2013-2014-2015

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

AUSTRALIAN CITIZENSHIP AMENDMENT (ALLEGIANCE TO AUSTRALIA) BILL 2015

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Border Protection, the Hon. Peter Dutton MP)

THIS EXPLANATORY MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED
AUSTRALIAN CITIZENSHIP AMENDMENT (ALLEGIANCE TO AUSTRALIA) BILL 2015

OUTLINE

On 23 February 2015, the Prime Minister delivered his National Security Statement outlining the Government’s response to the Review of Australia’s Counter-Terrorism Machinery for a Safer Australia (‘the Review’). The Review found that the terrorist threat in Australia is rising, specifically:

- the number of foreign fighters is increasing;
- the number of known sympathisers and supporters of extremists is increasing; and
- the number of potential terrorists is rising.

The Government is taking a multi-faceted approach to countering these threats to national security. This includes implementing the Review’s recommendations to strengthen the coordination of agencies, introduce initiatives to counter violent extremism and manage the return of foreign fighters, and implement measures to improve the community understanding of the threat level.

As part of the response, the Government is also amending the Australian Citizenship Act 2007 (the Citizenship Act) 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.

As the basic requisite for participation in and adherence to the values and institutions of Australia’s secular democracy, citizenship does not simply bestow privileges or rights, but entails fundamental responsibilities. As set out in the preamble to the Citizenship Act, Australian citizenship gives full and formal membership of the Australian community and is a common bond, involving reciprocal rights and obligations, uniting all Australians while respecting their diversity. 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 Australians or Australian interests, or engages in acts that are intending to harm Australians or Australia’s interest, 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 Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Bill) was introduced in the House of Representatives on 24 June 2015. The Bill was referred to the Parliamentary Joint Committee for Intelligence and Security (the Committee) on the same day for inquiry and report. The Committee tabled its report on 4 September 2015.

The Committee made 27 recommendations for amendment to the Bill and Explanatory Memorandum. Government amendments to the Bill, Revised EH190, and Explanatory Memorandum implement the Committee’s recommendations to the fullest extent possible.

The amended Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the amended Bill) is 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 the amended Bill 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.

The amended Bill 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.

“Allegiance” is the legal concept referred to by the High Court in *Singh v Commonwealth* (2004) 209 ALR 355 and *Koroitamana v Commonwealth* (2006) 227 CLR 31. The ordinary meaning of “allegiance” is (relevantly) “the obligation of a subject or citizen to their sovereign or government; duty owed to a sovereign or state” (Macquarie Dictionary, 5th ed (2009)). Allegiance is the concept of a duty that is imposed by law on citizens, which is the same for all citizens. A citizen’s duty of allegiance is not created by the Citizenship Act, but is rather recognised by it.

The principal source of power for a person’s Australian citizenship ceasing is the alien’s power in section 51(xix) of the Constitution. The concept of ‘allegiance’ is central to the constitutional term ‘alien.’ The High Court judgement in *Koroitamana* demonstrates that an alien is a person who does not owe allegiance to Australia.

The amended Bill amends the Citizenship Act to:

- insert a ‘purpose clause’ setting out the fundamental principles upon which the amendments are based;
- outline the circumstances in which a dual citizen ceases to be an Australian citizen through their engagement in terrorism-related activities;
- outline the circumstances in which the Minister may exempt a person from the operation of the amended Bill;
- provide for reporting on and monitoring of the operation of the arrangements in the amended Bill;
- provide for the protection of sensitive or prejudicial information in relation to that reporting and monitoring; and
- related matters.

In particular, the amended Bill introduces three new ways in which a person, who is a national or citizen of a country other than Australia, can cease to be an Australian citizen:

- the person, aged 14 years or older, renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct, where the conduct was engaged in outside Australia or the person left Australia before being charged and brought to trial for the conduct;
- the person, aged 14 years or older, ceases to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation. The Minister may, by legislative instrument, declare a declared terrorist organisation. This legislative instrument is subject to strict oversight;
the Minister may determine in writing that a person ceases to be an Australia citizen because the person has been convicted of a specified terrorist-related offence with at least 6 years of imprisonment (or to periods of imprisonment that total at least 6 years).

The proposed amendments are intended to capture those dual citizens who, by acting against the interests of Australia by choosing to engage in terrorism, have by this conduct repudiated their allegiance to Australia, thereby renouncing their Australian citizenship.

The amendments in the amended Bill:

- apply to a person who is an Australian citizen regardless of how the person became an Australian citizen, including a person who became an Australian citizen upon the person’s birth;
- will not result in a person becoming stateless. The amended Bill only applies to persons who are a national or citizen of a country other than Australia, that is, dual citizens, and who would therefore not be rendered stateless if their Australian citizenship were to cease;
- prevent a person from re-obtaining Australian citizenship where they have ceased to be an Australian citizen under the three new provisions providing for citizenship to cease (as outlined above). The person can never become an Australian citizen again unless the Minister exempts the person from operation of the relevant cessation provision;
- require the Minister to give written notice to the person (or make reasonable attempts to do so) regarding the loss of citizenship as soon as practicable, except where the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia or Australian law enforcement operations. The notice must include a basic description of that conduct and the person’s rights of review; and
- authorise the Minister to consider rescinding the written notice and exempting a person from loss of their Australian citizenship, having regard to specific factors.

FINANCIAL IMPACT STATEMENT

The financial impact of the amended Bill is low. Any costs will be met from within existing resources of the Department of Immigration and Border Protection.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this amended Bill and assesses that the amendments are compatible with Australia’s human rights obligations. A copy of the Statement of Compatibility with Human Rights is at Attachment A.
NOTES ON INDIVIDUAL CLAUSES

Clause 1  Short title

1. Clause 1 provides that this Act may be cited as the Australian Citizenship Amendment (Allegiance to Australia) Act 2015.

Clause 2  Commencement

2. Subclause 2(1) of the Bill provides that each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

3. Table item 1 provides that the whole of this Act commences on the day after this Act receives the Royal Assent.

4. The note to the table provides that this table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

5. Subclause 2(2) of the Bill provides that any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act. There are currently no details in column 3.

Clause 3  Schedules

6. This clause provides that legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Clause 4  Purpose of this Act

7. This clause provides that the 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.

8. The purpose of this clause is to provide clarity for the amendments in the Bill. The clause confirms the intention of the amendments in the Bill, that 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 communication, rather than punishing terrorist or hostile acts.

sovereign or government; duty owed to a sovereign or state” (Macquarie Dictionary, 5th ed (2009)). Allegiance is the concept of a duty that is imposed by law on citizens, which is the same for all citizens. A citizen’s duty of allegiance is not created by the Citizenship Act, but is rather recognised by it.

10. The principal source of power for a person’s Australian citizenship ceasing is the alien’s power in section 51(xix) of the Constitution. The concept of ‘allegiance’ is central to the constitutional term ‘alien.’ The High Court judgement in Koroitamana demonstrates that an alien is a person who does not owe allegiance to Australia.
SCHEDULE 1- MAIN AMENDMENTS

Australian Citizenship Act 2007

11. This amendment omits Schedule 1 of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 as introduced in the House of Representatives on 24 June 2015 and substitutes a new Schedule 1 and Schedule 2 to the Bill (‘the amended Bill’).

1 Section 32A

12. This item omits:

- you serve in the armed forces of a country at war with Australia: see section 35; or

and substitutes:

- you engage in various kinds of conduct inconsistent with allegiance to Australia: see sections 33AA, 35 and 35A; or

in the simplified outline in section 32A of Division 3 of Part 2 of the Citizenship Act.

13. This is a consequential amendment to reflect new sections 33AA, 35, and 35A in the simplified outline for Division 3 of Part 2 of the Citizenship Act. New section 33AA provides for renunciation of Australian citizenship if a person acts inconsistently with their allegiance to Australia due to engaging in specified terrorist related conduct. New section 35 provides for cessation of Australian citizenship where a person serves in the armed forces of a country at war with Australia, or fights for, or is in the service of, a terrorist organisation. New section 35A provides for the cessation of citizenship where a person is convicted for treason, terrorism or foreign incursion or recruitment etc.

2 Section 33 (heading)

14. This item repeals the heading and substitutes:

‘33 Renunciation by application’

15. This is a consequential amendment to reflect the inclusion of new section 33AA which provides for renunciation of Australian citizenship by conduct.

3 After section 33

This amendment inserts new section 33AA into the amended Bill. This amendment implements Recommendations 1, 2, 11, 12, 13, 14, 16, 19 and 20 of the Committee report.
Section 33AA - Renunciation by conduct

Renunciation and cessation of citizenship

16. New subsection 33AA(1) provides that a person aged 14 years and older who is a national or citizen of a country other than Australia renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in conduct specified in subsection 33AA(2).

17. Note 1 to new subsection 33AA(1) provides that the Minister may, in writing, exempt the person from the effect of section 33AA in relation to certain matters: see subsection 33AA(14).

18. Note 2 to new subsection 33AA(1) provides that this section does not apply to conduct of Australian law enforcement or intelligence bodies, or to conduct in the course of certain duties to the Commonwealth (see section 35AB).

19. New subsection 33AA(2) provides that subject to subsections 33AA(3) to 33AA(5), subsection 33AA(1) applies to the following conduct:

- engaging in international terrorist activities using explosive or lethal devices;
- engaging in a terrorist act;
- providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
- directing the activities of a terrorist organisation;
- recruiting for a terrorist organisation;
- financing terrorism;
- financing a terrorist;
- engaging in foreign incursions and recruitment.

20. New subsections 33AA(1) and 33AA(2) operate so that a person, aged 14 years or older, can by their own conduct cease to be an Australian citizen. The subsections are automatic so that if a person undertakes one of the terrorist-related conducts specified in subsection 33AA(2), and they meet the relevant intent specified in new subsection 33AA(3) to (5), they cease to be an Australian citizen as a result of this conduct.

21. The words ‘…the person acts inconsistently with their allegiance to Australia…’ in new subsection 33AA(1) are not an additional requirement that sits on top of the requirement that the person must have engaged in conduct specified in subsection 33AA(2). The words are in fact an assertion that if a person engages in the terrorist-related conduct specified in subsection 33AA(2), and they meet the relevant intent specified in new subsection 33AA(3) to (5), the person has, by their conduct, acted inconsistently with their allegiance to Australia. By acting in a manner contrary to their allegiance to Australia, the person has chosen to step outside of the formal Australian community.

22. The conduct must have occurred when the person was an Australian citizen. This is because the person owes an allegiance to Australia at all times they are an Australian citizen. A
person cannot repudiate allegiance to Australia if the person does not owe the allegiance at
the time of the conduct.

23. The operation of section 33AA is limited to persons who are nationals or citizens of a country
other than Australia. The purpose of this amendment is to ensure that the application of this
provision will not result in a person becoming stateless.

24. The term ‘national or citizen’ is used because some persons may be legally entitled to
‘nationality’ of a country but not ‘citizenship’. For example, in the United States a person can
be a U.S national but is not necessarily a U.S citizen. A person born in an outlying possession
of the United States is a U.S national but not a U.S citizen. An outlying possession of the
United States is currently American Samoa and the Swains Islands. U.S non-citizen nationals
who are eligible may obtain U.S passports and owe permanent allegiance to the United States.

25. The drafting of this provision differs slightly to other provisions in the Citizenship Act
relating to statelessness. The standard for cessation of citizenship under this new provision
has been set deliberately high because the operation of section 33AA can be differentiated
from other provisions relating to the cessation of citizenship under the Citizenship Act. This
is because the new provision applies to conduct that occurs while the person is an Australian
citizen. This will not affect the operation of other statelessness provisions in the
Citizenship Act.

26. It is also made clear that new subsection 33AA(1) does not apply to children under the age of
14 years. That is a person under the age of 14 years will not automatically renounce their
Australian citizenship by engaging in the terrorist related conduct specified in new
subsection 33AA(2).

27. The intention of the person when undertaking the specified terrorist-related conduct that
renounces their Australian citizenship is prescribed in subsections 33AA(3) to 33AA(5).
These amendments implement recommendation 2 of the Committee report.

28. New subsection 33AA(3) provides that the terrorist-related conduct listed in the new
paragraphs 33AA(2)(a) to (h) only applies if the conduct is engaged in with the intention of
advancing a political, religious or ideological cause and with the intention of

   (i) coercing, or influencing by intimidation, the government of the Commonwealth or
       a State, Territory or foreign country, or of part of a State, Territory or foreign country;

   or

   (ii) intimidating the public or a section of the public.

29. The effect of new subsection 33AA(3) is that where a dual citizen has undertaken specific
terrorist-related conduct as provided for in subsection 33AA(2), and has done so with the
intention as provided for in subsection 33AA(3), the person is taken to have repudiated their
allegiance to Australia and renounced their Australian citizenship.

30. New subsection 33AA(4) provides that a dual citizen is taken to have engaged in conduct with
an intention referred to in new subsection 33AA(3) if, when the person engaged in the
conduct, the person was:

   • a member of a declared terrorist organisation (see section 35AA); or
   
   • acting on instruction of, or in cooperation with, a declared terrorist organisation.
This a deeming provision to the effect that, where a person is a member of a declared terrorist organisation or is acting on instruction of, or in cooperation with, a declared terrorist organisation, they are taken to have satisfied the intention requirements for the conduct as specified in new subsection 33AA(3). For example, a person may recruit for a terrorist organisation and may also be a member of a declared terrorist organisation. In this case, the person is taken to satisfy the element of intent in respect of the conduct, inasmuch as the person could be taken to be advancing a political, religious or ideological cause. Therefore, upon recruiting for a terrorist organisation, the person has demonstrated repudiation to Australia and has renounced their Australian citizenship.

New subsection 33AA(5) provides that, to avoid doubt, new subsection 33AA(4) does not prevent the proof of establishment, by other means, that a person engaged in conduct with an intention referred to in subsection 33AA(3).

The purpose of this provision is to clarify that the person does not necessarily need to be a member of a declared terrorist organisation to satisfy the intent component of the terrorist-related conduct. For example, a person may undertake the terrorist related conduct in new subsection 33AA(2) alone, and by their action, demonstrate that they have satisfied the intent element provided for in 33AA(3). That is, a person may independently engage in a terrorist act to advance a political, religious or ideological cause that is not associated with a declared terrorist organisation.

