



Law Council
OF AUSTRALIA

Review of the Australian Citizenship renunciation by conduct and cessation provisions

Parliamentary Joint Committee on Intelligence and Security

1 July 2019

Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Executive summary	5
Introduction	8
Australia’s international human rights obligations	9
Necessity and proportionality	9
The right to not be declared ‘stateless’	10
The right to freedom of movement.....	13
The rights of children.....	14
Equality before the law	15
Risk of marginalisation and further radicalisation.....	16
The loss of citizenship due to conduct (s 33AA and s 35)	16
Section 33AA – Renunciation of citizenship by conduct.....	17
Section 35 – Cessation of citizenship by conduct	19
Establishing findings of fact	20
Effect on terrorism related prosecutions	21
Constitutional implications	23
Separation of Powers	23
The scope of power for the Commonwealth	24
The Citizenship Loss Board	24
An alternative model for consideration	28
A judicial determination model	28
Involvement of the Administrative Appeals Tribunal	29
Other matters of concern	30
Retrospectivity.....	30
Rehabilitation and dependants	32
Accessibility of judicial review and merits review	33

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933 and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 July 2019 are:

- Mr Arthur Moses SC, President
- President-elect (vacant)
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Ross Drinnan, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee, Constitutional Law Committee, National Human Rights Committee, the Law Society of Western Australia and the Law Society of New South Wales in the preparation of this submission.

Executive summary

1. The Law Council welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) review into the operation, effectiveness and implications of the amendments introduced to the *Australian Citizenship Act 2017* (Cth) (**the Act**) by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (**Allegiance to Australia Act**).
2. The Law Council previously provided submissions to the Committee when the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (**Allegiance to Australia Bill**) was referred to the Committee for inquiry and report.¹ While a number of recommendations made by the Law Council were accepted and incorporated in the subsequent amendments made to the Act, some were not, including:
 - that there be greater provision for procedural fairness in the scheme; and
 - that the judiciary have a greater role in the decision-making process leading to the potential loss of citizenship.
3. The Law Council maintains its previous position that citizenship revocation provisions in relation to terrorism cases are neither necessary nor proportionate. The provisions relating to revocation of citizenship should not occur automatically. The recent case concerning Neil Prakash² clearly illustrates that the current legislative regime creates uncertainty and a high risk that a person may be left stateless. This is not consistent with Australia's international obligations and is an undesirable consequence of the existing legislation.
4. The Law Council considers that a further undesirable consequence of the current legislative regime is that it may preclude the extradition of terrorist offenders to Australia to be tried, and if convicted, sentenced under Australian law.
5. This submission addresses the following issues:
 - the threshold for the loss of citizenship and the role of the Minister in exempting the cessation or renunciation of citizenship;
 - the procedural requirements for cessation of citizenship, natural justice and the role of the Citizenship Loss Board (**the Board**);
 - Constitutional validity;
 - the laws' compatibility with Australia's international human rights obligations; and
 - whether the provisions are in fact necessary and effective in achieving their purported goals of ensuring the safety and security of the people of Australia.
6. The Law Council maintains its primary position that if citizenship is to be removed, it should only be removed where an individual has been convicted by an independent, impartial and competent court of a serious terrorism related offence. If, following conviction, a decision is made by a Minister to revoke citizenship, this should only occur after the Minister is satisfied there is evidence that the person poses a substantial risk

¹ Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)* (17 July 2015).

² Matthew Doran et al, 'Fiji Casts Fresh Doubt on Decision to Strip Terrorist Neil Prakash of Australian Citizenship', *ABC News* (online), 8 January 2018 <<https://www.abc.net.au/news/2019-01-08/neil-prakash-definitely-not-fijian-argue-officials/10698462>>.

to Australia's security. The Minister's decision should be made after complying with the requirements of procedural fairness and be subject to clear and effective judicial review.

7. In this regard, the Law Council notes the issues raised by the Committee in its inquiry into the Allegiance to Australia Bill that it may not always be possible to secure a conviction, and that in order to protect the Australian community, there should still be a means by which loss of citizenship based on certain terrorist-related conduct can occur.³
8. Therefore, as an alternative to the preferred conviction-based model, consideration should be given to a judicial determination model. This would require the court, on the application of the Minister, to make an order for the revocation of citizenship upon making findings of fact as to the conduct that justifies the order being made. The Minister could be permitted to make the application where the Minister is satisfied there is evidence that the person poses a substantial risk to Australia's security, and after consideration of other relevant factors.
9. As set out in this submission, the Law Council makes the following core recommendations (**the primary recommendations**) in relation to the current review of the citizenship revocation provisions:
 - sections 33AA and 35 of the Act should be repealed;
 - loss of citizenship under the Act should ideally only occur:
 - after conviction by a court, particularly where such conduct occurs within Australia; and then
 - after a decision by the Minister as to whether the person poses a substantial risk to Australia's security and international obligations; and
 - in circumstances where the Minister's decision affords procedural fairness is accompanied by a means for effective judicial review.
10. If the Committee determines that citizenship revocation remains appropriate in the absence of a conviction, the Law Council recommends as an alternative:
 - that the Minister must make an application to a court seeking an order for the revocation of citizenship;
 - before such an order is made the court must be satisfied, at least to the civil standard of proof:
 - of the conduct relied on to justify the cessation of citizenship; and
 - that the individual is a citizen or national of another country.
11. More generally, in relation to the existing framework, the Law Council recommends that:
 - the measures in the Act should not apply retrospectively to convictions or conduct that occurred prior to commencement of the Act;
 - the scheme should not apply to any child or person who suffers from serious mental illness or any cognitive impairment;
 - if the scheme is to apply to children, there should be evidence available to prove the child had the necessary capacity to form the intention to engage in the conduct capable of severing their allegiance to Australia and a similar test should apply to any individual suffering from a serious mental illness or any cognitive impairment before their citizenship is removed;

³ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)* (September 2015) 181.

- when exercising his or her powers under the Act, the Minister or any other decision maker should be required to consider:
 - prospects for rehabilitation and actual rehabilitation; and
 - the likely effect of citizenship cessation on any dependants and what, if any, alternative arrangements might apply;
- in addition to the availability of judicial review, the scheme should, as a minimum, provide for a clear right of merits review in relation to the Minister's power to exempt the person from the operation of the sections to remove citizenship;
- following a conviction from a court, there should be a requirement for both a court and the Minister to be satisfied that the decision to revoke citizenship will not have the practical effect of rendering a person stateless or subject to indefinite detention;
- if the Board is to remain:
 - it should operate with clearly defined powers, rules and procedures including adherence to the rules of procedural fairness; and
 - information (both inculpatory and exculpatory) it provides to the Minister should be available as part of a right of appeal to a court or Administrative Appeals Tribunal as part of a merits review process.

12. Further, the Law Council does not support provisions as outlined in the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 for reasons detailed in its attached submission to the Committee dated 16 January 2019.

Introduction

13. The Allegiance to Australia Act introduced three new ways in which a person, who is a national or citizen of a country other than Australia, can cease to be an Australian citizen:
- the person, aged 14 years or older, renounces Australian citizenship if the person acts inconsistently with allegiance to Australia by engaging in specified terrorist-related conduct, where the conduct was engaged in outside Australia or the person left Australia before being charged and brought to trial for the conduct (conduct-based citizenship loss);⁴
 - the person, aged 14 years or older, ceases to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation (conduct-based citizenship loss);⁵ and
 - the Minister may determine in writing that a person ceases to be an Australian citizen because the person has been convicted of one or more specified terrorist-related offences and sentenced to at least six years imprisonment (conviction-based citizenship loss).⁶
14. Currently, a person's Australian citizenship may only be removed under these provisions if the person is a dual citizen. This applies to both the automatic and the conviction-based citizenship loss provisions, to seek to ensure that a person is not rendered stateless where a person's citizenship is removed by the operation of the current provisions.
15. Nonetheless, recent practical experience of the operation of these laws raises serious questions about whether these are effective in protecting a person from statelessness.⁷ In the case of Neil Prakash, much media attention has been placed on whether or not he is a Fijian citizen, as Fiji has stated there is no evidence of his Fijian citizenship.⁸ Uncertainty then exists over whether the operation of the automatic-based citizenship loss in this case in fact occurred. The case has demonstrated that the laws are incapable of ensuring that a person is not rendered stateless as a result of citizenship being removed pursuant to the amendments introduced by the Allegiance to Australia Act.
16. While the Law Council understands the necessity of laws which are enacted to maintain the security of Australia and the safety of the Australian community, it is important that such laws are necessary and proportionate and these objectives supported by a demonstrated evidential basis.
17. In this context, the Law Council welcomes the review by the Committee into the citizenship revocations provisions set out in sections 33AA, 35 and 35A of the Act.

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

⁵ *Ibid* s 35.

⁶ *Ibid* s 35A.

