
Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Parliamentary Joint Committee on Intelligence and Security

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Executive Summary

1. The Law Council is pleased to provide the following submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee) on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Bill).
2. The Australian Parliament and Government have a responsibility to ensure the security of Australia and its people. Critical to this is citizenship. This is because citizenship provides formal membership of the Australian community, which comes with privileges and responsibilities. Citizenship cessation removes those privileges and has significant consequences for a person, including the potential for: deportation; detention; prevention from entering Australia; and no longer receiving consular assistance.¹ Legislative measures to remove citizenship should carefully consider the legal principles on which our democracy is founded and be a necessary and proportionate response to potential threats.
3. The Law Council acknowledges that the Bill seeks to pursue the legitimate objective of addressing terrorism and providing consequences for citizens who are no longer loyal to Australia and its people. While ultimately it is a matter for the Parliament to determine the necessity and appropriate form of the proposed citizenship cessation Bill, the Law Council has serious concerns with the Bill because:
 - the basis for and the scope of the Commonwealth's power to enact the proposed citizenship legislation appears uncertain;
 - the grounds of loss of citizenship capture conduct which may be unrelated to a lack of allegiance to Australia, or may be minor conduct;
 - the procedures for losing citizenship and subsequent administrative action do not provide sufficient safeguards to accord with the rule of law, the presumption of innocence, the right to a fair trial and the right of appeal;
 - it does not provide adequate protections for children or to prevent indefinite detention and effective statelessness; and
 - the partial retrospectivity of the Bill is inconsistent with the rule of law.
4. Consequently the Law Council recommends the Bill be amended if it is to be passed to properly align with fundamental legal principles. Should the Committee find that a citizenship cessation scheme is necessary and appropriate, ideally, loss of citizenship under the Bill should only flow after a conviction by an independent, impartial and competent court or tribunal, particularly where the conduct in question has occurred within Australia. After a conviction, automatic citizenship cessation should not occur, but require a decision by the Minister considering whether the person poses a

¹ Subsection 34(4) of the *Australian Citizenship Act 2007* (Cth) provides that if the Minister revokes a person's Australian citizenship, the person ceases to be an Australian citizen at the time of the revocation. The person would then be deemed to be an unlawful non-citizen (if they did not hold a valid visa). An unlawful non-citizen can then be detained under s 189 of the *Migration Act 1958* (Cth), and the power to remove an unlawful non-citizen under s 198. Pursuant to s 228B of the *Migration Act*, a non-citizen has no lawful right to come to Australia if the non-citizen does not hold a valid visa that is in effect. The *Australian Consular Operations Handbook* governs the provision of consular services to Australians overseas. Chapter 4 of Part 2 provides that the Department of Foreign Affairs and Trade 'aims to give humanitarian assistance to Australian citizens and permanent residents whose welfare is at risk abroad'. A person who is no longer an Australian citizen or a permanent residence would therefore not qualify for such consular assistance – see Department of Foreign Affairs and Trade, [Australian Consular Operations Handbook](#) (10 December 2014).

substantial risk to Australia's security, Australia's international obligations and standing and other relevant factors.

5. The Minister's decision should then afford procedural fairness and be accompanied by effective judicial review.
6. Should this model not be accepted by the Committee, the following provides a summary of some of the Law Council's key recommendations:
 - (a) Conduct captured by the Bill should demonstrate a specific lack of allegiance to Australia, including by demonstrating a repudiation of Australian values by committing war crimes or crimes against humanity, or be prejudicial to Australia's security.
 - (b) Criteria for declaring a terrorist organisation should be provided in legislation and require that the organisation conducts itself in a manner prejudicial to Australia's security or commits war crimes or crimes against humanity.
 - (c) Conduct and offences captured by the Bill should be of a sufficient level of seriousness to trigger citizenship cessation.
 - (d) A person should voluntarily *intend* to engage in the specified conduct before the conduct attracts the possibility of loss of citizenship.
 - (e) Exceptions should be provided which replicate possible defences in the *Criminal Code Act 1995* (Cth) (Criminal Code) such as duress or for persons who engage in conduct solely by way of, or for the purposes of, the provision of aid of a humanitarian nature.
 - (f) The Minister should be required to consider the likely effect of the citizenship cessation on any dependants and what alternative arrangements might apply.
 - (g) The rules of natural justice should apply.
 - (h) The Minister should be required to attempt to issue a notice to a person whose citizenship is deemed to have ceased or to whom an exemption has been granted in a timely manner and provide reasons for the decision.
 - (i) A person who receives an exemption should be taken never to have renounced their citizenship or for their citizenship to have never ceased, so that they are taken to have been a citizen at all times. Alternatively, it is recommended that it be made explicit that a person is *not* a citizen during the period between renunciation/cessation and the decision of the Minister to issue an exemption.
 - (j) The Minister's decision to issue a notice or allow an exemption should as a minimum be made on the basis of a full and robust intelligence assessment by the Australian Security Intelligence Organisation (ASIO).
 - (k) The Minister should be required to consider exercising the power to rescind a notice and exempt a person when requested to do so by the person whose citizenship is purported to have ceased.
 - (l) The Minister's exemption powers should be subject to merits review.
 - (m) Prospects for rehabilitation and actual rehabilitation should be required to be considered by the Minister in the exercise of his or her powers under the Bill.

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- (n) Restrictions on culpability in the Criminal Code relating to minors and persons with a mental impairment should apply to the Bill.
 - (o) There should be a requirement for Ministerial satisfaction that the decision will not have the practical effect of rendering a person stateless or subject to indefinite detention.
 - (p) In circumstances where a person requests to file an application for judicial review, there should be a prohibition against removing a person from Australia prior to the determination of the application. There should also be a requirement to notify the person of their right to review.
 - (q) The measures in the Bill should *not* apply retrospectively to conduct or convictions that occurred prior to commencement of the Bill.

Introduction

7. The Bill would introduce 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 renounces their Australian citizenship by acting inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct (section 33AA of the Bill);
 - the person ceases to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation (section 35 of the Bill)²; or
 - the person ceases to be an Australian citizen if the person is convicted of a specified terrorism offence as prescribed in the Criminal Code (section 35A of the Bill).
8. These provisions would operate to renounce/cease citizenship *automatically* upon a dual national/citizen engaging in or being convicted of the prescribed conduct.
9. The Bill has been introduced because the:

*... Government recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.*³
10. Statutory citizenship in Australia was first introduced by the *Nationality and Citizenship Act 1948* (Cth). Automatic citizenship cessation for dual nationals/citizens where an Australian serves in the armed forces of a country at war with Australia was inserted in section 19 of this Act:

An Australian citizen who, under the law of a country other than Australia, is a national or citizen of that country and serves in the armed forces of a country at war with Australia shall, upon commencing so to serve, cease to be an Australian citizen.
11. The Explanatory Memorandum to the Nationality and Citizenship Bill 1948 explained the rationale for section 19 as follows:

*Clause 19 (Loss of Citizenship by Reason of Service in Armed Forces of an Enemy Country) – During the war years a number of cases came under notice in which persons possessing dual British and (e.g.) German nationality served in enemy forces. It is considered desirable that in such circumstances Australian citizenship should automatically be lost. A similar clause appears in the Canadian Act.*⁴
12. The *Nationality and Citizenship Act 1948* was amended several times. In 1973 it was renamed the *Australian Citizenship Act 1948* (Cth), and after subsequent amendments, it was again renamed in 2007 as the *Australian Citizenship Act 2007* (Cth) (the ACA). Section 19 of the *Nationality and Citizenship Act 1948* is now section

² A declared terrorist organisation is any terrorist organisation as defined by the Criminal Code and declared by the Minister to apply (section 35 of the Bill).

