

2013-2014-2015

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**AUSTRALIAN CITIZENSHIP AMENDMENT (ALLEGIANCE TO AUSTRALIA)
BILL 2015**

EXPLANATORY MEMORANDUM

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

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 Australian 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 amendments in the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Bill) are therefore necessary to provide explicit powers for the cessation of Australian citizenship in specified circumstances where a dual citizen repudiates their allegiance to Australia by engaging in terrorism-related conduct. The desired outcome of this Bill is to ensure the safety and security of Australia and its people and to ensure the community of Australian citizens is limited to those who continue to retain an allegiance to Australia.

This Bill is introduced because the Government 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.

In particular, the 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 renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct;
- the person ceases to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation. A declared terrorist organisation is any terrorist organisation as defined by the *Criminal Code* and declared by the Minister to apply;
- the person ceases to be an Australian citizen if the person is convicted of a specified terrorism offence as prescribed in the *Criminal Code*.

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 operation of these provisions are by operation of law and do not necessitate the Minister making a decision. That is, a person's own conduct, specified in the new sections 33AA, 35 and 35A will be the cause of the person's citizenship to cease.

The amendments in the 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 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. The person can never become an Australian citizen again unless the Minister exempts the operation of the relevant cessation provision;
- requires the Minister to give written notice of the automatic cessation of Australian citizenship to such persons as the Minister considers appropriate;

- allows the Minister to rescind the written notice and exempt a person from automatic cessation of their Australian citizenship if the Minister considers it is in the public interest to do so;
- protects the disclosure of information in circumstances that would prejudice national security. The protection of such information is necessary to protect information; however, the courts will have access to the information in accordance with two existing mechanisms to manage such information in litigation: public interest immunity (PII) and the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act).

The amendments in the Bill do not limit the application of judicial review.

FINANCIAL IMPACT STATEMENT

The financial impact of the 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 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](#).

AUSTRALIAN CITIZENSHIP AMENDMENT (ALLEGIANCE TO AUSTRALIA) BILL 2015

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.
9. “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.

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 – AMENDMENTS

Australian Citizenship Act 2007

Item 1 Section 32A

11. 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.

12. 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 fights on behalf of 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.

Item 2 Section 33 (heading)

13. This item repeals the heading and substitutes:

‘33 Renunciation by application’

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

Item 3 After section 33

15. This item inserts new section 33AA in Division 3 of Part 2 of the Citizenship Act.

16. The effect of new section 33AA is to provide for the renunciation of Australian citizenship where a person engages in specified terrorist-related conduct.

Section 33AA Renunciation by conduct

Renunciation and cessation of citizenship

17. New subsection 33AA(1) provides that subject to this section, a person who is a national or citizens 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).

18. 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 33A(7).
19. New subsection 33AA(2) provides that 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 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) 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) 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. New subsection 33AA(3) provides that the words in new paragraphs 33AA(2)(a) to (h), have the same meaning as in sections 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Division 119 of the *Criminal Code*, respectively.

24. A brief description of the specified offences in the *Criminal Code* is below:

Provision	Offence	Maximum Penalty
101.1 Terrorist acts	<p>(1) A person commits an offence if the person engages in a terrorist act.</p> <p>(2) Section 15.4 (extended geographical jurisdiction-category D) applies to an offence against subsection (1).</p> <p><i>terrorist act</i> is defined in section 100.1 of the <i>Criminal Code</i></p>	Imprisonment for life
101.2 Providing or receiving training connected with terrorist acts	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (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) knows of the connection described in paragraph (b). <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (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). <p>(3) A person commits an offence under this section even if:</p> <ul style="list-style-type: none"> (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. <p>(4) Section 15.4 (extended geographical jurisdiction-category D) applies to an offence against this section...</p>	<p>Imprisonment for 25 years</p> <p>Imprisonment for 15 years</p>
102.2 Directing the activities of a terrorist organisation	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person intentionally directs the activities of an organisation; and (b) the organisation is a terrorist organisation; and (c) the person knows the organisation is a terrorist organisation. <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person intentionally directs the activities of an organisation; and (b) the organisation is a terrorist organisation; and (c) the person is reckless as to whether the organisation is a terrorist organisation. 	Up to 25 years imprisonment

