

The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

- 2.1 This chapter provides an outline of the Bill as drafted, including the following provisions:
- the purpose of the Bill,
 - proposed section 33AA – renunciation by conduct,
 - proposed section 35 – service outside Australia in armed forces of an enemy country or a declared terrorist organisation,
 - proposed section 35A – conviction for terrorism offences and certain other offences,
 - proposed amendment to section 36 – children of responsible parents who cease to be citizens, and
 - proposed section 36A – no resumption of citizenship if ceases under section 33AA, 35, or 35A.
- 2.2 This chapter also provides a brief international comparison of provisions for loss or revocation of citizenship in Canada, New Zealand, the United Kingdom, the United States and France.
- 2.3 Issues arising during the inquiry in relation to these provisions are examined in subsequent chapters.

The purpose of the Bill

- 2.4 The Bill includes the following purpose clause:

This Act is enacted because 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, demonstrate that they have severed that bond and repudiated their allegiance to Australia.

- 2.5 The purpose clause is intended to provide clarity to the intention of the changes proposed in the Bill.¹
- 2.6 The purpose clause itself will not form part of the amended *Australian Citizenship Act 2007* (Citizenship Act). However, the Explanatory Memorandum states that the ‘purpose of the statutory scheme’ would be referred to in the Minister’s assessment of public interest should he or she choose to consider an exemption under proposed subsections 33AA(6), 35(5) or 35A(5) (discussed in subsequent chapters).² The purpose would also be able to be referred to by courts in any statutory interpretation.
- 2.7 In the context of the purpose clause, the Explanatory Memorandum states that the intention of the Bill is
- the protection of the community and the upholding of its values, by providing for the cessation of citizenship of persons who have, through their conduct, repudiated their allegiance to Australia. The aim of the Bill is the protection of the Australian communi[ty], rather than punishing terrorist or hostile acts.³
- 2.8 The Explanatory Memorandum describes the concept of ‘allegiance’ as ‘the obligation of a subject or citizen to their sovereign or government’, and ‘the concept of a duty that is imposed by law on citizens, which is the same for all citizens’. It notes that the ‘principle source of power for a person’s Australian citizenship ceasing is the alien’s power in section 51(xix) of the Constitution’, and that the term ‘alien’ has been found by the High Court to be a person who does not owe allegiance to Australia.⁴
- 2.9 Elsewhere, the Explanatory Memorandum states the purpose of the amendments in the Bill as being ‘to broaden the powers relating to the cessation of Australian citizenship for those persons engaging in terrorism and who are a serious threat to Australia and Australia’s interests’. It elaborates on this as follows:

Those who are citizens owe their loyalty to Australia and its people. This applies to those who acquire citizenship automatically through birth in Australia and to those who acquire it through application. Where a person is no longer loyal to Australia and its people, and engages in acts that harm

1 Explanatory Memorandum, p. 4; The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 24 June 2015, p. 7369.

2 Explanatory Memorandum, pp. 12, 16, 22.

3 Explanatory Memorandum, p. 4.

4 Explanatory Memorandum, pp. 4–5.

Australians or Australian interests, or engages in acts that are intending to harm Australian[s] or Australia's interest[s], they have severed that bond and repudiated their allegiance to Australia.

Currently under the Citizenship Act, a conviction for a specified offence is required before citizenship can be revoked. In addition, the power to revoke only arises if the offence was committed prior to the Minister giving approval for the citizenship application, or the offence was committed in relation to the person's application to become an Australian citizen. These existing revocation powers are inadequate to address the Government's concerns in relation to persons who have acted contrary to their allegiance to Australia by engaging in terrorist-related conduct.

The amendments ... are therefore necessary to provide explicit powers for the cessation of Australian citizenship in specified circumstances where a dual citizen repudiates their allegiance to Australia by engaging in terrorism-related conduct. The desired outcome of this Bill is to ensure the safety and security of Australia and its people and to ensure the community of Australian citizens is limited to those who continue to retain an allegiance to Australia.⁵

Proposed section 33AA – Renunciation by conduct

- 2.10 Under the current Citizenship Act, a dual national may only renounce their citizenship by written application to the Minister and following the approval of the Minister.⁶
- 2.11 Proposed new section 33AA would provide that a person automatically renounces their Australian citizenship if they act 'inconsistently with their allegiance to Australia' by engaging in any of the following conduct:
- (a) engaging in international terrorist activities using explosive or lethal devices;
 - (b) engaging in a terrorist act;
 - (c) providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
 - (d) directing the activities of a terrorist organisation;
 - (e) recruiting for a terrorist organisation;

⁵ Explanatory Memorandum, p. 1.

