



**Australian Government**  
**Department of Home Affairs**



# **Department of Home Affairs submission to the Review of Subdivision C of Division 3 of Part 2 of the Australian Citizenship Act 2007 (citizenship cessation determinations)**

Parliamentary Joint Committee on Intelligence and Security

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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 (PJCIS) review of the amendments made by the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023 (the Bill).

The purpose of this submission is to provide the PJCIS with an overview of the operation of the new citizenship cessation provisions introduced by the *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (Cth) (the Citizenship Repudiation Act), as well as the intention and effectiveness of citizenship cessation laws in promoting the value and integrity of Australian citizenship and contributing to the protection of the Australian community.

Australia remains a potential terrorist target, with the current terrorism threat level at POSSIBLE. In their 2023 Annual Threat Assessment, the Director-General of Security noted that espionage and foreign interference are now ASIO's principal security concern.

The threats facing Australia are more serious and sophisticated than ever before, and it is important that Australia's laws are robust and equipped to adequately address these threats.

There are a range of measures available to the Australian Government to effectively manage the threats posed to the Australian community by serious offences, including terrorism, treason, espionage and foreign interference. The Citizenship Repudiation Act is a legislative scheme that provides an appropriate mechanism to deal with dual Australian citizens who have committed crimes that are so serious and so significant that they demonstrate the repudiation of their allegiance to Australia.

## Citizenship cessation in Australia

The legal framework for Australian citizenship is based on an exchange between the State and the citizen involving reciprocal rights and obligations, namely a 'common bond'. Certain serious and significant conduct can sever that common bond and, in extreme cases, represent a repudiation of a person's allegiance to the State. In these cases, a citizenship cessation regime is required to uphold the integrity of Australian citizenship and represents the strongest possible response to conduct which constitutes repudiation of a person's allegiance to Australia.

In 2015, terrorism-related citizenship cessation provisions were enacted in the *Australian Citizenship Act 2007* (Citizenship Act) for the first time, in response to the threat that foreign terrorist fighters and convicted terrorists presented to Australia and its interests. The intention of the legislation was to remove from the Australian community those dual Australian citizens who had, by their own intentional actions, engaged in terrorism related-conduct and as such repudiated their allegiance to Australia.

## Previous citizenship cessation legislation

Cessation of Australian citizenship on terrorism-related grounds was first introduced in the Citizenship Act by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*.

In 2018, the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* was introduced and expanded the existing terrorism related grounds in which a person's Australian citizenship could be cancelled.

In 2019, the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* was referred to the Independent National Security Legislation Monitor (INSLM).

The INSLM reviewed the operation, effectiveness and implications of the terrorism-related citizenship cessation provisions included in the Citizenship Act. The recommendations of this review lead to the citizenship cessation provisions of the time being repealed and replaced in 2020 by a Ministerial Discretion model, through the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020*, which was part of a suite of measures for the management of persons of counter-terrorism interest.

The 2020 legislation recognised and protected Australia's unity and cohesion, and noted that behaviour that harms or seeks to harm our community, whether in Australia or offshore, is in clear opposition to the common bond and shared values that underpin membership of the Australian community.

Under the 2020 legislation, section 36B of the Citizenship Act allowed the Minister for Home Affairs (the Minister) to make a determination that a dual national's Australian citizenship ceased where certain preconditions were met, including that the person had engaged in conduct that demonstrated the person repudiated their allegiance to Australia, and that it would not be in the public interest for the person to remain an Australian citizen.

Section 36D of the 2020 legislation allowed the Minister to make a determination that a dual national's Australian citizenship ceased in circumstances where:

- the person had been convicted of a specific offence or offences
- the person had been sentenced to a period of imprisonment of at least 3 years or periods that totalled at least 3 years
- the Minister was satisfied the conduct of the person to which the conviction related demonstrated they had repudiated their allegiance to Australia
- it would not be in the public interest for the person to remain an Australian citizen.

### **High Court challenges – *Alexander* and *Benbrika***

The High Court of Australia (the High Court) found that sections 36B and 36D of the Citizenship Act were inconsistent with Chapter III of the Constitution and therefore invalid in *Alexander v Minister for Home Affairs [2022] HCA 19 (Alexander)* and *Benbrika v Minister for Home Affairs [2023] HCA 33 (Benbrika)* respectively.

In invalidating sections 36B and 36D of the Citizenship Act, the High Court held that the provisions reposed on the Minister the exclusively judicial function of adjudging and punishing criminal guilt. The High Court found these provisions were contrary to Chapter III of the Constitution, which provides that the judicial power of the Commonwealth is vested in the courts, rather than the executive branch of the Commonwealth.

