



Australian Government
Department of Home Affairs

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Submission to the review of the terrorism-related citizenship loss provisions in the Australian Citizenship Act 2007

Independent National Security Legislation Monitor

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 Independent National Security Legislation Monitor's review of the terrorism-related citizenship loss provisions in the *Australian Citizenship Act 2007* (the Citizenship Act), specifically sections 33AA, 35, 35A, and 35AA. 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 the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP) on the drafting of this annexure and was provided with input relevant to their respective remits.

Environmental context

At the time the terrorism-related citizenship loss provisions were inserted into the Citizenship Act, the threat environment was characterised by the danger that foreign terrorist fighters presented to Australia and its interests, particularly those who may seek to return to Australia after fighting with Islamic State in Syria and Iraq.

While the number of Australians attempting to travel to the conflict zone has markedly diminished, around 80 Australians (or former Australians) remain in Syria and Iraq. Some of these individuals may attempt to leave the conflict zone and return to Australia. Amongst them, some may continue to show commitment to violent extremism, while others may no longer present security concerns. Each of these individuals' circumstances are unique and complex. In managing the risk presented by these individuals to Australia's safety and security, a suite of measures, that are sufficiently nuanced and can be applied on a case-by-case basis, is paramount.

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, cease automatically through operation of law, or be revoked by the Minister for Home Affairs, where the person's conduct repudiates their Australian allegiance.

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 The Allegiance Act inserted sections 33AA, 35AA and 35A into the Citizenship Act, and repealed and substituted section 35.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

The Allegiance Act was enacted because the Parliament recognised 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. It inserted into the Citizenship Act provisions for the loss of citizenship for persons, both onshore and offshore, who have engaged in specific terrorist-related conduct.

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:

1. **Section 33AA:** The person ceases to be an Australian citizen if 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.
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 where the person's service or fighting occurs outside Australia. Under **section 35AA**, the Minister may, by legislative instrument, declare any terrorist organisation within the meaning of paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1(1) of *Criminal Code Act 1995* (the Criminal Code), for the purposes of section 35. The Minister must be satisfied that those terrorist organisations are opposed to Australia or 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.
3. **Section 35A:** The Minister may determine in writing that a person ceases to be an Australian citizen if 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 convicted between 12 December 2005 and 11 December 2015 must have been sentenced to a period of imprisonment of at least 10 years. This section does not apply in relation to a conviction of a person which occurred before 12 December 2005.

Under sections 33AA and 35, citizenship loss occurs automatically, by operation of law. This means there is no Ministerial decision to cease an individual's Australian citizenship; rather, the individual automatically loses their citizenship at the point in time they engage in the conduct specified in the legislation. The Minister for Home Affairs is subsequently made aware that an individual has met the dual citizenship and conduct thresholds to trigger automatic cessation of their Australian citizenship. Cessation of citizenship is effective at the date of the relevant conduct, rather than the date the Minister becomes aware.

Under section 35A cessation of Australian citizenship occurs at the discretion of the Minister for Home Affairs. The Minister must be satisfied that the person's conduct to which the conviction relates 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 only apply to persons aged 14 years or older. Section 35A, which is offence-based, has a limited application to minors. Under sections 7.1 and 7.2 of 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. Under 35A if the person is aged under 18, the best interest of the child is a primary consideration.

There is no direct 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 Bill that became the Allegiance Act states that 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 is a multi-faceted approach to managing the risk that emanates from terrorist and terrorism more generally. The framework is designed to be both preventative and responsive, and to apply to threats both offshore and onshore. It provides a range of mechanisms that operate in relation to an individual's level of risk, which can be used simultaneously or on their own. When a person's Australian citizenship ceases, they no longer have full and formal membership of Australian society. Citizenship cessation reduces the risk of a terrorist act being undertaken by that person in Australia.

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 intentionally associating with a terrorist organisation, is contrary to 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 are 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** – on 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 for a dual citizen to 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.

