conjunction with the existing statute law of the Commonwealth, effectively impose mandatory detention, by the executive, prior to judicial trial, based upon an awareness of the Minister of the person having engaged in the specified conduct rendering them an unlawful non-citizen.*[22]

2.16. As the UK example shows, the revocation of citizenship can result in a 'race to the bottom' with foreign countries either revoking or denying the citizenship of a revokee. Liberty Victoria also identifies the distinction between *de jure* and *de facto* statelessness,[23] with the latter arising in circumstances where a person may have citizenship of a foreign country but is not recognised as a citizen by that country. In such circumstances the automatic revocation of citizenship may result in a contravention of Australia's obligations under the Statelessness Convention as the revokee would, for all practical purposes, be stateless.

2.17. Further, as noted in Liberty Victoria's submission, similar citizenship revocation provisions were repealed in Canada in December 2017. This was justified 'as protecting the principles of secure and equal citizenship'.[24]

2.18. Regarding the provisions' overall compliance with international law, the AHRC submitted that the,

> *removal of citizenship is likely to significantly limit numerous other human rights protected in the ICCPR and other human rights conventions to which Australia is a signatory. Without undertaking a comprehensive analysis of the consequences of removal of citizenship, it suffices for present purposes to observe that the resulting human rights implications may be extensive and not immediately apparent. For example, removal of citizenship may lead to loss of a passport, removal from the electoral roll, and loss of entitlement to social security benefits. It would change the activities that intelligence organisations such as the Australian Secret*

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20 Submission 5 – Law Council of Australia, pp 10–11.

21 Submission 5 – Law Council of Australia, p 12.

22 Submission 5 – Law Council of Australia, pp 12-13.

23 Submission 9 – Liberty Victoria, p 4.

24 Submission 9 – Liberty Victoria, p 2.

Intelligence Service and the Australian Signals Directorate can undertake with respect to a person.[25]

2.19. The AHRC was concerned in particular that the operation of the citizenship loss provisions contravened the ICCPR's prohibition on arbitrary detention:

Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) provides that 'no one shall be arbitrarily deprived of the right to enter his own country'. 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. … A person who loses their Australian citizenship while abroad would lose the right to re-enter Australia. A person who loses their Australian citizenship while in Australia would face immigration consequences, including likely mandatory detention until they are removed from Australia … These provisions therefore clearly interfere with the right of an affected person to enter and remain in their own country, Australia.

International obligations to children

***International Covenant on the Rights of the Child* (CRC)**

2.20. Article 7 relevantly provides:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

2.21. Apart from general obligations, submitters to this review have highlighted that the provisions engage special obligations owed to children.

2.22. The Government recognised the special position of children during the passage of the Bill in accepting these PJCIS recommendations regarding children:

(a) (20) The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to limit the extent of its application to children. The amendments should provide; that no part of the Bill applies to conduct by a child less than 10 years old; and that proposed sections 33AA and 35 do not apply to conduct by a child aged under 14 years. The amendments should make the Bill's application to children explicit on the face of the legislation.

(b) (21) The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended so that section 36 of the *Citizenship Act 2007* (which enables the Minister to revoke a child's citizenship following the revocation of a parent's citizenship) does not apply to proposed sections 33AA, 35 and 35A.

2.23. The Law Council of Australia submitted that the citizenship loss provisions:

apply to children in circumstances that are not in the best interests of the child with the potential to be inconsistent with recognised rights of children. In particular, the sections may apply to children regardless of whether the child is capable of forming the necessary intention to sever allegiance with Australian values. The Law Council is concerned that as there is no need for a conviction in the application of sections 33AA and 35, there is not the necessary assessment by

[25] Submission 7 – Australian Human Rights Commission

the court to determine whether a particular child can be regarded as having sufficient capacity to intentionally engage in the conduct and sever their allegiance to Australia.[26]

2.24. The Australian Human Rights Commission was similarly concerned:

International human rights law recognises that, in light of their physical and mental immaturity, and developing neurological makeup, children have special need of safeguards, care and protection and should therefore be treated differently to adults. In recognition of that fact, Australia has ratified the CRC, which protects the best interests of the child (article 3) and the right of children to preserve their identity including their nationality (article 8(1)). Overall, removal of a child's citizenship is extremely difficult to justify under international law.[27]

2.25. Despite the amendments to the Bill referred to above, which 'enhanced the protection of children to some extent', the AHRC still considered 'that the citizenship loss provisions do not adequately protect the best interests and right to nationality of Australian children'.[28]

2.26. The AHRC was also concerned that the citizenship loss provisions in their application to children are problematic under the ICCPR:

Removal of a child's citizenship, and consequent loss of their right to enter or remain in Australia, is even more likely to be arbitrary in contravention of article 12(4) of the ICCPR than in the case of an adult. That is so for a range of reasons, including that a child is less culpable for wrongdoing and is more vulnerable to any adverse consequences. While already an acute risk for adults, the risk of breaching a child's human rights by automatic cessation of their citizenship is even more likely. Again, a child is also at risk of exploitation or manipulation by adults.[29]

2.27. The AHRC therefore recommended that the conduct-based citizenship loss provisions (ss 33AA and 35) should not apply to children or, in the alternative, removal of a child's citizenship under those provisions should only occur 'following a process in which the same procedural safeguards that apply to conviction-based citizenship loss under s 35A are applied. In the further alternative, the Minister should be required to consider exercising their powers to exempt a child from the operation of the relevant section in every instance.'[30]

2.28. The AHRC also recommends that 'the conviction-based loss provisions in s 35A of the *Australian Citizenship Act 2007* (Cth) should only apply to persons aged at least 14 years of age or older'.[31]

2.29. It is important to recognise that international law, including the ICCPR, recognises that some limits may be placed on human rights, as the Law Council of Australia noted, for a limitation on a right to be justifiable under international human rights law, 'it is necessary to demonstrate that the measure seeks to achieve a legitimate objective, the measure is rationally connected to that objective and is a proportionate means of achieving the stated objective'.[32]

2.30. The Australian Human Rights Commission agreed, noting in its submission that:

loss of citizenship should never be automatic. These provisions should be strictly delimited to ensure use in only the most exceptional circumstances – and as a last resort where the gravest criminal conduct also repudiates allegiance to Australia – after careful consideration, reasonable

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26 Submission 5 – Law Council of Australia, p 14.

27 Submission 7 – Australian Human Rights Commission, pp 45–46.

28 Submission 7 – Australian Human Rights Commission, p 46.

29 Submission 7 – Australian Human Rights Commission, pp 45–46. It is not clear, however, the extent to which the AHRC's submission was informed by the requirements in ss 33AA(3) and 35(4) regarding intent.

30 Submission 7 – Australian Human Rights Commission, p 47.

31 Submission 7 – Australian Human Rights Commission, p 48.

32 Submission 5 – Law Council of Australia, p 9.

justification and due process. They should also be subject to robust review and oversight mechanisms.[33]

2.31. It follows that limitations designed to address national security are capable of being consistent with a range of rights if the limitations prescribed by law are not arbitrary and conform with the principle of proportionality.[34]

2.32. On this question there was a range of views from submitters.

2.33. The Law Council of Australia encapsulated this pointing out, for a limitation on a right to be justifiable under international human rights law, 'it is necessary to demonstrate that the measure seeks to achieve a legitimate objective, the measure is rationally connected to that objective and is a proportionate means of achieving the stated objective'.[35]

2.34. Professor Walker emphasised that an 'underlying rule' of international law that States are free to regulate the acquisition and loss of nationality within the limits set by international law[36]. He also urged that 'the policy of deprivation of citizenship appears irresponsible to allies, creates an unfair and unmanageable burden for weaker states, and disregards the interests of victims'.[37]

2.35. Similarly, Dr John Coyne and Dr Isaac Kfir from the Australian Strategic Policy Institute submitted that, 'bespoke CVE or deradicalization programs for convicted terrorists and foreign fighters are not a global norm ... In many cases those who lose their Australian citizenship could and do end up residing in jurisdictions with insufficient legislation, resources or will to manage their cases. In contrast the ongoing management of a terrorist offender in Australia, whilst resource intensive, is likely to have a far more lasting impact on mitigating global terrorism risks.'[38]

2.36. At the Revocation of Citizenship Expert Roundtable in May 2019 in London, it was noted that humanitarian concerns are increasingly important in addition to the expectation under international law to combat terrorism. 'For example, Security Council Resolution 2396 of 2017 on foreign terrorist fighters included provisions for rehabilitation, women and children, and victims of Islamic State. Likewise, the 2018 Addendum to the Counter-Terrorism Committee's Madrid Guiding Principles (2015) also softened the previous approach.'[39]

2.37. The Department of Home Affairs noted that citizenship loss provisions are 'included in the counter-terrorism or national security frameworks of a number of countries' such as France, Germany, the Netherlands, New Zealand, the United Kingdom and the United States.[40]

2.38. Against that position, Liberty Victoria's submission pointed out similar citizenship revocation provisions were repealed in Canada in December 2017. This was justified 'as protecting the principles of secure and equal citizenship'.[41]

2.39. The critical question then becomes whether the limitation is an arbitrary interference. In relation to the concept of arbitrariness under article 12(4), the UNHRC has stated: '[a]rbitrariness in this context is intended to emphasize that it applies to all state action, legislative, administrative and judicial; it guarantees that even interferences provided for by law should be in accordance with the provisions,

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33 Submission 7 – Australian Human Rights Commission, p 28.

34 See e.g. HRC General Comment no 27 UN Doc CCPR/C/21/Rev1/Add9 (1 November 1999)

35 Submission 5 – Law Council of Australia, p 9.

36 This is articulated in Article 1 of the 1930 *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws* 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.'

37 Submission 1 – Professor Emeritus Clive Walker, School of Law, University of Leeds, p 11.

38 Submission 3 – Dr John Coyne and Dr Isaac Kfir, Australian Strategic Policy Institute, p 2.

39 Revocation of Citizenship Expert Roundtable Paper, p 4.

40 Submission 4 – Department of Home Affairs, p 5.

41 Submission 9 – Liberty Victoria, p 2.

aims and objectives of the covenant and should be, in any event, reasonable in the particular circumstances'[42]. 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.[43]

2.40. The Department of Home Affairs acknowledged in its submission that the operation of law model challenges Australia's ability 'to manage its broader bilateral relationships and equities'.[44]

2.41. Applying that analysis to the provisions under review I conclude that:

(a) s 35A is necessary and proportionate to the counter-terrorism threat and generally contains appropriate safeguards for protecting the rights of individuals; but that

(b) ss 33AA and s 35 are neither necessary nor proportionate, nor do they contain appropriate safeguards for protecting the rights of individuals

(c) the operation-of-law provisions have the following serious problems in the international law context

(d) first, by failing to consider the best interests of the child at the point of deprivation of citizenship, there is a breach of the *Convention on the Rights of the Child*, Art 3

(e) second, failure to consult with foreign law experts may lead to a wrong conclusion by the CLB that a person has dual nationality when they do not. The person is then effectively stateless unless and until they obtain a declaration from an Australian court, or obtain an equivalent declaration from a foreign court or government AND persuade the Minister to exempt

(f) third, the practical difficulty in challenging adverse conclusions as to terrorist conduct, coupled with the permitted and routine failure to notify, may amount to failure of due process

(g) fourth, there is a lack of necessity and proportionality as set out in the final chapter of this report.

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42 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].

43 See Commonwealth Attorney-General's Department website – Human Rights – Permissible limitations

44 Submission 4 – Department of Home Affairs, p 5.

3. CONSTITUTIONAL ARRANGEMENTS

3.1. This is not the occasion for a treatise on the Constitution, but some analysis of the topic is needed as there has been considerable controversy about the constitutional validity of the citizenship loss provisions, both in relation to the original Ministerial decision model and the operation of law provisions which were passed.

3.2. The controversies have concerned two main issues:

(a) whether there is an available head of legislative power to support the provisions

(b) whether the provisions infringe a constitutional limitation, particularly an implied limitation derived from Chapter III of the Constitution.

Legislative power

3.3. The issue of legislative power is linked, in part, to the concepts of alienage and allegiance.

3.4. Section 51(xix) of the Constitution confers on the Commonwealth Parliament to make laws with respect to 'naturalization and aliens'.[45] An alien is one who owes obligations to another country. As three Justices of the High Court explained in *Singh v The Commonwealth* at [200]:

> *The central characteristic of [the] status [of an alien] is, and always has been, owing obligations ("allegiance") to a sovereign power other than the sovereign power in question (here Australia). That definition of the status of alienage focuses on what it is that gives a person the status: owing obligations to another sovereign power.*

3.5. The key difference between the status of an alien and a citizen in this context is that the allegiance of a citizen is owed to Australia.

3.6. Section 51(xix) is a wide power. While no doubt it has outer limits, hard though these may be to define, within them it authorises Parliament to create and define the status of Australian citizenship, and to prescribe the conditions on which such citizenship may be acquired and lost.[46]

3.7. The simplified outline in s 32A of the Act states that one way of losing citizenship is to 'engage in various kinds of conduct inconsistent with allegiance to Australia.' The preamble for the 2015 Act states:

> *This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.*

3.8. The notion of allegiance by citizens to Australia is thought by some to be outdated; however, there can be no doubt of its current legal relevance in international law, the law of Australia and the laws of other countries such as the United Kingdom.[47] Given the decided cases, it seems hard to deny that the citizenship provisions would be supported by the power in s 51(xix) in many circumstances to which they would apply, such as where a person commits a terrorist act directed against an Australian body politic or the Australian public.

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[45] While the Constitution does not give the Commonwealth Parliament any direct power with respect to citizenship, the power with respect to 'naturalization and aliens' includes the power to determine to whom is attributed the status of alien. In that sense, citizenship is the obverse of the status of alien: *Shaw v MIMA* (2003) 2018 CLR 28 at [2] (Gleeson CJ, Gummow and Hayne JJ, with Heydon J agreeing at [190]); *Koroitamana v Commonwealth* (2006) 227 CLR 1 at [48] (Gummow, Hayne and Crennan JJ).

[46] *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at [31] (Gleeson CJ).

[47] In Australia it at least remains relevant to the law of citizenship and the law concerning treason and sedition.

3.9. Even if s 51(xix) would not have that effect, however, there are other heads of power that would be available.

3.10. The external affairs power in s 51(xxix) of the Constitution authorises laws that operate upon 'places, persons, matters or things physically external to Australia'.[48] Insofar as ss 33AA and 35 operate in that way, they would be laws with respect to 'external affairs'.

3.11. The High Court's decision in *Thomas v Mowbray* also suggests that the defence power in s 51(vi) of the Constitution may support the provisions.[49] In that case, a majority of the High Court held that laws providing for the making of control orders for the purpose of protecting the public from a terrorist act were laws with respect to 'the naval and military defence of the Commonwealth and of the several States'. In doing so, the majority rejected submissions that the defence power should be limited to waging war, addressing external threats or protecting only bodies politic (as distinct from the public).[50] The reasoning in *Thomas v Mowbray* supports the proposition that the defence power authorises legislation aimed at preventing or proscribing terrorist conduct, at least where such conduct occurs in Australia or is directed to Australian bodies politic or the Australian public.[51] Provisions that revoke citizenship as a consequence of a person engaging in such conduct would be laws with respect to s 51(vi).

3.12. Finally, in the case of loss of citizenship owing to terrorist acts or association, the executive power of the Commonwealth which extends to 'the execution and maintenance of this Constitution, and of the laws of the Commonwealth', read with the express incidental power in s 51(xxxix), may also be relevant.[52]

3.13. In short, it seems reasonably clear that the current provisions would be supported by one or more heads of Commonwealth legislative power.

Constitutional limitations

3.14. The next issue is whether the provisions infringe a constitutional limitation.

3.15. The most relevant implied limitation (none of the few express limitations are relevant) is that derived from Chapter III of the Constitution. Section 71 provides that the 'judicial power of the Commonwealth' shall be vested in the High Court, other federal courts, and other courts that the Parliament invests with federal jurisdiction.

3.16. Section 73 gives the High Court jurisdiction, subject to such exceptions and regulations as the Commonwealth Parliament may prescribe, to hear and determine appeals from, among other things, federal courts, courts exercising federal jurisdiction, and State Supreme Courts.

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48 Section 51(xix) of the Constitution enables the Parliament to legislate with respect to things geographically external to Australia. As a majority of the High Court confirmed in *XYZ v Commonwealth*, that power extends to making laws with respect to 'places, persons, matters or things physically external to Australia': (2006) 227 CLR 532 at [10] (Gleeson CJ), [30] (Gummow, Hayne and Crennan JJ). The High Court has upheld the validity of Commonwealth legislation which concerns conduct outside Australia: see, for example, *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *XYZ v Commonwealth* (2006) 227 CLR 532; see also Ul-Haque v R [2006] NSWCCA 241; *Alqudsi v Commonwealth* (2015) 91 NSWLR 92.

49 In *Thomas v Mowbray* (2007) 233 CLR 307 at [7], Chief Justice Gleeson considered that the defence power 'is not confined to waging war in a conventional sense of combat between forces of nations'. Further, a law will be supported by the defence power if it can *reasonably be regarded* as a means towards attaining an object which is connected with defence – *Marcus Clark and Co. Ltd. v The Commonwealth* (1952) 87 CLR 177 at 256 per Fullagar J.

50 See *Thomas v Mowbray* (2007) 233 CLR 307, 324 [7] (Gleeson CJ), 362 [145]–[146] (Gummow and Crennan JJ), [611] (Heydon J, agreeing with Gleeson CJ and Gummow and Crennan JJ).

51 *Thomas v Mowbray* (2007) 233 CLR 307, 326 [9] (Gleeson CJ), 362 [146] (Gummow and Crennan JJ).

52 See the observations in *Burns v Ransley* (1949) 79 CLR 101 at 116 (Dixon J).

3.17. By s 77, the Commonwealth may, among other things, define the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States, and may invest State courts with 'federal jurisdiction'.

3.18. The High Court has held that Chapter III embodies the doctrine of the separation of powers, relevantly meaning that 'the judicial power of the Commonwealth' may only be vested in Chapter III courts; that is, the courts mentioned in s 71 of the Constitution.[53]

3.19. Originally the provisions empowered the Minister alone to revoke the Australian citizenship of an Australian dual citizen. Many commentators expressed concern that this would be contrary to the constitutional separation of powers doctrine because it would involve the Minister exercising the judicial power of the Commonwealth.

3.20. Professor Greg Craven, for example, was critical of the original form of the provisions, stating they were '*irredeemably unconstitutional by conferring judicial power on a Minister'.* But he went to say that '*the new automatic nature of the three proposed cessation provisions included in the Bill was much less likely to fall foul of the High Court'.*[54]

3.21. The change to automatic provisions did not assuage all concerns about the separation of powers. Thus, Professor George Williams in his submission to the PCJIS stated:[55]

> *… the Bill has not cured the underlying problem about ministerial discretion. I can see that it has been drafted to deal with the issue that this decision cannot be made by a minister for constitutional reasons, but the underlying constitutional reason for this is that the decision must be made by a court. That is an inescapable aspect of the separation of powers as determined by the High court. The self-executing model does still not provide for the decision to be made by a court; it simply amounts to a self-executing piece of legislation that bypasses the court at the critical moment of determining whether the requisite liability arises.*

3.22. With all respect, I do not consider that these criticisms are sound. My reasons are as follows.

3.23. Firstly, deprivation of citizenship is not something that traditionally has been achieved by an exercise of judicial power. In the United Kingdom prior to federation, citizenship was often conferred by statute. Australian citizenship has always been a creation of statute:

(a) Before the commencement of the *Australian Citizenship Act 1948* (Cth) on 26 January 1949, there was no such thing.

(b) From 26 January 1949 until 3 April 2002, s 17 of the *Australian Citizenship Act 1948* (Cth) generally provided for the automatic loss of Australian citizenship if an adult acquired another citizenship by a voluntary and formal act.

3.24. These facts are difficult to reconcile with the proposition that the deprivation of citizenship is and has been an exclusively judicial function. By contrast, exclusively judicial functions such as the adjudication and punishment of criminal guilt, the determination of contracts or tortious disputes or the making of binding determinations about breaches of the law have historically been associated with the exercise of judicial power by courts, especially the first.[56]

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53 *R v Kirby; Ex parte Boilermakers' Society of Australia ('Boilermakers' case')* (1956) 94 CLR 254.

54 Greg Craven 'Stripping Citizenship from a traitor is plain dumb', *The Australian* (online), 4 June 2015 < https://www.theaustralian.com.au/opinion/columnists/greg-craven/stripping-australian-citizenship-from-a-traitor-is-plain-dumb/news-story/5bbc1e84f92d4728ad5fb8ad093069d8>.

55 Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament House, Canberra, 4 August 2015, Submission 17 (Professor George Williams).

56 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258 (Mason CJ, Brennan and Toohey JJ).

3.25. Secondly, and relatedly, there is no analogy between the deprivation of liberty and the deprivation of citizenship whether under s 35A or otherwise. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[57] three members of the High Court first expressed the view that, subject to exceptional cases such as custody pending trial and cases of mental illness or quarantine, 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and … exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[58] In other words, subject to exceptional cases, the Commonwealth Executive could not be given the power to detain people unless a court had ordered those people to be detained as part of the sentencing process. But that principle depends partly on historical considerations: as Gleeson CJ explained in *Re Woolley; Ex parte Applicants M276/2003*,[59] deprivation of liberty has usually followed an adjudgment of criminal guilt and, outside of that context, is imposed by the state only in limited circumstances. In contrast, deprivation of citizenship appears no different from other forms of involuntary hardship that can be inflicted without resort to the courts.[60]

3.26. Thirdly, where, under s 35A, the fact of criminal conviction enlivens possible exercise of the Ministerial power to revoke citizenship, there is a close analogy with the constitutionally valid exclusion from Australia under the Migration Act of persons with certain criminal convictions. To adopt what the plurality of the High Court recently said in *Falzon v Minister for Immigration* [2018] HCA 2:

> *[The] power is administrative in character. It forms no part of the judicial power of the Commonwealth. In particular, the exercise of that power does not trespass on the exclusively judicial function of determining or punishing criminal guilt.*

3.27. Fourthly, as a matter of substance, the 'operation of law' provisions do not involve the Minister adjudicating and punishing criminal guilt.[61] Those provisions apply of their own force to certain dual citizens who engage in specified conduct. They do so regardless of whether the Minister for Home Affairs even knows of the existence of such persons (indeed, that is one of the practical difficulties that the provisions pose). Further, even if the Minister forms the view that a person has engaged in the specified conduct and therefore has lost Australian citizenship, that view would not be binding on the person or on any court.[62] It is therefore difficult to see how the 'operation of law' provisions involve an exercise of judicial power contrary to Chapter III.

3.28. Fifthly, if the deprivation of citizenship can be accomplished otherwise than as an adjunct to the determination of criminal guilt, then logically Parliament can provide for when citizenship is to be lost without breaching Chapter III. The situation would be no different to providing for the civil forfeiture of property upon the occurrence of specified events.

3.29. Finally, even if, as some have argued, the 'operation of law' provisions somehow involve the Minister or other officials making a decision that triggers loss of citizenship, they would still not

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57 (1992) 176 CLR 1.

58 (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

59 (2004) 225 CLR 1 at [17].

60 (2004) 225 CLR 1 at [17].

61 It should be noted that some commentators have raised doubts as to whether the operation of law model does in fact operate in this manner. As Dr Rayner Thwaites has observed, 'no law is entirely self-executing; it needs the interposition of human judgement … somebody to reach a determination that the conduct triggering revocation of citizenship has occurred' (Dr Rayner Thwaites, Submission 16, p. 2). In its submission to this review the Law Council noted that 'the removal of a "legal" decision does not mean a decision is not made in relation to the removal of citizenship' Submission of Law Council, 14 June 2019. In addition, the Commonwealth Ombudsman submitted the legislation 'conceals the administrative decision-making process, given that that must logically occur for the Bill to operate' (Colin Neave, Commonwealth Ombudsman, Committee Hansard, Canberra, 4 August 2015, p. 35). As outlined in paragraph 3.29 below, that would not mean that the provisions infringe Chapter III of the Constitution.

