THE LIMITATION CRITERION AND ITS APPLICATION TO THE *AUSTRALIAN CITIZENSHIP AMENDMENT (ALLEGIANCE TO AUSTRALIA) ACT 2015*

GEORGIA DRIELS[1]

ABSTRACT

Australia and the international community in general face a heightened and complex security environment, due to a rise in individuals funding, recruiting, and fighting for enemy terrorist organisations. [2] *In response, States have increasingly used denationalisation – the deprivation of citizenship without the consent of the person concerned – as a policy instrument for countering terrorism.*[3]

In June 2015, the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015[4] *(the Bill) was introduced into the House of Representatives.*[5] *After being passed by both Houses of the Parliament and assented to by the Governor-General, the* Australian Citizenship Amendment (Allegiance to Australia) Act 2015[6] *(the Act) was introduced. Arguably, one of the most contentious purposes of the Bill and subsequent amending Act, was the proposed amendment of the* Citizenship Act 2007[7] *to provide for the automatic cessation of Australian citizenship of dual nationals who, in repudiation of their allegiance to Australia, engaged in terrorist-related conduct.*[8]

---

[1] Juris Doctor with Honours (ANU), Bachelor degree of Social Work and Arts majoring in Psychology (UNSW). Any views or errors contained in this article are solely the author's and do not reflect the views of the author's employers. The author thanks Ryan Goss for their comments and contributions.

[2] Department of Immigration and Border Protection, Submission No 37 to Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 5 August 2015, 2.

[3] Dr. Marcel Szabó et al (eds), *Hungarian Yearbook of International Law and European Law* (Eleven International Publishing, 2014) 67.

[4] Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) ('*Australian Citizenship Amendment Bill')*.

[5] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) 1 ('*Advisory Report*').

[6] *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) ('*Australian Citizenship Amendment Act').*

[7] *Citizenship Act 2007* (Cth) ('*Citizenship Act*').

[8] *Australian Citizenship Amendment Bill,* ss 33AA, 35; *Australian Citizenship Amendment Act,* ss 33AA, 35; Parliamentary Joint Committee on Intelligence and Security (Cth), 'Committee Recommends Passage of Citizenship Bill' (Media Release, 4 September 2015) <file:///Users/u6514020/Downloads/media07.pdf>.

This article contends that the ad-hoc approach used to assess the Bill was unsuitable, and failed to reconcile the competing interests of national security with the protection of human rights.[9] *This article explores whether, and to what extent, the limitation criterion can be applied to provide a coherent and well-reasoned principle for assessing the appropriateness of an infringement of the right to nationality. The limitation criterion is a well-known methodological approach, a variant of proportionality, and is possibly the most discussed reasoning structure in public law.*[10] *As a subsidiary consequence the Act, as enacted in December 2015, is shown to be an arbitrary infringement of the right to citizenship, as it is not strictly justifiable per the application of the limitation criterion.*[11]

I INTRODUCTION

On 24 June 2015, the Minister for Immigration and Border Protection, the Hon. Peter Dutton MP, introduced the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015[12] (the Bill) into the House of Representatives.[13] After being passed by both Houses of the Parliament and assented to by the Governor-General, the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*[14] (the Act) was introduced, and came into force in December 2015. Arguably, one of the most contentious purposes of the Bill and subsequent amending Act, was the proposed

[9] Thomas Faist, '1 Introduction: The Shifting Boundaries of The Political' in Thomas Faist and Peter Kivisto (eds), *Dual Citizenship in Global Perspective: From Unitary to Multiple Citizenship* (Palgrave Macmillan, 2007); Christopher Michaelsen, 'Reforming Australia's National Security Laws: The Case for a Proportionality-Based Approach' (2010) 29(1) *The University of Tasmania Law Review* 31.

[10] The limitation criterion is a variant of proportionality that has been utilised by the European Court of Human Rights to deal with a substantial number of cases regarding interferences with a human right, elevating proportionality or the limitation criterion to a principle of interpretation of the *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September1953); Christopher Michaelsen, 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29(2) *UNSW Law Journal* 1; Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 *Journal of Comparative Policy Analysis* 43; Nicholas Emiliou, *The Principle of Proportionality in European Law; A comparative Study* (Kluwer Law International, 1996); Attorney-General's Department (Cth), *Permissible Limitations,* < https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>

[11] Michael Kirby, 'Australia's Growing Debt to the European Court of Human Rights' (2008) 34(2) *Monash University Law Review* 239, 241; Mark Villiger, 'The European Court of Human Rights' (2001) 91 *American Society of International Law Proceedings* 79, 80.

[12] *Australian Citizenship Amendment Bill.*

[13] *Advisory Report,* above n 5, 1.

[14] *Australian Citizenship Amendment Act.*

amendment of the *Citizenship Act*[15] to provide for the automatic cessation of Australian citizenship of dual nationals who, in repudiation of their allegiance to Australia, engaged in terrorist-related conduct.[16]

On the same day as the Bill was introduced, the Attorney-General, Senator the Hon. George Brandis QC, asked the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to inquire into, and report on, the Bill.[17] The Chair of the PJCIS, Mr Dan Tehan MP, announced the inquiry by media release on 26 June 2015, and invited submissions from interested members of the public.[18] Amongst other concerns, the PJCIS inquiry facilitated an examination of the Bill's constitutionality, lack of clarity as to the operation of the law, and potential human rights implications.[19]

Whilst the PJCIS recommendations and stakeholder submissions resulted in a vast and valuable source of understanding and interpretation of the Bill, a unified approach was not employed to assess the Bill's compliance with international human rights law. Instead, each analysis utilised a unique set of factors which the proponent believed to be indicative of the limits imposed by international law.