	Penalty: Imprisonment for 15 years.	
102.4 Recruiting for a terrorist organisation	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (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. <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (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. <p>Penalty: Imprisonment for 15 years.</p>	Up to 25 years imprisonment
103.1 Financing terrorism	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (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. <p>Penalty: Imprisonment for life.</p> <p>Note: Intention is the fault element for the conduct described in paragraph (1)(a). See subsection 5.6(1).</p> <p>(2) A person commits an offence under subsection (1) even if:</p> <ul style="list-style-type: none"> (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 (c) the funds will be used to facilitate or engage in more than one terrorist act. 	Imprisonment for life
103.2 Financing a terrorist	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person intentionally: <ul style="list-style-type: none"> (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. <p>Penalty: Imprisonment for life.</p> <p>(2) A person commits an offence under subsection (1) even if:</p> <ul style="list-style-type: none"> (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. 	Imprisonment for life
Division 119	Foreign incursions and recruitment	Up to imprisonment for life

25. 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:
 - 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.
26. The specified offences reflect the policy intention that an offence declared for the purpose of cessation under new subsection 33AA(1) must be a terrorism related offence where the maximum penalty of imprisonment is considerable and the offence is of a type that evidently tends to indicate that a person has acted contrary to his or her allegiance to Australia.
27. The specified offences in the above table 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.
28. These restrictions will apply to the application of new section 33AA. That is a person under the age of 10 years will not automatically renounce their Australian citizenship by engaging in the terrorist related conduct specified in new subsection 33AA(2).
29. 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.
30. 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.

31. 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.
32. New subsection 33AA(4) 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).
33. 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 Australian citizens 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, they can renounce their citizenship by conduct irrespective of how they obtained citizenship.
34. New subsection 33AA(5) 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.
35. The Note to new subsection 33AA(5) provides that a child of the person may also cease to be an Australian citizen: see subsection 36 of the Citizenship Act.

Minister to give notice

36. New subsection 33AA(6) 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 written notice to that effect at such time and to such persons as the Minister considers appropriate.

Minister's power to rescind notice and exempt person

37. Where the Minister has given a notice under subsection 33AA(6) relating to a person, the Minister may, if he or she considers it in the public interest to do so:
 - rescind the notice; and

- exempt the person from the effect of this section in relation to the matters that were the basis for giving the notice.

38. The Minister does not have a duty to consider whether to exercise the power under subsection (7), whether he or she is requested to do so by any person, or in any other circumstances.
39. The purpose of this amendment is to provide for the Minister to make a decision to exempt the person from the operation of section 33AA in circumstances where it is in the public interest to do so, this may include things such as if the person is cooperating with law enforcement authorities. The provision will still operate by law, that is, the revocation happens by force of the statute upon the conviction but there is scope thereafter for the Minister to consider exempting the person from the operation of section 33AA.
40. If the person is exempt by the Minister their citizenship will not cease under section 33AA. As such, it will be as if the person's citizenship never ceased under section 33AA.
41. This amendment is aimed to ensure that the public interest is taken into consideration when a decision to excuse a person from the operation of new section 33AA. 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 extremely serious nature of the conduct, the need for deterrence, the impact on the person, national security and international relations. It may also include matters relating to minors, including the best interests of the child, any impact that cessation may have on the child and Australia's obligations to children (this is further discussed in the Statement of Compatibility).
42. 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.
43. New subsection 33AA(8) provides that the Minister does not have a duty to consider whether to exercise the power under subsection 33AA(7) to exempt a person from the operation of section 33AA, whether he or she is requested to do so by any person, or in any other circumstances.

General provisions relating to Minister's powers

44. New subsection 33AA(9) provides that the powers of the Minister under this section may only be exercised by the Minister personally.
45. The effect of this provision is that the Minister's powers under section 33AA, including the power to excuse and the requirement to give notice, must be exercised by the Minister personally, and may not be exercised by a delegate of the Minister.

46. New subsection 33AA(10) provides that the rules of natural justice do not apply in relation to the powers of the Minister under this section, and section 47 does not apply in relation to the exercise of those powers.
47. Section 47 of the Citizenship Act relates to the notification of a decision made under the Citizenship Act.
48. The purpose of new subsection 33AA(10) is to clarify that the Minister is not required to apply the rules of natural justice, nor notify the person of the reasons for the decision, when exercising his powers under new section 33AA, including the power to excuse and the requirement to give notice.
49. New subsection 33AA(11) 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(8) 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.
50. New subsection 33AA(12) provides that section 39 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) does not apply to the exercise of a power or performance of a function within this section. This amendment will enable the Minister to act on the basis of a communication made by ASIO about a person which does not amount to a security assessment to make a decision to excuse the person from the application of section 33AA and in relation to the requirement to give notice.
51. Section 39 of the ASIO Act relates to prescribed administrative action which may be taken by a Commonwealth agency. Section 39 prohibits (subject to limited exceptions of a temporary nature) a Commonwealth Agency from taking, refusing to take or refraining from taking prescribed administrative action on the basis of any communication in relation to a person made by the Organisation not amounting to a security assessment. A 'security assessment' is defined in section 35 of the ASIO Act and attracts the operation of Part IV which provides the subject with rights of notice and merits review.
52. The purpose of this amendment is to exclude the application of section 39 of the ASIO Act to decisions made under new subsection 33AA. The effect of this amendment is that the Minister will not be prohibited from exercising his power to excuse a person or the requirement to provide notice from the operation of section 33AA on the basis of an ASIO communication that does not amount to a security assessment. This will put beyond doubt that section 39 does not operate to prohibit the Minister from relying upon intelligence derived from an ASIO communication.