New subsection 33AA(6) provides that the words and expressions used in paragraphs 33AA(2)(a) to (h) have the same meanings as in Subdivision A of Division 72, sections 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Division 119 of the Criminal Code, respectively. However (to avoid doubt) this does not include the fault elements that apply under the Criminal Code in relation to those provisions of the Criminal Code.
A brief description of the specified definitions in the *Criminal Code* is below:

<table>
<thead>
<tr>
<th>Provision</th>
<th>Offence</th>
<th>Maximum Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>72.3 International terrorist activities using explosive or lethal devices</td>
<td>(1) A person commits an offence if:</td>
<td>Imprisonment for life</td>
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<td></td>
<td>(a) the person intentionally delivers, places, discharges or detonates a device; and</td>
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<td></td>
<td>(b) the device is an explosive or other lethal device and the person is reckless as to that fact; and</td>
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<tr>
<td></td>
<td>(c) the device is delivered, placed, discharged, or detonated, to, in, into or against:</td>
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<tr>
<td></td>
<td>(i) a place of public use; or                                                                 ------------------------------------------------------------------------------------------------------------</td>
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<td>(ii) a government facility; or                                                                 --------------------------------------------------------------------------------------------------------</td>
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<td>(iii) a public transportation system; or</td>
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<td></td>
<td>(iv) an infrastructure facility; and</td>
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<td></td>
<td>(d) the person intends to cause death or serious harm.</td>
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<td>Penalty: Imprisonment for life.</td>
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<td>(2) A person commits an offence if:</td>
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<td></td>
<td>(a) the person intentionally delivers, places, discharges or detonates a device; and</td>
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<td></td>
<td>(b) the device is an explosive or other lethal device and the person is reckless as to that fact; and</td>
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<td></td>
<td>(c) the device is delivered, placed, discharged, or detonated, to, in, into or against:</td>
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<td></td>
<td>(i) a place of public use; or                                                                 ------------------------------------------------------------------------------------------------------------</td>
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<td></td>
<td>(ii) a government facility; or                                                                 --------------------------------------------------------------------------------------------------------</td>
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<td></td>
<td>(iii) a public transportation system; or</td>
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<td></td>
<td>(iv) an infrastructure facility; and</td>
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<td></td>
<td>(d) the person intends to cause extensive destruction to the place, facility or system; and</td>
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<td></td>
<td>(e) the person is reckless as to whether that intended destruction results or is likely to result in major economic loss.</td>
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<td>Penalty: Imprisonment for life.</td>
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<td></td>
<td>(3) Strict liability applies to paragraphs (1)(c) and (2)(c).</td>
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<tr>
<td>Section</td>
<td>Description</td>
<td>Offence</td>
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<tr>
<td>101.1 Terrorist acts</td>
<td>A person commits an offence if the person engages in a terrorist act. (2) Section 15.4 (extended geographical jurisdiction- category D) applies to an offence against subsection (1).</td>
<td>Imprisonment for life</td>
</tr>
<tr>
<td>101.2 Providing or receiving training connected with terrorist acts</td>
<td>A person commits an offence if: (1) the person provides or receives training; and (a) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and (b) the person mentioned in paragraph (a) knows of the connection described in paragraph (b). (2) A person commits an offence if: (a) the person provides or receives training; and (b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b). (3) A person commits an offence under this section even if: (a) a terrorist act does not occur; or (b) the training is not connected with preparation for, the engagement of a person in, or assistance in a specified terrorist act; or (c) the training is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act. (4) Section 15.4 (extended geographical jurisdiction- category D) applies to an offence against this section…</td>
<td>Imprisonment for 25 years, Imprisonment for 15 years</td>
</tr>
<tr>
<td>102.2 Directing the activities of a terrorist organisation</td>
<td>A person commits an offence if: (1) the person intentionally directs the activities of an organisation; and (a) the organisation is a terrorist organisation; and (c) the person knows the organisation is a terrorist organisation.</td>
<td>Up to 25 years imprisonment</td>
</tr>
<tr>
<td>Section</td>
<td>Offence Description</td>
<td>Penalties</td>
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</tbody>
</table>
| 102.4 Recruiting for a terrorist organisation | (1) A person commits an offence if:  
(a) the person intentionally recruits a person to join, or participate in the activities of, an organisation; and  
(b) the organisation is a terrorist organisation; and  
(c) the first-mentioned person knows the organisation is a terrorist organisation.  
Penalty: Imprisonment for 25 years.  
(2) A person commits an offence if:  
(a) the person intentionally recruits a person to join, or participate in the activities of, an organisation; and  
(b) the organisation is a terrorist organisation; and  
(c) the first-mentioned person is reckless as to whether the organisation is a terrorist organisation.  
Penalty: Imprisonment for 15 years. | Up to 25 years imprisonment |
| 103.1 Financing terrorism | (1) A person commits an offence if:  
(a) the person provides or collects funds; and  
(b) the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.  
Penalty: Imprisonment for life.  
Note: Intention is the fault element for the conduct described in paragraph (1)(a). See subsection 5.6(1).  
(2) A person commits an offence under subsection (1) even if:  
(a) a terrorist act does not occur; or  
(b) the funds will not be used to facilitate or engage in a specific terrorist act; or | Imprisonment for life |
Section 100.1 of the Criminal Code defines terrorist act as an action or threat of action where:

- the action is of a type that:
  - causes serious harm that is physical harm to a person; or
  - causes serious damage to property; or
  - causes a person’s death; or
  - endangers a person’s life, other than the life of the person taking the action; or
  - creates a serious risk to the health and safety of the public or a section of the public; or
  - seriously interferes with, seriously disrupts, or destroys, an electronic system.
- the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- the action is done or the threat is made with the intention of:

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| 103.2 Financing a terrorist | (1) A person commits an offence if:
| --- | --- |
| | (a) the person intentionally:
| | (i) makes funds available to another person (whether directly or indirectly); or
| | (ii) collects funds for, or on behalf of, another person (whether directly or indirectly); and
| | (b) the first-mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.
| Penalty: Imprisonment for life. |

(2) A person commits an offence under subsection (1) even if:

- (a) terrorist act does not occur; or
- (b) the funds will not be used to facilitate or engage in a specific terrorist act; or
- (c) the funds will be used to facilitate or engage in more than one terrorist act.

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<table>
<thead>
<tr>
<th>Division 119</th>
<th>Foreign incursions and recruitment</th>
<th>Up to imprisonment for life</th>
</tr>
</thead>
</table>

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36. Section 100.1 of the *Criminal Code* defines *terrorist act* as an action or threat of action where:
coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign Country; or

- intimidating the public or a section of the public.

37. The purpose of this provision is to clarify that, when considering the meanings of the specified terrorist related conduct in new subsection 33AA(2), a consideration of the fault element that apply under the Criminal Code is not required. This amendment recognises that new section 33AA is not concerned with whether a person has committed a criminal offence since that is a matter for a court to determine. It will ultimately be for a court to determine whether an individual has engaged in conduct prescribed by new section 33AA in contravention of the Criminal Code. That is, whether the terrorist-related conduct engaged in by the person is an infringement of the relevant provision in the Criminal Code is a matter for a criminal court to determine.

38. However, where the person engages in the specified terrorist-related conduct as prescribed in new subsection 33AA(2), and the conduct is engaged with the intention as specified in new subsection 33AA(3), the person is taken to repudiated their allegiance to Australia and the person will cease to be an Australian citizen. This occurs by operation of law and does not amount to an assessment of whether the person has committed a criminal offence.

39. New subsection 33AA(7) provides that section 33AA does not apply in relation to conduct by a person unless:

- the person was not in Australia when the person engaged in the conduct; or
- the person left Australia after engaging in the conduct and, at the time that the person left Australia, the person had not been tried for any offence related to the conduct.

40. The purpose of this amendment is to clarify that a person will have renounced their Australian citizenship for the purpose of new section 33AA, only if the person was outside Australia when the person engaged in the conduct, or had left Australia after engaging in the conduct and had not been tried for any offence relating to the conduct.

41. The prospects of bringing a person to trial and successfully convicting that person would be more constrained if that person is outside Australia. In order to protect the Australian community, it is appropriate that there is a process for Australian citizenship to be lost based on the person’s conduct repudiating their allegiance to Australia.

42. New subsection 33AA(8) provides that subsection 33AA(1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person’s birth).

43. The purpose of this amendment is to provide that renunciation of citizenship by conduct under subsection 33AA(1) applies to all Australian citizens, including those persons who are born in Australia and automatically acquire Australian citizenship. This is the case because all citizens have an obligation of allegiance to Australia irrespective of how they obtained their citizenship. If a person engages in specified terrorist-related conduct that is incompatible with their allegiance to Australia, they can renounce their citizenship by conduct irrespective of how they obtained citizenship.

44. New subsection 33AA(9) provides that where a person renounces their Australian citizenship under new section 33AA, the renunciation takes effect, and the Australian citizenship of the person ceases, immediately upon the person engaging in the terrorist-related conduct referred
to in new subsection 33AA(2). This is appropriate as the cessation of citizenship by renunciation as provided in new subsection 33AA is automatic so that if a person undertakes one of the terrorist-related conducts specified in subsection 33AA(2) they cease to be an Australian citizen as a result of this conduct at that point in time.

Minister to give notice

45. New subsection 33AA(10) provides that if the Minister becomes aware of conduct because of which a person has, under this section, ceased to be an Australian citizen, the Minister:

- must give, or make reasonable attempts to give, written notice to that effect to the person:
  - as soon as practicable; or
  - if the Minister makes a determination under subsection 33AA(12) – as soon as practicable after the Minister revokes the determination (if the Minister does so); and

- may give notice to that effect to such other persons and at such time as the Minister considers appropriate.

46. The Note at subsection 33AA(10) provides that a person may seek review of the basis on which a notice under section 33AA was given in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the Judiciary Act 1903. This implements recommendation 14 of the Committee report. The Note makes the distinction that review is available regarding the application of the provision to the conduct, not on the giving of the notice itself.

47. These provisions confer a power on the Minister, if he or she becomes aware of conduct, because of which the person has ceased to be an Australian citizen, to give or make reasonable attempts to give written notice to that effect to the person and other appropriate persons. These Ministerial notices are evidence of the Minister’s awareness that citizenship of a particular person has ceased.

48. Upon becoming aware of the relevant conduct, the Minister is obliged to give written notice of the cessation of citizenship to the person as soon as practicable. A question arises as to the level of satisfaction required of the Minister about the conduct which causes the cessation of citizenship, before a notice is issued. The statutory requirement is the Minister is ‘aware’ that the individual has ceased to be an Australian citizen because of their conduct. The term aware is not defined in the provision, so it should be given its ordinary meaning. In the Macquarie dictionary, the ordinary meaning of ‘aware’ is ‘cognisant or conscious’. In the context of other legislation, courts have found that to ‘become aware’ of something is to acquire subjective knowledge of it (Right to Life Association (NSW) Inc v Secretary of the Commonwealth Department of Human Services and Health (1994) 36 ALD 264, 267). Knowledge is more than suspicion or belief. To issue a notice under the provision in subsection 33AA(12), the Minister should have a degree of knowledge about the conduct which gives rise to a clear mental apprehension of the existence of the conduct. The Minister should have the same mental assurance that the person is a national or citizen of a country other than Australia.

49. The Minister must make ‘reasonable attempts’ to give written notice to the person. This recognises that the Minister may not always be able to provide written notice to the person in
situations where that person is overseas and not able to be contacted. For example, a person may be fighting with a terrorist organisation in a desert in Syria. Reasonable attempts to give written notice may include giving notice at a last known email address or postal address or via personal message on social media.

50. The notice is an expression of official opinion as to whether a person has renounced his or her citizenship (Recommendation 18 of the Committee report). The basis for the conclusion that the terrorist-related conduct has occurred may be reviewed by a court. In any such judicial proceedings, the notice would have no determinative or presumptive significance.

51. A person will have the right to seek judicial review of the basis on which a notice was given. The operation of the new provisions in the amended Bill is extraordinary and lends itself to review by the High Court and Federal Court. Section 75 of the Constitution gives the High Court original jurisdiction to hear all matters:

- arising under any treaty;
- affecting consuls or other representatives of other countries;
- in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- between States, or between residents of different States, or between a State and a resident of another State;
- in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

52. Section 39B of the Judiciary Act 1903 also gives the Federal Court of Australia original jurisdiction to, amongst other matters, hear matters in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

53. The notice alerts the person to the formation of official opinion as a means of ensuring that the person may bring the substantive issue before a court for determination.

54. The notice also may alert other administrators to take the existence of the notice into account for other decision making purposes. For example, the Minister may notify the Department of Foreign Affairs and Trade of the person’s cessation of Australian citizenship so that the person’s Australian passport is cancelled or an Electoral Commissioner so the person is removed from the electoral roll.

55. Any consequential action taken by Government agencies will only take place after the Minister issues the notice (Recommendation 18 of the Committee report).

56. New subsection 33AA(11) provides that a notice under paragraph (10)(a) must set out:

- the matters that are required by section 35B (see explanatory commentary below); and
- the person’s rights of review.

57. New subsection 33AA(12) provides that the Minister may determine in writing that a notice under paragraph 33AA(10)(a) should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia.
or Australian law enforcement operations. The Minister must consider whether to revoke such a determination:

- no later than 6 months after making it; and
- at least every 6 months thereafter until 5 years have passed since the determination was made.

58. The purpose of this provision is to recognise that there may be instances where providing immediate notice to a person regarding the cessation of their Australian citizenship may compromise ongoing operations of national security and thereby prejudice the security, defence or international relations of Australia or Australian law enforcement operations. For example, intelligence operations may be put at risk if a person were to be notified about the cessation of their Australian citizenship.

59. However, the Minister must review this decision no later than 6 months after making it, and at least every 6 months thereafter until 5 years has passed. This recognises the reasonable expectation that the person is to be notified as soon as possible, until 5 years has passed. It is expected that any ongoing operation of national security would be resolved within 5 years, or alternatively that the person may make themselves known to the Minister during this period (for example, by attempting to return to Australia).

Minister’s power to rescind notice and exempt person

60. New provision 33AA(13) provides that the power in new subsection 33AA(14) only applies where a person has renounced his or her citizenship under section 33AA.

61. New subsection 33AA(14) authorises the Minister to make a determination rescinding a notice given under subsection 33AA(10) and exempting the person from loss of citizenship. This is a discretionary power, which comes into play only after a person has renounced his or her citizenship, with the effect that the core ‘operation of law’ nature of new section 33AA is maintained.

62. New subsection 33AA(15) makes it clear that the Minister does not have a duty or obligation to exercise the power conferred by subsection 33AA(14). This includes in circumstances where a request or application for the Minister to consider exercising that discretion has been made.

63. New subsection 33AA(16) is an avoidance of doubt provision which makes it clear that, when deciding whether to consider exercising the power conferred by subsection 33AA(14), the Minister is not required to have regard to any of the matters set out in subsection 33AA(17).

64. New subsection 33AA(17) provides that, in the event the Minister decides to consider exercising the power conferred by subsection 33AA(14), the Minister must have regard to the following:

- the severity of the matters that were the basis for any notice given under subsection 33AA(10) or that would have been the basis for a notice under paragraph 33AA(10)(a) if not for the operation of subsection 33AA(12);
- the degree of threat posed by the person to the Australian community;
- the age of the person;
• if the person is aged under 18—the best interests of the child as a primary consideration;

• whether the person is being or is likely to be prosecuted in relation to the matters that were the basis for the notice;

• the person’s connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;

• Australia’s international relations;

• any other matters of public interest.

