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Submission on the Australian Citizenship  
Amendment (Allegiance to Australia) Bill 2015  
Parliamentary Joint Committee on Intelligence and Security

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## Human Rights Law Centre

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# 1. Executive Summary

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1. Citizenship is a fundamental human right which brings with it a range of other rights. Loss of citizenship is severe outcome that should only occur in narrow circumstances. Australia has international law obligations not to deprive a person of their citizenship arbitrarily. To comply with this obligation, the removal of citizenship must serve a legitimate purpose, it must be necessary and proportionate to that purpose and there must be due process.
2. The *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (the Bill), if passed or passed without substantial amendment, would likely facilitate the arbitrary removal of citizenship in breach of international law.
3. Under the Bill, citizenship loss would be triggered by a conviction for a wide range of criminal offences that have been criticised for being vague, too broad and in breach of human rights.
4. Citizenship would be automatically lost regardless of:
  - (a) the penalty imposed;
  - (b) the risk posed to the community by the person; or
  - (c) whether or not the offence was targeted at Australia.
5. Accordingly, a person could lose their citizenship:
  - (a) despite a court only imposing a minor penalty for a particular offence;
  - (b) for less serious offences such as damaging Commonwealth property or advocating terrorism; or
  - (c) for offences which do not involve repudiating a person's "allegiance" to Australia.
6. Accordingly, the measures in the Bill go well beyond what could reasonably be required to achieve the Government's stated purposes of protecting the community and upholding the value of allegiance to Australia.
7. Further, the Bill does not provide sufficient due process safeguards around the removal of citizenship. The Bill allows citizenship to be removed in certain circumstances without a determination from a court that the relevant conduct occurred.
8. The Minister has a discretion to decide that a person who would otherwise automatically lose citizenship under the Bill, is able to retain their citizenship. However, the Bill provides that the discretion is personal and non-compellable and the Minister does not have to comply with the rules of natural justice (in other words, a fair decision making process).
9. In summary, the measures in the Bill are excessive, unreasonable and lack effective safeguards.

***Recommendation 1***

The Bill should not be passed.

***Recommendation 2***

In the alternative, the Bill should not be passed without substantial amendment, including the amendments set out below.

***Recommendation 3***

The Bill should be amended so that citizenship can only be removed after a determination by a court that the relevant conduct occurred, followed by a decision by the Minister that revoking citizenship would be in the public interest.

***Recommendation 4***

The list of offences that can trigger the removal of citizenship should be narrowed to the most serious terrorism offences. In particular, citizenship should not be lost for a conviction for damaging Commonwealth property.

***Recommendation 5***

The Bill should require a minimum sentence (for example, 20 years imprisonment) to be imposed before citizenship can be removed for one of the listed offences.

***Recommendation 6***

The procedures in the Bill should be amended to provide appropriate due process safeguards.

***Recommendation 7***

The Bill should not apply retrospectively.

## 2. Right to citizenship and to entering your own country

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10. The right to a nationality (citizenship) is a fundamental human right and brings with it a number of other rights and protections. Article 15 of the *1948 Universal Declaration of Human Rights* declares that “Everyone has the right to a nationality”. Nationality entails rights and duties for both the State and the individual. Without citizenship, a person cannot obtain these attached rights or duties. Further, citizenship is essential for the realisation of other human rights. While human rights apply globally, nationality is the primary vehicle allowing people to access these human rights.
11. Article 15 of the *Universal Declaration of Human Rights* explicitly provides that no one should be arbitrarily deprived of a nationality. To comply with the obligation not to remove citizenship arbitrarily, the removal of citizenship must serve a legitimate purpose, it must be proportionate to that purpose and the removal must be accompanied by due process protections.
- 11.1 Article 24 of the *International Covenant on Civil and Political Rights (ICCPR)* also guarantees the right of every child to a nationality and article 12(4) provides that no one shall be arbitrarily deprived of the right to enter his own country. A person’s ‘own country’ is broader than “the country of his or her nationality”.<sup>1</sup> The United Nations Human Rights Committee has stated:
- “In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context...guarantees that even interference provided for by law should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.”<sup>2</sup>

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<sup>1</sup> See *Nystrom v Australia (1557/07)*, in which a non-citizen’s strong ties to Australia, including the location of his family and his language, meant that Australia was “his own country” for the purposes of Article 12(4). See also *Warsame v Canada (1959/10)*.

<sup>2</sup> Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para 21.

## 3. Citizenship must not be arbitrarily removed

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### 3.1 Purpose of the Bill

12. Section 4 of the Bill states that the purpose for the Bill is:

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

13. The Minister’s Second Reading Speech for the Bill stated that the intention of the Bill is “the protection of the community and the upholding of its values, rather than punishing people for terrorist or hostile acts.” The Minister stated that the Bill “emphasises the central importance of allegiance to Australia in the concept of citizenship.”

14. Accordingly, the Bill’s two purposes might be expressed as protecting the community and upholding the value of allegiance to Australia.

### 3.2 The Bill is not proportionate

15. The mechanisms provided in the Bill to achieve its purpose are clearly not proportionate.

16. There is already a suite of powers and offences available to authorities to protect the community against the threat of terrorism, including broad powers to cancel the passport of a person to prevent their return to Australia where it would pose a national security risk.

17. On the issue of “allegiance” to Australia, political debate on the Bill has noted the existing provision in the *Australian Citizenship Act 2007* allowing citizenship to be cancelled if a person serves in the armed forces of a country at war with Australia. Proponents for the Bill have argued that fighting for a terrorist group is analogous. Yet the Bill goes far beyond cancelling citizenship in this situation.