62 Contrast the provisions in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

infringe Chapter III. In *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*,[63] the High Court held that there was no constitutional difficulty in the ACMA investigating whether a licence holder had committed a criminal offence for the purposes of determining what action, if any, to take about the licence. Chief Justice French, Hayne, Kiefel, Bell and Keane JJ stated:[64]

> *[I]t is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action.*
>
> *…*
>
> *In determining that a licensee has breached the cl 8(1)(g) licence condition, as a preliminary to taking enforcement action, the Authority is not adjudging and punishing criminal guilt. It is not constrained by the criminal standard of proof and it may take into account material that would not be admitted in the trial of a person charged with the relevant offence. It may find that the broadcasting service has been used in the commission of an offence notwithstanding that there has been no finding by a court exercising criminal jurisdiction that the offence has been proven. Where a person is prosecuted for the relevant offence, the Authority is not bound by the outcome of the criminal proceeding and may come to a contrary view based upon the material and submissions before it.*

3.30. Based on the decision in *ACMA*, it is not easy to see how Chapter III would prevent the Minister (or the AAT standing in the Minister's shoes) from determining, on the basis of material that would not be admitted in any trial, the existence of certain elements of terrorism offences to work out whether the person has renounced their allegiance to Australia and should no longer be regarded as a citizen.[65]

3.31. The criticisms of the provisions based on Chapter III are not the only constitutional objections to the provisions. In evidence presented at the public hearing, Professor Kim Rubinstein suggested that the Parliament would be unable to deprive dual-nationals of their Australian citizenship (except for treason or fraud) because doing so would infringe an implication of equality before the law.[66]

3.32. I am not persuaded that the provisions are likely to be invalid because of any such argument.

3.33. In *Kruger v Commonwealth*, the High Court rejected the notion that the Constitution contained a general principle of legal equality.[67] Justice Dawson (with whom McHugh J agreed[68]) emphasised, among other things, that such a principle had no textual basis in the Constitution.[69] Other members of the majority made the same point.[70]

3.34. Further, the consequences of such a principle would be anomalous: apparently Parliament could rely on the external affairs power to impose mandatory penalties, including death or life imprisonment, on dual-nationals who committed terrorist offences overseas. But it could not deprive such persons of their citizenship. Indeed, according to Professor Kim Rubenstein, Parliament would be unable to

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63 (2015) 255 CLR 352.

64 (2015) 255 CLR 352 at [33], [49]. See also at [63]–[64] (Gageler J).

65 I do agree with the Law Council's submission that '*it could be argued that sections 33AA and 35 effectively impose a punishment (loss of Australian citizenship) where a person engages in prescribed conduct without any mechanism to determine if the conduct which leads to the punishment has in fact occurred*'. However, the imposition of hardship or what may colloquially be regarded as punishment is a function not exclusively vested in the judiciary, in contrast to the adjudication of criminal guilt: see *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [17] (Gleeson CJ).

66 Professor Kim Rubenstein, pp. 69–70, 73 Transcript of INSLM Hearing (27 June 2019, Canberra)

67 *Kruger v Commonwealth* (1997) 190 CLR 1 at 45 (Brennan CJ), 68 (Dawson J), 113–114 (Gaudron J), 142 (McHugh J), 153–155 (Gummow J).

68 Ibid at 142 (McHugh J).

69 Ibid at 64–66 (Dawson J).

70 Ibid at 44–45 (Brennan CJ), 112–113 (Gaudron J), 154–155 (Gummow J).

pass legislation to exclude known terrorists who were dual citizens from re-entering Australia. Unless and until a majority of the High Court declare that such an implication exists, I do not propose to consider it further.

3.35. Finally, the Law Council submitted[71] that the operation of law provisions could amount to an act of attainder or of pains and penalties. However, that cannot be right given my earlier conclusion that there is no adjudicating and punishing criminal guilt. As the majority of the High Court said in *Haskins v The Commonwealth* [2011] HCA 28 (omitting citations):

> [25] *The plaintiff submitted that the impugned provisions constitute a bill of pains and penalties because those provisions amount to the legislative imposition of punishment on a designated person or group of persons without the procedural safeguards of a judicial trial. In* Polyukhovich*, it was pointed out that in the Australian constitutional context, an Act that is a bill of pains and penalties is not prohibited merely because it matches that description. As Dawson J said, "the real question is not whether the Act amounts to a bill of attainder [or a bill of pains and penalties], but whether it exhibits that characteristic of a bill of attainder which is said to represent a legislative intrusion upon judicial power". And Mason CJ, Toohey and McHugh JJ each made the same point. It follows that the plaintiff's argument in relation to a bill of pains and penalties necessarily proceeded from the unstated premise that has been earlier identified, namely, that only a Ch III court could impose the punishment of detention on the plaintiff …. But as has been pointed out, the premise is wrong and that is reason enough to reject the plaintiff's argument that the impugned provisions are invalid because they have the features of a bill of pains and penalties.*

3.36. In summary therefore, I do not consider there are any significant constitutional defects in the current legislation or in relation to my recommendations.

[71] Submission 5 – Law Council of Australia, p 23.

Public Hearing, Canberra, 27 June 2019

4. EXPLANATION AND ANALYSIS OF CURRENT STATUTORY PROVISIONS

Concept of citizenship, its obligations and how it may be lost

4.1. In s 32 of the Act, which contains the simplified outline of Part 3, it is noted that 'you can cease to be an Australian citizen … [if] you engage in various kinds of conduct inconsistent with allegiance to Australia: see sections 33AA, 35 and 35A.' Sections 33AA, 35 and 35A were inserted into the *Australian Citizenship Act 2007* in late 2015 by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (Allegiance to Australia Act) which is set out in an Appendix in full together with relevant definitions. They have not been amendments to those provisions since.

4.2. While from 1949 Australia had laws dealing with loss of citizenship of those who fought with enemy nations against Australia, these laws were based on the notion of declared wars against nation states. There have been no formal declarations of war against another nation state since World War II, and, indeed, the *Charter of the United Nations*[72] may prohibit such declarations, the use of armed force being limited by that Charter to:

(a) self-defence as recognised in Article 51[73] of the Charter

(b) action as authorised by the United Nations Security Council under Chapter VII of the Charter.[74]

4.3. In 2015, when the Allegiance to Australia Bill was introduced, the then Minister for Immigration and Border Protection said in the Parliament:

> *We face a heightened and complex security environment. Regrettably, some of the most pressing threats to the security of the nation and the safety of the Australian community come from citizens engaged in terrorism. It is now appropriate to modernise provisions concerning loss of citizenship to respond to current terrorist threats. The world has changed, so our laws should change accordingly …*
>
> *[B]y these amendments, 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 safety and shared values of the Australian community, demonstrate that they have severed that bond and renounced their allegiance to Australia. The intention of the changes is the protection of the community and the upholding of its values, rather than punishing people for terrorist or hostile acts.*[75]

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72 See Articles 2(3–4):

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

73 Which provides 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security …'. It is unnecessary here to consider jurisprudence and state practice concerning anticipatory self-defence.

74 Thus, those Australian provisions may have become a dead letter.

75 Commonwealth, Parliamentary Debates, House of Representatives, 24 June 2014, 7369 (Peter Dutton MP) 7369.

4.4. As already noted, the provisions as amended by the Allegiance to Australia Act provide for the cessation of Australian citizenship of a person who is also a national of or citizen of another country (a dual citizen) in essentially three circumstances:

(a) if under the 'operation of law provisions' the person either:

(b) fights for or is in the service of a 'declared terrorist organisation' outside of Australia (s 35), or

(c) engages in specified conduct inconsistent with their allegiance to Australia (s 33AA).

(b) under the 'conviction based provisions', if the person is convicted of a specified offence under the Criminal Code (Cth) or the *Crimes Act 1914* (Cth) (s 35A) and certain other circumstances apply, the Minister may deprive a person of Australian citizenship.

4.5. I now turn to the detail of the provisions.

Operation of law provisions

4.6. Sections 33AA and 35 provide that citizens of Australia aged 14 years or over, upon engaging in certain specified forms of acts related to terrorism or foreign conflict, thereby both renounce and lose their Australian citizenship (described in the sections as acting 'inconsistently with their allegiance to Australia').

4.7. In essence, these sections revoke the person's citizenship automatically upon the person engaging in the relevant acts. Section 35A empowers the Minister to revoke a person's citizenship where the person has been convicted of an offence related to terrorism and certain other requirements are met.

4.8. If a revokee triggers the revocation of their citizenship under s 33AA or 35, the Minister may exempt the revokee from their citizenship loss.[76] While the Minister is under no compulsion to consider exercising this power in any given case,[77] a Minister who decides to consider exercising this power must have regard to a number of specified matters, including, but not limited to, the severity of the person's conduct, whether the person is or could be prosecuted and, if the revokee is under 18 years of age, the best interests of the revokee (i.e. child) as a primary consideration.[78]

4.9. If the Minister decides to exempt the revokee, the Minister must lay before each House of Parliament a statement setting out the decision, and the Minister's reasons for making the decision[79] and also brief the PJCIS[80].

Section 33AA – Renunciation of citizenship by conduct

4.10. Section 33AA was inserted into the *Australian Citizenship Act 2007* in late 2015 by the Allegiance to Australia Act. It has not been amended since, and so is still in its original form.

4.11. Section 33AA provides that dual citizens aged 14 years or over, upon engaging in certain conduct related to terrorism or foreign conflict with the requisite intention,[81] automatically renounce their Australian citizenship.

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76 *Australian Citizenship Act 2007* (Cth) ss 33AA(14), 35(9).

77 *Australian Citizenship Act 2007* (Cth) ss 33AA(15), 35(10).

78 *Australian Citizenship Act 2007* (Cth) ss 33AA(17), 35(12).

79 *Australian Citizenship Act 2007* (Cth) ss 33AA(18), 35(13).

80 *Australian Citizenship Act 2007* (Cth) s 51C.

81 The section describes engaging in such conduct as acting 'inconsistently with their allegiance to Australia'.

4.12. Sub-sections 33AA(1–9) provide:

(1) Subject to this section, a person aged 14 or older who is a national or citizen of a country other than Australia renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in conduct specified in subsection (2).

(2) Subject to subsections (3) to (5), subsection (1) applies to the following conduct:

(a) engaging in international terrorist activities using explosive or lethal devices

(b) engaging in a terrorist act

(c) providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act

(d) directing the activities of a terrorist organisation

(e) recruiting for a terrorist organisation

(f) financing terrorism

(g) financing a terrorist

(h) engaging in foreign incursions and recruitment.

(3) Subject Subsection (1) applies to conduct specified in any of paragraphs (2)(a) to (h) only if the conduct is engaged in:

(a) with the intention of advancing a political, religious or ideological cause, and

(b) with the intention of:

i. coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country, or

ii. intimidating the public or a section of the public.

(4) A person is taken to have engaged in conduct with an intention referred to in subsection (3) if, when the person engaged in the conduct, the person was:

(a) a member of a declared terrorist organisation (see section 35AA), or

(b) acting on instruction of, or in cooperation with, a declared terrorist organisation.

(5) To avoid doubt, subsection (4) does not prevent the proof or establishment, by other means, that a person engaged in conduct with an intention referred to in subsection (3).

(6) Words and expressions used in paragraphs (2)(a) to (h) have the same meanings as in Subdivision A of Division 72, sections 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Division 119 of the Criminal Code, respectively. However (to avoid doubt) this does not include the fault elements that apply under the Criminal Code in relation to those provisions of the Criminal Code.

(7) This section does not apply in relation to conduct by a person unless:

(a) the person was not in Australia when the person engaged in the conduct, or

(b) the person left Australia after engaging in the conduct and, at the time that the person left Australia, the person had not been tried for any offence related to the conduct.

(8) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).

(9) Where a person renounces their Australian citizenship under this section, the renunciation takes effect, and the Australian citizenship of the person ceases, immediately upon the person engaging in the conduct referred to in subsection (2).

4.13. Such conduct must also be done with the intention of advancing a political, religious, or ideological cause, and with the intention of coercing, or influencing by intimidation the government of the

Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country, or the public or a section of the public.

4.14. If the conduct is engaged in by a person who is a member of, or is instructed by or in cooperation with, a 'declared terrorist organisation' pursuant to s 35AA, the person is deemed to have had the requisite intention.

4.15. For s 33AA to apply, the person must also have been outside Australia when they engaged in the relevant conduct, or the person must have left Australia following the conduct and, at the time of leaving Australia, the person had not been tried for any offence related to the conduct (this is one reason the external affairs power appears to directly support enactment of the provisions).

Section 35 – Service in enemy armed forces or 'declared terrorist organisation'

4.16. Amendments to the *Allegiance to Australia Act* following the 2015 PJCIS review resulted in a restatement of s 35. Previously, s 35 was considerably shorter and simpler, reading:

35 Service in armed forces of enemy country

(1) A person ceases to be an Australian citizen if the person:

(a) is a national or citizen of a foreign country; and

(b) serves in the armed forces of a country at war with Australia.

(2) The person ceases to be an Australian citizen at the time the person commences to so serve.

Note: A child of the person may also cease to be an Australian citizen: see section 36.[82]

4.17. Section 35 is now in different terms. Sub-sections (1)–(4) provide as follows.

Service outside Australia in armed forces of an enemy country or a declared terrorist organisation
Cessation of citizenship

(1) A person aged 14 or older ceases to be an Australian citizen if:

(a) the person is a national or citizen of a country other than Australia, and

(b) the person:

i. serves in the armed forces of a country at war with Australia, or

ii. fights for, or is in the service of, a declared terrorist organisation (see section 35AA), and

(c) the person's service or fighting occurs outside Australia.

…

(2) The person ceases to be an Australian citizen at the time the person commences to so serve or fight.

(3) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).

(4) For the purposes of subparagraph (1)(b)(ii) and without limitation, a person is not in the service of a declared terrorist organisation to the extent that:

(a) the person's actions are unintentional, or

[82] Note that s 36 does not apply to revocation under ss 33AA, 35, and 35A.

(b) the person is acting under duress or force, or
(c) the person is providing neutral and independent humanitarian assistance.

4.18. The previous iteration of the Bill attracted significant criticism over the prospect of citizenship loss applying to children, including in instances where a conviction is obtained. Critics of this aspect of the Bill maintained that this was an unacceptable aspect of the proposed provisions that was contrary to 'the best interests' of children. For example, UNICEF's submission to the 2015 PJCIS review was highly critical of the scope of the proposed provisions with respect to children, stating:

> *UNICEF Australia emphasises that ceasing or revoking a child's citizenship in any circumstances is inconsistent with the rights of the child. This applies irrespective of whether the child is affected by virtue of the conduct of a responsible parent or in circumstances … where a child has been convicted for terrorism offences and certain other offences (section 35A).*
>
> *Not only is ending a child's citizenship inconsistent with the rights of the child, it is a response that seems formulated without a full and proper understanding of the ways in which children can find themselves involved in armed conflict (including terrorist related activities and others listed in the Bill). It also seems to be formulated without a full and proper understanding of how governments and communities can best act to help ensure that children are less vulnerable to radicalisation through addressing social isolation and exclusion, community education and encouraging cross cultural dialogue and community cohesion.*[83]

4.19. The Law Council of Australia raised similar concerns in its written submissions to me, identifying the failure of the legislation to account for the reduced capacity of children to intentionally engage in conduct at law as a serious concern,[84] a complexity which I noted in my opening remarks at the commencement of the public hearings.[85]

4.20. Furthermore, in evidence before me at the public hearing, the Australian Human Rights Commissioner made the following comment:

> *Children, we know, are at risk of being manipulated or exploited by adults; they may be victims more than they are perpetrators. And so in light of their physical and mental immaturity and developing neurological make-up, children should be treated differently to adults and afforded additional protection.*
>
> *Overall, the Commission considers that loss of citizenship should be possible only after criminal conviction for the gravest conduct that also repudiates allegiance to Australia.*
>
> *If that recommendation isn't accepted, then we submit that the procedural safeguards should be strengthened. We say the loss of citizenship should never be automatic, especially for children; it should require a positive decision by an appropriate Commonwealth officer, after careful consideration, reasonable justification, and due process. There should be robust review and oversight mechanisms.*[86]

4.21. The amendments suggested by the PJCIS were adopted and implemented to restate s 35 in its current form. The scope of the provision is now limited to persons aged 14 years or over (who are dual citizens thereby removing the potential to create stateless individuals, consistent with Australia's obligations under the *Convention on the Reduction of Statelessness*) and clarified that if a person does not serve with an enemy country voluntarily (e.g. by duress) they do not lose their Australian citizenship. As described above, the section as amended also includes requirements for

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83 UNICEF submission to the Parliamentary Joint Committee on Intelligence and Security Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, dated July 2015, p 13–14. See also Professor Clive Walker's public submission, 20 May 2019, p 6 where Prof Walker quotes from the *Convention on the Rights of the Child 1990*.

84 Submission dated 14 June 2019 – Law Council of Australia, p 14–15.

85 Transcript of INSLM public hearing, Thursday 27 June 2019 – Renwick J, p 4.

86 Transcript of INSLM public hearing, Thursday 27 June 2019 – Santow, E, p 52–53.

the Minister to provide notice of loss of citizenship, and potentially exempt a person from the operation of s 35.

4.22. In its current form, s 35 provides essentially that dual citizens aged 14 years or over automatically cease to be Australian citizens if they:

(a) serve in the armed forces of a country at war with Australia

(b) fight for, or are in the service of, an organisation declared to be a 'declared terrorist organisation' pursuant to s 35AA.

Section 35AA – Declaration of terrorist organisation by Minister

4.23. Under s 35AA, the Minister, by legislative instrument, can declare any terrorist organisation within the meaning of para (b) of the definition of the *terrorist organisation* in ss 102.1(1) of the *Criminal Code* to be a declared terrorist organisation.

4.24. Before exercising that power, however, the Minister must be satisfied, on reasonable grounds, of one of the following criteria:

(a) the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act

(b) the organisation advocates the doing of a terrorist act and is opposed to Australia or Australia's interests, values and beliefs.

4.25. A declaration under s 35AA may be reviewed by PJCIS 'as soon as possible after the declaration is made'.

4.26. At the time of writing this report, ministerial declarations were made in accordance with s 35AA in relation to the following organisations:

(a) Islamic State (declared on 4 May 2016)

(b) Jabhat al-Nusra (declared 15 August 2017).

4.27. In a supplementary submission provided after the public hearing, the Law Council of Australia criticised the drafting of ss 35AA(2)(b) as ambiguous and lacking clarity, and submitted that it should be amended so that it requires that an organisation be 'seriously prejudicial to the vital interests of Australia' to remove the ambiguity in the present provision.[87] I do not agree there is any ambiguity.

Section 35AB – Exemptions from conduct provisions for Australian law enforcement and intelligence

4.28. Section 35AB provides:

(a) Sections 33AA and 35 do not apply to conduct engaged in by:
  (a) a person in the proper performance of a function of an Australian law enforcement or intelligence body, or
  (b) a person acting in the course of the person's duty to the Commonwealth in relation to the defence, security or international relations of Australia.

(2) In this section: *"Australian law enforcement or intelligence body"* means a body, agency or organisation of the Commonwealth, or of a State or Territory, that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud, security intelligence, foreign intelligence or financial intelligence.

[87] Supplementary submission dated 16 July 2019 – Law Council of Australia.

4.29. Section 35AB provides self-evidently necessary exemptions in uncontroversial terms.

4.30. A primary concern to emerge during the course of the PJCIS's review of the Allegiance to Australia Bill concerned the scope of conduct considered to be within the ambit of the provisions. In particular, the PJCIS noted concerns that the phrase 'in the service of' a declared terrorist organisation, as set out under s 35 of the Bill, had the potential to unwittingly apply to conduct undertaken by humanitarian assistance agencies, as well as those core activities undertaken by Australia's intelligence and law enforcement agencies.[88]

4.31. The Committee expressed the view that it was unlikely that s 35 was intended to capture these activities within the scope of its operation, but also that this was not specifically clear in the Bill as it was drafted. The Committee ultimately recommend that the Bill be amended to clarify the intended scope of the operation of the citizenship loss provisions with respect to 'legitimate' or otherwise unintentional conduct in two ways:

(a) to make explicit that the provision of neutral and independent humanitarian assistance, and acts done unintentionally or under duress, are excluded from the scope of the provisions

(b) to ensure that staff members or agents of Australia's law enforcement or intelligence agencies are exempted as part of the 'proper and legitimate performance of their duties'.[89]

4.32. These recommendations were accepted by government and s 35 was amended to include an additional provision expressly defining conduct excluded from triggering automatic loss of citizenship under the provision. The provision now reads:

> (4) For the purposes of subparagraph (1)(b)(ii) and without limitation, a person is not in the service of a declared terrorist organisation to the extent that:
>
> (a) the person's actions are unintentional; or
>
> (b) the person is acting under duress or force; or
>
> (c) the person is providing neutral and independent humanitarian assistance.

4.33. The Bill was further amended to expressly exclude the operation of both s 33AA and 35 from applying to law enforcement or intelligence officers or conduct undertaken in accordance with defence, security or international relations duties to the Commonwealth.[90] Furthermore, in order to ensure the full extent of Australian law enforcement and intelligence bodies could be assured that the provisions did not apply to them, an express definition for the purposes of the provision, which included under the new s 35AB.

4.34. This defined an 'Australian law enforcement or intelligence body' to mean: 'a body, agency or organisation of the Commonwealth or of a State or Territory, that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud, security intelligence, foreign intelligence or financial intelligence'.

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88 Parliamentary Joint Committee on Intelligence and Security Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, dated 4 September 2015, p 105.

89 Parliamentary Joint Committee on Intelligence and Security Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, dated 4 September 2015, p 105.

90 *Australian Citizenship Act 2007* (Cth) s 35AB.

Conviction-based provisions

Section 35A – Conviction for terrorism and related offences

4.35. Section 35A, unlike ss 33A and 35, does not automatically deprive dual citizens of their Australian citizenship if they engage in certain conduct; it requires the Minister to determine in writing that a person's citizenship should be revoked.

4.36. The power to revoke a person's citizenship under s 35A is only enlivened in the following circumstances:

a) the person has been convicted of a specified offence related to terrorism,

b) the person has been sentenced to at least six years imprisonment for such offences,

c) the person is a national or citizen of a country other than Australia,

d) the Minister is satisfied that the person's conduct demonstrates that they have repudiated their allegiance to Australia, and

e) the Minister is satisfied that it is in the public interest for the person to no longer be an Australian citizen, having regard to certain factors.

4.37. The 'specified offences' relevant for the purposes of s 35 are as follows:

a) a provision of Subdivision A of Division 72 of the *Criminal Code*,

b) a provision of Subdivision B of Division 80 of the *Criminal Code* (treason),

c) a provision of Division 82 of the *Criminal Code* (sabotage) other than section 82.9 (preparing for or planning sabotage offence),

d) a provision of Division 91 of the *Criminal Code* (espionage),

e) a provision of Division 92 of the *Criminal Code* (foreign interference),

f) a provision of Part 5.3 of the *Criminal Code* (except section 102.8 or Division 104 or 105),

g) a provision of Part 5.5 of the *Criminal Code*,

h) sections 6 or 7 of the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*.

4.38. The Minister's power to revoke a person's citizenship under section 35A is not expressly limited to persons over 14 years of age, as is the case under s 33AA or 35. However, this power cannot extend to children under 10 years of age, or children between 10 and 14 years of age who did not 'know their conduct is wrong', because these children are not considered to have the capacity to be convicted of criminal offences under a law of the Commonwealth.[91]

4.39. If the trial has been on indictment as it invariably will have been, then, there must have been a trial by jury as required by s 80 of the Constitution: see my discussion of s 80 in my *Report to the Prime Minister on the prosecution and sentencing of children for terrorism offences*[92]. By s 35A(8) the Minister must revoke a determination of cessation of citizenship, which then has, by s 35A(9), retrospective effect if:

a) a conviction because of which the determination was made is later overturned on appeal, or quashed, by a court

b) that decision of that court has not been overturned on appeal

c) no appeal, or further appeal, can be made to a court in relation to that decision.

