



Australian Government
Department of Home Affairs

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Supplementary submission to the review of the Australian Citizenship renunciation by conduct and cessation provisions

Parliamentary Joint Committee on Intelligence and Security

Department of Home Affairs

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This submission provides the Department of Home Affairs' responses to Questions on Notice taken at the hearing, and subsequent written Questions on Notice.

Response to Questions on Notice taken at Hearing

Questions on international comparison

Q. Can the Department provide a comparison between Australia's citizenship loss provisions with other countries' similar provisions? The answer should include data on other countries' use of these measures, what constitutes an act of terrorism in France and the Netherlands, whether the US is the only comparable jurisdiction with an operation of law model of citizenship loss, oversight mechanisms, nature of safeguards and public reporting obligations. (Transcript Page 36, Paragraph 10 onwards and Page 37, Paragraph 5 onwards.)

- Where open-source reporting is available, the Department has provided information on the citizenship cessation provisions, including the use of the provisions and oversight mechanisms and safeguards in comparable jurisdictions at **Attachment A**.

Q. Can the Department provide comment on Canada's experience with its citizenship loss provisions? The answer should include reference to the fact that their legislation re-conferred citizenship on an individual whose Canadian citizenship had been previously stripped. (Transcript Page 37, Paragraph 19.)

- Canada's decision to repeal its citizenship loss legislation was made on policy grounds following an election and change of government.
- The Department of Home Affairs does not hold information to provide further comment.

Questions on effectiveness

Q. Could you please provide this Committee with the names of any independent prominent counter-terrorism or national security experts who argue that the Australian citizen revocation provisions are effective? Do counterterrorism experts within the Department consider the citizenship loss provisions to be effective? Can the Department address the question of whether these provisions have been effective? (Transcript Page 37, Paragraph 19 and Page 50, Paragraph 2 onwards.)

- The effectiveness of counter-terrorism measures is difficult to assess through traditional evaluation frameworks. Counter-terrorism measures are applied by various actors across levels of local, state, and federal government and involve highly individualised and sometimes overlapping interventions. There are multiple pathways to radicalisation and many factors that would divert a person away from terrorist-related conduct. Due to the complexity and evolving nature of the issues, it is difficult to separate cause and effect and to conclude whether the absence or presence of a terrorist act was due to a particular counter-terrorism measure.
- Further the citizenship cessation provisions have a broader aim. The legislation 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, demonstrate that they have severed that bond and repudiated their allegiance to Australia. The citizenship cessation provisions have protected the community but also ensured the integrity of Australia's citizenship framework by limiting membership in the community to those who embrace and uphold the values shared by Australians.

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Question on the Department's recommendations

Q: Is there anything the Department suggests that the Committee should consider? Does the Department have any suggestions for the Committee? (Transcript Page 51, Paragraph 18.)

- As noted in the Department's submission, there are a number of challenges associated with an automatic 'operation of law model', including that it may limit the availability of other mechanisms to manage the risk an individual poses to the Australian community.
- The Government considers it important that Australia's counter-terrorism laws can operate alongside one another and that authorities can determine the most appropriate course of action on a case-by-case basis to respond effectively and ensure the best outcomes for Australia's national security.
- The Department considers that an alternative model for citizenship loss, for example, where citizenship cessation comes into effect following a formal Ministerial decision, would be worth consideration.

Question on the suite of counter-terrorism measures

Q: Can the Department outline the suite of counter-terrorism measures that are available to authorities? (Transcript Page 52, Paragraph 4.)

- **Attachment B** outlines a range of counter-terrorism measures that are 'available' to authorities. However, citizenship cessation under sections 33AA and 35 of the *Australian Citizenship Act 2007* happens automatically, which pre-empts consideration of whether citizenship loss is appropriate in light of other factors.
- In addition, Australia's terrorism offences are contained in Chapter 5 of the Schedule to the *Criminal Code Act 1995*.