For example, in her submissions to the PJCIS Professor Kim Rubenstein, Director of the Centre for International and Public Law, expressed concern that the 'proper balance in the relationship between the executive and the individual' had been disturbed by the Bill.[20] Professor Gillian Triggs, former President of the Australian Human Rights Commission, took a somewhat different approach. She stated that it was inappropriate to use the penalty of loss of citizenship without proper judicial or administrative processes to ensure that the evidence upon which loss of citizenship was based was accurate and fair.[21] Sudrishti Reich and Linda Kirk took yet another approach to

[15] *Citizenship Act*.
[16] *Australian Citizenship Amendment Bill*, ss 33AA, 35; *Australian Citizenship Amendment Act*, ss 33AA, 35; Parliamentary Joint Committee on Intelligence and Security, 'Committee Recommends Passage of Citizenship Bill', above n 8.
[17] *Advisory Report*, above n 5, 2.
[18] Ibid 3.
[19] Department of Immigration and Border Protection (Cth), *Australian Citizenship: Your Right, You Responsibility*', Discussion Paper (2015); *Advisory Report*, above n 5, 2.
[20] Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 4 August 2015, 37 (Kim Rubenstein).
[21] Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 5 August 15, 15 (Gillian Triggs).

critiquing the Bill when they suggested that the deprivation of citizenship provisions in the Bill amounted to an arbitrary violation of international law, because they served the sole purpose of expelling former citizens from Australia.[22]

This lack of a unified approach is somewhat unsurprising given the number of human rights engaged by the Bill. On 11 August 2015, the Parliamentary Joint Committee on Human Rights (PJCHR), reported to both Houses of the Parliament on the Bill's compatibility with human rights.[23] The PJCHR identified that the Bill engaged with a long list of substantive human rights, no fewer than sixteen, including the right to freedom of movement, liberty, a fair hearing, obligations concerning non-refoulement, and the prohibition against double punishment.[24]

The lack of a unified approach to critiquing the Bill is also understandable when the confusion regarding the assessment of the appropriateness of acts of denationalisation on an international level is considered. For example Audrey Macklin, in her analysis of the international prohibition against arbitrary denationalisation, holds that acts of denationalisation should be assessed for arbitrariness against the following criteria: 'disproportionality, unreasonableness, denial of procedural fairness, lack of independent judicial engagement, discrimination and a desire to effectuate exile'.[25] Conversely, Jorunn Brandvoll holds that denationalisation should be assessed against only two factors: procedural and substantive standards.[26] The United Nations Human Rights Committee provides yet another set of factors against which acts of denationalisation should be assessed, holding that an act of denationalisation should not contain elements of 'inappropriateness, injustice, illegitimacy or lack of predictability'.[27] Despite their usefulness, these comments do not elucidate a clear and

[22] Sudrishti Reich and Linda Kirk, Submission No 40 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 21 July 2015, 28.
[23] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Bills Digest -Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, No. 15 of 2015–16, 2 September 2015.
[24] Ibid.
[25] Audrey Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' (2014-2015) 40 *Queens Law Journal* 1, 15.
[26] Jorunn Brandvoll, 'Chapter 8 - Deprivation of nationality' in Alice Edwards and Laura Van Wass (eds) *Nationality and Statelessness Under International Law* (Cambridge University Press 2014) 194, 215.
[27] Human Rights Committee, *Communication No. 560/199*, UN Doc CCPR/C/59/D/560/1993 (April 30, 1997) [9.8] (*A v Australia*).

unified set of criteria against which we can assess the appropriateness of acts of denationalisation. [28]

Exploring alternative analytical approaches, this article assesses the extent to which the limitation criterion can be applied to provide a coherent and well-reasoned principle for determining the appropriateness of infringements of the right to nationality. To this end this article first argues that the approach taken to assessing the Bill was unsuitable.[29] It then argues that although the limitation criterion is yet to be formally recognised in Australia, there is ample justification for applying the principle as a tool for assessing acts of denationalisation such as those provided for in the Act.[30] As a principle of law and good governance, the limitation criterion is shown to be an ideal basis for examination of the compatibility of acts of denationalisation with the internationally-recognised prohibition against arbitrary deprivation of nationality.[31]

Finally, as a somewhat subsidiary consequence, the Act is shown to be an arbitrary deprivation of citizenship. However, it is important to note from the outset that the primary purpose of this article is not to critique the Act nor propose how it should be reformed, but rather to offer a superior means by which to legally assess acts of denationalisation as a matter of international law.

II DEFINITIONAL DISTINCTION

Before entering into an in-depth analysis of the prohibition of arbitrary deprivation of citizenship, it is first necessary to define the notions of citizenship and nationality.[32]

Two approaches have been adopted to understanding these terms. The first approach holds that the terms citizenship and nationality are two distinct aspects of the same

[28] Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 5 August 15, 15 (Gillian Triggs).
[29] Parliamentary Joint Committee on Intelligence and Security, 'Committee Recommends Passage of Citizenship Bill', above n 8.
[30] *Australian Citizenship Amendment Act,* ss 33AA, 35.
[31] *Universal Declaration on Human Rights*, GA Res 217A (III), UN GOAR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR*').
[32] Tamás Molnár, 'The Prohibition of Arbitrary Deprivation of Nationality under International Law and EU Law: New Perspectives' in Dr. Marcel Szabó et al (eds), *Hungarian Yearbook of International Law and European Law* (Eleven International Publishing, 2014) 75.