65. This will require the Minister to have regard to all of the circumstances surrounding the person's conduct and the other matters specified in subsection 33AA(17), in considering whether to rescind any notice given under subsection (10) and exempt the person from the effect of the section - but this only applies if the Minister decides to consider exercising the power conferred by subsection 33AA(14). A decision of the Minister under new subsection 33AA(14) will be subject to judicial review.

66. The assessment of the public interest is by reference to the purpose of the statutory scheme. The application of the public interest test will require a balancing of competing interests and will be a question of fact and degree (Hogan v Hinch (2011) 243 CLR 506). Public interest consideration in this statutory scheme may include matters such as public confidence in the safety of the Australian community, actual public safety, the need for deterrence and the impact on the person.

67. The Minister is well placed to make an assessment of public interest as an elected member of the Parliament. The Minister represents the Australian community and has a particular insight into Australian community standards and values and if it would be contrary to the public interest for the person to remain an Australian citizen.

68. New subsection 33AA(18) requires the Minister to cause a statement to be laid before each House of Parliament if he or she makes a determination under subsection 33AA(14). The statement must be laid within 15 sitting days of making the determination, and must set out both the determination and the reasons for the determination, including the Minister’s reasons in relation to the matters set out in subsection 33A(17).

69. New subsection 33AA(19) provides an exception to subsection 33AA(18). Specifically, where the Minister forms the view that it would not be in the public interest to publish the name of any person connected with a determination under subsection 33AA(14) and a statement under subsection 33AA(18), the Minister must not include information that would identify those persons.

General provisions relating to Minister’s powers

70. New subsection 33AA(20) provides that the powers of the Minister under this section may only be exercised by the Minister personally.

71. The effect of this provision is that the Minister’s powers under section 33AA, including the power to give notice and the power to rescind notice and exempt a person, must be exercised by the Minister personally, and may not be exercised by a delegate of the Minister.
72. New subsection 33AA(21) provides that section 47 of the Act, which sets out the general notice requirements, applies to a decision by the Minister to make or not make a subsection 33AA(14) determination, but does not apply to any other decision of the Minister under this section, including a decision whether to consider exercising the power in that subsection to make a determination.

73. New subsection 33AA(22) provides that the rules of natural justice apply in relation to a decision by the Minister to make or not make a subsection 33AA(14) determination, but do not apply to any other decision of the Minister under this section, including a decision whether to consider exercising the power in that subsection to make a determination.

74. The purpose of new subsection 33AA(22) is to clarify that the Minister is required to apply the rules of natural justice when exercising the discretion under subsection 33AA(14). However, the rules of natural justice do not apply to the Minister’s decision whether or not to consider exercising that discretion or any other decision under this section.

75. New subsection 33AA(23) provides that an instrument exercising any of the Minister’s powers under this section is not a legislative instrument. The reason that a decision under this section is not a legislative instrument is that it is administrative in character. Subsection 33AA(23) is declaratory of the law and is not intended as an exemption to the Legislative Instruments Act 2003, but is included to assist readers in the interpretation of the legislation.

76. New subsection 33AA(24) provides that, to avoid doubt, a person’s citizenship is taken never to have ceased under this section because of particular conduct if:

- in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person did not engage in the conduct or have the requisite intention under subsection (3) of this section; or
- in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person was not a national or citizen of a country other than Australia at the time of the conduct; or
- the Minister makes a determination under subsection 33AA(14) in relation to the conduct to exempt the person from the effect of section 33AA; or
- a declaration under section 35AA is disallowed by either House of the Parliament, and the person’s citizenship would not have ceased under this section if that declaration had not been made.

77. The effect of this provision is that where a person is found by an Australian court not to have engaged in the terrorist-related conduct, or would be rendered stateless, the person’s Australian citizenship is taken never to have ceased. That is, the person is taken to never have lost their Australian citizenship. This also applies where the Minister rescinds the notice and exempts the person from the operation of section 33AA. Section 33AA may apply to any subsequent conduct. If the Minister rescinds the notice and exempts the person from the effect of section 33AA, sections 35 and 35A may still apply to the persons conduct.

78. The combined operation of new section 35AA and paragraph 33AA(24)(d) is such that a declaration under section 35AA will commence upon registration on the Federal Register of Legislative Instruments. However, in the event that the declaration is disallowed, any loss of
citizenship that occurred on the basis of that legislative instrument, is taken never to have occurred.

4 Section 35

79. This amendment repeals the section and inserts new sections 35, 35AA and 35AB into the amended Bill. This amendment implements Recommendations 3, 4, 5, 6, 11, 12, 13, 14, 16, 19 and 20 of the Committee report.

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

Cessation of citizenship

80. New subsection 35(1) provides that a person aged 14 years or older ceases to be an Australian citizen if:

- the person is a national or citizen of a country other than Australia; and
- the person:
  - serves in the armed forces of a country at war with Australia; or
  - fights for, or is in the service of, a declared terrorist organisation (see section 35AA); and
- the person’s service or fighting occurs outside Australia.

81. Note 1 to new subsection 35(1) provides that the Minister may, in writing, exempt the person from the effect of this section applying in relation to certain matters: see subsection 35(9).

82. Note 2 to new subsection 35(1) provides that this section does not apply to conduct of Australian law enforcement or intelligence bodies or to conduct in the course of certain duties to the Commonwealth (see section 35AB).

83. The provision does not include the requirement that appears in some Commonwealth offences that there is a Proclamation in relation to the country at war with Australia or a Declaration in relation to the war itself. Accordingly, there is no requirement that there be a Proclamation in relation to a country at war with Australia or a Declaration of war in order for a person to be regarded as serving in the armed forces of a country at war with Australia for the purposes of this provision.

84. The provision does not define ‘fights’. As the word is not defined, it should be given its ordinary meaning. The primary meaning of “fights” in the Macquarie Dictionary is battle or combat. Fighting for a declared terrorist organisation is intended to generally mean fight on behalf of a terrorist organisation.

85. The provision does not define ‘is in the service of’. As the phrase is not defined it should be given its ordinary meaning. In the Macquarie Dictionary “service” is an act of helpful activity or the supplying of any articles, commodities, activities etc., required or demanded. In this context the term, “in the service of” is intended to cover acts done by persons willingly and is not meant to cover acts done by a person against their will (for example, an innocent kidnapped person) or the unwitting supply of goods (for example, the provision of goods by innocent persons following online orders). This is further clarified in new subsection 35(4).
New subsection 35(1) provides that a person affected by this provision loses their Australian citizenship automatically. New subsection 35(1) builds on, adapts and modernises loss of citizenship provisions for those fighting in a war against Australia which have been in place since 1949.

The effect of this amendment is that in addition to the current provision which provides that a dual citizen ceases to be an Australian citizen if they serve in the armed forces of a country at war with Australia, a dual citizen’s Australian citizenship will now also cease if the person fights on behalf of, or is in the service of, a terrorist organisation outside Australia.

The purpose of this provision 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. 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 a person’s 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.

The provision also clarifies that new subsection 35(1) does not apply to children under the age of 14 years.

New subsection 35(2) provides that the person ceases to be an Australian citizen at the time the person commences to so serve or fight.

The effect of this provision is to make it clear that a person ceases to be an Australian citizen at the time that the person fights on behalf of, or is in the service of, a terrorist organisation, provided that the terrorist organisation is captured by the operation of new subsection 35AA. That is, where the terrorist organisation is captured by new section 35AA, and the person satisfies the requirements in subsection 35(1), the person ceases to be an Australian citizen at that time.

New subsection 35(3) provides that new subsection 35(1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person’s birth).

The purpose of this amendment is to provide that the cessation of citizenship referred to in subsection 35(1) applies to all Australian citizens, including those persons who are born in Australia and automatically acquired Australian citizenship. This is the case because all citizens have an obligation of allegiance to Australia irrespective of how they obtained their citizenship. If a person fights on behalf of, or is in the service of, a terrorist organisation, which is incompatible with their allegiance to Australia, the provision to cease Australian citizenship should apply to a person irrespective of how they obtained their citizenship.

New subsection 35(4) provides that, for the purpose of new paragraph 35(1)(b)(ii) and without limitation, a person is not in the service of a declared terrorist organisation to the extent that:

- the person’s actions are unintentional; or
- the person is acting under duress or force; or
• the person is providing neutral and independent humanitarian assistance.

95. The purpose of this provision is to clarify the circumstances in which a person would not be ‘in the service of’ a declared terrorist organisation, including where the person’s conduct takes place unwittingly or against the person’s will. The provision also clarifies that section 35 would not apply to the type of impartial, independent humanitarian assistance provided by organisations such as International Red Cross and Red Crescent Movement, UNICEF or Médecins Sans Frontières. However, the provision of medical services in a hospital run by a declared terrorist organisation would be conduct in the service of a declared terrorist organisation.

Minister to give notice

96. New subsection 35(5) provides that if the Minister becomes aware of conduct because of which a person has, under this section, ceased to be an Australian citizen, the Minister:

• must give, or make reasonable attempts to give, written notice to that effect to the person:
  o as soon as practicable; or
  o if the Minister makes a determination under subsection 35(7) – as soon as practicable after the Minister revokes the determination (if the Minister does so); and

• may give notice to that effect to such other persons and at such time as the Minister considers appropriate.

97. The Note at subsection 35(5) provides that a person may seek review of the basis on which a notice under section 35 was given in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the Judiciary Act 1903. This implements recommendation 14 of the Committee report. The Note makes the distinction that review is available regarding the application of the provision to the conduct, not on the giving of the notice itself.

98. These provisions confer a power on the Minister, if he or she becomes aware of conduct, because of which the person has ceased to be an Australian citizen, to give or make reasonable attempts to give written notice to that effect to the person and other appropriate persons. These Ministerial notices are evidence of the Minister’s awareness that citizenship of a particular person has ceased.

99. Upon becoming aware of the relevant conduct, the Minister is obliged to give written notice of the cessation of citizenship to the person as soon as practicable. A question arises as to the level of satisfaction required of the Minister about the conduct which causes the cessation of citizenship, before a notice is issued. The statutory requirement is the Minister is ‘aware’ that the individual has ceased to be an Australian citizen because of their conduct. The term aware is not defined in the provision, so it should be given its ordinary meaning. In the Macquarie dictionary, the ordinary meaning of ‘aware’ is ‘cognisant or conscious’. In the context of other legislation, courts have found that to ‘become aware’ of something is to acquire subjective knowledge of it (Right to Life Association (NSW) Inc v Secretary of the Commonwealth Department of Human Services and Health (1994) 36 ALD 264, 267). Knowledge is more than suspicion or belief. To issue a notice under the provision in subsection 33AA(7), the Minister should have a degree of knowledge about the conduct
which gives rise to a clear mental apprehension of the existence of the conduct. The Minister should have the same mental assurance that the person is a national or citizen of a country other than Australia.

100. The Minister must make ‘reasonable attempts’ to give written notice to the person. This recognises that the Minister may not always be able to provide written notice to the person in situations where that person is overseas and not able to be contacted. For example, a person may be fighting with a terrorist organisation in a desert in Syria. Reasonable attempts to give written notice may include giving notice at a last known email address or postal address or via personal message on social media.

101. The notice is an expression of official opinion as to whether a person has renounced his or her citizenship (Recommendation 18 of the Committee report). The basis for the conclusion that the terrorist-related conduct has occurred may be reviewed by a court. In any such judicial proceedings, the notice would have no determinative or presumptive significance.

102. A person will have the right to seek judicial review of the basis on which a notice was given. The operation of the new provisions in the amended Bill is extraordinary and lends itself to review by the High Court and Federal Court. Section 75 of the Constitution gives the High Court original jurisdiction to hear all matters:

- arising under any treaty;
- affecting consuls or other representatives of other countries;
- in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- between States, or between residents of different States, or between a State and a resident of another State;
- in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

103. Section 39B of the Judiciary Act also gives the Federal Court of Australia original jurisdiction to, amongst other matters, hear matters in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

104. The notice alerts the person to the formation of official opinion as a means of ensuring that the person may bring the issue before a court for determination.

105. The notice also may alert other administrators to take the existence of the notice into account for other decision making purposes. For example, the Minister may notify the Department of Foreign Affairs and Trade of the person’s cessation of Australian citizenship so that the person’s Australian passport is cancelled or the Electoral Commissioner so the person is removed from the electoral roll.

106. Any consequential action taken by Government agencies will only take place after the Minister issues the notice to the person (Recommendation 18 of the Committee report).

107. New subsection 35(6) provides that a notice under paragraph 35(5)(a) must set out:

- the matters required by section 35B (see explanatory commentary below); and
108. New subsection 35(7) provides that the Minister may determine in writing that a notice under paragraph (5)(a) should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia or Australian law enforcement operations. The Minister must consider whether to revoke such a determination:

- no later than 6 months after making it; and
- at least every 6 months thereafter until 5 years have passed since the determination was made.

109. The purpose of this provision is to recognise that there may be instances where providing immediate notice to a person regarding the cessation of their Australian citizenship may compromise ongoing operations of national security and prejudice the security, defence or international relations of Australia. For example, intelligence operations or informants in the field may be put at risk if a person were to be notified of the cessation of their Australian citizenship.

110. However, the Minister must review this decision no later than 6 months after making it, and at least every 6 months thereafter until 5 years has passed. This recognises the reasonable expectation that the person is to be notified as soon as possible, until 5 years has passed. It is expected that any ongoing operation of national security would be resolved within 5 years, or alternatively that the person may make themselves known to the Minister during this period (for example, by attempting to return to Australia).

Minister’s power to rescind notice and exempt person

111. New provision 35(8) provides that subsection 35(9) only applies if a person has ceased to be an Australian citizen under section 35.

112. New subsection 35(9) provides that, if a person has ceased to be an Australian citizen under section 35, the Minister may make a determination rescinding the notice of cessation under subsection 35(5) and exempting the person from the operation of section 35 in relation to the matters that were the basis for the notice or in relation to matters that would have been the basis for giving a notice under paragraph 35(5)(a) if not for the operation of subsection 35(7). This is a discretionary power, which comes into play only after a person’s citizenship has ceased, with the effect that the core ‘operation of law’ nature of new section 35 is maintained.

113. Subsection 35(10) clarifies that the Minister does not have a duty, and is not obliged, to consider whether to exercise the power conferred by subsection 35(9). This includes in circumstances where a request or application for the Minister to consider exercising that discretion has been made.

114. Subsection 35(11) is an avoidance of doubt provision that clarifies that, when the Minister considers whether or not to exercise the discretion conferred under subsection 35(9), the Minister is not required to have regard to the matters listed in subsection 35(12).