⁶ *Australian Citizenship Act 2007*, section 33.

- (f) financing terrorism;
 - (g) financing a terrorist;
 - (h) engaging in foreign incursions and recruitment.⁷
- 2.12 The proposed section is limited to persons who are nationals or citizens of another country, regardless of how they obtained their Australian citizenship (by birth or conferral).⁸
- 2.13 The Explanatory Memorandum states that the offences specified in the proposed section
- reflect the policy intention that an offence declared for the purpose of cessation ... must be a terrorism related offence where a maximum penalty of imprisonment is considerable and the offence is of a type that evidently tends to indicate that a person has acted contrary to his or her allegiance to Australia.⁹
- 2.14 The Bill provides that the 'words and expressions' used to describe the conduct in the proposed section are to 'have the same meanings' as in specified parts of the *Criminal Code Act 1995* (the Criminal Code).¹⁰ However, a criminal conviction under one of the equivalent offences in the Criminal Code would not be a requirement and the loss of citizenship would take effect immediately from the time the conduct took place.¹¹
- 2.15 The Explanatory Memorandum makes clear that the use of the words 'acting inconsistently with their allegiance to Australia' in the section is not intended to be an additional requirement on top of the requirement for the person to have engaged in the specified conduct. Rather, the words are intended to assert that 'if the person engages in the terrorist-related conduct specified in subsection 33AA(2) the person has, by their conduct, acted inconsistently with their allegiance to Australia'.¹²
- 2.16 Proposed subsection 33AA(6) provides that if the Minister 'becomes aware' that a person has engaged in the conduct resulting in loss of citizenship, he or she must give written notice to that effect 'at such a time and to such persons as the Minister considers appropriate'. Due to the proposed exception to section 39 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), there would be no requirement for the Minister to receive a formal security assessment from Australian Security

7 Proposed subsections 33AA(1)–(2).

8 Proposed subsections 33AA(1) and 33AA(4).

9 Explanatory Memorandum, p. 10.

10 Proposed subsection 33AA(3). The relevant Criminal Code offences are included in Table 2.1.

11 Proposed subsection 33AA(5).

12 Explanatory Memorandum, p. 7.

Intelligence Organisation (ASIO) as the basis of such a notice being issued.¹³

- 2.17 The Minister would have the discretion to rescind notices and exempt persons from the effect of the proposed section 'if he or she considers it to be in the public interest to do so'.¹⁴ However, the Bill makes clear that there would be no duty for the Minister to consider such an exemption.¹⁵ The exercise of the Minister's powers to give notice of the loss of citizenship or to rescind/exempt a person would not be delegable,¹⁶ would not be subject to natural justice, would not require notice or reasons to be given to the person affected,¹⁷ and would not be a legislative instrument.¹⁸
- 2.18 The Bill's application provisions indicate that proposed section 33AA would apply to Australian citizens regardless of when they became citizens, and in regard to conduct engaged in on or after the Act commenced (the day after Royal Assent).¹⁹

Proposed section 35 – Service outside Australia in armed forces of an enemy country or a declared terrorist organisation

- 2.19 The Bill proposes to replace and expand on the existing section 35 of the Citizenship Act, which currently states that a person ceases to be an Australian citizen if they are a foreign national or citizen and they serve in the armed forces of a country at war with Australia.
- 2.20 The proposed new section would expand this automatic ground for cessation of citizenship to any person who 'fights for, or is in the service of, a declared terrorist organisation'.²⁰
- 2.21 The proposed new section would also limit the conduct to fighting or service that occurs outside Australia, a limitation that does not exist in the existing section 35.
- 2.22 The Explanatory Memorandum states that the proposed new section 'builds on, adapts and modernises loss of citizenship provisions for those

13 Proposed subsection 33AA(12).

14 Proposed subsection 33AA(7).

15 Proposed subsection 33AA(8).

16 Proposed subsection 33AA(9).

17 Proposed subsection 33AA(10).

18 Proposed subsection 33AA(11).

19 Item 8(1).

20 Proposed subparagraph 35(1)(b)(ii)

fighting in a war against Australia which have been in place since 1949'.
The purpose of the provisions is

to deal with the threat caused by those who have acted in a manner contrary to their allegiance to Australia by removing them from formal membership of the Australian community.²¹