notion.[33] Nationality has been described as giving rise on the part of the State to 'personal jurisdiction over the individual, and standing *vis-à-vis* other States under international law'.[34] Citizenship, on the other hand, is 'the highest of political rights/duties in municipal law'.[35]

An alternative view is that the terms citizenship and nationality are in fact deeply interwoven. Under this view, the label is less important than the ability to exercise rights of social membership and substantive equality.[36] In the authors' opinion, this is the preferred view. This is because distinguishing between citizenship and nationality is not always necessary or helpful.[37] Moreover, it is worthwhile to use the terms nationality and citizenship interchangeably, because it recognises both the municipal and international nature of the legal bond between a citizen and the State, and avoids the contradictions between inclusion and exclusion that occurs when an arbitrary distinction between the terms is adopted.[38] As Openheim notes, from the point of view of international law it is not incorrect to say that the "nationality of an individual is his quality of being a subject of a certain State and therefore its citizen".[39] Consequently, the use of the terms citizenship and nationality in this article should be interpreted widely, and as encapsulating both the domestic and international dimension of the relationship between the State, the individual, and international law.[40]

III THE LIMITATION CRITERION

[33] Paul Weis, Nationality and Statelessness in International Law (Springer, 2nd ed, 1979) 4-5; Alice Edwards, 'Chapter 1: the Meaning of Nationality in International Law in an Era of Human Rights' in Alice Edwards and Laura Van Wass (eds) *Nationality and Statelessness under international Law* (Cambridge University Press, 2014), 11; Rainer Bauböck et al, *Acquisition and Loss of Nationality, Volume 2: Policies and trends in 15 European Countries* (Amsterdam University Press, 2006).
[34] Alfred Boll, 'Nationality and Obligations of Loyalty in International and Municipal Law' (2005) 24 *Australian Yearbook of International Law* 37; Weis, above n 33.
[35] Edwards, above n 33, 4; Boll, above n 34, 39.
[36] Kim Rubenstein, 'Balancing Citizenship: The Legal Armory and its Limits' (2007) 8 *Theoretical Inquiry into the Law* 509, 512.
[37] Edwards, above n 33, 14.
[38] Stephen Castles and Alistair Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (Routledge New York, 2000).
[39] Lassa Oppenheim, *International law, a treatise* (London, Longmans, Green & Co, 1948) 5.
[40] Weis, above n 33, 3.

A *Prohibition of arbitrary deprivation of citizenship*

At its core, the right to nationality confers upon every individual the right to have a legal connection with a State.[41] The right to nationality has been described as the 'right to have rights' due to its conditional nature as a gateway for the realisation of other fundamental human rights.[42] By this I mean that nationality entitles individuals to the protection of a State and to many other ancillary civil and political rights.[43]

In recognition of the importance of nationality, variations of the right to acquire nationality have been enshrined in a number of international instruments including the *Universal Declaration of Human Rights* (UDHR); *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Rights of the Child*. [44]

As a corollary of the right to nationality, an explicit prohibition of arbitrary deprivation of nationality can be found in Article 15 of the UDHR which holds that 'no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'.[45] The UN Convention on the Reduction of Statelessness,[46] also includes a prohibition of arbitrary deprivation of nationality in the context of statelessness, in Article 8(1) which

---

[41] United Nations High Commissioner for Refugees, *Nationality and Statelessness: A Handbook for Parliamentarians* (Inter-Parliamentary Union, 2005).

[42] International Law Commission, *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States with Commentaries*, Supp No. 10, UN Doc A/54/10 (3 April 1999) ('*Draft Articles on Nationality*'); *Trop v Dulles*, 356 U.S. 86 (1958) 101-102; Alison Kesby, *The Right to Have Rights: Citizenship Humanity and International Law* (Oxford University Press, 2012).

[43] United Nations High Commissioner for Refugees, above n 41.

[44] *UDHR*, UN Doc A/810, Article 15; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2015) 12 ('*Guide to Human Rights)*; Weis, above n 33, 44; *Draft Articles on Nationality*, UN Doc A/54/10; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 33 (entered into force 2 September 1990) art 8 ('*Rights of the Child Treaty*'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5 ('*Racial Discrimination Treaty*'); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 9 ('*Discrimination Against Women Treaty*'); *Convention on the Nationality of Married Women*, opened for signature 29 January 1957, GA Res1040 (XI) (entered into force 11 August 1958) ('*Nationality of Married Women Treaty*'); *Convention on the Rights of Persons with Disabilities*, opened for signature 24 January 2007, A/Res/61/106, 61st sess, art 18 ('*Persons with Disabilities Treaty*'). The issue of nationality is also regulated in the *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961 989 UNTS 175 (entered into force 13 December 1975) ('*Reduction of Statelessness Treaty*'); *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) ('*Status of Stateless Persons Treaty*'); *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Status of Refugees Treaty*').

[45] *UDHR*, UN Doc A/810, Article 15(2.

[46] *Reduction of Statelessness Treaty*.

states that 'Contracting States shall not deprive a person of his nationality if such deprivation would render him stateless'.[47]

Further United Nations Conventions implicitly incorporate this fundamental norm, including the *Convention on the Elimination of All Forms of Racial Discrimination*,[48] the *Convention on the Elimination of All Forms of Discrimination against Women*,[49] and the *Convention on the Rights of the Child*.[50]

It is important to acknowledge from the outset that this article does not analyse the extension of the arbitrary deprivation of nationality to the context of dual-nationality. It is accepted that international authorities on the right to nationality may offer limited assistance in the absence of a further argument that nationality should be extended to dual-nationality. However, this discussion is beyond the scope of this article.