115. Subsection 35(12) provides that, if the Minister does decide to consider whether to exercise the power conferred by subsection 35(9), the Minister must have regard to the following:
• the severity of the matters that were the basis for any notice given under subsection 35(5) or in relation to matters that would have been the basis for giving a notice under paragraph 35(5)(a) if not for the operation of subsection 35(7);

• the degree of threat posed by the person to the Australian community;

• the age of the person;

• if the person is aged under 18—the best interests of the child as a primary consideration;

• whether the person is being or is likely to be prosecuted in relation to the matters that were the basis for the notice;

• the person’s connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;

• Australia’s international relations;

• any other matters of public interest.

116. This will require the Minister to have regard to all of the circumstances surrounding the person's conduct and the other matters specified in subsection 35(12), in considering whether to rescind any notice given under subsection (9) and exempt the person from the effect of the section - but this only applies if the Minister decides to consider exercising the power conferred by subsection 35(9).

117. A decision of the Minister under new subsection 35(9) will be subject to review.

118. The assessment of the public interest is by reference to the purpose of the statutory scheme. The application of the public interest test will require a balancing of competing interests and will be a question of fact and degree (Hogan v Hinch (2011) 243 CLR 506). Public interest consideration in this statutory scheme may include matters such as public confidence in the safety of the Australian community, actual public safety, the need for deterrence and the impact on the person.

119. The Minister is well placed to make an assessment of public interest as an elected member of the Parliament. The Minister represents the Australian community and has a particular insight into Australian community standards and values and if it would be contrary to the public interest for the person to remain an Australian citizen.

120. New subsection 35(13) requires the Minister to cause a statement to be laid before each House of Parliament if he or she makes a determination under subsection 35(9). The statement must be laid within 15 sitting days of making the determination, and must set out both the determination and the reasons for the determination, including the Minister’s reasons in relation to the matters set out in subsection 35(12).

121. New subsection 35(14) provides an exception to subsection 35(13). Specifically, where the Minister forms the view that it would not be in the public interest to publish the name of any person connected with a determination under subsection 35(9) and a statement under subsection 35(13), the Minister must not include information that would identify those persons.
General provisions relating to Minister’s powers

122. New subsection 35(15) provides that the powers of the Minister under this section may only be exercised by the Minister personally.

123. The effect of this provision is that the Minister’s powers under section 35, including the power to give notice and the power to rescind notice and exempt person, must be exercised by the Minister personally, and may not be exercised by a delegate of the Minister.

124. New subsection 35(16) provides that section 47 of the Act, which sets out the general notice requirements, applies to a decision to make or not make a subsection 35(9) determination, but does not apply to any other decision, including a decision not to consider exercising the power in that subsection to make a determination.

125. New subsection 35(17) provides that the rules of natural justice apply in relation to a decision by the Minister to make or not make a subsection 35(9) determination, but do not apply to any other decision of the Minister under this section, including a decision whether to consider exercising the power in that subsection to make a determination.

126. New subsection 35(18) provides that an instrument exercising any of the Minister’s powers under this section is not a legislative instrument. The reason that a decision under this section is not a legislative instrument is that it is administrative in character. Subsection 35(12) is declaratory of the law and is not intended as an exemption to the Legislative Instruments Act 2003, but is included to assist readers in the interpretation of the legislation.

127. New subsection 35(19) provides that, to avoid doubt, a person’s citizenship is taken never to have ceased under this section because of particular conduct if:

- in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person did not engage in the conduct; or
- in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person was not a national or citizen of a country other than Australia at the time of the conduct; or
- the Minister makes a determination subsection 35(9) in relation to the conduct to exempt the person from the effect of the section; or
- a declaration under section 35AA is disallowed by either House of the Parliament, and the person’s citizenship would not have ceased under this section if that declaration had not been made.

128. The effect of this provision is that where a person is found by an Australian court not to have engaged in the terrorist-related conduct, or would be rendered stateless, the person’s Australian citizenship is taken never to have ceased. That is, the person is taken to never have lost their Australian citizenship. This also applies where the Minister rescinds the notice and exempts the person from the operation of section 35. Section 35 may apply to any subsequent conduct. If the Minister rescinds the notice and exempts the person from the effect of section 35, sections 33AA and 35A may still apply to the persons conduct.

129. The combined operation of new section 35AA and new paragraph 35(13)(d) is such that a declaration under section 35AA will commence upon registration on the Federal Register of Legislative Instruments. However, in the event that the declaration is disallowed, any loss of
citizenship that occurred on the basis of that legislative instrument is taken never to have occurred.

35AA - Declared terrorist organisation

Declaration of declared terrorist organisation

130. New section 35AA implements Recommendations 3, and 4 of the Committee report.

131. New subsection 35AA(1) provides that a declared terrorist organisation is any terrorist organisation within the meaning of paragraph (b) of the definition of terrorist organisation in subsection 102.1 of the Criminal Code, that the Minister, by legislative instrument, declares, is a declared terrorist organisation for the purposes of this section.

132. Section 102.1 of the Criminal Code provides that ‘terrorist organisation’ means:

- an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or

- an organisation that is specified by the regulations for this purpose.

133. Currently, 20 organisations are listed as terrorist organisation under the Criminal Code. These are listed on the Australian National Security government website.

134. Before declaring that an organisation is a declared terrorist organisation, subsection 35AA(2) requires the Minister to 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 being the service of such an organisation the person would be acting inconsistently with their allegiance to Australia.

135. The effect of this provision is to enable the Minister to declare, by legislative instrument, a subset of listed terrorist organisations under the Criminal Code support for which would involve a repudiation of allegiance to Australia. This is because the Minister may only list terrorist organisations that are opposed to Australia or are opposed to any of Australia’s interests, values, democratic beliefs, rights or liberties.

136. Australia’s values, interests, democratic beliefs, rights or liberties are the unifying characteristics for Australian citizenship. These characteristics are expressly included in the pledge of commitment as citizen of Australia. Therefore, where a person fights with a terrorist organisation that is opposed to Australia or to any of Australia’s values, interests, democratic beliefs, rights or liberties, the person has evidently repudiated their allegiance to Australia.
New subsection 35AA(3) provides that a declaration made under new subsection 35AA(1) does not amount to ‘prescribed administrative action’ for the purposes of Part IV of the Australian Security Intelligence Organisation Act 1979 (ASIO Act).

Part IV of the ASIO Act regulates ASIO communications that are relied upon by Commonwealth agencies (and State and Territory agencies in certain situations) to take prescribed administrative action and in specific circumstances includes the requirement to provide notice, reasons and review rights with respect to prejudicial security assessments. These provisions do not extend to ASIO communications that inform the making of a regulation that specifies an organisation for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in section 102.1 of the Criminal Code. This provision ensures that the same proscribed terrorist organisations are not otherwise afforded additional review rights in connection with the exercise of a power under new subsection 35AA(1).

Review of declaration by Parliamentary Joint Committee on Intelligence and Security

New subsection 35AA(4) provides that the Parliamentary Joint Committee on Intelligence and Security may:

- review a declaration made under subsection 35AA(1) as soon as possible after the declaration is made; 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.

The purpose of the provision is to ensure that the subset list of ‘declared terrorist organisation’ under new section 35AA is subject to the same procedural safeguards as the current listing process in section 102.1A of the Criminal Code. Under section 102.1A of the Criminal Code, the Committee may also review a regulation that specifies an organisation for the purposes of the definition of terrorist organisation in section 102.1 of the Criminal Code.

The combined operation of new section 35AA and paragraphs 33AA(19)(d) and 35(13)(d) is such that a declaration under section 35AA will commence upon registration on the Federal Register of Legislative Instruments. However, in the event that the declaration is disallowed, any loss of citizenship that occurred on the basis of that legislative instrument, is taken never to have occurred.

35AB – Sections 33AA and 35 do not apply to conduct of Australian law enforcement or intelligence bodies or in the course of certain duties to the Commonwealth

New section 35AB implements Recommendation 6 of the Committee report.

New subsection 35AB(1) provides that sections 33AA and 35 do not apply to conduct engaged in by:

- a person in the proper performance of a function of an Australian law enforcement or intelligence body; or
- a person acting in the course of the person’s duty to the Commonwealth in relation to the defence, security or international relations of Australia.

New subsection 35AB(2) provides that in this section:
**Australian law enforcement or intelligence body** means a body, agency or organisation of the Commonwealth, or of a State or Territory, that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud, security intelligence, foreign intelligence or financial intelligence.

145. The purpose of new section 35AB is to establish an exemption for law enforcement, intelligence agencies and the Australian Defence Force from new sections 33AA and 35 of the amended Bill. There is some overlap in the operation of new paragraph 35AB(1)(a) and 35AB(1)(b), this overlap is intentional.

146. Law enforcement and intelligence agencies require appropriate legal protections for persons where it is necessary to engage in covert activities and operations or other authorised activities, such as defence operations, that involve otherwise unlawful conduct for the legitimate purpose of carrying out functions in accordance with applicable legislation.

147. For example, some offences in Division 102 of the *Criminal Code Act 1995* (Criminal Code) relate to a person’s engagement with a terrorist organisation (such as membership, direction, recruitment, training, funding, providing support and association). While such offences are necessary to protect Australia’s security interests by isolating terrorist organisations from the community, they may also capture the activities of persons who associate covertly with targets for the purpose of legitimate intelligence or evidence collection activities.

148. Section 35AB also reflects that certain persons performing duty for the Commonwealth are not employed by agencies with prescribed statutory functions, for example members of the Australian Defence Force, but likewise should not be exposed to the operation of sections 33AA and 35 where that duty is related to the defence, security or international relations of Australia. Persons performing such duties should not be exposed to the operation of section 33AA and 35.

149. New section 35AB implements the Government’s response to Recommendation 6 of the Committee report, to ensure that sections 33AA and 35 do not lead to the renunciation of a person’s citizenship by operation of law in cases where the person undertakes activities in accordance with the proper performance of the functions of their agency or in the course of the person’s duty to the Commonwealth in relation to the defence, security or international relations of Australia.

5 After section 35

150. This amendment inserts new sections 35A and 35B into the amended Bill. This amendment implements Recommendations 7, 8, 9, 12, 13, 14, 17, 18 and 20 of the Committee report.

35A Conviction for terrorism offences and certain other offences

*Cessation of citizenship on determination by Minister*

151. New subsection 35A(1) provides that the Minister may determine in writing that a person ceases to be an Australian citizen if:

- the person has been convicted of an offence against, or offences against, one or more of the following:
  - a provision of Subdivision A of Division 72 of the *Criminal Code*;
  - a provision of section 80.1, 80.1AA or 91.1 of the *Criminal Code*;
o a provision of Part 5.3 of the *Criminal Code* (except section 102.8 or Division 104 or 105);

o a provision of Part 5.5 of the *Criminal Code*;

o section 24AA or 24AB of the *Crimes Act 1914*

o section 6 or 7 of the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*; and

- the person has, in respect of the conviction or convictions, been sentenced to a period of imprisonment of at least 6 years, or to periods of imprisonment that total at least 6 years; and

- the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination; and

- the Minister is satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia; and

- having regard to the following factors, the Minister is satisfied that it is not in the public interest for the person to remain an Australian citizen:
  
  o the severity of the conduct that was the basis of the conviction or convictions and the sentence or sentences;
  
  o the degree of threat posed by the person to the Australian community;
  
  o the age of the person;
  
  o if the person is aged under 18 – the best interests of the child as a primary consideration;
  
  o the person’s connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
  
  o Australia’s international relations; and
  
  o any other matters of public interest.

152. The Note to new subsection 35A(1) provides that a person may seek review of a determination made under subsection 35A(1) in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*.

153. The effect of new subsection 35A(1) is that the Minister may determine that a dual citizen’s Australian citizenship ceases where that person has been convicted of a specified terrorist-related offence. Before the Minister makes such a determination, the Minister must be satisfied that:

- the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia; and
having regard to specified factors, it is not in the public interest for the person to remain an Australian citizen.

154. The specified offences in 35A(1)(a) 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 at least 10 years imprisonment. The offences are of a nature that on the face of them a person who undertakes such offences has repudiated their allegiance to Australia.

155. The specified offences also have limited application with respect to minors. Under the Criminal Code, a child:

- under 10 years of age is not criminally responsible for an offence; and
- a child from 10 to 14 years of age can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.

156. A brief description of the relevant offence and the maximum penalty is provided below.

<table>
<thead>
<tr>
<th>Act/Provision</th>
<th>Offence</th>
<th>Maximum Penalty (imprisonment)¹</th>
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</thead>
<tbody>
<tr>
<td><em>Criminal Code Act 1995</em></td>
<td>International terrorist activities using explosive or lethal devices</td>
<td>Life</td>
</tr>
<tr>
<td>Section 72.3</td>
<td></td>
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<tr>
<td><em>Criminal Code Act 1995</em></td>
<td>Treason</td>
<td>Life</td>
</tr>
<tr>
<td>Section 80.1</td>
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<tr>
<td><em>Criminal Code Act 1995</em></td>
<td>Treason – material assisting enemies</td>
<td>Life</td>
</tr>
<tr>
<td>Section 80.1AA</td>
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</tr>
<tr>
<td><em>Criminal Code Act 1995</em></td>
<td>Espionage</td>
<td>25 years</td>
</tr>
<tr>
<td>Section 91.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Criminal Code Act 1995</em></td>
<td>Terrorist acts</td>
<td>Life</td>
</tr>
<tr>
<td>Section 101.1</td>
<td></td>
<td></td>
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<tr>
<td><em>Criminal Code Act 1995</em></td>
<td>Providing or receiving training connected with terrorist acts</td>
<td>15 or 25 years</td>
</tr>
<tr>
<td>Section 101.2</td>
<td></td>
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<tr>
<td><em>Criminal Code Act 1995</em></td>
<td>Possessing things connected with terrorist acts</td>
<td>10 or 15 years</td>
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<tr>
<td>Section 101.4</td>
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<tr>
<td><em>Criminal Code Act 1995</em></td>
<td>Collecting or making documents likely to facilitate terrorist acts</td>
<td>15 years</td>
</tr>
<tr>
<td>Section 101.5</td>
<td></td>
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</tr>
<tr>
<td><em>Criminal Code Act 1995</em></td>
<td>Other acts done in preparation for, or planning, terrorist acts</td>
<td>Life</td>
</tr>
<tr>
<td>Section 101.6</td>
<td></td>
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<tr>
<td><em>Criminal Code Act 1995</em></td>
<td>Directing the activities of a terrorist organisation</td>
<td>10 or 15 years</td>
</tr>
<tr>
<td>Section 102.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Criminal Code Act 1995</em></td>
<td>Membership of a terrorist organisation</td>
<td>10 years</td>
</tr>
<tr>
<td>Section 102.3</td>
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</tbody>
</table>