4.40. Second, by s 35A(1)(b), the person has 'in respect of the conviction or convictions, been sentenced to a period of imprisonment of at least 6 years, or to periods of imprisonment that total at least 6 years'. The sentence will have been passed by a judge exercising federal jurisdiction and applying

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91 *Crimes Act 1914* (Cth) ss 4M, 4N.

92 INSLM *Report on the prosecution and sentencing of children for terrorism offences*, pp 32–35

the relevant matters in the Crimes Act (such as section 16A 'Matters to which court to have regard when passing sentence' and section 19AG, which sets out the 'the 75 percent rule' whereby the person must serve three quarters of the head sentence before being eligible for parole).

4.41. Section 35A(4) contains provisions making clear a suspended sentence does not count, and where a person is convicted of offences covered by subsection (1)(a) and other offences, the whole sentence counts unless the irrelevant part is clearly identifiable in the sentence imposed.

4.42. Third, by s 35A(1)(c), 'the person [must be]… a national or citizen of a country other than Australia at the time when the Minister makes the determination'. This ensures compliance with Australia's international obligations to avoid statelessness as set out in the *Convention on Statelessness 1961*.

4.43. Fourth, by s 35A(1)(d), there must be Ministerial satisfaction, formed personally (s 35A(10)) that the conduct of the person to which the convictions relate 'demonstrates that the person has repudiated their allegiance to Australia'.[93]

4.44. Fifth, if and only if those matters are established does the Minister then embark on the ultimate question, namely satisfaction whether or not it is in the public interest for the person to remain an Australian citizen, by having regard to seven listed factors, all of which appear to be mandatory relevant considerations, namely:

a) the severity of the conduct that was the basis of the conviction or convictions and the sentence or sentences
b) the degree of threat posed by the person to the Australian community
c) the age of the person
d) if the person is aged under 18 – the best interests of the child as a primary consideration
e) 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
f) Australia's international relations
g) any other matters of public interest.

4.45. The note to subsection 1 correctly states that there could be judicial review of such a determination in the High Court or the Federal Court, and that would appear to include:

a) review as a jurisdictional fact the conviction, the sentence and the dual nationality[94]
b) review of the reasonableness of the satisfaction as to repudiation of citizenship and the public interest in determining cessation[95].

4.46. Sixth, in subsections 5 and 7 there must be notice given to the person of their loss of citizenship or reasonable attempts to give such notice unless there is a written determination by the Minister that such notice should not be given because so giving 'could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations'. That must be reconsidered every 6 months for a maximum period of five years.

4.47. By s 35B, it is provided that:

(b) A notice that is given to a person under paragraph 35A(5)(a) must:

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93 This was the subject of some criticism by the Executive Council of Australian Jewry in their written submissions prior to the public hearing, in which the Council submitted that the legislation should be amended such that the Minister must arrive at the conclusion having regard to *all* relevant circumstances, not just the conduct underlying the conviction, when examining whether a person had repudiated their citizenship – Executive Council of Australian Jewry Inc. public submission to INSLM review, 18 April 2019, p 3. The extent to which this concern is or is not addressed by the matters set out at ss 35A(1)(e) is not clear.

94 See French CJ et al in *M70/2011 v Minister for Immigration and Citizenship & Anor* (2011) 244 CLR 144.

95 See *Minister for Immigration and Citizenship v Li* [2013] HCA 18 and *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63.

i. state that the Minister has determined under section 35A that the person has ceased to be an Australian citizen, and

ii. include the reasons for the decision to make the determination.

(3) However, a notice given to a person under […] paragraph 35A(5)(a) must not contain information, or content of a document, if:

(a) the information or content includes any operationally sensitive information (within the meaning of the *Independent National Security Legislation Monitor Act 2010*), or

(b) the disclosure of the information or content would or might prejudice:

i. the security, defence or international relations of Australia, or

ii. the performance by a law enforcement or security agency (within the meaning of the *Independent National Security Legislation Monitor Act 2010*) of its functions, or

(c) the disclosure of the information or content would or might endanger a person's safety, or

(d) the disclosure of the information or content would be likely to be contrary to the public interest for any other reason.

4.48. Finally, by Sch 1, s 8 (4) of the Allegiance to Australia Act it is provided that:

Section 35A of the *Australian Citizenship Act 2007* (as amended by this Schedule):

(a) applies in relation to persons who became Australian citizens before, on or after the commencement of this item, and

(b) does not apply in relation to a conviction of a person before the commencement of this item unless:

i. the conviction occurred no more than 10 years before the commencement of this item, and

ii. the person was sentenced to a period of imprisonment of at least 10 years in respect of that conviction.

4.49. I will later in the report measure s 35A against the INSLM Act tests, especially necessity, proportionality, compliance with international obligations and protection of individual rights.

Process after loss of citizenship

Minister must give notice or make a determination not to give notice

4.50. Upon the Minister becoming aware of citizenship ending under s 33AA, 35, or 35A, the Minister must give (or make reasonable attempts to give) notice to the person (the revokee) of their citizenship ending, as soon as is practicable.[96] The notice to the revokee must contain the information specified under s 35B of the Act, in addition to setting out the avenues available to the person for seeking review of the cessation of their citizenship.[97]

4.51. Under s 35B of the Act, any notice to be given to a revokee under ss 33AA(10)(a) of 35(5)(a) must contain:

(a) a statement that the Minister has become aware of conduct because of which the person has, under section 33A or 35, ceased to be an Australian citizen (but it does not require a date of cessation to be identified)

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

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

(b) a basic description of that conduct. Examples of notices, in relation to cessation under s 35, that I have been able to review for the purposes of this review have satisfied this requirement via a statement to the following effect:

> *Specifically, I have become aware, that you were in the service of [named declared terrorist organisation] on and after [date of declared terrorist organisation declaration pursuant to s 35AA], the date of which [named organisation] became a declared terrorist organisation for the purposes of s 35AA of the Act. As a result, your Australian citizenship ceased on [date of declaration].*

4.52. Where an individual's citizenship has ceased by operation of s 35A(5)(a), the notice must state that the Minister has made a determination that the person has ceased to be an Australian citizen and include a statement of reasons for the Minister's determination.[98] Although not expressly required under the Act, I note that the notices I have had access to during the course of my review have also contained a statement informing revokees that, pursuant to s 36A of the Act, they can never become Australian citizens again unless one of the specified circumstances where citizenship is taken not to have ceased applies to the revokee.[99]

4.53. Conversely, the Minister retains discretion to make a determination not to provide notice to a revokee if satisfied that the giving of notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations.[100]

4.54. The Minister is obliged to consider whether a determination not to give notice should be revoked, firstly, no later than six months after the date of the initial determination and secondly, at least every six months during the course of five years since the date of the original determination. At each point in which the Minister considers whether a determination should be revoked, the prejudice to the key Australian government equities (security, defence, etc.) is reevaluated.

Ministerial reporting requirements for citizenship loss cases

4.55. Where an individual's citizenship ceases, whether automatically or by Ministerial determination under s 35A, and:

(a) the Minister has given or unsuccessfully attempted to give notice to the individual concerned

(b) the Minister has made a determination under ss 33AA(12), 35(7) or 35(5)(a) not to give notice to the individual concerned the Minister must then brief the PJCIS of the event, in writing and as soon as practicable after the occurrence of the event.[101] Based on the materials I have had access to as part of my review, this has almost always taken place on or around the same date of the Minister's declaration of awareness (for ss 33AA and 35 cases) or determination (for s 35A cases). It is an important safeguard.

4.56. The Minister is subject to an additional requirement to report to the Parliament as a whole on instances of citizenship cessation.[102] A report must be tabled in each House of Parliament as soon as practicable after each six-month period since the commencement of the reporting requirement.[103] The requirements of the Parliamentary reports are set out under s 51B(1) of the Act and include:

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98 *Australian Citizenship Act 2007* (Cth) s 35B(2)(a)–(b).

99 *Australian Citizenship Act 2007* (Cth) s 36A. The specified circumstances where citizenship is taken not to have ceased are set out under ss 33AA(14), (24) 35(9), (19) and 35A(8) and (9).

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

101 *Australian Citizenship Act 2007* (Cth) s 51C. The Committee can also request that Minister arrange for the Committee to receive a briefing, either orally or in writing, on the events notified. If requested, briefings must occur before the later of 20 sitting days after the occurrence of the event in either house of Parliament. The requirements for a briefing to the Committee are set out under s 51C(5).

102 *Australian Citizenship Act 2007* (Cth) s 51B.

103 The definition of 'reporting period' under s 51B(3) means:

(a) The period of 6 months beginning on the day this section commences; and

(a) details as to the number of notices given by the Minister under ss 33AA(10)(a), 35(5)(a) or 35A(5)(a)

(b) the number of notices the Minister unsuccessfully attempted to give under the above mentioned provisions

(c) in cases of citizenship cessation under ss 33AA or 35, a brief statement of the matters informing the basis for the notice

(d) in cases of citizenship cessation under s 35A, a brief statement of the matters informing the basis of the Minister's determination.

4.57. These parliamentary reports are publicly available upon request.

Exempting a revokee from the operation of ss 33AA or 35

4.58. The Minister can decide, at any time including after an initial occurrence of citizenship loss, to exempt the revokee from the operation of ss 33A and 35,[104] but the Minister is not obliged to consider exercising that power in any given case.[105] That is, mandamus would not lie to compel consideration of exercise of the discretion.

4.59. In the event that the Minister does decide to consider exercising this power, he or she must have regard to a number of considerations. These include the degree of threat posed by the person to the Australian community; the age of the person; and (if the revokee is under 18 years of age) the best interests of the child or the severity of the individual's conduct as a primary consideration.[106] I have provided an illustrative overview of the exemption procedure as part of my flowchart analysis of the operations of the Citizenship Loss Board in Chapter 6.

4.60. As with cases where citizenship ceases, the Minister also remains subject to a Parliamentary reporting obligation in cases where there is a decision to exempt a revokee. After determining to exempt a revokee, the Minister must lay before each House of Parliament a statement setting out the decision, and the reasons for making the decision and advise the PJCIS.[107] It is important to note that, in providing such a statement to Parliament, the Minister may elect not to publish the name or any identifying information of a person connected with the matters outlined in the statement if the Minister considers that it would not be in the public interest to publish such information.[108]

4.61. While the rules of natural justice apply to the Minister's decision to exempt or not to exempt a revokee from the operation of s 33AA or 35,[109] and to a decision to revoke a citizenship under s 35A,[110] the rules of natural justice are expressly not to apply to any other decisions or exercises of power by the Minister under these sections. Decisions made by the Minister not to consider an exemption for a revokee or not to provide a notice to a revokee would therefore not be subject to the requirements of natural justice.

4.62. The scope for revocation of a determination under s 35A is more limited than in the case of ss 33AA and 35. If the Minister makes a determination to revoke a citizenship under s 35A on the basis of a specified conviction, and that conviction is subsequently overturned, then the Minister must revoke the determination to revoke the person's citizenship. Upon revocation, the revokee's citizenship is

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(b) Each subsequent 6-month period.

104 *Australian Citizenship Act 2007* (Cth) ss 33AA(14), 35(9).

105 *Australian Citizenship Act 2007* (Cth) ss 33AA(15), 35(10).

106 *Australian Citizenship Act 2007* (Cth) ss 33AA(17), 35(12).

107 *Australian Citizenship Act 2007* (Cth) ss 33AA(18), 35(13), 51C.

108 *Australian Citizenship Act 2007* (Cth) ss 33AA(19), 35(14).

109 *Australian Citizenship Act 2007* (Cth) ss 33AA(22), 35(17).

110 *Australian Citizenship Act 2007* (Cth) s 35A(11).

taken never to have ceased.[111] In no other situation does the Minister appear to have power under s 35A to revoke a determination that a person ceases to be a citizen.

4.63. Sections 33AA, 35 and 35A each state that they do not displace a person's right to seek judicial review under either s 75 of the Constitution or s 39B of the *Judiciary Act 1903* (Cth).[112] They also make it clear that if, for example, a court finds that the person was not a dual citizen or the preconditions for the cessation of citizenship are found by a court not to exist, the revokee's citizenship is taken never to have ceased.

4.64. The Australian Human Rights Commission identified the limited nature of this form of judicial review in its submission prior to the public hearing:

> *The Commission is also concerned that the automatic revocation of citizenship is only amenable to a very limited form of judicial review. This is because the revocation occurs by operation of the law, without a 'decision' being made, and without any positive duty on the Minister to consider exercising the exemption power. It is therefore unlikely that this outcome could be challenged through a writ of mandamus. It appears that one potential narrow avenue is seeking declaratory relief from the court, to the effect that the automatic provisions do not apply to their circumstances.*[113]

4.65. To address this difficulty, the Commission submitted that any decision leading to a loss of citizenship should be subject to independent merits review and judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Similar concerns, with a similar suggested solution, formed part of the Law Council of Australia's submission.[114]

4.66. There is no provision for any merits review of the operation of s 33AA and 35 by a revokee, or for merits review of a determination under s 35A, save for seeking merits review of the QSA which will usually have considered the conduct and intent triggering the operation of law provisions.

4.67. Finally, because the CLB is a mixture of intelligence officials and public servants, it appears that neither the Commonwealth Ombudsman nor the IGIS has jurisdiction over its deliberations.

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

112 *Australian Citizenship Act 2007* (Cth) ss 33AA(24), 35(19), 35A(1)(note).

113 Submission dated 14 June 2019 – Australian Human Rights Commission, p 43.

114 Submission dated 14 June 2019 – Law Council of Australia, p 33–35.

5. THE ADMINISTRATIVE PROCESSES BEHIND THE OPERATION OF LAW PROVISIONS

5.1. The provisions do not provide any detail on what processes take place to enable the Minister to *become aware* of particular cases of citizenship loss. Substantial insight into the administrative processes of the citizenship loss provisions was provided during the course of the PJCIS's 2015 review of the Allegiance to Australia Bill.[115] A key observation to emerge from the Committee's review was that, based on consistent concerns raised by submitters to the committee's review, there was a substantial lack of clarity as to the administrative procedures underpinning the operation of the provisions. I agree.

5.2. I have provided my own analysis of the administrative processes for citizenship loss for the purposes of my review. Based on information obtained pursuant to s 24 of my Act and evidence presented during the hearings I conducted, I have prepared Flowchart 1.

5.3. That said, it is important to repeat that both ss 33AA and 35 operate automatically to remove a person's Australian citizenship if the person engages in the specified conduct in those sections[116]. This operation of the provisions does not depend on the Commonwealth or any other person *knowing about* the conduct. In fact, the operation of the law provisions is the same whether the Minister or other officials are entirely unaware of the conduct.

The role of the Department of Home Affairs and the Citizenship Loss Board

5.4. The Department of Home Affairs plays a central role in the citizenship loss processes (see flowchart), as it coordinates the processes of assessing relevant conduct and identifying dual-national Australian citizens to whom one or more of the operation of law provisions might apply. This work involves close cooperation with central intelligence and law enforcement agencies.

5.5. In this connection, the Commonwealth Counter-Terrorism Coordinator (Home Affairs Deputy Secretary-level) chairs an inter-departmental committee known as the Citizenship Loss Board (CLB). The CLB is comprised of representatives from those Commonwealth departments and agencies with responsibility for national security, intelligence and law enforcement. The CLB supports the Department of Home Affairs in administering the citizenship loss provisions, however it is not a decision-making body recognised by the Act.

5.6. A key function of the CLB is to consider relevant information in relation to possible dual Australian citizens whose Australian citizenship may have ceased and satisfy itself that citizenship has been lost in accordance with the criteria under the citizenship loss provisions and that the citizen in question is a dual citizen. This often takes place over several instances of deliberation in the course of regular CLB meetings. Once satisfied of the threshold elements to a high degree of satisfaction, the CLB generally 'endorses' a particular case of citizenship loss to progress to the Minister for Home Affairs for his awareness.

5.7. The CLB also assesses the implications or consequences that loss of an individual's citizenship could have on such matters as security, defence and international relations.

5.8. There has been conjecture and some criticism about the role played by the CLB in citizenship loss. In evidence before me at the Public Hearing, the Attorney-General's Department indicated that the CLB status is limited to that of an inter-departmental committee:

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115 See Parliamentary Joint Committee on Intelligence and Security Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, dated 4 September 2015, Chapter 5, p 63–75.

116 S 33AA operates automatically providing the intent element in subsection (3) is met.

> *I think the other issue about the Citizenship Loss Board is it's an inter-agency committee. Ultimately the advice provided to the Minister for Home Affairs is prepared and provided by the Department of Home Affairs – which is subject to the Ombudsman. The Citizenship Loss Board itself has no legal identity and there's no decision making power*.[117]

5.9. Notwithstanding this, it is important to recognise that even though the CLB is not an administrative decision-maker as such, its advisory role can exert decisive influence in citizenship loss cases, meaning administrative action can inevitably flow from its deliberations. This was made clear by Dr Rayner Thwaites in evidence before the PJCIS, where he stated:

> *[T]he reality is that there will be administrative action that underlies the operation of the new provisions, and that needs to be acknowledged and there need to be clear standards that are to be employed by the relevant decision makers to ensure that the measure as framed does not invite dysfunction and tie up valuable government resources that would otherwise be usefully addressed to keeping our fellow Australians safe. These points are not simply lawyers' points in the pejorative sense that that word sometimes is used. They lose sight of the fact that many of the legal objections, if heeded, would provide for greater clarity in decision making and accountability, curtail potential abuse of the power, minimise error and bring clarity to the purpose and goals.*[118]

5.10. Noting the consequences that can flow from the loss of citizenship, the concept of questions of conduct being determined, in the sense of ascertained, by an administrative group as opposed a judicial or quasi-judicial fact-finding body has generated significant debate.

5.11. For example, in a submission to the 2015 PJCIS review, the Executive Council of Australian Jewry commented that the administrative processes of the citizenship loss provisions enable decisions on a an individual's allegiance to Australia to be lost 'on the sole basis of untested interpretations of alleged evidence, with no opportunity for the accused person to … challenge the case against him'.[119]

5.12. Similarly, the Law Council of Australia drew attention to the lack of clarity surrounding the administrative processes surrounding the operation of the provisions, submitting:

> *[T]here is a whole gathering of information in a legal vacuum from across various government departments, with, it seems, no controls, transparency or accountability in any of that process ultimately leading to the minister issuing a notice and/or an exemption. So it really underscores the fact that there is an entire vacuum around that process.*[120]

5.13. The Refugees Council of Australia made some similar observations:

> *[I]f we had a person in Australia, for example, who was suspected of a different kind of serious crime – if they had been suspected of multiple murders, for instance – we would not penalise them in this manner on the basis of suspicion alone. We would have to have due process, even if we had people involved who, as you suggested, witnessed what had happened or suggested that they had strong evidence of it. That evidence would have to be presented in a court of law … I do not see why we should be applying a differential standard here to different types of serious crimes. Especially when the penalties are so serious, I think due process becomes even more important, rather than less.*[121]

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117 Attorney-General's Department, INSLM Public Hearing Canberra, 27 June 2019.

118 Dr Rayner Thwaites, Committee Hansard, Canberra, 5 August 2015, p 45

119 Executive Council of Australian Jewry, Submission to the Parliamentary Joint Committee on Intelligence and Security Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, p 6.

120 Mr Duncan McConnel, President, Law Council of Australia, Committee Hansard, Canberra, 4 August 2015, p 6.

121 Ms Lucy Morgan, Information and Policy Coordinator, Refugee Council of Australia, Committee Hansard, Canberra, 5 August 2015, p 23.

5.14. The Secretary for the then Department of Immigration has attempted to clarify the extent of the decisions made as part of the administrative processes for citizenship loss, telling the PJCIS:

> *[I]t is the government's contention … that in that circumstance the minister is not in fact making a decision to deprive anyone of anything. The minister is operationalising because for administrative purposes the fact of someone's renunciation of their allegiance to Australia … has already occurred … They will have to satisfy themselves that it has occurred. They are pulling together an information brief that suggests that they are satisfied that the conduct has occurred.*[122]

Explanation of the CLB processes

5.15. Before the CLB can provide guidance or direction on the cessation of an individual's citizenship, it first must have access to the relevant information that the individual's citizenship may have automatically ceased. This information is sourced by and presented to the CLB by a number of 'interagency working groups'.

5.16. Once this information is received, ASIO then develops a 'qualified security assessment' (QSA) on the individual. This document is developed for the Director-General of Security, who then furnishes the QSA to the CLB and concurrently advises the Minister that is has been developed. At this point, the Minister for Home Affairs may decide whether or not to sign a certificate withholding notification of the outcome of the QSA from the individual under assessment. The issue of such a certificate effectively renders the QSA 'silent' and means that the rights of review are nugatory.

5.17. At the same time, the Department of Home Affairs leads the development of an 'issues paper' with respect to the individual alleged to have lost their Australian citizenship. This paper is developed through the input of the departments and agencies comprising the CLB and is designed to pinpoint the key issues for discussion at CLB meetings.

5.18. The efficacy and appropriateness of this approach has been equally challenged, particularly the 'practice' of not always seeking expert advice or consulting the 'other country' in assessing whether the individual is a dual citizen. Professor Kim Rubenstein of the Australian National University commented on this issue in evidence before me at the public hearing, noting:

> *You have already identified and the Department accepted in Neil Prakash that there was no attempt to determine as matter of international law where there is a dual citizen. So there is I would argue an unlawful decision here because they haven't actually determined according to law because the only way you can determine that is by the other country affirming whether in fact the person is a national.*[123]

5.19. I have made remarks earlier in this report about the risk of the conclusions on foreign law being 'wrong'.

5.20. Next, the CLB members convene to deliberate upon the Home Affairs issues paper, the QSA and any supplementary oral briefings provided by ASIO. The purpose of these deliberations is to test whether there is sufficient evidence to reach a consensus that the thresholds for the conduct and dual citizenship elements for citizenship loss have been met. In evidence before the PJCIS, the Secretary of the then Department of Immigration referred to this as a small-'d' decision.[124]

5.21. Once the CLB reaches a consensus (to a high degree of confidence) that the threshold elements have been demonstrated, the CLB 'endorses' Home Affairs' issues paper and proceeds to consider the potential implications that could flow from the loss of the person's citizenship. This involves

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122 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, Committee Hansard, Canberra, 10 August 2015, p 9

123 Transcript of INSLM Public Hearing 27 June 2019, Professor Rubenstein, p 79.

124 Parliamentary Joint Committee on Intelligence and Security Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, dated 4 September 2015, p 71.

assessing the risks posed to Australia's security, defence and international relations 'equities' and how potential risks can be managed.

5.22. Any outcomes of this assessment, as well as the 'endorsed' issues paper, are then used to inform the development of a Ministerial submission on the relevant citizenship loss case. The Ministerial submission also includes a recommendation on whether a notice advising loss of Australian citizenship should be issued to the individual. The respective answer to the question of whether or not notice should be given to a particular person varies from case to case and is generally reflective of concerns or issues raised in the course of the CLB's consideration of government equities likely to be impacted by a particular case of automatic citizenship loss. It should also be noted that, depending upon the circumstances of individual cases, the Ministerial submission may also contain a recommendation on whether rescission and exemption from the operation of ss 33AA or 35 should be considered for a particular individual.

5.23. The Ministerial submission is then provided to the Minister along with a copy of the individual's QSA for consideration. If the Minister is satisfied that the individual's citizenship has ceased at some earlier, often much earlier, date, the Minister is said to have become 'aware' of the cessation of the person's citizenship. Once the Minister *becomes aware* of a particular case of citizenship loss, they can exercise discretion not to issue a notice in circumstances where to do so may jeopardise operational matters. The Secretary of Home Affairs explained this to the PJCIS Committee:

> *There is a discretion in two elements of the issuance of the notice. One is in relation to the person to whom it is issued – it might be issued to the police or it might be issued to the intelligence agencies or it might be issued to other parties so that they can be seized of that and be aware of what the minister has decided. Or the Minister could come to the view, I'm not going to issue this at this particular point in time because I've been advised that that would compromise operations*.[125]

5.24. Evidence from Home Affairs and the Attorney-General's Department (AGD) during the INSLM Public Hearing was that, regardless of the reliance placed on the QSA by the CLB that the conduct element was satisfied, the loss of citizenship under the operation of law provisions is not dependent on the provision of the QSA by ASIO or for that matter on the administrative processes described here. This is because according to the agencies the question of whether the conduct element has been made out is a *matter of fact.* Where a QSA is subsequently overturned by the Security Appeals Division of the Administrative Appeals Tribunal, the conduct element may be able to be substantiated by other means.

