



Australian Government
Department of Home Affairs

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Submission to the review of the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

Parliamentary Joint Committee on Intelligence and Security
Department of Home Affairs

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Table of Contents

Introduction	3
Current legislative framework	3
Policy intention and rationale for the Bill	4
Protecting the Australian community in an evolving threat environment	4
Maintaining the integrity of Australian citizenship	5
Summary of amendments	6
Removal of requirement for six-year term of imprisonment	6
Inclusion of offence against section 102.8 of the <i>Criminal Code</i>	6
Adjustment of threshold for ascertaining dual nationality	7
Retrospective application	7
Practical implications	8
Conclusion	9
Appendices	10
Appendix A: Terrorism offences that are not captured by the provisions	10
Appendix B: International context	11

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Introduction

The Department of Home Affairs (Home Affairs) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) review of the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (the Bill). This submission sets out the policy justification for these amendments including the domestic threat context and international comparisons, provides an overview of the current provisions in the *Australian Citizenship Act 2007* (the Citizenship Act) and how they are proposed to change, and outlines the practical impacts of these amendments. Home Affairs consulted with the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP) on this submission.

Current legislative framework

The Citizenship Act provides the legislative framework that governs Australian citizenship, including in what circumstances it is acquired, but also, in certain circumstances, how it is revoked or 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, as a result of conduct by the person that is incompatible with Australian values.

On 24 June 2015 the Government introduced the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Allegiance to Australia Bill) into Parliament. The Allegiance to Australia Bill inserted current sections 33AA, 35A, and 36A into the Citizenship Act, and repealed and replaced existing section 35. It was referred to the PJCIS for inquiry, which recommended passage subject to the implementation of 27 recommendations. The Government subsequently moved a range of amendments implementing all recommendations. The Allegiance to Australia Bill passed the Parliament on 3 December 2015, and commenced on 12 December 2015.

The purpose of the Allegiance to Australia Bill was to respond to evolving terrorism threats and address the challenges posed by dual citizens who participate in terrorism, in particular, foreign fighters. The Act inserted into the Citizenship Act provisions for the cessation of citizenship for persons, both onshore and offshore, who are involved in terrorism.

Relevantly, section 35A of the Citizenship Act provides that the Minister may determine a person ceases to be an Australian citizen if:

- they have been convicted in Australia of an offence (or offences) specified in section 35A (including a relevant terrorism offence) and;
- they have been sentenced to a total of at least 6 years' imprisonment in respect of the conviction/s and;
- they are a national or citizen of a country other than Australia at the time the Minister makes the determination and;
- 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 the public interest for them to remain an Australian citizen.

Further, these provisions also apply to any person who meets the above criteria in the 10 years prior to commencement of the Act on 12 December 2015 (i.e. a person convicted on or after 12 December 2005); however, they must be convicted and sentenced to a period of at least 10 years' imprisonment, rather than 6 years.

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Policy intention and rationale for the Bill

The Bill seeks to enhance the existing citizenship cessation provisions in section 35A of the Citizenship Act, for two key purposes:

1. First, to ensure the power of the Minister to cease Australian citizenship remains an adaptable and accessible tool to protect the Australian community in the current, constantly evolving threat environment.
2. Second, to maintain and enhance the integrity of Australian citizenship, and the privileges that attach to it.

Protecting the Australian community in an evolving threat environment

Citizenship loss is a key counter-terrorism tool

The ability to cease a person's Australian citizenship is a key part of Australia's mature and comprehensive legal and policy frameworks to address terrorism. Australia's National Counter-Terrorism Strategy takes a holistic approach that includes both preventative and responsive mechanisms. While arrest, prosecution and conviction form a critical part of this response, these criminal justice processes cannot completely eliminate the threat posed by terrorism.

It is therefore crucial that these criminal justice processes are complemented by preventative measures to address threats posed by terrorism, which may include the ongoing threat posed by offenders who have served or are serving a sentence of imprisonment. The power to cease Australian citizenship is one such preventative mechanism to address the threat of a terrorist attack on Australian soil.

