



Australian Government
Department of Home Affairs

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Submission to the review of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

Parliamentary Joint Committee on Intelligence and Security

Department of Home Affairs

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Introduction

The Department of Home Affairs (the Department) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) review of the Australia Citizenship Amendment (Citizenship Cessation) Bill 2019 (the Bill). This submission sets out the policy rationale for the Bill, and outlines its intended operation.

The Department consulted the following departments and agencies on the proposed amendments contained in the Bill: the Department of the Prime Minister and Cabinet, the Department of Foreign Affairs and Trade (DFAT), the Attorney-General's Department (AGD), the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP). Consultation also occurred with the Department of Defence, the Australian Secret Intelligence Service and the Australian Border Force through relevant senior departmental committees and boards. The Department consulted with DFAT, AGD, ASIO and the AFP on this submission.

The Department has taken appropriate steps to ensure the legal soundness of the Bill, including obtaining advice from the Solicitor-General on the amendments made by the Bill.

Legislative framework

The *Australian Citizenship Act 2007* (the Citizenship Act) provides the legislative framework that governs Australian citizenship, including in what circumstances it is acquired, but also, how it ceases. The Citizenship Act recognises the duty of allegiance to Australia owed by its citizens and, makes provision for a person to lose their citizenship through, amongst other things, renunciation by application or by conduct: in the latter case where the person acts inconsistently with their allegiance to Australia by engaging in specified conduct.

In 2015, through the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (the Allegiance Act), the current terrorism-related citizenship cessation provisions (sections 33AA, 35 and 35A) were included in the Citizenship Act in light of the threat that foreign terrorist fighters presented to Australia and its interests. Prior to passage, the Allegiance Bill was referred to the PJCIS for inquiry, which recommended passage subject to the implementation of 27 recommendations. The Government subsequently moved amendments implementing the recommendations. The Allegiance Act passed the Parliament on 3 December 2015, and commenced on 12 December 2015.

Context for the Bill

Under current sections 33AA and 35 of the Citizenship Act, citizenship ceases automatically, at the point in time the individual engages in the specified terrorist-related conduct. In previous interactions with the Committee and the Independent National Security Legislation Monitor (INSLM), the Department has made comments about the automatic nature of citizenship cessation under the 'operation of law' model. These comments have related to the level of certainty as to whether and when a person's citizenship has ceased, and the impact this may have on the availability of other measures to manage the threat a person may pose to the Australian community. The automatic nature of the current provisions can also have a bearing on Australia's ability to manage its broader bilateral relationships and equities.

Australia's national security and counter-terrorism legislation is kept under constant review to ensure that Australia's law enforcement and intelligence agencies have the powers they need to prevent terrorist attacks and manage those who would commit them. To that end, the Department has been contemplating amendments to the current provisions for some time. The amendments contained in the Bill address administrative issues associated with the operation of law model by moving to a decision-making model. Under this proposed model, the Minister may determine that a person ceases to be an Australian citizen if the Minister is satisfied that the person has engaged in specified conduct and that it would be contrary to the public interest for the person to remain an Australian citizen, having regard to a number of specified factors.

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The amendments have been developed following careful consideration, advice and consultation with relevant departments and agencies.

The development of the amendments has also had regard to the recommendations made in the recent report by the INSLM on ss33AA, 35, 35A and 35AA of the Citizenship Act. The INSLM has articulated a number of the challenges associated with the current operation of law provisions, citing the 'uncontrolled and uncertain' operation of the provisions. The Bill gives effect to a majority of the recommendations, in full or in part, made by the INSLM. This includes the key recommendation to repeal current sections 33AA and 35 and replace them with a Ministerial decision-making model.