⁷ The Law Council of Australia, 'Law Council of Australia's Statement Regarding Neil Prakash's Citizenship Status' (Media Release, 4 January 2019) <<https://www.lawcouncil.asn.au/media/media-releases/law-council-of-australias-statement-regarding-neil-prakashs-citizenship-status>>; Helen Davidson, 'Dutton Insists Neil Prakash is Fijian Citizen, But Fiji PM Says He 'Cannot Come Here'', *The Guardian* (online), 3 January 2018 <<https://www.theguardian.com/australia-news/2019/jan/03/dutton-insists-neil-prakash-is-fijian-citizen-but-fiji-pm-says-he-cannot-come-here>>; David Wroe, 'Fijian PM Says Terrorist Neil Prakash Cannot Go to Fiji, Amid Deepening Citizenship Row', *The Canberra Times* (online), 3 January 2018 <<https://www.canberratimes.com.au/politics/federal/fijian-pm-says-terrorist-neil-prakash-cannot-go-to-fiji-amid-deepening-row-20190103-p50pcz.html>>.

⁸ Matthew Doran et al, 'Fiji Casts Fresh Doubt on Decision to Strip Terrorist Neil Prakash of Australian Citizenship', *ABC News* (online), 8 January 2018 < <https://www.abc.net.au/news/2019-01-08/neil-prakash-definitely-not-fijian-argue-officials/10698462>>.

Australia's international human rights obligations

Necessity and proportionality

18. Under international human rights law, for a limitation on a right to be justifiable, 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.
19. The purpose of these provisions is to ensure the safety of the Australian community. It is questionable whether there is a reasoned and evidence-based argument that these laws are necessary to address this issue. When the Allegiance to Australia Bill was first introduced to the Parliament, the Parliamentary Joint Committee on Human Rights (PJCHR) inquired into and prepared a report in relation to the Bill.⁹ In the report of the PJCHR it stated '[t]he statement of compatibility does not provide reasoning or evidence that the measures support a pressing or substantial concern' and while the statement of compatibility with human rights spoke about the 'security and safety of Australians' the report stated there was no evidence provided of what these threats were, beyond references to 'existing and emerging threats to national security'.¹⁰
20. Australia has an array of laws designed to target terrorism-related offending that are capable of being more practical and effective than the citizenship revocation provisions. There was no evidence provided to the PJCHR about why these existing methods to keep Australians safe and protecting national security were insufficient. The PJCHR report went on to say:

*It is not clear that the measures, in automatically depriving a person of citizenship in relation to a broad range of circumstances, can be said to be proportionate. In order to be proportionate a limitation on a right must be the least restrictive means of achieving a legitimate objective and must include appropriate safeguards.*¹¹
21. In relation to people who have been convicted of terrorist offences and are currently serving a sentence of imprisonment, an application can be brought for a continuing detention order under the scheme contained in Division 105 of the Criminal Code.
22. Some provisions appear to have been utilised under the Act. In its submission to the Committee's inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, the Department of Home Affairs stated that as at 3 January 2019, fifty eight individuals had been convicted and sentenced for Commonwealth terrorism offences in Australia since 2001 and twelve individuals offshore have 'ceased to be Australian citizens as a result of terrorism-related conduct', while 'no individuals have had their Australian citizenship ceased under section 35A of the Act'.¹²

⁹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Twenty-Fifth Report of the 44th Parliament, 11 August 2015) 4-46.

¹⁰ *Ibid* 10 [1.39].

¹¹ *Ibid* 11 [1.43].

¹² Department of Home Affairs, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth)*, 4-5.

23. In the United Kingdom between 2006 and 2009 four people were deprived of their citizenship status. Since 2010 33 people have been deprived of their citizenship status, all but two of whom were outside of Britain when the order was made.¹³
24. However, this does not demonstrate necessity or proportionality when there may be the potential for other options to address the national security risk such as bringing the person to trial for alleged acts committed or, as noted, the use of a continuing detention order.
25. Further, the Department of Home Affairs' submission to the recent inquiry conducted by the Independent Security Legislation Monitor (**INSLM**) noted a number of challenges with the automatic operation of law model.¹⁴ These include: the impact on other mechanisms, such as criminal justice processes; different intelligence agency powers depending on whether a person is an Australian citizen or non-citizen; and Australia's ability to manage its broader bilateral relationships.¹⁵
26. In the absence of evidence to suggest necessity and proportionality and in light of the challenges identified with the operation of law model, the Law Council recommends that sections 33AA and 35 of the Act should be repealed.

The right to not be declared 'stateless'

27. The United Nations' *Convention on the Reduction of Statelessness* (1961), to which Australia gave accession in 1973, provides that a contracting state shall not deprive a person of his or her nationality if such deprivation would render the person stateless.¹⁶ The Convention does permit, however, renunciation of citizenship in circumstances where the person concerned possesses or acquires another nationality.¹⁷
28. While international law dictates that everyone has the right to a nationality and that no one shall be arbitrarily deprived of their nationality,¹⁸ 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.¹⁹ 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 law, which holds that all

¹³ Melanie Gower, *Deprivation of British Citizenship and Withdrawal of Passport Facilities* (Standard Note No SN/HA/6820, House of Commons Library, 30 January 2015) 5; Victoria Parsons, 'Theresa May Deprived 33 Individuals of British Citizenship in 2015', *The Bureau of Investigative Journalism* (London, 21 June 2016) <www.thebureauinvestigates.com/>, quoted in Pillai and Williams, *The Utility of Citizenship Stripping Laws in the UK, Canada and Australia*, 9-10.

¹⁴ Department of Home Affairs, Submission to the Independent National Security Legislation Monitor, *Review of the Terrorism-Related Citizenship Loss Provisions in the Australian Citizenship Act* (12 June 2015).

¹⁵ *Ibid.*

¹⁶ *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) art 8.

¹⁷ *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) art 7.

¹⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) [15].

¹⁹ See *Migration Act 1958* (Cth) s 35. A citizen who is in Australia at the time their citizenship ceases will automatically acquire an ex-citizen visa allowing them to remain in, but not re-enter Australia. However, under s 501 of the Act the Minister has the power to cancel the visa on character grounds, which would be a likely outcome if the person lost their citizenship under ss 33AA, 35 or 35A. The person would then become a non-citizen subject to immigration detention.

individuals, including non-citizens, must be protected from arbitrary indefinite detention.²⁰

29. Australia has obligations under Article 9(1) of the *International Covenant on Civil and Political Rights (ICCPR)* not to subject anyone to arbitrary detention. The United Nations Human Rights Committee has considered that 'arbitrary detention' includes detention which, although lawful under domestic law, is unjust or disproportionate. Therefore, for the detention of a person not to be arbitrary, it must be a reasonable and necessary measure in all the circumstances.²¹
30. One of the implications of the provisions is that these may be capable of rendering a person stateless in breach of Australia's international obligations. This is evidenced through the recent case concerning Neil Prakash where there remains doubt as to whether or not he is stateless. Further, given the complexity of this area of law, noting that expert witnesses are often called to give evidence with respect to difficult questions of foreign nationality law (as with the recent referral of multiple parliamentarians to the High Court over potential foreign citizenship), there is a possibility that the Minister may err in believing that a person was a national/citizen of another country, when they are not. Indeed, a citizen or national of a foreign country may have that citizenship or status revoked by the foreign country after the decision is made to revoke the Australian citizenship of the person, again rendering them stateless.
31. A person may also be subject to indefinite detention in circumstances where a person could not be returned to a country where the person may be subject to torture or the death penalty, even if the person has citizenship or a right of entry to that country. Australian²² and international law²³ prohibits returning people in such cases because²⁴ *Refoulement* in such circumstances would likely be in breach of international law.
32. It may be that a person facing such harm is eligible for a protection visa but may be ineligible on character grounds. If a person is ineligible on character grounds, it is at least reasonably arguable that section 197C of the *Migration Act 1958 (Cth) (Migration Act)* requires their removal to the place they fear such harm. The only way to prevent a breach of international law is if the Minister personally intervenes and grants some form of visa such as an ex-citizen visa under section 35 of the Migration Act (only if the person was in the migration zone at the time of that loss) or a Class XA protection visa.

²⁰ *Conka v Belgium* (2002) Eur Court HR, 51564/99.

²¹ Human Rights Committee, *Views: Communication No 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) ('*Van Alphen v Netherlands*'), [5.8]; Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*'), [9.4].

²² *Migration Act 1958 (Cth)* s 36(2)(aa). This paragraph states that a protection visa may be granted to a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

²³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 171 (entered into force 3 January 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, GA Res 44/128, UN Doc A/RES/44/128 (adopted 15 December 1989); *Convention on the Rights of a Child*, opened for signature 20 November 1987, 1577 UNTS 3 (entered into force 2 September 1990); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

²⁴ International human rights protections apply to a person who has lost citizenship. In particular, a person must not be returned to a country where they may be subjected to the death penalty or other arbitrary deprivation of life, persecution, or cruel, inhuman or degrading treatment or punishment: Human Rights Committee, *Views: Communication No 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) ('*FKAG v Australia*'); Human Rights Committee, *Views: Communication No 2136/2012*, 108th sess, UN Doc CCPR/C/108/D/2136/2011 (20 August 2013) ('*MMM v Australia*').

However, given the Minister would have cancelled the person's citizenship, it may be highly unlikely that the person would be granted a protection visa, leaving them to either being removed if able to be or face indefinite detention. International obligations are put aside in making a decision to remove. However, the Minister has the power to grant visas to such persons to ensure that Australia does not break its international obligations.