The amendments in the Bill are designed to ensure that this power remains appropriately responsive and adaptive to the current threat environment—namely— the threat posed by individuals in Australia who have been convicted of a relevant terrorism offence and who have therefore demonstrated behaviour that is indicative of a repudiation of their allegiance to Australia.

Evolution of the threat environment

Since 2014, there have been seven terrorist attacks on Australian soil, and law enforcement and security agencies have disrupted a further 15 potential terrorist attacks. The terrorism threat level remains at PROBABLE, meaning credible intelligence indicates there are groups and individuals with both the intent and capability to conduct a terrorist attack in this country.

At the time section 35A (along with sections 33AA and 35) was 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. The Allegiance to Australia Bill sought to address the threats posed by those individuals primarily through the introduction of section 33AA and amendment of existing section 35 of the Citizenship Act, which provide for the automatic cessation of a dual national's Australian citizenship where they engage in specified conduct, or service outside Australia in armed forces of a country at war with Australia or with a declared terrorist organisation.

The number of Australians (and other foreign terrorist fighters) attempting to travel to the conflict zone has reduced considerably with the collapse of the self-declared caliphate of the Islamic State of Iraq and the Levant (ISIL). However, the violent ideology of Sunni Islamist terrorist groups, such as ISIL and al-Qa'ida, continues to appeal to a small number of people in Australia, and security and law enforcement agencies remain focused on stopping a terrorist attack in Australia. The terrorism threat level in Australia has remained elevated since September 2014. While the threat level has not been further raised, neither has it been reduced.

Recent events such as the Bourke Street terrorist attack on 9 November 2018, and the arrests of three men in Melbourne on 20 November 2018 thwarting an alleged planned mass-casualty attack, highlight the

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ongoing importance of robust measures to protect our community, and continued evaluation of all available measures under Australian law.

The growing number of domestic terrorism convictions also impacts Australia's threat environment. As at 3 January 2019, 58 individuals have been convicted and sentenced for Commonwealth terrorism offences in Australia since 2001. Forty-six of these individuals (just over 80% of the cohort) were sentenced in the last three years, after the commencement of the provisions in the Allegiance to Australia Bill from 12 December 2015.

These statistics also show, unfortunately, that children continue to be prosecuted for terrorism offences—an issue that has recently been considered by the Independent National Security Legislation Monitor. Six of those currently incarcerated for terrorism offences (and one individual currently before the courts) were children at the time they were charged. This aspect of the evolving threat environment has already been recognised and responded to, in part, by changes to the control order scheme in 2016 that lowered the minimum age for a control order to be sought from 16 to 14 years.

Reform is needed to address current and emerging threats

These developments highlight the need to constantly review, and amend as necessary, our suite of counter-terrorism measures, to ensure they remain responsive to the evolving threat environment. As at 3 January 2019, while 12 individuals offshore have ceased to be Australian citizens as a result of terrorism-related conduct, no individuals have had their Australian citizenship ceased under section 35A of the Citizenship Act.

The continued focus by law enforcement and security agencies on preventing and disrupting attacks in Australia highlights the need to critically examine the onshore citizenship loss provisions. The Bill will expand the cohort of offenders who the Minister may determine cease to be an Australian citizen, and give greater flexibility in determining whether an offender is a dual national. In practice, this will allow for a broader range of information to be taken into account by the Minister in order to be satisfied that the individual would not become stateless should their Australian citizenship cease. These amendments will increase the deterrence value of the provisions in relation to would-be offenders, and better address the fluid nature of the threat posed by re-engagement in violent extremist ideologies of convicted terrorists.

In particular, the increasing number of offenders, a number of whom have served, or will serve, sentences of less than 6 years' imprisonment (or 10 years' imprisonment, for those convicted prior to 12 December 2015), is now a significant feature of the security landscape. Some of these offenders will continue to pose a threat to the community at the end of their sentence. A range of measures are available to manage the risks posed by offenders at the end of their sentence, including citizenship cessation (which will be further strengthened by the measures in this Bill), continuing detention or control orders.