Item 4 Section 35

53. This item repeals current section 35 and substitutes new section 35 in Division 3 of Part 2 of the Citizenship Act.

Section 35 – Cessation of citizenship

54. New subsection 35(1) provides that a person 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; and
 - the person’s service or fighting occurs outside Australia.
55. 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.
56. 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 following online orders by innocent persons). A person may act in the service of a declared terrorist organisation if they undertake activities such as providing medical support, recruiting persons to join declared terrorist organisations, providing money or goods, services and supplies to a declared terrorist organisation.
57. New subsection 35(1) causes citizenship to cease by operation of law and builds on, adapts and modernises loss of citizenship provisions for those fighting in a war against Australia which have been in place since 1949.
58. 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.
59. 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.

60. 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(6).
61. Note 2 to new subsection 35(1) provides that a child or a person may also cease to be an Australian citizen: see section 36.
62. Section 36 of the Citizenship Act currently provides for the cessation of Australian citizenship for children of responsible parents who cease to be citizens in certain circumstances.
63. 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.
64. 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 35(4). That is, where the terrorist organisation is captured by new subsection 35(4), and the person satisfies the requirements in subsection 35(1), the person ceases to be an Australian citizen at that time.
65. 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).
66. 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 Australian citizens 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 citizenship should apply to a person irrespective of how they obtained their citizenship.
67. New subsection 35(4) 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 declares, in writing, is a declared terrorist organisation for the purposes of this section. This is not a legislative instrument, see new subsection 35(10).
68. 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.
69. Currently, 20 organisations are listed as terrorist organisation under the Criminal Code. These are listed on the Australian National Security government website.

70. It is intended that the Minister rely upon the terrorist organisation list under the Criminal Code because fighting for, or being in the service of, a terrorist organisation in this list demonstrates a repudiation of allegiance to Australia. This amendment reflects the policy intention that only terrorist organisations that are opposed to Australia or are opposed to any of Australia's values, democratic beliefs, rights or liberties.
71. Australia's values, democratic beliefs, rights or liberties are the uniting 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, democratic beliefs, rights or liberties, the person has evidently repudiated their allegiance to Australia.

Minister to give notice

72. 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 written notice to that effect at such time and to such persons as the Minister considers appropriate.

Minister's power to rescind notice and exempt person

73. Where the Minister has given a notice under subsection 35(5) relating to a person, the Minister may, if he or she considers it in the public interest to do so:
- rescind the notice; and
 - exempt the person from the effect of this section in relation to the matters that were the basis for giving the notice.
74. New subsection 35(7) provides that the Minister does not have a duty to consider whether to exercise the power under subsection (6), whether he or she is requested to do so by any person, or in any other circumstances.
75. The purpose of this amendment is to provide for the Minister to make a decision to exempt the person from the operation of section 35 in circumstances where it is in the public interest to do so, this may include things such as if the person is cooperating with law enforcement authorities. The provision will still operate by law, that is, the revocation happens by force of the statute upon the conviction but there is scope thereafter for the Minister to consider exempting the person from the operation of section 35.
76. If the person is exempt by the Minister their citizenship will not cease under section 35. As such, it will be as if the person's citizenship never ceased under section 35.
77. This amendment is aimed to ensure that the public interest is taken into consideration when a decision to exempt a person from the operation of new section 35. 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 extremely serious nature of the conduct, the need for deterrence, the impact on the person, national security and international relations. It may also include matters relating to minors, including the best interests of the child, any impact that cessation may have on the child and Australia's obligations to children (this is further discussed in the Statement of Compatibility).

78. 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.
79. New subsection 35(7) provides that the Minister does not have a duty to consider whether to exercise the power under subsection 35(6) to exempt a person from the operation of section 35, whether he or she is requested to do so by any person, or in any other circumstances.