³ Explanatory Memorandum to the Bill, 2. See also clause 4 of the Bill.

⁴ Explanatory Memorandum to the Nationality and Citizenship Bill 1948, 8.

35 of the ACA. This provision has never been used or tested for its validity. It applies irrespective of how a person has gained citizenship.⁵ Currently, under the ACA, the Minister can revoke citizenship for a conviction for specified offences, but only where the offence was committed prior to the Minister giving approval for the citizenship application, or the offence was committed in relation to the person's application to become an Australian citizen.⁶

13. The Explanatory Memorandum to the Bill makes it clear that the Bill seeks to update these provisions to recognise that threats to Australia are not only from nation states, but may be from other sources, such as terrorists, terrorist organisations or those that commit treachery, treason, espionage or sabotage (among other conduct).
14. While the ACA already provides for automatic revocation of citizenship, it does so in a very confined and relatively simple and obvious circumstance, with its narrow application demonstrated by it never having been used. The Bill significantly expands the scope of such automatic revocation to a wide and vague set of variable circumstances. It is undesirable to have a broad range of conduct and factually variable scenarios automatically giving rise to a change in status of citizenship without some satisfactory mechanism for fact finding and determination being in place.
15. If there is to be a regime for loss of citizenship in a wide variety of circumstances then the regime should be re-designed to provide a system which adheres to the very democratic freedoms upon which our nation is founded. Such a system should:
 - accord with the separation of powers, the rule of law, the presumption of innocence and the right to a fair trial; and
 - include fact finding by an independent tribunal, procedural fairness and merits review.
16. While this submission focuses on the specific issues raised by the Bill, the Law Council reiterates the importance of offences in the Criminal Code being carefully confined to avoid inadvertently capturing a wide range of benign conduct.⁷ The importance of confined offences is even more pressing should the Bill proceed.

⁵ Other grounds for citizenship revocation under the ACA include where a person has: renounced their citizenship through an application under the ACA (s33); 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 s34 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 (s34A); 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 (s36(2)(a)), or where revocation would render the child stateless (s36(3)).

⁶ Section 34 of the ACA.

⁷ The Law Council's Rule of Law Principles (March 2011) provide that 'the law must be both readily known and available, and certain and clear' and that 'offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and are thus overly dependent on police and prosecutorial discretion to determine, in practice, what type of conduct should or should not be subject to sanction. The Law Council has previously raised a number of concerns with the definition of a 'terrorist act' and various terrorism and foreign incursions offences. These concerns were noted in the Law Council's Anti-Terrorism Reform Project (October 2013) and the Law Council's submission (3 October 2014) and supplementary submission (9 October 2014) to the Parliamentary Joint Committee on Intelligence and Security's inquiry regarding the Counter-terrorism Legislation (Foreign Fighters) Bill 2014.

Constitutional validity

17. The current drafting of the Bill may avoid Constitutional invalidity on the grounds that it is not inconsistent with Ch III of the Constitution.⁸ This is because it purports to avoid the Executive exercising an essentially judicial function of adjudicating the law by way of the Bill's self-executing provisions.
18. 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.⁹ However, the basis for and the scope of the Commonwealth's power to enact citizenship legislation is uncertain.¹⁰ 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'.¹¹ 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'.¹²
19. The Constitution notes, for example, that the House of Representatives is to be chosen by the people of the Commonwealth.¹³
20. Further, it is not certain whether the Bill will be viewed by the High Court as being within one of the heads of Constitutional power required for validity.¹⁴
21. Both issues of Constitutional validity will ultimately be a matter for the High Court to determine.

Applicability to dual nationals and citizens

22. The application only to dual nationals/citizens needs to be considered in the context of Australia's international obligation not to render people stateless¹⁵, and the differing legal conceptions of nationality and citizenship.

⁸ Ch III of the Constitution outlines judicial power, such as, the interpretation of law and adjudication according to law, and allows for the exercise of these powers by the judiciary and not the executive or legislature.

⁹ *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).

¹⁰ 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' (Record of the Debates of the Convention (Melb 1898) Vol V, O'Connor at 1761).

¹¹ *Hwang v Commonwealth* (2005) 222 ALR 83 at 89 [18].

¹² *Hwang v Commonwealth* [2005] HCA 66 [18] (McHugh J).

¹³ Section 24 of the *Australian Constitution*.

¹⁴ For example, the external affairs power (section 51(xxix) of the Constitution), the military defence power (section 51 (vi) of the Constitution), the naturalisation and aliens power (section 51 xix), and the immigration power (section 51(xxvii) of the Constitution).

¹⁵ *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175: Article 8 provides that contracting States shall not deprive people of their nationality so as to render them stateless. Australia ratified the Convention in December 1973.

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- 23.** As noted, the Bill has the potential to apply to both dual nationals and dual citizens. Nationality and citizenship can be used interchangeably in some countries, or they may be two distinct forms of legal status defining a relationship between a person and a State/country. A person can be a national of a country but not necessarily a citizen.
- 24.** For example, a person born in an outlying possession of the United States (U.S.) is a U.S. national but not a U.S. Citizen. U.S. non-citizen nationals who are eligible may obtain U.S. passports and owe permanent allegiance to the U.S.,¹⁶ but cannot vote in an election or hold office.
- 25.** People can become dual nationals by: birth; marriage; granting of citizenship (naturalisation); and state succession.¹⁷ A person may not even know that they are a dual national.¹⁸ Whether they are a dual national depends on the laws of the country involved. A person could be considered and treated as a national by another country even if they do not accept that nationality.¹⁹ In some countries, a nationality may automatically be acquired through marriage.²⁰ Some countries also have laws that prevent citizens giving up their nationality under any circumstances,²¹ and a number of countries have laws that prevent citizens giving up their nationality except by a formal act of renunciation.²²
- 26.** The Law Council therefore queries how practicably workable is the distinction based on classification of citizenship and recommends further analysis of the distinction should be undertaken.

Loss of citizenship should only follow after a criminal conviction

- 27.** Loss of citizenship can result in significant legal consequences for a person, including permanent removal from Australia and periods of detention. Sometimes these consequences can be more serious than a criminal conviction.²³ Any proposed citizenship cessation scheme should therefore involve effective procedural safeguards to ensure:
- innocent persons do not inadvertently lose their Australian citizenship; and
 - lawful and correct decisions and the maintenance of public confidence in the scheme.
- 28.** Citizenship cessation in circumstances where a person is believed to have betrayed Australia by their conduct (which would otherwise amount to a criminal offence under Australian law) should ideally only occur after a criminal conviction by a court²⁴, particularly where such conduct occurs in Australia. Self-executing provisions such as proposed sections 33AA and 35 are imprecise and can potentially leave persons in a

¹⁶ Explanatory Memorandum to the Bill, 11.

¹⁷ Department of Foreign Affairs and Trade, *Dual Nationals*, October 2012, 1.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ For example, if renunciation/cessation results in deportation or not being able to re-enter Australia.

²⁴ Including domestic Australian courts, the International Criminal Court and International Criminal Tribunals created for specific wars and conflicts.

state of limbo until/unless the Minister becomes aware of the disqualifying conduct and decides to do something about it (for example, by giving notice or preventing a person from entering Australia). The provisions depend upon uncertain criteria and effectively remove the right to be presumed innocent until proved guilty and according to law.

