Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

1 July 2019

**Parliamentary Joint Committee on Intelligence and Security Review: Australian Citizenship Renunciation By Conduct and Cessation Provisions**

The Australian National University Law Reform and Social Justice Research Hub (**ANU LRSJ Research Hub**) welcomes the opportunity to provide this submission to the Review into the Australian Citizenship Renunciation by Conduct and Cessation Provisions by the Parliamentary Joint Committee on Intelligence and Security (the Committee).

The ANU LRSJ Research Hub falls within the ANU College of Law LRSJ program that supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members are ANU law students, who participate in wide-ranging projects with the aim of exploring the role of law and lawyers in society in the promotion of social justice.

**Summary of Recommendations:**

The ANU LRSJ Research Hub recognises the role of Section 33AA and Section 35A of the *Australian Citizenship Act 2007* (Cth) in protecting 'Australians and Australian interests' from harmful conduct, by acting as a deterrent to overseas terrorism by Australian citizens.[1] However, it is also important that the provisions operate within the rule of law, especially in adhering to procedural fairness, natural justice and Australia's international obligations. Informed by these concerns, the ANU LRSJ Research Hub makes the following observations and recommendations to improve the operation and implications of the legislative provisions:

**Operation of Section 33AA:**

1. That the Committee review the self-executing nature of s 33AA and its potentially destabilising effect on the capacity of an affected individual to review the basis upon which renunciation has occurred.

**Implications of Section 33AA:**

1. That the Committee consider the risks associated with revoking individuals' Australian citizenship, in terms of inconsistency with Australia's international law obligations to cooperate in prosecuting acts of terrorism and fighting impunity.

[1] Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 33 [157].

**Operation of Section 35A:**

1. That the Minister should be satisfied *on reasonable grounds*, as opposed to be 'satisfied that the conduct of the person constitutes a repudiation of allegiance to Australia'.[2]
2. That clearer guidelines should be set regarding what constitutes a repudiation of allegiance of Australia.
3. That the Minister should be satisfied *on reasonable grounds*, as opposed to be 'satisfied that it is not in the public interest for the person to remain an Australian citizen'.[3]
4. That the Minister should, after following required steps, be satisfied on reasonable grounds that the person is in fact a dual citizen before invoking s 35A.
5. That the Committee recommend that the threshold of a certain sentence length be kept.

**Implications of Section 35A:**

1. That the Committee consider the effect of s 35A on federal sentencing, especially given recent developments and divergence of sentencing practices concerning a federal offender's prospects of deportation.
2. That the Committee consider requiring the decision to be made while the offender is serving their custodial sentence.

If we can provide further information, please contact us at anulrsjresearchhub@gmail.com.

**On behalf of the ANU LRSJ Research Hub:**

**Authors:**

Section 33AA:

– Administrative Law and International Law Concerns: *Shenpaha Ganesan and Rosie Kethel*

Section 35A:

– Legal Threshold as to Ministerial Decisions under Section 35A: *Kevin Marco Tanaya*
– Definitional and Sentence Length Concerns: *Alice Read, Holly Ashburner, Mara Burslem and Kevin Marco Tanaya*
– Effect of Section 35A on Federal Sentencing Exercise:[4] *Andrew Ray, Bridie Adams, Sophie Hewitt*

**Editors:**

*Jessica Hodgson, Saye Kaeo Saylan, Sophia Collins and Jess Pantinople*

**Under the supervision of:**

*Matthew Zagor, Kim Rubenstein and Dominique Dalla-Pozza*

[2] *Australian Citizenship Act 2007* (Cth) s 35A(1)(d).

[3] Ibid s 35A(1)(e).

[4] The views in this section reflect the views of the authors and may not necessarily reflect the views of their employer.

# Section 33AA

## 1. Administrative Law Concerns

Section 33AA(9) states that 'where a person renounces their Australian citizenship under this section, the renunciation takes effect, and the Australian citizenship of the person ceases, immediately upon the person engaging in the conduct'.[5] This renunciation will take place where an individual is 14 years or older, is 'a national or citizen of a country other than Australia' and they engage in conduct captured by s33AA(2).[6] The ultimate effect of this section is that the revocation of citizenship is self-executing, in the sense that a positive act, on behalf of Australian authorities, is not required for the renunciation to take effect. The self-executing nature of the provision may compromise an affected individual's right to judicial review.