Replacing the operation of law model with a Ministerial decision-making model

The INSLM's key recommendation, at 1.31(d) of the review, is that the current operation of law model, whereby a dual-national's Australian citizenship is automatically ceased through their engagement in certain conduct, be replaced by a Ministerial decision-making model, under which the Minister may take into account a broader range of considerations in determining whether to cease an individual's citizenship. This is the central reform of the Bill. The Bill also builds on, adapts and refines the citizenship cessation provisions, further establishing citizenship cessation as one of a suite of measures that can be applied to Australians of counter-terrorism interest, as appropriate.

The overarching purpose of this Bill remains the same as when the terrorism-related provisions were introduced in 2015. That is, the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations and that citizens may, through certain conduct incompatible with the shared values of the Australian community, sever that bond and repudiate their allegiance to Australia.

Overview of amendments

The Bill amends Division 3 of Part 2 of the Citizenship Act to provide that, the Minister may determine that a person whom the Minister is satisfied is a national or citizen of a country other than Australia ceases to be an Australian citizen if the person acts inconsistently with their allegiance to Australia by:

- engaging in specified terrorism-related conduct;
- fighting for, or being in the service of, a declared terrorist organisation outside Australia. A declared terrorist organisation is any terrorist organisation within the meaning of paragraph (b) of the definition of a terrorist organisation in subsection 102.1(1) of the *Criminal Code Act 1995*, that the Minister, by legislative instrument, declares is a declared terrorist organisation for the purposes of this section; and
- engaging in conduct that results in a conviction of a specified terrorism offence, for which the person is sentenced to a period of imprisonment of at least 3 years, or periods totalling at least 3 years.

Safeguards and reinstatement of Australian citizenship

In considering whether to cease a person's citizenship, the Minister must have regard to certain public interest criteria, as set out in new section 36E. This includes, amongst other things, the degree of threat the person poses to the Australian community, Australia's international relations, and the person's connection with the other country of citizenship. This will enable the Minister to consider a person within their specific context. The inclusion of these public interest criteria aligns with the INSLM's recommendation at 1.32(a)(ii).

Once the Minister has decided to cease a person's citizenship, the Minister must inform the person in writing as soon as practicable, as set out in section 36F of the Bill. The onus being on the Minister to provide notice to the person aligns with the INSLM's recommendation at 1.32(c)(ii). Consistent with the existing provisions, the Bill retains the Minister's right to withhold notice if satisfied that giving notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations.

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Similar to the existing provisions, a decision to withhold notice from a person of cessation of citizenship can remain in place for up to five years. However, the new provisions, at subsection 36G(2), require the Minister to review this determination every 90 days, rather than every 6 months as required by the existing provisions. Additionally, subsection 36G(3) provides that at the conclusion of the five years, the person must be provided notice unless the Minister extends the determination, under subsection 36H(5), once for a further year. Withholding notice does not prevent a person from seeking judicial review of the determination to cease their citizenship if they become aware of it through other means.

Once a person is provided with notice of cessation of citizenship, the new provisions in the Bill give the person 90 days to apply to the Minister in writing for a revocation of the determination to cease their citizenship. This process is set out in new section 36H. This implements the INSLM's recommendation at 1.32(c)(ii), in part. The Minister must consider an application for revocation. Natural justice is also afforded to the person so they can make representations on their case. This provision also aligns with the INSLM's recommendation at 1.32(c)(i). Outside of the 90 day period, if the Minister is satisfied the person did not receive the original notice, the Minister may, under section 36F(3), give the notice again and give the person 30 days to make an application.

In addition to providing a mechanism for a person to apply to the Minister for revocation, the Bill contains several other avenues for a person's citizenship to be reinstated. Firstly, the Minister may reinstate an individual's citizenship on his or her own initiative under new section 36J if it is in the public interest to do so. Secondly, in certain circumstances, a person's citizenship is taken never to have ceased. The circumstances are set out in section 36K of the Bill. Thirdly, a person can access judicial review in relation to the Minister's decision to cease their citizenship or reject their application for revocation. This is made clear throughout the Bill, in relevant sections 36B, 36D and 36H.

