

**AMNESTY
INTERNATIONAL**



Submission to the

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

21 July 2015

Submitted by
Amnesty International Australia

Contact: Guy Ragen

Title: Government Relations Adviser

Email: guy.ragen@amnesty.org.au

Phone: (02) 8396 7698

About Amnesty International

Amnesty International is the world's largest independent human rights organisation, comprising more than seven million supporters in more than 160 countries and over 500,000 supporters in Australia.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights.

Amnesty International is impartial and independent of any government, political persuasion or religious belief. Amnesty International Australia does not receive funding from governments or political parties.

1. Summary

- 1.1 Amnesty International welcomes the opportunity to provide this submission to the Joint Parliamentary Committee on Intelligence and Security's Inquiry into the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* ('the Bill').
- 1.2 This legislation raises significant questions relating to human rights, statelessness, citizenship, and the limits of executive power. Australia is party to numerous international legal conventions which are applicable to the Bill. This submission will consider a number of Australia's international legal obligations.
- 1.3 Amnesty International concurs with the UN Global Counter-Terrorism Strategy that respect and protection of human rights and the rule of law are a "fundamental basis of the fight against terrorism."¹ Under international human rights law, any interference with human rights for the protection of national security must meet the tests of being demonstrably necessary for that purpose and proportionate to the harm it is aimed to prevent. The burden is on the state to demonstrate the necessity and proportionality of the restriction. Restrictions must be consistent with all other human rights recognised in international law; may not impair the essence of the right affected; and may not be applied in a discriminatory or arbitrary manner.
- 1.4 The current Bill does not align with Australia's international human rights obligations. Amnesty International has serious concerns regarding the Bill's human rights impact, and we recommend the bill is not passed in its current form.
- 1.5 Amnesty International also notes the Canadian Government has recently introduced similar citizenship provisions to those in this Bill.² In response to the Canadian legislation, Amnesty noted that "deprivation of citizenship has very serious human rights consequences."³
- 1.6 Amnesty International holds that any decision to revoke citizenship must adhere to the following principles:
 - Withdrawing nationality should always be an exceptional measure;
 - Anyone subject to loss of citizenship should have access to a fair hearing before an independent body, and any decision should be appealable;
 - The decision to strip citizenship should never be "automatic" and should take into account the circumstances of the individual's case;
 - An individual must not be rendered "stateless" via the withdrawing of Australian citizenship.
- 1.7 Amnesty International notes the Committee has been asked by the Australian Government to consider whether the legislation should apply retrospectively. We also note the recent Discussion Paper on Citizenship asked whether powers to strip citizenship should extend to include people who are in a position to apply for another nationality. Both questions have troubling implications for human rights in Australia, and this submission will look each question in turn.

¹ The United Nations Global Counter-Terrorism Strategy, accessed at <http://www.un.org/en/terrorism/strategy-counter-terrorism.shtml#poa4>

² *Strengthening Canadian Citizenship Act 2014*, <http://www.parl.gc.ca/HousePublications/Publication.aspx?doc=C-24&pub=bill>

³ Amnesty International's Concerns Related to the proposed changes to the *Canadian Citizenship Act*, 9 June 2014, available at http://www.amnesty.ca/sites/default/files/c24_brief_amnesty_international_canada.pdf

Recommendations

- 1.8 Amnesty International recommends that Parliament rejects the legislation.
- 1.9 If the Bill is to be passed, Amnesty International recommends that at a minimum, the Australian Parliament:
 - (1) Amend the bill to only allow the loss of Australian citizenship after a criminal conviction in a court of law;
 - (2) Ensure the legislation adheres to Australia's international legal obligations, preserving the principle that stripping citizenship is both an extraordinary measure and a last resort;
 - (3) Reject the retrospective operation of the legislation.
 - (4) Reject any effort to expand the legislation to cover sole nationals.

2. International Legal Frameworks

The right to a nationality is a fundamental human right. It is enshrined in Article 15 of the Universal Declaration of Human Rights.

Australia is a State Party to a number of other international human rights conventions which are also relevant to any analysis of the Bill. Among these conventions are:

- The International Covenant on Civil and Political Rights (ICCPR);⁴
- The International Covenant on Economic, Social and Cultural Rights (ICESCR);⁵
- The Convention Relating to the Status of Stateless Persons (CRSSP);⁶
- The Convention on the Reduction of Statelessness (CRS).⁷

Under international human rights law, any interference with human rights for the protection of national security must meet the tests of being demonstrably necessary for that purpose and proportionate to the harm it is aimed to prevent. The burden is on the state to demonstrate the necessity and proportionality of the restriction.