The avenues for seeking judicial review around the renunciation are uncertain. This is aggravated by the fact that the Minister is exempt from providing a mandatory notice, under s 33AA(10), [7] if such a notice may compromise the 'security, defence or international relations of Australia, or Australian law enforcement operations'[8] under subsection 12. At what point, in that situation, would a person know that they have a decision that is applying to them to review?

Subsection 10 states that 'a person may seek review of the basis on which a notice under this subsection was given in the High Court of Australia' under s 75 of the Constitution or in the Federal Court of Australia under s 39B of the *Judiciary Act 1903* (Cth).[9] This provision seeks to provide a minimum avenue to judicial review of the basis on which the citizenship is deemed to have been renounced, that is, 'the basis on which a notice…was given'.[10]

Although this section seeks to address the recommendations made in the *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, the effect of this provision is still uncertain.[11] While the nature of the section creates an obligation to give notice of renunciation, which can be subject to review, the provision is nonetheless self-executing and cannot, in and of itself, be reviewed. If the basis on which the notice was given is effectively challenged, it is not sufficiently clear whether the renunciation itself would be revoked or void

[5] *Australian Citizenship Act 2007* (Cth) s 33AA(9).
[6] *Australian Citizenship Act 2007* (Cth) s 33AA (1).
[7] Ibid s 33AA(10).
[8] Ibid s 33AA(12).
[9] Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 48.
[10] Ibid.
[11] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) (Report, September 2015) xix.

ab initio.

The current procedure appears to achieve the same effect as if, for example, the minister made a reviewable decision to deem the citizenship revoked. The ultimate effect of the self-executing nature of the provision is destabilising, at the very least, in relation to the effect this has on the capacity of an affected individual to review the basis on which renunciation has occurred.

**1.1 Recommendations:**

That the Committee review the self-executing nature of s33AA and its potentially destabilising effect on the capacity of an affected individual to review the basis on which renunciation has occurred.

Given the uncertainty surrounding the availability of judicial review, the provision ought to be amended to make clear to potential applicants what exactly is reviewable i.e. whether it is the notice of revocation or the revocation itself that is reviewable.

## 2. International Law Concerns

### 2.1 The International Convention for the Suppression of Terrorist Bombings

Australia acceded to the International Convention for the Suppression of Terrorist Bombings[12] in 2002. The Convention lists the objective recognition of 'the urgent need to enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators'.[13] It also acknowledges the occurrence of terrorist bombings as 'a matter of grave concern to the international community as a whole'[14] thereby emphasizing the need for international cooperation to address such offences.

Article 6(1)(c) of the Convention states that 'each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 when: … the offence is committed by a national of that State'.[15] The requirements of this article are mirrored in the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 (Cth)*. Section 72.4(1)(b) of the Act, which lays out the 'jurisdictional requirement' for an offence, provides that 'a person commits an offence under this Division only if one or more of the following paragraphs applies and the circumstances relating to the alleged offence are not exclusively internal […]: 'at the time of the alleged offence, the person is an Australian citizen'.[16]

[12] *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 256 (entered into force 23 May 2001).
[13] Ibid Preamble.
[14] Ibid.
[15] Ibid art 6(1)(c).
[16] *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth) s 72.4(1)(b).

The type of serious conduct captured by the Convention and its implementing legislation in Australia encompasses at least the conduct captured by s 33AA(2)(a) of the *Australian Citizenship Act 2007* ('engaging in international terrorist activities using explosive or lethal devices').[17]

## 2.2 The International Convention for the Suppression of the Financing of Terrorism

Australia ratified the International Convention for the Suppression of the Financing of Terrorism[18] in 2002. The Convention contains similarly worded statements to those contained in the above Convention regarding the need for international cooperation with respect to the financing of terrorism. This includes the preambular statement that the 'financing of terrorism is a matter of grave concern to international community as a whole'[19] and the acknowledgement that there is an 'urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators'.[20]

Similar to the above Convention, this Convention also provides in art 7(1)(c) that 'each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 when: the offence is committed by a national of that State'.[21] Both treaties also oblige parties, under arts 7 and 9 respectively, to prosecute or extradite alleged offenders in their territory.