33. The recent case of Prakash highlights these concerns. Reports indicated that the level of consultation conducted by Australia with Fiji to determine and verify Prakash's citizenship status appeared unclear, with both countries now maintaining he is not a citizen of their nation.²⁵
34. In the United Kingdom there have been two cases where an individual has lost their citizenship from a country other than the United Kingdom 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.²⁶ This illustrates that dual citizenship is not a fixed status of sufficient certainty to render loss of citizenship with any certainty that it will not result in statelessness.
35. There do not appear to be any examples of where the citizenship loss provisions have been applied to a dual national citizen within Australia. However, the same practical concerns about disputes as to citizenship status could arise where Australia seeks to deport a citizen to another country and that country may not be willing to take the former citizen because that country denies that the person has citizenship in that country. This is a situation which occurred in the United Kingdom where the Government stripped an individual of British citizenship on the basis they were a dual national and had Vietnamese citizenship. The deportation was frustrated when the Vietnamese government responded by saying it did not recognise the person as a Vietnamese citizen.²⁷
36. 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 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. Subsection 189(1) of the Migration Act imposes an imperative duty upon 'an officer' – broadly defined to include officers of the Department of Immigration and Border Protection, customs officers, AFP officers, state and territory police officers, and any class of persons authorised by the Minister – to detain a person 'if the officer knows or reasonably suspects that a person

²⁵ David Wroe, 'Fijian PM Says Terrorist Neil Prakash Cannot Go to Fiji, Amid Deepening Citizenship Row', *The Sydney Morning Herald* (online), 3 January 2019 <<https://www.smh.com.au/politics/federal/prakash-citizenship-revocation-could-jeopardise-extradition-chances-says-law-council-20190103-p50ph6.html>>; David Wroe, 'Citizenship Revocation Could Jeopardise Extradition Chances, Says Law Council', *The Sydney Morning Herald* (online), 3 January 2019 <<https://www.smh.com.au/politics/federal/prakash-citizenship-revocation-could-jeopardise-extradition-chances-says-law-council-20190103-p50ph6.html>>; Mark Schliebs, 'Peter Dutton Stands Firm as Fiji Rejects Prakash', *The Australian* (online), 4 January 2019 <<https://www.theaustralian.com.au/national-affairs/immigration/dutton-embarrassed-as-fiji-rejects-prakash/news-story/ae3de1c00a03aaf57090756e63dbb51a>>.

²⁶ *Al-Jedda v Secretary of State for the Home Affairs Department* [2014] AC 253; *Hamza v Secretary of State for the Home Affairs Department* (Special Immigration Appeals Commission, Appeal No SC/23/2003, 5 November 2010).

²⁷ *Pham v Secretary of State for the Department of Home Affairs* [2015] UKSC 19.

in the migration zone... is an unlawful non-citizen'. Every such officer thus comes under an imperative duty to detain the person.

37. 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.
38. 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.
39. Generally, if the detained person is deemed an unlawful non-citizen, the person must be removed from Australia or deported unless granted a visa. Subsection 196(2) of the Migration Act makes it clear that a person can be released from detention if the person is an Australian citizen. The practical effect of section 189 is, however, that a detained person will be released only if the person demonstrates that they are an Australian citizen. That is to say, a detained person would be required to prove – to an officer of the executive – that the person is innocent of any conduct/offence referred to in the citizenship revocation provisions in order to secure their release from detention. This requirement to prove innocence would play out in the context of an administrative decision to be made by a Departmental officer, a customs officer or a police officer, prior to any application for judicial review.
40. The Law Council is of the view that any legislative scheme that permits such an outcome as a matter of law is unacceptable, according to both the rule of law principles which underpin Australia's legal system and Australia's international human rights obligations.

Recommendation:

- **Following a conviction from a court, there should be a requirement for both a court and the Minister to be satisfied that the decision to revoke citizenship will not have the practical effect of rendering a person stateless or subject to indefinite detention.**

The right to freedom of movement

41. Under Article 12 of the ICCPR there is right to freedom of movement, including the right to leave any country. However, if the person is overseas when their Australian citizenship is removed, and the country the person is in does not accept the person as being a citizen of that country and refuses to issue them with a passport, it is likely that the right to leave the country will be particularly limited. This can restrict the ability of the person to attempt to challenge whether the conduct that led to the loss of citizenship actually occurred. It may also render the person liable to detention.
42. The right to freedom of movement also includes the right for an individual to enter their own country. Where a person has 'close and enduring connections' with a country, these create strong ties, possibly stronger than those of nationality,²⁸ and even though citizenship may be removed, this does not necessarily mean the person is deprived of the right to enter their own country. Where a person has lost their citizenship on the basis of a self-executing legislative provision, rather than following a judicial

²⁸ Human Rights Committee, *Views: Communication No 1557/2007*, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) ('*Nystrom v Australia*') [7.4].

determination, it arguably would be in contravention of Article 12(4) to restrict the person from entering their 'own country' in these circumstances.

The rights of children

43. The provisions under review impact on children where a child of or above the age of fourteen years has their citizenship cease under sections 33AA, 35 and 35A. The automatic cessation of citizenship measures contained in sections 33AA and 35 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.²⁹ 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.
44. 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 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. The Law Council is concerned that the sections are disproportionate and contrary to the rule of law. The Law Council therefore considers that sections 33AA and 35 of the Act should be repealed. In any given determination by a court (or other body or person) as to the facts relied on to establish the conduct for the sections, it should address both whether the child has engaged in the prescribed conduct and whether they had capacity to form the requisite intention set out in subsection 33AA(3). This would avoid children being captured by sections 33AA and 35³⁰ who have limited or no understanding about the concepts of allegiance and loyalty.
45. Should the Minister's discretionary power to make an exemption where it would be in the public interest remain, there should be consideration of matters relating to minors, including the best interests of the child, which presumably would take into account any impact cessation may have on the child and Australia's obligations to children.
46. However, it is unclear how the Minister will be in a position to determine whether a particular child has the capacity to form the necessary intention required by subsection 33AA(3) or to know that his or her conduct is capable of a severing of allegiance with Australia. Capacity is usually a matter for determination by a court after psychological evaluations have been conducted, the court has had access to school records and reports and the child has been examined by an appropriate expert. Similar issues arise in relation to individuals who may be considered to have insufficient capacity due to mental illness or cognitive impairment.
47. Given the lack of any requirement for an assessment of the capacity of a child or a person with cognitive impairment to know that their conduct demonstrates a severing of allegiance with Australia, the Law Council considers that at the very least, both children

²⁹ See for example – Article 3 of the United Nations *Convention on the Rights of the Child* 1989 (**CROC**) which provides In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The CROC generally defines a child as any person under the age of 18. However, Article 38 uses the lower age of 15 as the minimum for recruitment or participation in armed conflict. Under Article 7(1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), 'States parties shall cooperate... in the rehabilitation and social integration of persons who are victims' as child soldiers: *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, opened for signature 25 May 2000, 2173 UNTS 236 (entered into force 12 February 2002). Australia has been a party to the Convention since 26 September 2006.

³⁰ This section does not apply where 'actions are unintentional': *Australian Citizenship Act 2007 (Cth)* s 35(4)(a).

and people with mental illness or cognitive impairment should be exempt from the operation of sections 33AA and 35.

48. In the alternative, the Law Council considers that should sections 33AA and 35 be retained there be a requirement that before a notice is issued by the Minister, there be consideration of evidence as to the capacity of the person to form the necessary intention to engage in conduct listed in section 33AA and 35 that can result in the loss of citizenship and the intention to sever their allegiance to Australia in the process. This point was made in the Committee's Advisory report where it stated 'that even for adolescent children, the capacity of the individual should be considered'.³¹

Recommendations:

- **Sections 33AA and 35 of the Act should be repealed.**
- **Alternatively:**
 - **Sections 33AA and 35 should not apply to any child or person who suffers from serious mental illness or any cognitive impairment;**
 - **If these sections are to apply to children, there should be evidence available to prove the child had the necessary capacity to form the intention to engage in the conduct capable of severing their allegiance to Australia; and**
 - **A similar test should apply to all persons who suffer from mental illness or cognitive impairment before their citizenship ceases.**

Equality before the law

49. The Law Council is concerned that the laws undermine certain rule of law principles fundamental to our democratic system of government. One of these is the concept of equality before the law. These laws single out 'dual citizens' from other citizens as being capable of losing their citizenship due to certain conduct as the legislation precludes loss of citizenship where it would result in statelessness.
50. The right to equality and non-discrimination is also protected by articles 2, 16 and 26 of the ICCPR. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal protection of the law. The scheme operates so as to provide direct discrimination on the basis of dual nationality and possibly indirect discrimination on the basis of race and religion as while it may appear neutral, the laws may have a greater impact on people from a Middle Eastern background who practice Islamic faith.
51. Dual citizenship often results from being the son or daughter, or grandson or granddaughter, of an immigrant. The recent controversy concerning the dual citizenship of Commonwealth Parliamentarians has served to highlight that it may not be easy to determine who has dual citizenship and that many people may in fact be dual citizens (or eligible to be) without even knowing this fact.

³¹ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)* (September 2015) 177.