Attachment A provides further information.

Operation and use of the provisions

Cessation of Citizenship under sections 33AA and 35

Relevant Government agencies established the Citizenship Loss Board (the Board) to advise the Secretary of the Department of Home Affairs and the Minister for Home Affairs in administering the citizenship loss provisions. The Board is not a decision-making body. The Board is comprised of senior executives from eight Commonwealth departments and agencies to bring a whole-of-government perspective to citizenship loss cases. In doing so, the Board:

- considers a range of information in citizenship loss cases, including departmental information, security and intelligence information and legal advice
- reviews whether legislative thresholds have been met in citizenship loss cases, including criteria that may inform the Minister's powers to not give notice to the person if the Minister is satisfied that the notice could prejudice the security, defence or international relations of Australia, or Australia's law enforcement operations, and
- supports cases to be progressed to the Minister for Home Affairs through a Ministerial Submission.

A flowchart of the Board's process is at **Attachment 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 consideration of foreign nationality law. The Government takes a case-by-case approach to seeking 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 announced that 12 individuals had ceased their Australian citizenship through the operation of the Citizenship Act.

Declarations under section 35AA

The Minister for Home Affairs may declare an organisation to be a declared terrorist organisation under section 35AA. A dual citizen's Australian citizenship ceases under section 35 if the person fights for, or is in the service of, a declared terrorist organisation, where the person's service or fighting occurs outside Australia.

The Minister may only declare an organisation to be a 'declared terrorist organisation' under section 35AA if it falls within paragraph (b) of the definition of a terrorist organisation under subsection 102.1(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 to be a declared terrorist organisation 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 for Home Affairs' discretion to exercise his or her power to determine that a person ceases to be an Australian citizen if they are convicted of a specified terrorism offence is subject to 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 that having regard to a number of specified factors, it is not in the public interest for the person to remain an Australian citizen. In considering the public interest, the Minister must have regard to various factors including (but not limited to) 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.

Administrative oversight, review and reporting

There are a number of administrative processes associated with implementing the citizenship loss provisions, including independent review or oversight, and public reporting obligations. These 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. Details of these are outlined below.

Legislative safeguards

Subsections 33AA(24) and 35(19) set out four circumstances in which a person's citizenship will be taken never to have ceased, despite the automatic nature of the provisions. These four circumstances are:

- if a court finds that the person did not engage in the conduct or have the requisite intention
- if a court finds that the person was not a national or citizen of a country other than Australia
- if the Minister makes a determination in relation to the conduct to exempt the person from the effect of the citizenship loss provision, or
- if a declaration under section 35AA is disallowed by either House of the Parliament.

Judicial review

The Minister for Home Affairs' 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 seek judicial review of the basis on which the Minister issued a notice of cessation of their Australian citizenship 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 ceased to be an Australian citizen.

Natural justice

The rules of natural justice apply in respect to the Minister's decision to exercise his or her power to make or not make a determination to rescind a notice and exempt a person from the renunciation or cessation of citizenship (under sections 33AA and 35). The rules of natural justice also apply in respect to the Minister's decision to exercise his or her power to make a determination under section 35A to cease a person's Australian citizenship.

If the Minister is making or considering making a determination to cease a person's Australian citizenship, the person must be provided with details of the key elements of the case against the person and an opportunity to respond to the Minister.

Other oversight and review mechanisms

There is a range of other oversight and review mechanisms, as outlined below.