The conduct targeted by this Convention is plainly captured by s 33AA(2)(f) ('financing terrorism')[22] and s 33AA(2)(g) ('financing a terrorist')[23] of the *Australian Citizenship Act 2007* (Cth).

## 2.3 Inconsistency of Citizenship Act with International Law

By revoking an individual's citizenship under s 33AA of the *Australian Citizenship Act 2007* (Cth), they are prevented from entering Australia and are either left stateless (see below) or the other state, whose citizenship they hold, is forced to accept them. This effectively strips the Australian government of the opportunity – and obligation – to prosecute them and exports the risk they pose elsewhere. If the individual does pose a genuine threat to the community and another state is forced to accept them, then they will simply pose the same threat to a different community, likely under circumstances in which they are separated, at least temporarily, from

[17] *Australian Citizenship Act 2007* (Cth) s 33AA(2)(a).
[18] *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002).
[19] Ibid Preamble.
[20] Ibid.
[21] Ibid art 7(1)(c).
[22] *Australian Citizenship Act* 2007 (Cth) s 33AA(2)(f).
[23] Ibid s 33AA(2)(g).

friends and family.

By stripping the individual of their Australian citizenship, Australia cannot exercise jurisdiction regarding their conduct by virtue of their Australian citizenship. Consequently, revoking the individual's citizenship and thereby forcing another state to take responsibility for their conduct is inconsistent with Australia's international law commitments to cooperate in prosecuting acts of terrorism. As the International Law Commission pointed out in its report on the obligation to prosecute or extradite, this obligation to fight impunity is a core component of upholding the international rule of law.[24]

**2.3.1 Recommendation:**

That the Committee consider the risks associated with revoking individuals' Australian citizenship, in terms of inconsistency arising with Australia's international law obligations to cooperate in prosecuting acts of terrorism and fighting impunity.

# Section 35A

## 3. Legal Threshold as to Ministerial Decisions under Section 35A

### 3.1 Threshold Required for Minister to Issue Notice of Cessation

The usage of 'satisfied' is a common threshold for administrative decisions. However, common usage does not suggest appropriateness, especially with regards to s 35A. This threshold will make it harder than it already is for interested parties to apply for judicial review. It is harder to prove the absence of a subjective satisfaction rather than the existence of an objective fact.[25] While an interested party can still challenge a decision on the grounds that the Minister did not form their satisfaction reasonably, on a correct understanding of the law,[26] the nebulous definition of 'allegiance' to Australia, as it stands, may make it difficult to demonstrate that the Minister failed in these things. In addition, the possibility that a person may be ignorant of their citizenship being revoked for at least 6 months,[27] may compromise the availability of evidence and witnesses that might bear on the Minister's state of mind. We therefore recommend that the threshold for 'satisfied' should be reviewed and changed to 'satisfied *on reasonable grounds*'. This would focus the Court's attention to the grounds of a decision and incentivise proper consideration and careful record-keeping by the Minister.

[24] International Law Commission, *The Obligation to Extradite or Prosecute (aut dedere aut judicare)* (Final Report of the International Law Commission, 2014).
[25] See Anne Twomey, 'A Tale of Two Cases: Wilkie v The Commonwealth and Re Canavan' (2018) 92 *Australian Law Journal* 17, 18.
[26] *Wilkie v The Commonwealth* (2017) 349 ALR 1, 26 [109].
[27] See *Australian Citizenship Act 2007* (Cth) s 35A(7). There may also be a denial of procedural fairness in s 35A(11), which precludes someone from learning the revocation sooner.