¹ Where more than one maximum penalty is specified, the penalty differs according to specific elements of the offence.
| Act/Provision | Offence | Maximum Penalty (imprisonment)
<table>
<thead>
<tr>
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<tbody>
<tr>
<td><strong>Criminal Code Act 1995 Section 102.4</strong></td>
<td>Recruiting for a terrorist organisation</td>
<td>15 or 25 years</td>
</tr>
<tr>
<td><strong>Criminal Code Act 1995 Section 102.5</strong></td>
<td>Training involving a terrorist organisation</td>
<td>25 years</td>
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<tr>
<td><strong>Criminal Code Act 1995 Section 102.6</strong></td>
<td>Getting funds to, from or for a terrorist organisation</td>
<td>15 or 25 years</td>
</tr>
<tr>
<td><strong>Criminal Code Act 1995 Section 102.7</strong></td>
<td>Providing support to a terrorist organisation</td>
<td>15 or 25 years</td>
</tr>
<tr>
<td><strong>Criminal Code Act 1995 Section 103.1</strong></td>
<td>Financing terrorism</td>
<td>Life</td>
</tr>
<tr>
<td><strong>Criminal Code Act 1995 Section 103.2</strong></td>
<td>Financing a terrorist</td>
<td>Life</td>
</tr>
<tr>
<td><strong>Criminal Code Act 1995 Section 119.1</strong></td>
<td>Incursions into foreign countries with intention to engage in hostile activities</td>
<td>Life</td>
</tr>
<tr>
<td><strong>Criminal Code Act 1995 Section 119.2</strong></td>
<td>Entering or remaining in a declared area overseas where terrorist organisations are engage in hostile activities</td>
<td>10 years</td>
</tr>
<tr>
<td><strong>Criminal Code Act 1995 Section 119.4</strong></td>
<td>Preparations for incursions into foreign countries for purposes of engaging in hostile activities</td>
<td>Life</td>
</tr>
<tr>
<td><strong>Criminal Code Act 1995 Section 119.5</strong></td>
<td>Allowing use of buildings, vessels and aircraft to commit foreign incursions offences</td>
<td>Life</td>
</tr>
<tr>
<td><strong>Criminal Code Act 1995 Section 119.6</strong></td>
<td>Recruiting persons to join organisations engaged in hostile activities against foreign governments</td>
<td>25 years</td>
</tr>
<tr>
<td><strong>Criminal Code Act 1995 Section 119.7</strong></td>
<td>Recruiting persons to serve in or with an armed force in a foreign country</td>
<td>10 years</td>
</tr>
<tr>
<td><strong>Crimes Act 1914 Section 24AA</strong></td>
<td>Treachery by overthrow of the Constitution or Government, levying war or assisting in levying war, or instigating an armed invasion</td>
<td>Life</td>
</tr>
<tr>
<td><strong>Crimes Act 1914 Section 24AB</strong></td>
<td>Sabotage by destroying, damaging or impairing Australian Defence Force equipment</td>
<td>15 years</td>
</tr>
<tr>
<td><strong>Crimes (Foreign Incursions and Recruitment) Act 1978 Section 6</strong></td>
<td>Incursions into foreign States with intention of engaging in hostile activities</td>
<td>20 years</td>
</tr>
<tr>
<td><strong>Crimes (Foreign Incursions and Recruitment) Act 1978 Section 7</strong></td>
<td>Preparations for incursions into foreign States for purpose of engaging in hostile activities</td>
<td>10 years</td>
</tr>
</tbody>
</table>
157. The purpose of new section 35A 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. Cessation of citizenship is a very serious outcome of very serious conduct that demonstrates a person has repudiated their allegiance to Australia (refer to paragraph 35A(1)(d)). Removing 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.

158. Paragraph 35A(1)(c) provides that the Minister may only make a determination under subsection 35A(1) if the person is a national or citizen of a country other than Australia when the Minister makes the determination. The purpose of this amendment is to ensure that a determination cannot be made under subsection 35A(1) if it would result in a person becoming stateless.

159. The term ‘national or citizen’ is used because some persons may be legally entitled to ‘nationality’ of a country but not ‘citizenship’. For example, in the United States a person can be a U.S national but is not necessarily a U.S citizen. A person born in an outlying possession of the United States is a U.S national but not a U.S citizen. An outlying possession of the United States is currently American Samoa and the Swains Islands. U.S non-citizen nationals who are eligible may obtain U.S passports and owe permanent allegiance to the United States.

160. The drafting of this provision differs slightly to other provisions in the Citizenship Act relating to statelessness. The amendment has been set deliberately high as the operation of section 35A can be differentiated from other reasons for cessation under the Citizenship Act because it applies to conduct that occurs while the person is an Australian citizen. This will not affect the operation of other statelessness provisions in the Citizenship Act.

161. New subparagraph 35A(1)(e)(vii) requires the Minister to consider public interest matters before making a determination under subsection 35A(1). This amendment is aimed to ensure that the public interest is taken into consideration when a determination is being considered under new subsection 35A(1). The assessment of public interest is by reference to the purpose of the statutory scheme. The application of the public interest test will require a balancing of competing interests and be a question of fact and degree (Hogan v Hinch (2011) 243 CLR 506). Public interest consideration in this statutory scheme may include matters such as public confidence in the safety of the Australian community, actual public safety, the need for deterrence and the impact on the person.

162. The Minister is well placed to make an assessment of public interest as an elected member of the Parliament. The Minister represents the Australian community and has a particular insight into Australian community standards and values and if it would be contrary to the public interest for the person to remain an Australian citizen.

163. New subsection 35A(2) provides that the person ceases to be an Australian citizen at the time the determination is made by the Minister.

164. New subsection 35A(3) provides that subsection 35A(1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person’s birth).

165. The purpose of this amendment is to provide that cessation of citizenship referred to in subsection 35A(1) can apply to all Australian citizens, including those persons who are born in Australia and automatically acquired Australian citizenship. This is the case because all
citizens have an obligation of allegiance to Australia irrespective of how they obtained their citizenship. If a person engages in specified terrorist-related conduct that is incompatible with their allegiance to Australia, and they are convicted of this offence their citizenship should cease irrespective of how they obtained citizenship.

166. New subsection 35A(4) provides that, for the purpose of new paragraph 35A(1)(b):

- the reference to being sentenced to a period of imprisonment does not include a suspended sentence; and

- if a single sentence of imprisonment is imposed in respect of both an offence against a provision mentioned in paragraph 35A(1)(a) and in respect of one or more other offences, then:
  
  o if it is clear that only a particular part of the total period of imprisonment relates to the offence against the provision mentioned in paragraph 35A(1)(a)—the person is taken to have been sentenced to imprisonment in respect of that offence for that part of the total period of imprisonment; and

  o if subparagraph (i) does not apply—the person is taken to have been sentenced to imprisonment in respect of the offence against the provision mentioned in paragraph 35A(1)(a) for the whole of the total period of imprisonment.

167. The purpose of new subsection 35A(4) is to clarify that where a person is convicted of a terrorist-related offence for the purpose of subsection 35A(1) and has been sentenced to a period of imprisonment of at least 6 years, that the sentence does not include a suspended sentence.

168. The provision also clarifies that where the person receives a single sentence of imprisonment of at least 6 years for a number of offences, and it is clear that only a particular part of the total period of imprisonment relates to the terrorist-related offence captured by new subsection 35A(1), then section 35A does not apply, and the person does not cease to be an Australian citizen. However, if it is not clear that only a particular part of the total period of imprisonment relates to the terrorist-related offence, then the person is taken to have been sentenced to imprisonment in respect of the terrorist-related offence for the whole of the total period of imprisonment.

169. For example, a person may be convicted of providing support to terrorist organisation pursuant to section 102.7 of the Criminal Code (which is included in new subsection 35A(1), as well as threatening a Commonwealth official (which is not an offence included in new subsection 35A(1)). The person receives a total sentence of imprisonment of 8 years for both offences. That is, it is unclear if only a particular part of that sentence relates to providing support to a terrorist organisation. It follows that new section 35A would apply to the person, as the person has received a total sentence of imprisonment of 8 years imposed in respect of an offence included in new subsection 35A(1).

170. However, if the person were to receive separate sentences for each offence, for example a sentence of imprisonment of 3 years for providing support to a terrorist organisation, and a 7 year sentence of imprisonment for threatening a Commonwealth official, new section 35A would not apply. This is because the person received a separate sentence of 3 years for providing support to a terrorist organisation and the offence of threatening a Commonwealth official is not included for the purpose of new subsection 35A(1). Therefore, in the case where the person is sentenced to separate sentences of imprisonment for multiple offences, at least
one of the offences must be included as an offence in new subsection 35A(1) and the person
must be sentenced to at least 6 years imprisonment for that offence.

Minister to give notice

171. New subsection 35A(5) provides that if the Minister makes a determination under
subsection 35A(1) because of which a person ceases to be an Australian citizen, the Minister:

- must give or make reasonable attempts to give written notice to that effect to the
  person:
  - as soon as practicable; or
  - if the Minister make a determination under subsection 35A(7) – as soon as
    practicable after the Minister revokes the determination (if the Minister
    does so); and
- may give notice to that effect to such other persons and at such time as the
  Minister considers appropriate.

172. The Minister must make ‘reasonable attempts’ to give written notice to the person. This
recognises that the Minister may not always be able to provide written notice to the person in
situations where that person may not be able to be contacted. Reasonable attempts to give
written notice may include giving notice at a last known email address or postal address or
via personal message on social media.

173. The Minister may also give notice of the cessation of citizenship to such other persons and at
such time that the Minister considers appropriate. This ensures that the Minister is able to
notify relevant government agencies or appropriate persons of the person’s cessation of
Australian citizenship. For example, the Minister may notify the Department of Foreign
Affairs and Trade of the person’s cessation of Australian citizenship so that the person’s
Australian passport is cancelled. The Minister may also notify an Australian Electoral
Commissioner so the person can be removed from the electoral roll.

174. The giving of a notice is intended to constitute official recognition that a person’s Australian
citizenship has ceased by operation of new section 35A. Any consequential action taken by
Government agencies will only take place after the Minister issues the notice to the person
(Recommendation 18 of the Committee report).

175. New subsection 35A(6) provides that a notice under paragraph 35A(5)(a) must set out:

- the matters required by section 35B (see explanatory commentary below); and
- the person’s rights of review.

176. The purpose of this amendment is to make it clear to the person the reasons for the cessation
of their Australian citizenship and the person’s rights of review. New section 35B provides
for the matter to be set out in notices to persons who have ceased to be Australian citizens.
This is intended to ensure that a person is provided with the information they may need to
seek review.

177. A person will have the right to seek judicial review of the determination. The operation of
the new provisions in the amended Bill is extraordinary and lends itself to review by the High
Court and Federal Court. Section 75 of the Constitution gives the High Court original jurisdiction to hear all matters:

- arising under any treaty;
- affecting consuls or other representatives of other countries;
- in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- between States, or between residents of different States, or between a State and a resident of another State;
- in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

178. Section 39B of the *Judiciary Act 1903* also gives the Federal Court of Australia original jurisdiction to, amongst other matters, hear matters in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

179. Under new subsection 35A(11), the rules of natural justice apply to the Minister’s powers under subsection 35A(1), but not to other powers of the Minister under this section.

180. New subsection 35A(6) provides that the Minister may determine in writing that a notice under paragraph 35A(5)(a) should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relation of Australia. The Minister must consider whether to revoke the determination:

- no later than 6 months after making it; and
- at least every 6 months thereafter until 5 years have passed since the determination is made.

181. The Minister must review this decision no later than 6 months after making it, and at least every 6 months thereafter until 5 years has passed. This recognises the reasonable expectation that the person is to be notified as soon as possible, until 5 years has passed. It is expected that any ongoing operation of national security is likely to be resolved within 5 years, or alternatively that the person may make themselves known to the Minister during this period (for example, by attempting to return to Australia).

*Minister must revoke determination if conviction overturned*

182. New subsection 35A(8) provides that the Minister must, in writing, revoke a determination made under new subsection 35A(1) in relation to a person if:

- a conviction because of which the determination was made is later overturned on appeal, or quashed, by a court; and
- that decision of that court has not been overturned on appeal; and
- no appeal, or further appeal, can be made to a court in relation to that decision.

183. New subsection 35A(8) is intended to provide that the Minister is required to revoke the determination providing that a person has lost their Australian citizenship if the conviction
because of which the determination was made is overturned on appeal or quashed and all appeal rights of both parties have been exhausted. For example, a person may have their initial conviction quashed on appeal but the Commonwealth or other body (e.g. Director of Public Prosecutions) intends to appeal the court’s decision to quash the initial conviction. In such circumstances, the Minister would not be required to revoke the determination at this point in the judicial process. If the conviction is overturned, the Crown could institute a retrial. If the person was convicted upon a retrial and the conditions of section 35A were met, this would enliven the opportunity for a new determination. In this case, the Minister would be obliged to revoke the first determination.

184. New subsection 35A(9) provides that if the Minister revokes the determination, the person’s citizenship is taken never to have ceased under this section because of that determination. That is, the person is taken to never have lost their Australian citizenship.

**General provisions relating to Minister’s powers**

185. New subsection 35A(10) provides that the powers of the Minister under section 35A may only be exercised by the Minister personally.

186. The effect of this provision is that the Minister’s powers under section 35A, including the power to make a determination and revoke a determination, must be exercised by the Minister personally, and may not be exercised by a delegate of the Minister.

187. New subsection 35A(11) provides that except for the powers of the Minister under subsection 35A(1), the rules of natural justice do not apply in relation to the powers of the Minister under new section 35A.

188. The rules of natural justice include the hearing rule and the bias rule. The purpose of subsection 35A(11) is to ensure that the rules of natural justice apply to the Minister’s determination under new subsection 35A(1), but do not apply to the other powers exercised by the Minister under section 35A.

189. In general terms, this will mean that if the Minister is 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/make submission to the Minister.

190. Review rights relevant to natural justice will apply to a decision under subsection 35A(1).

191. New subsection 35A(12) provides that section 47 does not apply in relation to the exercise of powers of the Minister under section 35A. Section 47 of the Citizenship Act relates to the notification of decisions made under the Citizenship Act. Section 47 is excluded from operation under section 35A because section 35A provides for its own stand-alone notice provisions which differ from section 47.

192. New subsection 35A(13) provides that an instrument exercising any of the Minister’s powers under this section is not a legislative instrument. The reason that an instrument under this section is not a legislative instrument is that it is administrative in character. Subsection 35A(13) is declaratory of the law and is not intended as an exemption to the *Legislative Instruments Act 2003*, but is included to assist readers in the interpretation of the legislation.
35B Matters to be set out in notices to persons who have ceased to be Australian citizens

193. New section 35B implements Recommendation 13 of the Committee report.

194. New subsection 35B(1) provides that a notice that is given to a person under new paragraphs 33AA(10)(a) or 35(5)(a) must:
   - state that the Minister has become aware of conduct because of which the person has, under section 33AA or 35, ceased to be an Australian citizen; and
   - contain a basic description of that conduct.