Risk of marginalisation and further radicalisation

52. The Law Council is also concerned that, as per the observations of Dr Christophe Paulussen, a Research Fellow at the International Centre for Counter-Terrorism, the deprivation of nationality is more likely to affect people from minority groups because these people more often hold two nationalities, whereas states cannot deprive citizens that have only one nationality to avoid statelessness. Dr Paulussen commented that:

In this regard one needs to be mindful that exclusion, marginalisation and (perceived) discrimination can be one of the many factors that can play a role in people radicalising and joining extremist groups in the first place.³²

The loss of citizenship due to conduct (s 33AA and s 35)

53. Prior to the amendments introduced to the Act in 2015 following the passage of the Allegiance to Australia Act, it was only section 35 of the Act that allowed for the Minister to revoke citizenship for a conviction for a specified criminal offence, and only in circumstances where the offence had been committed prior to the Minister giving such approval or where the offence was committed in relation to the person's application to become an Australian citizen.³³ There was also limited scope for automatic loss of Australian citizenship where the person served in the armed forces of a country at war with Australia and was a citizen of that country.³⁴

54. The Allegiance to Australia Act significantly extends the scope of the automatic loss of citizenship to a wide and potentially vague set of circumstances as set out in sections 33AA and 35, the sections dealing with the 'renunciation and cessation of citizenship by conduct' and 'cessation of citizenship by engaging in service outside Australia in armed forces of an enemy country or a declared terrorist organisation'.

55. The Law Council reiterates the submission it made in 2015 that it is undesirable to have a broad range of conduct and factually variable scenarios automatically giving rise to a change in the status of citizenship without some satisfactory mechanism for fact finding and determination being in place. This is of particular importance where, unlike in section 35A where there is at least the threshold requirement for a 'conviction' for a specified offence, there is no such requirement for sections 33AA and 35. The same type of allegedly criminal conduct may be relied on to remove citizenship, but without the requirement for any defined standard of proof to be applied in establishing that such conduct in fact occurred, or scrutiny of a court.

56. The Law Council is particularly concerned because of the significant legal consequences for a person upon loss of Australian citizenship. This includes permanent

³² Christophe Paulussen, 'Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive', *International Centre for Counter-Terrorism: The Hague* (Web Page, 17 October 2018) <<https://icct.nl/publication/countering-terrorism-through-the-stripping-of-citizenship-ineffective-and-counterproductive/>>.

³³ *Australian Citizenship Act 2007 (Cth)* s 34.

³⁴ *Ibid* s 35. Other grounds for citizenship revocation under the Act include where a person has: renounced their citizenship through an application under the Act (s 33); been convicted of a serious offence in relation to their application for citizenship, or when citizenship was obtained through a false statement, representation of fraud. Revocation of a person's citizenship under s 34 is only possible for persons who gained citizenship by decent or conferral (ss 34(1) and (2) respectively). Citizens by conferral may additionally have their citizenship revoked under s 34(2)(b)(ii) of the ACA where, after lodgement of a citizenship application, but prior to conferral of citizenship, they were convicted of a serious offence; they do not satisfy special residence requirements (s 34A); and if they are a child under the age of 18 and their parents have ceased to be Australian citizens under ss 33, 34 or 35. The Minister may, in his or her discretion, choose to revoke the child's citizenship. However, revocation must not occur where the child has another responsible parent who holds Australian citizenship (s 36(2)(a)), or where revocation would render the child stateless (s 36(3)).

removal from Australia and the potential for periods of detention both in Australia and abroad. These consequences may be far greater than being convicted of a criminal offence, serving a sentence and then being released.

57. It is vital that there be effective procedural safeguards contained in the legislation to ensure innocent Australians do not lose their Australian citizenship, that lawful and correct decisions are made in accordance with rule of law principles that underpin Australian jurisprudence and that decisions are made in accordance with the requirements of Australia's international human rights obligations.

Section 33AA – Renunciation of citizenship by conduct

58. The Law Council does not support the self-executing or 'deeming' provisions in relation to the loss of something as important as citizenship. Subsection 33AA(1) of the Act provides:

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).

59. The loss of citizenship in circumstances where a person is believed to have engaged in the conduct prescribed in subsection 33AA(2) should ideally occur only after a criminal conviction by a court, particularly where such conduct occurs inside Australia.³⁵ The criteria listed in subsection 33AA(2) all amount to conduct that constitutes one or more criminal offences under the *Criminal Code Act 1995* (Cth) (**Criminal Code**). The conduct listed in subsection 33AA(2) is:

- (a) engaging in international terrorist activities using explosive or lethal devices;
- (b) engaging in a terrorist act;
- (c) providing training 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; and
- (h) engaging in foreign incursions and recruitment.

60. Subsection 33AA(3) of the Act requires the conduct specified in subsection 33AA(2) to be paired with the intention to:

- (a) advance a political, religious or ideological cause; and
- (b) to either coerce or influence by intimidation, the government of the Commonwealth, State or Territory or intimidate the public or a section of the public.

³⁵ The conviction could be either in a domestic Australian court or in the International Criminal Court.

61. However, pursuant to subsection 33AA(4), a person is deemed to have the intention referred to in subsection 33AA(3) by virtue of being a member of, or cooperating with, a declared terrorist organisation. It has been argued that:

*In light of these deeming provisions, it is difficult to ascertain how any meaningful assessment of the potentially exculpatory (mens rea) factors listed [in subsection 33AA(3)] could be undertaken.*³⁶

62. There is no further definition in the Act of what the word ‘inconsistently’ means for the purpose of the operation of section 33AA or section 35 and the legislation is very broad in the way it has been drafted. As a primary principle, the Law Council considers that the law must be both readily known and available, certain and clear.³⁷ The citizenship revocation provisions do not achieve these aims.

63. The only role for the Minister within section 33AA is to possibly ‘exempt the person from the effect of this section in relation to certain matters’.³⁸ Those matters are listed in subsection 33AA(14) of the Act which stipulates that that the Minister may determine to:

- (a) rescind any notice given under subsection (1) 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 but for the operation of subsection (12).³⁹

64. Subsection 33AA(1) of the Act provides that if the Minister ‘becomes aware of conduct because of which a person has, under this section, ceased to be an Australian citizen’, then the Minister must give or take reasonable steps to give ‘written notice to that effect’ as soon as practicable. However, there is no reference in the section as to how the facts which constitute the ‘conduct’ that caused the renunciation of citizenship are to be established, the standard of proof required, or by what rules or procedures the decision to issue a written notice is to be made. While there is reference to ‘the rules of natural justice’ in subsection 33AA(22) in relation to the decision to rescind a notice or to exempt the person from the effect of the section, the subsection states:

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.

65. The Law Council considers the absence of the rules of natural justice in either section 33AA or section 35, as applied to the process for the cessation of citizenship, to be of concern. The sections operate in such a way as to exclude any procedure protective of the rule of law, the presumption of innocence, the rules of natural justice and the opportunity for effective judicial review.

66. The Law Council acknowledges the argument made by the Committee in its advisory report in relation to the Allegiance to Australia Bill, that sections 33AA and 35 are:

³⁶ Michelle Foster, Jane McAdam and Devina Wadley, ‘The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge’ (2017) 40(2) *Melbourne University Law Review* 456, 491.

³⁷ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011) 2.

³⁸ *Australian Citizenship Act 2007* (Cth) s 33AA(1).

³⁹ Subsection 33AA(12) of the *Australian Citizenship Act 2007* (Cth) provides that the Minister does not have to provide Notice if so doing ‘could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations’.

*... 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.*⁴⁰

67. However, the Law Council maintains that while these provisions may be limited in their application to conduct that may not be able to be prosecuted in the context of a criminal trial within Australia, there can still be loss of citizenship predicated upon a conviction recorded for a terrorism-related offence in an overseas court such as the International Criminal Court. The Law Council maintains that Australian citizens who are alleged to have engaged in the prescribed conduct should face criminal prosecution in their own country subject to our laws and upon conviction be dealt with accordingly rather than left at large, potentially remaining a danger to Australia.
68. Australia has also introduced a range of legislation in order to counter terrorism. This includes enacting a number of criminal offences that relate to the commission of acts of terrorism but also offences that cover a range of conduct that are directed to criminalise the preparatory acts of terrorism so as to reduce the risk of an act of terrorism occurring as set out in Part 5.5 of the Criminal Code.
69. In cases where sufficient admissible evidence cannot be obtained to secure a conviction for an offence contained in Part 5.5 of the Criminal Code, Divisions 104 and 105 of the Criminal Code allow considerable obligations, prohibitions and restrictions to be imposed on an individual in the form of a control order or preventative detention order. Under this scheme, individuals, whether or not they are suspected of involvement in a criminal offence, may be subject to a wide range of restrictions if they are deemed to be 'reasonable necessary, and reasonably appropriate and adapted, for the purpose of...protecting the public from a terrorist act'.⁴¹ This allows for other means to address the requirements of national security other than citizenship revocation in the absence of a criminal conviction.

Section 35 – Cessation of citizenship by conduct

70. Subsection 35(1) of the Act provides that a person aged 14 years or older ceases to be an Australian citizen if the person is a national or citizen of a country other than Australia and the person:
- (a) serves in the armed forces of a country at war with Australia; or
 - (b) fights for, or is in the service of a declared terrorist organisation, within the meaning of section 35AA; and
 - (c) serves or fighting occurs outside Australia.
71. However, subsection 35(4) provides the person is not in the service of a declared organisation in situations where:
- (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.

⁴⁰ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)* (September 2015) 87.

⁴¹ *Criminal Code Act 1995* (Cth) s 104.4(1)(d).