Secondly, a clearer test for determining whether a person is a dual citizen should be set. Such a test could include, inter alia, requiring consultation with relevant diplomatic personnel or citizenship lawyers. It would also require the Minister to be 'satisfied on reasonable grounds' that an offender is a dual citizen. People from all around the world have adopted the common bond of Australian citizenship. As has become manifestly evident in our Parliament, it is likely that many Australians are citizens of countries that they have never known or lived in,[28] and which may be less appreciative of human rights. In addition, foreign citizenship laws can be opaque and complex. It is possible that without clearer guidelines, mistaken assessments of dual citizenship could occur. This has the potential to leave individuals stateless. Such a status may have devastating legal and health implications on not only the person but also their next of kin.[29] It may also be inconsistent with Australia's international obligations.[30] A desire to remove serious criminals is understandable. However, using citizenship law to do so means Australia is effectively 'deporting' to a truly alien country or rendering stateless such a person. This does not add anything to public perception of who these persons are, beyond what can be gleaned from their crimes. It does, however, speak volumes to who we are.

### 3.1.1 Recommendations:

The following legal thresholds as to Ministerial decisions under Section 35A should be reviewed and amended as follows:

- That the Minister should be satisfied on reasonable grounds, as opposed to the current test of 'satisfied that the conduct of the person constitutes a repudiation of allegiance to Australia.'
- That clearer considerations should be set regarding what constitutes a repudiation of allegiance of Australia.
- That the Minister should be satisfied on reasonable grounds, as opposed to the current test of 'satisfied that it is not in the public interest for the person to remain an Australian Citizen'.
- That the Minister should be satisfied on reasonable grounds that the person is in fact a dual citizen.

[28] See *Re Canavan* [2017] HCA 45; *Re Gallagher* (2018) 355 ALR 1; *Re Lambie* (2018) 351 ALR 559.

[29] See United Nations High Commissioner for Refugees, *I am her, I belong: The urgent need to end childhood statelessness* (Full Report, 2015) 4; Andrew Riley et al., 'Daily stressors, trauma exposure and mental health among stateless Rohingya refugees in Bangladesh' (2017) 54(3) *Transcultural Psychiatry* 304; Joy Park et al., 'A Global Crisis Writ Large: The Effects of Being 'Stateless in Thailand' on Hill-Tribe Children' (2009) 10 *San Diego International Law Journal* 495.

[30] See Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Report, September 2015) 48.

# 4. Definitional and Sentence Length Concerns

## 4.1 Allegiance to Australia

Section 35A does not include a definition of 'allegiance to Australia', granting the Minister broad discretionary powers. Section 35A(e) includes a list of public interest factors that the Minister must consider. However, we believe this measure is inadequate in mitigating what is ultimately a subjective test of 'repudiation' that does not reflect the dire consequences to the affected individual, should s 35A be used. The Explanatory Memorandum from the 2015 Australian Citizenship Amendment Bill[31] specifies that the definition of 'allegiance' is that of Sir William Blackstone, cited in *Singh v Commonwealth*: 'the tie, or ligamen, which binds the subject to the king, in return for that protection which the king affords the subject'.[32] We recommend that the Act specifically clarify the definition of 'allegiance to Australia', and adopt the common law meaning of this term as expressed in the 2015 Australian Citizenship Amendment Bill.[33]

By adopting such a definition, the characterisation of 'allegiance to Australia' implies that committing an offence listed under s 35A(1) against an enemy of the state, or even in the name of defending Australia does not, on its own, satisfy the requirements for cessation of citizenship. The University of New South Wales Law Journal Student Series noted that committing an offence listed in s 35A(1) does not necessarily imply renunciation of allegiance. Here, an accused may argue that they acted in the perceived best interest of the nation, similar to the arguments put to the NSW Supreme Court in *R v Burgess*.[34]

### 4.1.1 Recommendation:

The Act should specifically clarify the definition of 'allegiance to Australia', and adopt the common law meaning of this term as expressed in the 2015 Australian Citizenship Amendment Bill.