2.23 The Explanatory Memorandum further notes:

Cessation of citizenship is a very serious outcome of very serious conduct that demonstrates a person has repudiated their allegiance to Australia. Citizenship is a privilege not a right. The cessation of a person's formal membership of the Australian community is appropriate to reduce the possibility of a person engaging in acts or further acts that harm Australians or Australian interests. The cessation of Australian citizenship will also have a deterrent effect by putting radicalised persons on notice that their citizenship is in jeopardy if they engage in terrorist-related conduct contrary to their allegiance to Australia.²²

2.24 Similarly to proposed section 33AA, the loss of citizenship under section 35 is proposed to be automatic and a conviction would not be required for it to take effect. The Minister would be required to give written notice of the cessation 'at such time and to such persons as the Minister considers appropriate' and have non-compellable discretion to rescind a notice and exempt a person. The exercise of these powers would be non-delegable, not subject to natural justice, would not be a legislative instrument and a formal security assessment from ASIO would not be required.²³

2.25 'Declared terrorist organisation' is defined in the Bill as any terrorist organisation listed under subsection 102.1(1) of the Criminal Code that the responsible Minister declares in writing. There are no specified criteria that the responsible Minister would be required to consider in making such a declaration and the Minister's declaration would not be a legislative instrument.²⁴

2.26 The Bill's application provisions indicate that proposed section 35 would apply to Australian citizens regardless of when they became citizens, and in regard to fighting or service that occurred, or continued to occur, on or after the Act commenced (the day after Royal Assent).²⁵

21 Explanatory Memorandum, p. 14.

22 Explanatory Memorandum, p. 14.

23 Proposed subsections 35(2), (5)-(11).

24 Proposed subsection 35(4).

25 Items 8(2), (3).

Proposed section 35A – Conviction for terrorism offences and certain other offences

- 2.27 Proposed new section 35A of the Citizenship Act would provide that a person automatically ceases to be an Australian citizen if they are convicted of an offence under the Criminal Code or *Crimes Act 1914* (Crimes Act) that is specified in the proposed section.
- 2.28 The proposal is limited to persons who are nationals or citizens of another country, regardless of how they obtained their Australian citizenship.²⁶
- 2.29 The specified offences, and current maximum penalties, that would result in automatic cessation of citizenship for persons convicted are outlined in Table 2.1.

Table 2.1 Offences leading to loss of citizenship under proposed section 35A on conviction

Act/Provision	Offence	Maximum Penalty (Imprisonment)
Criminal Code Section 72.3	International terrorist activities using explosive or lethal devices*	Life
Criminal Code Section 80.1	Treason	Life
Criminal Code Section 80.1AA	Treason – material assisting enemies	Life
Criminal Code Section 80.2	Urging violence against the Constitution, the Government, a lawful authority of the Government, an election, or a referendum	7 years
Criminal Code Section 80.2A(1)	Urging violence against groups	7 years
Criminal Code Section 80.2B(1)	Urging violence against members of groups	7 years
Criminal Code Section 80.2C	Advocating terrorism	5 years
Criminal Code Section 91.1	Espionage	25 years
Criminal Code Section 101.1	Terrorist acts*	Life
Criminal Code Section 101.2	Providing or receiving training connected with terrorist acts*	15 or 25 years
Criminal Code Section 101.4	Possessing things connected with terrorist acts	10 or 15 years
Criminal Code Section 101.5	Collecting or making documents likely to facilitate terrorist acts	10 or 15 years
Criminal Code Section 101.6	Other acts done in preparation for, or planning, terrorist acts	Life

26 Proposed subsection 35A(1) and (4).

Criminal Code Section 102.2	Directing the activities of a terrorist organisation*	10 or 15 years
Criminal Code Section 102.3	Membership of a terrorist organisation	10 years
Criminal Code Section 102.4	Recruiting for a terrorist organisation*	15 or 25 years
Criminal Code Section 102.5	Training involving a terrorist organisation	25 years
Criminal Code Section 102.6	Getting funds to, from or for a terrorist organisation	15 or 25 years
Criminal Code Section 102.7	Providing support to a terrorist organisation	15 or 25 years
Criminal Code Section 103.1	Financing terrorism*	Life
Criminal Code Section 103.2	Financing a terrorist*	Life
Criminal Code Section 119.1	Incursions into foreign countries with intention to engage in hostile activities*	Life
Criminal Code Section 119.2	Entering or remaining in a declared area*	10 years
Criminal Code Section 119.4	Preparations for incursions into foreign countries for purposes of engaging in hostile activities*	Life
Criminal Code Section 119.5	Allowing use of buildings, vessels and aircraft to commit offences*	Life
Criminal Code Section 119.6	Recruiting persons to join organisations engaged in hostile activities against foreign governments*	25 years
Criminal Code Section 119.7	Recruiting persons to serve in or with an armed force in a foreign country*	10 years
Crimes Act Section 24AA	Treachery	Life
Crimes Act Section 24AB	Sabotage	15 years
Crimes Act Section 25	Inciting mutiny against the Queen's Forces	Life
Crimes Act Section 26	Assisting prisoners of war to escape	Life
Crimes Act Section 27(1)	Unlawful drilling	5 years
Crimes Act Section 29	Destroying or damaging Commonwealth property	10 years