The practical implications of the High Court decisions in *Alexander* and *Benbrika* were that the Australian citizenship of those whose Australian citizenship had purportedly ceased, pursuant to Ministerial determinations made under sections 36B and 36D of the Citizenship Act, remained Australian citizens. This included Mr Alexander and Mr Benbrika.

## **A new citizenship cessation regime**

The Australian Government considers that a citizenship cessation regime is reasonable and necessary to uphold the integrity of Australian citizenship, and represents the strongest possible response to conduct which constitutes repudiation of a person's allegiance to Australia. Removal of a person's access to the benefits of Australian citizenship, where the person has repudiated their allegiance to Australia by voluntary conduct which led to conviction, achieves the legitimate purpose of protecting the Australian community. Other countries, including the United Kingdom, New Zealand, Canada and the United States, have schemes in place where citizenship can be revoked or lost in certain circumstances.

The Citizenship Repudiation Act, which received Royal Assent on 7 December 2023, amended the Citizenship Act and other Commonwealth Acts to repeal invalid provisions and establish a revised citizenship cessation regime to appropriately address the implications of the High Court's judgments in *Alexander* and *Benbrika*. Under the Citizenship Repudiation Act, the power to make a citizenship cessation order is vested in the courts and is an appropriate exercise of judicial, rather than executive, power.

The new provisions provide that – upon application by the Minister – a court may, as part of sentencing the person to such a period or periods of imprisonment, also order at that time that the person ceases to be an Australian citizen.

## ***Australian Citizenship Amendment (Citizenship Repudiation) Act 2023***

### **Operation of the Citizenship Repudiation Act**

The Citizenship Repudiation Act amends the Citizenship Act and other Commonwealth Acts to repeal the invalid provisions and establish a revised citizenship cessation regime that appropriately addresses the implications of the High Court's judgements in *Alexander* and *Benbrika*.

This new citizenship cessation regime empowers the Minister to make an application to a court, enlivening the court's discretionary power, to make an order to be made to cease a dual citizen's Australian citizenship, where the person has been convicted of one or more specified offences. The application will be lodged in the jurisdiction in which the matter is being heard, and must be made before or after the person is convicted, but must be made before the person is sentenced. The Minister must give the person written notice of the application as soon as practicable after the application is made. The application must also only be heard by the court after the person has been convicted of one or more serious offences, and must not be made or referred to in the presence of the jury. A citizenship cessation order may be made regardless of how a person acquired their Australian citizenship, and the Minister must consult the Minister for Foreign Affairs before making an application.

Serious offences captured by the Citizenship Repudiation Act are provided under the *Criminal Code Act 1995* (Criminal Code) and include:

- a provision of Subdivision A of Division 72 of the Criminal Code (explosives and lethal devices)
- a provision of Subdivision B of Division 80 of the Criminal Code (treason)
- a provision of Subdivision B of Division 83 of the Criminal Code (advocating mutiny)
- a provision of Division 91 of the Criminal Code (espionage)
- a provision of Division 92 of the Criminal Code (foreign interference)
- a provision of Part 5.3 of the Criminal Code (terrorism), other than the following:
  - section 102.8
  - Division 104
  - Division 105
  - section 105A.7D
  - section 105A.18B.
- a provision of Part 5.5 of the Criminal Code (foreign incursions and recruitment).

The above serious offences were identified as appropriate to attract the significant penalty of citizenship cessation as they are acts that are inherently tied to the repudiation of a person's allegiance to Australia and Australian values.

### **Matters for determination by the court**

For the court to consider a citizenship cessation application, it is a requirement for the person to have been convicted of a serious offence or serious offences, and a period or periods of imprisonment of at least three years for the relevant conviction must have been imposed by the court.



There are a number of matters that the court must determine when deciding, upon application by the Minister, to make a citizenship cessation order. Before making a citizenship cessation order, the court must be satisfied of each of the following matters:

- the person is aged 14 years or over
- the person is a dual Australian citizen
- the person's conduct to which the conviction or convictions relate is so serious and significant that it demonstrates that the person has repudiated their allegiance to Australia.

