



Australian Government
Department of Home Affairs

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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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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 review of the renunciation by conduct and cessation provisions in the *Australian Citizenship Act 2007* (the Citizenship Act). This submission provides an overview of the provisions under review in the Citizenship Act, the policy rationale for the provisions and a summary of their operation, effectiveness and implications. The submission also describes the practical implications of the provisions, including implementation challenges the Department has encountered.

The Department consulted on the drafting of this submission with the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP), which provided input relevant to their remit.

Environmental context

At the time terrorism-related citizenship loss provisions were inserted into the Citizenship Act, the threat environment was largely characterised by the danger posed to Australia and its interests by foreign fighters, including those who sought to return to Australia after travelling to the conflict zone.

While the number of Australians attempting to travel to the conflict zone has reduced considerably, around 80 Australians (or former Australians) who fought for or supported Islamic extremist groups remain in Syria and Iraq. Some of these individuals may attempt to leave the conflict zone and seek to return to Australia. Amongst them, some may continue to show commitment to violent extremism, while others might no longer be a significant security concern. Each of these individual's circumstances are unique and complex, calling for a nuanced and case-by-case approach to managing their risk to the safety and security of Australia.

Legislative framework

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 all its citizens and, accordingly, that Australian citizenship may be renounced by a person, or revoked by the Minister for Home Affairs, where the person's conduct repudiates their Australian allegiance.

The provisions currently under review by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) were introduced by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (the Allegiance Act). The Allegiance Act inserted current sections 33AA, 35AA and 35A into the Citizenship Act, and repealed and replaced section 35. Prior to its passage, it was referred to the PJCIS for inquiry, which recommended passage subject to the implementation of 27 recommendations. The Government subsequently moved amendments implementing all 27 recommendations. The Allegiance Act passed the Parliament on 3 December 2015, and commenced on 12 December 2015.

The purposes of the Allegiance Act was to respond to evolving terrorism threats. It inserted into the Citizenship Act provisions for the loss of citizenship for persons, both onshore and offshore, who are involved in terrorism.

Overview of provisions

The provisions outline the circumstances in which a dual citizen ceases to be an Australian citizen through their engagement in terrorism-related activities and the circumstances in which the Minister may exempt a person from the operation of the provisions.

The provisions contain three means by which a person, who is a national or citizen of a country other than Australia, can cease to be an Australian citizen:

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1. **Section 33AA:** The person renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct offshore, or the person left Australia before being charged and brought to trial for the conduct.
2. **Section 35:** The person ceases to be an Australian citizen if 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 while offshore. Under **section 35AA**, the Minister may, by legislative instrument, declare a terrorist organisation, as defined by the *Criminal Code Act 1995* (the Criminal Code), for the purposes of section 35. The Minister can declare those terrorist organisations that are opposed to Australia or Australia's interests, values, democratic beliefs, rights or liberties.
3. **Section 35A:** The Minister may determine in writing that a person ceases to be an Australian citizen because the person has been convicted of a specified terrorism-related offence and sentenced to at least 6 years' imprisonment (or to periods of imprisonment that total at least 6 years). Offenders sentenced between 12 December 2005 and 11 December 2015 must have received a 10 year sentence of imprisonment.

Under sections 33AA and 35, citizenship loss occurs automatically, by operation of law.

Citizenship revocation under section 35A occurs at the discretion of the Minister for Home Affairs. The Minister must be satisfied that the person's offence demonstrates a repudiation of their allegiance to Australia, and that it is not in the public interest (having regard to factors set out in section 35A of the Citizenship Act) for them to remain an Australian citizen.

Sections 33AA and 35 apply to persons aged 14 years or older. Section 35A, which is offence-based, has a limited application to minors. Under the Criminal Code, a child under 10 years of age is not criminally responsible for an offence. A child from 10 to 14 years of age is only criminally responsible if the child knows that his or her conduct is wrong.

There is no consequential loss of Australian citizenship for an Australian citizen child whose parent's Australian citizenship ceases under these provisions.

Policy rationale

The Explanatory Memorandum to the Allegiance Act states the policy rationale for the provisions is to ensure the safety and security of Australia and its people and to ensure the Australian community is limited to those persons who continue to retain an allegiance to Australia.