* denotes conduct that would also result in automatic renunciation of citizenship under proposed section 33AA.

2.30 The Explanatory Memorandum describes the reasons for the inclusion of these particular offences as follows:

The specified offences reflect the policy intention that an offence listed for the purpose of cessation under new subsection 35A(1)

must be a terrorism-related offence where the maximum penalty is considerable. However, it is not as restricted as the offences listed in new sections 33AA and 35 as a criminal offence is required for the operation of this new section 35A so it is appropriate that the list of offences is broader. The offences are of a nature that on the face of them a person who undertakes such offences has repudiated their allegiance to Australia.²⁷

- 2.31 As with the other proposed sections described above, the Minister would be required to give written notice of the cessation 'at such time and to such persons as the Minister considers appropriate' and have non-compellable discretion to rescind a notice and exempt a person. The exercise of these powers would be non-delegable, not subject to natural justice, would not be a legislative instrument and a formal security assessment from ASIO would not be required.²⁸
- 2.32 The Bill's application provisions indicate that proposed section 35A would apply to Australian citizens regardless of when they became citizens, and in regard to convictions handed down after the Act commenced (the day after Royal Assent); regardless of when the conduct leading to the conviction occurred.²⁹

Proposed amendment to section 36 – Children of responsible parents who cease to be citizens

- 2.33 Existing section 36 of the Citizenship Act provides that when the parent of a child aged under 18 years loses his or her citizenship, and there is no remaining Australian-citizen parent responsible for the child, then the Minister may also revoke the child's citizenship. This does not apply in circumstances where the remaining parent dies (as opposed to having their citizenship revoked), or if the child would become stateless.
- 2.34 The Bill proposes to extend the existing section 36 to cover the three new grounds for loss of citizenship described above. The Bill would not otherwise alter the provision.

27 Explanatory Memorandum, p. 19.

28 Proposed subsections 35A (5)–(11).

29 Item 8(4). As part of the inquiry, the Committee has been asked to consider whether proposed section 35A should be extended to apply retrospectively with respect to convictions handed down prior to the commencement of the Act.

Proposed section 36A – No resumption of citizenship if ceases under section 33AA, 35, or 35A

- 2.35 Proposed new section 36A of the Citizenship Act would provide that a person who ceases to be an Australian citizen under any of the above clauses would never be able to obtain Australian citizenship again.
- 2.36 The Explanatory Memorandum describes the reason for this provision as follows:
- It is not appropriate for a person to regain the privileges and responsibilities of Australian citizenship if their citizenship has been ceased for something as grave as terrorist related conduct and the person has repudiated their allegiance to Australia.³⁰
- 2.37 This bar would not apply if the Minister exercised his or her discretionary powers to rescind the notice that the person's citizenship has ceased.³¹ The Explanatory Memorandum states that the bar would also not apply if the reasons for the person's citizenship ceasing were quashed by a court on review.³²

International comparisons

- 2.38 Many countries have legislation which enables citizenship to be revoked under specified circumstances. In particular, countries such as the United Kingdom and Canada have recently amended legislation relating to citizenship revocation in order to provide its application to those engaging in terrorist activities.
- 2.39 The mechanisms for citizenship revocation vary between countries according to constitutional and legislative frameworks. How Australia might frame updated citizenship revocation measures must necessarily be appropriate to the Australian Constitution and to the *Australian Citizenship Act 2007*.
- 2.40 The following section outlines citizenship revocation provisions in Canada, New Zealand, the United Kingdom, the United States and France.