General provisions relating to Minister's powers

80. New subsection 35(8) provides that the powers of the Minister under this section may only be exercised by the Minister personally.
81. The effect of this provision is that the Minister's powers under section 35, including the power to exempt and the requirement to give notice, must be exercised by the Minister personally, and may not be exercised by a delegate of the Minister.
82. New subsection 35(9) provides that the rules of natural justice do not apply in relation to the powers of the Minister under this section, and section 47 does not apply in relation to the exercise of those powers.
83. The purpose of new subsection 35(9) is to clarify that the Minister is not required to apply the rules of natural justice, nor notify the person of the reasons for the decision, when exercising his powers under new section 35, including the power to excuse and the requirement to give notice.
84. New subsection 35(10) provides that an instrument exercising any of the Minister's powers under this section is not a legislative instrument.
85. New subsection 35(11) provides that section 39 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) does not apply to the exercise of a power or performance of a function within this section. This amendment will enable the Minister to act on the basis of a communication made by ASIO about a person which does not amount to a security assessment to excuse the person from the application of section 35 and in relation to the requirement to give notice.
86. Section 39 of the ASIO Act relates to prescribed administrative action which may be taken by a Commonwealth agency. Section 39 prohibits (subject to limited exceptions of a temporary nature) a Commonwealth Agency from taking, refusing to take or refraining from taking prescribed administrative action on the basis of any communication in relation to a person

made by the Organisation not amounting to a security assessment. A ‘security assessment’ is defined in section 35 of the ASIO Act and attracts the operation of Part IV which provides the subject with rights of notice and merits review.

87. The purpose of this amendment is to exclude the application of section 39 of the ASIO Act to decisions made under new subsection 35. The effect of this amendment is that the Minister will not be prohibited from exercising his power to excuse a person or to give notice from the operation of section 35 on the basis of an ASIO communication that does not amount to a security assessment. This will put beyond doubt that section 39 does not operate to prohibit the Minister from relying upon intelligence derived from an ASIO communication.

Item 5 After section 35

88. This item inserts new section 35A after section 35 in Division 3 of Part 2 of the Citizenship Act.
89. New section 35A provides for the cessation of Australian citizenship if a person is convicted for terrorism offences and certain other offences.

Section 35A – Cessation of citizenship

90. New subsection 35A(1) provides that a person ceases to be an Australian citizen if:
- the person is convicted of an offence mentioned in subsection 35A(3); and
 - at the time of the conviction, the person is a national or citizen of a country other than Australia.
91. Note 1 to new subsection 35A(1) provides that the Minister may, exempt the person from the effect of section 35A in relation to certain matters: see subsection 35A(6).
92. Note 2 to new subsection 35A(1) provides that a child of the person may also cease to be an Australian citizen: see section 36 of the Citizenship Act.
93. The effect of new subsection 35A(1) is that a dual citizen’s Australian citizenship will automatically cease where that person has been convicted of a specified terrorist-related offence.
94. Paragraph 35A(1)(b) provides that section 35A operates if a person is a national or citizen of a country other than Australia at the time of the conviction. The purpose of this amendment is to ensure that a person’s citizenship does not automatically cease if it would result in a person becoming stateless.
95. 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.

96. 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.
97. New subsection 35A(2) provides that the person ceases to be an Australian citizen at the time of the conviction.
98. New subsection 35A(3) provides that for the purposes of new paragraph 35A(1)(a), the offences are the following:
- an offence against Subdivision A of Division 72 of the *Criminal Code*;
 - an offence against section 80.1, 80.1AA or 80.2, subsection 80.2A(1) or 80.2B(2) or section 80.2C or 91.1 of the *Criminal Code*;
 - an offence against Part 5.3 of the Criminal Code (except section 102.8 or Division 104 or 105);
 - an offence against Part 5.5 of the Criminal Code;
 - an offence against section 24AA, 24AB, 25 or 26 or subsection 27(1) of the *Crimes Act 1914*.
99. The specified offences reflect the policy intention that an offence listed for the purpose of cessation under new subsection 35A(1) must be a terrorism-related offence where the maximum penalty is considerable. However, it is not as restricted as the offences listed in new sections 33AA and 35 as a criminal offence is required for the operation of this new section 35A so it is appropriate that the list of offences is broader. The offences are of a nature that on the face of them a person who undertakes such offences has repudiated their allegiance to Australia.
100. 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.