72. Section 35 operates in the same manner as section 33AA in that the cessation of citizenship occurs without any judicial hearing into the nature, reliability and substance of the evidence relied on to support a finding of fact that the circumstances listed in subsection 35(1) actually exist. As with section 33AA, the standard of proof for the Minister under this provision is unclear.
73. While subsection 35(4) of the Act provides certain defences for a person who is deemed to be in the service of a declared terrorist organisation, 'given the lack of a clear procedure to make such determinations...it is unclear how effective these potential defences could be in practice'.⁴² The legislation is silent as to the manner in which any evidence is to be presented, what it shall consist of, and as to any method to challenge the evidence.
74. The Law Council considers that loss of citizenship should only occur following a conviction being imposed for terrorism related conduct, as occurs with section 35A. Australian citizens who engage in such conduct should be held to account in courts following a trial conducted in accordance with the rule of law. This includes the safeguards that a criminal trial provides, such as the presumption of innocence, the right to a fair trial, the application of the procedural fairness and the requirement for the State to prove the offence beyond a reasonable doubt. This ensures the process is one that accords with both the rule of law and the separation of powers, both fundamental to Australian democratic values.
75. For these reasons the Law Council considers that sections 33AA and 35 should be repealed.

Recommendations:

- **Sections 33AA and 35 be repealed;**
- **Loss of citizenship under the Act should ideally only occur:**
 - **after a conviction by a court, particularly where such conduct occurs within Australia; and then**
 - **after a decision by the Minister as to whether the person poses a substantial risk to Australia's security and international obligations; and**
 - **in circumstances where the Minister's decision affords procedural fairness and is accompanied by a means for effective judicial review.**

Establishing findings of fact

76. The absence of a requirement for a conviction in sections 33AA and 35 means it is likely that government officials through the Board will advise the Minister in making an assessment of whether a person has engaged in what would otherwise be criminal conduct under the Criminal Code.
77. Under the current provisions, the Commonwealth does not bear any stated onus of proof to establish the factual basis for loss of citizenship under sections 33AA and 35. This legislation subverts the established principles of the common law that an individual has a presumption of innocence and that the onus of proof is on the State to prove their guilt beyond a reasonable doubt. The Law Council considers that, at the very least, the

⁴² Michelle Foster, Jane McAdam and Devina Wadley, 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge' (2017) 40(2) *Melbourne University Law Review* 456, 491.

legislation should clearly state that there is an onus on the State to establish the factual basis for loss of citizenship to a high degree of probability.

78. In evidence given to the Committee's earlier inquiry into the Allegiance to Australia Bill, the Department of Immigration and Border Protection General Counsel advised the Committee that 'awareness' by the Minister for the purpose of sections 33AA and 35 is:

*... more than a belief or a suspicion. It does not require absolute proof. It involves a clear degree of mental apprehension... That would be knowledge based on a high degree of probability as to the facts underpinning the assessment.*⁴³

79. The Law Council considers that if there is a 'high degree of probability' required to establish a finding of fact, then this should be specified in the sections. The absence of such a requirement in the legislation highlights concerns raised by the Law Council in evidence to the Committee's earlier inquiry into the Allegiance to Australia Bill that:

*There 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.*⁴⁴

80. If sections 33AA and 35 are to be used in circumstances where the long-standing judicial procedures for testing and challenging evidence in criminal trials are not applied, the Law Council is concerned that this may lead to instances of error. Innocent people may mistakenly be deemed to have renounced and ceased their Australian citizenship. For this reason the Law Council's primary position is that loss of citizenship should only occur following conviction by a court.

Effect on terrorism related prosecutions

81. 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.⁴⁵
82. It is difficult to gauge how effective these laws are in practice in terms of deterring people from engaging in terrorism related activity. The laws are effective in achieving a symbolic statement by the Australian Government of denouncing Australian citizens who engage in terrorist related activity as not deserving of their Australian citizenship. However, whether these laws achieve the purported aim of greater safety for the Australian community is debatable. The regime may in fact be counterproductive to this aim. This is because if a person is genuinely a threat to Australian security on the grounds of terrorism, the most effective solution would be for the person to be arrested, charged, and if convicted, sentenced by a court. If a custodial sentence is imposed, attempts can be made, while the offender is incarcerated, to facilitate the rehabilitation and de-radicalisation of the offender. Should this be unsuccessful, at the end of the

⁴³ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)* (September 2015) 67.

⁴⁴ Evidence to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 4 August 2015, 6 (Duncan McConnel).

⁴⁵ SC Res 1566, UN SCOR, 503rd mtg, UN Doc S/RES/1566 (2004) (8 October 2004).

sentence the offender may be subject to a continuing detention order application and monitored upon their release from custody.

83. However, if stripped of their citizenship, the person is simply free to pursue acts of terrorism-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.
84. 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.⁴⁶ The danger also remains for those Australians abroad who are at risk from the person remaining overseas.
85. As a signatory to the international treaty to establish the International Criminal Court (the Rome Statute),⁴⁷ 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.
86. 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.
87. 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.
88. This is because section 33AA would have the effect that a person would cease to be an Australian citizen upon engaging in the relevant prescribed conduct. A person may engage in further conduct which the Crown may wish to bring to a trial and obtain a conviction (such as a different offence prescribed by section 35A or another offence under Commonwealth legislation). It may be that because the person is not a citizen, they cannot be tried for the further offence either because being an Australian citizen is a statutory pre-requisite that must be present in order that a person be viable to be charged, or the fact of not being a citizen attracts some form of constitutional argument or generally creates difficulties with jurisdictional issues in trying the person for the further and potentially more serious offence.
89. For example, offences relating to cluster munitions under section 72.38 of the Criminal Code have a category B jurisdiction.⁴⁸ Category B jurisdiction requires that the person

⁴⁶ Christophe Paulussen, 'Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive', *International Centre for Counter-Terrorism: The Hague* (Web Page, 17 October 2018).

⁴⁷ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force on 1 July 2002).

⁴⁸ *Criminal Code Act 1995* (Cth) s 72.38(3).

who engaged in the relevant conduct was an Australian citizen, Australian resident or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory. Under the self-executing scheme in the Act a person who ceases to be an Australian citizen under section 33AA may evade prosecution under an offence such as contained in subsection 72.38(3), which is captured by section 35A. A further example of this is where a person could be charged with an offence under subsection 119(1) of the Criminal Code, a foreign incursion offence attracting a maximum penalty of life imprisonment, providing the person is either an Australian citizen, resident or visa holder, as this requirement for citizenship is an element of the offence.

Constitutional implications

Separation of Powers

90. The manner in which sections 33AA and 35 operate is such that the 'self-executing' provisions remove from the Minister the requirement to make a 'decision' concerning the loss of citizenship. This avoids the constitutional argument that the Minister is in fact exercising a form of judicial power in revoking the citizenship of a citizen in circumstances where the Minister does not have the power to do so due to the separation of powers set out in Chapter III of the Constitution.
91. At the Committee's 2015 inquiry in relation to the Allegiance to Australia Bill, the Law Council was critical of this approach as it did 'not provide a process up front where a person's status can be authoritatively determined'.⁴⁹
92. The removal of a 'legal' decision does not mean a decision is not made in relation to the removal of citizenship and the substance of sections 33AA and 35 is the potential misuse of executive power rather than judicial power to remove citizenship.⁵⁰ This is particularly important where the consequences of the decision to revoke citizenship are very grave, may be akin to punishment and result in the loss of liberty for an unknown period of time if deportation follows and the person is rendered stateless for a variety of reasons.
93. 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. In *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, the High Court held that a law that in effect amounted to a *bill of attainder* would contravene Chapter III of the Constitution and be constitutionally invalid. In *Polyukhovich* Chief Justice Mason stated:

*The application of the [separation of powers] doctrine depends upon the legislature adjudging the guilt of a specific individual or individuals or imposing punishment upon them. If, for some reason, an ex post facto law did not amount to a bill of attainder, yet adjudged persons guilty of a crime or imposed punishment upon them, it could amount to trial by legislature and usurpation of judicial power.*⁵¹

94. While the self-executing provisions may seek to circumscribe this constitutional argument, it is clear with the advent of the 'Citizenship Loss Board', that the decision-

⁴⁹ Evidence to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 4 August 2015, 3-4 (Geoffrey Kennett SC).

⁵⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁵¹ *Polyukhovic v The Commonwealth* (1991) 172 CLR 501, [32] (Mason CJ).

making process is administrative and that the sections are arguably resulting in the 'trial by legislature'. The sections operate so that 'after an administrative process to make findings of fact, the Minister is informed that certain conduct has occurred'.⁵²

95. In order to address these constitutional concerns, the Law Council reiterates its primary recommendations. If the Committee determines that citizenship revocation remains appropriate in the absence of a conviction, the Law Council considers there should be a regime whereby the Minister applies to the Federal Court for an order which has the effect, under the statute of terminating a person's citizenship. However, the section would need to specify that the criterion for the making of the order was that the person had engaged in conduct of a certain kind or meeting a certain description. A regime of this kind may be capable of being brought within the 'double function' idea discussed in *Ex Parte Barrett*,⁵³ namely that the statute both creates the right and gives the court jurisdiction to determine it.