29. The absence of a requirement for a conviction in proposed sections 33AA and 35 means that ASIO officials will be advising the Minister and making an assessment of whether a person has engaged in what would otherwise be unlawful conduct under the Criminal Code. Effectively, the Bill supplants what would ordinarily be a criminal court process in determining whether a person has engaged in certain conduct with an administrative law process to make the same determination.
30. This means that rather than the prosecution having to prove beyond reasonable doubt that a person is guilty of an offence, it must only be shown on the balance of probabilities that the person engaged in certain conduct.²⁵ Given that the fact in issue – the loss of a person’s citizenship – has grave consequences, it is likely that a court would recognise that a stronger degree of evidence would be required to establish the fact.²⁶ Nonetheless, this standard for determining whether a person has engaged in conduct that would otherwise be considered unlawful under Australian law, is much lower than the criminal burden of proof. Given the lower standard of proof, it is conceivable that a person could be acquitted at trial on the criminal standard and yet the Minister could find that person has renounced his or her citizenship based on the same set of facts.
31. Further, it seems at least arguable that the person would retain the ultimate onus of proof to show he or she had not ceased to be an Australian citizen (on the basis that the occurrence (or not) of the disqualifying event is part of a ‘statement of the complete factual situation’ rather than an ‘excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds’).²⁷
32. A concern therefore arises that the scheme may be used to avoid the long-standing judicial procedures for testing and challenging evidence in criminal trials that normally apply before a person is presumed to have engaged in unlawful conduct and substantially deprived of their liberty. This may increase the likelihood of error and mean that innocent persons are mistakenly captured. For this reason, loss of

²⁵ In civil proceedings, a fact must be proved ‘on the balance of probabilities’; a fact is proved to that standard if the court is satisfied it is more likely than not that the fact is true. Generally, it is the civil standard that applies in administrative fact finding. The qualification is where the decision maker must decide a matter, on the basis of logically probative evidence, where the decision maker is reasonably satisfied that a particular fact is more likely than not to be true.

²⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-363 (Dixon J).

²⁷ *Vines v Djordjevitch* (1955) 91 CLR 512, 519-520. Where the onus of proof lay on this question would depend on the nature of the proceedings in which it arose and might involve some complexity. (a) A person seeking judicial review of a decision by the Minister to issue a notice under proposed s 33AA(6), 35(5) or 35A(5) would clearly need to prove error by the Minister. (b) It is possible to imagine proceedings in which a government agency or other entity might seek some relief against a person which involved an allegation that he or she had ceased to be an Australian citizen (eg, to recover money paid by way of some benefit or salary, which was only payable to citizens). In such a case it is fairly clear that the agency or entity would need to make good its allegation by leading evidence if it was not conceded. (It is notable that the Bill does not provide for a certificate issued by the Minister to have any evidentiary status in such a case.) (c) It is probably more likely that the party seeking relief would be the person who had purportedly ceased to be a citizen (eg, if he or she were refused a passport and sought review of that refusal). He or she would at least prima facie bear the onus of proving that he or she was an Australian citizen. Normally, that would be done by tendering a birth certificate or evidence of the conferral of citizenship. The respondent (eg the agency that had made its decision on the footing that the person was not an Australian citizen) would have at least an evidentiary onus, to put forward some evidence of a disqualifying event having occurred. However, it seems at least arguable that the person would retain the ultimate onus of proof.

citizenship should ideally only occur after a conviction by a court. This is particularly important where a person is in Australia and the alleged conduct is said to have occurred within Australia and difficulties with foreign evidence are minimal.

33. As a matter of public policy a question also arises as to whether it should be incumbent for the Minister to refer the matter to the Commonwealth Director of Public Prosecutions for possible prosecution where the Minister becomes aware that a person has engaged in conduct that would otherwise be considered unlawful under Australian domestic law.
34. A requirement for conviction would also more readily accord with the terms of the *United Nations Security Council Resolution 1566* (2004). This resolution requires Member States, including Australia, to cooperate fully in the fight against terrorism and to deny safe haven and bring to justice through prosecution or extradition, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.²⁸
35. After a conviction, automatic citizenship cessation should not occur, but require a decision by the Minister considering whether the person poses a substantial risk to Australia's security, Australia's international obligations and standing, and other relevant factors.
36. This would help to avoid any difficulties that may be encountered for a person whose conviction may be overturned on appeal. It may also assist in avoiding unnecessary complications for prosecuting authorities in deciding whether to prosecute and for sentencing courts because of the prospect that a dual national/citizen may be subject to the automatic (and potentially disproportionate) additional penalty of loss of Australian citizenship upon conviction.
37. The Minister's decision should then afford procedural fairness and be accompanied by effective judicial review. The Law Council's *Rule of Law Principles* require that executive decision making should be subject to meaningful judicial review.²⁹
38. Such an approach preserves the presumption of innocence, the requirement of proof beyond a reasonable doubt, and administrative law principles applicable to the exercise of discretionary administrative powers which affect persons' rights and interests. In short, it recognises and maintains the division of functions between the Executive and the courts (which, notably, in this context, means trial by jury – not merely by the judiciary).

Recommendation:

- **Loss of citizenship under the Bill should ideally only occur after a conviction by a court, particularly where such conduct occurs within Australia.**
- **After a conviction, automatic citizenship cessation should not occur, but require a decision by the Minister considering whether the person poses a substantial risk to Australia's**

²⁸ UN Security Council, *Security Council Resolution 1566 (2004), Concerning Threats to International Peace and Security Caused by Terrorism*, 8 October 2004, S/RES/1566 (2004). In addition, it would also arguably be more consistent with the right to a fair trial as contained in Article 14 of the *International Covenant on Civil and Political Rights*. The Convention entered into force for Australia on 13/11/1980, except Article 41, which came into force for Australia on 28 January 1993.

²⁹ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 6(d).

security, Australia's international obligations and standing, and other relevant factors. The Minister's decision should then afford procedural fairness and be accompanied by effective judicial review.

39. Should the preferred model not be accepted by the Committee (for example, on the basis that it is not considered practical), the Law Council makes the following observations and recommendations.

Grounds of citizenship cessation

Conduct amounting to a lack of allegiance to Australia

40. To remain consistent with the intended purpose of the Bill, it is important that the type of conduct or offence triggering citizenship cessation demonstrates a repudiation of allegiance to Australia.
41. Under the current Bill, Australian citizenship for dual citizens/nationals may cease without any conduct demonstrating a lack of allegiance to Australia. The required conduct does not necessarily demonstrate that a person is no longer loyal to Australia and its people, or that the person has engaged in acts that harm Australian interests, or demonstrate a repudiation of Australian values by committing war crimes or crimes against humanity.
42. The terms of proposed new subsection 33AA(1) are ambiguous. It is unclear from the face of the Bill whether it is intended that (subject to paragraph 33AA(7)(b)):
- a) any person who engages in any of the conduct identified in s 33AA(2) is *thereby taken to* 'act inconsistently with their allegiance to Australia', and thus to renounce their Australian citizenship; or
 - b) a person only renounces their Australian citizenship if the nature of the particular conduct in which they engage is such that, *objectively assessed*, it amounts to acting inconsistently with their allegiance to Australia.
43. It is not difficult to envisage conduct which might meet one of the descriptions in subsection 33AA(2) but which does not seem objectively inconsistent with a person's allegiance to Australia. For example, a person might engage in a terrorist act against a foreign country with which Australia is at war, in an ideologically-motivated attempt to assist Australia in that war. The definition of 'terrorist act' in subsection 100.1(1) of the Criminal Code appears sufficiently broad to include this kind of conduct. Similarly, under proposed sections 35 and 35A, a person may engage in terrorism or foreign incursions in a foreign country where Australians or Australia's interests are not harmed or intended to be harmed.
44. The offence of property damage committed against the Commonwealth (section 29 of the *Crimes Act 1914* (Cth)) is prescribed for the purpose of proposed section 35A. That offence is committed if a person intentionally damages property whether real or personal and it is a circumstance that the property happens to be Commonwealth property. This offence can apply even if the person does not know that the property belongs to the Commonwealth or a Commonwealth authority. In such circumstances,

it is not appropriate, to equate all conduct of that kind to the cessation of citizenship. For example, it may also potentially capture graffiti on a public building.

