

## **Inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018**

### **Parliamentary Joint Committee on Intelligence and Security**

#### **Submission by the Office of the United Nations High Commissioner for Refugees**

##### **Introduction**

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security in respect of its inquiry into the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (the Bill). UNHCR's submission focuses only on the amendments in the Bill which change the threshold for determining dual citizenship.
2. Under Article 15 of the *Universal Declaration of Human Rights*, every individual has a right to a nationality.<sup>1</sup> This right is important not only because it provides a sense of identity and inclusion in society, but also because those without a nationality are often excluded from the enjoyment of many basic human rights and made more vulnerable to a range of human rights abuses including arbitrary detention.
3. Australia is a State Party to the *1954 Convention relating to the Status of Stateless Persons* (the 1954 Convention),<sup>2</sup> and the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention).<sup>3</sup> The purpose of the latter is to prevent and reduce statelessness, thereby guaranteeing every individual's right to a nationality. Consequently, Australia has an obligation to take measures to avoid statelessness.
4. Article 1(1) of the 1954 Convention sets out the definition of a stateless person as follows:

“For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.”

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<sup>1</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 15.

<sup>2</sup> UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <https://www.refworld.org/docid/3ae6b3840.html>.

<sup>3</sup> UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

The International Law Commission has concluded that the definition in Article 1(1) of the 1954 Convention is part of customary international law.<sup>4</sup>

5. Article 8(1) of the 1961 Statelessness Convention requires that a Contracting State “not deprive a person of nationality if such deprivation would render him stateless”. However, under Article 8(3) a Contracting State can retain the right to deprive a person of their nationality, if at the time of signature, ratification or accession it specifies its retention of such a right on one or more of the stipulated grounds, being grounds existing in its national law at that time. Australia acceded to the 1961 Stateless Convention on 13 December 1973 and made no declarations or reservations upon accession or thereafter.<sup>5</sup> Article 8 states as follows:

- “1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.
2. Notwithstanding the provisions of paragraph 1 of this Article, a may be deprived of the nationality of a Contracting State:
  - (a) in the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality;
  - (b) where the nationality has been obtained by misrepresentation or fraud.
3. Notwithstanding the provisions of paragraph 1 of this Article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:
  - (a) that, inconsistently with his duty of loyalty to the Contracting State, the person
    - (i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
    - (ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State;
  - (b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.

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<sup>4</sup> See page 49 of the International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, which states that the Article 1 definition can ‘no doubt be considered as having acquired a customary nature’: <https://www.refworld.org/docid/525e7929d.html>. See also Part One of UNHCR, *Handbook on Protection of Stateless Persons* (UNHCR Handbook), 30 June 2014, available at: <https://www.refworld.org/docid/53b676aa4.html>.

<sup>5</sup> UN General Assembly, *1961 Signatory States, Declarations and Reservations on the Reduction of Statelessness*, 30 August 1961, available at: <https://www.refworld.org/docid/4fa368ea2.html>

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

### **UNHCR’s Authority**

6. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly (UNGA) with the global mandate for the identification, prevention and reduction of statelessness and for the protection of stateless persons.<sup>6</sup> Pursuant to this mandate, UNHCR is, inter alia, to provide technical advice to States to encourage States to examine their nationality laws and other relevant legislation with a view to adopting and implementing safeguards, consistent with fundamental principles of international law, to prevent the occurrence of statelessness which results from arbitrary denial or deprivation of nationality.
7. Further, in accordance with UNGA resolutions 3274 (XXIX)<sup>7</sup> and 31/36<sup>8</sup>, UNHCR has been designated, pursuant to Article 11 of the 1961 Statelessness Convention,<sup>9</sup> as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities.

### **Concerns Regarding Australia’s Obligations to Prevent and Reduce Statelessness under the Bill**

8. The Bill proposes to amend paragraph 35A(1)(b) of the *Australian Citizenship Act 2007* (Cth) (the Act), to retrospectively change the threshold from the existing requirement that the person *is* a national or citizen of a country other than Australia at the time when the Minister makes the determination that a person ceases to be an Australian citizen. This provision is to be replaced with a requirement that the Minister need only be *satisfied* that the person would not become a person who is not a national or citizen of any country.