B *The Limitation Criterion*

International human rights law recognises that reasonable limits may be placed on most rights and freedoms.[51] In general, any measure that limits a human right must comply with the following criteria (the limitation criterion).[52] It must have a clear legal basis.[53] It must be in pursuit of a legitimate objective, be rationally connected to its stated objective and be proportionate to achieving that objective.[54]

The limitation criterion employs an aggregated approach requiring that each of its four components be met in order for an act of denationalisation to be compatible with international law.[55] If an act of denationalisation fails any of the components of the

[47] Molnár, above n 32.
[48] *Racial Discrimination Treaty*.
[49] *Discrimination Against Women Treaty*.
[50] *Rights of the Child Treaty*.
[51] *Guide to Human Rights*, above n 44, 12.
[52] Attorney-General's Department (Cth), above n 10.
[53] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Bills Digest -Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, No. 15 of 2015–16, 2 September 2015., Appendix 2, 2.
[54] *A v Secretary of State for the Home Department* [2004] UKHL 56 (*Belmarsh Case*); Ahron Barak, *Proportionality: Constitutional Rights and Their Limitation* (Cambridge University Press 2012) 131; Attorney-General's Department (Cth), above n 10.
[55] Barak, above n 54, 132.

limitation criterion it is an arbitrary deprivation of citizenship, and is thereby contrary to international law. [56]

C *The need for the limitation criterion*

Pushing the legal frontiers to safeguard Australia from terrorism by revoking the Australian citizenship of dual nationals is problematic for a number of reasons. First, it leads to disproportionate weight being given to security concerns over the protection of human rights.[57] As Christopher Michaelsen suggests, 'the balance routinely appears to tip towards security' regardless of the disproportionate impact on human rights and civil liberties.[58] The limitation criterion is needed to provide a uniform approach and clarification of the relative weight that should be attached to these competing interests.[59]

Second, international law requires Australian authorities to consider their compliance with human rights when introducing limitation measures. This obligation stems primarily from the *International Covenant on Civil and Political Rights* (ICCPR) [60] to which Australia became a signatory in 1980. However, the obligation to ensure that a State's measures to safeguard national security comply with international law obligations can be found in numerous international instruments, such as the UN Global Counter-Terrorism Strategy.[61] The limitation criterion arguably represents a superior means of legally assessing the permissibility of acts of denationalisation as a matter of international law.

Third, as a matter of good governance, it makes sense to apply the limitation criterion to acts of denationalisation. The limitation criterion has previously been adopted in regards to a number of other human rights infringements such as arbitrary detention

[56] Ibid.
[57] *Nationality Decrees Issued in Tunis and Morocco* (*Advisory Opinion)* [1923] PCIJ (ser B) No. 4; Edwards, above n 33, 23.
[58] Michaelsen, 'Reforming Australia's National Security Laws, above n 9, 36.
[59] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Bills Digest -Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, No. 15 of 2015–16, 2 September 2015, 33; *Human Rights and Arbitrary Deprivation of Nationality*: *Report of the Secretary-General*, UN GAOR, 25th sess, Agenda Item 2 and 3, UN Doc A/HRC/25/28 (19 December 2009) [49].
[60] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*Civil and Political Rights Treaty*').
[61] *United Nations Global Counter-Terrorism Strategy*, GA Res 60, UN GAOR, 60th sess, 99th mtg, Supp No 49, UN Doc A/RES/60/288 (8 September 2006) 3-9.

and limitations to freedom of speech, providing certainty to the weighting placed on national security objectives over Article 9 and Article 19 human rights, and vice versa.[62] However, despite its general acceptance, the limitation criterion has not been formally recognised in Australian law. It is nonetheless appropriate to review limitations to the right to nationality using the limitation criterion, if Australia wants to implement good governance practices.[63] In this context the limitation criterion can be utilised as an analytical and evaluative tool to ensure consistency of legal reasoning.

Finally, the limitation criterion is required because the current approach results in faulty decision making and fundamentally flawed public policy. A prominent feature of current political and academic discourse is the argument that the unprecedented threat to our way of life warrants restrictions of civil liberties and human rights.[64] Conversely, it may be argued that in times of crisis the State, more than ever, must adhere to its defining principles.[65] As Michaelson suggests there are a number of jurisprudential problems with the current approach such as a lack of adequate consideration of the philosophical and conceptual underpinnings of the notion of balancing citizenship and security.[66] The limitation criterion fortifies the spirit of the rule of law and enables it to overcome the tension between the freedoms of the individual and national security objectives.[67] It therefore results in an improved and more uniformed assessment of acts of denationalisation [68]

IV APPLICATION OF THE LIMITATION CRITERION

[62] *Civil and Political Rights Treaty*; Molnar, above n 32, 67; Yash Ghai, 'Expulsion and Expatriation in International Law: The Right to Leave to Stay and To Return' (1973) 67 *American Society of International Law Procedure* 122, 122.
[63] Kirby, above n 11, 241; Villiger, above n 11, 80.
[64] Michaelsen, 'Balancing Civil Liberties Against National Security?' above n 9, 1.
[65] Ibid.
[66] Michaelsen, 'Reforming Australia's National Security Laws, above n 9, 33.
[67] Sebastian de Brennan, 'The Internationalisation of Terrorism Winning the War while preserving democratic rights- a balance gone wrong' (2004) 11 *Australian Journal of International Law* 67, 68; Emanuel Gross, 'Trying Terrorists-Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights' (2003) 13 *International Comparative Law* 1, 2.
[68] De Brennan, above n 67, 67; Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australian and New Zealand* (Springer, 2010) 421.