The scope of power for the Commonwealth

96. The Commonwealth's constitutional power to determine who may be an Australian citizen and when citizenship can be lost through legislation has been affirmed by the High Court.⁵⁴
97. However, the basis for and the scope of the Commonwealth's power to enact citizenship legislation is uncertain.⁵⁵ For example, in *Hwang v Commonwealth*, Justice McHugh stated that Parliament 'does not have unlimited power to declare the conditions on which citizenship or membership of the Australian community depends'.⁵⁶ His Honour suggested that there may be constitutional limits to the Commonwealth's power to regulate citizenship as the Parliament cannot 'exclude from citizenship, those persons who are undoubtedly among 'the people of the Commonwealth'.⁵⁷
98. It is not certain whether the sections will be viewed by the High Court as being within one of the heads of Constitutional power required for validity.⁵⁸ These live issues of constitutional validity will of course ultimately be a matter for the High Court to determine. There are two cases currently pending before the High Court where the issue relating to the 'aliens' head of power are under consideration.⁵⁹

The Citizenship Loss Board

⁵² Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)* (September 2015) 56.

⁵³ (1945) 70 CLR 141, [165]-[166] (Dixon J). See also *Precision Data Holdings Ltd v Wills* (1993) 173 CLR 167.

⁵⁴ *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 190 (Gaudron J); *Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 173 [31] (Gleeson CJ); *Singh v Commonwealth* (2004) 222 CLR 322, 329 [4] (Gleeson CJ); *Hwang v Commonwealth* (2005) 222 ALR 83, 86 [9] (McHugh J).

⁵⁵ The framers of the Constitution were familiar with the word 'citizenship' (section 44 of the Constitution makes reference to the term 'citizen'), however, chose not to give the Parliament a power with respect to citizenship. The Convention Debates (Melbourne) in particular confirm that the delegates did not want to vest the Commonwealth Parliament with a right to deprive individuals of citizenship. Some delegates cautioned that defining citizenship in the Constitution would also result in the 'handing over to the Federal Parliament something which is vague in the extreme, and which might be misused': *Official Record of the Debates of the Convention*, Melbourne, 1898, Vol V, 1761 (O'Connor).

⁵⁶ *Hwang v Commonwealth* (2005) 222 ALR 83, 89 [18] (McHugh J).

⁵⁷ *Hwang v Commonwealth* [2005] HCA 66, [18] (McHugh J).

⁵⁸ For example, the external affairs power (section 51(xxix)), the military defence power (section 51(vi)), the naturalisation and aliens power (section 51(xix)), and the immigration power (section 51(xxvii)).

⁵⁹ *Love v Commonwealth of Australia; Thoms v The Commonwealth of Australia* (High Court of Australia, B43/2018, B64/2018, commenced on 10 September 2018).

99. The Law Council does not support the current approach of utilising the Board for in practical effect assisting the Minister to decide citizenship revocation in terrorism cases.
100. It is not correct to contend that the Board does not make a determination and is simply an interdepartmental committee which supports the Minister in administering the citizenship loss provisions (as explained further below at paragraph 103-110).
101. Draft Minutes of a meeting held on Tuesday, 23 February 2016 report that the Board may:
- (a) task member agencies and coordinate cross-agency work to support the implementation of the legislation;
 - (b) review the supporting information for citizenship loss cases that will be provided to the Minister for Immigration and Border Protection through the Secretary, DIBP, including reviewing:
 - (c) the information underpinning citizenship loss cases against the legislative thresholds; and, where appropriate,
 - (d) information that may inform the Minister's discretionary powers under the legislation (for example, the Minister's power to rescind a notice and exempt a person under sections 33AA and 35);
 - (e) provide guidance from a whole of government perspective on managing implications that may arise from citizenship loss cases; and
 - (f) provide general advice to the Secretary on the implementation of the citizenship loss provisions.⁶⁰
102. The Australian Counter Terrorism Centre Joint Operations Group may support the work of the Board through referral of possible candidates for possible consideration of citizenship loss.
103. A range of agencies appear to be represented on the Board, including:
- (a) Department of Home Affairs;
 - (b) Department of the Prime Minister and Cabinet;
 - (c) Department of Foreign Affairs and Trade;
 - (d) Australian Secret Intelligence Service
 - (e) Attorney-General's Department;
 - (f) Australian Crime Commission;
 - (g) Australian Federal Police;
 - (h) Australian Security Intelligence Organisation; and

⁶⁰ *Citizenship Loss Board: Terms of Reference*, Department of Immigration and Border Protection (at 23 February 2016) 1
<https://web.archive.org/web/20180328092356/https://www.homeaffairs.gov.au/AccessandAccountability/Documents/FOI/20160520_FA160401379_Documents_Released.pdf>.

(i) Department of Defence.⁶¹

104. The Law Council draws attention to the basic and fundamental right to a fair hearing, protected by Article 14 of the ICCPR.⁶² The right is concerned with procedural fairness, equality in proceedings and the requirement that hearings be conducted by an independent and impartial body. Article 14(2) provides for the right to the presumption of innocence.

105. While the loss of citizenship is described as ‘automatic’ or ‘self-executing’, as has been argued, the reality is that these laws are not ‘self-executing’ because ‘the law cannot apply itself. Someone or some authority must make a determination’.⁶³ In practice it appears that the determination to remove citizenship will be made by either the Board, which is an executive body created in 2016, or the Minister on advice from the Board. The then Minister for Immigration, the Hon. Peter Dutton MP, stated in 2016 that the Board:

*... will consider individual cases that have been worked through ASIO, ASIS, the Department of Defence, my Department of Immigration and Border Protection, Justice, obviously the Attorney-General, Prime Minister and Cabinet, they're all involved in the process here. So it is a very significant process and it can result in people losing their Australian citizenship.*⁶⁴

106. The Law Council is concerned citizenship loss decisions under the conduct provisions are effectively made by the Minister on advice of the Board, or by the Board which is an arm of the Executive. As stated above, the ability of the Executive to make decisions concerning an individual's citizenship status in terrorism cases has serious implications for the separation of powers. The Board is not a statutory body, it operates in secrecy and it appears to operate free from established administrative law constraints such the requirement to make decisions reasonably and without bias.⁶⁵

107. The Administrative Review Council has stated that ‘procedural fairness should be an element in government decision making in all contexts, accepting that what is fair will vary in the circumstances’.⁶⁶ The principles of natural justice or procedural fairness under the common law generally require that the decision maker be, and appear to be, free from bias and that the person receives a fair hearing.

108. The common law recognises a duty to accord to a person procedural fairness when a decision is made affecting their rights or interests. As stated by Justice Mason in *Kioa v West*:

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a

⁶¹ Ibid 1-2.

⁶² *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976), except Article 41 which came into force in Australia on 28 January 1993.

⁶³ Sangeetha Pillai and George Williams, ‘The Utility of Citizenship Stripping Laws in the UK, Canada and Australia’ (2017) 41 *Melbourne University Law Review* 845, citing Helen Irving, ‘Bill Relies on Legal Fiction of Self-Executing Law to Revoke Citizenship’, *The Conversation* (online), 17 August 2015 <<https://theconversation.com/bill-relies-on-legal-fiction-of-self-executing-law-to-revoke-citizenship-46017>>.

⁶⁴ Santilla Chingaipe, ‘What is the Citizenship Loss Board and How Will it Work’, *SBS News* (online), 14 April 2016 <<https://www.sbs.com.au/news/what-is-the-citizenship-loss-board-and-how-will-it-work>>.

⁶⁵ Sangeetha Pillai and George Williams, ‘The Utility of Citizenship Stripping Laws in the UK, Canada and Australia’ (2017) 41 *Melbourne University Law Review* 845.

⁶⁶ Administrative Review Council, *The Scope of Judicial Review* (Report No. 47, 2006) 13.

*benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.*⁶⁷

109. There is no requirement for a person to be given notice of the inquiry or hearing being conducted by the Board. There is no requirement for the Board to provide the person with the reasons or grounds relied on for the loss of citizenship. These matters further highlight the lack of consistency with fundamental rule of law principles.

110. The operation of the Board was commented on recently in relation to the case of Neil Prakash. Following the cessation of Mr Prakash's citizenship, the Minister for Home Affairs, the Hon. Peter Dutton MP, stated that:

Mr Prakash's case was brought to my attention after careful consideration by the Citizenship Loss Board that Mr Prakash's Australian citizenship had ceased by virtue of his actions in fighting for Islamic State from May 2016.

*Neither the Citizenship Loss Board nor I make decisions on whether an individual ceases to be an Australian citizen, as the provisions operate automatically by virtue of a person's conduct.*⁶⁸

111. The Law Council considers it is a legal fiction that no determination as to the cessation of citizenship is made by either the Board or the Minister. Accordingly, the Law Council reiterates its primary recommendations.

112. If the 'decisions' in relation to loss of citizenship are to be made by a body such as the Board, its powers should be properly constituted and defined by statute and there should be clarity around the decision making process, including rules for practice and procedure, the manner in which evidence is taken, and the provision for the person concerned to appear and be legally represented before the Board. In the absence of the appearance of the person, a representative could be appointed to protect their interests in such instances. The statutory provisions should also provide for a right of appeal against any decision of the Board and could be subject to review by the Administrative Appeals Tribunal. This Tribunal already has powers of review in relation to other decisions relating to citizenship.⁶⁹

Recommendations:

- **If the Citizenship Loss Board is to remain:**
 - **it should operate with clearly defined powers, rules and procedures including adherence to the rules of procedural fairness; and**
 - **information (both inculpatory and exculpatory) it provides to the Minister should be available as part of a right of appeal to a court or Administrative Appeals Tribunal as part of a merits review process.**

⁶⁷ *Kioa v West* (1985) 159 CLR 550, [582] (Mason J).