30 Explanatory Memorandum, pp. 24–25.

31 See note to proposed section 36A.

32 Explanatory Memorandum, p. 25.

Canada

- 2.41 In June 2015, legislation came into force to authorise the revocation of citizenship from dual citizens (whether born in Canada or naturalized) in the following situations:
- the Minister of Citizenship and Immigration Canada has a discretion to revoke citizenship if a dual citizen has been convicted of terrorism, high treason, treason or spying with particular minimum sentences³³, and
 - the Minister can ask the Federal Court of Canada to make a declaration that a person has served as a member of an armed force or organised armed group engaged in armed conflict with Canada. Such a declaration operates as a revocation of citizenship.³⁴
- 2.42 Individuals whose citizenship has been revoked under these grounds are barred permanently from obtaining citizenship again.³⁵

New Zealand

- 2.43 The Minister of Internal Affairs may deprive a person of New Zealand citizenship if satisfied that the person is also the citizen of another country and, while aged over 18 and of full capacity, has acted in a manner contrary to the interests of New Zealand.³⁶
- 2.44 A person who has been served a notice of 'intention to deprive' may, within 28 days, appeal to the High Court for a declaration that there are insufficient grounds to justify deprivation. If the person appeals and is unsuccessful, the Minister can make an order depriving the person of citizenship. In these cases, all citizenship and passport documents are recalled, and Immigration New Zealand may begin deportation procedures.³⁷
- 2.45 The Prime Minister of New Zealand has stated that New Zealand is unlikely to amend its citizenship legislation concerning foreign fighters and those involved in terrorist activities.³⁸

33 *Citizenship Act 1977* (Canada), section 10(2).

34 *Citizenship Act 1977* (Canada), sections 10.1(2)–(3).

35 *Citizenship Act 1977* (Canada), section 22(1)(g).

36 *Citizenship Act 1977* (New Zealand), section 16.

37 Department of Immigration and Border Protection, *Submission 37.3*, p. [4ff].

38 'New Zealand will not follow Australia if it strips citizenship of dual national in Syria', *International Business Times*, 27 May 2015, <<http://www.ibtimes.com.au/new-zealand-will-not-follow-australia-if-it-strips-citizenship-dual-national-syria-1449764>>, viewed 28 August 2015. See also 'NZ could not stop dual citizen's return – Key', *Radio New Zealand News*, 25 May 2015, <<http://www.radionz.co.nz/news/political/274488/nz-could-not-stop-dual-citizen-s-return-key>>, viewed 28 August 2015.

United Kingdom

- 2.46 A British dual citizen may be deprived of their citizenship if the Secretary of State is satisfied that deprivation would be conducive to the public good.³⁹
- 2.47 However, recent amendments provide that the Secretary of State may also make an order depriving a naturalised person of British citizenship if the Secretary of State is satisfied that
- deprivation is conducive to the public good because the person has conducted himself in a manner which is seriously prejudicial to the vital interests of the UK, and
 - the Secretary of State has reasonable grounds for believing that the person is able to become a national of another country.⁴⁰

United States

- 2.48 In the United States, the 14th Amendment to the US Constitution protects citizenship rights. An individual's US citizenship cannot be revoked through legislative enactment, however a person can voluntarily perform certain expatriating acts which can lead a court to declare that the individual intended to relinquish their US citizenship. These acts are:
- obtaining naturalisation in, or taking an oath of allegiance to, a foreign state,
 - entering or serving in the armed forces of a country at war with the United States,
 - assuming or performing official duties in a foreign government, and
 - committing an act of treason or conspiracy against the United States.
- 2.49 In all cases except the last-named, the subject must be outside the United States in order to for the loss of citizenship to take effect.⁴¹

France

- 2.50 According to Article 25 of the Civil Code, an acquired French citizenship can be revoked for serious matters, such as being convicted of acts of terrorism or of crimes or offences which threaten the fundamental interest of the State.

39 *British Nationality Act 1981* (UK), sections 40(2) and 40(3).

40 *Immigration Act 2014* (UK), section 66, inserting section 40(4A) into the *British Nationality Act 1981*.

41 Department of Immigration and Border Protection, *Submission 37.3*, p. [4ff]. See also Centre for Comparative Constitutional Studies, *Submission 29*, p. 8.

- 2.51 Revocation of citizenship for non-terrorist related crimes is possible if the dual national obtained French citizenship within the ten years preceding the offence. In the case of crimes of terrorism, this period is fifteen years (due to a 2005 extension by the French Government).⁴²

42 'Ad-Hoc Query on Revoking Citizenship on Account of Involvement in Acts of Terrorism or Other Serious Crimes', *European Commission*, 25 September 2014, <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/visas/604_emn_ahq_revoking_citizenship_terrorism_25september2014_en.pdf> viewed 27 August 2015.

