
The Parliament of the Commonwealth of Australia

Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Parliamentary Joint Committee on Intelligence and Security

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Canberra

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Membership of the Committee

Chair Mr Dan Tehan MP

Deputy Chair Hon Anthony Byrne MP

Members

Hon Mark Dreyfus QC, MP	Senator David Bushby
Mr Andrew Nikolic AM, CSC, MP	Senator the Hon Stephen Conroy
Hon Philip Ruddock MP	Senator David Fawcett
Hon Bruce Scott MP	Senator Katy Gallagher
	Senator the Hon Penny Wong



Terms of reference

On 24 June 2015, the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 was referred to the Committee by the Attorney-General.

The Attorney-General asked the Committee to also consider whether proposed section 35A of the Bill (the conviction-based cessation) should apply retrospectively to convictions prior to the commencement of the Act.



List of abbreviations

AAT	Administrative Appeals Tribunal
AFP	Australian Federal Police
ANU	Australian National University
ASIO	Australian Security Intelligence Organisation
ASIO Act	<i>Australian Security Intelligence Organisation Act 1979</i>
Citizenship Act	<i>Australian Citizenship Act 2007</i>
CRC	<i>Convention on the Rights of the Child</i>
Criminal Code	<i>Criminal Code Act 1995</i>
FECCA	Federation of Ethnic Communities' Councils of Australia
ICCPR	International Covenant on Civil and Political Rights
IS Act	<i>Intelligence Services Act 2001</i>
Migration Act	<i>Migration Act 1958</i>
Optional Protocol	<i>Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict</i>
PJCHR	Parliamentary Joint Committee on Human Rights
UNICEF	United Nations Children's Fund



List of recommendations

5 Conduct-based provisions – proposed sections 33AA and 35

Recommendation 1

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to limit the operation of proposed section 33AA to individuals who have:

- engaged in relevant conduct offshore; or
- engaged in relevant conduct onshore and left Australia before being charged and brought to trial in respect of that conduct.

Recommendation 2

The Committee recommends that changes be made to clarify that the conduct leading to loss of citizenship listed in proposed section 33AA of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 is intended to be considered in light of the meaning of the equivalent provisions in the *Criminal Code Act 1995*, and is not intended to be restricted to the physical elements.

The Committee recommends that, if possible, these amendments be made in the Bill, with additional amendments to the Explanatory Memorandum where necessary.

Recommendation 3

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to include explicit criteria that the Minister must be satisfied of before declaring a terrorist organisation for the purpose of proposed section 35. The criteria should make clear the connection between proposed section 35 and the purpose of the Bill.

Recommendation 4

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to make the Minister's declaration of a 'declared terrorist organisation' for the purpose of proposed section 35 a disallowable instrument.

Further, the Committee recommends that the Bill be amended to enable the Parliamentary Joint Committee of Intelligence and Security to conduct a review of each declaration and report to the Parliament within the 15 sitting day disallowance period.

Recommendation 5

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and the Explanatory Memorandum be amended to clarify the intended scope of the term 'in the service of' a declared terrorist organisation.

In particular, the Bill should be amended to make explicit that the provision of neutral and independent humanitarian assistance, and acts done unintentionally or under duress, are not considered to be 'in the service of' a declared terrorist organisation for the purposes of proposed section 35.

Recommendation 6

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and the Explanatory Memorandum be amended to provide that staff members or agents of Australian law enforcement or intelligence agencies are exempted from sections 33AA and 35 of the Bill when carrying out actions as part of the proper and legitimate performance of their duties.

6 Conviction-based provisions – proposed section 35A

Recommendation 7

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to give the Minister discretion to revoke a person's citizenship following conviction for a relevant offence with a sentence applied of at least six years imprisonment, or multiple sentences totalling at least six years' imprisonment.

In exercising this discretion, the Minister should be satisfied that:

- the person's conviction demonstrates that they have repudiated their allegiance to Australia, and
- it is not in the public interest for the person to remain an Australian citizen, taking into account the following factors:
 - ⇒ the seriousness of the conduct that was the basis of the conviction and the severity of the sentence/s,
 - ⇒ the degree of threat to the Australian community,
 - ⇒ the age of the person and, for a person under 18, the best interests of the child as a primary consideration,
 - ⇒ whether the affected person would be able to access citizenship rights in their other country of citizenship or nationality, and the extent of their connection to that country,
 - ⇒ Australia international obligations and relations, and
 - ⇒ any other factors in the public interest.

The rules of natural justice should apply to the Minister's discretion under section 35A.

Recommendation 8

The Committee recommends that the list of relevant offences in proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to remove reference to section 29 of the *Crimes Act 1914*.

Recommendation 9

The Committee recommends that the list of relevant offences in proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to exclude offences that carry a maximum penalty of less than 10 years' imprisonment and certain *Crimes Act* offences that have never been used.

The Committee notes that the following offences would be removed:

- Section 80.2, *Criminal Code Act 1995*, Urging violence against the Constitution, the Government, a lawful authority of the Government, an election, or a referendum,
- Section 80.2A(1) *Criminal Code Act 1995*, Urging violence against groups,

- Section 80.2B(1) *Criminal Code Act 1995*, Urging violence against members of groups,
- Section 80.2C, *Criminal Code Act 1995*, Advocating terrorism,
- Section 25 *Crimes Act 1914*, Inciting mutiny against the Queen's Forces,
- Section 26 *Crimes Act 1914*, Assisting prisoners of war to escape, and
- Section 27(1) *Crimes Act 1914*, Unlawful drilling.