45. If the self-executing provisions³⁰ for citizenship cessation remain in the Bill, they should be amended to require that the person has engaged in the specified conduct in a manner which demonstrates a specific lack of allegiance to Australia, including by demonstrating a repudiation of Australian values by committing war crimes or crimes against humanity, or the conduct is prejudicial to Australia's security.

Recommendation:

- **Conduct captured by the Bill should demonstrate a specific lack of allegiance to Australia, including by demonstrating a repudiation of Australian values by committing war crimes or crimes against humanity, or be prejudicial to Australia's security.**

46. There is no requirement for the declared terrorist organisations under proposed section 35 to pose a direct threat to Australia's interests or the health or safety of Australians or the maintenance of Australian values against committing war crimes or crimes against humanity. Nor is this a necessary precondition to terrorist organisation prescription under the Criminal Code. The definition of a 'terrorist act' in subsections 100.1(1) and 100.1(2) of the Criminal Code includes for example an action or threat of action made only in relation to a foreign country. It is conceivable that some listed terrorist organisations do not identify Australia or Australian interests as targets.

47. If there is no threshold link to a threat to Australia or commission of war crimes or crimes against humanity, there is no reason why then, for example, other crimes like child sex offences could not be regarded as inconsistent with allegiance to Australia and its values and therefore could justifiably amount to renunciation of citizenship.

Recommendation:

- **Criteria for declaring a terrorist organisation should be provided in legislation and require that the organisation conducts itself in a manner prejudicial to Australia's security or commits war crimes or crimes against humanity.**

Seriousness of conduct captured

48. To remain consistent with the intended purpose of the Bill, it is important that the type of offence required to trigger citizenship is such that it demonstrates a repudiation of allegiance to Australia *and* that it is of a considerable level of seriousness.
49. The section 35A offences are broader than those in new sections 33AA and 35 and include offences ranging from terrorism, treason, espionage and foreign incursions to advocating terrorism and destroying/damaging Commonwealth property.³¹ The Explanatory Memorandum explains the rationale for the breadth of this provision:

³⁰ A self-executing provision is effective immediately upon the legislative condition being met without the need of intervening court or Ministerial action, or other type of implementing action.

³¹ The offences proposed to be captured include: an offence against Subdivision A of Division 72 of the Criminal Code (international terrorist activities using explosive or lethal devices: maximum life imprisonment);

... it is not as restricted as the offences listed in new sections 33AA and 35 as a criminal offence is required for the operation of this new section 35A so it is appropriate that the list of offences is broader. The offences are of a nature that on the face of them a person who undertakes such offences has repudiated their allegiance to Australia.³²

50. The purpose of new section 35A is to:

... deal with the threat caused by those who have acted in a manner contrary to their allegiance to Australia by removing them from formal membership of the Australian community. Cessation of citizenship is a very serious outcome of very serious conduct that demonstrates a person has repudiated their allegiance to Australia.³³

51. Some offences that are captured are arguably not of sufficient seriousness to warrant automatic cessation of citizenship, such as those offences carrying a penalty of less than 10 years imprisonment (e.g. advocating terrorism which carries a maximum 5 year imprisonment term).

52. Proposed section 35A will also include foreign incursions offences. Division 119 of the Criminal Code includes offences for entering a foreign country with the intention of engaging or actually engaging in hostile activities,³⁴ or preparing to do so.³⁵ These offences are underpinned by a definition of 'engaging in hostile activity' in section 117.1. These offences carry a maximum sentence of life imprisonment. The definition of 'engaging in hostile activity' in proposed section 117 includes bodily injury to a public official.³⁶ Minor offences such as preparing to go overseas to punch a police officer could possibly come within the definition of engaging in hostile activity. The definition also includes damage to a public building,³⁷ which potentially means that engaging in graffiti on a public building in a foreign country could be captured.

53. Similarly, the meaning of 'is in the service of' under new section 35 is not defined and may, as noted in the Explanatory Memorandum, include any act of helpful activity or the supplying of any articles, commodities, activities etc., required or demanded.³⁸ Contrary to the Explanatory Memorandum, there is nothing in the Bill to prevent this covering acts done by a person against their will (for example, an innocent kidnapped person) or the unwitting supply of goods (for example, the provision of goods following online orders by innocent persons).

an offence against s80.1 (treason), s80.1AA (treason, materially assisting enemies) or s80.2 (urging violence against the Constitution or Government by force of violence: maximum 7 years imprisonment), ss80.2A(1) (urging violence against groups: maximum 7 years imprisonment) or ss80.2B(1) (urging violence against members of groups: maximum 7 years imprisonment) or section ss80.2C (advocating terrorism: maximum 5 years imprisonment) or s91.1 of the Criminal Code (espionage and similar activities: maximum 25 years imprisonment); an offence against Part 5.3 of the Criminal Code relating to terrorism offences (except s102.8 (associating with terrorist organisations) or Division 104 or 105 (control orders and preventative detention orders)); an offence against Part 5.5 of the Criminal Code (foreign incursions offences: maximum 10 years to life imprisonment); an offence against s24AA (treachery: maximum life imprisonment), s24AB (sabotage: maximum 15 years imprisonment), s25 (inciting mutiny against the Queen's Forces: maximum life imprisonment) or s26 (assisting prisoners of war to escape: maximum life imprisonment) or ss27(1) (unlawfully training, drilling or practicing military exercises: maximum 5 years imprisonment) or s29 (destroying or damaging Commonwealth property: maximum 10 years imprisonment) of the *Crimes Act 1914*.

³² Explanatory Memorandum to the Bill, p. 19.

³³ Ibid, p. 21.

³⁴ Section 119.1 of the Criminal Code.

³⁵ Section 119.4 of the Criminal Code.

³⁶ Paragraph 117.1(d) of the Criminal Code.

³⁷ Proposed paragraph 117.1(e) of the Criminal Code.

³⁸ Explanatory Memorandum to the Bill, p. 14.

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54. As noted, the conduct may have nothing to do with terrorism or adherence to a cause adverse to Australia's interests. The conduct may have no political or ideological content or allegiance at all.

Recommendation:

- **Conduct and offences captured by the Bill should be of a sufficient level of seriousness to trigger citizenship cessation.**

Intention required to sever allegiance with Australia

55. The mental element needed for the person to have automatically renounced/ceased their citizenship also requires clarification to be consistent with the objective of the Bill.
56. In terms of breaking allegiance to Australia and demonstrating that the person is no longer loyal to Australia, it would seem that the person must *voluntarily intend* to engage in the conduct. That is, recklessness would not suffice. Indeed, in the U.S., a person who is a national of the U.S. whether by birth or naturalisation will lose their U.S. nationality only if they perform certain specified acts voluntarily and with the intention to relinquish their U.S. nationality.³⁹

Recommendation:

- **A person should voluntarily *intend* to engage in the specified conduct before the conduct attracts the possibility of loss of citizenship.**

Availability of defences

57. Under the Bill, a person or child who engages in the required conduct under duress or a Red Cross worker assisting an injured jihadist in Syria could potentially be considered to have lost their citizenship. Exceptions should be provided for under sections 33AA and 35 which replicate possible defences in the Criminal Code. For example, a person who operates under duress⁴⁰ or persons who engage in conduct solely by way of, or for the purposes of, the provision of aid of a humanitarian nature⁴¹ should not be captured.