> DR RENWICK: *Now, let's assume that hypothetically [the AAT concluded] 'Yes, we're satisfied that you were never in Syria', for example. So that quashes or sets aside the QSA. Is it your view that that's it? That from the Commonwealth point of view in this hypothetical case, everyone accepts 'Yes, you didn't lose citizenship because that conduct which was the basis didn't exist.' Do I understand that correctly?*
>
> MR DEANE (Home Affairs): *I think in that example, there would be a very strong reason to go to the Minister and ask him to seriously consider rescinding and exempting.* ***It's not one of the events that are set out in the legislation which automatically reverses the citizenship loss.***
>
> **…**

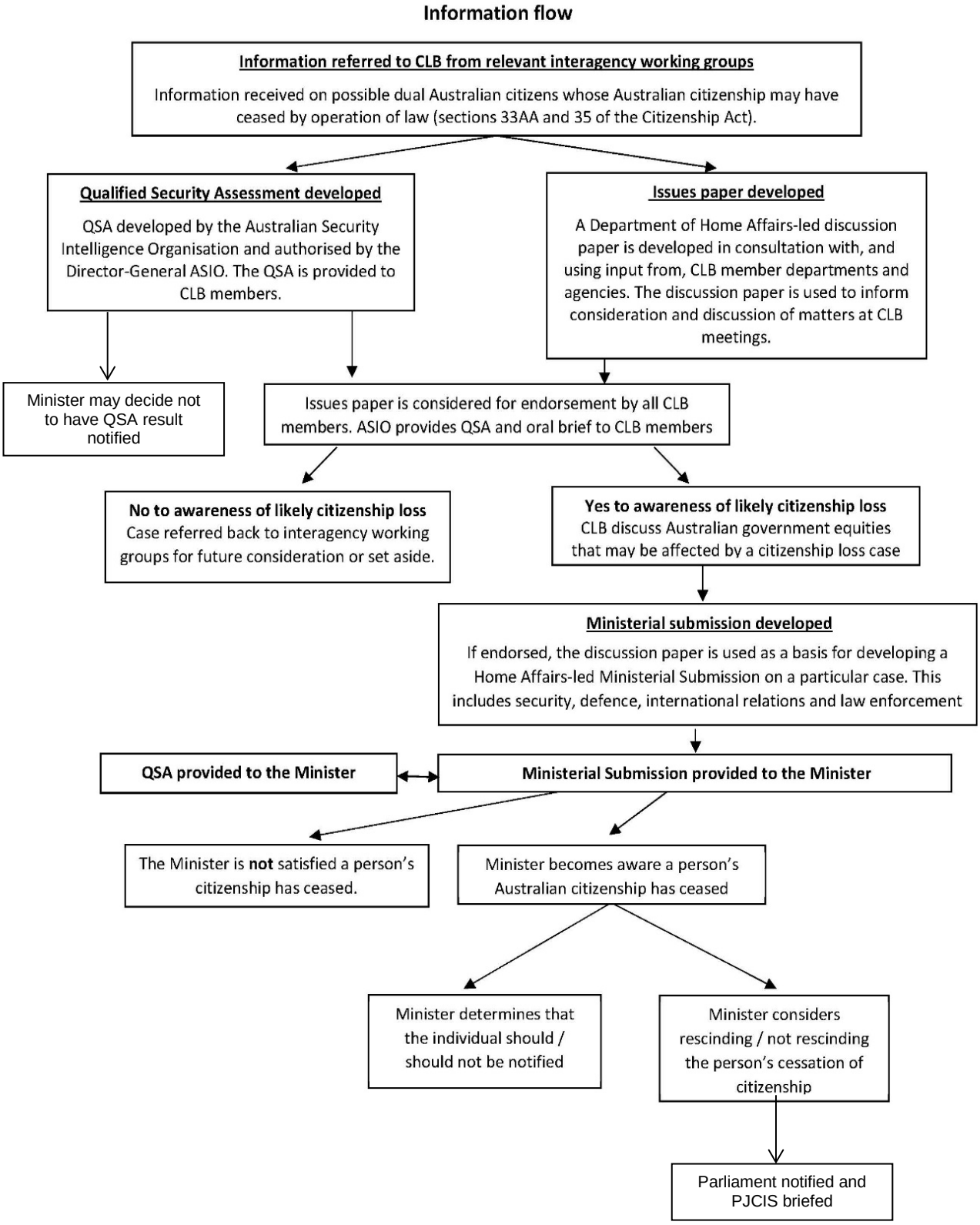
[125] Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, Committee Hansard, Canberra, 10 August 2015, p 15.

> DR RENWICK: *I've explored this a bit with Home Affairs before the break, but again, let's take this hypothetical example. If the AAT says: 'Well actually, we accept your evidence and your alibi evidence that you were never in Syria.' And therefore the QSA should be set aside. What Home Affairs said – well, in that situation, technically speaking, they would probably still need to go to the Federal Court to seek a declaration, or they would need to ask the Minister to exempt – because that's just setting aside the QSA. Do you agree with that?*
>
> MS CHIDGEY (AGD): *Yes, I do*.[126]

5.25. This means that the QSA process cannot be regarded as a sufficient protection of individual rights. Although loss of citizenship under ss 33AA and 35 operates automatically, consequential administrative decisions, such as cancelling an Australian passport, require action by officials. Further, upon becoming aware of citizenship loss the Minister is required to consider notification of loss to the revokee, and may choose to consider exemption. The instrument for ensuring the Minister and other officials are properly briefed is the CLB.

[126] INSLM Public Hearing Canberra, 27 June 2019.

Flowchart 1 - Overview of the Citizenship Loss Board



Public Hearing, Canberra, 27 June 2019

The Third INSLM (centre) with Counsel Assisting, Gim del Villar and Brodie Buckland

6. INSLM CONSIDERATION

INSLM Act tests for s 35A

6.1. As noted earlier, the INSLM Act requires me to review the operation, effectiveness and implications of the laws being monitored (s 6) and, having regard to Australia's international and federal obligations, to consider whether such laws:

a) remain proportionate 'to any threat of terrorism or threat to national security, or both'

b) remain necessary

c) contain appropriate safeguards for protecting the rights of individuals (s 8).

6.2. The laws that I am monitoring are not temporary or emergency measures: unlike some other laws which I have reviewed, they do not have a sunset provision bringing them to an end by a stated date unless renewed by the Parliament. Instead, they will they operate indefinitely unless repealed.

6.3. For the purposes of INSLM analysis, that means that they cannot be given the benefit of the doubt on the basis that they are temporary or emergency measures.[127]

6.4. Further, where, as here with s 35A, a particular provision has not yet operated, it should be 'explicable by reference to cases or situations in which the law can reasonably be expected to operate.'[128] As at the date of this report, s 35A has not been used. It is to be expected that as any dual citizens who have been sentenced to six years of imprisonment or more for conviction of any of the offences in s 35A(1)(a) become eligible for release whether on parole or otherwise, the Minister will consider in every such case whether s 35A should be used so as to allow the person to be deported from Australia following cessation of their citizenship.

Proportionality and necessity

6.5. The legislative aim of the Allegiance to Australia Act is well summarised in the preamble which sets out its statutory purpose, namely:

> *This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.*

6.6. As I have noted earlier, in both international law and Australian constitutional law, 'owing obligations' or 'allegiance' remains at the core of citizenship, and its opposite, alienage. Thus, to again quote what Gummow, Hayne and Heydon JJ said in *Singh v Commonwealth* [2004] HCA 43 about the power to make laws with respect to 'aliens':

> [200] *The central characteristic of that status is, and always has been, owing obligations ("allegiance") to a sovereign power other than the sovereign power in question (here Australia). That definition of the status of alienage focuses on what it is that gives a person the status: owing obligations to another sovereign power.*

6.7. The common bond owed by all citizens to the sovereign power of the Commonwealth of Australia is one that can be broken. This can be done by express renunciation: 'I decide to renounce my citizenship.' But it can also be done implicitly. The paradigm case of implicit renunciation would be spying or fighting for a declared enemy state during World War 2. I will later deal with s 35 'Service outside Australia in armed forces of an enemy country or a declared terrorist organisation'. I

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127 Compare First INSLM's *2011 Annual report*, p 6.

128 See First INSLM's *2011 Annual report*, p 11.

consider the case of an Australian citizen fighting for ISIL against the Australian Defence Force to be relevantly indistinguishable from that paradigm case.

6.8. Turning to conviction for serious terrorism offences, I consider the analogy remains good. Since 'a federal offence is, in effect, an offence against the whole Australian community',[129] sufficiently serious terrorism conviction may amount to an offence against the Australian community sufficient to be seen to break the common bond.

6.9. As I wrote earlier in this report, the Department of Home Affairs has submitted to me in this review:

> *Australia's counter-terrorism framework is a multi-faceted approach to managing the risk that emanates from terrorist and terrorism more generally. The framework is designed to be both preventative and responsive, and to apply to threats both offshore and onshore. It provides a range of mechanisms that operate in relation to an individual's level of risk, which can be used simultaneously or on their own. When a person's Australian citizenship ceases, they no longer have full and formal membership of Australian society. Citizenship cessation reduces the risk of a terrorist act being undertaken by that person in Australia.*

6.10. I agree with this part of the submission save that I would qualify the last sentence to read 'In some, possibly rare cases, citizenship cessation reduces the risk of a terrorist act being undertaken by that person in Australia.'

6.11. The Department also submitted:

> *At the time the terrorism-related citizenship loss provisions were inserted into the Citizenship Act, the threat environment was characterised by the danger that foreign terrorist fighters presented to Australia and its interests, particularly those who may seek to return to Australia after fighting with Islamic State in Syria and Iraq. While the number of Australians attempting to travel to the conflict zone has markedly diminished, around 80 Australians (or former Australians) remain in Syria and Iraq. Some of these individuals may attempt to leave the conflict zone and return to Australia. Amongst them, some may continue to show commitment to violent extremism, while others may no longer present security concerns. Each of these individuals' circumstances are unique and complex. In managing the risk presented by these individuals to Australia's safety and security, a suite of measures, that are sufficiently nuanced and can be applied on a case-by-case basis, is paramount.*

6.12. I agree with this quote, save here that I would replace the word 'paramount' with 'capable of being justified'.

6.13. True it is that the laws I am considering are not limited to involvement with ISIL; nevertheless, such involvement can be regarded as the main focus of the laws at this time.

6.14. The argument set out above in this chapter, read with my analysis of the current terrorism threat elsewhere in the report, seems to me to justify *some* laws which may result in cessation of Australian citizenship by dual-nationals on account of their terrorism activity. To be clear, I do not accept the submissions that such laws can never be justified. I do not consider that Australia's international obligations alter the position provided the *Convention on the Rights of the Child* and the *Convention on the Reduction of Statelessness* are complied with, and they otherwise pass muster under the INSLM Act.

S 35A and the INSLM Act

6.15. Turning to s 35A, I conclude that the law is necessary, proportionate, and contains appropriate safeguards for protecting the rights of individuals. Indeed so much seemed to be accepted by most submitters.

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[129] In *Pham v R* (2015) 256 CLR 550 the plurality said at [24]: 'As Kirby J observed in *Putland v The Queen*, a federal offence is, in effect, an offence against the whole Australian community and so the offence is the same for every offender throughout the Commonwealth.'

6.16. First, for the reasons set out above, a law which permits cessation of Australian citizenship, bearing in mind especially the current threat posed by Australian foreign fighters for ISIL, is capable of being necessary to protect the safety and security of Australia and its people. I agree with submitters such as the Executive Council of Australian Jewry that in some, perhaps many cases, it will, on balance, be better to permit a dual Australian citizen who is a terrorist to return to Australia, even perhaps if they cannot be tried here. But I consider there will be at least some cases where removal of Australian citizenship will be justified and be necessary to protect the safety and security of Australia and its people.

6.17. Second, key to a finding of necessity and proportionality is that the law allows an appropriate response to the 'unique and complex' circumstances of each individual. This flexibility and responsiveness is to be sufficiently found in s 35A, as:

a) there is a conviction by a jury – so the terrorist conduct is established beyond reasonable doubt

b) there is a substantial sentence of imprisonment of six years or more, imposed by a judge, which shows the level of seriousness of the conduct

c) there is proper protection against the person becoming stateless, through the requirement of dual citizenship

d) if those circumstances are established, the Minister must still be satisfied of two matters:

i. first, that 'the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia'

ii. second, by reference to an extensive, indeed comprehensive, list of factors, that it is 'not in the public interest for the person to remain an Australian citizen'. The Minister must consider the best interests of any child revokee as a primary consideration, thereby complying with Article 3 of the *Convention on the Rights of the Child*: s 35(12)(d).

6.18. Those factors, combined with the rights of judicial review under the Constitution and the Judiciary Act, also provide 'appropriate safeguards for protecting the rights of individuals.' Based on the analysis above, I therefore do not recommend repeal or amendment of s 35A and any cognate provisions on which s 35A depends.

S 35 and the INSLM Act

6.19. It is necessary to closely analyse the provisions and their operation. The following matters may be noticed about s 35 and its cognate provisions.

6.20. The first is the requirement that the person be 14 years or older; that is, the age at which a child ceases under federal law to have the *doli incapax* principle or the presumption against criminal intent apply.

6.21. Second, there must be no risk of statelessness; that is, there must be a person who has both Australian and other nationality. In this way this key international obligation is met.

6.22. Third, the person is one who:

a) serves in the armed forces of a country at war with Australia

b) fights for, or is in the service of, a declared terrorist organisation

6.23. Critically, if those first three factors exist, then citizenship is automatically lost, at that point, by operation of the law itself, without independent decision-making or determination by any person, such as a Minister, or body, such as a Tribunal.

6.24. Fourth, there is the process of declaration of a terrorist organisation by the Minister with automatic consideration of the declaration by the PJCIS: s 35A. The declaration may be disallowed by either House of the Parliament.

6.25. Fifth, there are carve-outs for Australian law enforcement or intelligence bodies or other official duties, as well as neutral and independent humanitarian assistance, and acting under duress or force, or unintentionally: s 35AB.

6.26. Sixth, there is the familiar provision in relation to giving notice; that is, a requirement that notice of loss of citizenship must be given, unless there is a Ministerial determination to the contrary, which may last for six month periods up until five years have passed. If notice is given, then, by s 35B(1) and (3):

(1) A notice that is given to a person under …35(5)(a) must:

a) state that the Minister has become aware of conduct because of which the person has, under s 35, ceased to be an Australian citizen; and

b) contain a basic description of that conduct.

6.27. Section 35B(3), the terms of which are noted above, equally applies.

6.28. Seventh, there is a power to exempt from the automatic operation of the law, which the Minister cannot be compelled to consider, let alone compelled to grant. If the Minister does decide to consider, however, the Minister must consider such of the following factors as are relevant:

s 35(12)

a) the severity of the matters that were the basis for any notice given in respect of the person under subsection (5), [that is the conduct which led to the loss of citizenship] or of matters that would have been the basis for giving a notice in respect of the person under paragraph (5)(a), but for the operation of subsection (7),

b) the degree of threat posed by the person to the Australian community,

c) the age of the person,

d) if the person is aged under 18 – the best interests of the child as a primary consideration,

e) whether the person is being or is likely to be prosecuted in relation to matters referred to in paragraph (a),

f) the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person,

g) Australia's international relations, any other matters of public interest.

6.29. While each factor must be considered (to the extent it is relevant), the respective weight to be given to particular factors is for the decision-maker alone, provided that the power is exercised reasonably: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24, p 41, and *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [paras 29, 63, 72, 88]. The range of matters to which a decision-maker may have regard in applying a criterion of 'public interest' is 'very wide indeed': *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, [42].

6.30. Section 35(12)(d) seeks to respond to Australia's obligations under the *Convention on the Rights of the Child*. As to those obligations, I direct readers to my last report to the Prime Minister, *The prosecution and sentencing of children for terrorism offences*.

6.31. Eighth, in notable contrast to the loss of citizenship which happens automatically when the circumstances and conduct in s 35(1) occur, if there is to be consideration of an exemption, the Minister must give procedural fairness: s 35(17). If an exemption is granted, moreover, that determination and reasons for it must be tabled in each house of the Parliament within 15 sitting days: s 35(13). The name and identifying details of the person may, however, be redacted if the Minister considers that their disclosure would be contrary to the public interest: s 35(14). However, the PJCIS must be briefed in any event: s 51C.

6.32. Finally, s 35(19) provides:

(19) To avoid doubt, a person's citizenship is taken never to have ceased under this section because of the person serving or fighting as set out in subsection (1) if:

(a) in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person did not so serve or fight (whether because of subsection (4) of this section or for any other reason), or

(b) in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person was not a national or citizen of a country other than Australia at the time the person served or fought, or

(c) the Minister makes a determination under subsection (9) in relation to the conduct to exempt the person from the effect of this section, or

(d) a declaration under section 35AA is disallowed by either House of the Parliament, and the person's citizenship would not have ceased under this section if that declaration had not been made.

6.33. While a person caught by these provisions does have the option of seeking a court declaration in the circumstances set out in s 35(19)(a), there is no onus of proof provided for in the section. The starting point may be 'he or she who asserts must prove' and that proving a negative – i.e. neither service nor fighting – may not be easy. Of course, the Minister may well want to rely on classified or sensitive material which would not be desirable to show to the former citizen. The requirements of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) may facilitate court closure orders and orders that classified documents are properly handled; however the Act does not permit the court to have regard to material in making a decision as opposed to inspecting material privately for the purposes of ruling on a privilege claim. There is first instance authority that in very special circumstances it may be possible for the court to receive evidence and consider material not shown to a party, but in the absence of appellate authority confirming this, it cannot be said that such a general principle has been established: see *Nicopoulos v Commissioner for Corrective Services* (2004) 148 A Crim R74; *Amer v Minister for Immigration*, FCA, Lockhart J, 19/12/1989.

6.34. For the reasons already set out, I accept that, at least in some circumstances, a law which removes Australian citizenship from a dual citizen, aged over 14, who deliberately serves in the armed forces of a country at war with Australia; or deliberately fights for, or is in the service of, a declared terrorist organisation, *may* be necessary; however, the terms of s 35, especially its automatic and indiscriminate operation, lead me to the clear conclusion that the current terms and operation of the law:

a) are not proportionate to any threat of terrorism or threat to national security, or both

b) do not contain appropriate safeguards for protecting the rights of individuals

c) are not necessary.

6.35. One difficulty with s 35 (in contrast to s 35A or even s 33AA) is that it does not seek to have the disqualifying conduct correspond with specified criminal conduct. While there can be no doubt that fighting for or being in the service of a terrorist organisation may be a serious criminal offence, the seriousness varies considerably depending upon the nature of the acts and whether the fault element is intent or recklessness.

6.36. At the more serious end of the spectrum, the conduct could amount to contravention of s 80.1AA of the Criminal Code: 'Treason – assisting enemy to engage in armed conflict', which relevantly provides:

(1) A person commits an offence if:

(a) a party (the *enemy*) is engaged in armed conflict involving the Commonwealth or the Australian Defence Force, and

(b) the enemy is declared in a Proclamation made under section 80.1AB, and

(c) the person engages in conduct, and

(d) the person intends that the conduct will materially assist the enemy to engage in armed conflict involving the Commonwealth or the Australian Defence Force, and

(e) the conduct materially assists the enemy to engage in armed conflict involving the Commonwealth or the Australian Defence Force, and

(f) at the time the person engages in the conduct:

i. the person knows that the person is an Australian citizen or a resident of Australia; or

…

Note 1: There is a defence in section 80.3 for acts done in good faith.

Penalty: Imprisonment for life.

6.37. The conduct could also encompass offences such as :

a) membership of a terrorist organisation – maximum penalty 10 years imprisonment[130]

b) recruiting for a terrorist organisation – maximum penalty 25 years imprisonment[131]

c) training involving a terrorist organisation – maximum penalty 25 years imprisonment[132]

d) providing support to a terrorist organisation – maximum penalty 25 years imprisonment[133]

e) financing a terrorist – maximum penalty imprisonment for life[134]

f) entering foreign countries with the intention of engaging in hostile activities – maximum penalty imprisonment for life[135]

g) recruiting others to serve with foreign armed forces – maximum penalty 25 years imprisonment.[136]

6.38. However, the conduct might only amount to contravention of associating with terrorist organisations – an offence carrying a maximum penalty of three years' imprisonment.[137]

6.39. Of course, these are all maximum penalties. The actual sentence following conviction will vary considerably depending upon how serious the actual contravention is; the extent of any mitigation; especially assistance to the authorities; whether there is an early plea of guilty; and the criminal antecedents of the accused.

6.40. There are fundamental flaws with s 35.

6.41. First, s 35:

a) does not discriminate between the most serious criminal conduct and the least serious

b) makes no allowance for matters typically the subject of mitigation in criminal proceedings

c) does not in terms answer the two ultimate questions posed in s 35A; namely:

i. whether the conduct be treated as evincing an intention to renounce citizenship

130 *Criminal Code Act 1995* (Cth) s 102.3

131 *Criminal Code Act 1995* (Cth) s 102.4

132 *Criminal Code Act 1995* (Cth) s 102.5

133 *Criminal Code Act 1995* (Cth) s 102.7

134 *Criminal Code Act 1995* (Cth) s 103.2

135 *Criminal Code Act 1995* (Cth) s 119.1

136 *Criminal Code Act 1995* (Cth) s 119.7

137 *Criminal Code Act 1995* (Cth) s 102.8

ii. whether it is in the public interest for citizenship to cease.

6.42. The matters in s 35(12) are all matters which go to whether the operation of the law is proportionate to the threat the person poses, yet none is relevant under s 35(1); and the Minister is not obliged even to consider invoking the exemption process, where such matters may be considered. Further, that process is designed to be far more cumbersome than the automatic loss of citizenship for which s 35(1) provides.

6.43. The terms of s 35 itself contemplate that citizenship may cease even in a case of relatively low-level offending, with considerable mitigating factors, where the threat to the Australian community may be negligible and where it may be contrary to both Australia's international relations and the public interest.

6.44. The law therefore fails the sensible policy aim articulated by the Department of Home Affairs in its submission, which I have quoted in para 6.11 above; it does not provide a nuanced, case-by-case way of dealing with each individual's unique circumstances.

6.45. Second, the law is badly designed in a number of ways. The law is uncertain in its operation: the Minister may not know at the time, or ever, that citizenship of a particular person has been lost. True it is that the PJCIS in its report in 2015 predicted:

> 5.103 *The Committee's view is that proposed sections 33AA and 35 should continue to operate by law. The Committee notes these provisions would be an extension of the existing section 35 of the* Australian Citizenship Act 2007*, which serves as a precedent that loss of citizenship can occur by operation of law on the basis of conduct.*
>
> 5.104 *The Committee considers that these provisions are likely to be used only rarely and in circumstances where criminal prosecution, which could otherwise lead to loss of citizenship under proposed section 35A, is not possible. Given the intended exceptional nature of these provisions, the Committee has determined to support the approach proposed in the Bill for sections 33AA and 35.* [emphasis added]

6.46. While the Minister has stated publicly that ss 33AA and 35 have operated on 12 occasions, the government witnesses in the review accepted there may well be many formerly dual but now ex-Australian citizens who are simply unknown to them. That is no criticism of them; instead, it reflects the universal reality that not all wrong-doers are known to the authorities.

6.47. It has proved impossible to say that the provisions in ss 33AA and 35 '*are likely to be used only rarely and in circumstances where criminal prosecution … is not possible*'. As a matter of good administration, the government should be able to say with certainty who is or is not a citizen at a particular point in time, but it cannot do so under s 35.