Question on constitutionality

Q: Can the Department address the question of whether these provisions are constitutional? (Transcript Page 52, Paragraph 4.)

- The Department's position on the constitutional validity of the provisions is unchanged: the Department believes that the provisions are constitutionally sound. The provisions under review have all been the subject of legal advice, including consideration as to the constitutional validity of the provisions.

Question on the community understanding of the laws

Q. Can the Department provide information on whether or not there is awareness of the citizenship loss provisions in the community? Have the provisions acted as a deterrence or have the provisions deterred people reporting family members? (Transcript Page 47, Paragraph 3 onwards and Page 52, Paragraph 5)

- There has been considerable media reporting on the citizenship cessation provisions.
- Feedback from the Department's Community Liaison Officer network indicates that there is little understanding of the practical operation of the citizenship cessation provisions.

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Response to Questions on Notice received following Hearing

Q. Small number of citizenship cancellations

According to government statements, as many as 230 Australian “foreign fighters” have travelled to Syria or Iraq. Why is it that as few as 12 people have lost their Australian citizenship under sections 33AA or 35? Why isn’t that number higher?

- Due to the operation of law model, the individuals counted in these numbers are only those whom the Minister has become aware that their Australian citizenship had ceased automatically through their own conduct.
- Further, not all foreign fighters are dual citizens, which is a requirement for citizenship cessation.

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Attachment A: International comparison

Country	Data on use of citizenship cessation measures	Safeguards and oversight	Additional information in response to Committee's questions
France	Between 1973 and 2018, there were 13 reported cases of French citizenship deprivation for acts of terrorism and acts against the fundamental interest of the nation.	<ul style="list-style-type: none"> The legislation contains a requirement to be convicted of a terrorist offence. The person must be notified of the Minister's intention to seek the deprivation of nationality, including the legal grounds and reasons for the decision (Article 61 of the Decree No. 93-1362 of 30 December 1993). The person is given one month from the date of notification to make arguments against citizenship deprivation. The citizenship deprivation laws apply to naturalised dual citizens. 	Article 421-1 of the French Criminal Code provides a list of offences which become acts of terrorism when 'committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb the public order through intimidation or terror'. These offences include the production of explosive devices, possessing weapons and physical attacks on persons.
Germany		<ul style="list-style-type: none"> The proposed legislation, referred to in the Department's submission was to apply to adult dual citizens. 	Germany's proposed legislation, referred to in the Department's submission, provided for automatic cessation of citizenship. Media reporting indicates that Germany has now passed this legislation. However, the Department does not have information on the final form of the legislation and is unable to confirm whether there are other comparable jurisdictions with an operational of law model.
Netherlands	In September 2017, the media reported that four 'convicted jihadists' were deprived of citizenship by the Netherlands in 2017.	<ul style="list-style-type: none"> In the Netherlands, withdrawal of citizenship for terrorist activity can occur in two instances: after final conviction for certain terrorist offences or if a citizen appears to have joined a terrorist organisation abroad that is deemed to pose a threat to national security. In the first case, the Minister must inform the person concerned of the intention to revoke their citizenship and allow them the opportunity to make submissions before the 	The Dutch Government can revoke Dutch citizenship if the person is convicted of terrorist offences. The Dutch Criminal Code provides a list of serious offences which become terrorist offences if the offence has been committed with a terrorist intent. As of 1 March 2017, a person can also lose their Dutch citizenship if they join a terrorist organisation abroad.