Sentences imposed for terrorism offences in Australia have ranged from 44 days to 44 years' imprisonment. While offenders may be subject to intervention and rehabilitation initiatives while in custody, there is no guarantee that this will result in their complete disengagement from a violent extremist ideology. Recidivism remains a risk where offenders re-adopt or re-engage in violent extremist ideologies following their release into the community.

Finally, the possible loss of Australian citizenship for committing a terrorism offence can serve as a further deterrent, assisting to prevent future terrorist activity before it occurs. The prospect of not being able to remain in the Australian community following conviction for a terrorism offence may deter would-be offenders from engaging in terrorism-related conduct.

Maintaining the integrity of Australian citizenship

Australian citizenship is a privilege that also comes with responsibilities, including to obey the law and uphold Australian values. While all persons in Australia must obey the law, Australian citizenship is founded on common values and carries with it a duty of allegiance to Australia. Committing a terrorism offence goes directly against Australia's democratic values and beliefs. Conduct such as acts in preparation for a terrorist

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act, or associating with a terrorist organisation, is inconsistent with these values and poses a serious threat to the safety and security of the community. This was noted by the PJCIS in its review of the Allegiance to Australia Bill, where it indicated it was likely the Australian community would view prior ‘terrorist-related conduct’ as ‘repugnant’, and demonstrative of an individual’s departure from the values that define Australian society.

Summary of amendments

Removal of requirement for six-year term of imprisonment

The Bill creates a distinction between ‘relevant terrorism convictions’ and ‘relevant other convictions’. It removes the requirement for an individual to be sentenced to a term of at least six years’ imprisonment in respect of a ‘relevant terrorism conviction’ only. The Bill does not amend the existing requirement for a person convicted of a ‘relevant other offence’ to be sentenced to a period of imprisonment of at least six years in respect of that offence.

Therefore, under the amendments made by the Bill, the Minister may determine that a person ceases to be an Australian citizen if they:

- a) have a ‘relevant terrorism conviction’, or
- b) have a ‘relevant other conviction’, **and** are sentenced to a period of at least six years’ imprisonment, or to periods of imprisonment that total at least six years in respect of the conviction or convictions.

A ‘relevant terrorism conviction’ is defined as a conviction for a range of specified offences in the *Criminal Code* and the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*. This expands the current list of offences to include one additional offence—section 102.8 of the *Criminal Code* (associating with a terrorist organisation).

Current section 35A of the Citizenship Act reflects a previous recommendation of the PJCIS to ensure that cessation of citizenship occurs at the discretion of the Minister (and not automatically) if the person has been convicted of a specified terrorism-related offence and sentenced to at least 6 years’ imprisonment, subject to consideration of whether their conduct demonstrates repudiation of their allegiance to Australia and the public interest. This Bill retains the Minister’s discretion to cease citizenship, and replaces the requirement for a six-year sentence of imprisonment (for relevant terrorism offences) with a requirement for a conviction only, reflective of the evolving terrorist threat. The Bill also retains the requirements for the Minister to consider whether the individual’s conduct demonstrates a repudiation of their allegiance to Australia, and the public interest more broadly.

Inclusion of offence against section 102.8 of the *Criminal Code*

The definition of ‘relevant terrorism conviction’ in the Bill includes an offence under section 102.8 of the *Criminal Code* (associating with a terrorist organisation), which is not currently captured under section 35A of the Citizenship Act.

The offence of associating with a terrorist organisation is narrowly defined and requires several elements to each be made out, including that on two or more occasions:

- the person intentionally associates with another person who is a member, director or promoter of a terrorist organisation,
- the person knows the other person is a member, director or promoter of the organisation,
- the terrorist organisation is a listed terrorist organisation under the *Criminal Code*,
- the person knows the organisation is a terrorist organisation,
- the association provides support to the terrorist organisation, and

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- the person intends that the support assist the organisation to expand or continue to exist.

The offence is carefully drafted to exclude conduct unrelated to terrorism activity. It does not capture circumstances where the association is with a close family member and relates to a matter of family or domestic concern, or takes place in the course of practicing a religion in a place used for public religious worship, or the association is only for the purpose of providing humanitarian aid or only for the purpose of providing legal advice or legal representation. Listing of a terrorist organisation under the *Criminal Code* is also subject to a range of safeguards and Parliamentary oversight.