## 4.2 Retrospectivity and Constitutionality Concerns

The potential for retrospective operation of s 35A is also concerning. The notion of retrospective operation of criminal law 'is generally considered to be inconsistent with the rule of law'.[35] As Lord Bingham said in his seminal speech on the rule of law, 'the law is and has long been clear: you cannot be punished for something which was not criminal when you did

[31] Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 2.
[32] *Singh v Commonwealth* [2004] 222 CLR 322, 427 [299].
[33] Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 2.
[34] *R v Burgess; R v Saunders* (2005) 152 A Crim R 100.
[35] *Magna Carta* cl 39.

it, and you cannot be punished more severely than you could have been punished at the time of the offence.'[36]

Secondly, retrospective operation of this section, within the scope of the Act (ten years), creates inconsistency in the law as the notion of 'repudiation of allegiance' did not exist over the entire period the Act covers. Consequently, an accused could not have knowingly repudiated their allegiance at the time of their offending. Further, were a court to hold that removal of citizenship constitutes punishment,[37] s 35A would operate as a form of double punishment and mean that the executive would be exercising an inherent judicial function, violating Chapter III of the Australian *Constitution*.[38]

### 4.3 Threat Posed by Removal of a Sentence Length Threshold

We understand that the Parliament may be considering in the near future an amendment to the Citizenship Bill that would remove the threshold for conviction of certain offences before a Minister can make a decision under s 35A.[39] This bill, proposed by the Attorney-General, lapsed before the prorogation of Parliament for the 2019 election. Given the result of the election, it is likely that the Committee may consider a similar amendment. Such a move, we submit, would be a mistake. The length of a sentence with respect to a crime is as much an indicator of someone's allegiance to Australia as the fact of conviction.[40] Removing the length of sentence as a key consideration would reduce the Minister's ability to make a lawful decision, and the courts' to review this decision. It would potentially bring a person convicted of a terrorism offence with only a nominal sentence or sentence on time served within the ambit of s 35A. Terrorism is prima facie a reprehensible act and those who commit such acts should stand condemned. However, before we deprive them of their citizenship, it is right that a Minister have regard to a dispassionate assessment made by our Courts as to the gravity of the conduct, as exemplified by a sentence.

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[36] Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 74; cited in Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Report, September 2015) 119.

[37] No such decision has yet been made, however courts have held that deportation does not constitute punishment see, eg, *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2. Given the importance of citizenship, and the wide array of privileges that attach to it, stripping citizenship may meet the definition of punishment.

[38] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 28.

[39] Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth). See also Commonwealth, *Parliamentary Debates*, House, 28 November 2018, 11762 (Christian Porter, Attorney-General)

[40] See *Roach v Electoral Commissioner* (2007) 233 CLR 162, 176-7 [12] (Gleeson CJ).

**4.3.1 Recommendation:**

That the Committee recommend that the threshold of a certain sentence length be kept.

## 5. Effect of Section 35A on Federal Sentencing Exercise

Section 35A also sets out the scheme by which offenders convicted of serious offences (usually terrorism related) and sentenced to over six years' imprisonment may have their citizenship revoked by the Immigration Minister. Any offender whose citizenship is revoked will also be refused a visa on character grounds due to the combined operation of ss 501(3A) and 501(7)(b) of the *Migration Act 1958* (Cth). Together, this means that these offenders will be liable to deportation from Australia at the conclusion of their sentence.

According to court records and publicly available information, s 35A has not yet been applied. In spite of this, a number of comments can be made about the potential implications of the provision's application. Notably, Australian state and territory courts have inconsistent approaches as to whether a federal offender's prospects of deportation may be considered at sentence. The application of s 35A, as it currently stands, could result in further inconsistencies amongst Australian jurisdictions. Relevant to this submission is the fact that the s 35A scheme operates *after* an offender has been sentenced.[41]

### 5.1 Inconsistency in Federal Sentencing Approaches to Offender's Prospects of Deportation

Australian state and territory courts have developed two broad approaches as to whether a federal offender's prospects of deportation should be considered at sentence. One approach recognises that an offender's prospects of deportation is not listed as a sentencing factor under s 16A(2) of the *Crimes Act 1914* (Cth) ('*Crimes Act'*) and accordingly is not taken into account by the courts;[42] rather, it is considered a matter for the executive branch.[43] Under the second approach, developed at common law, courts may take an offender's prospects of deportation into account as a mitigating factor if clear evidence establishes that deportation will in fact occur, and will result in hardship to the offender.[44]

[41] It appears on the reading of the section that the Minister has the discretion to revoke citizenship under this section *after* the offender's sentence has been completed.