Ensuring the safety and security of Australia and its people

Australia's counter-terrorism framework takes a multi-faceted approach to managing risk from terrorist threats to the Australian community. It is designed to be both preventative and responsive, and to apply to threats both offshore and onshore. It provides a range of mechanisms that can be tailored to an individual's level of risk, which can be used simultaneously or on their own.

Arrest, prosecution and conviction form a critical part of this response, but these processes are not always feasible, and cannot completely eliminate the threat posed by terrorism. Criminal justice processes are therefore complemented by preventative options. The power to cease Australian citizenship is one such option.

When a person's Australian citizenship ceases, they no longer have full and formal membership of Australian society. They lose their entitlement to live in Australia or to re-enter Australia. Citizenship cessation reduces the risk of a terrorist act being undertaken by that person in Australia.

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Allegiance and the Australian community

Australian citizenship is a privilege that also comes with responsibilities, including to obey the law and uphold Australian values. It carries with it a duty of allegiance to Australia. Conduct such as acts in preparation for a terrorist act, or associating with a terrorist organisation, goes against Australia's democratic values and beliefs. It is a repudiation of a person's allegiance to Australia. This was noted by the PJCIS in its review of the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, where it indicated it was likely the Australian community would view prior terrorist-related conduct as 'repugnant', and demonstrative of a person's departure from the values that define Australian society. It would be contrary to the public interest for such a person to remain an Australian citizen.

International comparison

Citizenship loss provisions have been included in the counter-terrorism or national security frameworks of a number of countries, including the majority of Australia's Five Eyes partners.

- **France** – Article 25 of the *Civil Code* provides that a naturalised dual citizen may lose their French citizenship by decree if they are sentenced for an offence that constitutes 'an infringement of the fundamental interests of the nation' or an act of terrorism, as long as the offence occurred prior to or within 15 years of acquiring French citizenship.
- **Germany** – in 3 April 2019 the German Government approved the introduction of terrorism-related citizenship loss legislation. The new provisions will apply to adult dual citizens who fight for a foreign terrorist organisation, and will not apply retrospectively.
- **Netherlands** – Article 14 of the *Dutch Citizenship Act* provides a dual citizen may have their Dutch citizenship revoked if they are convicted of a terrorism offence or war crime.
- **New Zealand** – Section 16 of the *Citizenship Act 1977* provides that a dual citizen may have their New Zealand citizenship revoked if the Minister of Internal Affairs is satisfied that they 'acted in a manner that is contrary to the interests of New Zealand'.
- **United Kingdom** – Section 40 of the *British Nationality Act 1981* provides that a dual citizen may be deprived of citizenship if the Secretary of State is satisfied that 'the deprivation is conducive to the public good' and the person has conducted themselves 'in a manner which is seriously prejudicial to the vital interests of the United Kingdom'.
- **United States** – Section 1481 of the *U.S. Code* provides that an adult may automatically lose their US citizenship where they commit an act of treason or conspiracy against the US.

Appendix A provides further information.

Operation and use of the provisions

Renunciation or cessation under sections 33AA and 35

Relevant Government agencies established the Citizenship Loss Board (the Board) to provide advice on issues of citizenship loss. The Board is comprised of senior executives from eight Commonwealth departments and agencies to bring a whole-of-government perspective to citizenship loss cases. The Board advises the Secretary of the Department of Home Affairs and the Minister for Home Affairs in administering the citizenship loss provisions. In doing so, the Board:

- considers a range of information in citizenship loss cases, including departmental information, security and intelligence information and legal advice

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- reviews whether legislative thresholds have been met in citizenship loss cases, including criteria that may inform the Minister's powers to exempt the person from citizenship loss (such as aspects of prejudice to Australian security, defence, international relations or Australia's law enforcement operations), and
- endorses cases to be progressed to the Minister for Home Affairs through a Ministerial Submission.

The Board does not make decisions. It provides strategic direction and guidance to support implementation of the legislation as it relates to citizenship loss. A flowchart of the Board's process is at **Appendix B**.

As part of the consideration of a citizenship loss case, the Department undertakes a dual citizenship assessment. This assessment is based on a range of information, including information contained within departmental holdings and specialist legal interpretation of foreign nationality law. The Government takes a case-by-case approach to whether to seek the advice of foreign legal experts. It is not normal practice to confirm a person's dual citizenship status with the other country involved. This is in line with normal practice in citizenship revocation cases.