While the submission will largely focus on the following rights, we note this is not an exhaustive list:

2.1 The right to a nationality

The UDHR does not just enshrine the right to a nationality; it also creates a protection against arbitrary deprivation of this nationality.⁸ Subsequent conventions impose a prohibition on Australia rendering an individual stateless. While we note the Bill introduced to the House of Representatives will only apply to dual nationals – meaning someone stripped of Australian citizenship under this legislation will not be stateless according to law – the Australian Government has explicitly flagged the possibility of extending legislation to include sole nationals. In this case, the CRSSP and CRS are relevant.

2.2 Presumption of innocence and due process

The rights to a presumption of innocence and a fair trial are enshrined in the ICCPR.⁹ The Bill – which provides for an automatic renunciation of citizenship – has serious implications for whether Australian citizens are being afforded due process.

2.3 Prohibition on retrospective criminal laws

The ICCPR creates a protection for individuals against being found guilty of a crime which did not exist at the time it was committed. Further, a heavier penalty than was applicable at the time of the criminal offence cannot be imposed.¹⁰ Amnesty acknowledges the Bill is not seeking to create a new criminal offence. Yet, we do argue that retrospective laws can negatively impact the rule of law. Amnesty notes the UN's Global Counter-Terrorism Strategy includes makes the rule of law a "fundamental basis" of the global fight against terrorism.¹¹

⁴ ICCPR, [1980] ATS 23, entered into force for Australia 23/3/1976

⁵ ICESCR, [1976], ATS 5, entered into force for Australia 10/3/1976

⁶ CRSSP, [1974], ATS 20, entered into force for Australia 13/3/1974

⁷ CRS, [1975], ATS 46, entered into force for Australia 13/12/1975

⁸ Universal Declaration of Human Rights, Article 15(1), 15(2)

⁹ ICCPR, Article 14(2)

¹⁰ ICCPR, Article 15(1)

¹¹ The United Nations Global Counter-Terrorism Strategy, accessed at <http://www.un.org/en/terrorism/strategy-counter-terrorism.shtml#poa4>

3. Citizenship and dual nationality

- 3.1 Citizenship is not merely someone's legal status and entitlement to live in a country. It forms a key part of the individual's relationship with the state, creating both rights and obligations. As such citizenship lays the foundation for the protection of a wide range of human rights.
- 3.2 In essence, the Bill seeks to create a legal framework through which the Australian Government can strip Australian nationality from dual citizens engaging in various acts associated with terrorism.
- 3.3 The reality, however, is not so simple. As the Australian Government points out on its travel advice website, many Australian with dual nationality may not even be aware of the fact they have dual citizenship.¹² Likewise, the same advice points out that someone may be a dual national even if they do not accept that nationality, and in some countries "nationality may automatically be acquired through marriage."¹³
- 3.4 Taking the proposed legislation to its logical conclusion – and taking the Australian Government's own advice – the Bill raises the possibility the Australian Government would strip citizenship from someone who has no idea they hold citizenship of another country.
- 3.5 While the Bill does not necessarily contravene Australia's obligation not to render an individual stateless, we do note that in operation, the Bill could lead to adverse outcomes. As the Government's own advice to Australians travelling overseas makes clear, dual nationality is not limited to a class of Australians who have expressly chosen to maintain citizenship of another country. Moreover, the Bill may strip citizenship from an individual who has never visited the country of their second citizenship.

4. Statelessness in international law

- 4.1 While this Bill applies to dual nationals only, we note that the Australian Government is actively considering the possibility of stripping citizenship from sole nationals.¹⁴
- 4.2 As a State Party to the Convention on the Reduction of Statelessness, Australia is obliged not to deprive someone of nationality which would lead to them becoming stateless.¹⁵
Exceptionally, a state can deprive nationality where a person has committed acts seriously prejudicial to the vital interests of the state, even if it leads to statelessness. However, this is only lawful if the state's law already provided for such revocation at the time of accession to the Convention and the state made a declaration to that effect. Australia made no declaration or reservation to the Convention.¹⁶
- 4.3 The proposal to withdraw Australian nationality from people who are eligible (to apply) for, but have not yet applied for, nationality of other countries, is hugely problematic. There is nothing to guarantee an individual in this situation would not be left stateless.
- 4.4 Amnesty International strongly opposes any move to allow the Australian Government to revoke citizenship from sole nationals.