195. New subsection 35B(2) provides that a notice given to a person under paragraph 35A(5)(a) must:
   - state the Minister has determined under section 35A that the person has ceased to be an Australian citizen because of one or more convictions; and
   - identify the conviction or convictions, and contain a basic description of conduct to which the conviction or convictions relate.

196. The purpose of new subsections 35B(1) and (2) is to clarify what the Minister must include in the notice that is provided to the person notifying them of the cessation of their Australian citizenship.

197. New subsection 35B(3) provides that a notice given to a person under paragraph 33AA(10)(a), 35(5)(a) or 35A(5)(a) must not contain information, or content of a document, if:
   - the information or content includes any operationally sensitive information (within the meaning of the Independent National Security Legislation Monitor Act 2010); or
   - the disclosure of the information or content would or might prejudice:
     - the security, defence or international relations of Australia; or
     - the performance by a law enforcement or security agency (within the meaning of the Independent National Security Legislation Monitor Act 2010) of its functions; or
   - the disclosure of the information, or content, would or might endanger a person’s safety; or
   - the disclosure of the information or content would be likely to be contrary to the public interest for any other reason.

198. ‘Operationally sensitive information’ is defined in the Independent National Security Legislation Monitor Act 2010 to mean:
   - information about information sources or operational activities or methods available to a law enforcement or security agency; or
• information about particular operations that have been, are being or are proposed to be undertaken by a law enforcement or security agency, or about proceedings relating to those operations; or

• information provided by a foreign government, or by an agency of a foreign government, where that government does not consent to the public disclosure of the information.

199. ‘Law enforcement or security agency’ is defined in the Independent National Security Legislation Monitor Act 2010 to mean any of the following agencies:

• the Australian Federal Police;

• the Australian Crime Commission;

• Customs;

• the Australian Security Intelligence Organisation;

• the Australian Secret Intelligence Service;

• the Australian Defence Force;

• the part of the Department of Defence known as the Defence Imagery and Geospatial Organisation;

• the part of the Department of Defence known as the Defence Intelligence Organisation; the part of the Department of Defence known as the Defence Signals Directorate;

• the Office of National Assessments established by the Office of National Assessments Act 1977;

• the police force of a State or Territory;

• any other agency prescribed by the regulations for the purposes of this definition.

200. New subsection 35B(3) ensures that the Minister is not required to disclose any information that may compromise ongoing operations of national security or prejudice the security, defence or international relations of Australia when providing notice to the person regarding the cessation of their Australian citizenship.

201. The assessment of the public interest is by reference to the purpose of the statutory scheme. The application of the public interest test will require a balancing of competing interests and will be a question of fact and degree (Hogan v Hinch (2011) 243 CLR 506). Public interest consideration in this statutory scheme may include matters such as public confidence in the safety of the Australian community, actual public safety, the need for deterrence and the impact on the person.

202. The Minister is well placed to make an assessment of public interest as an elected member of the Parliament. The Minister represents the Australian community and has a particular insight into Australian community standards and values and if it would be contrary to the public interest for the person to remain an Australian citizen.
6 Paragraph 36(1)(a)

203. This amendment omits “, 34A or 35”, and substitutes “ or 34A” in paragraph 36(1)(a) of the Citizenship Act.

204. This amendment deletes a reference to amended section 35 from paragraph 36(1)(a) of the Citizenship Act. This amendment implements Recommendation 21 of the Committee report.

205. Section 36 of the Citizenship Act provides for the revocation of Australian citizenship for children of responsible parents who cease to be citizens.

206. Subsection 36(1) currently provides that if a person ceases to be an Australian citizen at a particular time (the *cessation time*) under section 33, 34, 34A or 35 and at the cessation time, the person is a responsible parent of a child aged under 18, then the Minister may, by writing, revoke the child’s Australian citizenship. If the Minister does so – the child ceases to be an Australian citizen at the time of the revocation.

207. Subsection 36(2) provides that if, at the cessation time, another responsible parent of the child is an Australian citizen, subsection 36(1) does not apply to the child:

- while there is a responsible parent who is an Australian citizen; and
- if there ceases to be such a responsible parent – at any time after that death.

208. Subsection 36(3) provides that the Minister must not revoke a child’s Australian citizenship under subsection 36(1) if the Minister is satisfied that the child would then become a person who is not a national or citizen of any country.

209. The purpose of this amendment is to exclude amended section 35 from the operation of section 36 of the Citizenship Act. This means that, where a person ceases to be an Australian citizen at a particular time under amended section 35 and the person is a responsible parent of a child under the age of 18 at the cessation time, the Minister can no longer revoke the child’s Australian citizenship under that provision.

7 At the end of Division 3 of Part 2

210. This amendment adds new section 36A at the end of Division 3 of Part 2 of the Citizenship Act.

211. New section 36A is concerned with limitations on resumption of citizenship if citizenship ceases under section 33AA, 35 and 35A.

212. New section 36A provides that if under section 33AA, 35 or 35A a person ceases to be an Australian citizen, then Divisions 1 and 2 of Part 2 of the Citizenship Act do not apply in relation to the person on and after the time of that cessation. This is subject to the Minister’s powers to exempt the operation of sections 33AA, 35 and 35A.

213. New section 36A also includes a note which makes clear that the effect of this section is that the person can never become an Australian citizen again, subject to subsections 33AA(14) and 33AA(24), 35(9) and 35(19) and 35A(8) and 35A(9). 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.
8 Application provisions

Application of section 33AA

214. This amendment provides that section 33AA of the Citizenship Act (as amended by this Schedule) applies in relation to:

- persons who became Australian citizens before, on or after the commencement of this item; and
- conduct engaged in on or after the commencement of this item (whether the conduct commenced before, on or after the commencement of this item).

215. This provision is not retrospective as it does not have the provisions of the amended Bill apply prior to the day after the Royal Assent. However, it does capture conduct that commenced before, on or after the commencement of the amended Bill.

216. The effect of this provision is that the new revocation power in section 33AA applies to all Australian citizens regardless of when they became an Australian citizen.

217. The provision also clarifies that a person will only cease to be an Australian citizen if the person has engaged in conduct on or after the commencement of the legislation in subsection 33AA(1). However, the commencement of the conduct that is relied upon for the purpose of subsection 33AA(1) can occur before, on or after the commencement of the legislation in subsection 33AA(1). That is, a person may have begun undertaking the conduct prior to the commencement of section 33AA, but a person’s Australian citizenship will only cease if the person is engaging in the conduct on or at the time that section 33AA comes into effect.

Application of section 35

218. This amendment provides that section 35 of the Citizenship Act (as amended by this Schedule) applies in relation to:

- persons who became Australian citizens before, on or after the commencement of this item; and
- fighting for, or being in the service of, a declared terrorist organisation that occurs on or after the commencement of this item (whether the fighting or service commenced before, on or after the commencement of this item).

219. This amendment also provides that if the fighting or service commenced before the commencement of this item, the person ceases to be an Australian citizen at the time this item commences.

220. This provision is not retrospective, as it does not have the provisions of the amended Bill apply prior to the day after the Royal Assent.

221. The effect of this provision is that the new revocation power in section 35A applies to all Australian citizens regardless of when they became an Australian citizen. It is also the effect that a person who is currently fighting for, or being in the service of, a terrorist organisation and is still fighting for, or being in the service of, a terrorist organisation at the time the legislation in subsection 35(1) commences will automatically lose their Australian citizenship by operation of section 35(2).
222. For example, if a person is fighting in the armed forces of an enemy country before commencement of Schedule 1 to the Bill and continues to fight in the armed forces of an enemy country on commencement of Schedule 1 to the Bill, section 35 will apply to that person.

Application of section 35A

223. This amendment also provides that section 35A of the Citizenship Act (as amended by this Schedule):

- applies in relation to persons who became Australian citizens before, on or after the commencement of this item; and

- does not apply in relation to a conviction of a person before the commencement of this item, unless:
  
  o the conviction occurred no more than 10 years before the commencement of this item; and

  o the person was sentenced to a period of imprisonment of at least 10 years in respect of that conviction.

224. This amendment implements Recommendation 10 of the Committee report. The effect of this provision is that the new revocation power in section 35A applies to all Australian citizens regardless of when they became an Australian citizen.

225. The provision also clarifies that new section 35A does not apply in relation to a conviction of a person before commencement of this item, unless the conviction occurred within 10 years before the commencement of this item, and the person was sentenced to a period of imprisonment of at least 10 years in respect of that conviction.

226. This provision has a partial retrospective application as it applies to past convictions that occurred within the previous 10 years before commencement of the item. However, the provision does not operate so that affected persons are taken to have lost their Australian citizenship at a time before commencement. The partial retrospective application is appropriate as a person should be subject to revocation of citizenship on the basis of past conduct where that conduct involves a high degree of criminality.

227. This provision enables the Minister to make a current decision to deprive somebody of their Australian citizenship, based on a previous conviction. This would include a current assessment of whether the person’s past conviction reveals that they have breached their allegiance to Australia and whether it is contrary to the public interest for the person to remain an Australian citizen.

228. This provision recognises that past terrorist-related conduct, to which persons have been convicted under Australian law, is conduct that all members of the Australian community would view as repugnant and a deliberate step outside of the values that define Australian society.
SCHEDULE 2 - OTHER AMENDMENTS

Australian Citizenship Act 2007

1 After section 51A

229. This amendment inserts new sections 51B and 51C after section 51A of the Citizenship Act 2007. This amendment implements Recommendations 22 and 24 of the Committee report.

51B- Reports to Parliament

230. This amendment implements Recommendation 22 of the Committee report.

231. New sub section 51B(1) provides that, as soon as practicable after each reporting period, the Minister must table a report in each House of Parliament that sets out:

- the number of notices given by the Minister under paragraph 33AA(10)(a), 35(5)(a) or 35A(5)(a) during the reporting period; and
- the number of notices the Minister unsuccessfully attempted to give under paragraph 33AA(10)(a), 35(5)(a) or 35A(5)(a) during the reporting period; and
- for each notice given or attempted to be given under paragraph 33AA(10)(a) or 35(5)(a) – a brief statement of the matters that are the basis for the notice; and
- for each notice given or attempted to be given under paragraph 35A(5)(a) – a brief statement of the matters that are the basis for the determination under subsection 35A(1) to which the notice relates.

232. New subsection 51B(2) provides that the report must not contain information, or content of a document if:

- the information or content includes any operationally sensitive information (within the meaning of the Independent National Security Legislation Monitor Act 2010); or
- the disclosure of the information or content would or might prejudice:
  - the security, defence or international relations of Australia; or
  - the performance by a law enforcement or security agency (within the meaning of the Independent National Security Legislation Monitor Act 2010) of its functions; or
- the disclosure of the information or content would or might endanger a person’s safety; or
- the disclosure of the information or content would be likely to be contrary to the public interest for any other reason.

233. ‘Operationally sensitive information’ is defined in the Independent National Security Legislation Monitor Act 2010 to mean:

- information about information sources or operational activities or methods available to a law enforcement or security agency; or
• information about particular operations that have been, are being or are proposed to be undertaken by a law enforcement or security agency, or about proceedings relating to those operations; or

• information provided by a foreign government, or by an agency of a foreign government, where that government does not consent to the public disclosure of the information.

234. ‘Law enforcement or security agency’ is defined in the Independent National Security Legislation Monitor Act 2010 to mean any of the following agencies:

• the Australian Federal Police;
• the Australian Crime Commission;
• Customs;
• the Australian Security Intelligence Organisation;
• the Australian Secret Intelligence Service;
• the Australian Defence Force;
• the part of the Department of Defence known as the Defence Imagery and Geospatial Organisation;
• the part of the Department of Defence known as the Defence Intelligence Organisation; the part of the Department of Defence known as the Defence Signals Directorate;
• the Office of National Assessments established by the Office of National Assessments Act 1977;
• the police force of a State or Territory;
• any other agency prescribed by the regulations for the purposes of this definition.

235. The assessment of the public interest is by reference to the purpose of the statutory scheme. The application of the public interest test will require a balancing of competing interests and will be a question of fact and degree (Hogan v Hinch (2011) 243 CLR 506). Public interest consideration in this statutory scheme may include matters such as public confidence in the safety of the Australian community, actual public safety, the need for deterrence and the impact on the person.

236. The Minister is well placed to make an assessment of public interest as an elected member of the Parliament. The Minister represents the Australian community and has a particular insight into Australian community standards and values and if it would be contrary to the public interest for the person to remain an Australian citizen.

237. New subsection 51B(3) provides that, for the purposes of section 51B, reporting period means:

• the period of 6 months beginning on the day this section commences; and
Each subsequent 6 month period.

238. The purpose of this provision is to require the Minister to publically report, every six months, the number of times a notice for loss or revocation of citizenship has been issued under new sections 33AA, 35 or 35A and to provide a brief statement of reasons.

239. The cessation of Australian citizenship due to terrorist-related conduct will likely involve matters of national security. However, areas of government involving national security are unable to be subject to the same level of public scrutiny as other areas of government.

240. This provision therefore ensures rigorous oversight so that the powers vested to the Minister regarding the cessation of Australian citizenship are wielded fairly, effectively and as intended.

51C - Briefing of Parliamentary Joint Committee on Intelligence and Security

241. This amendment implements Recommendation 24 of the Committee report.

242. New subsection 51C(1) provides that this section applies if any of the following events occur:

- the Minister gives or unsuccessfully attempts to give a notice under paragraph 33AA(10)(a) or 35(5)(a);
- the Minister gives or unsuccessfully attempts to give a notice under paragraph 35A(5)(a);
- the Minister makes a determination under subsection 33AA(12), 35(7) or 35A(7).

243. New subsection 51B(2) provides that the Minister must, as soon as practicable after the occurrence of the event, inform the Parliamentary Joint Committee on Intelligence and Security in writing.

244. New subsection 51C(3) provides that, before the end of the later of:

- the end of 20 sittings days of the House of Representatives after the giving of the notice or the making of the determination; and
- the end of 20 sittings days of the Senate after the giving of the notice or the making of the determination;

the Minister must, if requested to do so by the Parliamentary Joint Committee on Intelligence and Security, arrange for the Committee to be briefed on the event.