18. Perhaps of greatest concern is that the loss of citizenship is triggered by the broad range of offences listed in section 35A including “advocating” terrorism and “possessing things connected with terrorist acts”. The drafting of many of these terrorism offences has been criticised by a range of bodies as being vague, too broad and breaching human rights.<sup>3</sup>

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<sup>3</sup> UN Human Rights Committee, Concluding Observations: Australia, UN Doc CCPR/C/AUS/CO/5 (2009), [11] and Martin Scheinin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism, UN Doc A/HRC/4/26/Add.3 (2006), [15]. See also Australian Human Rights Commission, A Human Rights Guide to Australia’s Counter-Terrorism laws (2008) <https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws>

19. Accordingly, relying on a conviction for these offences as the trigger for a loss of citizenship means citizenship can be lost for less serious criminal conduct that was never intended to be captured by the Bill. This would include conduct that does not demonstrate any significant risk to the Australian community and that does not involve repudiating allegiance to Australia.
20. These concerns are compounded by the fact that the Bill (section 35A(3)(e)) provides that a person ceases to be an Australian citizen if they are found guilty of an offence under section 29 of the *Crimes Act 1914*. Section 29 provides that:

Any person who intentionally destroys or damages any property, whether real or personal, belonging to the Commonwealth or to any public authority under the Commonwealth, shall be guilty of an offence.
21. This offence captures a wide range of conduct, including minor conduct such as graffiti. It does not require any connection to terrorism whatsoever. The inclusion of this offence in the list of offences triggering the loss of citizenship is emblematic of the poor drafting, overreach and human rights risks involved in this Bill.
22. Finally, we note that under the drafting of the Bill, citizenship would be lost following a conviction for these offences regardless of the penalty imposed. Given, in particular that the Bill includes offences with *maximum* penalties as low as 5 and 7 years imprisonment, the Bill creates significant risks that loss of citizenship will result from conduct that cannot justify such a severe outcome.

## 4. Due process concerns

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23. The UN Human Rights Council notes that procedural safeguards are essential to prevent abuse of laws in relation to the deprivation of citizenship.<sup>4</sup> States are expected to observe minimum procedural standards in order to ensure that decisions on nationality are not arbitrary. As a minimum standard, decisions should be open to effective administrative or judicial review.
24. As highlighted above, the list of offences in the Bill that trigger citizenship loss creates significant risks that citizenship will be lost for conduct that was never intended to be captured by the Bill. The safeguard in the Bill to protect against this is that the Minister can rescind a notice that a person has ceased to be a citizen and exempt the person from the loss of citizenship if the Minister considers it is in the public interest to do so.
25. This is not an effective safeguard. The Minister's discretion to rescind a notice and exempt a person is personal and non-compellable. It is entirely at the discretion of the Minister. The Bill

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<sup>4</sup> Human Rights Council, *Human rights and arbitrary deprivation of nationality*, 14 December 2009, U.N. Doc. A/HRC/13/34

specifically provides that the Minister does not have to comply with the rules of natural justice (in other words, a fair decision making process) when deciding whether or not to exempt someone. This creates serious risks of decisions that are arbitrary, inconsistent, political and subjective - and that rely on irrelevant or incorrect information.

26. Further, the Bill permits citizenship to be cancelled without any conviction or order from a court. For example, section 33AA provides that a person “renounces” their citizenship by conduct such as “financing terrorism”. The Bill provides that the words financing terrorism and other listed conduct have the same meaning as they do in the specific criminal offences for that conduct. Yet the Bill does not require any conviction for that offence to occur prior to citizenship being cancelled. Again, the personal, non-compellable discretion of the Minister (with no natural justice obligation) does not provide an adequate safeguard.

## 5. Statelessness

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27. Citizenship is human right, and the deprivation of citizenship should only be considered in the most serious cases and where there is no chance of rendering someone stateless.
28. Relative to the Australian Government’s initial proposal, the narrowed scope of the Bill to dual nationals is welcome. This reduces the risks of a person being rendered stateless. However, the risk of becoming *de facto* stateless remains.
29. While a person may nominally hold citizenship of another country, the extent to which they are able to exercise the rights associated with citizenship in that country may vary (particularly if they have resided in Australia for most or all of their lives). As such, there is a risk that a dual national may become *de facto* stateless if their Australian citizenship is revoked and they are unable to exercise their citizenship rights in another country. It is also important to consider that Australia may not be alone in seeking to revoke citizenship from dual nationals on security grounds. A person suspected of involvement in terrorist activities who was a dual national of both Australia and the UK, for example, would also be at risk of having their UK citizenship revoked.

## 6. Non-refoulement and indefinite detention

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30. The deprivation of citizenship may also cause other human rights issues, such as arbitrary detention or the refoulement (return) of a person to a country where they are likely to face harm. A person whose Australian citizenship is revoked, may be at risk of persecution, torture or inhuman treatment if they are sent to their other country of citizenship. Australia has a number of obligations to ensure that a person is not refouled, including under the *Refugee Convention*, the ICCPR and the *Convention against Torture*.

31. If Australia is unable to return a person to their country of citizenship, it is possible that such a person would be at risk of prolonged indefinite detention under the *Migration Act 1958*, contrary to international law.

## 7. Retrospectivity

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- 7.1 The Bill should not be amended to operate retrospectively. Citizenship is a fundamental right. It is a basic principle that legislation limiting fundamental rights should only apply prospectively. People should be able to know the extent of potential liability arising from conduct at the time the conduct is engaged in.
- 7.2 Part of the Bill already operates retrospectively. Section 35A (cancellation for convictions) can apply to *conduct* occurring before the commencement of the section provided that the *conviction* occurs after the section commences. This should be amended so that the section only applies to conduct engaged in after the commencement of the section.