- Under section 51C of the Citizenship Act, the Minister is required to brief the PJCIS within 20 sitting days of both Houses of the Parliament, if he or she gives or unsuccessfully attempts to give notice under subsection 33AA(10)(a), 35(5)(a), or 35A(5)(a), or if the Minister makes a determination under subsection 33AA(12), 35(7), or 35A(7).
- The PJCIS may review any declaration that a terrorist organisation is a declared terrorist organisation under section 35AA, and report the Committee's comments and recommendations to each House of the Parliament before the end of the period during which the House may disallow the declaration. 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. Pursuant to section 29(1)(ca) of the *Intelligence Services Act 2001*, the PJCIS must also review the operation, effectiveness and implications of certain provisions of the Allegiance Act by 1 December 2019.
- The Citizenship Act does not preclude other administrative review options; for example, security assessments made by ASIO under the *Australian Security Intelligence Organisation Act 1979* are 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. However, if a QSA is used to provide the evidence of conduct, then the IGIS has oversight of that process due to their oversight role of ASIO. The IGIS can inquire into an intelligence or security matter relating to any Commonwealth agency (which includes a department), but this can only be done at the request of the Prime Minister; the IGIS has no general inquiry function in this regard.
- The Independent National Security Legislation Monitor may also review, by their own initiation or by referral from the Prime Minister or Attorney-General, the operation, effectiveness, or implications of Australian counter-terrorism and national security legislation.

Public reporting

Under section 51B of the Citizenship Act, the Minister is required to table a report in each House of the Parliament, every six months, that sets out the total number of notices given under the specified provisions, the number of notices unsuccessfully attempted to be given, and for each notice – a brief statement of the matters that are the basis for the notice or the determination to which the notice relates, during the reporting period.

If the Minister makes a determination to rescind any notice given and exempt a person from the operation of sections 33AA or 35 (so that person's Australian citizenship is taken to never have ceased), the Minister must cause a statement to be laid before each House of Parliament setting out the determination and the reasons for the determination.

Effectiveness of the provisions

Citizenship loss as a response to the threat environment

Between 2014 and 2018, Islamic State's drive towards establishing a territorial caliphate saw large numbers of foreign fighters move into Syria and Iraq. These people pledged allegiance to Islamic State and the values for which that organisation stands.

It was in this context that the citizenship loss provisions were introduced. The Allegiance Act affirms that Australian citizenship is a common bond, demanding reciprocal rights and obligations of its citizens. It holds that citizens may sever that bond and repudiate their allegiance to Australia by engaging in conduct incompatible with the values shared by the Australian community. It reminds us that membership to Australian society is a privilege. The threat environment has now changed. Around 80 Australians (or former Australians) remain in Syria and Iraq. Some may now seek to resume their place in Australian society.

Each terrorism threat is unique and the environment will continue to evolve. What works to address one threat will not necessarily work for another. What is without doubt is that Australian authorities need a range of measures that enable nuanced but definitive action to protect Australia. The citizenship loss provisions are one of this suite of measures.

To date, the provisions have ensured that only those individuals who have wholly repudiated their allegiance to Australia are removed from Australian society. The provisions have helped protect the community and limited membership in that community to individuals that embrace and uphold Australian values. Ultimately, it is the cohesion, resilience, and unity of the Australian community that is our 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 if the relevant thresholds are reached, at the point in time the individual, who is a dual national, engages in the specified terrorist-related conduct. The automatic nature of the citizenship cessation, under the 'operation of law' model, creates several challenges.

- Citizenship cessation applies automatically and may impact other mechanisms, such as criminal justice processes, that can be used to manage the level of risk an individual poses to the Australian community.
- 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 of Australia to manage its broader bilateral relationships and equities can be impacted by the automatic operation of the law.

Procedural requirements that may prejudice security, defence or international relations

The Minister is required to give notice (or make reasonable attempts to do so) to the person who has ceased to be an Australian citizen under section 33AA, 35, and 35A except where the Minister has determined provision of 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 cessation 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 exercises his or her power to consider rescinding the notice and exempting a person from the effect of sections 33AA and 35 that have caused the cessation of their Australian citizenship, and
- the Minister for Home Affairs considers an individual for cessation of Australian citizenship under section 35A.

In practical terms, this means giving a person a reasonable period of notice 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 processes which facilitate the cessation or revocation of citizenship are subject to multiple safeguards in the form of independent review or oversight, and public reporting obligations.

Attachments

Attachment A – International comparison

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