On 14 February 2019, the Minister for Home Affairs stated that 12 individuals had ceased their Australian citizenship through the operation of the Citizenship Act.

Declarations under section 35AA

Declaring a terrorist organisation under section 35AA enables a dual citizen's Australian citizenship to cease under section 35 if they fight for or are in the service of the declared terrorist organisation. Being a member of a declared terrorist organisation, or acting on instruction of or cooperating with, a declared terrorist organisation, also establishes that a person intended to engage in terrorist-related conduct for the purposes of section 33AA citizenship renunciation.

The Minister may only declare an organisation for the purposes of section 35AA if it has been listed by the Governor-General as a terrorist organisation under section 102.1 of the Criminal Code.

Before declaring that an organisation is a declared terrorist organisation, the Minister must be satisfied on reasonable grounds that the organisation:

- either is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or
- advocates the doing of a terrorist act, and
- is opposed to Australia, or to Australia's interests, values, democratic beliefs, rights or liberties, so that if a person were to fight for or be in the service of such an organisation the person would be acting inconsistently with their allegiance to Australia.

At this time two organisations have been declared under section 35AA: Islamic State, the declaration of which came into effect on 6 May 2016; and Jabhat al-Nusra (now listed as Jabhat Fatah al-Sham under the Criminal Code), the declaration of which came into effect on 15 August 2017. Both declarations remain in effect.

Determinations under section 35A

Under section 35A, the Minister's discretion to cease the Australian citizenship of a person convicted of a terrorism offence is safeguarded by an allegiance and public interest test. The Minister must be satisfied that the conduct of the person demonstrates a repudiation of their allegiance to Australia and it is not in the public interest for the person to remain an Australian citizen. In considering the public interest, the Minister would take into account the individual circumstances of the case, such as the age of the person and the severity of their conduct.

To date, no individual's Australian citizenship has ceased or progressed to the Minister for consideration in respect of section 35A of the Citizenship Act.

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Oversight, review and reporting

The administrative process which facilitates citizenship loss is subject to multiple safeguards. These safeguards come in the form of independent review or oversight, and public reporting obligations. They cover various points of the administrative process, from the making of a security assessment regarding an individual to the Minister's decision to rescind notice of and exempt a person from citizenship cessation.

Judicial review

The Minister's discretionary power to exempt a person from the conduct-related provisions under sections 33AA and 35, and as well as the Minister's power to make a determination under the section 35A offence-based provision, are subject to judicial review in the High Court or Federal Court. The ASIO security assessment may also be subject to judicial review in the High Court or the Federal Court.

A person may also seek judicial review of the basis on which a notice of citizenship cessation is given under sections 33AA and 35 in the High Court or Federal Court.

In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been exercised according to law. A person would be able to seek a declaration from the court that they have not lost their citizenship.

Natural justice

A decision by the Minister to make, or not to make, a determination to exempt a person from these provisions are subject to the rules of natural justice, as is the power to make a determination under section 35A that it is not in the public interest for the person to remain an Australian citizen. In practical terms, the person is given notice in writing that consideration which may result in cessation of their Australian citizenship is underway, and an opportunity to respond to the Minister.

Other oversight and review mechanisms

The PJCIS may review any declaration of a terrorist organisation under section 35AA. Any declaration under section 35AA is also dependent on the organisation remaining listed as a terrorist organisation under the Criminal Code, a process which is also subject to review by the PJCIS.

The Citizenship Act does not preclude other administrative review options; for example, a Qualified Security Assessment (QSA) made by ASIO under the *Australian Security Intelligence Organisation Act 1979* is reviewable by the Administrative Appeals Tribunal (AAT) under section 54 of that Act. Matters of administration by the Department are reviewable by the Commonwealth Ombudsman under the *Ombudsman Act 1976*.

The Board and its activities do not fall within the remit of the Inspector-General of Intelligence and Security (IGIS) as the functions of IGIS are concerned with the oversight of intelligence agencies. This is appropriate as the Board is not an intelligence agency. The IGIS can inquire into an intelligence or security matter relating to a Commonwealth agency, but this can only be done at the request of the Prime Minister; the IGIS has no general inquiry function in this regard.