A *Prescribed by law*

The requirement that any limitation of a human right must have a clear legal basis is widely recognised.[69] To meet this requirement a law must be shown to be adequately accessible and formulated with sufficient precision to enable a person to regulate their conduct, and foresee to a reasonable degree the consequences of their action.[70] The Bill, when initially introduced, seemingly failed to satisfy this requirement.[71] The PJCIS made a number of recommendations with respect to the proposed conduct-based provisions of the Bill.[72] In particular, the PJCIS report raised concerns regarding the conduct-based provisions contained in section 33AA and section 35 of the Bill.[73] The PJCIS included in its list of recommendations the need for clarification that conduct leading to loss of citizenship was intended to be considered in light of similar provisions in the *Criminal Code Act 1995.*[74] The PJCIS also suggested that greater clarification was needed to address the vague and overly broad scope of the term 'in the service of' a declared terrorist organisation contained in proposed section 35. Further, the PJCIS recommended that the Bill be amended to ensure that the provision of humanitarian assistance, and acts done unintentionally or under duress, were not captured in the scope of 'in the service of' a declared terrorist organisation.[75]

In response to the PJCIS report the Government made significant amendments to the conduct-based provisions reflected in sections 33AA and 35 of the Bill. For example, the Government responded to the PJCIS' concerns by clarifying that conduct leading to loss of citizenship is intended to be considered in light of the meaning of the

[69] Laura Van Wass, 'Chapter 23: Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds) *Foreign Fighters Under International Law and Beyond* (Springer 2016), 476; *Guide to Human Rights*, above n 44, 12.
[70] Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff Publishers, 1987), 24.
[71] Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth), 1.
[72] *Advisory Report*, above n 5, 63-109.
[73] Ibid 87-107.
[74] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Bills Digest -Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, No. 15 of 2015–16, 2 September 2015, Appendix 2, 2.
[75] Gross, above n 67, 56.

equivalent provisions in the *Criminal Code Act 1995*[76] and by providing greater clarity as to the scope of 'in the service of' a declared terrorist organisation.[77]

In light of these amendments it is reasonable to conclude that the Act is formulated with sufficient precision to meet the requirement that limitations on human rights be prescribed by law.[78]

B *Proper purpose*

Any limitation of a human right must also be in pursuit of a proper purpose.[79] A proper purpose is one that is necessary and addresses an area of public or social concern, that is pressing and substantial enough to warrant limiting the right.[80]

1. National security

A purported objective of both the Bill and Act is 'to broaden the powers relating to the cessation of Australian citizenship for those persons engaging in terrorism and who are a serious threat to Australia and Australia's interests'.[81]

The Department of Immigration and Border Protection, in support of the Act, provided the following overview of the threat posed by terrorist acts committed by Australian citizens:

> Since the terror level was raised last September, there have been two terrorist attacks. Twenty-three Australians have been charged as a result of eight counter-terrorism operations—almost one third of all terrorism-related arrests since 2001. Some 120 Australians are known to be fighting with terrorist organisations. Around 155 Australians are known to be supporting them with financing and recruitment. About 25–30 Australians have so far been killed in Syria and Iraq as a result of their involvement in the conflict.[82]

[76] *Criminal Code Act 1995* (Cth).
[77] *Advisory Report*, above n 5, xvi.
[78] Hannum, above n 70, 24.
[79] Ibid.
[80] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report No 127 (2015).
[81] *Advisory Report*, above n 5, 4-5.
[82] Department of Immigration and Border Protection (Cth), *Australian Citizenship: Your Right, You Responsibility*', Discussion Paper (2015) 2.

The jurisprudence of the international community reflects the belief that national authorities are most aptly placed to determine the existence of a threat to national security.[83]

State practice would support this trend of deferring to domestic authorities in regards to matters of national security. Many States have provided for deprivation of citizenship in response to acts seriously prejudicial to the vital interests of the State.[84] The United Kingdom and Canada have amended legislation to allow for the withdrawal of nationality from people who join a foreign army, or that render services to a foreign or enemy State.[85] State custom would therefore suggest that any infringement of the right to nationality, in pursuit of ensuring national security, satisfies the requirement of proper purpose.[86]

2. Allegiance

Another purported objective of the Act is to 'ensure the community of Australian citizens is limited to those who continue to retain an allegiance to Australia'.[87] The Act's justification for depriving citizenship is then to be found in the understanding of citizenship as a form of allegiance.[88]

Deprivation of citizenship in response to the broken bond of allegiance has often been used to explain a theory of constructive renunciation.[89] Under a theory of constructive renunciation, the foreign fighter is not deprived of nationality by the State, but rather

[83] Hannum, above n 70, 23; *Handyside v The United Kingdom* (European Court of Human Rights, Application No. 5493/72, 7 December 1976) 5; *Ireland v UK* (European Court of Human Rights, Application No. 5310/71, 18 January 1978) [78]-[79]*; Brannigan and McBride v United Kingdom* (European Court of Human Rights, Application Nos 14553/89 and 14554/89, 25 May 1993) 539, [41]; Christopher Michaelsen 'Chapter Seven: The Proportionality Principle in the Context of Anti-Terrorism Laws: An Inquiry into the Boundaries between Human Rights Law and Public Policy' in Miriam Gani and Penelope Methew (eds) *Fresh Perspective on the War on Terror* (ANU Press, 2008) 114.
[84] Van Wass, above n 69, 476; William Worster, 'International Law and the Expulsion of Individuals with More than One Nationality' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 423.
[85] Van Wass, above n 69, 472.
[86] *Human Rights and Arbitrary Deprivation of Nationality*: *Report of the Secretary-General,* UN GAOR, 25th sess, Agenda Item 2 and 3, UN Doc A/HRC/25/28 (19 December 2009) [7-8].
[87] *Advisory Report*, above n 5, 81, [5.75]; Bruce Baer Arnold, Submission No 6 to Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 5 August 2015, 3-4.
[88] Thomas Aleinikoff, 'Theories of Loss of Citizenship' (1986) 84(7) *Michigan Law Review* 1471, 1472.
[89] Ibid.