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Country	Data on use of citizenship cessation measures	Safeguards and oversight	Additional information in response to Committee's questions
		<p>decision is made. The decision may be appealed either in an administrative objection procedure or before a court.</p> <ul style="list-style-type: none">• In the second case, the person concerned will not be informed in advance of a pending decision to revoke their citizenship. The person will be entitled to directly appeal to an administrative court. The court will perform a 'marginal' (i.e. procedural) review, which can occur in the absence of the person concerned.• The citizenship deprivation laws cannot be applied retroactively.• The citizenship deprivation laws only apply to dual citizens.	
New Zealand		<ul style="list-style-type: none">• The Minister must notify the person of the intention to deprive them of citizenship, including the grounds for making such an order.• The person has 28 days to lodge a High Court application to challenge the Minister's proposed order.• The citizenship deprivation laws only apply to persons who have acquired the citizenship of another country by 'any formal or voluntary act'.	N/A

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Country	Data on use of citizenship cessation measures	Safeguards and oversight	Additional information in response to Committee's questions
United Kingdom	There were 104 citizenship revocations 'conducive to the public good' in the UK in 2017.	<ul style="list-style-type: none">• Individuals who have had their citizenship revoked have a right to appeal.• These individuals are also entitled to written notice informing them of this right and the reasons for the decision.• Where it is not possible to contact the person to provide them with written notice because their location is unknown, the decision is placed on file until the person seeks to make contact.• As a general policy, and in line with the European Convention on Human Rights, the practice in the United Kingdom is not to advise the other affected country (or countries) of the person's deprivation of citizenship. The rationale behind this policy is that, in some circumstances, notifying a country may result in harm to the person.• The Secretary of State must arrange for a review of the operation of the citizenship deprivation power every three years. The report must be provided to the Secretary of State who must table the report in each House of Parliament.• The person must not become stateless as a result of the decision to deprive them of citizenship; unless the person is a naturalised citizen who has conducted themselves 'in a manner which is seriously prejudicial to the	N/A

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Country	Data on use of citizenship cessation measures	Safeguards and oversight	Additional information in response to Committee's questions
		United Kingdom' and who the Home Secretary is satisfied could become a national of another country.	
United States	<p>The treason provision referred to in the Department's submission appears to be infrequently used.</p> <p>Between 1990 and 2017, the US Department of Justice filed a total of 305 denaturalisation cases, an average of eleven per year.</p>	<ul style="list-style-type: none">The State Department is required to determine that the person intended to lose their citizenship by committing the relevant act, and the individual can challenge that determination in court.	See response above in relation to 'Germany'.

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Attachment B: Suite of counter-terrorism measures

Power	Threshold	Decision-maker	Key safeguards and oversight
<p>Control orders</p> <p>A control order can, amongst other things, regulate a person's:</p> <ul style="list-style-type: none"> a) ability to be in certain areas b) communication or association with certain people c) possession or use of certain things d) activities, including work or education e) access to certain forms of technology, including the internet. <p>A control order can also impose reporting obligations, or require the person to be photographed and fingerprinted by authorities.</p>	<p>A control order can be imposed if the court is satisfied on the balance of probabilities:</p> <ul style="list-style-type: none"> a) the order would substantially assist in preventing a terrorist act, or support for a terrorist act, or b) a person has: <ul style="list-style-type: none"> i. provided to, received from or participated in training with a listed terrorist organisation, or ii. engaged in hostile activity in a foreign country, or iii. been convicted in Australia of an offence relating to terrorism, a terrorist organisation or terrorist act, or iv. been convicted in a foreign country of an offence that is constituted by conduct that in Australia would constitute a terrorism offence, or v. provided support for, or otherwise facilitated, the engagement in hostile activity in a foreign country. <p>The court must also be satisfied that each control is reasonably necessary, and reasonably appropriate and adapted, for</p>	<p>The Minister for Home Affairs must consent to the AFP seeking an interim control order.</p> <p>Federal Court determines whether or not to issue a control order, upon application from the AFP.</p>	<p>The Federal Court maintains judicial oversight of the making and confirmation of a control order.</p> <p>The AFP Commissioner must apply for the control order to be revoked, should the grounds for making the control order cease to exist.</p> <p>The Minister for Home Affairs must table an annual report to Parliament containing specified information about the operation of the regime.</p> <p>The Parliamentary Joint Committee on Intelligence and Security (PJCIS) is empowered to monitor and review the AFP's performance of its functions in relation to the control orders regime. It is also empowered to review by 7 January 2021 the operation, effectiveness and implications of the control order regime.</p>