⁶⁸ The Minister for Home Affairs, the Hon Peter Dutton MP, 'Prakash Citizenship' (Media Release, 2 January 2019).

⁶⁹ *Australian Citizenship Act 2007* (Cth) s 52. This section states an application may be made to the Administrative Appeals Tribunal in relation to the decisions made in relation to the following sections of the *Australian Citizenship Act 2007* (Cth): 17, 19D, 24 (to refuse an application for citizenship), 25 (cancel approval given to a person under s 24), 30 (refuse to approve a person resuming citizenship), 33 (refuse to approve a person renouncing citizenship), 34 (decision to revoke citizenship under s 34).

An alternative model for consideration

A judicial determination model

113. At the Committee's inquiry into the Allegiance to Australia Bill, the Committee requested that the Law Council give consideration to an alternative model whereby the Minister would first seek a declaration from a court that a person had, on the balance of probabilities, engaged in certain conduct as a matter of law. It was noted in the Advisory Report that the Law Council had submitted this model would have the merit of providing an independent 'up-front determination of whether the individual had engaged in the prescribed conduct'.⁷⁰
114. However, as discussed above, care should be taken in the distinction between a declaration, which is generally a declaration of law or of legal right, as opposed to a determination being made as to facts. The Law Council considers that it could be problematic to have a court merely making a declaration as to the existence of particular facts as opposed to making an order which has the effect, by operation of statute, of terminating a person's citizenship.
115. The Law Council maintains that while its preferred position is that loss of citizenship be contingent upon conviction, an alternative and preferred model to the self-executing provisions of sections 33AA and 35 is for the Minister to seek a determination from a Court as to the matters contained in subsections 33AA(2),(3) and (4) or subsection 35(1) so that it can make an order to terminate citizenship. This would be a more transparent process that would provide stronger procedural safeguards to ensure that innocent people do not lose their Australian citizenship and that lawful decisions are made. This would in turn maintain public confidence in the scheme and ensure there is a separation of judicial from executive power while avoiding the very real difficulties of the self-executing model.
116. The Law Council acknowledges the policy concerns raised by the Committee in relation to the Allegiance to Australia Act that bringing overseas terrorist-related activity to trial within Australia may not always be possible, however there can still be an important role played by an Australian court in the process of making an order that results in the revocation of citizenship. A court would generally require a high standard of proof to be applied to establish the facts, given the serious consequences of loss of citizenship.⁷¹
117. A judicial determination model, to be applied in circumstances where a conviction cannot be obtained, in addition to the conviction-based model in section 35A would have the merit of providing an independent judicial determination as to whether the individual engaged in the prescribed conduct as alleged. The Law Council considers that should this model be explored, it would be important to allow the court sufficient discretion as to whether to make an order and to allow appropriate testing of evidence. The court should be required to only make an order for the loss of citizenship where the evidence satisfies the court to the civil standard of proof that the conduct relied on by the Minister to bring the application has occurred and that the person is also a dual citizen or national and will not be rendered stateless. This may also instigate the application of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

⁷⁰ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)* (September 2015) 83.

⁷¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-3 (Dixon J).

Recommendations:

- **Where section 35A cannot be used, the Minister is to make an application to a court seeking an order be made for the loss of citizenship;**
- **Before such an order is made the court should be satisfied, at least to the civil standard of proof, of:**
 - **the conduct relied on to justify the cessation of citizenship; and**
 - **that the individual is a citizen or national of another country.**

Involvement of the Administrative Appeals Tribunal

118. While the Law Council supports merits review by the Administrative Appeals Tribunal (**Tribunal**) of any decision made by the Minister as to whether a person poses a substantial risk to Australia's security and international obligations for the revocation of citizenship in addition to the availability of judicial review, the Law Council would not support a broader role for the Security Appeals Division of the Tribunal for the revocation of citizenship.
119. The primary role of the Tribunal is to review administrative decisions on the merits by considering *de novo* the facts, law and policy relevant to the decision under review.⁷²
120. As outlined above, the Law Council considers that there should be a requirement for a conviction of a specified terrorism related offence as the starting point for consideration for the loss of citizenship. This requirement will best ensure the application of the principles and safeguards fundamental to the rule of law that are present in the criminal justice system in Australia. The stringent rules about the admissibility of evidence that apply to a criminal trial would not be present in any proceedings conducted by the Tribunal⁷³ which is not bound by the rules of evidence and requires that proceedings 'be conducted with as little formality and technicality' as permitted by the *Administrative Appeals Tribunal Act 1975* (Cth) or any other legislation.⁷⁴
121. The Law Council considers the informality of Tribunal proceedings to be unsatisfactory, given the significant consequences that follow from the loss of citizenship. Tribunal proceedings do not provide for the rigorous process that would occur in proceedings conducted by a court bound by the rules of evidence. This court process would in itself serve to demonstrate the importance of the proceedings, and may have some deterrent effect in relation to demonstrating the significance of citizenship revocation.
122. If the procedures for losing citizenship are inconsistent with fundamental rule of law principles including the presumption of innocence, the right to a fair trial, and natural justice, this, in and of itself, has the effect of diminishing the value, sanctity and integrity of the concept of 'citizenship' for all Australian citizens. It is important that the removal of citizenship in terrorism cases should only occur following adjudication by a court of law rather than through the Tribunal.
123. In this context, the Law Council notes the difficulties that have been identified with the United Kingdom's Special Immigration Appeals Commission (**SIAC**). The SIAC has

⁷² See, e.g., *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934.

⁷³ *Administrative Appeals Act 1975* (Cth) s 33(1)(c).

⁷⁴ *Ibid* s 33(1).

a primary role of providing a means for a person to appeal against decisions relating to deportation or the deprivation of citizenship. The SIAC only hears matters in private hearings where the disclosure of information to the appellant and the public would be against the public interest. The Law Council notes the criticism of the SIAC as set out in great detail in the report by the House of Commons Constitutional Affairs Committee (HCCAC)⁷⁵ which included:

- (a) the standard of proof applied by SIAC is ‘undemanding’, that is, the Minister at first instance needs only to have reasonable grounds to believe certain conduct has occurred;⁷⁶
- (b) the merits review by SIAC therefore only considers whether the Minister’s decision was reasonable and not whether the belief was reasonable to any objective standard such as the civil standard of proof;⁷⁷
- (c) there is inadequate support for special advocates;⁷⁸ and
- (d) there is no effective requirement for disclosure of exculpatory material to the appellant by the Minister.⁷⁹

124. The HCCAC concluded that it is preferable for all cases to be removed from SIAC and transposed to the High Court.⁸⁰

125. In the SIAC the appellant, while having their own legal representative in a limited capacity, is reliant on a special advocate who can conference the client before seeing the classified material, but not after they see that material. The special advocate then works to challenge, as best they can, aspects of the classified material and the issue of disclosure of material. However, they have limited resources, have no capacity to call evidence in reply, including any expert evidence, and are significantly compromised and restricted as to their ability to communicate with their client.

126. The difficulties associated with relying on a model similar to that in the United Kingdom’s SIAC highlight the importance of the Law Council’s primary recommendations.

Other matters of concern

Retrospectivity

127. Section 35A of the Act:

- (a) applies in relation to persons who become Australian citizens before, or on or after the commencement the Allegiance to Australia Bill; and
- (b) does not apply in relation to a conviction of a person before the commencement of this item unless:

⁷⁵ House of Commons, Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* (Seventh Report of Session 2004-05, 3 April 2005).

⁷⁶ Ibid 38.

⁷⁷ Ibid 39.

⁷⁸ Ibid 40.

⁷⁹ Ibid 34.

⁸⁰ Ibid 14.

- (i) the conviction occurred no more than 10 years before the commencement; and
- (ii) the person was sentenced to a period of imprisonment of at least 10 years in respect of that conviction.

128. The Law Council submits that the provisions should not apply retrospectively to conduct that occurred before commencement of the Allegiance to Australia Bill.

129. Retrospective laws are generally inconsistent with the rule of law. Lord Bingham has stated:

*Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.*⁸¹

130. Retrospective measures offend rule of law principles that the law must be readily known and available, and certain and clear.⁸² In this context, Lord Diplock has stated:

*...acceptance of the rule of law as a constitutional principle requires that a citizen before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.*⁸³

131. The law should be knowable, certain and its reach ascertainable by those who are subject to it. Further:

*A person cannot rely on ignorance of the law and is required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly.*⁸⁴

132. While it is within the power of the Parliament to enact retrospective laws,⁸⁵ holding a person responsible for automatic citizenship cessation for doing what did not amount to conduct warranting cessation at the time that the person did it, contravenes fundamental notions of justice, fairness and the rule of law. The gravity of retroactive removal of a person's citizenship is a substantive alteration of a person's legal rights and obligations which is fundamentally unjust.

⁸¹ Thomas Bingham, *The Rule of Law* (Penguin UK, 2011) 74. There are also prohibitions on retrospective criminal laws in international law. Article 15 of the *International Covenant on Civil and Political Rights*, expressing a rule of customary international law (*Polyukhovich v Commonwealth* (1991) 172 CLR 501, 574 (Brennan CJ)), provides: 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

⁸² Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011) Principle 1.