voluntarily renounces citizenship through their conduct. Section 33AA of the Act allows such constructive renunciation, holding that:

> Subject to this section, a person aged 14 or older who is a national or citizen of a country other than Australia renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in conduct specified in subsection (2).[90]

Conduct inconsistent with the duty of loyalty to the State, such as conduct seriously prejudicial to the vital interest of the State, has long been held to be a valid exception to the prohibition of arbitrary deprivation of citizenship.[91] This exception is related to the main duty that citizens have towards their State, namely the duty of loyalty. Thus, when the duty of loyalty is breached, it is well within the State's power to sever the formal link between itself and the citizen.[92] Consequently, the Act satisfies the requirement of in pursuit of a proper purpose.

3. Sole purpose of expulsion

It has been argued that where the purpose, or primary effect, of denationalisation is to prevent a former citizen from returning to his or her country, denationalisation would violate the common rights and freedoms recognised under international law.[93] This view finds some support in the accompanying comments of the International Law Commission to Article 8 of the *Draft Articles on the Expulsion of Aliens*[94] (Draft Article 8), 'a State shall not make its citizenship an alien, by deprivation of nationality, for the sole purpose of expelling him or her'.[95]

[90] *Australian Citizenship Amendment Act* s 33AA.
[91] Molnar, above n 32, 82; *Nationality Decrees Issued in Tunis and Morocco* (*Advisory Opinion)* [1923] PCIJ (ser B) No. 4, [69].
[92] Molnar, above n 32, 82.
[93] Hannum, above n 70, 62; *Civil and Political Rights Treaty.*
[94] Maurice Kamto, Special Rapporteur, *International Law Commission, Expulsion of Aliens: Texts and Titles of the Draft Articles Adopted by the Drafting Committee on Second Reading*, UN Doc A/CN.4/L.832 (20 May 2014) art 8.
[95] *Report of the International Law Commission: Expulsion of Aliens*, UN GAOR, 64th sess, Supp No 10, UN Doc A/67/10 (7 May - 1 June and 2 July – 3 August 2012) 9, 32–33; Van Wass, above n 69, 478; Macklin, above n 25, 12.

A number of prominent academics have argued that the Act violates Draft Article 8, as the primary effect of the act of denationalisation is to prevent the 'newly minted alien' from entering Australia or to allow for their expulsion.[96]

However, it is beyond the scope of this article to address the question of whether or not the requirement of proper purpose includes purposes which are not expressly stated, but which are directly served by an act of denationalisation. Furthermore, such considerations are unnecessary. Utilising the limitation criterion allows for an assessment of the Act's compatibility with international law without needing to extend the natural interpretation of the requirement of proper purpose, thereby avoiding legal uncertainty caused by ad-hoc interpretive practices.

C *Rational connection*

A limitation of the right to nationality must also be rationally connected to the pursuit of a proper purpose.[97] The existence of a rational link will normally be accepted if the measure is logically capable of furthering the objective.[98]

The test of suitability is usually very broadly defined and requires only that the Government introduce legislative measures that are generally suitable to achieve the intended purpose. As Michaelson suggests the requirement may rightly be conceived as 'no completely unsuitable measures may be undertaken'. [99] The Deputy Commissioner of National Security of the Australian Federal Police and the Deputy Director-General of the Australian Security Intelligence Organisation have noted that the Act is rationally connected to Australia's ability to keep problems offshore and thereby minimise the direct threat to the Australian community posed by terrorists.[100]

---

[96] Molnar, above n 32, 84-85; Guy S. Goodwin-Gill, 'Mr Al-Jedda, Deprivation of Citizenship, and International Law (Paper delivered at a Seminar at Middlesex University, 14 February 2014); Macklin, above n 25, 11.
[97] *Guide to Human Rights*, above n 44, 12.
[98] Barak, above n 54, 131.
[99] Michaelsen, 'Reforming Australia's National Security Laws, above n 9, 41.
[100] Australian Capital Territory, *Parliamentary Inquiry Into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, House of Representatives, 5 August 2015, 7 (Deputy Director-General, Counter-Terrorism, Australian Security Intelligence Organisation); Australian Capital Territory, *Parliamentary Inquiry Into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, House of Representatives, 10 August 2015, 7 (Michael Phelan, Deputy Commissioner National Security, Australian Federal Police).

Furthermore, if allegiance is understood as attachment to the core principles of a community then denationalising those who hold contrary values to those of a peaceful and democratic community may be necessary to ensure that the Australian community is limited to those who retain an allegiance to Australia.[101]

However, there are those that suggest that the act of denationalisation is not suitable to protecting Australian interests.[102] In exile, terrorists may pose a greater threat to Australia.[103] Further, the potential threat posed by terrorists may be increased, if they are residing in countries incapable of proper monitoring.[104] Exiling terrorists is arguably more likely to promote unrest and terrorism than contain it.[105] It is not enough to put forward a legitimate objective if the measure limiting the right would not make a real difference to achieving that objective.[106]

Given the low threshold requirement of 'rational connection' it is reasonable to conclude that the Act satisfies the requirement of a rational connection; and that the act of denationalisation is logically capable of safeguarding the security and vital interests of the State.