The conduct captured by this offence is therefore similar to that of other terrorism offences that already fall within the definition of 'relevant terrorism conviction', in that it promotes support for a terrorist organisation. The Minister, in determining whether to cease an individual's Australian citizenship under amended section 35A, must continue to take into account both the severity of the person's conduct as well as the degree of threat they pose to the Australian community.

The offences included in current section 35A reflect the previous recommendation of the PJCIS that these should exclude offences that carry a maximum penalty of less than 10 years' imprisonment. This Bill remains largely consistent with this recommendation, with the exception of adding section 102.8 of the *Criminal Code* as an eligible offence. Inclusion of the offence recognises the serious nature of knowingly associating with a terrorist organisation, on multiple occasions, for the purposes of supporting its expansion or continued existence, in light of the current and evolving terrorism threat.

Offences under the control order and preventative detention order schemes in Division 104 and 105 of Part 5.3 of the *Criminal Code* continue to be excluded from the relevant terrorism offences under section 35A. Additional information on these offences is set out in Appendix B.

Adjustment of threshold for ascertaining dual nationality

New paragraph 35A(1)(b) in the Bill adjusts the threshold for determining an individual's dual nationality or citizenship, providing that the Minister must be satisfied the person "would not, if the Minister were to determine that the person ceases to be an Australian citizen, become a person who is not a national or citizen of any country." This has the effect of making the determination of an individual's dual nationality subject to the Minister's satisfaction that the person would not become stateless.

This is consistent with the existing provision in paragraph 34(3)(b) of the *Citizenship Act*, which provides the Minister must not revoke a person's citizenship on the basis of certain offences if satisfied that the person would become someone who is not a national or citizen of any country.

This adjustment is consistent with Australia's international obligations not to render a person stateless under the 1961 *Convention on the Reduction of Statelessness* (the Convention). The Convention provides that States shall not deprive people of their nationality so as to render them stateless—but permits renunciation of citizenship in circumstances where the person possesses or acquires another nationality. The Bill does not remove the requirement that a person must not be left stateless if their Australian citizenship is ceased, but adjusts the threshold for how this status is determined.

Retrospective application

Section 35A currently applies such that individuals convicted of relevant terrorism offences on or after 12 December 2005 and before 12 December 2015 must be sentenced to at least 10 years' imprisonment for the Minister to determine the cessation of their Australian citizenship. This reflects the previous recommendation of the PJCIS that section 35A be applied retrospectively.

The Bill provides that new section 35A applies to persons who became Australian citizens before, on, or after the commencement of the provision. It also specifies that section 35A, as amended, will apply as follows:

- to persons convicted of a relevant terrorism offence on or after 12 December 2005; and

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- to persons convicted of a relevant other offence on or after 12 December 2005 and before 12 December 2015, if they were sentenced to a period of at least 10 years' imprisonment.

In summary, the Bill amends the retrospective application of section 35A to apply to all individuals convicted of a relevant terrorism offence on or after 12 December 2005, regardless of the length of sentence imposed. This is consistent with the PJCIS's observation that prior 'terrorist-related conduct' was likely to be viewed by the Australian community as 'repugnant', and demonstrative of an individual's departure from the values that define Australian society.

It is now appropriate to amend the Citizenship Act to apply section 35A more broadly than the original PJCIS recommendation in light of the increasing number of incarcerated terrorism offenders and the range in the length of sentences that have been imposed.

The Bill does not make any changes to the application provisions in respect of 'relevant other convictions' in section 35A.

Practical implications

The combined effect of the Bill's amendments is to expand the cohort of terrorist offenders who the Minister may determine cease to be an Australian citizen under section 35A by virtue of their offending conduct, and offer greater flexibility to the Minister in determining whether an individual is a dual national. This will ensure that section 35A remains responsive to both current and emerging terrorist threats.

Removal of the requirement for a six-year sentence of imprisonment (in relation to a 'relevant terrorism conviction') reflects the fluid nature of the terrorist threat, as radicalised individuals may never completely disengage from violent extremist ideologies. This threat may manifest both in individuals who have been released into the community, as well as those who are currently incarcerated and will be released in the future.