The Bill does not apply to individuals who engage in specified conduct prior to obtaining Australian citizenship. The Bill is directed at specified conduct engaged in by an Australian citizen which demonstrates that the person has repudiated their allegiance to Australia. Engagement in specified conduct prior to a person's commencement of Australian citizenship, and therefore prior to that person having an allegiance to Australia, does not warrant consideration for citizenship cessation.

In addition, the Bill makes clear new section 36B does not apply to a person or persons whose actions are unintentional or who is acting under duress or force or providing neutral and independent humanitarian assistance. The provisions are not intended to apply to the type of impartial, independent humanitarian assistance provided by relevant humanitarian organisations and personnel. The Bill also retains exemptions for law enforcement, intelligence agencies and the Australian Defence Force and makes it clear that new section 36B does not apply to persons acting in the proper performance of a function, agency or organisation of the Commonwealth, or of a State or territory.

Protection against statelessness

In accordance with Australia's international obligations, the Bill retains provisions, in subsections 36B(2) and 36D(2), that the Minister must not make a determination ceasing a person's citizenship if the Minister is satisfied that to do so would render the person stateless. As an additional safeguard, the Bill includes a provision whereby if a court finds the person was not a national or citizen of another country at the time of the determination, their citizenship is taken never to have ceased.

Strengthening the existing regime

There are three additional measures in the Bill that expand the operation of the existing provisions.

First, the Bill amends existing section 33AA (proposed section 36B) so that conduct dating from 29 May 2003 onwards (compared to 12 December 2015 at present) can be taken into consideration when the Minister determines whether to cease a person's citizenship. This enables the Minister to take into consideration and address any historical conduct engaged in by a person that is incompatible with the shared values of the Australian community. The date of 29 May 2003 is important as it is the date the

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relevant offences, specified in the Citizenship Act, were fully enacted under the *Criminal Code Amendment (Terrorism Act) 2003*.

Second, the Bill amends existing section 35A (proposed section 36D) to allow the Minister to cease a person's citizenship if they are convicted of specified terrorism offences and sentenced to a period or periods of imprisonment totalling at least three years. The existing requirement is a sentence of imprisonment of at least six years, or periods totalling at least six years, for a conviction from 12 December 2015 to present, or 10 years for the period prior to that, from 12 December 2005. This amendment reflects the seriousness of a criminal conviction for a terrorism offence.

Third, the Bill adjusts the time period in which a person convicted of a specified terrorism offence or offences resulting in at least 3 years imprisonment may be considered for citizenship cessation, such that persons convicted of such a specified terrorism offence from 29 May 2003 could be considered for citizenship cessation (compared to 12 December 2015 at present).

Accountability and transparency

The Bill retains existing accountability and transparency measures. The Minister must continue to report to the Parliament and the PJCIS on the use of the provisions. The Bill also amends the *Intelligence Services Act 2001* to provide that the PJCIS review the new provisions by 30 June 2021.

The Bill also retains the Independent National Security Legislation Monitor's oversight role in relation to the terrorism-related citizenship cessation provisions in the Citizenship Act.