D *Proportionality*

Proportionality plays a key role in the international human rights system including the European Convention for the Protection of Human Rights and Fundamental Freedoms[107] and the ICCPR, with a number of articles in these instruments expressly invoking proportionality.

In considering whether a limitation of the right to nationality is proportionate, one must consider: a) whether the measure is the least restrictive of human rights among all the

[101] Van Wass, above n 69, 478.
[102] Ruvi Ziegler, 'Disowning citizens' in Audrey Macklin and Rainer Bauböck (eds) *The return of banishment: do the new denationalisation policies weaken citizenship*? (EUI Working Paper, RSCAS, 2015) 43–44; Michaelsen, 'Reforming Australia's National Security Laws, above n 9, 36.
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] *Guide to Human Rights*, above n 44, 12.
[107] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 April 1950, 213 UNTS 195 (entered into force 4 January 1969).

adequate options that could be applied; b) whether there are effective safeguards or controls over the measures; and c) proportional stricto sensu.[108]

Fundamentally, what many of the critics of the Act have in common is a concern that extreme laws dismantle Australia's criminal justice system in the name of combatting terrorism. It is argued that greater clarification is needed of the concept of terrorism in order to justify the erosion of fundamental human rights.[109]

1. Least restrictive means test

The requirement of the least-restrictive means test requires the assurance that the measure does not curtail individual rights any more than is necessary to achieve the stated policy goals.[110] Thus the Government must refrain from interfering with the right to nationality if it can accomplish the same policy objective through a less drastic measure.[111] Laura Van Wass suggests 'it must be noted that threats to national security by foreign fighters have been met with an array of policy responses of which the powers of deprivation of nationality is just one'.[112] Alternative measures, which provide a less intrusive means of countering terrorism, include imposing travel bans as well as criminal law penalties.[113] Likewise, Sudrishti Reich and Linda Kirk have suggested that:

> the protection of the Australian community from persons who engage in behaviour or activities contrary to the anti-terrorism laws of Australia, can be achieved by them being charged with relevant crimes, tried and convicted by a court of law of these crimes, and sentenced accordingly. As there are existing criminal laws to deal with the behaviour that will lead to renunciation/cessation of citizenship under the amendments and which will result in the incarceration of persons found guilty of relevant offences, thereby protecting the

[108] Nicholas Emiliou, above n 10, 6; Attorney-General's Department (Cth), above n 10.
[109] Hannum, above n 70, 8; United Nations Children's Fund, Submission No 24 to Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, July 2015; George Williams, Andrew Lynch Gilbert and Tobin Centre of Public Law, Submission No 25 to Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, July 2015, 2 (disagree).
[110] Michaelsen, 'Balancing Civil Liberties Against National Security?' above n 9, 4.
[111] Ibid.
[112] Van Wass, above n 69, 478-479.
[113] Christian Joppke 'Terrorists repudiate their own citizenship' in Audrey Macklin and Rainer Bauböck (eds) *The Return of Banishment Do the New Denationalisation Policies Weaken Citizenship?* (Working Paper, Robert Schuman Centre for Advanced Studies, 2015) 11, 13.

> Australian community, it cannot be said that the amendments are proportionate to their stated purpose.[114]

2. Safeguards

Another consideration incorporated within the requirement of proportionality is whether the act of denationalisation has met other safeguards enshrined in international human rights law.[115] Procedural safeguards are essential to prevent abuse and arbitrariness in the application of the law. A number of procedural standards and safeguards are protected under international law.[116] One such safeguard is the right to review.[117]

The right to review as contained in Article 2(3) of the ICCPR and many other treaties provides an opportunity for overturning disproportionate or unreasonable denationalisation decisions and stands as a cornerstone of procedural guarantees.[118]

The Act represents a significant improvement from the initial Bill, which failed to elucidate how an application for declaratory relief regarding the automatic loss of citizenship would operate in practice.[119] However, despite its improvements the Act does not provide sufficient procedural safeguards to ensure that a person who wrongfully lose their citizenship is able to seek effective review and redress. A dual national who loses their Australian citizenship may face significant practical hurdles in seeking access to courts. Anyone who had been deprived of their Australian citizenship in such circumstances would be unlikely to be able to remain in Australia, as denationalisation results in the simultaneous loss of the right of abode in the Australia and so paves the way for possible immigration detention, deportation or exclusion from Australia. The Act does not take into consideration the practical effect of the cessation of citizenship on the right to an effective remedy.

---

[114] Reich and Kirk, above n 22, 11.
[115] *Human Rights and Arbitrary Deprivation of Nationality*: *Report of the Secretary-General*, UN GAOR, 25th sess, Agenda Item 2 and 3, UN Doc A/HRC/25/28 (19 December 2009) [21]; Molnar, above n 32, 77.
[116] Edwards, above n 33, 23; Macklin**,** above n 25, 1.
[117] United Nations Human Rights Committee, *Consideration of reports submitted by State Parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (7 May 2009), art 2(3); Molnar, above n 32, 78.
[118] Molnar, above n 32, 78.
[119] *Australian Citizenship Amendment Act; Australian Citizenship Amendment Bill.*

Furthermore, while allowing review of a determination in the High Court or the Federal Court of Australia the Act does not provide for merits review.[120] In its report the PJCHR noted that the availability of judicial review of these decisions 'represents a considerably limited form of review in that it allows a court to consider only whether the decision was lawful ... [t]he court cannot undertake a full review of the facts, that is the merits of a particular case to determine whether the case was decided correctly'.[121]