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

Act/Provision	Offence	Maximum Penalty (Imprisonment) ¹
<i>Criminal Code Act 1995</i> Section 72.3	International terrorist activities using explosive or lethal devices	Life

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)¹
<i>Criminal Code Act 1995</i> Section 80.1	Treason	Life
<i>Criminal Code Act 1995</i> Section 80.1AA	Treason – material assisting enemies	Life
<i>Criminal Code Act 1995</i> Section 80.2	Urging violence against the Constitution, the Government, a lawful authority of the Government, an election, or a referendum	7 years
<i>Criminal Code Act 1995</i> Section 80.2A(1)	Urging violence against group	5 or 7 years
<i>Criminal Code Act 1995</i> Section 80.2B(1)	Urging violence against member of group	5 or 7 years
<i>Criminal Code Act 1995</i> Section 80.2C	Advocating terrorism	5 years
<i>Criminal Code Act 1995</i> Section 91.1	Espionage	25 years
<i>Criminal Code Act 1995</i> Section 101.1	Terrorist acts	Life
<i>Criminal Code Act 1995</i> Section 101.2	Providing or receiving training connected with terrorist acts	15 or 25 years
<i>Criminal Code Act 1995</i> Section 101.4	Possessing things connected with terrorist acts	10 or 15 years
<i>Criminal Code Act 1995</i> Section 101.5	Collecting or making documents likely to facilitate terrorist acts	15 years
<i>Criminal Code Act 1995</i> Section 101.6	Other acts done in preparation for, or planning, terrorist acts	Life
<i>Criminal Code Act 1995</i> Section 102.2	Directing the activities of a terrorist organisation	10 or 15 years
<i>Criminal Code Act 1995</i> Section 102.3	Membership of a terrorist organisation	10 years
<i>Criminal Code Act 1995</i> Section 102.4	Recruiting for a terrorist organisation	15 or 25 years
<i>Criminal Code Act 1995</i> Section 102.5	Training involving a terrorist organisation	25 years
<i>Criminal Code Act 1995</i> Section 102.6	Getting funds to, from or for a terrorist organisation	15 or 25 years
<i>Criminal Code Act 1995</i> Section 102.7	Providing support to a terrorist organisation	15 or 25 years
<i>Criminal Code Act 1995</i> Section 103.1	Financing terrorism	Life
<i>Criminal Code Act 1995</i> Section 103.2	Financing a terrorist	Life
<i>Criminal Code Act 1995</i> Section 119.1	Incursions into foreign countries with intention to engage in hostile activities	Life
<i>Criminal Code Act 1995</i> Section 119.2	Entering or remaining in a declared area overseas where terrorist organisations are engage in hostile activities	10 years
<i>Criminal Code Act 1995</i> Section 119.4	Preparations for incursions into foreign countries for purposes of engaging in hostile activities	Life
<i>Criminal Code Act 1995</i> Section 119.5	Allowing use of buildings, vessels and aircraft to commit foreign incursions offences	Life
<i>Criminal Code Act 1995</i> Section 119.6	Recruiting persons to join organisations engaged in hostile activities against foreign governments	25 years
<i>Criminal Code Act 1995</i> Section 119.7	Recruiting persons to serve in or with an armed force in a foreign country	10 years
<i>Crimes Act 1914</i> Section 24AA	Treachery by overthrow of the Constitution or Government, levying war or assisting in levying war, or instigating an armed invasion	Life
<i>Crimes Act 1914</i> Section 24AB	Sabotage by destroying, damaging or impairing Australian Defence Force equipment	15 years

Act/Provision	Offence	Maximum Penalty (Imprisonment) ¹
<i>Crimes Act 1914</i> Section 25	Inciting mutiny against the Queen's Forces	Life
<i>Crimes Act 1914</i> Section 26	Assisting prisoners of war to escape	Life
<i>Crimes Act 1914</i> Section 27(1)	Unlawful training, drilling or practicing military exercises	5 years

102. 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. 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. The automatic cessation of Australian citizenship may 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.
103. Note 2 to new subsection 35A(1) clarifies that the section extends to acts, omissions, matters and things outside Australia as provided in current subsection 11(2) of the Citizenship Act. Current subsection 11(2) of the Citizenship Act provides:

Application outside Australia

- (2) This Act extends unless the contrary intention appears:
- (a) to acts, omissions, matters and things outside Australia; and
 - (b) to all persons, irrespective of their nationality or citizenship.

104. This provision is to make clear that if a person undertakes conduct outside Australia it can be taken into consideration for the purposes of section 35A.
105. New subsection 35A(4) provides that new 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).
106. 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 Australian citizens 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.

Minister to give notice

107. New subsection 35A(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 written notice to that effect at such time and to such persons as the Minister considers appropriate.