Conclusion

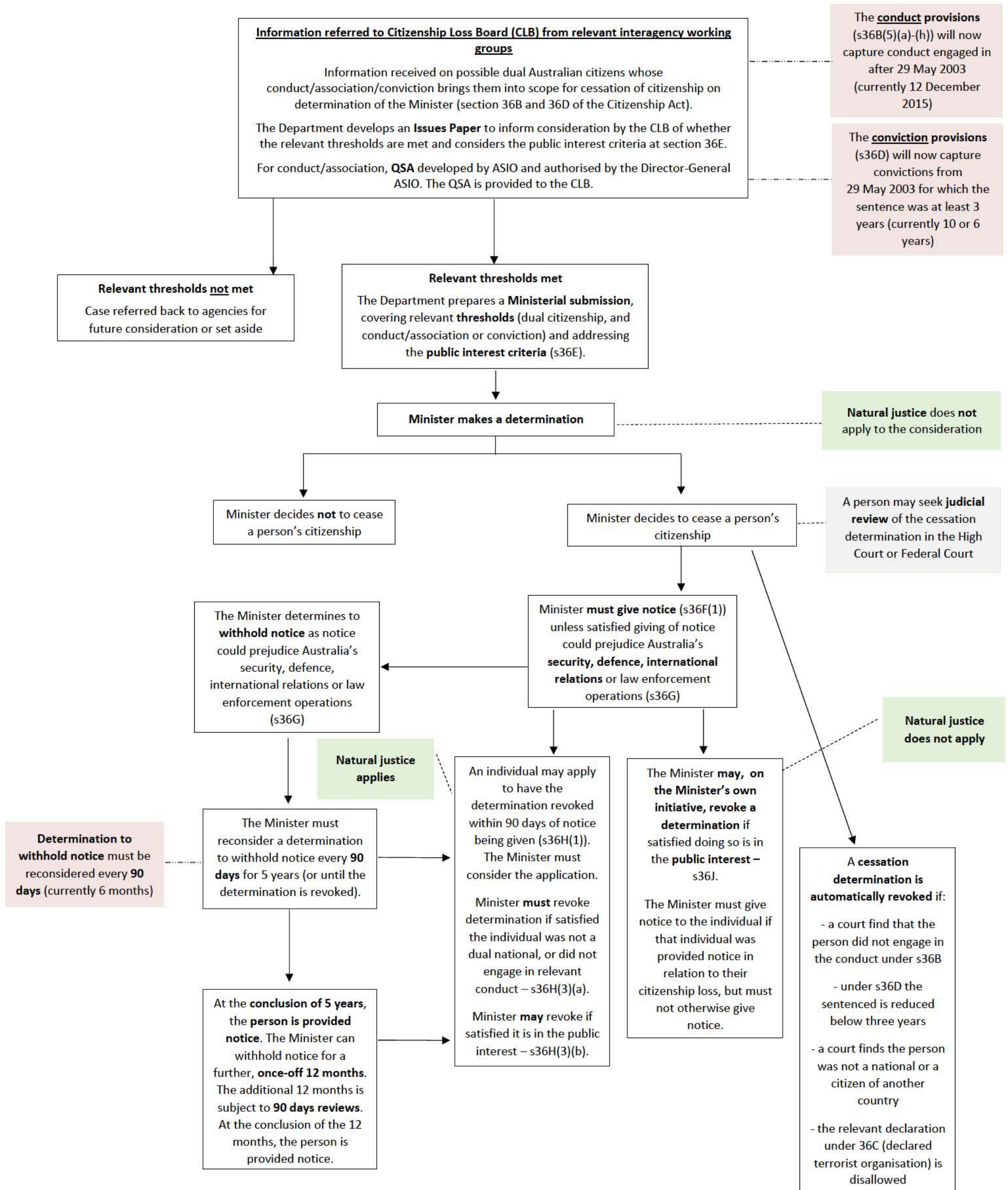
The amendments contained in the Bill build on, adapt and refine the existing citizenship cessation provisions. They strengthen the operation of the measures in response to the increasingly complex challenges facing the national security, defence and international relations of Australia. They further establish citizenship cessation as one of a suite of measures – which includes control orders, continuing detention orders, preventative detention orders, passport cancellation, prosecution, temporary exclusion orders and de-radicalisation programs – that can be applied on a case-by-case basis, as appropriate.

Appendices

Appendix A – Citizenship cessation flowchart

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Cessation of citizenship by Ministerial Determination – Flow-chart



The Minister must table a **report to Parliament** every 6 months on **notices of cessation or consideration of an application for revocation** (s36H) given or attempted to be given (s51(B))

The Minister must **inform the PJCIS** as soon as practicable of notices of cessation given, attempted to be given, or withheld, or notices of revocation application (under ss36H and 36J) given or attempted to be given (s51C). On request by the Committee, the Minister must provide written briefing on these matters.

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