6.48. The law also lacks the traditional and desirable accountability which comes from a person taking responsibility for making a reviewable decision, whether that is a Minister, an official, a judge or a tribunal member. Here, an inter-departmental committee, the CLB, conscientiously (on my review of the materials) seeks to draw to the attention of the Minister each known loss of citizenship under s 35, although it cannot be sure it has done so in every case. The CLB brings together ASIO's qualified security assessment with Home Affairs' conclusions as to dual citizenship for the ostensible purpose of the Minister deciding whether or not to notify the former citizen of their loss of status and rights of review. The Minister may then choose, but cannot be compelled, to consider exemption. The non-compellable nature of the exemption power means that mandamus will not issue and may mean that a quashing order will not be made in the unlikely event that jurisdictional error was established as there is no utility for any relief, save perhaps for a declaration: see *Plaintiff M61/2010* (2010) 243 CLR 319 at [99]–[103]. Failure to notify, as is the usual case, deprives the revokee of even that limited right of review.

6.49. There are evident inadequacies with review and scrutiny. Although the courts can make a declaration that at the relevant time the person was not in fact a dual citizen and thus cannot have

lost their (sole) Australian citizenship, the finding by an inter-departmental committee, based on ASIO's QSA, as to the disqualifying conduct of serving or fighting, cannot easily be challenged by the ex-citizen. Although merits review of the QSA is available to the ex-citizen in the Security Appeals Division of the AAT, the view of the Attorney-General's Department is that such review, even if it leads to the QSA being set aside, does not necessarily mean that the Commonwealth would regard such a successful applicant as being restored to citizenship[138]. And the advantage the AAT has in seeing and considering all classified material is not shared by the Federal Court.

6.50. Third, as explained below in the section 'Interaction with prosecutions under the Code', the operation of law provisions may frustrate or bring undone criminal prosecutions in a variety of ways, not all of which are foreseeable or preventable.

6.51. Fourth, the problems are compounded by the capacity of the Minister not to give notice of the loss of citizenship: the revokee may well order their life on the basis that they remain a citizen when they are not. Take the possibility of an Australian woman who decided to have another child wrongly thinking the child will be Australian: there will be no technical breach of either the *Convention on the Rights of the Child* or the *Convention on Statelessness*, but it would still be highly problematic for mother and child. In any event, there is doubt as to the effectiveness of the provision to deny notice for up to five years as the former citizen will discover their new non-citizen status when they seek new travel documents. In the United Kingdom, former citizens are always notified directly or by next of kin. That should also occur here.

6.52. Fifth, as the Department of Home Affairs submission itself accepts, the automatic nature of the citizenship cessation, under the 'operation of law' model, creates several challenges:

a) *Citizenship cessation applies automatically and may impact other mechanisms, such as criminal justice processes, that can be used to manage the level of risk an individual poses to the Australian community.*

b) *Intelligence agency powers differ depending on whether a person is an Australian citizen or non-citizen. For example, the point in time at which citizenship ceases impacts on the remit of agencies' intelligence functions under the* Australian Security Intelligence Organisation Act 1979 *and the* Intelligence Services Act 2001*.*

c) *The ability of Australia to manage its broader bilateral relationships and equities can be impacted by the automatic operation of the law.*[139]

6.53. These are mostly self-explanatory statements: the point about intelligence agency powers was highlighted in the Home Affairs unclassified submission to this review[140].

6.54. In conclusion, while I accept that in a particular case fighting for, or service in, a terrorist organisation may be seen as renunciation such that cessation of citizenship is justified in the public interest, s 35 in its current form is neither necessary nor proportionate. Further, the section does not adequately protect individual rights. For those reasons, the current provision should be repealed with retrospective effect. One reason for retrospective repeal is that otherwise the potentially significant numbers of persons affected without their knowledge or current official knowledge eventually find out they must be excluded from Australia if overseas and placed in migration detention if in Australia. I later discuss in this report what type of provision could take its place without contravening INSLM Act standards.

S 33AA and the INSLM Act

6.55. The following matters may be noted in relation to s 33AA.

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138 Attorney-General's Department Deputy Secretary Sarah Chidgey, pp 39–40 Transcript of INSLM Hearing, 27 June 2019, Canberra.

139 Submission 4 – Department of Home Affairs, p 9.

140 Ibid.

6.56. Subsection 1 is the key operative provision. It includes three concepts.

a) First, there must be a person aged 14 or more.

b) Second, they must have dual citizenship. These two are basic preconditions.

c) Third, when such a person actually engages in the conduct specified in s 33AA(2) which is further defined in ss 33AA(3–7), they then immediately are deemed to renounce, and thus, lose, their citizenship because, as the statute recites, 'they have acted inconsistently with their allegiance to Australia'.

6.57. The interaction between these provisions and the Criminal Code is critical to understanding how s 33AA works, and I return to this topic shortly.

6.58. Sub-section 33AA(2) lists seven types of criminal conduct. That conduct, by s 33AA(6), is defined to coincide with the provisions set out in subsection 6, being various parts of the Criminal Code but importantly only the conduct.

6.59. The conduct by itself is not enough – there must also be the relevant intention specified in subsection 3 which coincides with the intention required for a terrorist act in the Criminal Code, i.e. the conduct must be done with the intention of advancing a political, religious, or ideological cause, and with the intention of coercing, or influencing by intimidation the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country, or the public or a section of the public: s 33AA(3).[141]

6.60. Recognising the difficulty in some, perhaps many, cases of establishing the requisite intent, there is also a deeming provision whereby the person is taken to have had the relevant intention if at the relevant time the person was a member of a declared terrorist organisation or acting on the instruction of or in cooperation with a declared terrorist organisation: s 33AA(4). That deeming provision is not exhaustive: s 33AA(5).

6.61. Critically, unlike s 35A but like s 35, the provision only applies to the person's conduct if they were out of Australia at the time of the conduct or left Australia after engaging in the conduct in Australia but had not at the time of leaving been tried for any offence relating to the conduct: s 33AA(7). To this extent, both ss 35 and 33AA are amply supported by the external affairs power in the Constitution.

6.62. Section 33AA(9) makes it clear that citizenship ceases 'immediately upon the person engaging in the conduct referred to in subsection (2)'.

6.63. There is a similar provision to those in ss 35 and 35A concerning the giving of notice to the ex-citizen of citizenship loss and review rights: s 33AA(10–11), and also for withholding notice for six-month periods up to five years: s 33AA(12). There are similar provisions to s 35 in s 33AA (13–19) to deal with exempting the person from their citizenship loss.

6.64. Finally, as with s 35, the person has the capacity to reverse the effect of the loss of citizenship and to do so retrospectively, under s 33AA(24):

a) in proceedings under s 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person did not engage in the conduct or have the requisite intention under subsection (3) of this section, or

b) in proceedings under s 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person was not a national or citizen of a country other than Australia at the time of the conduct, or

c) the Minister makes a determination under subsection (14) in relation to the conduct to exempt the person from the effect of this section, or

[141] Criminal Code s 100.1 Definitions – 'terrorist act'.

d) a declaration under section 35AA is disallowed by either House of the Parliament, and the person's citizenship would not have ceased under this section if that declaration had not been made.

6.65. It is now necessary to consider the interaction between s 33AA and relevant parts of the Criminal Code.

S 33AA and the Criminal Code

6.66. I begin with some key concepts in the Code which were conveniently summarised by French CJ in *R v RK and LK* [2010] HCA 17 as follows (omitting citations):

Statutory framework – criminal responsibility

41. Chapter 2 of the Code is entitled "General principles of criminal responsibility". The stated purpose of the chapter is the exhaustive codification of "the general principles of criminal responsibility under laws of the Commonwealth". The chapter applies to all offences against the Code.

42. Part 2.2 deals with the elements of offences. The drafters of the Code adopted "the usual analytical division of criminal offences into the actus reus *and the* mens rea *or physical elements and fault elements". Division 3 contains general provisions relating to the elements of an offence. The classification of the elements is set out in s 3.1:*

(1) An offence consists of physical elements and fault elements.

(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.

(3) The law that creates the offence may provide different fault elements for different physical elements."

Physical elements are dealt with in Div 4. A physical element of an offence, as defined in s 4.1(1), may be:

(a) conduct, or

(b) a result of conduct, or

(c) a circumstance in which conduct, or a result of conduct, occurs.

Conduct is broadly defined by s 4.1(2) to mean "an act, an omission to perform an act or a state of affairs". To "engage in conduct" means to "do an act" or to "omit to perform an act". The concept of engaging in conduct which is a state of affairs is not explained.

43. Fault elements are dealt with in Div 5. A fault element for a particular physical element may be intention, knowledge, recklessness or negligence. A person is said to have intention with respect to conduct if he or she means to engage in that conduct. A person has intention with respect to a circumstance if he or she believes that it exists or will exist. A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. Knowledge of a circumstance or a result is defined in terms of awareness that the circumstance or result exists or will exist in the ordinary course of events.

6.67. Thus, in s 33AA, the law operates on the criminal conduct, being physical elements of the offences, but not fault elements: s 33AA(2), (6). Instead there must also be a particular type of terrorist-like intention: s 33AA(3).[142] A person is, however, deemed to have that intention based on membership of or acting on instruction of, or in cooperation with, a terrorist organisation the subject of a declaration in s 35AA: see s 33AA(4). The need for intention would appear to exclude a person acting under duress, recklessly or negligently, although the statute does not say so.

6.68. One of the serious problems with s 33AA is how to be sure at any particular time that there has been the requisite intention or deemed intention. Take the case of 14-year-old Australian children originally brought into Mosul or Raqqa by their Australian parents under duress: at that time they would appear to lack the relevant intention so that s 33AA does not affect their citizenship. Assume then that the children were required by ISIL to act under its instruction to undertake terrorism training, for example, how to assemble a bomb. As I explained in my 2017 report on Declared Areas, once someone was in ISIL's controlled territory it was almost impossible for them to remain neutral: in practice, either they became an ISIL victim or they had to serve ISIL or act under its instruction. Of course, for some years it was difficult and very dangerous to seek to escape from ISIL-controlled territory. The point is that s 33AA may have operated to remove citizenship from someone who arrived as a child, who never had terrorist-like intention but rather had no, or no real, choice whether or not to follow ISIL instructions. That result is not a proportional response to the threat. There are also some Code provisions which are important when the conduct complained of takes place outside of Australia or is done by someone who is not an Australian citizen.

Geographical jurisdiction under the Criminal Code

6.69. The Code defines 'Standard geographical jurisdiction'[143] in s 14.1 and then 'Extended geographical jurisdiction' in four categories A, B, C and D. Standard geographical jurisdiction is normally presumed and it limits the ambit of the primary offence creating provisions to cases where the conduct occurs 'wholly or partly in Australia; or wholly or partly on board an Australian aircraft or an Australian ship'; or 'the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs' in those locations. Thus for a primary offence to which s 33AA attaches the conduct and sometimes the result of the conduct will normally mean the offence falls outside Standard geographical jurisdiction.

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[142] Presumably although this is not stated 'intention' has the meaning in s 5.2 of the Code, i.e.:

1) A person has intention with respect to conduct if he or she means to engage in that conduct.
2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

[143] **14.1 Standard geographical jurisdiction**

(1) This section may apply to a particular offence in either of the following ways:
  (a) unless the contrary intention appears, this section applies to the following offences:
    i. a primary offence, where the provision creating the offence commences at or after the commencement of this section;

…

(2) If this section applies to a particular offence, a person does not commit the offence unless:
  (a) the conduct constituting the alleged offence occurs:
    i. wholly or partly in Australia; or
    ii. wholly or partly on board an Australian aircraft or an Australian ship; or
  (b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
    i. wholly or partly in Australia; or
    ii. wholly or partly on board an Australian aircraft or an Australian ship; …

6.70. In s 15 of the Code, there are four extended geographical jurisdiction categories, A,B,C and D.

6.71. For example, s 15.2(1), Extended geographical jurisdiction category B, provides in part: [144]

> If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless:
>
> (c) the conduct constituting the alleged offence occurs wholly outside Australia and:
>
> i. at the time of the alleged offence, the person is an Australian citizen
>
> ii. at the time of the alleged offence, the person is a resident of Australia.

Section 15.4 'Extended geographical jurisdiction – category D' states:

> If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:
>
> (a) the whether or not the conduct constituting the alleged offence occurs in Australia, and
>
> (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

6.72. Conduct for an offence mentioned in s 33AA(2) of the Act is, by operation of s 33AA(6), to correspond with provisions in 'Subdivision A of Division 72, sections 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Division 119 of the Criminal Code, respectively'.

6.73. Each of ss 101.1 (see s 101.1(2), 101.2 (see s 101.2(4)), 102.2, 102.4 (see s 102.9), 103.1 and 103.2 (see s 103.3) are category D. The other provisions have their own special requirements.

6.74. Subdivision A of Division 72 'International terrorist activities using explosive or lethal devices' comprises ss 72.1–72.10 inclusive. By s 72.4 a jurisdictional requirement is imposed.[145] One of the

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[144] Complemented by s 15.2(2) which provides:

> Defence – primary offence
>
> (2) If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence if:
>
> (aa) the alleged offence is a primary offence; and
>
> (a) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
>
> (b) the person is neither:
>
> i. an Australian citizen; nor
>
> ii. a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
>
> (c) there is not in force in:
>
> i. the foreign country where the conduct constituting the alleged offence occurs; or
>
> ii. the part of the foreign country where the conduct constituting the alleged offence occurs;
>
> a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the first-mentioned offence.

[145] **72.4 Jurisdictional requirement**

(1) A person commits an offence under this Subdivision only if one or more of the following paragraphs applies and the circumstances relating to the alleged offence are not exclusively internal (see subsection (2)):

(a) the conduct constituting the alleged offence occurs:

i. wholly or partly in Australia; or

ii. wholly or partly on board an Australian ship or an Australian aircraft;

(b) at the time of the alleged offence, the person is an Australian citizen;

jurisdictional requirements (satisfying other requirements will also be sufficient) is that 'at the time of the alleged offence, the person is an Australian citizen'. Division 119 is extended geographically by: s 117.2 however, there is an additional element of the offence in each of ss 119.1 'Incursions into foreign countries with the intention of engaging in hostile activities'; 119.2 'Entering, or remaining in, declared areas'; 119.4 'Preparations for incursions into foreign countries for purpose of engaging in hostile activities', 119.5 'Allowing use of buildings, vessels and aircraft to commit offences', namely, that the person:

a) is an Australian citizen, or
b) is a resident of Australia, or
c) is a holder under the *Migration Act 1958* of a visa, or
d) has voluntarily put himself or herself under the protection of Australia, or
e) is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

6.75. Furthermore, for all offences within Div 119, Consent of the Attorney-General is required for prosecutions as s 119.11 states:

119.11

(1) Proceedings for the commitment of a person for the following must not be instituted without the written consent of the Attorney-General:

(a) the trial on indictment for an offence against the following provisions:
  i. this Division,
  ii. section 6 of the *Crimes Act 1914* to the extent that it relates to an offence against this Division,
(b) the summary trial of a person for an offence referred to in paragraph (a).

(c) at the time of the alleged offence, the person is a stateless person whose habitual residence is in Australia;
(d) the conduct is subject to the jurisdiction of another State Party to the Convention established in accordance with paragraph 1 or 2 of Article 6 of the Convention and the person is in Australia;
(e) the alleged offence is committed against a government facility of the Commonwealth, or of a State or Territory, that is located outside Australia;
(f) the alleged offence is committed against:
  i. an Australian citizen; or
  ii. a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory;
(g) by engaging in the conduct constituting the alleged offence, the person intends to compel a legislative, executive or judicial institution of the Commonwealth, a State or a Territory to do or omit to do an act.

(2) The circumstances relating to the alleged offence are exclusively internal if:

(a) the conduct constituting the alleged offence occurs wholly within Australia; and
(b) the alleged offender is an Australian citizen; and
(c) all of the persons against whom the offence is committed are Australian citizens or bodies corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
(d) the alleged offender is in Australia; and
(e) no other State Party to the Convention has a basis under paragraph 1 or 2 of Article 6 of the Convention for exercising jurisdiction in relation to the conduct.

(2) However, the following steps may be taken (but no further steps in proceedings may be taken) without consent having been given:

(c) a person may be charged with an offence referred to in paragraph (1)(a),
(d) a person may be arrested for an offence referred to in paragraph (1)(a), and a warrant for such an arrest may be issued and executed;

(c) a person so charged may be remanded in custody or on bail.

(3) Nothing in subsection (2) prevents the discharge of the accused if proceedings are not continued within a reasonable time.

6.76. By ss 13.1 and 13.2 of the Code, the 'legal burden of proving every element of an offence relevant to the guilt of the person charged' must be proved, and beyond reasonable doubt, by the prosecution. Thus, for the specified offences against s 119, being an Australian citizen at the time of the offence is such a matter.

6.77. Finally, by s 16.1 of the Code it is provided that:

16.1 Attorney-General's consent required for prosecution if alleged conduct occurs wholly in a foreign country in certain circumstances

(1) Proceedings for an offence must not be commenced without the Attorney-General's written consent if:

(a) section 14.1, 15.1, 15.2, 15.3 or 15.4 applies to the offence, and
(b) the conduct constituting the alleged offence occurs wholly in a foreign country, and
(c) at the time of the alleged offence, the person alleged to have committed the offence is neither:
    i. an Australian citizen, nor
    ii. a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

(2) However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence before the necessary consent has been given.

6.78. A number of difficult questions arise.

6.79. First, all of these provisions amply demonstrate the correctness of the Home Affairs' submissions to me that 'Citizenship cessation applies automatically and may impact other mechanisms, such as criminal justice processes.'

6.80. Where a person has lost their citizenship a prosecution may fail or a conviction may later be quashed without re-trial being possible if:

a) the Attorney-General's consent was required under s 16 or s 119 but not obtained
b) the prosecution cannot prove citizenship beyond reasonable doubt if that is an element of an offence
c) the prosecution cannot prove beyond reasonable doubt that some or all of the conduct constituting the alleged offence occurs in Australia or some or all of the result of the conduct constituting the alleged offence occurs in Australia, where there is a geographical jurisdictional requirement to either effect.

6.81. Further, as has been noted, s 119.2(1) provides:

(1) A person commits an offence if:

(a) the person enters, or remains in, an area in a foreign country, and

(b) the area is an area declared by the Foreign Affairs Minister under section 119.3, and

(c) when the person enters the area, or at any time when the person is in the area, the person:

i. is an Australian citizen, or

ii. is a resident of Australia, or

iii. is a holder under the *Migration Act 1958* of a visa, or

iv. has voluntarily put himself or herself under the protection of Australia.

6.82. Assume a person commits this offence and remains in the declared area for a considerable period of time and at all relevant times has the intent required by s 33AA(3) 'terrorist intent' so that s 33AA(1) operates. How does s 119.2 of the Code operate in relation to s 33AA of the Act?

6.83. It is certainly possible to argue that the person who so enters loses their citizenship before they commit the s 119.2 offence, but I assume the contrary for the purposes of argument. In that case, the person commits the offence for an instant, and then immediately loses their citizenship. This has the effect that at most they can be charged with an offence of entry, or alternatively, of remaining for an instant; in the latter case they cannot be convicted of nor punished for remaining the full extent of the time they actually remained.

6.84. The response to this from the agencies is that the Minister in those circumstances can exempt the person from citizenship loss for the sole purpose of their prosecution. I assume for the purposes of the argument that exempting for the sole purpose of allowing prosecution over the objection of the person is a permissible use of the exemption power. Of course, at that point the Minister must provide procedural fairness and the former citizen may ask not to be exempted, although that would not appear to prevent the Minister from so exempting and for the sole purpose of prosecution. So it is not a simple or necessarily quick matter. If exemption is granted, however, the operation of law provisions are then 'spent' in relation to that conduct for that person: all that is then available, and only if they are convicted and sentenced for more than six years, is taking action under s 35A.

6.85. All of this shows a convoluted and sometimes unclear statutory scheme.

6.86. Another significant difficulty which the provisions do not fully deal with is if the revokee commences proceedings seeking a declaration that they have not engaged in the relevant conduct, who is to bear the onus of proof in showing that they in fact have met the statutory preconditions? As a practical matter, it will often be difficult for the Commonwealth to establish that the conduct has taken place without seeking to deploy classified material disclosing that the revokee, for example, had engaged in a terrorist act or had been present in a declared area. That will not always be so because there may be a witness to the conduct but if the conduct is evidenced by classified 'technical means', then there will be little desire to put that material forward and it is very difficult to put that forward in court proceedings in a way which the applicant is not aware of.

INSLM Act conclusions for s 33AA

6.87. I here repeat my conclusions in relation to s 35: if anything, the lack of necessity, proportionality and proper protections for individual rights is more pronounced in the case of s 33AA particularly because it may be impossible for the Commonwealth to accurately fix a date when citizenship was first lost. There is a clear breach of the *Convention on the Rights of the Child*, there is a risk of de facto or temporary statelessness, and there is a denial of due process.

6.88. The Minister has advised that there have been 12 instances of loss of citizenship under s 33AA, or alternatively s 35 or both, but none under s 35A. Details are all classified save for Neil Christopher Prakash whose circumstances have already been considered. The other cases are instead considered in the classified version of the report which is provided to the Prime Minister and the Attorney-General. In this unclassified report I simply note that the detail of the classified instances only confirms that ss 33AA and 35 should be repealed with retrospective effect, but could be replaced with the model discussed later in this report.

6.89. In relation to Mr Prakash, accepting that Home Affairs have done all they reasonably can to determine that he was a Fijian citizen at the time s 33AA was said to operate upon him, he at most has *de jure* but not *de facto* citizenship of Fiji and cannot enter that country. That circumstance would have been a strong reason for at least considering not stripping him of citizenship. The automatic nature of s 33AA, however, prevented that from occurring.

6.90. For all of the above reasons, ss 33AA and 35 should be retrospectively repealed and I so recommend. Given my earlier findings, I consider these provisions could be replaced with a scheme which passes muster under the INSLM Act as follows.

Alternate model

6.91. Sections 33AA and 35 could be replaced with a ministerial power to deprive a person of Australian citizenship in certain conditions.

6.92. The exercise of that power, however, should be subject to meaningful review.

6.93. One matter that was canvassed at the public hearing was whether some form of merits review by the Security Division of the AAT would be appropriate. Although the Law Council of Australia submitted that only judicial review would be adequate, most of the witnesses expressed a different view. Professor Rayner Thwaites, for example, made it clear that if there were to be merits review, it should be of the entire decision to deprive a person of citizenship, not merely of discrete aspects such as whether the person had been a dual citizen or had engaged in particular conduct. Similar views were also expressed by the representatives of the Australian Human Rights Commission. The rationale was that a decision to deprive someone of citizenship was very serious, so judicial review should be supplemented by full merits review.

6.94. It is not appropriate, however, to have the AAT exercising a discretion that turns on judgments about quintessentially political matters such as how the deprivation of an individual's citizenship would affect Australia's international relations. A Minister is better placed to make those judgments, and take responsibility for them in the Parliament, than the AAT.

6.95. At the same time, however, there seems to be no good reason why the Security Division of the AAT could not review what probably would be the key issue in many decisions by the Minister; namely, whether the person engaged in particular (terrorist like) conduct. To an extent, the Security Division can already deal with that issue in conducting a review of qualified security assessments.

6.96. The proposal sketched below builds on these considerations and incorporates a role for special advocates (who have a legislated role in relation to control orders, although they have not yet been used). This has been done to recognise the practical difficulties that a person may have in challenging a decision based on sensitive information, and the unfairness which might otherwise result.

6.97. The key features of the proposal are these:

a) If the Minister believes on reasonable grounds that a person aged 14 or older is a citizen of Australia and a national or citizen of a country other than Australia, and has engaged in the

conduct currently specified in ss 33AA(2)[146] or 35(1), then the Minister may determine that it is in the public interest that the person lose their Australian citizenship ('the deprivation determination'), and the person loses Australian citizenship upon that determination being made.[147]

b) Before determining that the person should be deprived of their Australian citizenship, the Minister would have to also consider the following factors:[148]
   i. the nature and severity of the conduct in which the person is believed to have engaged
   ii. the degree of threat posed by the person 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. whether the person is being or is likely to be prosecuted in Australia in relation to the conduct in paragraph (i)
   vi. Australia's international relations
   vii. any matters of public interest the Minister regards as relevant.