The assessment of the cessation of citizenship powers against Article 2 of the ICCPR raises questions as to whether a person who has lost their citizenship will have access to an effective remedy. It is this article's assessment that the limitation fails the proportionality assessment and amounts to an arbitrary interference with the right to nationality.[122]

3. The greater the interference the less likely it is to be considered proportionate

By far the most complex step of the proportionality test requires an analysis of the appropriateness of the legislative action.[123] It is not sufficient that a State decide that a particular restriction may be desirable or politically expedient.[124] Rather, the legislative action must be shown to create an acceptable burden.[125]

Citizenship has been widely treated as embodying the 'highest normative value'.[126] Theorists such as Linda Boseneik argue that citizenship is: a legal status, basic human right, political activity and a form of collective identity.[127] Hannah Arendt also suggests that citizenship is the 'right to have rights'.[128] By this she means that whilst citizenship in-and-of-itself is a human right, it is also an essential basis or threshold requirement for the subsequent conferral of ancillary rights.[129] Denationalisation, therefore, has

[120] Barak, above n 54, 131.
[121] *Guide to Human Rights*, above n 44, 12 [2.91].
[122] Ibid.
[123] Michaelsen, 'Reforming Australia's National Security Laws, above n 9, 42.
[124] Hannum, above n 70, 27.
[125] *Guide to Human Rights*, above n 44, 12.
[126] Linda Bosniak, 'Citizenship Denationalized' (2000) 7(2) *Indian Journal of Global Legal Studies* 447, 451.
[127] Ibid 453.
[128] Hannah Arendt, *The Origins of Totalitarianism* (New York, Harcourt Books, 1994).
[129] Kesby, above n 42, 1; Kim Rubenstein, 'Advancing Citizenship: The Legal Armory and Its Limits' (2007) 8 *Theoretical Inquiries Law* 509, 513.

profound consequences.[130] Denationalisation places the individual concerned in a legal vacuum regarding the enjoyment of their fundamental rights and freedoms.[131]

The greater the extent of any interference with human rights, the less likely it is to be considered proportionate.[132] The Act has a two-fold effect. First, it diminishes the mutual rights and duties between an individual and the State. Second, it severs the critical bond between the State, an individual, and international law. In light of this it is clear that the Act has dramatic consequences for the realisation and protection of human rights. It constitutes a disproportionate interference of the right to nationality.

V CONCLUSION

Australia's national security is threatened by the rise of terrorism.[133] In response to this threat Australia amended the *Citizenship Act* to allow for the denationalisation of Australians who engaged in terrorism and who are a serious threat to Australia and Australia's interests.[134]

Matters of national security naturally enliven debate regarding the protection of human rights and the circumstances which warrant limiting such rights.[135] This is in part because such situations engage the continual struggle between State sovereignty and the role of international law in protecting human rights. The use of denationalisation as a policy response to foreign-fighters and threats of violence and terror reflects a contentious area of debate in which the sovereign right of States, and the rights of individuals protected under international law are combatively engaged.

Traditionally, issues of citizenship conferral and loss have been held to be the exclusive domain of national authorities. However, developments in international law have proscribed limits to the extent to which municipal law may limit the right to nationality.

---

[130] Weis, above n 33, 669; Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002).
[131] Molnar, above n 32, 67; Van Wass, above n 69, 485.
[132] *Guide to Human Rights*, above n 44, 12.
[133] Department of Immigration and Border Protection (Cth), *Australian Citizenship: Your Right, You Responsibility*', Discussion Paper (2015) 2.
[134] Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth).
[135] Van Wass, above n 69, 485.

The prohibition of the arbitrary deprivation of citizenship constitutes such a limitation, and represents the balance to be struck between State sovereignty and international law.

It is not surprising, given the evolving nature of international legal norms, that there exists considerable confusion regarding the prohibition of arbitrary deprivation of citizenship. This confusion has had dramatic consequences with regard to the protection of human rights. The indiscriminate approach to assessing the Bill's compliance with international law was unsuitable and led to dangerous confusion and legal uncertainty.[136] For one thing, the ad-hoc approach taken to assessing the Bill failed to prevent the acceptance of the Act and the expansion of state powers to allow for acts of denationalisation.[137]

This article has applied the well-established principle, the limitation criterion, to the Act, and has argued that the limitation criterion provides a coherent and well-reasoned principle for assessing the appropriateness of acts of denationalisation against the prohibition of the arbitrary deprivation of citizenship.[138] More significantly, this article suggests that the limitation criterion provides a uniform approach to balancing State sovereignty with the role of international law in protecting human rights.[139] It is also capable of providing legal certainty and adequate protection of the right to nationality.[140] The Act fails to satisfy two components of the limitation criterion; the requirement that a limitation of the right to nationality be prescribed by law, and that the limitation be proportionate to the objective sought. As a result, this article has shown the Act to be an arbitrary deprivation of citizenship, contrary to international law.

The limitation criterion should form the basis for reform of Australia's national security legislation and examination in particular of Australia's citizenship law.

[136] Weis, above n 33, 3.
[137] Van Wass, above n 69, 485.
[138] *UDHR*, UN Doc A/810, Article 15(2).
[139] Michaelsen, 'Balancing Civil Liberties Against National Security?' above n 9, 1; Golder and Williams, above n 9, 46; Attorney-General's Department (Cth), above n 10.
[140] Michaelsen, 'Reforming Australia's National Security Laws, above n 9, 34.