Recommendation:

- **Exceptions should be provided which replicate possible defences in the Criminal Code such as duress, or for persons who engage in conduct solely by way of, or for the purposes of, the provision of aid of a humanitarian nature.**

³⁹ 8 U.S Code § 1481.

⁴⁰ See for example section 10.2 of the Criminal Code.

⁴¹ See for example subsection 80.1AA(6) of the Criminal Code.

Procedures for cessation

Judicial review

58. Under the proposed scheme, a person's citizenship may be removed and their liberty restricted before the person is notified of the allegations against him or her or afforded the opportunity to challenge the cessation. Loss of Australian citizenship under proposed subsections 33AA(1), 35(1) or 35A(1) would occur by force of the Act upon commencement of the relevant conduct or conviction for the relevant offence, and without any decision being taken under the Act. That operation of the law would not in itself involve a 'decision' which could be reviewed under any specific regime for judicial or administrative review.
59. Whether a loss of citizenship had or had not occurred in relation to a person would be able to be established in judicial proceedings at the point when a dispute arose that depended on whether the person was an Australian citizen (e.g., if the person applied for and was refused an Australian Passport, or was prevented from re-entering Australia). In any such proceedings the Court would need to determine, on the evidence, whether the person was an Australian citizen (i.e., whether the relevant disqualifying event had taken place).
60. It is less clear whether a person (e.g. a person who was the subject of a notice under proposed subsections 33AA(6), 35(5) or 35A(5)) could commence proceedings in a federal court seeking a declaration that he or she was an Australian citizen, in the absence of a concrete dispute of the kind referred to in the previous paragraph. Such an application might encounter a threshold objection that it raised a question which was academic and was not a proper subject for a grant of declaratory relief.⁴² Subject to that possible objection, the proceedings could be brought in the Federal Court under paragraph 39B(1A)(c) of the *Judiciary Act 1903* (Cth) (*Judiciary Act*). Whether such a proceeding could be brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) is doubtful as it would not fasten upon anything readily identifiable as a 'decision'.
61. It is likely, although not certain, that this difficulty could be avoided at least in part by framing the application as one seeking judicial review of the Minister's decision to issue a notice. Although the notice does not appear from the terms of the Bill to have any legal effect in itself, a court would probably be inclined to regard the decision to issue it as one which was amenable to review under s 39B of the *Judiciary Act* or the *ADJR Act* and could be the subject at least of declaratory relief.
62. An attempt to commence proceedings in the High Court under s 75(v) of the Constitution may 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 (apparently) has no purported legal force and merely records the Minister's conclusion.
63. However, 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 would require the Minister to issue the notice if he or she 'becomes aware of [conduct or a conviction]

⁴² See for example *Ainsworth v Criminal Justice Commission* (1992) 173 CLR 564, 582

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 *understanding or opinion* that a disqualifying event had occurred. If the latter construction is the correct one, the applicant would be limited to attempting to show that the Minister had erred in law in reaching that understanding or opinion. 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.

64. A person who loses their citizenship under the Bill would have standing to apply for judicial review, but they would need someone on the ground in Australia to file the application.⁴³ A family member with a 'special interest' in the subject matter may also have standing to file the application.⁴⁴
65. From an administrative law perspective, there is to be no clear process for resolving authoritatively whether or not a person has ceased to be an Australian citizen. In some cases (e.g. where paragraphs 33AA(2)(c), (f) or (g) are said to apply), whether a loss of citizenship has occurred may be debatable.
66. The purpose and effect of the notice required to be issued by the Minister is also somewhat unclear. No particular legal consequences are given to the notice (except that there must be a notice before the Minister's dispensing powers come into operation), yet other provisions refer to a decision to 'rescind' a notice. The notice is presumably 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.

Access to information

67. Self-executing cessation under the Bill limits the right of the person subject to cessation to challenge the legality of the cessation by restricting access to relevant information.⁴⁵ In circumstances where it is claimed that the release of information might prejudice national security, the person subject to the order may be excluded from accessing information relied upon by the Minister to support the Minister's notice. A claim of public interest immunity may also be made under the common law and is also available under section 130 of the uniform Evidence Acts. While judicial review for errors of law remains available, the Law Council queries its likely effectiveness in such circumstances.

⁴³ 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 ADJR Act 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.

⁴⁴ *Ibid.*

⁴⁵ Under the *National Security Information (Criminal Proceedings) Act 2004*, the Attorney-General can issue a non-disclosure certificate or a witness exclusion certificate, preventing information from being disclosed if it would be likely to prejudice national security. Where a certificate has been issued, the court must hold a closed hearing to determine whether it will maintain, modify or remove the ban on disclosure or the calling of witnesses.

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68. The Law Council has previously raised concerns and made recommendations with how the *National Security Information (Criminal Proceedings) Act 2004* (Cth) restricts the disclosure of classified or security sensitive information in the course of civil and criminal proceedings and directs the Committee to such considerations in the context of the current Bill.⁴⁶

Natural justice

69. Natural justice is important to ensure that errors of fact can be rectified prior to the loss of liberty. The Law Council's *Rule of Law Principles* require that executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review.⁴⁷ The current lack of natural justice in the Bill is inconsistent with this requirement.
70. The Bill would allow a person's citizenship to effectively be revoked without the applicability of the rules of natural justice to the Minister's powers.⁴⁸ This means that there is no requirement for the person to be heard before the Minister exercises his or her powers to issue a notice or allow an exemption. The Bill would not place the Minister under any obligation to serve, or attempt to serve, a notice to the person affected; only any person the Minister considers appropriate.⁴⁹ There is also no requirement to inform the person of the reasons for the decision. Section 47 of the ACA, which requires that persons affected by decisions made under the Act be notified of those decisions, is expressly excluded in relation to the exercise of the Minister's powers under proposed section 33AA, 35 and 35A.
71. The Minister's 'decision' that s/he has 'become aware' that one of the proposed relevant provisions applies, is likely to have profound practical effects for persons to whom it applies. For example, the absence of any requirement to inform the person of the grounds upon which a notice was issued impedes his or her right to take proceedings before a court, in relation to the lawfulness of the issuance of the notice (in which they would effectively be required to prove their own innocence of any wrongdoing to which the relevant section applies).⁵⁰

⁴⁶ These concerns have previously been noted in the Law Council's Anti-Terrorism Reform Project (October 2013), p. 103.

⁴⁷ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 6(d).

⁴⁸ The rules of natural justice would not apply to the Minister's powers to issue a notice or to allow an exemption under sections 33AA, 35 or 35A. Natural justice or procedural fairness under the common law generally requires that the decision maker be, and appear to be, free from bias and/or that the person receives a fair hearing – see Administrative Review Council, *The Scope of Judicial Review* Report No. 47 (2006) 13. 'The precise contents of the requirements... may vary according to the statutory context; and may be governed by express statutory provision' – *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ). A decision maker commits a legal error when they breach natural justice. 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 with the circumstances' – see Administrative Review Council, *The Scope of Judicial Review* Report No. 47 (2006) 52.

⁴⁹ If the Minister 'becomes aware' of conduct which has resulted in the cancellation of a person's Australian citizenship, s/he must give written notice to that effect 'at such time and to such persons as the Minister considers appropriate' – subsections 33AA(6), 35(5) and 35A(5) of the Bill.

⁵⁰ As noted by the Administrative Review Council, a statement of reasons affords 'a person affected by a decision the opportunity to have the decision explained. The person can then decide whether to exercise their rights of review and appeal, and, if they decide to do so, they are then able to act in an informed manner. Describing the reasoning process can also help decision makers think more carefully about their task and be more careful in their decision making' – Administrative Review Council, *Decision Making: reasons – Administrative Review Council Best Practice Guide 4* (2007) 1.