Public reporting

The Minister is required to report to the Parliament, every six months, the number of times a notice for citizenship cessation has been issued (or unsuccessfully attempted) under sections 33AA, 35 and 35A and provide a brief statement of reasons.

If the Minister makes a decision to rescind notice of and exempt a person from citizenship cessation (so that cessation of Australian citizenship is taken to never have occurred), the Minister must report the determination and reasons for the determination to each House of Parliament.

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Effectiveness of the provisions

Citizenship loss as a response to the threat environment

The provisions under sections 33AA, 35 and 35A were introduced as part of a cohesive package of reforms to Australia's national security framework in response to the 2015 Review of Australia's Counter-Terrorism Machinery for a Safer Australia. The threat environment at the time was largely characterised by the danger posed to Australia and its interests by foreign terrorist fighters, including those who sought to return to Australia after travelling to the conflict zone.

The number of Australians (and other foreign terrorist fighters) attempting to travel to the conflict zone has markedly diminished; however, around 80 Australians (or former Australians) remain in Syria and Iraq. There remains the potential for a number of these individuals to attempt to leave the conflict zone and seek to return to Australia.

The terrorism threat level in Australia remains at PROBABLE. Since the threat level was raised in September 2014, there have been seven terrorist attacks targeting people on Australian soil, and law enforcement and security agencies have disrupted a further 15 potential terrorist attacks. Since 2001, 69 individuals have been convicted and sentenced for Commonwealth terrorism offences (as at 17 June 2019).

As each terrorist threat is unique, what works to address one threat may not necessarily work for another. Australia's counter-terrorism framework provides government and agencies with a range of measures to manage terrorist threats on a case-by-case basis. These measures include prosecutions in Australia or overseas for terrorism offences committed overseas, personal restrictions (such as control orders), continuing detention orders, participation in countering violent extremism programmes, mutual assistance to other countries, and citizenship cessation.

Further, ceasing the citizenship of people who have engaged in terrorist-related conduct helps ensure that membership of Australian society is limited to people who retain allegiance to Australia. The cohesion and strength of the Australian community is, ultimately, the best defence against violent extremism.

Practical implications of the provisions

Challenges of an automatic 'operation of law' model

Under 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. The automatic nature of the citizenship cessation under the 'operation of law' model can present several challenges.

- Citizenship cessation applies automatically and may thereby reduce the availability of other mechanisms, such as criminal justice processes, that can be used to manage the level of risk an individual poses to the Australian community. The ability of Australia to manage its broader bilateral relationships and equities can also be affected by the automatic operation of law.
- Intelligence agency powers differ depending on whether a person is an Australian citizen or non-citizen. For example, the point in time at which citizenship ceases impacts on the remit of agencies' intelligence functions under the *Australian Security Intelligence Organisation Act 1979* and the *Intelligence Services Act 2001*.
- The ability to prosecute a person for certain terrorism offences may depend on their citizenship status; for example, the offence of entering or remaining in a declared area under section 119.2 of the Criminal Code only applies to citizens and residents of Australia.

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Procedural requirements that may prejudice security, defence or international relations

The Minister is required to give notice to the person (or make reasonable attempts to do so) about their loss of citizenship except where the Minister is satisfied that giving notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations. This exception recognises that there will be instances where providing immediate notice to a person regarding the loss of their Australian citizenship may not be in the national interest.

There are, however, procedural requirements in the Citizenship Act which result in the disclosure of citizenship loss which could compromise Australia's security, defence or international relations. In particular, natural justice must be afforded to the person where:

- the Minister seeks to exercise the power to rescind the notice and exempt a person from the cessation of their Australian citizenship under sections 33AA and 35, and
- the Minister for Home Affairs seeks to make a determination to cease Australian citizenship under section 35A.

In practical terms, this means giving a person a period of notice (for example, 35 days) that consideration of their citizenship status is underway. This gives them the opportunity to make representations on the matter. Providing notice in these circumstances could alert the person and others to ongoing national security operations and create the opportunity to circumvent the provisions.