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Power	Threshold	Decision-maker	Key safeguards and oversight
	the purpose of preventing terrorism-related activity.		
<p>Continuing detention orders (CDOs)</p> <p>The Minister for Home Affairs may apply for a CDO against a convicted terrorist offender who poses an unacceptable risk of committing a serious Part 5.3 offence if released into the community at the conclusion of their sentence.</p>	<p>A State or Territory Supreme Court must be satisfied to a high degree of probability that there is an unacceptable risk that the offender would commit a serious Part 5.3 offence if released into the community at the end of their sentence.</p>	<p>State or Territory Supreme Court, upon application from the Minister for Home Affairs.</p>	<p>A State or Territory Supreme Court retains oversight of the making of a CDO.</p> <p>Continuing detention orders must be reviewed annually, and may only be in force for up to 3 years.</p> <p>The Minister for Home Affairs must table an annual report containing specified information about the operation of the CDO scheme.</p> <p>The Independent National Security Legislation Monitor (INSLM) and PJCIS must review the CDO scheme within 5 and 6 years respectively of the legislation coming into force.</p> <p>The CDO scheme will sunset in 2026, 10 years after the passage of the legislation.</p>
<p>Temporary exclusion orders (TEOs)</p> <p>A TEO prohibits a person from entering Australia for up to two years unless issued a return permit.</p> <p>A return permit allows entry to Australia, and may specify the period and manner of entry, as well as impose limited post-entry</p>	<p>The Minister for Home Affairs can make a TEO against an Australian who is:</p> <ul style="list-style-type: none"> • currently outside of Australia; and • above 14 years of age, and • not subject to a return permit, if: 	<p>The Minister for Home Affairs' decision to make a TEO is automatically reviewed by an independent reviewing authority to determine whether the Minister's decision to make the TEO was lawful. If the reviewing authority considers the decision was not lawful,</p>	<p>The Minister's TEO decision is automatically reviewed by an independent reviewing authority.</p> <p>All decisions under the legislation may be subject to judicial review.</p> <p>A TEO cannot be made against a child younger than 14 years of age. For children 14 to 17 years of age, the</p>

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<p>conditions, such as the requirement to notify authorities of:</p> <ul style="list-style-type: none"> the person's place of residence, work or education, and any changes, and the person's intention to use specified technology. 	<ul style="list-style-type: none"> the Minister suspects on reasonable grounds that making the TEO would substantially assist in preventing terrorism-related conduct, or ASIO has assessed the person to be a directly or indirectly a risk to security for reasons related to politically motivated violence. 	<p>the TEO is taken to have never been made.</p> <p>The Minister for Home Affairs must issue a return permit if the person subject to a TEO:</p> <ul style="list-style-type: none"> applies for a return permit, or is being deported or extradited to Australia. <p>The Minister for Home Affairs may also issue a return permit if the Minister considers it appropriate to do so.</p>	<p>Minister must have the best interests of the child as a primary consideration before making a TEO or imposing conditions on a return permit.</p> <p>The Minister for Home Affairs must table an annual report containing specified information about the operation of the TEO scheme.</p> <ul style="list-style-type: none"> The PJCIS is empowered to monitor and review the exercise of the Minister's powers under the TEO scheme, and must review the TEO scheme within 3 years of it coming force. The INSLM also has a statutory function to review the operation, effectiveness and implications of the TEO scheme.
<p>Terrorist organisation listings</p> <p>Where an organisation is listed as a terrorist organisation, it is an offence to:</p> <ul style="list-style-type: none"> be a member of the organisation; or direct the activities of, or recruit for, the organisation train or receive training from, or participate in training with, the organisation get funds to, from or for, the organisation 	<p>A terrorist organisation may be listed if the Minister for Home Affairs is satisfied that it:</p> <ul style="list-style-type: none"> is engaged in preparing, planning, assisting or fostering the doing of a terrorist act, or advocates the doing of a terrorist act. 	<p>The Governor-General may make a regulation listing a terrorist organisation if the Minister is satisfied the organisation meets the legal threshold.</p>	<ul style="list-style-type: none"> If the Minister ceases to be satisfied an organisation meets the legal threshold for listing, the Minister must make a declaration and the regulation ceases to have effect. The Minister must consider an application for an organisation to be de-listed. The making of a regulation listing an organisation is reviewable by the PJCIS.