(c) The hearing rule of natural justice (*audi alteram partem*) would not apply to the Minister's power to make the deprivation determination because in order to make the deprivation effective, prior notice to the proposed revokee or the other country of citizenship could well result in loss of the other citizenship, so rendering this scheme nugatory – however as in some other statutory contexts, viewed overall, procedural fairness is given at the next stage.

(d) If the Minister makes a deprivation determination, the Minister must give written notice to that effect to the person as soon as reasonably practicable, and the notice also must set out rights of review, including review to the AAT on the question of conduct (discussed below).

(e) The Minister may determine in writing that a notice should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations; but such a determination would cease to have effect after 90 days. [149] The Minister has a one-off option to determine in writing that a notice should not be given for a further period of 90 days. A Minister who exercises this option must provide a copy of their determination to the IGIS and the PJCIS. In my view, six months is a sufficient maximum period to withhold notice.

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146 The provision should be amended so the Minister is not required to be satisfied that a person have an intention of the kind currently specified in s 33AA (3). The Minister would therefore only be required to consider whether the person engaged in the prescribed conduct without the need to consider whether the person engaged had a particular state of mind.

147 The power has been conditioned on the Minister's state of mind because conditioning the power on the fact that a person is a dual citizen and has in fact engaged in particular conduct may make it very uncertain whether the power is even engaged.

148 These are drawn from the factors that the Minister must consider if they decide to exempt a person from loss of citizenship under s 33AA (17) of the Citizenship Act and being the current factors in ss 35A, 33AA and 35.

149 As opposed to the six months in the current s 33AA (12).

(f) The person can request in writing that the Minister revoke the deprivation determination within 90 days of the Minister giving the written notice of the determination and rights of review.

(g) If the person makes a request within that timeframe, the Minister must:

i. consider the factors set out in 3(ii) above

ii. decide whether to revoke the deprivation determination.

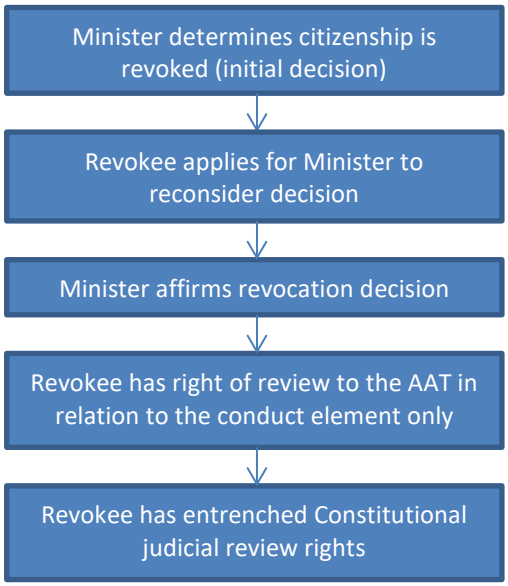
h) The hearing rule of natural justice *would apply* to the Minister's decision whether to revoke the deprivation determination.

i) If the Minister decides to revoke the deprivation decision, the Minister must lay before each House of Parliament a statement setting the decision and the reasons for the decision; but if the Minister thinks that it would not be in the public interest to publish the name of the person or of any other person connected in any way with the matter concerned, the statement must not include those names or any information that may identify those persons (the PJCIS should continue to be briefed under s 51C).

j) If the Minister decides to revoke the deprivation decision, the person is taken never to have been deprived of their Australian citizenship.[150]

k) Likewise, if in proceedings under s 75 of the Constitution or under a Commonwealth Act, a court makes an order or declaration setting aside or quashing any deprivation determination of the Minister, the person is taken to have never been deprived of their Australian citizenship.

(l) If the Minister affirms his decision following an application by the revokee, the revokee may then apply to the AAT for review of the affirmation of revocation decision within 28 days of receiving the notice or a longer period that the AAT regards as reasonable in all the circumstances.



(m) The AAT's task would be limited to determining whether the information permitted a state of reasonable satisfaction that the person engaged in the conduct that formed the basis for the deprivation determination; the person would have the onus of satisfying the AAT that they did not engage in the conduct; and if the AAT was so satisfied, it would set the

150 However, any administrative action taken in reliance on the cessation of Australian citizenship remains valid.

deprivation determination aside, and citizenship would ordinarily be taken never to have been lost.[151] (There is already QSA merits review however the government evidence before me was that a successful challenge to a QSA where the AAT found the conduct did not occur did not automatically or necessarily result in restoration of citizenship: this recommendation makes the position clear.)

(n) In order to ensure, as far as possible, that a revokee can adequately engage in the AAT process, while still fully protecting classified information and protected identities of witnesses, the AAT's procedures on review would be based partly on its existing procedures for review of adverse security assessments and partly on provisions in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) for the appointment of special advocates. In brief:

i. The Minister would not be required to provide the Tribunal and the applicant with a full statement of reasons.

ii. The Minister would, however, be obliged to provide the AAT with copies of the complete brief relating to making the deprivation determination and other relevant information in the Minister's possession.[152]

iii. The Attorney-General could issue a certificate stating that the disclosure of particular information or the contents of certain documents would be against the public interest ('sensitive information').

iv. If the Attorney-General did so, the AAT could not provide the sensitive information to the applicant or the applicant's legal representatives; however, the AAT could appoint a special advocate to whom full disclosure would be made.[153]

v. Similarly, the Attorney-General could issue a certificate requiring the AAT to exclude the applicant or the applicant's legal representatives from part of a hearing if the Attorney-General considered that their presence would be against the public interest, given the submissions or evidence proposed to be adduced by the Minister,[154] but a special advocate appointed by the AAT could attend that part of the hearing.

vi. The special advocate would generally be able to communicate without restriction with the applicant and their legal representatives before the advocate receives sensitive information; afterwards, the special advocate could only communicate with the applicant in writing and with the AAT's approval.[155]

vii. Hearings would be presided over by a presidential member and two other members.

viii. Proceedings before the AAT would be in private and, subject to the certificates outlined above, the applicant and their representatives would be entitled to be present.

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151 Unless, in exceptional circumstances, the AAT orders that citizenship be restored with effect from a particular date.

152 Compare s 39A (2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) (requiring the Director General of Security to present to the Tribunal all relevant information available to the Director-General, whether favourable or unfavourable to the applicant).

153 The function of a special advocate would be to represent the interests of the applicant in the proceeding by, among other things, making written submissions to the AAT: compare NSI Act, s 38PB (function of special advocate).

154 AAT Act, s 39A(8).

155 Compare NSI Act, ss 38PD and 38PF.

ix. The AAT would provide a set of reasons to the Minister and the applicant at the conclusion of its decision, but would have to do so in a way that protected any sensitive information.

x. An unsuccessful applicant could appeal on question of law to the Federal Court.

(o) If a person is the subject of a deprivation decision, they cannot seek review of a qualified security assessment in the Security Division of the AAT but must pursue review of the deprivation decision (if review is to be sought at all).

(p) This model, if adopted, and for the reasons set out in my reports, retrospectively, would in my view pass muster under the INSLM Act. S 35A of the *Australian Citizenship Act 2007* (Cth) could remain in its current form.

Public Hearing, Canberra, 27 June 2019
The Third INSLM with Mark Mooney (Principal Adviser)

7. APPENDIXES

Appendix A – Conduct of the review

7.1. This review was the most sensitive I have undertaken to this point. The sensitivity arose in large part as a result of the continued operation of the laws, their automatic operation, the significant international implications of the provisions' operation and the keen public interest in the topic of Australians travelling overseas to engage in terrorist activities. As a result of the intensely topical nature of the review, I have, for the first time as INSLM, and for only the second time since the role was enacted in 2010, produced a classified annex to this unclassified, public report. The highly classified and operationally sensitive materials I have viewed throughout the course of this review were, and remain, vital in the formation of my recommendations to the Attorney-General. The INSLM Act specifies what should remain classified and I have complied with its requirements. Additionally, I have decided that it is proper to maintain confidentiality in legal advice where the privilege is held by the Commonwealth; so I do not disclose its contents in the unclassified report, although I have considered all relevant legal advice.

7.2. The review began with a reference from the Attorney-General, the Hon Christian Porter MP, by letter dated 15 February 2019. He requested that the review be completed by 15 August 2019, as it has been, noting that the Parliamentary Joint Committee on Intelligence and Security is to undertake and report on its own review of these provisions by 1 December 2019.

7.3. I wish to thank for their assistance in carrying out the review my Principal Adviser Mr Mark Mooney, my Counsel Assisting Mr Gim del Villar of the Queensland Bar and Mr Brodie Buckland of the Australian Capital Territory Bar, my Solicitor Assisting Mr Tom Colwell from the Australian Government Solicitor, my Adviser Mr Alexander Blackwell on secondment from the Attorney-General's Department, and my Executive Officers Ms Cara Yianoulakis and Ms Karen Thornton. I express my deep appreciation for the tireless work of them all but particularly the indispensable work of Mr Mooney. Any errors remain mine.

7.4. Requests for information pursuant to my coercive powers were issued to relevant agencies. Classified and unclassified responses were received and the unclassified responses were posted on the INSLM website.

Submissions

7.5. Following receipt of the Attorney-General's letter, on 22 February 2019 correspondence was sent to relevant agency and departmental heads and senior executives to advise them of my review and that I would shortly be seeking information from them or their organisation in relation to the review. On 7 March 2019, I wrote to non-governmental organisations, academics and other civil society representatives to advise them of my review. On 15 May 2019, my Office wrote to civil society representatives to inform them that the public submission phase of the review had now opened and that the public hearing would take place on 27 June 2019 in Canberra. A media release was also disseminated to Australian media organisations on 19 June 2019 and posted on the INSLM website. Public submissions were received from (in order of receipt):

(b) Executive Council of Australian Jewry
(c) Professor Clive Walker
(d) Dr John Coyne and Dr Isaac Kfir
(e) Department of Home Affairs
(f) Law Council of Australia

(g) Dr Rayner Thwaites

(h) Australian Human Rights Commission

(i) Dr Sangeetha Pillai and Professor George Williams AO

(j) Liberty Victoria

Hearings

7.6. As is normal, a private hearing was held early on with Commonwealth departments and agencies so that I could be provided with classified, as well as unclassified, information in response to my questions. This occurred before the public hearing so that I had an appreciation of the full picture before the public hearing, but also so that the departments and agencies had an idea of my preliminary thoughts and could consider providing any further information I required at the public hearing, including how to express it in an unclassified form, if possible.

7.7. A public hearing was then held in Canberra on 27 June 2019, attended by representatives from many of the relevant agencies and departments, along with the Human Rights Commissioner and Deputy General Counsel of the Australian Human Rights Commission, and the President and Director of Policy of the Law Council of Australia. Professor Kim Rubenstein FAAL FASSA (Australian National University), Dr John Coyne and Dr Isaac Kfir (Australian Strategic Policy Institute) and Dr Rayner Thwaites (University of Sydney) also all appeared at the public hearing in their private capacities. This public hearing was live-streamed online and the transcript and video recording of the hearing are available on the INSLM website.

7.8. A supplementary public submission was also received from the Law Council of Australia, as well as answers to questions on notice from the Attorney General's Department.

First INSLM's views

7.9. In his fourth *Annual report*, after considering the legislative regimes in the United States and the United Kingdom, the former INSLM, Brett Walker SC, made a recommendation in favour of a citizenship-loss regime based upon apprehensions towards the ability of individuals to be loyal to two nations, particularly in circumstances where those two nations' interests conflict or are otherwise inconsistent. The former INSLM stated:

> *The INSLM is concerned with the implications dual, or multiple, citizenship has for Australia's counter-terrorism effort. The INSLM is concerned that the concept of dual citizenship raises issues of divided loyalties and does not see why, as a matter of policy, an Australian citizen should also be able to be a citizen of another country …*
>
> *Dual citizenship is not a human right. Its permission in Australia since 2002 does not render it anything like traditional (sic) …*
>
> *Taking into account Australia's international obligations, and the national security and counter-terrorism risks posed by Australians engaging in acts prejudicial to Australia's security, the INSLM supports the introduction of a power for the Minister for Immigration to revoke the citizenship of Australians, where to do so would not render them stateless, where the Minister is satisfied that the person has engaged in acts prejudicial to Australia's security and it is not in Australia's interests for the person to remain in Australia.*
>
> ***Recommendation V/9**: Consideration should be given to the introduction of a power for the Minister for Immigration to revoke the citizenship of Australians, where to do*

> *so would not render them stateless, where the Minister is satisfied that the person has engaged in acts prejudicial to Australia's security and it is not in Australia's interests for the person to remain in Australia*.[156]

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

7.10. Following the release of the fourth report, the then Minister for Immigration and Border Protection, the Hon Peter Dutton MP, introduced the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 into the House of Representatives.

7.11. In his second reading speech, the Minister stated that the Bill proposes three mechanisms for automatic loss of Australian citizenship. As such, the Bill:

> *Implements the commitment made by the Prime Minister, myself and the Australian Government to address the challenges posed by dual citizens who betray Australia by participating in serious terrorism related activities*.[157]

7.12. The Minister added that the Bill 'emphasises the central importance of allegiance to Australia in the concept of citizenship' and noted:

> *The concept of allegiance is central to the constitutional term 'alien' and to this bill's reliance upon the aliens power in the Constitution. The High Court has found that an alien is a person who does not owe allegiance to Australia. By acting in a manner contrary to their allegiance, the person has chosen to step outside of the formal Australian community.*[158]

7.13. Then Prime Minister the Hon Tony Abbott also stated that the new provisions were being introduced in pursuance of the recommendation made by the INSLM. However, the First INSLM asserted that the proposed bill did not reflect the recommendation in his report and, after a suggestion by the government that the former INSLM was changing his recommendation,[159] Mr Walker was quoted by the *Guardian* as stating:

> *I am impatient with and I condemn those who persist in reading pages of my report as if they say the government can exercise ministerial discretion after dispensing with a criminal trial. I said the minister should have discretion over the revocation of citizenship after a criminal trial ... and it reflects very poorly that those quoting me can't read beyond the few lines they are citing.*
>
> *I assume they have been given speaking notes to that effect, but my report does not provide a justification for what they intend to do … it is not what I said, nor what I think now, and anyone who claims otherwise is wrong. In fact I am saying the opposite*.[160]

7.14. In an interview on *Lateline*, Mr Walker further stated:

> *If you're not going to have conviction, which other laws in relation to citizenship use as the trigger for revocation, then you'd better have judicial review that permits a judge on evidence to determine whether there has been involvement in terrorism. That was the PM's phrase: 'involvement in terrorism'.*

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156 INSLM, *Fourth annual report*, pp 53, 58.

157 Hon Peter Dutton MP, Minister for Immigration and Border Protection, House of Representatives Hansard, 24 June 2015, p 7369.

158 Ibid.

159 See e.g. David Wroe and Mark Kenny, 'Former terrorism law watchdog Bret Walker demands apology from Tony Abbott', *The Sydney Morning Herald* (online), 18 June 2015 < http://www.smh.com.au/federal-politics/political-news/furious-terrorism-watchdog-demands-apology-from-pm-20150618-ghrmv4.html>.

160 Lenore Taylor, 'Government misquoting my report to defend revoking citizenship, says Bret Walker', *The Guardian* (online), 16 June 2015 < http://www.theguardian.com/australia-news/2015/jun/16/government-misquoting-my-report-to-defend-revoking-citizenship-says-bret-walker>.

> *You'd better have a judge deciding that and not just a ministerial opinion, based upon unexaminable secret intelligence …*
>
> *Ministers should be discouraged from thinking that they are in a position to provide something as good as or better than a conviction on the basis of unexaminable intelligence.*
>
> *I think this is a very good idea for the Government to be looking at [the matter of revoking citizenship]…*
>
> *Now, one way to do it properly is to ensure that before you treat people so drastically, so seriously, as to strip them of their citizenship, that in my view we should have something which is the functional equivalent of a conviction – preferably a conviction.*[161]

7.15. On the same day the Bill was introduced into Parliament, the former Attorney-General, Senator the Hon George Brandis QC, wrote to the PJCIS and formally referred the Bill for inquiry. As part of the inquiry, the Attorney-General asked the PJCIS to specifically consider whether the proposed s 35A of the Bill should apply retrospectively with respect to convictions prior to the commencement of the Act.

7.16. The inquiry was announced by media release on 26 June 2015 and the PJCIS invited submissions from interested members of the public.

First PJCIS report

7.17. Following an initial extension, the PJCIS provided its report to Parliament on Friday 4 September. The Committee had received 43 submissions and 7 supplementary submissions during the course of the inquiry. Sources of submissions included government agencies, legal, community and civil liberties groups, academics and members of the public. A full list of the submissions received can be found at Appendix A of the PJCIS's 2015 report.

7.18. The PJCIS made 27 recommendations which included amendments aimed at limiting the automaticity of s 33AA and 35 to operate upon the commission of specified conduct by a citizen, rather than upon the decision of the Minister.

7.19. These amendments were recommended in response to concerns about the constitutional validity of the sections, as it was consistently contended by submitters that if revocation of citizenship was based on the Minister's decision alone, the Minister would be purporting to exercise a judicial function by determining whether the citizen was guilty of a particular (criminal) act sufficient to warrant revoking citizenship.

7.20. Amendments were also made to ss 33AA and 35 to enhance the clarity and scope of the terms of the provisions, particularly in relation to the applicable fault elements under the proposed provisions. As originally drafted, the provisions did not specify whether such knowledge, recklessness or intention, was required for conduct to be 'engaged in' under s 33AA, thereby creating confusion as to what fault element, if any, applied to trigger the automatic citizenship revocation.[162]

7.21. The Committee also recommended that the conviction-based provisions, such as s 35A, be amended to incorporate a number of critical safeguards such as a public interest test and the principles of natural justice, in addition to reducing the number of offences that could trigger the operation of s 35A.

7.22. An amended version of the Bill incorporating the PJCIS's recommendations was tabled in Parliament on 30 November 2015.[163] The amended Bill was passed by the Senate on 3 December 2015 without

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161 ABC, 'Interview: Bret Walker SC', *Lateline*, 26 May 2015 (Bret Walker SC).

162 Senate Standing Committee for the Scrutiny of Bills, *Fourth report of 2016*, pp 259–264.

163 Ibid.

further amendment and prior to the completion of a review conducted by the Senate Standing Committee for the Scrutiny of Bills.[164]

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

7.23. On 28 November 2018, the Attorney-General, the Hon Christian Porter MP, introduced the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (the Bill) into the House of Representatives.

7.24. In his second reading speech, the Attorney-General noted:

> *… 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.*

7.25. Among the amendments proposed under this Bill was an expansion of the Minister's power to revoke citizenship under s 35A to a broader range of criminal offences and removing the six-year minimum prison sentence threshold. It was also proposed to revise the requirement for a person, prior to their citizenship being revoked, to be a citizen of another country as a matter of fact, to a Ministerial satisfaction that 'the person would not become a person who is not a national or citizen of any country if the person has their Australian citizenship revoked.'

7.26. On the same day, the Attorney-General wrote to the Parliamentary Joint Committee on Intelligence and Security (the Committee) to refer the Bill for inquiry and report.

Second PJCIS report

7.27. The Committee tabled its report, including a minority report from non-government members on 14 February 2019. The majority report recommended passage of the Bill as introduced, subject to the PJCIS's existing statutory review of the citizenship loss provisions being delayed by 12 months to December 2020.

7.28. Conversely, the minority report recommended that the Bill not be passed in its current form, expressing fundamental concerns about the constitutionality of the Bill and the permissibility of the proposed broad powers to be conferred on the Minister. The minority report also recommended that the provisions introduced by the 2015 Allegiance Bill be immediately referred to the INSLM.

[164] The SSCSB expressed concern over not being able to complete its review prior to the Bill passing maintained scrutiny concerns about the Bill as passed. See Senate Standing Committee for the Scrutiny of Bills, *Fourth report of 2016*, p 258.

Appendix B – Comparison with UK position

7.29. The United Kingdom's *British Nationality Act 1981* shares similarities with the Australian citizenship-loss regime in that it permits the Home Secretary to deprive a person of 'citizenship status' if satisfied that it 'would be conducive to the public good'.[165]

7.30. In 2014, a new section 40(4A) was introduced,[166] enabling the Home Secretary to also deprive a naturalised person of British citizenship if satisfied that the person has 'conducted him or herself in a manner which is seriously prejudicial to the vital interest of the United Kingdom, any of the Islands or any British Overseas territory'.[167] This amendment is broadly analogous to the powers conferred under s 33AA and has raised concerns for dual citizens because it purportedly enables revocations to take place with limited regard to considerations of statelessness in 'the most serious cases'.[168]

7.31. The United Kingdom views the power as within the right it reserved upon ratification of the 1961 United Nations *Convention on the Reduction of Statelessness,* to deprive persons of citizenship in accordance Article 8(3) of the Convention.[169]

7.32. Notwithstanding this, the United Kingdom has faced similar complexities arising from the operation of this legislation. In early 2019, it was reported that 19-year-old 'ISIS bride' Shamima Begum had been deprived of British citizenship after she had sought to return to the UK from Syria, where she had married an ISIS fighter in 2015. Media reports suggest that more than 100 people have recently been deprived of citizenship.

7.33. The case is notable because the Home Secretary's power was exercised against a British-born national of Bangladeshi heritage, despite uncertainty surrounding her entitlement to Bangladeshi citizenship. This has raised questions over whether Ms Begum was in fact a dual citizen and whether the UK Government's decision could render her stateless. Litigation on this issue is under way.

7.34. A key component of the UK's counter-terrorism judicial apparatus is the Special Immigration Appeals Commission (SIAC); a tribunal formed in 1997 to hear appeals from those excluded from the UK, subject to a deportation order from the Home Secretary or where citizenship has been revoked on national security grounds. The SIAC also heard appeals from foreign nationals detained in the UK on suspicion of terrorism-related offences under the *Anti-Terrorism, Crime and Security Act 2001* (UK). SIAC's tribunal appeal panels comprise three members, one of whom is a senior judge.

7.35. A specialist function of the SIAC is to conduct secret hearings where the Home Secretary's decision to exclude, deport or detain is based, partially or in full, on information not suitable for public dissemination. These closed hearings enable judges to consider operationally sensitive and classified information from intelligence and security agencies, most commonly MI5, SIS and GCHQ.

7.36. Where required, SIAC members will deliver a classified judgment in addition to the customary publicly available decision.

7.37. To date, SIAC has held 19 deprivation of nationality cases and appeals, the first of which was in 2008 (concerning a preliminary issue in the *Al-Jedda* appeal)[170]. SIAC has also held 27 hearings on decisions to refuse naturalisation.

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165 *British Nationality Act 1981* s 40(2).

166 Sangeetha Pillai and George Williams, 'The utility of citizenship stripping laws in the UK, Canada and Australia' (2017) 41(2) *Melbourne University Law Review* (advance) 9.

167 The Home Secretary must also have reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

168 Explanatory Notes, Immigration Bill 2013–14 (UK) [381–382].

169 It is important to note that Australia did not make any similar reservation or declaration in relation to the Statelessness Convention. See also INSLM *Annual report,* 28 March 2014, p 57.

170 SIAC Outcomes Database, Tribunals & Judiciary, https://siac.decisions.tribunals.gov.uk/

7.38. Appeals to, and of decisions made by, the SIAC are subject to strict application timeframes, noting the SIAC may grant additional time for those appealing to it, upon request. Appellants in detention have only five working days in which to make an application to the SIAC or, following a SIAC judgment, to appeal to the Courts of Appeal in Northern Ireland, England and Wales or the Court of Session in Scotland. Where the appellant to SIAC is located outside of the UK, this timeframe is increased to 28 days.

7.39. Appeals of SIAC decisions relating to non-detainees must be made within 10 days of the judgment. In all cases, the rights of appeal of a SIAC decision are limited to a redetermination of points of law.

7.40. It is important to recognise the specific procedures involved in SIAC closed hearings, particularly noting the use of 'special advocates'. Special advocates are security-vetted lawyers (typically barristers) who represent the appellant when a closed session is required. Appointed by the Attorney-General following advice from the Home Secretary that the prosecution has classified or 'closed material', the special advocates are retained by the SIAC and have the right to see all classified evidence held by the Home Secretary. Special advocates cannot disclose any information or details from the closed proceedings to their clients or the appellant's legal team. Accordingly, one of the first things a special advocate does in a closed hearing once they have the classified brief of evidence or tribunal documents is usually to argue very strongly that things have been overclassified and that more information should be given to the appellant[171].