Conclusion

The provisions currently under review provide the Government and agencies with another measure to keep the community safe from terrorism. The administrative process that facilitates the cessation or revocation of citizenship is subject to multiple safeguards in the form of independent review or oversight, and public reporting obligations.

Appendices

Appendix A – International comparison

Appendix B – Administering citizenship cessation and renunciation provisions under sections 33AA and 35 of the Citizenship Act

Attachment A: International comparison

Country	Legislation	Operation	Conduct conditions	Citizenship conditions
France	<i>Civil Code</i> (Article 25)	Council of State declares by decree that the person has forfeited their French nationality.	Person is sentenced for an offence that constitutes 'an infringement of the fundamental interests of the nation' or an act of terrorism (Article 25, 1°).	Naturalised dual citizen; offence must have occurred prior to or within 15 years of acquiring French citizenship (Article 25-1).
Germany	<i>Nationality Act</i>	Bill introduced in April 2019 to provide for automatic cessation of citizenship (non-retrospective) for dual citizens who fight for a 'terrorist militia' in a foreign country.		
Netherlands	<i>Dutch Citizenship Act</i> (Article 14)	Minister of Justice and Security may revoke Dutch citizenship.	Person is convicted of a terrorism offence under the Netherlands Penal Code or a war crime under the Rome Statute (Article 14(2)).	Person must not become stateless (Article 14(6)).
New Zealand	<i>Citizenship Act 1977</i> (Section 16)	Minister for Internal Affairs revokes New Zealand citizenship.	Minister for Internal Affairs is satisfied that the person 'acted in manner that is contrary to the interests of New Zealand' (Section 16 (a)).	Person must have acquired the citizenship of another country 'by any formal or voluntary act' (Section 16(a)).
United Kingdom	<i>British Nationality Act 1981</i> (Section 40)	Home Secretary makes order to deprive person of British citizenship.	Home Secretary is satisfied that deprivation of citizenship is 'conducive to the public good' (Section 40(2)).	Person must not become stateless; unless person is a naturalised citizen who has conducted themselves 'in a manner which is seriously prejudicial to the United Kingdom' and who the Home Secretary is satisfied could become a national of another country (Section 40(4A)).
United States	<i>United States Code</i> (Section 1481)	Person automatically relinquishes US nationality.	Person voluntarily (with the intention of relinquishing US nationality) commits an act of treason or conspiracy against the United States.	No requirement to establish dual citizenship.

Attachment B - The Citizenship Loss Board (CLB)
 (Sections 33AA and 35 of the *Australian Citizenship Act 2007*)

Role and status of the CLB

The CLB supports the Minister for Home Affairs in administering sections 33AA and 35 of the *Australian Citizenship Act 2007* (the Citizenship Act). It is not a decision-making body.

The CLB reviews potential cases for citizenship loss and considers whether the relevant legislative thresholds have been met.

The CLB provides strategic direction and guidance, including advice on possible consequences that may flow from the cessation of an individual's Australian citizenship.

Information flow

Information referred to CLB from relevant interagency working groups

Information received on possible dual Australian citizens whose Australian citizenship may have ceased by operation of law (sections 33AA and 35 of the Citizenship Act).

Qualified Security Assessment developed

QSA developed by the Australian Security Intelligence Organisation and authorised by the Director-General ASIO. The QSA is provided to CLB members.

Issues paper developed

A Department of Home Affairs-led discussion paper is developed in consultation with, and using input from, CLB member departments and agencies. The discussion paper is used to inform consideration and discussion of matters at CLB meetings.

Issues paper is considered for endorsement by all CLB members. ASIO provides QSA and oral brief to CLB members

No to awareness of likely citizenship loss
 Case referred back to interagency working groups for future consideration or set aside.

Yes to awareness of likely citizenship loss
 CLB discuss Australian government equities that may be affected by a citizenship loss case

Ministerial submission developed

If endorsed, the discussion paper is used as a basis for developing a Home Affairs-led Ministerial Submission on a particular case. This includes security, defence, international relations and law enforcement

QSA provided to the Minister

Ministerial Submission provided to the Minister

The Minister is **not** satisfied a person's citizenship has ceased.

Minister becomes aware a person's Australian citizenship has ceased

Minister determines that the individual should / should not be notified

Minister considers rescinding / not rescinding the person's cessation of citizenship