UNCLASSIFIED

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<ul style="list-style-type: none"> provide support to the organisation, or intentionally associate with a member, or a promoter or director of the activities, of the organisation (except in specified circumstances). 			<ul style="list-style-type: none"> A regulation listing an organisation sunsets three years after it is made. The listing of a terrorist organisation is judicially reviewable.
<p>Conviction-based citizenship loss</p> <p>The Minister for Home Affairs may determine a person ceases to be an Australian citizen in specific circumstances where they have been convicted of a terrorism offence.</p>	<p>The Minister for Home Affairs may determine a person ceases to be an Australian citizen if:</p> <ul style="list-style-type: none"> they have been convicted in Australia of an offence (or offences) specified in section 35A (including certain terrorism offences); they have been sentenced to a period or periods of at least 6 years' imprisonment in total in respect of the conviction/s; they are a national or citizen of a country other than Australia at the time the Minister makes the determination; the Minister is satisfied that the conduct to which their conviction relates demonstrates a repudiation of their allegiance to Australia; and having regard to a range of factors, the Minister is satisfied it is not in 	<p>The Minister for Home Affairs may make a determination, if the person is convicted by a court of a specified terrorism offence.</p>	<ul style="list-style-type: none"> The PJCIS and INSLM are undertaking reviews of the citizenship loss provisions. The Minister has reporting obligations to the PJCIS (for example, if there is an unsuccessful attempt to give notice of citizenship loss). The rules of natural justice apply in respect of the Minister's determination that a person ceases to be an Australian citizenship. The provisions only apply to persons aged 14 or older.

UNCLASSIFIED

Power	Threshold	Decision-maker	Key safeguards and oversight
	the public interest for the person to remain an Australian citizen.		
<p>Citizenship loss by operation of law</p> <p>A person automatically ceases to be an Australian citizen if they:</p> <ul style="list-style-type: none"> engage in terrorist-related conduct offshore, or left Australia after engaging in the terrorist-related conduct but before being tried for an offence related to the conduct, or serve in the armed forces of a country at war with Australia, or fight for, or are in the service of, a declared terrorist organisation. 	<p>A person ceases to be an Australian citizen if:</p> <ul style="list-style-type: none"> they act inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct offshore, or the person left Australia after engaging in the conduct but before being tried for an offence related to the conduct; and they are a national or citizen of a country other than Australia. <p>A person also ceases to be an Australian citizen if:</p> <ul style="list-style-type: none"> they serve in the armed forces of a country at war with Australia, or fight for, or are in the service of, a declared terrorist organisation (where their service or fighting occurs outside Australia); and they are a national or citizen of a country other than Australia. 	<p>There is no decision-maker. Citizenship loss happens ‘automatically’, by operation of law.</p>	<ul style="list-style-type: none"> The PJCIS and INSLM are undertaking reviews of the citizenship loss provisions. The Minister has reporting obligations to the PJCIS (for example, if there is an unsuccessful attempt to give notice of citizenship loss). The PJCIS may review any declaration that a terrorist organisation is a declared terrorist organisation. Legislative safeguards set out circumstances in which a person’s citizenship will be taken never to have ceased (for example, the Minister has a discretionary power to exempt a person from the effect of the citizenship loss provision). The person may seek judicial review of the basis on which the Minister issued a notice of citizenship cessation. The rules of natural justice apply in respect of the Minister’s decision to exempt a person from the citizenship loss provisions. The provisions only apply to persons aged 14 or older.