245. New subsection 51C(4) provides that the briefing may be done orally or in writing.

246. New subsection 51C(5) provides that the briefing must include details of the following:

- for an event mentioned in paragraph 51C(1)(a):
  - the matters that are the basis for the notice; and
whether the Minister has rescinded the notice and exempted the person to whom the notice related from the effect of the section in relation to the matters that were the basis for the notice;

- for an event mentioned in paragraph 51C(1)(b):
  - the matters that are the basis for the determination under subsection 35A(1) to which the notice relates;
  - whether the Minister has revoked under subsection 35A(8) the determination to which the notice relates; and

- for an event mentioned in paragraph 51C(1)(c) – the matters that are the basis for the determination.

247. The purpose of new section 51C is to require the Minister to advise the Parliamentary Joint Committee on Intelligence and Security (PJCIS) upon issuing a notice for the loss of citizenship under new section 33AA, 35 or 35A. New section 51C also requires, if requested, that the Minister to provide a subsequent briefing to PJCIS within 20 days of the initial notice being issued, and advice given to PJCIS should detail whether the notice has been provided to the person, the conduct that engaged the relevant provisions of the amended Bill and whether an exemption has been given by the Minister.

248. The measures in the amended Bill are necessary in light of the current threat posed by persons who are Australian citizens but act to cause Australia harm. The purpose of the provision is to ensure that the effectiveness of the measures is continually reviewed by the PJCIS. The review would explore whether the provisions have been effective in their goal to help protect the Australian community; whether the laws have been applied as intended; any practical difficulties encountered in their application; and any unintended consequences that may have become apparent. This is similar to current reviews conducted for other counter-terrorism measures.

Independent National Security Legislation Monitor Act 2010

2 Section 4 (before paragraph (a) of the definition of counter-terrorism and national security legislation)


250. This amendment inserts new subsection 4(aa) into section 4 of the INSLM Act, with the effect that new sections 33AA, 35 and 35A of the Australian Citizenship Act 2007 and any other provisions of that Act as far as it relates to those sections are added to the definition of counter-terrorism and national security legislation for the purposes of the INSLM Act.

251. Recommendation 25 of the Committee report provides that the INSLM Act be amended to require the Independent National Security Legislation Monitor (the Monitor) to finalise a review of the revocation of citizenship provisions in the Bill by 1 December 2018.

252. The INSLM’s role is to review the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation on an ongoing basis. This includes considering whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or threat to national security or both, and remain necessary.
253. Item 2 amends the INSLM Act to list the new provisions providing for the loss of citizenship due to undertaking specified terrorist-related conduct in the INSLM Act as matters that the Monitor can review. The Prime Minister will make a referral to the Monitor under section 7 of the INSLM Act for the Monitor to undertake a review of the relevant new citizenship provisions in the amended Bill to be completed by 1 December 2018.

*Intelligence Services Act 2001*

3 Section 3

254. This amendment inserts the definition of Immigration and Border Protection Department into the definition section of the *Intelligence Services Act 2001* (‘IS Act’) (section 3). The term *Immigration and Border Protection Department* is included to mean ‘the Department administered by the Minister administering the *Australian Citizenship Act 2007*’.

4 Before paragraph 29(1)(c)

255. This item inserts new paragraph 29(1)(ca) into section 29 of the IS Act. Section 29 of the IS Act provides for the functions of the Committee on Intelligence and Security.

256. New paragraph 29(1)(ca) provides that the functions of the Committee are:

- To review, by 1 December 2019, the operation, effectiveness and implications of sections 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007* and any other provision of that Act as far as it relates to those sections.

5 Paragraph 29(3)(g)

257. Paragraph 29(3)(g) of the IS Act is amended to omit “ONA or AFP” and substitute “ONA, AFP or the Immigration of Border Protection Department.”

6 At the end of section 30

258. This item adds ‘the Secretary of the Immigration and Border Protection Department’ as paragraph 30(e) of the IS Act.

7 Clause 1A of Schedule 1 (definition of *agency*)

259. This item omits ‘or AFP’ and substitutes ‘, AFP or the Immigration and Border Protection Department’ into the definition of *agency* in Schedule 1 to the ISA.

8 Clause 1A of Schedule 1 (at the end of the definition of *agency head*)

260. This item adds ‘the Secretary of the Immigration and Border Protection Department to the definition of *agency head* in Schedule 1 to the ISA.

261. The purpose of the amendments to the IS Act is to extend the functions of the Parliamentary Joint Committee on Intelligence and Security (the Committee) to include monitoring and reviewing the performance by the Department of Immigration and Border Protection of its functions under the provisions of the amended Bill. The extended functions are consistent with the Committee’s current responsibilities under the IS Act.

262. The Committee is required to review the operation, effectiveness and implications of the provisions under the amended Bill by 1 December 2019.
263. The amendments to the IS Act also require the Secretary of the Department of Immigration and Border Protection to brief the Committee for the purpose of this new function.

264. The amendments to the IS Act in items 3 to 8 above, implement Recommendations 23 and 26 of the Committee report. Recommendations 23 and 26 generally provide that the IS Act be amended to extend the functions of the Committee to include monitoring and reviewing the performance by the Department of Immigration and Border Protection of its functions under the provisions of the amended Bill. The extended functions should be consistent with the Committee’s current remit under the IS Act. The IS Act should also be amended to enable relevant agency heads to brief the Committee for the purpose of this new function.

9 Application of amendments

265. This item provides the application provisions for amendments to the INSLM Act and IS Act.

266. This item provides that the amendments of the Independent National Security Legislation Monitor Act 2010 and the Intelligences Services Act 2001 made by this Schedule apply in relation to sections 33AA, 35 and 35A of the Australian Citizenship Act 2007 as in force on and after the commencement of this Act.

267. The effect of this provision is that the amendments to the INSLM Act and IS Act apply to new sections 33AA, 35 and 35A at the time they come into force.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

1. The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

2. The Bill has received significant amendments to implement the recommendations made by the Parliament Joint Committee on Intelligence and Security (PJCIS) in the Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (released on 4 September 2015). The recommendations made by the PJCIS have been implemented by the Government to the fullest extent possible and are reflected in the new draft Bill.

3. The purpose clause in the Bill has not changed. It declares that 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.

Overview of the Bill

4. The Bill amends the Australian Citizenship Act 2007 (the Act) to:
   • Provide in new section 33AA that a person aged 14 or older who is a national or citizen of a country other than Australia, renounces their Australian citizenship when they engage in specified conduct with the specified intention, while out of Australia or, if the specified conduct occurred in Australia with the specified intention, the individual has now left Australia and not been tried for any offence related to the conduct.
   • Provide in amended section 35 that a person aged 14 or older ceases to be an Australian citizen if the person is a national or citizen of a country other than Australia and
     o the person serves in the armed forces of a country at war with Australia; or
     o fights for, or is in the service of a declared terrorist organisation;
   and the person’s service or fighting occurs outside Australia.
• Subsection 35(4) provides that a person is not ‘in the service of’ a declared terrorist organisation where a person’s acts are unintentional; the person is acting under duress or force; or the person is providing neutral and independent humanitarian assistance.

• Provide in new section 35AA that the Minister may, by legislative instrument, declare a terrorist organisation within the meaning of subsection 102.1 of the Criminal Code to be a declared terrorist organisation for the purposes of this section. The Minister must be satisfied of explicit criteria in subsection 35AA(2) before making the declaration.

• Provide in new section 35AB that sections 33AA and 35 do not apply to conduct engaged in by a person in the proper performance of a function of an Australian law enforcement or intelligence body; or, by a person acting in the course of the person’s duty to the Commonwealth in relation to the defence, security or international relations of Australia.

• Provide in new section 35A that the Minister has the discretion to determine that a person’s Australian citizenship ceases following conviction(s) for a specified offence with a sentence of at least six years imprisonment, or multiple sentences totalling at least six years’ imprisonment. The Minister must also be satisfied of criteria in paragraphs 35A(1)(c),(d) and (e) before making the determination.

• Provide in new section 35B the matters that must be set out in notices to individuals who have ceased to be citizens under section 33AA, 35 or 35A.

• Provide in each of new sections 33AA and 35 that the Minister has a discretion to consider whether to make a determination to rescind a notice and exempt a person from the effect of new section 33AA or new section 35.

• Provide in new sections 33AA and 35 a requirement for the Minister to table a statement containing details of any determination made in Parliament within 15 sitting days after the Minister has made a determination.

• Provide in new section 36A that if a person ceases to be a citizen under section 33AA, 35 or 35A they can never become an Australian citizen again.

• Provide in new section 51B that the Minister must table a Report to Parliament every six months that sets out statistical information about notices given under paragraphs 33AA(10)(a), 35(5)(a) or 35A(5)(a) in the reporting period.

• Provide in new section 51C that the Minister must inform the Parliamentary Joint Committee on Intelligence and Security in writing of any notice under subsections 33AA(10), 35(5) or 35A(5) or of a determination made under subsection 33AA(12), 35(7) or 35A(7).
5. The following provisions of the Bill have been assessed as engaging human rights under the seven core international human rights treaties to which Australia is a party:
   - The new citizenship cessation powers in proposed sections 33AA, 35, and 35A;
   - Proposed section 36A, which provides limitations on the way in which a person may resume citizenship if their citizenship ceases under these new provisions;
   - The application provisions at item 8.

6. As noted above, the Bill was the subject of an inquiry by the PJCIS, which reported on 4 September 2015. The PJCIS made 27 recommendations in relation to the previous version of the Bill, including that it be passed subject to its recommendations being implemented. Many of these amendments introduce additional accountability measures and further strengthen safeguards in relation to the provisions of the Bill.

Cessation of citizenship

7. The Bill proposes to amend the Act to provide for cessation of citizenship in a number of circumstances.

8. These cessation provisions would apply regardless of how the person became an Australian citizen; that is, whether by operation of law (including people born Australian citizens) or by application. However, the amended provisions will not apply to cease a person’s citizenship if the person would become stateless, i.e. a person who is not a national or citizen of any country.

9. The amendments to Section 35A in light of the recommendations of the PJCIS are significant.

10. New section 35A provides that the Minister may determine in writing that a person ceases to be an Australian citizen where the person has a conviction or convictions against the specified list and has been sentenced to a period of imprisonment of at least 6 years or periods of imprisonment that total at least 6 years, and the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination, and the Minister is satisfied that:
    - the conduct of the person to which the conviction or convictions relate demonstrates repudiation of their allegiance to Australia; and
    - it is not in the public interest for the person to remain an Australian citizen.

11. The offences of which a person must be convicted to enliven the power in proposed section 35A are contained in the following:
Criminal Code

- Division 72 Subdivision A – International terrorist activities using explosive or lethal devices;
- Section 80.1 – Treason;
- Section 80.1AA – Treason – materially assisting enemies etc.;
- Section 91.1 – Espionage and similar activities;
- Part 5.3 – Terrorism (except section 102.8 – associating with terrorist organisations; Division 104 – control orders; and Division 105 – preventative detention orders);
- Part 5.5 – Foreign incursions and recruitment;

Crimes Act 1914

- Section 24AA – Treachery;
- Section 24AB – Sabotage;

Repealed Crimes (Foreign Incursions and Recruitment) Act 1978

- Section 6 - Incursions into foreign States with intention of engaging in hostile activities;
- Section 7 - Preparations for incursions into foreign States for purpose of engaging in hostile activities.

12. This list of offences has been developed following recommendations of the PJCIS that these offences prima facie indicate that a person has acted contrary to his or her allegiance to Australia. The seriousness with which the Government views the cessation of something as fundamental as citizenship is reflected in the requirement that the person has been convicted of an identified offence, received significant sentence/s of imprisonment and has demonstrated an intent to repudiate their allegiance to Australia, and the requirement that the continuation of their citizenship not be in the public interest.

13. The Bill makes it clear that new section 35A has a retrospective operation, but only in limited circumstances. The Application provisions (item 8) relevantly provide that section 35A applies in relation to a conviction of a person before the commencement of that item if the conviction occurred no more than ten years before the commencement and the person was sentenced to imprisonment for at least ten years in respect of that conviction. This application reflects the concerns raised by stakeholders, as acknowledged by the PJCIS, that retrospectivity should only be applied with great caution and following careful deliberation, with regard to the nation as a whole, but also that past terrorist-related conduct of which persons have been convicted under Australian law, is conduct that all members of the Australian community would view as repugnant
and a deliberate step outside of the values that define our society. This cessation of citizenship remains the decision of the Minister, and would include a current assessment of whether the person’s past conviction reveals that they have breached their allegiance to Australia, and whether it is contrary to the public interest for them to remain an Australian citizen.

14. A person in the migration zone whose citizenship ceases acquires an ex-citizen visa by operation of law (see section 35 of the *Migration Act 1958*; ‘the Migration Act’). The ex-citizen visa is a permanent visa allowing the holder to remain in, but not re-enter, Australia. While the grant of this visa is an automatic process, in the circumstances under contemplation it is likely that the Minister would at least consider immediately cancelling this visa on character or national interest grounds, assuming the relevant criteria were met. If, however, the person is outside the migration zone when their citizenship ceases, they would not then hold an ex-citizen visa or any other visa. As such they would be unable to lawfully travel to Australia, but may be eligible to apply for a visa such as a resident return visa (with the caveat that in the circumstances it is likely they would fail the character test at section 501 of the Migration Act).

15. Discretionary powers to consider and make a determination to rescind a notice and exempt a person from the effect of either new sections 33AA or 35 have also been included. The Minister does not have a duty to consider whether to exercise the discretions to make a determination to rescind a notice and exempt a person from the effect of either new sections 33AA or 35, and the rules of natural justice do not apply to that consideration. However, if the Minister decides to consider exercising either discretion, the rules of natural justice will apply to the decision to make or not make a determination and the Minister must also have regard to the factors prescribed in new subsections 33AA(17) or new subsection 35A(12), depending on which determination the Minister is considering making.

16. Further, the Minister is accountable to the Parliament in respect of determinations made under new sections 33AA or 35, with the addition of requirements for tabling statements setting out the determinations and giving reasons for the determinations, including reference to the reasons in relation to prescribed matters, in the Parliament within 15 sitting days of a determination being made. Safeguards preventing publication of certain details in the public interest have also been incorporated.

17. Cessation of citizenship on determination by the Minister is a very serious outcome of criminal convictions that demonstrates a person has repudiated their allegiance to Australia. Cessation of citizenship will allow the Government 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.
Human rights implications

18. Article 12 of the ICCPR provides:

i. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

ii. Everyone shall be free to leave any country, including his own.

iii. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

iv. No one shall be arbitrarily deprived of the right to enter his own country.

Right to freedom of movement and choice of residence – Article 12(1) ICCPR

19. The exercise of the power to cease a person’s citizenship while that person is in Australia will not of its own force alter a person’s liberty of movement and freedom to choose their residence. However, cessation may lead to circumstances (depending on any subsequent action in relation to a potential ex-citizen visa) which alter whether or not the person is lawfully within Australia’s territory. As noted above, while section 35 of the Migration Act provides for the automatic grant of an ex-citizen visa to a person who is in the migration zone when his or her citizenship ceases, it may be considered that a person should not be allowed to continue to hold such a visa in circumstances where their character or conduct is such that their citizenship has ceased.