⁸³ *Black-Clawson International Ltd v Papierwerke Waldhof-Ascjaffenburg* [1975] AC 591.

⁸⁴ *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoting *Bennion on Statutory Interpretation* (LexisNexis Australia, 5th ed, 2008).

⁸⁵ *Polyukhovich v Commonwealth* (1991) 172 CLR 501. See also *Millner v Raith* (1942) 66 CLR 1.

133. Retrospective laws do not achieve outcomes of general or personal deterrence in respect of conduct occurring prior to the provisions commencing. Prospective laws may arguably have a general deterrence effect or a specific deterrence effect on individuals contemplating radicalisation but there is no evidence to suggest that making the laws retrospective will achieve these outcomes.
134. Those who have already been convicted of offences captured by section 35A will be sentenced to ensure the offender is adequately punished for the offence and protection of the community from the offender. For those who have engaged in the conduct prior to commencement, the criminal law system is available to apply punitive measures. There is additionally a continuing regime of supervision orders to monitor conduct once released where warranted.

Recommendation:

- **The measures in the Act should not apply retrospectively to convictions or conduct that occurred prior to commencement of the Act.**

Rehabilitation and dependants

135. The provisions do not require any consideration of the person's prospects for, or actual, rehabilitation. The availability of Ministerial discretionary exemptions may allow such matters to be considered, but there is currently no requirement to take such factors into account. This means that individuals who have engaged in prohibited conduct, but who have reformed and de-radicalised may nevertheless lose their citizenship. This is inconsistent with Australia's justice system, which recognises the potential for offenders to be reformed. In the unanimous five Judge decision of the New South Wales Court of Criminal Appeal in *R v Pogson*, Chief Justice McClellan and Justice Johnson stated:

[R]ehabilitation has as its purpose the remodelling of a person's thinking and behaviour so that they will, notwithstanding their past offending, re-establish themselves in the community with a conscious determination to renounce their wrongdoing and establish or re-establish themselves as an honourable law abiding citizen: Vartzokas v Zanker at 279 (King CJ).⁸⁶

136. This may be particularly relevant where terrorism and foreign incursion offenders are young and thereby are vulnerable due to their young age. Offending for such offenders may be influenced by older offenders, a particular peer group or inappropriate online activity. Offenders may have been raised in Australia and have strong family ties to Australia, including supportive, pro-social family members who encourage the offender's engagement in rehabilitation. The offenders may have withdrawn from terrorist or foreign incursion related activity before any terrorist act had occurred and by the time of sentence has started, or have renounced their extremist beliefs.
137. There is a 'strong public interest in rehabilitation, both for the benefit of the community and the individual'.⁸⁷ As noted by Chief Justice French, '[r]ehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protections and is clearly in the public interest'.⁸⁸
138. Similarly, there is no requirement in the provisions for there to be a consideration of cessation of citizenship on any dependants and what alternative arrangements might

⁸⁶ *R v Pogson* (2012) 82 NSWLR 60, [103] (McClellan CJ, Johnson J).

⁸⁷ *R v Groombridge* (New South Wales Court of Criminal Appeal, Wood CJ, Hunt and McInerney JJ, 30 September 1990) [9].

⁸⁸ *Hogan v Hinch* (2011) 243 CLR 506, 537 [32] (French CJ).

apply. This may produce grave consequences for a family member or child who loses a parent or spouse.

Recommendation:

- **When exercising his or her powers under the Act, the Minister and any other decision maker should be required to consider:**
 - **prospects for rehabilitation and actual rehabilitation; and**
 - **the likely effect of a citizenship cessation on any dependants and what, if any, alternative arrangements might apply.**

Accessibility of judicial review and merits review

139. The Law Council's *Rule of Law Principles* require that executive decision making should be subject to meaningful judicial review.⁸⁹ In this regard, sections 33AA, 35 and 35A each contain a notation which states:

*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.*⁹⁰

140. At the time of writing this submission these provisions have not been tested in the High Court and there is no judicial authority as to how these provisions are to be interpreted.

141. The opportunity for judicial review may in practice only arise when action is taken consequent upon the loss of citizenship such as the individual being arrested for the purpose of deportation or when the person makes an application for an Australian passport. At this point the person may seek to challenge the basis of their arrest and to prove that they have not in fact ceased to be an Australian citizen as they have not engaged in the conduct that led to the cessation or renunciation of citizenship. The individual concerned may be at a significant disadvantage as the onus of proving this may rest on them and they would presumably not have access to the evidence relied on for the issuing of the notice confirming the loss of citizenship.

142. In relation to the notice it is not strictly necessary for the Minister to serve the notice on the person where the Minister considers that the notice should not be given due to concerns it may 'prejudice the security, defence or international relations of Australia or Australian law enforcement operations'.⁹¹ It is quite possible that the person will not ever be served with the notice which informs them they have ceased to be an Australian citizen or of their limited rights to judicial review.

143. It is also unclear whether a person could commence proceedings seeking a declaration that they are in fact an Australian citizen. As the legislation is framed the application can be made to seek judicial review of the Minister's decision to issue a notice. The decision to issue the notice may be considered to be a decision which is capable of being reviewed under paragraph 39B(1A)(c) of the *Judiciary Act 1903* (Cth). The notice does have some legal effect in the sense the notice would need to be rescinded for the discretionary exemption to apply. The notice is also presumably

⁸⁹ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011) Principle 6(d).

⁹⁰ *Australian Citizenship Act 2007* (Cth) ss 33AA(10), 35(5), 35A(1)(e).

⁹¹ *Ibid* ss 33AA(12), 35(7).

intended to inform decision-making by other arms of the executive government in relation to the person to whom it relates; but its lack of clear legal status creates uncertainties as to whether and how it may be challenged.

144. A declaration by a court is not effective 'judicial review' but is rather a statement of the law. In the context of the automatic loss of citizenship by conduct, the remedy would be a declaration that the individual never ceased to be a citizen, presumably because the conduct relied on for the loss of citizenship is proven to have not occurred.
145. An attempt to commence proceedings in the High Court under section 75(v) of the Constitution may also encounter difficulty in that none of the constitutional writs (one or more of which must be sought in order to engage the jurisdiction) seems apt to deal with a notice which arguably has no purported legal force and merely records the Minister's conclusion.
146. In any proceeding where a person sought to set aside a notice, there would be a substantial question as to whether the applicant could seek to prove that the relevant disqualifying event had not occurred (and therefore he or she had not ceased to be an Australian citizen), or was limited to challenging the reasoning of the Minister on normal judicial review grounds. Each of the relevant subsections requires the Minister to issue the notice if he or she 'becomes aware of [conduct or a conviction] because of which a person has, under this section, ceased to be an Australian citizen'. That language appears to be ambiguous as to whether the relevant trigger is:
- (a) an *actual* disqualifying event, of which the Minister becomes aware, or
 - (b) the Minister's *awareness* that a disqualifying event had occurred.
147. If the latter construction is correct, the applicant would be limited to attempting to show that the Minister had erred in law in having such awareness. That exercise might be of limited utility, as it would leave unresolved the underlying question whether the person had ceased to be an Australian citizen or not.
148. A person who loses their citizenship under the Act would have standing to apply for judicial review but would need someone on the ground in Australia to file the application.⁹² A family member with a 'special interest' in the subject matter may also have standing to file the application.⁹³
149. From an administrative law perspective, there seems to be no clear process for resolving authoritatively whether or not a person has ceased to be an Australian citizen. In some cases (for example where paragraphs 33AA(2)(c), (f) or (g) are said to apply), whether a loss of citizenship has occurred may be debatable.
150. While the sections do provide for a right of appeal, the efficacy of the appeal rights are limited, particularly where the person is overseas, and possibly in a prison overseas,

⁹² Generally, the common law test for standing in Australia is that the person applying for standing have either a private right, or be able to demonstrate that he or she has a 'special interest' in the subject matter of the action. The 'special interest' does not need to involve a legal or pecuniary right but has to be more than a 'mere intellectual or emotional concern' and must be an interest that is different than that of an ordinary member of the public: *Australian Conservation Fund v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27. If standing is sought under a prerogative writ or equitable remedy rather than a statute, different rules of standing may apply to each remedy. The *Administrative Decisions (Judicial Review) Act 1977* (Cth) provides that proceedings can be instituted by 'a person who is aggrieved' by a reviewable decision or conduct (sections 5, 6). This test is often interpreted consistently with the test of 'special interest' developed at common law for declaration and injunction.

⁹³ *Ibid.*

and without consular assistance because they have apparently renounced or ceased holding their Australian citizenship.

151. The Law Council is concerned that there does not appear to be a clear legislative provision for a merits review of the decision to issue a notice confirming the loss of citizenship. It appears the available means of judicial review are not sufficient to fulfil the international standard required for 'effective review' due to a lack of clarity about the available means of judicial review. This point was made by the Parliamentary Joint Committee on Human Rights, in considering the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 where they also queried whether 'judicial review, likely restricted to errors of law, will constitute effective review for the purposes of international law'.⁹⁴

Recommendation:

- **In addition to the availability of judicial review, the scheme should as a minimum, provide for a clear right of merits review in relation to a decision to issue a notice confirming the loss of citizenship.**

⁹⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Thirty-Sixth Report of the 44th Parliament, 2016) 62 [2.177].