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<sup>6</sup> UN General Assembly resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR’s Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 20 October 1995. UNHCR’s mandate on statelessness has continued to evolve as the General Assembly has endorsed the conclusions of the Executive Committee, notably Executive Committee Conclusion No. 106 of 2006 on “Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons”. See UN General Assembly resolution A/RES/61/137 of 19 December 2006.

<sup>7</sup> UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 10 December 1974, A/RES/3274 (XXIX).

<sup>8</sup> UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 30 November 1976, A/RES/31/36.

<sup>9</sup> UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

9. This proposed amendment represents a lowering of the threshold to be applied. It also requires the Minister to simply be satisfied that the person will not *become* stateless, rather than in fact *being* a national of another country at the time of the determination, as is currently the case. This temporal shift may result in consideration of what a person's nationality status may become rather than what it is at the time the determination to deprive nationality is made.
10. Statelessness could result if the Minister takes the view that an individual would not become stateless provided they take steps to confirm or claim an entitlement to another nationality. It should be recalled that an individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historical nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures are yet to be completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention.<sup>10</sup>
11. UNHCR acknowledges the Government's view, expressed in the Minister's second reading speech that "It is well established under case law that where statute provides a Minister must be 'satisfied' of a matter, it is to be understood as requiring the attainment of that satisfaction reasonably."<sup>11</sup> However, while the existing requirement (that a person is a national of a country at the time the Minister makes the determination to deprive a person of their Australian citizenship) is a question of fact which can be reviewed by the Courts for correctness, the proposed amendment would instead confine the Court's ruling to the question of whether the Minister's view was reasonably formed.
12. UNHCR considers that the proposed threshold which would only require the Minister's satisfaction, albeit reasonably attained, creates a heightened risk that an individual may be rendered stateless. For example, the Minister may base his satisfaction that a person will not become stateless based on a strict interpretation of another country's nationality law and fail to consider how that country regards an individual's entitlement to nationality in practice. Establishing whether an individual is considered a national under the operation of law requires a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have an impact on the individual's status.<sup>12</sup> This is a mixed question of fact and law. Examining an individual's position in practice may lead to a different conclusion than one derived from a purely formalistic analysis of the application of nationality laws of a country to an individual's case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to "law" in the definition of statelessness in Article 1(1) of the 1954

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<sup>10</sup> See paragraph 50 of the UNHCR Handbook.

<sup>11</sup> C. Porter (Attorney-General), Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, *Parliamentary Debates*, House of Representatives, 28 November 2018, p. 9.

<sup>12</sup> This approach reflects the general principle of law set out in Articles 1 and 2 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.

Convention therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.<sup>13</sup>

13. Given the heightened risk that an individual could be rendered stateless under proposed paragraph 35A(1)(b), Australia, per its obligations under the 1961 Statelessness Convention, would have been required pursuant to Article 8(3) of the 1961 Statelessness Convention, to have retained such a right to deprive nationality at the time it acceded to the 1961 Statelessness Convention. Further, it would have been necessary for Australia to have had such a ground for deprivation of nationality existing in its nationality law at the time it acceded. As previously stated, these procedural requirements are not satisfied.
14. UNHCR also acknowledges the view expressed in the Explanatory Memorandum that the Bill is seeking to harmonize provisions of the Citizenship Act.<sup>14</sup> However, it appears existing paragraph 35A(1)(c) was intentionally drafted differently to other provisions of the Citizenship Act. The 2015 Revised Explanatory Memorandum to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 relevantly notes:

“The drafting of this provision differs slightly to other provisions in the Citizenship Act relating to statelessness. The amendment has been set deliberately high as the operation of section 35A can be differentiated from other reasons for cessation under the Citizenship Act because it applies to conduct that occurs while the person is an Australian citizen. This will not affect the operation of other statelessness provisions in the Citizenship Act.”<sup>15</sup>
15. In conclusion, UNHCR considers that the proposed amendment to paragraph 35A(1)(b) of the Act are contrary to Australia’s obligations under the 1961 Statelessness Convention. On the basis that the proposed amendment would create a heightened risk that an individual could be rendered stateless, it is strongly recommended that the threshold not be altered.

## **UNHCR Regional Representation in Canberra 11 January 2019**

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<sup>13</sup> See paragraphs 23 and 24 of the UNHCR Handbook.

<sup>14</sup> Explanatory Memorandum, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, p. 5.

<sup>15</sup> Revised Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, p. 33, available at: [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5507](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5507).