Under current section 35A, the ability of the Minister to cease a person's Australian citizenship is only available if they have been sentenced to at least six years' imprisonment for their relevant terrorism offence (or ten years if the conviction occurred on or after 12 December 2005 and before 12 December 2015). Broadening the retrospective application of section 35A will bolster the Minister's ability to cease an individual's Australian citizenship where they have been convicted of a relevant terrorism offence, regardless of length of sentence. This includes persons who have been released into the community, but either continue to prescribe to a violent extremist ideology or subsequently re-adopt such an ideology, and are thus of concern to authorities.

Having regard to information currently known as at January 2019, the amendments, if passed, may give the Minister the power to cease the Australian citizenship of a further 18 individuals (five currently serving sentences, and 13 who have been released into the community) under section 35A. While the number of eligible individuals may increase, there is no change to the existing safeguards and review mechanisms available under the Citizenship Act – namely, the public interest considerations the Minister must have regard to, and the availability of judicial review following a determination by the Minister.

The amendments would also provide the Minister with greater flexibility in determining whether an individual is a national or citizen of another country, while remaining consistent with Australia's international obligations not to render an individual stateless. In practice, this will allow for a broader range of information to be taken into account by the Minister in order to be so satisfied.

More generally, the amendments will not only provide greater flexibility in the application of the Minister's discretionary power to cease Australian citizenship under section 35A, but may also provide additional deterrence. While the cessation of Australian citizenship is not a punitive measure, the removal of the requirement for a minimum term of imprisonment, combined with the inclusion of section 102.8 as a relevant terrorism offence, may serve as a further deterrent—alongside the threat of prosecution and imprisonment—to assist in preventing future terrorist activity before it occurs.

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Conclusion

The Bill seeks to enhance the scope and operation of Australia's citizenship loss legislation to keep the community safe and uphold the integrity of Australian citizenship, as well as the privileges that attach to it. The amendments respond to the evolving threat environment by recognising the fluid nature of individuals' adherence to extremist ideology, and acknowledging the need for a variety of different mechanisms to protect the community from individuals convicted of terrorism offences, including those released into the community following completion of their prison sentence.

Removing the requirement for a six-year sentence of imprisonment, expanding section 35A to include offences against section 102.8 of the *Criminal Code*, adjusting the threshold for determining dual nationality, and retrospectively applying these provisions is key to ensuring that cessation of Australian citizenship is a reasonably adapted and fit-for-purpose tool to manage the risk of those individuals who are currently serving sentences in Australia for terrorism offences (or are convicted in the future), or who have been released into the community.

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Appendices

Appendix A: Terrorism offences that are not captured by the provisions

The amended definition of ‘relevant terrorism conviction’ will not capture every offender convicted of a terrorism-related offence.

A terrorism offence, as defined in the *Crimes Act 1914*, means:

- (a) an offence against Subdivision A of Division 72 of the *Criminal Code*; or
- (aa) an offence against Subdivision B of Division 80 of the *Criminal Code*; or
- (b) an offence against Part 5.3 or 5.5 of the *Criminal Code*; or
- (c) an offence against either of the following provisions of the *Charter of the United Nations Act 1945*:
 - (i) Part 4 of that Act;
 - (ii) Part 5 of that Act, to the extent that it relates to the *Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008*.

Offences against Divisions 104 and 105 of the *Criminal Code*

Offences against Division 104 and Division 105 of Part 5.3 of the *Criminal Code* are not captured by the definition of ‘relevant terrorism conviction’. This recognises the fact that offences against Divisions 104 and 105 (control orders and preventative detention orders, respectively), although related to terrorism, are offences concerned with breaching protective orders, and would generally not be considered to demonstrate an individual’s repudiation of allegiance to Australia in the same way as other terrorism offences (for example, acts in preparation for a terrorist act, or providing support to a terrorist organisation).

Offences against Divisions 104 and 105 include interfering with a tracking device (section 104.27A) and disclosure offences for individuals, lawyers, and parents/guardians (section 105.41). While these provisions appropriately criminalise such conduct, the character of these offences can be distinguished from other terrorism offences in the *Criminal Code* that clearly demonstrate an individual’s support for terrorist acts and terrorist organisations—posing a distinct risk to the safety and security of Australia and its interests.