20. As such, in terms of its human rights impact, a move to cease a person’s citizenship cannot be absolutely separated from the visa cancellation, and liability for removal from Australia, which cessation would make possible. Cessation should, therefore, be viewed as a measure which may lead to the removal of the ability to remain lawfully within Australia. This is discussed in more detail under Article 13.

21. Should measures short of removal from Australia be considered appropriate, it is clear from Article 12(3) that the rights in 12(1) and 12(2) may be limited on bases that are

- provided by law,
- necessary to protect national security, public order, or the rights and freedoms of others, and
- are otherwise consistent with the Covenant.

22. Any measures restricting freedom of movement and the ability to choose a residence will be based in the Migration Act (should immigration detention result) or security legislation and will therefore have a lawful domestic basis. In circumstances where a person has been convicted and sentenced to imprisonment for a specified crime/s such that their continued
citizenship is, in the Minister’s view, not in the public interest, such measures will be necessary to protect national security, public order, and the rights and freedoms of the Australian community at large. This is consistent with the Covenant, being explicitly contemplated by Article 12(3) and being proportionate, in the Government’s judgement, to the existing and emerging threats to national security which Australia faces.

**Right to leave a country – Article 12(2) ICCPR**

23. The ability to leave Australia will not be directly affected by the cessation provisions, but there are several ways in which the right may be indirectly affected. Clearly this is relevant only to people whose citizenship ceases while they are in Australia. In some cases the cessation may lead to visa cancellation and removal; in these circumstances Article 12(2) would not be relevant.

24. If the person is allowed to remain in Australia it may be the case that their ability to leave the country is restricted under other legislation. The most obvious current example is preventing travel where the person is likely to join an extremist movement overseas. The UN Human Rights Committee has noted that “since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents.” The inability to hold an Australian passport as a result of cessation of citizenship could potentially prevent travel outside Australia, but if necessary in the circumstances either a travel document from the person’s other country of nationality, a temporary document issued by Australia, or some other facility could potentially be used.

**Right to enter one’s own country – Article 12(4) ICCPR**

25. While a person whose citizenship has ceased would no longer be a citizen under Australian law, under international law Australia may still be considered their “own country” for the purposes of Article 12(4). The phrase “his own country” has been interpreted broadly by the UN Human Rights Committee, and the drafting history of the provision supports the interpretation that “own country” goes beyond mere nationality. However, it is the Government’s view that, where a person has objectively demonstrated through their conduct that they have repudiated their allegiance to Australia, which under the cessation provisions will necessarily be in circumstances where they hold another citizenship, any ties they may have to Australia for the purposes of Article 12(4) have been voluntarily severed, and regardless of prior connections the person should not be entitled to gain any advantage from a relationship they are responsible for breaking.

26. However, should circumstances arise where a person whose citizenship has ceased can properly consider Australia to be “his [or her] own country”, and they are outside Australia when the Minister determines that they cease to be an Australian citizen, depriving them of the right to enter Australia would not be arbitrary, as it would be based on a genuine threat to Australia’s security posed by a person who has objectively demonstrated repudiation of their allegiance to Australia, in which extraordinary circumstances the very serious move of
ceasing citizenship (thereby preventing return to Australia) is, in the Government’s view, proportionate to the legitimate goal of ensuring the security of the Australian community.

27. A person whose citizenship ceases while they are outside Australia may apply for a visa for entry to Australia, though as noted above, in the circumstances it is likely they would fail the character test.

**Expulsion of aliens – Article 13 ICCPR**

28. Article 13 of the ICCPR provides that:

   An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

29. While technically the power to cease a person’s citizenship would not result directly in the expulsion of a person from Australia, as outlined above, expulsion (most likely removal from Australia under section 198 of the Migration Act) is the most likely outcome of the process which begins with cessation where a person is in Australia at the time.

30. Any removal would come only after the person’s lawful status in Australia (i.e. any visa they held after the cessation of their citizenship) was cancelled. In that sense they would not be able to claim the benefit of Article 13 (as they would not be lawfully in Australia’s territory), but that is a distinction which avoids the reality that these are two steps in a closely linked process.

31. However, decisions leading to removal from Australia following cessation of citizenship would all be conducted in line with the relevant provisions in the Migration Act, so removal itself would be in pursuance of a decision reached in accordance with law. Further, those decisions would most likely be subject to review by a tribunal or court.

**Equality before the courts and tribunals – Article 14 ICCPR**

32. The measures engage Article 14 of the ICCPR, which provides:

   1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where
publicity would prejudice the interests of justice; but any judgement rendered in a
criminal case or in a suit at law shall be made public except where the interest of juvenile
persons otherwise requires or the proceedings concern matrimonial disputes or the
guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent
until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the
following minimum guarantees, in full equality:
   (a) To be informed promptly and in detail in a language which he understands of
       the nature and cause of the charge against him;
   (b) To have adequate time and facilities for the preparation of his defence and to
       communicate with counsel of his own choosing;
   (c) To be tried without undue delay;
   (d) To be tried in his presence, and to defend himself in person or through legal
       assistance of his own choosing; to be informed, if he does not have legal
       assistance, of this right; and to have legal assistance assigned to him, in any
       case where the interests of justice so require, and without payment by him in
       any such case if he does not have sufficient means to pay for it;
   (e) To examine, or have examined, the witnesses against him and to obtain the
       attendance and examination of witnesses on his behalf under the same
       conditions as witnesses against him;
   (f) To have the free assistance of an interpreter if he cannot understand or speak
       the language used in court;
   (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their
   age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being
   reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when
   subsequently his conviction has been reversed or he has been pardoned on the ground that
   a new or newly discovered fact shows conclusively that there has been a miscarriage of
   justice, the person who has suffered punishment as a result of such conviction shall be
   compensated according to law, unless it is proved that the non-disclosure of the unknown
   fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has
   already been finally convicted or acquitted in accordance with the law and penal
   procedure of each country.

33. The Government considers that the right to a fair trial and fair hearing are not limited by the
    proposal. The proposal does not limit the application of judicial review of decisions that
    might be made as a result of the cessation or renunciation of citizenship. 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 also has a right to seek declaratory relief as to
    whether the conditions giving rise to the cessation have been met.
34. It is also the case that, as reflected in the notes to sections 33AA, 35, and 35A an affected person may seek judicial review of the basis on which a notice was given under subsections 33AA(10) and 35(5), and review of a determination made under subsection 35A(1). The Bill also confirms that a person’s citizenship is taken never to have ceased under sections 33AA and 35 if a court finds that the person did not engage in the conduct, or a court finds that the person was not a dual national or dual citizen at the relevant time, or if the Minister rescinds the notice and exempts the person from the effect of the particular section. In respect of sections 33AA and 35, a person’s citizenship is also taken never to have ceased if a declaration under section 35AA is disallowed and the person’s citizenship would not have ceased if the declaration had not been made. In relation to section 35A, a person’s citizenship is taken never to have ceased if the Minister revokes a determination made where the conviction that led to the determination is overturned or quashed.

Retrospectivity – Article 15 ICCPR

35. Article 15(1) of the ICCPR provides that:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit therefrom.

36. The application of section 35A to persons who have been convicted of a specified offence within ten years prior to commencement of section 35A, and who were sentenced to a period of imprisonment of at least 10 years in respect of that conviction, engages Article 15. Section 35A does not create a criminal offence. Rather it relevantly allows for the imposition of a civil consequence in respect of a conviction and penalty that occurred prior to commencement. Cessation of citizenship on this basis is not automatic and remains at the discretion of the Minister, having regard to the remainder of section 35A, in particular noting the Minister’s required satisfaction that the conduct that led to the conviction demonstrates the person’s repudiation of their allegiance to Australia, and that it not be in the public interest for the person to remain an Australian citizen.

37. The retrospectivity is confined to specified terrorism offences and acts, and does not constitute a ‘bill of attainder’ that would interfere with the exercise of judicial power. Further, the purpose of the provision is to ensure the safety and security of Australia, and to ensure that the community of Australian citizens comprises persons who have an allegiance to Australia. The retrospective application accords with the recommendations of the PJCIS.
Right to the family unit – Article 17 and 23 ICCPR

38. Article 17 of the ICCPR provides that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

39. Article 23(1) of the ICCPR provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

40. These rights are engaged by the possibility of a person ceasing their citizenship while outside Australia, where family members remain in Australia. Although a person who ceases their citizenship while outside Australia will be able to apply for certain visas to enter Australia, it is unlikely that the person would meet visa criteria in relation to security or character. This would result in the person not being able to lawfully enter Australia, and interference with the family as a result of this separation. However, it is the Government’s position that such interference would not be unlawful, and also would not be arbitrary. The cessation of citizenship of persons outside Australia is caused by the person’s conduct and, consequently, based on a genuine threat to Australia’s security posed by a person who has objectively demonstrated an intent to repudiate their allegiance to Australia, in which the very serious move of ceasing citizenship (thereby preventing return to Australia) is, in the Government’s view, proportionate to the legitimate goal of ensuring the security of the Australian community. It is also the case that the separation of the family would have first occurred by the person having left Australia.

41. These rights may also be engaged when a person who is in Australia has his or her citizenship ceased under proposed section 35A. In these circumstances, subsequent decisions which might flow from cessation of citizenship would all be lawfully based in the Migration Act. Having regard to the seriousness of the offences that are the subject of the conviction and the need to protect the Australian community, the Government considers that any limitation of rights reflected in these articles is reasonable and proportionate.

Equality before the law – Article 26 ICCPR

42. Article 26 of the ICCPR states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

43. This a stand-alone right which will be breached if a person does not enjoy equality before the law or equal protection of the law with others, on the basis of discrimination on a prohibited ground. The proposed cessation provisions do not discriminate on a prohibited
ground but rather operate on the basis of certain conduct or a conviction or convictions of a particular kind. To the extent that the cessation powers in the Bill differentiate on the basis that they apply only to those people who hold foreign citizenship or nationality in addition to their Australian citizenship, the Government considers that it is reasonable and proportionate and consistent with Australia’s obligations under the statelessness conventions.

44. As observed by the Human Rights Committee in General Comment no. 18, not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

45. Differentiation on the basis of dual nationality is the consequence of international obligations relating to statelessness, and as such represents a measure of extra protection for those without dual nationality, rather than a means of positively selecting those who may be subject to the new cessation power.

46. The differentiation at the heart of the cessation provisions is that the person has been convicted of a crime of a particular character, or has engaged in particular conduct, which demonstrates repudiation of allegiance to Australia. These provisions operate only in the most serious of circumstances, and the consequence of their operation – the cessation of a person’s citizenship – is proportionate to the seriousness of the conduct.

The best interests of the child – Article 3 CRC

47. Article 3 of the CRC provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

48. This right would be engaged by the new cessation powers in proposed sections 33AA and 35 for minors aged 14 or older. For section 35A, there is no specified age that applies to its application.

49. The proposed cessation powers would only enliven in relation to a child directly when the child meets the crime or conduct thresholds.

50. There are, though, documented cases of children fighting with extremist organisations overseas and being otherwise involved in terrorist activities, so the application of the cessation provisions to children is justified.

51. For section 35A, the cessation power is discretionary and allows the Minister to take into account all the circumstances of each individual case. The Minister must expressly have regard to the best interests of the child as a primary consideration when reaching satisfaction
on whether it is in the public interest for the child to remain an Australian citizen. For sections 33AA and 35, in considering whether to rescind a notice given under those provisions, the Minister must likewise have regard to the best interests of the child as a primary consideration. The Minister also has the power to revoke a determination made under section 35A if a conviction (in relation to a child or otherwise) is later overturned or quashed, or - in relation to sections 33AA and 35 - to rescind the notice of loss of citizenship.

52. This right is also engaged where a parent’s citizenship ceases. In circumstances where the parent is in Australia at the time of cessation, decisions which might flow from that cessation would all be lawfully based in the Migration Act. The best interests of the child would be a primary consideration in all of those decisions, though may be outweighed by countervailing considerations such as the integrity of the citizenship programme and national security risks.

Rights of children to nationality, identity, family etc. – Articles 23 and 24 ICCPR and Article 7 CRC

53. Paragraph 1 of Article 23 of the ICCPR provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

54. Article 24 of the ICCPR provides that:
   1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
   2. Every child shall be registered immediately after birth and shall have a name.
   3. Every child has the right to acquire a nationality.

55. Article 7 of the CRC provides that:
   1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
   2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

56. The right in Articles 7 and 24 to acquire a nationality is not the same as a right to retain a nationality. The rights in Articles 7 and 24 do not provide a right to acquire Australian nationality – merely to acquire a nationality.

57. Cessation of a child’s citizenship (for children aged 14 or older for sections 33AA and 35, and children less than 18 years for section 35A) must of necessity occur after a child has
acquired citizenship, and the new cessation provisions do not operate if a person would be rendered stateless by the cessation, meaning a child would have the nationality of at least one other country. Consequently the right to acquire a nationality set out in Article 7(1) is not limited.

58. While the new cessation provisions engage Article 24(1), as noted above, the cessation of a child’s citizenship would only occur when the child had met the crime or conduct thresholds for the provision to operate.

59. In relation to section 35A, this power is discretionary such that it allows the Minister to take into account all the circumstances of each individual case. In considering the possible cessation of citizenship in respect of a child - the Minister is required to consider the child’s best interests as a primary consideration.

**Proposed section 36A - limitations on the way in which a person may resume citizenship if their citizenship ceased under proposed section 35A, 35B or section 36**

60. Proposed section 36A prevents a person whose citizenship ceased under sections 33AA, 35 or 35A from resuming Australian citizenship again.

**Human rights implications**

61. This change may be argued to engage several human rights outlined above. However, provided that the citizenship framework does not discriminate on impermissible grounds, which it does not and will not following this amendment, the conditions on which Australian citizenship may be granted or resumed are a matter for Australia as a sovereign nation. This new provision does not breach Article 2(1) of the ICCPR relating to non-discrimination or Article 26 providing for equality before the law, as it differentiates legitimately based on objective criteria, and proportionately to the goal of maintaining the integrity of Australian citizenship.

62. Article 3 of the CRC provides that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (emphasis added), the best interests of the child shall be a primary consideration.” While the amended section will not entail the making of any decisions, being an operation of law provision, Members and Senators may consider as a primary consideration the impact that this this measure may have on children, and balance this against the primary consideration of ensuring the integrity of the citizenship programme.

**Conclusion**

63. The Bill is compatible with human rights because to the extent that it may limit some human rights, those limitations are reasonable, necessary and proportionate in light of the Bill’s objective and purpose.

The Hon Peter Dutton MP, Minister for Immigration and Border Protection