¹² See: <http://www.smartraveller.gov.au/tips/dual-nationals.html>

¹³ See: <http://www.smartraveller.gov.au/tips/dual-nationals.html>

¹⁴ See *Australian Citizenship: Your Rights, Your Responsibilities*, at <http://www.border.gov.au/about/reports-publications/discussion-papers-submissions>

¹⁵ 1961 Convention on the Reduction on Statelessness, Article 8

¹⁶ <https://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&lang=en>

4.5 Citizenship is not merely someone's legal status and entitlement to live in a country. Without a nationality – and the legal protections flowing from it – the UNHCR has pointed out, stateless persons are “profoundly vulnerable.”¹⁷

5. Human rights implications of s33AA – presumption of innocence and due process

- 5.1 If passed in its current form, s33AA creates a situation where an individual renounces their citizenship by “conduct.” That is, by engaging in one of the criminal acts listed at s33AA(2), an Australian citizen automatically loses their citizenship.
- 5.2 Amnesty International holds there are serious unanswered questions as to whether an individual who, according to s33AA has renounced their citizenship, has actually received due process.
- 5.3 The Bill seeks to take any loss of decision out of the hands of the Minister – the individual loses their citizenship automatically because they have engaged in an act listed at s33AA(2). Yet, we note the Bill does not stipulate that such an individual has already been convicted one of these crimes.
- 5.4 The question then is how a decision under s33AA made? Can an individual lose their citizenship without having first been convicted (or even charged) with one of the named offences? The legislation and the Explanatory Memorandum do not answer these questions.
- 5.5 In its current form, the Bill gives no protection that someone will have their right to a presumption of innocence respected.¹⁸ While the ICCPR allows states to derogate from their obligations during a time of “public emergency which threatens the life of the nation”,¹⁹ such derogations can only “to the extent strictly required by the exigencies of the situation.”²⁰ The question is about balance. Does the current national security situation in Australia mean this Bill is a reasonable and proportionate response by the Australian Government?
- 5.6 Amnesty also highlights the list of Commonwealth Criminal Code offences for which an individual renounces their citizenship under s33AA is not limited to the one the Australian Government has emphasised – that is, fighting for a listed terrorist organisation. As the Prime Minister has characterised the legislation:
- “So, what we are effectively doing is updating Section 35 of the Citizenship Act to reflect modern conditions where often people don't go and fight against us in a foreign army; they fight against us in a terrorist group.”²¹*
- 5.7 In fact, the list within s33AA is wider. It includes “financing terrorism (s33AA(f))” and “financing a terrorist (s33AA(g))”. Amnesty International holds concerns that bringing these two offences under s33AA – where there is no requirement for a conviction – could lead to a adverse outcome related to the significant remittance flows from Australia to the developing world.

¹⁷ Preamble to 1954 Convention on Relating to the Status of Stateless Persons
<http://www.unhcr.org/3bbb25729.html>

¹⁸ ICCPR, Article 14(2)

¹⁹ ICCPR, Article 4(1)

²⁰ UN Human Rights Committee, General Comment no.32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, at paragraph 6

²¹ Prime Minister, Press Conference, 23 June 2015, transcript at <https://www.pm.gov.au/media/2015-06-23/joint-press-conference-parliament-house-canberra>

- 5.8 Whereas someone suspected of financing terrorism through remittances would need to have their guilt proven in a criminal court under the offence created by the Criminal Code, there is no such protection under s33AA.
- 5.9 This demonstrates the wide-ranging nature of s33AA. It is not limited to those who are actively fighting on behalf of a listed terrorist organisation. Under s33AA, an individual who innocently believes they are funding family members overseas through a remittance could lose their citizenship without having the allegations adjudicated by a court.
- 5.10 Amnesty International holds that the Bill in its current form implies any individual stripped of citizenship under s33AA would effectively be stripped of any presumption to innocence.
- 5.11 Further, s33AA is constructed in such a way to make renunciation of citizenship automatic. Amnesty International holds that any loss of citizenship must only take place after a fair hearing by an independent body. Section 33AA does not meet this test.
- 5.12 Linked to this is whether the Bill is consistent with an individual's right to due process. Amnesty notes the Explanatory Memorandum posits the Bill is consistent on this point because it does not limit the scope for judicial review of any cessation or renunciation.²² On this point, Amnesty has questions about how renunciation of citizenship is going to operation in practice.
- 5.13 In essence, if a dual citizen currently outside Australia has lost their citizenship according to s33AA, how can they apply for judicial review? Can they simply re-enter the country as a (newly-created) former citizen? Will they have standing to lodge an appeal, and which appropriate forum would hear the case?
- 5.14 Further, as s33AA is designed to operate automatically, there is nothing within the Bill which requires an individual to be provided with the evidence on which their citizenship renunciation has been based. Amnesty International has serious concerns about the hindrance to any appeal on this self-executing clause if the evidence on which the Australian Government has relied is not provided to the affected person.
- 5.15 Amnesty International in the United Kingdom has noted the growing use of secret evidence over the past decade in response to national security concerns. In the United Kingdom, Amnesty International has argued that "this growing resort to secrecy undermines basic standards of fairness and open justice, can result in violations of the right to a fair trial and the right to effective remedy for victims of human rights violations."²³ We are concerned the Bill sets Australia on a similar path.
- 5.16 The Australian Government claims an individual loses their citizenship under this section simply by their own conduct. It has expressly claimed that the decision here is not the Minister's.²⁴ At some point, however, logically the Australian Government must rely on some evidence to indicate s33AA has been triggered. What this evidence is, and whether the affected individual has access to it, is unanswered by the Bill in its current form.