[42] This approach is followed in New South Wales, Western Australia and the Northern Territory. See, eg, Commonwealth Sentencing Database, 'Deportation', *National Judicial College of Australia* (Web Page, 30 May 2019) <https://csd.njca.com.au/deportation2/>.

[43] But see *Crimes Act 1914* (Cth) s 19AK where deportation is mentioned in the context of setting a non-parole period.

[44] The approach has been followed in Victoria, Queensland, Tasmania and the ACT. The approach in South Australia is unsettled. See Commonwealth Sentencing Database, 'Deportation', *National Judicial College of Australia* (Web Page, 30 May 2019) <https://csd.njca.com.au/deportation2/>.

## 5.2 Implications of Inconsistent Approaches and Section 35A

There are two implications which may arise as a consequence of these inconsistencies and the application of s 35A. The first implication is that the provision, as it currently stands, may lead to reduced sentences for federal offenders in jurisdictions that take an offender's prospects of deportation into account. In particular, recent 2019 federal sentencing decisions from Victorian courts[45] appear to broaden the circumstances under which an offender's prospects of deportation — based on its likelihood — will act to reduce a sentence. In these decisions, the offender's prospects of deportation was considered to mitigate the sentence due to the *likelihood* of deportation.[46] This is a lower test than other jurisdictions, where an offender's prospects of deportation will only be taken into account where there is evidence the offender *will* be deported and the deportation *results* in hardship to the offender.[47] While no federal sentencing case has yet discussed the application of s 35A as it currently stands, the provision may potentially lead to inconsistent (and lower) sentences amongst Australian jurisdictions, most notably Victoria.

The second implication concerns the broad discretion given to the Minister as to *when* an offender's citizenship may be revoked. Under the provision, the Minister must revoke the offender's citizenship after they have been sentenced.[48] Accordingly, if the offender is in a jurisdiction which recognises their prospects of deportation as a mitigating factor, the offender may not have had the benefit of that factor taken into account by the sentencing judge. This may result in offenders appealing their sentence, on the grounds of the sentence being manifestly excessive. An additional cause for concern could arise where the Minister's decision is made *after* the offender's sentence is complete, meaning no appeal would be open to the offender, despite the fact that they may have been entitled to a lesser sentence.

[45] *Foley v The Queen* [2019] VSCA 99; *DPP (Cth) v Ooi* [2019] VCC 156.

[46] In these decisions, courts did not require substantiated evidence that the offender was going to be deported; rather, it appeared counsel's submissions alone were satisfactory.

[47] These Victorian cases concern deportation where the offender was a non-citizen and was sentenced to more than 12 months' imprisonment and as such their visas would be cancelled due to the operation of *Migration Act 1958* (Cth) s 501(3A). These same principles could apply were a Victorian court to sentence an offender with dual nationality who may be liable to be deported due to the combined operation of *Australian Citizenship Act 2007* (Cth) s 35A and *Migration Act 1958* (Cth) s 501(3A) at conclusion of their sentence.

[48] See *Australian Citizenship Act 2007* (Cth) s 35A(1)(b) where the offender must have already been sentenced.

**5.2.1 Recommendations:**

The Committee should consider the effect of this provision on federal sentencing, especially given recent developments and divergence of sentencing practices concerning a federal offender's prospects of deportation.

The Committee should consider implementing a time limitation to the discretion, requiring the decision to be made while the offender is serving their custodial sentence. This will allow offenders to appeal their sentences and would ensure that the executive branch does not unintentionally deny offenders potential benefits under the common law.

While resolving the broader inconsistency in sentencing issue may be beyond the scope of this inquiry, it could be resolved through an amendment to s 16A of the *Crimes Act*, stating when and how courts should consider an offender's prospects of deportation in sentencing.