In deciding whether the court is satisfied a person's conduct is so serious and significant that it demonstrates they have repudiated their allegiance to Australia, the court must have regard to the following matters:

- whether the conduct to which the conviction or convictions relate demonstrates a repudiation of the values, democratic beliefs, rights and liberties that underpin Australian society
- the degree, duration or scale of the person's commitment to, or involvement in, the conduct to which the conviction or convictions relate
- the intended scale of the conduct to which the conviction or convictions relate
- the actual impact of the conduct to which the conviction or convictions relate
- whether the conduct to which the conviction or convictions relate caused, or was intended to cause, harm to human life or a loss of human life.

A three year single or aggregate term of imprisonment for specified serious offences, amongst other pre-requisites, is the threshold required allow the court to make a citizenship cessation order.

An application for citizenship cessation may be made for defendants over the age of 14 years, which is above the current minimum age of criminal responsibility for Commonwealth offences. Where a minor is convicted of a serious offence, the Citizenship Repudiation Act requires the court to balance the best interests of the child with the protection of the Australian community in determining whether to make a citizenship cessation order. If the defendant has any dependent children in Australia, the court must have regard to the best interests of the dependent children. The court may consider any other matters which it deems relevant to the exercise of its discretion to make an order to cease the Australian citizenship of a person under 18 years of age.

A court must not make a citizenship cessation order if the court is satisfied that the person would become stateless. Additionally, the court must have regard to the defendant's connection to the other country of which the person is a national or citizen.

## Repudiation of allegiance

A key consideration of the Citizenship Repudiation Act is that, in order for a citizenship cessation order to be made, a person must have engaged in conduct to which the conviction relates that is so serious and so significant that it demonstrates the repudiation of their allegiance to Australia.

In *Alexander*, the High Court noted that "section 44(i) of the Australian Constitution itself expressly acknowledges that allegiance may be an integral aspect of citizenship" and that "allegiance is a useful gauge of the existence of the bonds of citizenship". In *Benbrika*, the majority of the High Court expressly observed that the case was a 'sequel' to *Alexander*, given the commonalities between sections 36B and 36D of the Citizenship Act.

Section 36A of the Citizenship Act, which outlines the purpose of the citizenship cessation provisions, provides that:

*[...] 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.*

Repudiation is characterised by specific conduct to which serious convictions captured by the Citizenship Repudiation Act relate, that is so serious and so significant that it demonstrates the repudiation of a person's allegiance to Australia.

Conduct of this nature which is voluntarily undertaken might be so incompatible with the values of the Australian people as to be seen to be incompatible with continued membership of the Commonwealth, and therefore be interpreted as repudiation that membership. The offences outlined in the Citizenship Repudiation Act place Australian interests at risk. These offences, which include terrorism, espionage and foreign interference, are incompatible with the shared values of Australian society and may be so serious and significant that they demonstrate a repudiation of allegiance and a severance of the offender's bond to Australia.

### **Matters to have regard to when considering whether conduct was so serious and significant that it demonstrates repudiation of allegiance**

When considering whether the person has engaged in conduct that demonstrates they have repudiated their allegiance to Australia, the factors the court must consider are a non-exhaustive list and the court may have regard to other matters relevant to the circumstances of the case, including any mitigating factors.

In considering whether a person has demonstrated a repudiation of the values, democratic beliefs, rights and liberties that underpin Australian society the court may consider the responsibilities of an Australian citizen which are broadly but succinctly captured in the Australian Citizenship Pledge at Schedule 1 to the Citizenship Act:

*[...] I pledge my loyalty to Australia and its people; whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey.*

The degree, duration or scale of the person's commitment to or involvement in the conduct are considerations bearing upon the objective gravity of the person's conduct. This factor envisages that the court may consider applying different weight to an individual's circumstances and context of their involvement in or support of the relevant conduct – for example, looking beyond a person's membership in a terrorist organisation to their seniority in that organisation, or the role that the person played in coordinating or orchestrating the particular conduct.

The intended scale of the conduct includes circumstances where the relevant conduct was either partly or wholly disrupted through successful law enforcement and other intervention, and therefore the intended outcome is a defining feature, rather than the actual outcome. This factor may also be a relevant consideration in circumstances where the actual impact surpasses the intended impact (such as where the intention was to cause damage to property or critical infrastructure, but eventuated in loss of human life).

The actual impact of the conduct is considered to be a relevant factor, and demonstrative of conduct that signifies the person is opposed to Australia, or to Australia's interests, values, democratic beliefs, rights or liberties.

The duration of the sentence of imprisonment to be imposed treats the sentence concurrently being imposed for the specific conduct as a proxy for the seriousness of the conduct. A sentence that is towards the outer limit of the maximum sentence indicates of the seriousness of the conduct.