²² *Australian Citizenship (Allegiance to Australia) Bill 2015*, Explanatory Memorandum, p.31

²³ Amnesty International, *Left in the Dark: the growing use of secret evidence in the United Kingdom*, p.4

²⁴ See, for example – Prime Minister: "*The role of the Minister is not adjudication; it's notification. That's the role of the Minister. It is the law – the law itself – it will be the operation of the law that actually strips people of their citizenship rather than the ministerial decision as such.*" Joint Press Conference, Prime Minister, Attorney-General, Minister for Immigration and Border Protection, Parliament House, 23 June 2015, accessed at <http://www.attorneygeneral.gov.au/transcripts/Pages/2015/SecondQuarter/23-June-2015-Prime-Ministers-Transcript-Joint-Press-Conference-Parliament-House-Canberra.aspx>

- 5.17 On these points, Amnesty International argues s33AA is inconsistent with Australia's obligations under the ICCPR's Article 14.
- 5.18 Amnesty International holds that an individual should only be able to lose Australian citizenship if they have been convicted of a criminal offence by a court of law – not suspected of a criminal offence. Amnesty International recommends that at a minimum s33AA should be removed from the legislation.

6. Should the bill apply retrospectively?

- 6.1 The Australian Government has requested the Committee investigate whether the Bill should operate retrospectively. As noted above, the ICCPR creates a prohibition against applying criminal laws retrospectively, or imposing a heavier penalty than was applicable at the time of the offence. Amnesty International acknowledges the Bill is not creating any criminal acts. We also note the High Court of Australia has upheld the Parliament's power to make retrospective laws, where the intention of the Parliament is clear.²⁵
- 6.2 Nevertheless, retrospective laws have an uneasy relationship with the rule of law in general – they make the law “less certain and reliable.”²⁶ At the same time, the UN's Global Counter-Terrorism Strategy makes respect for the rule of law a key part of the global fight against terrorism. There are serious questions as to whether stripping citizenship – something so innate to an individual's human rights protections – on the basis of a retrospective law would be in line with our commitment to the rule of law in general.
- 6.3 Throughout this submission, we have made clear the Bill as currently written could lead to some adverse outcomes. We have also noted that its application is wider than what is being suggested by the Australian Government's rhetoric. On this basis, Amnesty International holds the Bill should not apply retrospectively. In essence, making the Bill retrospective widens its application even further. It would amplify the weak human rights protections already within the Bill.

7. Conclusion

- 7.1 Amnesty acknowledges governments have a responsibility to protect the security of all individuals within the state's jurisdiction. We also acknowledge the group calling itself the Islamic State is carrying out grave human rights abuses, many of which Amnesty International has documented.²⁷
- 7.2 Nevertheless, any counter-terrorism measure adopted by Australia – such as that which is characterised by this Bill – must comply with Australia's obligations under international law. Throughout this submission, we have argued the Bill potentially breaches a number of Australia's human rights obligations and may lead to adverse outcomes.
- 7.3 Citizenship is one means by which an individual's human rights are protected. While Amnesty abhors the grave human rights abuses being carried out by the group calling itself the Islamic State, these abuses do not excuse the Australian Government in undermining citizenship and the right to not be arbitrarily deprived due process.
- 7.4 For these reasons, we urge the Parliament to reject the legislation.

²⁵ For example, *Polyukhovich v Commonwealth* (1991) HCA 32

²⁶ See, for example, the Australian Law Reform Commission on *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (IP 46)*, chapter 7, at 7.6, accessed at https://www.alrc.gov.au/sites/default/files/pdfs/publications/ip46_ch_7_retrospective_laws.pdf

²⁷ Amnesty International, “The State of the World's Human Rights,” 2014-15, p.40