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72. Further, the absence of timely notice to a person may compromise that person's ability to obtain the necessary evidence to show that he or she did not engage in relevant conduct and so did not cease to be an Australian citizen.
73. Therefore, it is submitted that an amendment should be made to the proposed provisions that places the Minister under a duty to attempt to notify the person whom he or she considers is directly affected by the operation of the Bill. Moreover, the duty should be to attempt to notify the person forthwith, not just 'at such time ... as the Minister considers appropriate'.
74. Presumably the proposed exemption powers of the Minister⁵¹ means that, despite the (deemed) renunciation or cessation of the person's citizenship, the person suddenly becomes an Australian citizen again when the Minister makes an exemption decision under the relevant provision. It is unclear whether the person is to be taken never to have renounced their citizenship, or whether their citizenship is merely effectively reinstated.
75. It is submitted that, it should be made explicit in the Bill that the person is to be taken never to have renounced their citizenship or for their citizenship to have ceased, so that they are taken to have been a citizen at all times. Alternatively, if the contrary policy is favoured, it is recommended that it be made explicit that a person is *not* a citizen during the period between renunciation and the decision of the Minister to issue the exemption powers.
76. The proposed exemption powers are made conditional upon the Minister having issued a notice. The Minister might, immediately upon hearing that a particular person engaged in particular conduct enlivening the operation of the relevant provision, decide that it is clearly in the public interest that the person should be exempted from its effect. In such a case, it appears that the Minister must go through the process of issuing a notice (to someone), only to immediately rescind it and exempt the person.
77. It is submitted that, if the proposed new exemption powers are to be retained, the Minister's power to determine that a person should be exempt from the effects of the relevant provision should be made to depend upon the deemed renunciation of citizenship, rather than upon the Minister's issuing of a notice.
78. Given that section 47 of the ACA is to be excluded, a person who is exempted from the operation of the Bill by decision of the Minister need not be notified of that decision. A person who has received a notice relating to citizenship renunciation or cessation may, therefore, believe that they are no longer an Australian citizen, yet if the Minister has exercised his/her exemption power to reinstate their citizenship they need not be informed of that fact. This is problematic. It is submitted that, if the proposed exemption powers are to be retained, the Minister should be required to attempt to notify the person who is the subject of the decision.

Recommendations:

- **The rules of natural justice should apply.**
- **The Minister should be required to attempt to issue a notice to a person whose citizenship is deemed to have ceased or to whom an exemption has been granted in a timely manner and provide reasons**

⁵¹ As per subsections 33AA(7), 35(6) and 35A(6) of the Bill.

for the decision.

- **A person who receives an exemption should be taken never to have renounced their citizenship or for their citizenship to have never ceased, so that they are taken to have been a citizen at all times. Alternatively, it is recommended that it be made explicit that a person is *not* a citizen during the period between renunciation/cessation and the decision of the Minister to issue an exemption.**

No requirement for full intelligence assessment by ASIO

79. The Bill would allow a person's citizenship to effectively be revoked without a full intelligence assessment being conducted by ASIO.⁵² It may be based on untested, inaccurate or incomplete intelligence. This is contrary to fundamental minimum guarantees which should be in place when a person is faced with allegations of criminal and serious offences (such as the right to a fair trial and the presumption of innocence).
80. The Minister's decision to issue a notice or allow an exemption should as a minimum be made on the basis of a full and robust intelligence assessment by ASIO. This is critical if such decisions are not made after a conviction by a court.

Recommendations:

- **The Minister's decision to issue a notice or allow an exemption should as a minimum be made on the basis of a full and robust intelligence assessment by ASIO.**

Discretionary Ministerial exemption

81. Each of the proposed new sections also includes a non-compellable discretionary power in the Minister to 'rescind the notice' and exempt the person from the effect of the section (subsections 33AA(7), 35(6), 35A(6)). It may be noted that the reference to 'rescinding' a notice tends to suggest that the notice otherwise has some legal effect, which is confusing (since, on the face of the provisions, no legal consequences flow from the issue of a notice). A decision as to whether to exercise one of these powers would in principle be justiciable.

⁵² New subsections 33AA(12), 35(11) and 35A(11) provide that section 39 of the *Australian Security Intelligence Organisation Act (Cth) 1979* (the ASIO Act) does not apply to the exercise of a power or performance of a function within these sections. These amendments would enable the Minister to act on the basis of a communication made by ASIO about a person which does not amount to a security assessment to make a decision to excuse the person from the application of the sections and in relation to the requirement to give notice. Section 39 of the ASIO Act relates to prescribed administrative action which may be taken by a Commonwealth agency. Section 39 prohibits (subject to limited exceptions of a temporary nature) a Commonwealth Agency from taking, refusing to take or refraining from taking prescribed administrative action on the basis of any communication in relation to a person made by ASIO not amounting to a security assessment. A 'security assessment' is defined in section 35 of the ASIO Act and attracts the operation of Part IV which provides the subject with rights of notice and merits review. The purpose of these amendments is to exclude the application of section 39 of the ASIO Act to decisions made under new sections 33AA, 35 and 35A. The effect of these amendments would be that the Minister would not be prohibited from exercising his power to excuse a person or the requirement to provide notice from the operation of the sections on the basis of an ASIO communication that does not amount to a security assessment. This will put beyond doubt that section 39 does not operate to prohibit the Minister from relying upon intelligence derived from an ASIO communication.

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82. However, because each discretion is in its terms unfettered, is not subject to the rules of natural justice, and the Minister is not obliged to consider its exercise, the circumstances in which an application for judicial review would succeed are likely to be extremely limited.⁵³
83. It is a matter for concern that the Minister is not to be under any obligation to consider exercising the relevant dispensing powers, and that decisions as to whether to exercise them are not to be controlled by the rules of natural justice. Such a regime leaves room for capricious or even arbitrary decision-making. The discretionary nature of the power and the absence of natural justice is inconsistent with the rule of law, which requires that the use of executive powers should be subject to meaningful parliamentary and judicial oversight.⁵⁴
84. Given the importance of Australian citizenship and the variety of exculpatory factors that might be raised, it is desirable that the Minister be required to give reasoned consideration to requests for the exercise of his dispensing powers, and to provide procedural fairness to persons who seek that exercise.

Recommendation:

- **The Minister should be required to consider exercising the power to rescind a notice and exempt a person when requested to do so by the person whose citizenship is purported to have ceased.**

Merits Review

85. Cessation of citizenship under the Bill occurs without the ability of merits review for the person to test the facts before an independent tribunal. Judicial review would only enable an examination of the lawfulness of the exercise of the Minister's powers under the legislation; it would not allow an examination of whether the exercise of the powers was preferable – in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.⁵⁵
86. The loss of citizenship under the proposed provisions would occur by force of the Act, upon the occurrence of particular events and without anybody making a decision. There would be no logical role for merits review here as there would be no decision to review.
87. The Minister would then have the discretionary power to exempt a person from the operation of the relevant section and the Law Council suggests that s/he ought to be required to consider exercising this power in any case where s/he is asked to do so. Decisions as to whether to exercise that power could properly be subject to merits review.
88. The Law Council has always taken the view that in general, merits review of primary decisions involving the conferral or withdrawal of rights is desirable to promote

⁵³ cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 411, 474 [100]; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358-359 [99]-[101].

⁵⁴ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 6(b).

⁵⁵ Administrative Review Council, *What decisions should be subject to merits review?* (1999) <<http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttoheritreview1999.aspx#intro>>.

fairness and enhance the quality of decision-making. There are circumstances where other considerations may outweigh those factors – for example, if there is a need for a decision to be made especially quickly or if the decision is necessarily a political one involving disparate interests.