7.41. A summary of key provisions from the UK Home Office follows.

Other comparable schemes

7.42. Canada had also introduced broader revocation grounds under the Strengthening Canadian Citizenship Act in 2014. This included a ministerial discretion to revoke Canadian citizenship where a citizen was convicted of certain terrorism or national security offences and where there were reasonable grounds that a citizen served in the armed forces of a country or 'as a member of an organized armed group'.

7.43. The Canadian Liberal government repealed these laws in 2017, but not before they were applied to convicted terrorist Zakaria Amara in 2015. The repeal and subsequent restoration of Mr Amara's citizenship highlighted the potential for citizenship revocation legislation to discriminate and undermine citizenship certainty for dual nationals, with now Prime Minister Justin Trudeau stating in 2015:

> *A Canadian is a Canadian is a Canadian … you devalue the citizenship of every Canadian citizen in this place and in this country when you break down and make it conditional for anybody.* [172]

171 See transcript 27 June 2019, p 59.

172 Thomas Walkom, 'Why terrorist should keep his Canadian citizenship', *The Star* (online), 30 September 2015.

Summary

Deprivation of citizenship powers

The Home Secretary has power to deprive a person of British citizenship in any of the following scenarios:

- She considers that deprivation of citizenship is 'conducive to the public good', and would not make the person stateless;
- The person obtained his citizenship through registration or naturalisation, and the Home Secretary is satisfied that this was obtained by fraud, false representation or the concealment of a material fact;
- The person obtained his citizenship through naturalisation, and the Home Secretary
  - considers that deprivation is conducive to the public good because the person has conducted themselves 'in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory'; and
  - has reasonable grounds to believe that the person is able to become a national of another country or territory under its laws.

In the second and third scenarios, deprivation of citizenship is permissible even if the person would be left stateless.

Recent use of deprivation powers

A Home Office Freedom of Information response in June 2016 revealed that there had been 81 deprivation of citizenship orders made in the years 2006-2015. 36 orders were made on the grounds that deprivation was conducive to the public good; 45 orders were made on the grounds that the Home Secretary was satisfied that people had used fraud or false representation to gain British citizenship by registration or naturalisation. In December 2013 the Bureau of Investigative Journalism reported a significant increase in the use of deprivation powers in 2013, in part due to British citizens travelling to fight in Syria.

Withdrawal of passport facilities

British citizens are not entitled to a British passport. The passport does not confer citizenship; it is merely evidence of it. Passports are issued at the discretion of the Home Secretary under the Royal Prerogative and can be withdrawn through the use of the same discretionary power.

Appeal rights

Those who are the subject of a deprivation of citizenship order can appeal to the First Tier tribunal against the Home Secretary's decision. Appeals must be made to the Special Immigration Appeals Commission where the Home Secretary considers that the information she relied on should not be made public.

As passports are issued at the Home Secretary's discretion there is no right of appeal against a decision to withdraw passport facilities. However a person whose passport is withdrawn may seek a judicial review of the Home Secretary's decision.

In December 2013 the Bureau of Investigative Journalism reported a significant increase in the use of deprivation powers in 2013, in part due to British citizens travelling to fight in Syria.[12] The article contended that in the vast majority of cases, the deprivation orders had been issued whilst the individual was overseas, resulting in them being left 'stranded abroad' whilst legal appeals against deprivation could take years to resolve.

The use of deprivation powers has increased since the start of the Syrian civil war

James Brokenshire, then Minister of State for Immigration, denied that the Coalition Government was deliberately waiting until people were outside the UK before making deprivation orders:

> It is true that people have been deprived while outside the UK, but I do not accept that it is a particular tactic. It is simply an operational reality that in some cases the information comes to light when the person is outside the UK or that it is the final piece of the picture, confirming what has been suspected. In other cases, we may determine that the most appropriate response to the actions of an individual is to deprive that person while they are outside the UK. Equally, there are cases where it can be determined that it is appropriate to take action to deprive individuals while they are inside the UK.
>
> (...)
>
> I understand that Members are concerned about instances where deprivation action takes places when a person is outside the UK, and I hear the hon. Lady's point. I restate that the Home Secretary takes deprivation action only when she considers it is appropriate and that may mean doing so when an individual is abroad, which prevents their return and reduces the risk to the UK. That individual would still have a full right of appeal and the ability to resolve their nationality issues accordingly. It is often the travel abroad to terrorist training camps or to countries with internal fighting that is the tipping point—the crucial piece of the jigsaw—that instigates the need to act.[13]

The then Immigration Minister James Brokenshire asserted that it is often the fact of the person leaving the UK that necessitates the making of an order

[12] The Bureau of Investigative Journalism, 'Rise in citizenship-stripping as government cracks down on UK fighters in Syria', 23 December 2013
[13] HC Deb 11 February 2014 c261-2WH

4 Deprivation of British citizenship and withdrawal of passport facilities

Implications of deprivation of citizenship

Deprivation of citizenship entails the loss of the right of abode in the UK. It makes possible the administrative ('immigration') detention, deportation and exclusion from the UK of the person concerned. Flowing from the loss of the right of abode are myriad associated and consequential rights, duties and opportunities.

The al-Jedda Case and the *Immigration Act 2014*

An annex to this briefing paper provides a summary of the al-Jedda case and of the Parliamentary and external scrutiny of the Coalition Government's legislative response to its loss in the Supreme Court.

3. Recent use of deprivation orders: how many and in what circumstances?

In June 2016 the Home Office responded to a Freedom of Information request that sought the number of deprivation decisions made each year since 2006.[11] The Home Office revealed there had been 81 such decisions and provided the following break-down by year:

Year	Number of Deprivation Orders Made
2006	*
2009	*
2010	*
2011	6
2012	6
2013	18
2014	23
2015	19

* Less than 5

The Home Office response also provided information as to the reasons for the deprivation decisions:

- 36 decisions were taken on the grounds that the Secretary of State was satisfied that deprivation was conducive to the public good (section 40 (2));
- 45 decisions were taken on the grounds that the Secretary of State was satisfied that the person's registration or naturalisation as a British citizen was obtained by means of fraud, false representation or concealment of a material fact (section 40 (3)).

[11] www.whatdotheyknow.com, 'Citizenship deprivations for last 10 years' (Home Office letter to Mr Colin Yeo dated 20 June 2006), accessed 9 June 2017

Appendix C – PJCIS Determinations of Islamic State and Jabhat Al-Nusra as declared terrorist organisations

7.44. I have set out key quotes from the PJCIS determinations of the two organisations declared under the Act.

Islamic State

7.45. Islamic State is an Iraq and Syria-based Sunni extremist group and former affiliate of al-Qa'ida.

7.46. Islamic State follows an extreme interpretation of Islam that is anti-Western, promotes sectarian violence and targets those who do not agree with its interpretations as infidels and apostates. It aims to establish a Salafist-orientated Islamist state spanning Iraq, Syria and other parts of the Levant. Islamic State has also accepted pledges of allegiance from like-minded groups elsewhere in the world.

7.47. The group was first listed in 2005 under the name Tanzim Qa'idat al'Jihad fi Biiad al-Rafidayn and re-listed in 2007 under the same name. Subsequent listings used al-Qa'ida in Iraq and then Islamic State of Iraq and the Levant (ISIL) as the commonly recognised names for the group. Another common name for the group is Islamic State of Iraq and Syria (ISIS), reflecting differences in the translation of its Arabic name, Dawlat al-Islamiyah fil 'Iraaq wa Shaam. The group is also frequently referred to as Daesh (or Da'esh), an Arabic acronym that has critical connotations. The Committee has supported the use of the term Daesh in the past in order to help counter the group's desire to portray itself as representing the core beliefs of Islam. In order to avoid confusion in this instance, however, the Committee will use the same name for the group as that used for proscription by the Australian Government.

7.48. The group proclaimed an Islamic Caliphate in areas it controls on 29 June 2014 and changed its name to Dawla al-Islamiya (Islamic State).

7.49. Lands claimed by the Islamic State extend from Aleppo in Syria to Diyala in Iraq, the Sunni-dominated areas of both countries. In Iraq, areas under Islamic State control currently include parts of Anbar Province and most of Ninawa Province, including the city of Mosul. In Syria, Islamic State controls large areas of the provinces of Raqqah and Dayr az-Zawr, as well as parts of Homs, al-Hassakah and Aleppo provinces.

7.50. The Attorney-General re-listed the group under the name Islamic State on 11 July 2014.

7.51. Islamic State was affiliated with al-Qa'ida between 2004 and June 2013 and originally established operations in Syria through its former subordinate organisation, Jabhat al-Nusra. The group now operates in both Syria and Iraq as one consolidated organisation separate from Jabhat al-Nusra.

7.52. Islamic State has several thousand members in both Iraq and Syria. In Iraq, its membership is largely drawn from young Iraqi Sunni men, while in Syria, its members are drawn from Syrian nationals and foreign fighters. Fighters in both countries are able to pass across the border, which is no longer recognised by Islamic State.

Is the organisation directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act?

7.53. Islamic State is one of the world's deadliest and most active terrorist organisations and conducts daily attacks on security forces and civilians. In addition to its war against the security forces in Iraq and Syria – and against rival opposition groups – it conducts frequent attacks against civilians. Its attacks often aim to maximise casualties and publicity by targeting crowds and gatherings at festivals and religious events. It also conducts public executions and violent punishments in areas it controls.

7.54. The supporting statement for the declaration lists a number of recent significant attacks either claimed by, or reliably attributed to, Islamic State. These attacks have taken place both within and outside the region in which Islamic State operates and include:

(a) coordinated explosions, including a suicide bombing, at Brussels Airport and Maelbeek metro station in Belgium

(b) simultaneous armed assaults against a concert hall, stadium, restaurants and bars in Paris, France

(c) suicide bombings targeting tourists visiting Istanbul, Turkey

(d) car bombings and suicide bombings targeting Shiite worshippers in Syria

(e) attacks against Iraqi soldiers and pro-government fighters in Ramadi, Iraq

(f) multiple bombings, suicide bombings and armed attacks against civilian targets in Iraq.

Does the organisation advocate the doing of a terrorist act?

7.55. The supporting statement cites examples of Islamic State's advocacy of terrorist acts. These include the distribution of videos produced by Islamic State, many featuring the execution of captives, that threaten further attacks against Western targets and call on Islamic State followers to carry out attacks against civilians in the West.

Is the organisation opposed to Australia, or to Australia's interests, values, democratic beliefs, rights or liberties?

7.56. The supporting statement for the declaration concludes that:

> *It is clear Islamic State is opposed to Australia and Australia's interests. Islamic State leadership have openly called for attacks against Australia and Australian citizens while official Islamic State propaganda seeks to radicalise Australian Muslims in an effort to swell Islamic State ranks and encourage domestic terror attacks.*

7.57. In support of this conclusion, the statement cites several examples taken from official publications of Islamic State and other propaganda where Australia has been specifically named, both in praising past terrorist attacks and in calling for further attacks on Australian soil. The statement attributes these open calls for attacks against Australia and its interests to the group's anti-Western ideology and Australia's support for military operations against Islamic State.

7.58. The supporting statement also highlights the aim of Islamic State and its supporters to radicalise Australian Muslims to 'adopt its extreme interpretation of Sunni Islam and encourage violent jihad against non-believers'. It notes that:

> *Susceptible Australians are influenced toward radicalisation through a coordinated Islamic State propaganda campaign and exposure to extremist ideology within Australia.*

7.59. More than 60 Australians are currently fighting with Islamic State in Iraq and Syria. Australians fighting with Islamic State have been involved in acts of violence including suicide bombings and beheadings; incidents subsequently used to support Islamic State's propaganda campaign.

7.60. Further, there have been three terrorist attacks carried out within Australia that Islamic State claims to have inspired or influenced, and has openly praised through online propaganda:

(a) 23 September 2014: 18-year-old Numan Haider stabbed two counter-terrorism police officers in Endeavour Hills, Victoria.

(b) 15–16 December 2014: Man Haron Monis held hostage ten customers and eight employees of a Lindt chocolate cafe located at Martin Place in Sydney, NSW.

(c) 2 October 2015: Farhad Khalil Mohammad Jabar, a 15-year-old boy, shot and killed Curtis Cheng, an unarmed police civilian, outside the New South Wales Police Force headquarters in Parramatta, NSW.

7.61. The supporting statement for the declaration claims that Australians who are fighting for or are in the service of Islamic State are 'acting inconsistently with their allegiance to Australia' because Australians who fight for or are in the service of Islamic State will be expected to engage in acts of violence, in support of Islamic State objectives, or to actively encourage the radicalisation of Australian citizens in an effort to increase recruitment or orchestrate terrorist attacks domestically; conduct which is incompatible with the shared values of the Australian community.

7.62. More broadly, the statement argues that the primary objective of Islamic State – the establishment of a worldwide caliphate by means of extreme violence – 'is in direct opposition to Australia's national interest, international stability and a rules-based global order'.

7.63. **Committee comment**

As noted above, Islamic State has been listed (under its various names) as a terrorist organisation under the Criminal Code since 2005. The Committee has considered the listing and re-listing of the organisation on each occasion and supported the Government's assessment of Islamic State's involvement in and advocacy of terrorist acts. In addition, the Committee has requested further information from the Department of Immigration and Border Protection on the implementation of citizenship revocation powers, and will report on this in its annual report.

7.64. For the purposes of the Citizenship Act, the Committee has considered whether the matters at subsection 35AA(2) have been met in relation to Islamic State. On the basis of the evidence provided, the Committee considers the Government's assessment to be reasonable, namely that the group is opposed to Australia, and to Australia's interests, values, democratic beliefs, rights or liberties.

7.65. Accordingly, the Committee is satisfied that the self-described 'Islamic State' is directly engaged in, preparing, planning, assisting in and fostering the doing of terrorist acts, and is opposed to Australia, Australia's interests, values, democratic beliefs, rights and liberties, so that if a person were to fight for or be in the service of the organisation the person would be acting inconsistently with their allegiance to Australia.

7.66. In relation to Jabhat Al Nusra, the PJCIS came to the same conclusions.

Jabhat Al-Nusra

7.67. Jabhat al-Nusra was first listed as a terrorist organisation under the Criminal Code on 29 June 2013, and was re-listed on 28 June 2016. Both listings were reviewed by the Committee.

7.68. On 28 July 2016, Jabhat al-Nusra's leader released a video announcing that it had changed its name to Jabhat Fatah al-Sham. On 31 October 2016, the group's Criminal Code listing was amended to include Jabhat Fatah al-Sham as an alias.

7.69. According to the supporting statement for the declaration, Jabhat al-Nusra remains part of al-Qa'ida's global network and is a group that 'adheres to a violent jihadist ideology that is strongly anti-Western and encourages violence as a key element of pursuing its goals'.

7.70. Jabhat al-Nusra's objectives are to remove the Syrian al-Assad government and create a Salafist-oriented Sunni Islamist state in Syria, which it plans to expand into an Islamist Caliphate under its own rule throughout the Levant. The supporting statement notes that Jabhat al-Nusra 'intends to expel or forcibly convert the minority Alawite and Christian communities in Syria'.

7.71. Publicly, Jabhat al-Nusra has distanced itself from al-Qa'ida. The supporting statement notes that this is 'to avoid international scrutiny and gain further support for its cause among other Syrian anti-regime groups'. Jabhat al-Nusra attempts to portray itself as less extreme and brutal than Islamic

State, and promotes its activities as legitimate opposition to the government of Syria. It enjoys cooperative relationships with some like-minded Syrian opposition groups, while it uses violence against moderate Syrian opposition and rival groups.

7.72. Jabhat al-Nusra is led by Abu-Muhammad al-Jawlani (an alias) and has its strongest presence in Syria's northwest, particularly in Idlib province.

7.73. Jabhat al-Nusra operates at least 19 training camps in north-western Syria and is estimated to have between 3000 and 10 000 fighters, along with further members in support roles. Around 30 per cent of its forces are 'foreign fighters' from a wide range of countries, including Australia.

7.74. Jabhat al-Nusra is 'well-funded from a range of international donors and local sources'. Its Syria-based fundraising activities include 'extensive kidnapping, including of Westerners, to raise ransom payments'.

Is the organisation directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act?

7.75. The supporting statement for the declaration summarises Jabhat al-Nusra's terrorist activities as follows:

> *Jabhat al-Nusra undertakes a range of militant activities and terrorist attacks. They use improvised explosive devices, suicide attacks, snipers and small-arms attacks, as well as kidnapping and executions throughout Syria. Targets are often the Syrian regime of Bashar al-Assad and its perceived supporters, rival groups and religious minorities – which Jabhat al-Nusra considers apostates and infidels. The group also conducts public executions and violent punishments in areas it controls.*

7.76. The statement lists numerous attacks since 2014 that have either been claimed by, or reliably attributed to, Jabhat al-Nusra. These include:

(a) a double suicide bombing carried out with explosive belts in Damascus

(b) the mass execution of captured Syrian soldiers

(c) attacks against Shia towns and villages

(d) the kidnapping of aid workers, United Nations personal, and members of another Syrian rebel group

(e) the public execution of a woman for adultery

(f) a car bomb attack on an army checkpoint in Lebanon

(g) the destruction of churches and religious items in captured cities, with threats to kill Christians unless they paid fees.

Does the organisation advocate the doing of a terrorist act?

7.77. The supporting statement identifies several media statements issued by Jabhat al-Nusra, and its identified members, that advocate the doing of terrorist acts.

Is the organisation opposed to Australia, or to Australia's interests, values, democratic beliefs, rights or liberties?

7.78. The supporting statement notes that:

> *Jabhat al-Nusra adheres to al-Qa'ida's global jihadist ideology – which is fundamentally anti-Western, and advocates violence to achieve its goals. It directly threatens Australia's interests by upholding al Qa'ida's overall mission of global terror.*

7.79. The statement notes that al-Qa'ida has 'endorsed and directly called for attacks in Australia, and encouraged attacks on Australians overseas'. Al-Qa'ida's leader has 'encouraged South-East Asia-

based extremists to attack Western interests in the region' and Australians have been threatened with attacks should they visit Bali or other Indonesian tourist destinations.

7.80. Jabhat al-Nusra 'openly praises and incites terrorist acts which oppose Australian interests at home and abroad'. A June 2015 video released by Jabhat al-Nusra commends al-Qa'ida's 11 September 2001 attacks against the United States of America, which killed ten Australians. An alleged Australian Jabhat al-Nusra fighter Mehmet Biber is also cited as endorsing acts of terrorism, including in Australia.

7.81. Jabhat al-Nusra and its supporters have aimed to radicalise Australian Muslims to adopt an extreme interpretation of Salafist-oriented Sunni Islam in order to increase recruitment of foreign fighters and encourage attacks across the globe.

7.82. At least 110 Australians have travelled to Syria and Iraq to join jihadist groups engaged in conflict, including Jabhat al-Nusra. Australians fighting with Jabhat al-Nusra are involved in acts of violence – including suicide bombing – in Syria. These acts of violence have been subsequently used to support Jabhat al-Nusra's propaganda campaign.

7.83. The supporting statement concludes:

> *Australians fighting for or in the service of Jabhat al-Nusra are acting inconsistently with their allegiance to Australia. Jabhat al-Nusra adheres to al-Qa'ida's global jihadist ideology which aims to remove the Syrian regime, Western influence and establish a Caliphate – first in Syria then broader – using extreme violence. Jabhat al-Nusra has also endorsed acts of terrorism which have killed Australians overseas and at home. These actions are in direct opposition to Australia's national interest, international stability and a rules-based global order.*
>
> *Australians who fight for or are in the service of Jabhat al-Nusra will be expected to engage in acts of violence, in support of Jabhat al-Nusra objectives. They will also actively encourage the radicalisation of Australian citizens in an effort to increase recruitment or orchestrate terrorist attacks domestically; conduct which is incompatible with the shared values of the Australian community.*

Committee comment

7.84. As noted above, Jabhat al-Nusra has been listed as a terrorist organisation under the Criminal Code since 2013. The Committee has considered the listing and re-listing of the organisation on two occasions and supported the Government's assessment of Jabhat al-Nusra's involvement in and advocacy of terrorist acts. The Committee has not received any information in the current review to contradict this assessment.

7.85. For the purposes of the Citizenship Act, the Committee has considered in this review whether the additional matters at subsection 35AA(2)(b) have been met in relation to Jabhat al-Nusra. On the basis of the evidence provided, the Committee considers the Government's assessment to be reasonable: namely, that the group is opposed to Australia, and to Australia's interests, values, democratic beliefs, rights or liberties.

7.86. The Committee is therefore satisfied that Jabhat al-Nusra is:

(a) directly engaged in, preparing, planning, assisting in and fostering the doing of terrorist acts

(b) opposed to Australia, Australia's interests, values, democratic beliefs, rights and liberties, so that if a person were to fight for or be in the service of the organisation the person would be acting inconsistently with their allegiance to Australia.

7.87. Consequently, the Committee finds no reason to disallow the legislative instrument making Jabhat al-Nusra a declared terrorist organisation for the purposes of section 35AA of the *Australian Citizenship Act 2007*.

Appendix D – Persons and organisations consulted

Parliamentarians

- Rt Hon Dominic Grieve QC MP, Chairman of the Intelligence and Security Committee of the UK Parliament
- Rt Hon Baroness Warsi PC of Dewsbury (House of Lords)

Judiciary – United Kingdom

- Rt Hon Sir Charles Haddon-Cave, Lord Justice of Appeal and then Presiding Terrorism Judge, UK
- Rt Hon Sir Brian Leveson, then President of the Queen's Bench Division and Head of Criminal Justice, UK

Government agencies – Commonwealth

- Attorney-General's Department
- Department of Home Affairs
- Department of Foreign Affairs and Trade
- Australian Signals Directorate
- Australian Secret Intelligence Service
- Australian Security Intelligence Organisation
- Australian Federal Police

Bingham Centre seminar

The INSLM attended a closed roundtable on 10 May 2019, held in London at the Bingham Centre for the Rule of Law. It was convened jointly by the York Law School (University of York), the Centre for Socio-Legal Studies (University of Oxford) and the Bingham Centre. Experts from academia, the legal profession and civil society discussed a range of aspects relating to citizenship revocation laws, looking especially at how the UK laws and experience might inform the Australian review. The discussion explored issues including the necessity, effectiveness and the proportionality of the laws, international obligations, procedural fairness, safeguards and scrutiny. A report on the roundtable is available on the websites of the convening organisations.

Government agencies – United Kingdom

- Office for Security and Counter-Terrorism Prevention, Home Office, UK
- Australian High Commission, UK
- Department of Justice and Equality, Republic of Ireland
- National Cyber Security Centre
- Home Office, UK
- Security Service (MI5), UK
- Secret Intelligence Service (MI6), UK
- New Scotland Yard, UK
- Crown Prosecution Service, UK

INSLM counterparts – United Kingdom

- Rt Hon Lord Carlile of Berriew CBE QC, served as the Independent Reviewer of Terrorism Legislation from 2007 to 2011
- Rt Hon Lord Anderson of Ipswich KBE QC, served as the Independent Reviewer of Terrorism Legislation from 2011 to 2017

Appendix E – Text of key statutory provisions – *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*

An Act to amend the *Australian Citizenship Act 2007*, and for related purposes

[*Assented to 11 December 2015*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provisions	**Commencement**	**Date/Details**
1. The whole of this Act	The day after this Act receives the Royal Assent.	12 December 2015

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

4 Purpose of this Act

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

Schedule 1—Main amendments

Australian Citizenship Act 2007

1 Section 32A

Omit:

> • you serve in the armed forces of a country at war with Australia: see section 35; or

substitute:

> • you engage in various kinds of conduct inconsistent with allegiance to Australia: see sections 33AA, 35 and 35A; or

2 Section 33 (heading)

Repeal the heading, substitute:

33 Renunciation by application

3 After section 33

Insert:

33AA Renunciation by conduct

Renunciation and cessation of citizenship

(1) Subject to this section, a person aged 14 or older who is a national or citizen of a country other than Australia renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in conduct specified in subsection (2).