Minister's power to rescind notice and exempt person

108. Where the Minister has given a notice under subsection 35A(5) relating to a person, the Minister may, if he or she considers it in the public interest to do so:
- rescind the notice; and
 - exempt the person from the effect of this section in relation to the matters that were the basis for giving the notice.
109. New subsection 35A(7) provides that the Minister does not have a duty to consider whether to exercise the power under subsection (6), whether he or she is requested to do so by any person, or in any other circumstances.
110. The purpose of this amendment is to provide for the Minister to make a decision to exempt the person from the operation of section 35A in circumstances where it is in the public interest to do so, this may include things such as if the person is cooperating with law enforcement authorities. The provision will still operate by law, that is, the revocation happens by force of the statute upon the conviction but there is scope thereafter for the Minister to consider exempting the person from the operation of section 35A.
111. If the person is exempt by the Minister their citizenship will not cease under section 35A. As such, it will be as if the person's citizenship never ceased under section 35A.
112. This amendment is aimed to ensure that the public interest is taken into consideration when a decision to exempt a person from the operation of new section 35A. 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 extremely serious nature of the conduct, the need for deterrence, the impact on the person, national security and international relations. It may also include matters relating to minors, including the best interests of the child, any impact that cessation may have on the child and Australia's obligations to children (this is further discussed in the Statement of Compatibility).
113. 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.
114. New subsection 35A(7) provides that the Minister does not have a duty to consider whether to exercise the power under subsection 35A(6) to exempt a person from the operation of section 35A, whether he or she is requested to do so by any person, or in any other circumstances.

Subsections 35A(8) to 35(11)- General Provisions relating to Minister's powers

115. New subsection 35A(8) provides that the powers of the Minister under this section may only be exercised by the Minister personally.
116. The effect of this provision is that the Minister's powers under section 35A, including the power to exempt and the requirement to give notice, must be exercised by the Minister personally, and may not be exercised by a delegate of the Minister.
117. New subsection 35A(9) provides that the rules of natural justice do not apply in relation to the powers of the Minister under this section, and section 47 does not apply in relation to the exercise of those powers.
118. Section 47 of the Citizenship Act relates to the notification of a decision made under the Citizenship Act.
119. The purpose of new subsection 35A(9) is to clarify that the Minister is not required to apply the rules of natural justice, nor notify the person of the reasons for the decision, when exercising his powers under new section 35A, including the power to exempt and the requirement to give notice.
120. New subsection 35A(10) provides that an instrument exercising any of the Minister's powers under this section is not a legislative instrument. The purpose of this provision is because the exercise of the Minister's powers under new section 35A is administrative in character. Subsection 35A(10) 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.
121. New subsection 35A(11) provides that section 39 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) does not apply to the exercise of a power or performance of a function within this section. This amendment will enable the Minister to act on the basis of a communication made by ASIO about a person which does not amount to a security assessment to excuse the person from the application of s33A and in relation to the requirement to give notice.
122. Section 39 of the ASIO Act relates to prescribed administrative action which may be taken by a Commonwealth agency. Section 39 prohibits (subject to limited exceptions of a temporary nature) a Commonwealth Agency from taking, refusing to take or refraining from taking prescribed administrative action on the basis of any communication in relation to a person made by the Organisation not amounting to a security assessment. A 'security assessment' is defined in section 35 of the ASIO Act and attracts the operation of Part IV which provides the subject with rights of notice and merits review.
123. The purpose of this amendment is to exclude the application of section 39 of the ASIO Act to decisions made under new subsection 35A. The effect of this amendment is that the Minister will not be prohibited from exercising his power to excuse a person or the requirement to provide notice from the operation of section 35A on the basis of an ASIO communication that does not amount to a security assessment. This will put beyond doubt that section 39 does

not operate to prohibit the Minister from relying upon intelligence derived from an ASIO communication.

Item 6 Paragraph 36(1)(a)

124. This item omits “section 33, 34, 34A or 35”, and substitutes with “section 33, 33AA, 34, 34A, 35 or 35A.”
125. This amendment includes a reference to new sections 33AA, 35 and 35A into paragraph 36(1)(a) of the Citizenship Act.
126. Section 36 of the Citizenship Act provides for the revocation of Australian citizenship for children of responsible parents who cease to be citizens.
127. 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.
128. 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.
129. 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.
130. The purpose of this amendment is to provide that, where a person ceases to be an Australian citizen at a particular time under sections 33, 33AA, 34, 34A, 35, or 35A and the person is a responsible parent of a child under the age of 18 at the cessation time, the Minister may revoke the child’s Australian citizenship, except if there is another responsible parent or the child would become stateless.