89. The Law Council does not see any reason not to allow merits review of decisions by the Minister to refuse to exercise one of the dispensing powers. Some decisions may involve dealing with highly sensitive information but the Administrative Appeals Tribunal has experience in dealing with cases of this kind. The Tribunal also has members with expertise in citizenship law more generally. The decisions will involve weighing the seriousness of individual conduct and the risk that a person might pose to the Australian community against whatever mitigating factors might be put forward, and are thus very similar to visa cancellation decisions (which the Tribunal has considerable experience in reviewing); they would not have the kind of polycentric character that makes review by a Tribunal difficult.

Recommendation:

- **The Minister’s exemption powers should be subject to merits review.**

Rehabilitation and dependants

90. The Bill does not require any consideration of the person’s prospects for, or actual, rehabilitation. This means that individuals who have engaged in prohibited conduct, but who have reformed and de-radicalised may lose their citizenship. This is inconsistent with Australia’s justice system, which recognises the potential for offenders to be reformed.
91. Generally, rehabilitation as a purpose of sentencing is aimed at the renunciation by the offender and the offender’s establishment or re-establishment as an honourable law-abiding citizen.⁵⁶ In *R v Pogson*, McClellan CJ and Johnson J 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).*
- In this sense, every offender is in need of rehabilitation. Some may need greater assistance than others.*⁵⁷
92. There is a ‘strong public interest in rehabilitation, both for the benefit of the community and the individual’.⁵⁸ 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’.⁵⁹
93. Similarly, there is no requirement in the Bill for there to be a consideration of cessation on any dependants and what alternative arrangements might apply. This may produce grave consequences for a family and children who lose a parent/spouse. The

⁵⁶ *Vartzokas v Zanker* (1989) 51 SASR 277 at 279.

⁵⁷ *R v Pogson*; *R v Lapham*; *R v Martin* [2012] NSWCCA 225 at [122]-[123], Price, RA Hulme and Button JJ agreeing at [152], [155]-[156].

⁵⁸ *R v Groombridge* (unrep, 30/9/90, NSWCCA) [9] Wood J, with whom Hunt and McInerney JJ agreed.

⁵⁹ *Hogan v Hinch* (2011) 243 CLR 506, 537 [32].

availability of Ministerial discretionary exemptions may allow such matters to be considered, but there is currently no requirement to take such factors into account.

Recommendation:

- **Prospects for rehabilitation and actual rehabilitation should be required to be considered by the Minister in the exercise of his or her powers under the Bill.**
- **The Minister should be required to consider the likely effect of the citizenship cessation on any dependants and what alternative arrangements might apply.**

Children

94. The Bill would impact on children where a child's citizenship ceases under proposed sections 33AA, 35 and 35A.⁶⁰ The automatic cessation of citizenship measures contained in proposed sections 33AA and 35 may 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.⁶¹ In particular, the Bill may apply to children younger than 10 years of age and to children from 10 to 14 years of age regardless of whether the child knows that his or her conduct is wrong and without an intention to sever allegiance with Australian values.
95. The Explanatory Memorandum notes that 'the proposed amendments apply to all Australian (dual) citizens regardless of age'⁶² and that the:
- ... Government has considered the best interests of the child in these circumstances where conduct of a minor is serious enough to engage the cessation or renunciation provisions and has assessed that the protection of the Australian community and Australia's national security outweighs the best interests of the child.*⁶³
96. However, in the criminal law, children under a certain age are exempted from criminal responsibility because of 'their incapacity to understand the consequences of their acts and because they have not fully developed an appreciation of the difference between right and wrong'.⁶⁴ Under the Criminal Code, a child:

⁶⁰ The Bill would also impact on children where the Minister has the power to revoke the Australian citizenship of a child if their parent's citizenship is ceased under the proposed sections. Exceptions would be where another responsible parent of the child is an Australian citizen or if it would render the child stateless. These amendments would be an update of current section 36 of the ACA.

⁶¹ 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. Australia has been a party to the Convention since 26 September 2006.

⁶² Ibid, 32.

⁶³ Ibid, 33.

⁶⁴ Simon Bronnitt and Bernadette McSherry, *Principles of Criminal Law*, Third Edition, Lawbook Co, Sydney 2010, 171.

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- under 10 years of age is not criminally responsible for an offence;⁶⁵ and
 - a child from 10 to 14 years of age can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.⁶⁶
97. These restrictions would apply to the application of proposed section 35A by virtue of the need for a conviction and the necessary assessment by the court to determine whether a particular child can be regarded as having the capacity to be held criminally responsible.
98. They would not, contrary to statements in the Explanatory Memorandum,⁶⁷ appear to apply to the application of new section 33AA and 35. This is because there is no requirement for a conviction under these provisions. A judicial review determination by a court will be whether the child has engaged in the prescribed conduct listed in the Bill on the balance of probabilities as a matter of jurisdictional fact, not whether they had capacity to do so. While the words and expressions used in the Criminal Code have the same meaning as those used in subsection 33AA(2),⁶⁸ the age restrictions are not applicable. This means that children may be captured by proposed sections 33AA and 35 who have limited or no understanding about the concepts of allegiance, loyalty, or right or wrong.
99. Similarly, there are no age restrictions in the Bill or any mandatory requirement on the Minister to apply the Criminal Code restrictions in decisions of whether to issue a notice or an exemption.
100. The Minister's discretionary power to make an exemption where it would be in the public interest⁶⁹ may (as the Explanatory Memorandum to the Bill notes⁷⁰) include consideration of matters relating to minors, including the best interests of the child, any impact cessation may have on the child and Australia's obligations to children.
101. However, such considerations are not mandatory and, with respect, it is unclear how the Minister will be in a position to determine whether a particular child has the capacity to know that his or her conduct is wrong and that the conduct demonstrates a severing of allegiance with Australia. Capacity is usually a matter for determination by a court after psychological evaluations have been conducted and the child has been examined. Similar issues arise in relation to individuals who may be considered to have insufficient capacity due to mental impairment.⁷¹

Recommendation:

- **Restrictions on culpability in the Criminal Code relating to minors and persons with a mental impairment should apply to the Bill.**

⁶⁵ Section 7.1 of the Criminal Code.

⁶⁶ Section 7.2 of the Criminal Code.

⁶⁷ Explanatory Memorandum to the Bill, 10.

⁶⁸ As per subsection 33AA(3) of the Bill.

⁶⁹ Subsections 33AA(7) and 35(6) of the Bill.

⁷⁰ Explanatory Memorandum to the Bill, 17.

⁷¹ See section 7.3 of the Criminal Code.

Unacceptable consequences arising

102. Citizenship is a concept that infuses other areas of the law. Notably, the *Migration Act 1958* (Cth) (the Migration Act) is structured around the distinction between Australian citizens and non-citizens. Australian citizens are not required to hold a visa to remain in or enter Australia. Non-citizens are.
103. Under the Bill, a person is deemed to have renounced or had their citizenship ceased at the time they engage in the specified conduct or are convicted of a prescribed offence. The person would then be deemed to be an unlawful non-citizen if they did not hold a valid visa. An unlawful non-citizen is a non-citizen who does not hold a visa that is in effect.⁷²
104. Under section 35 of the Migration Act 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 section 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 sections 33AA, 35 or 35A.⁷³
105. The person would then become an unlawful non-citizen subject to mandatory immigration detention. One of the most significant consequences of being a non-citizen who does not hold a 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 in the migration zone ... is an unlawful non-citizen”.
106. 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.
107. Every such officer thus comes under an imperative duty to detain the person. That is, proposed sections 33AA and possibly section 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, would effectively impose mandatory detention, by the executive, prior to judicial trial, based upon mere “suspicion” of an offence.
108. Generally, if the detained person is deemed an unlawful non-citizen, they must be removed from Australia or deported, unless they are granted a visa.⁷⁴ Subsection 196(2) of the Migration Act makes it clear that a person *can* be released from

⁷² Sections 13 and 14 of the *Migration Act 1958* (Cth).