Recommendation 10

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be applied retrospectively to convictions for relevant offences where sentences of ten years or more have been handed down by a court.

The Ministerial discretion to revoke citizenship must not apply to convictions that have been handed down more than ten years before the Bill receives Royal Assent.

7 Administrative application of the Bill

Recommendation 11

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended such that section 39 of the *Australian Security Intelligence Organisation Act 1979* is not exempted, and consequently a security assessment would be required before the Minister can take prescribed administrative action.

Recommendation 12

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to provide that, if citizenship is lost (under proposed sections 33AA or 35) or revoked (under proposed section 35A), then the Minister must provide, or make reasonable attempts to provide, the affected person with written notice that citizenship has been lost or revoked.

Such notice should be given as soon as possible, except in cases where notification would compromise ongoing operations or otherwise compromise national security.

If the Minister has determined not to notify the affected person, this decision should be reviewed within six months and every six months thereafter.

Recommendation 13

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to provide that, where the Minister issues a notice to the affected person advising that their citizenship has been lost or revoked, the notice must include:

- the reasons for the loss of citizenship, and
- an explanation of the person's review rights.

Recommendation 14

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to include the rights of review available to a person who has lost their citizenship pursuant to proposed sections 33AA, 35 or 35A.

Recommendation 15

The Committee recommends that proposed sections 33AA(7) and 35(6) of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to require the Minister,

- to give consideration to exercising the discretion to exempt a person from the effects of the relevant provisions upon signing the relevant notice, and
- when considering whether to exercise the discretion to exempt, to take into account the following factors:
 - ⇒ the severity of the conduct that was the basis for the notice to be issued,
 - ⇒ the degree of the threat posed by the person to the Australian community,
 - ⇒ the age of the person, and for persons under 18 years of age, the best interests of the child as a primary consideration,
 - ⇒ whether a prosecution is underway, or whether the person is likely to face prosecution for the relevant conduct,
 - ⇒ whether the affected person would be able to access the citizenship rights in their other country of citizenship or nationality, and the extent of their connection to that country,

- ⇒ Australia's international obligations and relations, and
- ⇒ any other factors in the public interest.

Recommendation 16

The Committee recommends that proposed sections 33AA and 35 of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to clarify that citizenship is taken never to have been lost if the facts said to ground a finding of fact concerning loss of citizenship are subsequently found to have been incorrect.

Recommendation 17

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to give the Minister power to annul a revocation decision if the relevant conviction is later overturned on appeal or quashed, such that the person's citizenship is taken never to have been lost.

Recommendation 18

The Committee recommends that the Explanatory Memorandum to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to clarify that:

- the giving of notice under proposed sections 33AA and 35 is intended to constitute official recognition that a person's citizenship has ceased by operation of one of the provisions, and
- any consequential action by Government agencies will only take place after the notice has been issued pursuant to the Bill's provisions.

Recommendation 19

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to clarify that if the Minister exempts a person from the effect of proposed sections 33AA or 35, the person is taken never to have lost their citizenship.

8 Children

Recommendation 20

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to limit the extent of its application to children. The amendments should provide:

- that no part of the Bill applies to conduct by a child aged less than 10 years, and

- that proposed sections 33AA and 35 do not apply to conduct by a child aged under 14 years.

The amendments should make the Bill's application to children explicit on the face of the legislation.

The Committee notes that in relation to proposed section 35A, section 7.2 of the *Criminal Code Act 1995* or section 4N of the *Crimes Act 1914* will apply to a child aged 10 to 14 years.

Recommendation 21

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended so that section 36 of the *Australian Citizenship Act 2007* (which enables the Minister to revoke a child's citizenship following revocation of a parent's citizenship) does not apply to proposed sections 33AA, 35 and 35A.

9 Concluding comments

Recommendation 22

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to require the Government to publicly report, every six months, the number of times a notice for loss or revocation of citizenship has been issued under each of the grounds contained in Bill, and provide a brief statement of reasons.

Recommendation 23

The Committee recommends that *Intelligence Services Act 2001* (IS Act) be amended to extend the functions of the Parliamentary Joint Committee on Intelligence and Security to include monitoring and reviewing the performance by the Department of Immigration and Border Protection of its functions under the provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015. The extended functions should be consistent with the Committee's current remit under the IS Act.

The IS Act should also be amended to enable relevant agency heads to brief the Committee for the purpose of this new function.

Recommendation 24

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to require the Minister to advise the Parliamentary Joint Committee on Intelligence and Security upon issuing a notice for the loss of citizenship under the Bill. A

subsequent briefing should be offered to the Committee within 20 sitting days of the initial notice being issued. The advice given to the Committee should detail whether notice has been provided to the person, the conduct that engaged the Bill's provisions and whether an exemption has been given by the Minister.

Recommendation 25

The Committee recommends that the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor to finalise a review of the revocation of citizenship provisions in the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 by 1 December 2018.

Recommendation 26

The Committee recommends that the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to complete a review of the revocation of citizenship provisions in the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 by 1 December 2019.

Recommendation 27

The Committee recommends that, following implementation of the recommendations in this report, the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be passed.