Item 7 At the end of Division 3 of Part 2

131. This item adds new section 36A at the end of Division 3 of Part 2 of the Citizenship Act.
132. New section 36A is concerned with limitations on resumption of citizenship if citizenship ceases under section 33AA, 35 and 35A.
133. 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.
134. 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 the Minister’s powers under subsections 33AA(7), 35(6) and 35A(6). 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.

135. This bar would not apply if the reasons for the persons citizenship ceasing have been quashed, for example if a Court quashes the conviction upon review or exempted by the Minister.

Item 8 Application provision

Application of section 33AA

136. This item 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).

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

138. 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.

139. 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 33AA(1). However, the commencement of the conduct that is relied upon for the purpose of 33AA(1) can occur before, on or after the commencement of the legislation in 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

140. This item 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).

141. This item 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.

142. This provision is not retrospective as it does not have the provisions of the Bill apply prior to the day after the Royal Assent.
143. 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).
144. The provision also clarifies that if the fighting or service commenced prior to section 35(1) commencing, the person will cease to be an Australian citizen at the time section 35 comes into effect.

Application of section 35A

145. This item 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
 - convictions that occur after the commencement of this item, whether the conduct constituting the offence occurred before, on or after that commencement.
146. This provision is not retrospective as it does not have the provisions of the Bill apply prior to the day after the Royal Assent, but it does capture conduct constituting the offence prior to commencement of the Bill.
147. 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.
148. The provision also clarifies that where convictions occur after the commencement of the legislation in subsection 35A(1), the conduct constituting the offence can occur before, on or after the commencement of the legislation in subsection 35A(1). That is, the conduct constituting the offence does not need to occur after the commencement of section 35A but a person's Australian citizenship will only cease at the time they are convicted.

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

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*.

Overview of the Bill

1. The Bill amends the *Australian Citizenship Act 2007* (the Act) to provide that a person, who is a national or citizen of a country other than Australia, ceases to be an Australian citizen if:
 - the person renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct;
 - the person fights for, or is in the service of, a declared terrorist organisation outside Australia. A declared terrorist organisation is any terrorist organisation as prescribed in the *Criminal Code* that the Minister declares to be a terrorist organisation;
 - the person is convicted of a specified terrorism offence as prescribed in the *Criminal Code*.
2. However, if the Minister considers it appropriate to do so in the public interest, the Minister may exempt the person from the automatic cessation of their Australian citizenship.
3. The amendments also provide the Minister with power to revoke the Australian citizenship of a child if their parent's citizenship is renounced or ceased in the above circumstances.
4. The amendments have been assessed as engaging human rights under one or more of the seven core international human rights treaties to which Australia is a party.

Human rights implications**Renunciation of citizenship – engaging in terrorist-related activities****Cessation of Citizenship – service outside Australia in the armed forces of a country or a declared terrorist organisation****Cessation of Citizenship -conviction for terrorism and certain other offences**

5. The cessation and renunciation provisions 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 provisions only apply to a person if they are also a national or citizen of a country other than Australia.

6. The Minister has the power to exempt a person from automatic cessation of their Australian citizenship if the Minister considers that it is in the public interest to do so. This new power is non-compellable and must be exercised by the Minister personally. The rules of natural justice do not apply to the exercise of the Minister's non-compellable powers.
7. Under the new provisions, the Minister must, on becoming aware of the conduct or conviction that gives rise to the cessation of a person's Australian citizenship, issue a notice to that effect.
8. 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 ex-citizen visa is a permanent visa allowing the holder to remain in, but not enter or re-enter Australia. If the person is outside the migration zone when their Australian 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 technically eligible for a visa such as the resident return visa (with the caveat that in the circumstances it is likely that they would fail the character test).
9. The Government considers that the measures in the Bill are appropriate and proportionate in light of the existing and emerging threats to national security. Cessation of citizenship is a significant outcome of very serious conduct that demonstrates a person has repudiated their allegiance to Australia. The Government considers that 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.
10. It is the Government's position that the measures may also have a deterrent effect by making radicalised persons aware that their Australian citizenship is in jeopardy if they participate in certain conduct contrary to their allegiance to Australia.
11. The measures in the amendments engage Article 12 of the ICCPR, which 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

12. The amendments will not of their own force alter a person's liberty of movement and freedom to choose their residence. Cessation or renunciation of citizenship may lead to circumstances which alter whether or not the person is lawfully within Australia's territory.
13. 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
 - otherwise consistent with the ICCPR.