Offences against the *Charter of the United Nations Act 1945*,

Similarly, offences under the *Charter of the United Nations Act 1945*, including dealing with freezable assets, giving an asset to a proscribed person or entity, and offences relating to UN sanctions, are not captured by the definition of ‘relevant terrorism conviction’. These offences are also the only terrorism offences where an individual may be liable to a fine, rather than (or in addition to), a sentence of imprisonment, which distinguishes them from other terrorism offences in the *Criminal Code*.

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Appendix B: International context

The majority of Australia's Five Eyes partners also provide for the cessation of citizenship based on national security grounds. Table 1 provides a brief overview of publicly available information on the citizenship cessation provisions for the United Kingdom (UK), United States (US), Canada, and New Zealand.

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Table 1: Comparison of Five Eyes citizenship cessation provisions

Country	Legislation	Decision maker	Threshold - conduct	Threshold – dual nationality	Use of provisions
Canada			N/A – the <i>Strengthening Canadian Citizenship Act 2014 (C-24)</i> was repealed by <i>The Act to amend the Citizenship Act and to make consequential amendments to other Acts 2017 (C-6)</i>		
New Zealand	<u>Citizenship Act 1977</u>	Minister of Internal Affairs (described as the Minister)	Sections 16(a) and (b) provide that the Minister may, by order, deprive a person of their New Zealand citizenship if the Minister is satisfied they have acquired another citizenship, and “acted in a manner that is contrary to the interests of New Zealand” (section 16(a)), or “voluntarily exercised any of the privileges or performed any of the duties of another nationality or citizenship possessed by him in a manner that is contrary to the interests of New Zealand ” (section 16(b)).	Sections 16(a) and (b) provide that the person must have either “ acquired the nationality or citizenship of another country by any voluntary and formal act ” (section 16(a)), or have another nationality or citizenship possessed at the time when they voluntarily exercised any privileges or performed any duties of the other citizenship in a manner that is contrary to the interests of New Zealand (section 16(b)).”	There is no publicly available information on the use of these provisions.
United Kingdom	<u>British Nationality Act 1981</u>	Home Secretary (described as the Secretary of State)	Section 40(2) provides that the Home Secretary “may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.”	Section 40(4A) provides that the Home Secretary must not make an order to deprive a person of their citizenship if it would render them stateless. This does not prevent the Home Secretary from making an order if: <ul style="list-style-type: none"> The citizenship status results from the person’s naturalisation 	From 2006-2015, the Home Secretary made 36 citizenship deprivation orders under section 40(2). ¹

¹ Letter from UK Home Office to Mr Colin Yeo, dated 26 February 2016 (accessed 18 December 2018)

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- The Home Secretary is satisfied that the person has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, and
- The Home Secretary has reasonable grounds for believing the person is able to become a national of another country or territory.

United States	Immigration And Naturalization Act 1952 / US Code	Judicial process – either civil or criminal proceedings depending on conduct	<p><u>Civil proceedings</u></p> <p>A person who illegally procured US nationality may be subject to civil denaturalization under 8 U.S.C 1451 (revocation of naturalization).</p> <p>Under 8 U.S.C 1481, an adult may automatically lose their US citizenship in cases where they voluntarily (with the intention of relinquishing US nationality):</p> <ul style="list-style-type: none"> • obtain naturalization in, or takes an oath of allegiance to a foreign state • enter or serve in the armed forces of a country at war with the US 	No requirement to establish dual nationality.	Between 1990 and 2017, the Department of Justice filed 305 denaturalization cases. ²
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² National Immigration Forum 2018, *Fact Sheet on Denaturalization*, viewed 18 December 2018, <https://immigrationforum.org/article/fact-sheet-on-denaturalization/>

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- assume or perform official duties in a foreign government, or
- commit an act of treason or conspiracy against the US.

Criminal Proceedings

A person may be subject to criminal denaturalization if they engage in 'naturalization fraud' under 18 U.S.C section 1425.

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