⁷³ There are two different scenarios that relate to when a Minister/delegate can cancel a visa, and when only a Minister can cancel a visa. Under subsection 501(2) the Minister/delegate can cancel the visa if the Minister/delegate reasonably suspects that the person does not pass the character test; and the person does not satisfy the Minister/delegate that the person passes the character test. Under subsection 501(3) the Minister (and not a delegate) may cancel a visa that has been granted to a person if the Minister suspects that the person does not pass the character test and the Minister is satisfied that the refusal or cancellation is in the national interest. In the context of removing someone’s citizenship in the circumstances of the Bill, the Minister would be likely to use subsection 501(3) which would not allow the person the opportunity to satisfy the Minister that they would pass the character test, and also not be subject to Administrative Appeals Tribunal review.

⁷⁴ Section 198 of the *Migration Act 1958* (Cth).

detention if they are an Australian citizen. The practical effect of section 189 is, however, that a detained person will be released only if they demonstrate that they are an Australian citizen so as to alleviate the 'reasonable suspicion' that they are an unlawful non-citizen. That is to say, a detained citizen would be required to prove – to an officer of the executive – that they are innocent of any conduct/offence referred to in the proposed new sections in order to secure their release from detention. This requirement to prove their innocence will not play out in the context of a judicial trial, but rather 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.

109. The United Nations' *Convention on the Reduction of Statelessness* (1961), which Australia gave accession to in 1973, sets out that a contracting state shall not deprive a person of their nationality if such deprivation would render them stateless.⁷⁵ The convention does permit, however, renunciation of citizenship in circumstances where the person concerned possesses or acquires another nationality.⁷⁶
110. While international law dictates that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality⁷⁷, there is no guarantee that a dual national's/citizen's other country of nationality will not revoke their citizenship and/or refuse to accept them (because of suspected terrorist involvement), effectively rendering that person stateless. In such circumstances, a dual national/citizen who is in Australia at the time their citizenship is removed may be subject to indefinite immigration detention.⁷⁸ This would be inconsistent with international law which holds that all individuals, including non-citizens, must be protected from arbitrary indefinite detention.⁷⁹
111. A person may also be subject to indefinite detention in circumstances where a person could not be returned to a country where they may be subject to torture or the death penalty. Australian⁸⁰ and international law⁸¹ prohibits returning people in such cases.⁸²

⁷⁵ *Convention on the Reduction of Statelessness*, (30 August 1961), UN GA, Treaty Series, vol. 989, 175, [8]

⁷⁶ *Ibid*, Article 7

⁷⁷ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) [15]

⁷⁸ Under section 35 of the *Migration Act 1958* (Cth) 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 section 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 s33AA, 35 or 35A. The person would then become a non-citizen subject to immigration detention.

⁷⁹ *Conka v. Belgium* (2002) Eur Court HR , 51564/99.

⁸⁰ *Migration Act 1958* (Cth), s36(2)(aa): 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

⁸¹ *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*, opened for signature 15 December 1989, A/RES/44/128; *Convention on the Rights of a Child*, opened for signature 20 November 1987, 1577 UNTS 3 (entered into force 2 September 1990); UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

⁸² 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 – *FKAG v Australia*, UNHRC Communication 2094/2011 (August 2013); *MMM v Australia*, UNHRC Communication 2136/2012 (August 2013).

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112. The proposed sections 33AA and possibly 35 therefore create a regime that permits indefinite detention of Australian citizens by the executive on mere reasonable suspicion of the commission of particular offences by that person. To be released, the Australian citizen must prove their own innocence of any such offence of which they are suspected. This is not only manifestly unfair to the person concerned, but also places an unacceptable burden on officers of the Commonwealth.
113. Moreover, unless a citizen can demonstrate their innocence (and thus their citizenship), they will in most cases be liable to be removed from Australia pursuant to section 198 of the Migration Act (unless they are granted a visa). In removing such a person, section 197C of the Migration Act appears to mandate that any non-*refoulement* obligations owed under international law be disregarded.
114. In summary, the proposed new section 33AA and possibly section 35 creates a situation in which:
- an Australian citizen, may be required to be detained on the basis of a mere suspicion that they have committed such an offence, rather than on the basis that they have actually committed an offence and thereby renounced their citizenship (inconsistently with the presumption of innocence);
 - the decision to detain is made by officers of the executive rather than being connected with the judicial process (eg, detention in custody pending a judicial trial);
 - in order to be released from detention the person will, in practical terms, have to prove their own innocence (effectively reversing the normal burden of proof in relation to criminal offences and operating inconsistently with the presumption of innocence); and
 - a person who cannot demonstrate their innocence risks removal from Australia, including to a country where they may face persecution and where such removal would be contrary to Australia's international obligations.
115. It is submitted that any legislative scheme which dictates these results as a matter of law is unacceptable, according to traditional common law conceptions which underpin Australia's legal system relating to a right to a fair trial, and international human rights standards.⁸³
116. It is submitted that these undesirable consequences should be avoided by adopting the alternative legislative model referred to at the beginning of this submission.
117. There is also currently no requirement of communication of intent to revoke a dual national's/citizen's citizenship between Australia and the other nations concerned.
118. In the alternative, the Law Council makes the following recommendations.

Recommendation:

- **There should be a requirement for Ministerial satisfaction that the decision will not have the practical effect of rendering a person stateless or subject to indefinite detention.**

⁸³ See, in particular, Articles 9 (liberty and security of persons) and 14 of the International Covenant on Civil and Political Rights

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- **In circumstances where a person requests to file an application for judicial review, there should be a prohibition against removing a person from Australia prior to the determination of the application. There should also be a requirement to notify the person of their right to review.**

Retrospectivity

119. In light of the concerns outlined below, the Law Council submits that the measures in the Bill should *not* apply retrospectively with respect to conduct that occurred before commencement of the Act.
120. The Bill as currently drafted has partial retrospective application. Section 35 is proposed to apply where the fighting or service commenced before the commencement of the Act, but the person will cease to be an Australian citizen at the time the Act commences. Similarly, the application of section 35A applies to convictions that occur after the commencement of the Act, whether the conduct constituting the offence occurred before, on or after that commencement. The Committee is also required to consider under the terms of reference for the current inquiry whether proposed section 35A of the Bill (the conviction-based cessation) should apply retrospectively with respect to convictions prior to the commencement of the Act.
121. 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.*⁸⁴
122. Retrospective measures offend rule of law principles that the law must be readily known and available, and certain and clear.⁸⁵ 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.*⁸⁶
123. The law should be certain and its reach ascertainable by those who are subject to it. Further:

⁸⁴ Tom Bingham, *The Rule of Law* (Penguin UK, 2011). 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.

⁸⁵ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), Principle 1.

⁸⁶ *Black-Clawson International Ltd v Papierwerke Waldhof-Ascjaffenburg* [1975] AC 591.

*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.*⁸⁷

- 124.** While it is within the power of the Parliament to enact retrospective laws,⁸⁸ holding a person responsible for automatic citizenship cessation for doing what did not amount to cessation at the time that s/he 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.
- 125.** 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.
- 126.** For those who have already been convicted of offences captured by proposed section 35A, the courts have the ability in sentencing 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.

Recommendation:

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

⁸⁷ *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* 5th ed (2008).

⁸⁸ *Polyukhovich v Commonwealth* (1991) 172 CLR 501. See also *Millner v Raith* (1942) 66 CLR 1.

Attachment A: Profile of 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 Large Law Firm Group, 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 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

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