Note 1: The Minister may, in writing, exempt the person from the effect of this section in relation to certain matters: see subsection (14).

Note 2: This section does not apply to conduct of Australian law enforcement or intelligence bodies, or to conduct in the course of certain duties to the Commonwealth: see section 35AB.

(2) Subject to subsections (3) to (5), subsection (1) applies to the following conduct:
- (a) engaging in international terrorist activities using explosive or lethal devices;
- (b) engaging in a terrorist act;
- (c) providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
- (d) directing the activities of a terrorist organisation;
- (e) recruiting for a terrorist organisation;
- (f) financing terrorism;
- (g) financing a terrorist;
- (h) engaging in foreign incursions and recruitment.

(3) Subsection (1) applies to conduct specified in any of paragraphs (2)(a) to (h) only if the conduct is engaged in:
- (a) with the intention of advancing a political, religious or ideological cause; and

(b) with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public.

(4) A person is taken to have engaged in conduct with an intention referred to in subsection (3) if, when the person engaged in the conduct, the person was:

(a) a member of a declared terrorist organisation (see section 35AA); or

(b) acting on instruction of, or in cooperation with, a declared terrorist organisation.

(5) To avoid doubt, subsection (4) does not prevent the proof or establishment, by other means, that a person engaged in conduct with an intention referred to in subsection (3).

(6) Words and expressions used in paragraphs (2)(a) to (h) have the same meanings as in Subdivision A of Division 72, sections 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Division 119 of the *Criminal Code*, respectively. However (to avoid doubt) this does not include the fault elements that apply under the *Criminal Code* in relation to those provisions of the *Criminal Code*.

(7) This section does not apply in relation to conduct by a person unless:

(a) the person was not in Australia when the person engaged in the conduct; or

(b) the person left Australia after engaging in the conduct and, at the time that the person left Australia, the person had not been tried for any offence related to the conduct.

(8) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).

(9) Where a person renounces their Australian citizenship under this section, the renunciation takes effect, and the Australian citizenship of the person ceases, immediately upon the person engaging in the conduct referred to in subsection (2).

Minister to give notice

(10) If the Minister becomes aware of conduct because of which a person has, under this section, ceased to be an Australian citizen, the Minister:

(a) must give, or make reasonable attempts to give, written notice to that effect to the person:

(i) as soon as practicable; or

(ii) if the Minister makes a determination under subsection (12)—as soon as practicable after the Minister revokes the determination (if the Minister does so); and

(b) may give notice to that effect to such other persons and at such time as the Minister considers appropriate.

Note: A person may seek review of the basis on which a notice under this subsection was given in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*.

(11) A notice under paragraph (10)(a) must set out:

(a) the matters required by section 35B; and

(b) the person's rights of review.

(12) The Minister may determine in writing that a notice under paragraph (10)(a) should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations. The Minister must consider whether to revoke such a determination:
  (a) no later than 6 months after making it; and
  (b) at least every 6 months thereafter until 5 years have passed since the determination was made.

Minister's power to rescind notice and exempt person

(13) Subsections (14) to (19) apply only if a person has renounced his or her citizenship under this section.

(14) At any time after a person has renounced his or her citizenship under this section, the Minister may make a determination to:
  (a) rescind any notice given under subsection (10) in respect of the person; and
  (b) exempt the person from the effect of this section in relation to the matters that were the basis for the notice, or in relation to matters that would have been the basis for giving a notice in respect of the person under paragraph (10)(a), but for the operation of subsection (12).

(15) The Minister does not have a duty to consider whether to exercise the power under subsection (14) in respect of any person, whether the Minister is requested to do so by the person who has renounced his or her citizenship under this section, or by any other person, or in any other circumstances.

(16) To avoid doubt, in deciding whether to consider exercising the power in subsection (14), the Minister is not required to have regard to any of the matters referred to in subsection (17).

(17) If the Minister decides to consider whether to exercise the power in subsection (14), then, in that consideration, the Minister must have regard to the following:
  (a) the severity of the matters that were the basis for any notice given in respect of the person under subsection (10), or of matters that would have been the basis for giving a notice in respect of the person under paragraph (10)(a), but for the operation of subsection (12);
  (b) the degree of threat posed by the person to the Australian community;
  (c) the age of the person;
  (d) if the person is aged under 18—the best interests of the child as a primary consideration;
  (e) whether the person is being or is likely to be prosecuted in relation to matters referred to in paragraph (a);
  (f) the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
  (g) Australia's international relations;
  (h) any other matters of public interest.

(18) If the Minister makes a determination under subsection (14), the Minister must cause to be laid before each House of the Parliament, within 15 sitting days of that House after the Minister makes the determination, a statement that:
  (a) sets out the determination; and
  (b) sets out the reasons for the determination, referring in particular to the Minister's reasons in relation to the matters set out in subsection (17).

(19) If the Minister thinks that it would not be in the public interest to publish the name of the person or of any other person connected in any way with the matter concerned, the statement under subsection (18) must not include those names or any information that may identify those persons.

General provisions relating to Minister's powers

(20) The powers of the Minister under this section may only be exercised by the Minister personally.

(21) Section 47 applies to a decision by the Minister to make, or not make, a determination under subsection (14), but does not apply to any other decision of the Minister under this section (including any decision whether to consider exercising the power in subsection (14) to make a determination).

(22) The rules of natural justice apply to a decision by the Minister to make, or not make, a determination under subsection (14), but do not apply to any other decision, or the exercise of any other power, by the Minister under this section (including any decision whether to consider exercising the power in subsection (14) to make a determination).

(23) An instrument exercising any of the Minister's powers under this section is not a legislative instrument.

(24) To avoid doubt, a person's citizenship is taken never to have ceased under this section because of particular conduct if:

(a) in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person did not engage in the conduct or have the requisite intention under subsection (3) of this section; or

(b) in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person was not a national or citizen of a country other than Australia at the time of the conduct; or

(c) the Minister makes a determination under subsection (14) in relation to the conduct to exempt the person from the effect of this section; or

(d) a declaration under section 35AA is disallowed by either House of the Parliament, and the person's citizenship would not have ceased under this section if that declaration had not been made.

4 Section 35

Repeal the section, substitute:

35 Service outside Australia in armed forces of an enemy country or a declared terrorist organisation

Cessation of citizenship

(1) A person aged 14 or older ceases to be an Australian citizen if:

(a) the person is a national or citizen of a country other than Australia; and

(b) the person:

(i) serves in the armed forces of a country at war with Australia; or

(ii) fights for, or is in the service of, a declared terrorist organisation (see section 35AA); and

(c) the person's service or fighting occurs outside Australia.

Note 1: The Minister may, in writing, exempt the person from the effect of this section in relation to certain matters: see subsection (9).

Note 2: This section does not apply to conduct of Australian law enforcement or intelligence bodies, or to conduct in the course of certain duties to the Commonwealth: see section 35AB.

(2) The person ceases to be an Australian citizen at the time the person commences to so serve or fight.

(3) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).

(4) For the purposes of subparagraph (1)(b)(ii) and without limitation, a person is not in the service of a declared terrorist organisation to the extent that:
  (a) the person's actions are unintentional; or
  (b) the person is acting under duress or force; or
  (c) the person is providing neutral and independent humanitarian assistance.

Minister to give notice

(5) If the Minister becomes aware of conduct because of which a person has, under this section, ceased to be an Australian citizen, the Minister:
  (a) must give, or make reasonable attempts to give, written notice to that effect to the person:
    (i) as soon as practicable; or
    (ii) if the Minister makes a determination under subsection (7)—as soon as practicable after the Minister revokes the determination (if the Minister does so); and
  (b) may give notice to that effect to such other persons and at such time as the Minister considers appropriate.

Note: A person may seek review of the basis on which a notice under this subsection was given in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*.

(6) A notice under paragraph (5)(a) must set out:
  (a) the matters required by section 35B; and
  (b) the person's rights of review.

(7) The Minister may determine in writing that a notice under paragraph (5)(a) should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations. The Minister must consider whether to revoke such a determination:
  (a) no later than 6 months after making it; and
  (b) at least every 6 months thereafter until 5 years have passed since the determination was made.

Minister's power to rescind notice and exempt person

(8) Subsections (9) to (14) apply only if a person has ceased to be a citizen under this section.

(9) At any time after a person has ceased to be a citizen under this section, the Minister may make a determination to:
  (a) rescind any notice given under subsection (5) in respect of the person; and
  (b) exempt the person from the effect of this section in relation to the matters that were the basis for the notice, or in relation to matters that would have been the basis for

giving a notice in respect of the person under paragraph (5)(a), but for the operation of subsection (7).

(10) The Minister does not have a duty to consider whether to exercise the power under subsection (9) in respect of any person, whether the Minister is requested to do so by the person who has ceased to be a citizen under this section, or by any other person, or in any other circumstances.

(11) To avoid doubt, in deciding whether to consider exercising the power in subsection (9), the Minister is not required to have regard to any of the matters referred to in subsection (12).

(12) If the Minister decides to consider whether to exercise the power in subsection (9), then, in that consideration, the Minister must have regard to the following:

(a) the severity of the matters that were the basis for any notice given in respect of the person under subsection (5), or of matters that would have been the basis for giving a notice in respect of the person under paragraph (5)(a), but for the operation of subsection (7);

(b) the degree of threat posed by the person to the Australian community;

(c) the age of the person;

(d) if the person is aged under 18—the best interests of the child as a primary consideration;

(e) whether the person is being or is likely to be prosecuted in relation to matters referred to in paragraph (a);

(f) the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;

(g) Australia's international relations;

(h) any other matters of public interest.

(13) If the Minister makes a determination under subsection (9), the Minister must cause to be laid before each House of the Parliament, within 15 sitting days of that House after the Minister makes the determination, a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons in relation to the matters set out in subsection (12).

(14) If the Minister thinks that it would not be in the public interest to publish the name of the person or of any other person connected in any way with the matter concerned, the statement under subsection (13) must not include those names or any information that may identify those persons.

General provisions relating to Minister's powers

(15) The powers of the Minister under this section may only be exercised by the Minister personally.

(16) Section 47 applies to a decision by the Minister to make, or not make, a determination under subsection (9), but does not apply to any other decision of the Minister under this section (including any decision whether to consider exercising the power in subsection (9) to make a determination).

(17) The rules of natural justice apply to a decision by the Minister to make, or not make, a determination under subsection (9), but do not apply to any other decision, or the exercise of any other power, by the Minister under this section (including any decision whether to consider exercising the power in subsection (9) to make a determination).

(18) An instrument exercising any of the Minister's powers under this section is not a legislative instrument.

(19) To avoid doubt, a person's citizenship is taken never to have ceased under this section because of the person serving or fighting as set out in subsection (1) if:

(a) in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person did not so serve or fight (whether because of subsection (4) of this section or for any other reason); or

(b) in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person was not a national or citizen of a country other than Australia at the time the person served or fought; or

(c) the Minister makes a determination under subsection (9) in relation to the conduct to exempt the person from the effect of this section; or

(d) a declaration under section 35AA is disallowed by either House of the Parliament, and the person's citizenship would not have ceased under this section if that declaration had not been made.

35AA Declared terrorist organisation

Declaration of declared terrorist organisation

(1) A ***declared terrorist organisation*** is any terrorist organisation, within the meaning of paragraph (b) of the definition of ***terrorist organisation*** in subsection 102.1(1) of the *Criminal Code*, that the Minister, by legislative instrument, declares is a declared terrorist organisation for the purposes of this section.

(2) Before declaring that an organisation is a declared terrorist organisation, the Minister must be satisfied on reasonable grounds that the organisation:

(a) either:

(i) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or

(ii) advocates the doing of a terrorist act; and

(b) is opposed to Australia, or to Australia's interests, values, democratic beliefs, rights or liberties, so that if a person were to fight for or be in the service of such an organisation the person would be acting inconsistently with their allegiance to Australia.

(3) The making of a declaration under subsection (1) is taken not to be prescribed administrative action for the purposes of Part IV of the *Australian Security Intelligence Organisation Act 1979*.

Review of declaration by Parliamentary Joint Committee on Intelligence and Security

(4) The Parliamentary Joint Committee on Intelligence and Security may:

(a) review a declaration made under subsection (1) as soon as possible after the declaration is made; and

(b) report the Committee's comments and recommendations to each House of the Parliament before the end of the period during which the House may disallow the declaration.

35AB Sections 33AA and 35 do not apply to conduct of Australian law enforcement or intelligence bodies or in course of certain duties to the Commonwealth

(1) Sections 33AA and 35 do not apply to conduct engaged in by:
  (a) a person in the proper performance of a function of an Australian law enforcement or intelligence body; or
  (b) a person acting in the course of the person's duty to the Commonwealth in relation to the defence, security or international relations of Australia.

(2) In this section:

Australian law enforcement or intelligence body means a body, agency or organisation of the Commonwealth, or of a State or Territory, that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud, security intelligence, foreign intelligence or financial intelligence.

5 After section 35

Insert:

35A Conviction for terrorism offences and certain other offences

Cessation of citizenship on determination by Minister

(1) The Minister may determine in writing that a person ceases to be an Australian citizen if:
  (a) the person has been convicted of an offence against, or offences against, one or more of the following:
    (i) a provision of Subdivision A of Division 72 of the *Criminal Code*;
    (ii) a provision of section 80.1, 80.1AA or 91.1 of the *Criminal Code*;
    (iii) a provision of Part 5.3 of the *Criminal Code* (except section 102.8 or Division 104 or 105);
    (iv) a provision of Part 5.5 of the *Criminal Code*;
    (v) section 24AA or 24AB of the *Crimes Act 1914*;
    (vi) section 6 or 7 of the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*; and
  (b) the person has, in respect of the conviction or convictions, been sentenced to a period of imprisonment of at least 6 years, or to periods of imprisonment that total at least 6 years; and
  (c) the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination; and
  (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; and
  (e) having regard to the following factors, the Minister is satisfied that it is not in the public interest for the person to remain an Australian citizen:
    (i) the severity of the conduct that was the basis of the conviction or convictions and the sentence or sentences;
    (ii) the degree of threat posed by the person 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; and

(vii) any other matters of public interest.

Note: A person may seek review of a determination made under this subsection in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*.

(2) The person ceases to be an Australian citizen at the time when the determination is made.

(3) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).

(4) For the purpose of paragraph (1)(b):

(a) the reference to being sentenced to a period of imprisonment does not include a suspended sentence; and

(b) if a single sentence of imprisonment is imposed in respect of both an offence against a provision mentioned in paragraph (1)(a) and in respect of one or more other offences, then:

(i) if it is clear that only a particular part of the total period of imprisonment relates to the offence against the provision mentioned in paragraph (1)(a)—the person is taken to have been sentenced to imprisonment in respect of that offence for that part of the total period of imprisonment; and

(ii) if subparagraph (i) does not apply—the person is taken to have been sentenced to imprisonment in respect of the offence against the provision mentioned in paragraph (1)(a) for the whole of the total period of imprisonment.

Minister to give notice

(5) If the Minister makes a determination under subsection (1) because of which a person ceases to be an Australian citizen, the Minister:

(a) must give, or make reasonable attempts to give, written notice to that effect to the person:

(i) as soon as practicable; or

(ii) if the Minister makes a determination under subsection (7)—as soon as practicable after the Minister revokes the subsection (7) determination (if the Minister does so); and

(b) may give notice to that effect to such other persons and at such time as the Minister considers appropriate.

(6) A notice under paragraph (5)(a) must set out:

(a) the matters required by section 35B; and

(b) the person's rights of review.

(7) The Minister may determine in writing that a notice under paragraph (5)(a) should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations. The Minister must consider whether to revoke the determination:

(a) no later than 6 months after making it; and

(b) at least every 6 months thereafter until 5 years have passed since the determination was made.

Minister must revoke determination if conviction overturned

(8) The Minister must, in writing, revoke a determination made under subsection (1) in relation to a person if:
  (a) a conviction because of which the determination was made is later overturned on appeal, or quashed, by a court; and
  (b) that decision of that court has not been overturned on appeal; and
  (c) no appeal, or further appeal, can be made to a court in relation to that decision.

(9) If the Minister revokes the determination, the person's citizenship is taken never to have ceased under this section because of that determination.

General provisions relating to Minister's powers

(10) The powers of the Minister under this section may only be exercised by the Minister personally.

(11) Except for the powers of the Minister under subsection (1), the rules of natural justice do not apply in relation to the powers of the Minister under this section.

(12) Section 47 does not apply in relation to the exercise of the powers of the Minister under this section.

(13) An instrument exercising any of the Minister's powers under this section is not a legislative instrument.

35B Matters to be set out in notices to persons who have ceased to be Australian citizens

(1) A notice that is given to a person under paragraph 33AA(10)(a) or 35(5)(a) must:
  (a) state that the Minister has become aware of conduct because of which the person has, under section 33AA or 35, ceased to be an Australian citizen; and
  (b) contain a basic description of that conduct.

(2) A notice that is given to a person under paragraph 35A(5)(a) must:
  (a) state that the Minister has determined under section 35A that the person has ceased to be an Australian citizen; and
  (b) include the reasons for the decision to make the determination.

(3) However, a notice given to a person under paragraph 33AA(10)(a), 35(5)(a) or 35A(5)(a) must not contain information, or content of a document, if:
  (a) the information or content includes any operationally sensitive information (within the meaning of the *Independent National Security Legislation Monitor Act 2010*); or
  (b) the disclosure of the information or content would or might prejudice:
    (i) the security, defence or international relations of Australia; or
    (ii) the performance by a law enforcement or security agency (within the meaning of the *Independent National Security Legislation Monitor Act 2010*) of its functions; or
  (c) the disclosure of the information or content would or might endanger a person's safety; or
  (d) the disclosure of the information or content would be likely to be contrary to the public interest for any other reason.

6 Paragraph 36(1)(a)

Omit ", 34A or 35", substitute "or 34A".

7 At the end of Division 3 of Part 2

Add:

36A No resumption of citizenship if citizenship ceases under section 33AA, 35 or 35A

If under section 33AA, 35 or 35A a person ceases to be an Australian citizen, then Divisions 1 and 2 of this Part do not apply in relation to the person on and after the time of that cessation.

Note: The effect of this section is that (subject to subsections 33AA(14) and (24), 35(9) and (19) and 35A(8) and (9)) the person can never become an Australian citizen again.

8 Application provisions

Application of section 33AA

(1) Section 33AA of the *Australian Citizenship Act 2007* (as amended by this Schedule) applies in relation to:

(a) persons who became Australian citizens before, on or after the commencement of this item; and

(b) conduct engaged in on or after the commencement of this item (whether the conduct commenced before, on or after the commencement of this item).

Application of section 35

(2) Section 35 of the *Australian Citizenship Act 2007* (as amended by this Schedule) applies in relation to:

(a) persons who became Australian citizens before, on or after the commencement of this item; and

(b) fighting for, or being in the service of, a declared terrorist organisation that occurs on or after the commencement of this item (whether the fighting or service commenced before, on or after the commencement of this item).

(3) If the fighting or service commenced before the commencement of this item, the person ceases to be an Australian citizen at the time this item commences.

Application of section 35A

(4) Section 35A of the *Australian Citizenship Act 2007* (as amended by this Schedule):

(a) applies in relation to persons who became Australian citizens before, on or after the commencement of this item; and

(b) does not apply in relation to a conviction of a person before the commencement of this item unless:

(i) the conviction occurred no more than 10 years before the commencement of this item; and

(ii) the person was sentenced to a period of imprisonment of at least 10 years in respect of that conviction.

Schedule 2—Other amendments

Australian Citizenship Act 2007

1 After section 51A

Insert:

51B Reports to Parliament

(1) As soon as practicable after each reporting period, the Minister must table a report in each House of the Parliament that sets out:

(a) the number of notices given by the Minister under paragraph 33AA(10)(a), 35(5)(a) or 35A(5)(a) during the reporting period; and

(b) the number of notices the Minister unsuccessfully attempted to give under paragraph 33AA(10)(a), 35(5)(a) or 35A(5)(a) during the reporting period; and

(c) for each notice given or attempted to be given under paragraph 33AA(10)(a) or 35(5)(a)—a brief statement of the matters that are the basis for the notice; and

(d) for each notice given or attempted to be given under paragraph 35A(5)(a)—a brief statement of the matters that are the basis for the determination under subsection 35A(1) to which the notice relates.

(2) The report must not contain information, or content of a document, if:

(a) the information or content includes any operationally sensitive information (within the meaning of the *Independent National Security Legislation Monitor Act 2010*); or

(b) the disclosure of the information or content would or might prejudice:

(i) the security, defence or international relations of Australia; or

(ii) the performance by a law enforcement or security agency (within the meaning of the *Independent National Security Legislation Monitor Act 2010*) of its functions; or

(c) the disclosure of the information or content would or might endanger a person's safety; or

(d) the disclosure of the information or content would be likely to be contrary to the public interest for any other reason.

(3) For the purposes of this section, ***reporting period*** means:

(a) the period of 6 months beginning on the day this section commences; and

(b) each subsequent 6-month period.

51C Briefing of Parliamentary Joint Committee on Intelligence and Security

(1) This section applies if any of the following events occurs:

(a) the Minister gives or unsuccessfully attempts to give a notice under paragraph 33AA(10)(a) or 35(5)(a);

(b) the Minister gives or unsuccessfully attempts to give a notice under paragraph 35A(5)(a);

(c) the Minister makes a determination under subsection 33AA(12), 35(7) or 35A(7).

(2) The Minister must, as soon as practicable after the occurrence of the event, inform the Parliamentary Joint Committee on Intelligence and Security in writing.

(3) Before the later of:

(a) the end of 20 sittings days of the House of Representatives after the occurrence of the event; and

(b) the end of 20 sittings days of the Senate after the occurrence of the event;

the Minister must, if requested to do so by the Parliamentary Joint Committee on Intelligence and Security, arrange for the Committee to be briefed on the event.

(4) The briefing may be done orally or in writing.

(5) The briefing must include details of the following:

(a) for an event mentioned in paragraph (1)(a):

(i) the matters that are the basis for the notice; and

(ii) whether the Minister has rescinded the notice and exempted the person to whom the notice related from the effect of the section in relation to the matters that were the basis for the notice;

(b) for an event mentioned in paragraph (1)(b):

(i) the matters that are the basis for the determination under subsection 35A(1) to which the notice relates;

(ii) whether the Minister has revoked under subsection 35A(8) the determination to which the notice relates; and

(c) for an event mentioned in paragraph (1)(c)—the matters that are the basis for the determination.

Independent National Security Legislation Monitor Act 2010

2 Section 4 (before paragraph (a) of the definition of *counter-terrorism and national security legislation*)

Insert:

(aa) sections 33AA, 35 and 35A of the *Australian Citizenship Act 2007* and any other provision of that Act as far as it relates to those sections;

Intelligence Services Act 2001

3 Section 3

Insert:

Immigration and Border Protection Department means the Department administered by the Minister administering the *Australian Citizenship Act 2007*.

4 Before paragraph 29(1)(c)

Insert:

(ca) to review, by 1 December 2019, the operation, effectiveness and implications of sections 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007* and any other provision of that Act as far as it relates to those sections; and

5 Paragraph 29(3)(g)

Omit "ONA or AFP", substitute "ONA, AFP or the Immigration and Border Protection Department".

6 At the end of section 30

Add:

; (e) the Secretary of the Immigration and Border Protection Department.

7 Clause 1A of Schedule 1 (definition of *agency*)

Omit "or AFP", substitute ", AFP or the Immigration and Border Protection Department".

8 Clause 1A of Schedule 1 (at the end of the definition of *agency head*)

Add:

; or (f) the Secretary of the Immigration and Border Protection Department.

9 Application of amendments

The amendments of the *Independent National Security Legislation Monitor Act 2010* and the *Intelligence Services Act 2001* made by this Schedule apply in relation to sections 33AA, 35 and 35A of the *Australian Citizenship Act 2007* as in force on and after the commencement of this Act.

[*Minister's second reading speech made in—*
House of Representatives on 24 June 2015
Senate on 30 November 2015]