## **Other Commonwealth legislation amended by the Act**

### ***Intelligence Services Legislation Act 2001***

Amendments made under the Citizenship Repudiation Act to the *Intelligence Services Act 2001*, provide that after the INSLM completes its review as outlined above, the PJCIS may resolve to also consider the operation, effectiveness and implications of the amendments.

### ***Independent National Security Legislation Monitor Act 2010***

Amendments made under the Citizenship Repudiation Act to the *Independent National Security Legislation Monitor Act 2010* (Cth) require the INSLM to review the operation, effectiveness and implications of the amendments as soon as practicable after the end of the three-year period from the commencement of the provisions.

Following this review, under amendments to the *Intelligence Services Act 2001* (Cth), the PJCIS may resolve to also consider the operation, effectiveness and implications of the amendments under the Citizenship Repudiation Act.

### ***Surveillance Devices Act 2004***

Amendments made under the Citizenship Repudiation Act to the *Surveillance Devices Act 2004* provide that protected information may be used, recorded, communicated, published or admitted in evidence if it is necessary to do for the performance of a function or duty, or the exercise of a power, by a person, court or other body under, or in relation to a matter arising under section 36C of the Citizenship Act. Section 36C of the Citizenship Act relates to the criteria that apply to the making of a citizenship cessation order.

## **Safeguards**

The Citizenship Repudiation Act includes a range of safeguards, similar to other counter-terrorism and national security laws. The legislation appropriately addresses the implications of *Alexander* and *Benbrika*, by providing that a citizenship cessation order can only be made by a court of law. This affords a clear degree of transparency, accountability and scrutiny of citizenship cessation matters through judicial proceedings, and appropriately reposes the punishment of criminal guilt in the judiciary, rather than the executive. The Minister must also consult with the Foreign Affairs Minister before making an application to the court.

A citizenship cessation order can only be made by a court, and the defendant in the matter will be afforded the procedural fairness that is available in all judicial proceedings. This includes the right to make submissions on sentencing following a conviction, and the right to appeal the making of a citizenship cessation order. The defendant may appeal a conviction or sentence, including a citizenship cessation order made by a court in the usual judicial process.

The Minister is one party to a citizenship cessation application, and must act in accordance with relevant state and territory judicial procedures to ensure the application meets the requisite standard for the court to make a decision. The defendant, as the other party to the application, can make submissions against the making of the order. Ultimately, the decision to make a citizenship cessation order is one for judicial discretion, in line with legislated criteria in the Citizenship Repudiation Act.

The offences for which an application for a citizenship cessation order may be made is limited to serious offences that have a clear nexus to the repudiation of a citizen's responsibilities to the State, and where the conduct of the person is incompatible with the values of Australian citizenship.

In using its discretionary power to make a citizenship cessation order, the court must have regard to the best interests of the child if the person is under 18; and, if the person has any dependants, the court must have regard to the best interests of those children. Additionally, the court must have regard to the defendant's connection to the other country of which the person is a national or citizen.

The Citizenship Repudiation Act also requires the INSLM to review the operation, effectiveness and implications of the amendments as soon as practicable after the end of the three-year period of the commencement of the provisions. Following this review, the PJCIS may also consider the operation, effectiveness and implications of the legislation. The Citizenship Repudiation Act also requires the Minister to table a report in each House of the Parliament every 12-months, that sets out the number of citizenship cessation applications that have been made to a court.



## Conclusion

The Citizenship Repudiation Act appropriately addresses the implications of the High Court's judgements in *Alexander* and *Benbrika*, and introduces a revised citizenship cessation regime that is in accordance with constitutional limits. It forms an important part of Australia's robust and wide-ranging national security legislative framework, and provides measures to effectively manage the threats posed to the Australian community by conduct that is so repugnant to Australia's interests and values that it elicits the strongest possible response, which is removing the offender's access to the benefits of Australian citizenship.

The Citizenship Repudiation Act implements a regime that reposes, as appropriate, the punishment of criminal guilt in the Judiciary, rather than the executive. This affords a clear degree of transparency, accountability and scrutiny of citizenship cessation matters through judicial proceedings, and reflects Chapter III of the Australian Constitution.

As of 8 February 2024, the Minister has not yet made an application for citizenship cessation under the new provisions introduced by the Citizenship Repudiation Act. The Department continues to engage with key policy and operational stakeholders to effectively implement the new citizenship cessation regime and ensure that it is applied fairly and appropriately to identified cases.