14. Any measures restricting freedom of movement and the ability to choose a residence will be based in the Migration Act or security legislation and therefore have a lawful domestic basis. In circumstances where a person is fighting on behalf of or is in the service of a declared terrorist organisation, or is convicted of a specified terrorism offence, 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 ICCPR, being explicitly contemplated by Article 12(3) and being proportionate, in the Government's view, to the existing and emerging threats to national security which Australia faces.

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

15. The ability to leave Australia will not be directly affected by the cessation or renunciation provisions, but there are several ways in which the rights may be indirectly affected. Clearly this is relevant only to people whose citizenship ceases or is renounced while they are in Australia. In some cases, the cessation or renouncing of citizenship may lead to visa cancellation and removal; in these circumstances Article 12(2) would not be relevant.
16. 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. This would be provided by law, most likely aimed at national security goals, and is likely to be proportionate to those goals given the seriousness of the conduct necessary to give rise to automatic cessation of Australian citizenship. 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 or renunciation could potentially prevent travel outside Australia. However, in this case, as the person is a dual citizen, 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

17. While a person whose citizenship has ceased or has been renounced 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 provisions supports the interpretation that “own country” goes beyond mere nationality. However, it is the Government's view that where a person has repudiated their allegiance to Australia, which under the new provisions will necessarily be in circumstances where they hold another citizenship and renounce their Australian citizenship or their Australian citizenship ceases, any ties they may have to Australia for the purposes of Article 12(4) have been voluntarily severed. The person should not be entitled to gain any advantage from a relationship they are responsible for breaking.
18. Should circumstances arise where a person whose citizenship has ceased or has been renounced can properly consider Australia to be “his [or her] country”, depriving them of the right to enter Australia would not be arbitrary. It would be based on a genuine threat to Australia's security posed by a person who is fighting on behalf of or is in the service of a terrorist organisation or is convicted of particular terrorism-related offences and has repudiated their allegiance to Australia. The cessation or renunciation of Australian 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.

19. A person whose citizenship ceases or is renounced while they are outside Australia may apply for a visa for entry to Australia. As noted above, given the circumstances for cessation and renunciation, it is likely they would fail the character test. However, any refusal on this basis would be undertaken in accordance with legislative requirements.

Expulsion of Aliens – Article 13 ICCPR

20. Article 13 of the ICCPR is also engaged, and 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.

21. While technically the amendments would not result directly in the expulsion of a person from Australia, as outlined above, expulsion (most likely removal under section 189 of the Migration Act) may be the outcome of the process which begins with cessation or renunciation.
22. Any removal would come only after the person's lawful status in Australia (i.e. any visa they held after the cessation or renunciation 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).
23. Circumstances that may lead to removal from Australia (cessation or renunciation of citizenship, cancellation, removal availability) will proceed in line with the relevant provisions of the Citizenship and Migration Acts, so removal would be in pursuance of a decision reached in accordance with law. As outlined extensively above, as any decision to remove a person from Australia may be the result of decisions about visas following the automatic cessation or renunciation of citizenship in this circumstance, it is clearly linked to compelling reasons of national security. Judicial pathways would be available for the review of such decisions.

Equality before the courts and tribunals - Article 14 ICCPR

24. 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.
25. 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.
 26. In respect of the renunciation by conduct provision, the activities giving rise to the renunciation by conduct are expressed in the legislation itself. In relation to the cessation provisions, the offences where convictions would give rise to cessation are also expressed in the legislation. A declared terrorist organisation is specified in the definition of terrorist organisation under the *Criminal Code*. The Minister declares that a declared terrorist organisations applies for the purposes of the Citizenship legislation. These Instruments are publicly available, which ensures a level of transparency and accountability.
 27. When the Minister is considering whether or not to exercise the non-compellable power to exempt a person from the application of the renunciation or the cessation provisions, the Minister must consider whether it is in the public interest to do so. This strikes the appropriate balance between giving a person a fair opportunity to address any issues raised in the information before the Minister while ensuring the effectiveness of cessation of citizenship as a measure to protect the public interest.

Equality before the law - Article 26 ICCPR

28. Article 26 of the ICCPR provides:

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.

29. 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 amendments provide for differential treatment on the basis of conduct or the commission of certain offences and therefore it may engage the rights to equality and non-discrimination, for example on the basis of political or other opinion.
30. The amendments also differentiate on the basis that they apply only to those persons who hold dual citizenship.
31. 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 ICCPR.
32. Differentiation on the basis of dual nationality is the consequence of obligations relating to statelessness, and as such represents a measure of extra protection for those without dual nationality, rather than a means of possibly selecting those who may be subject to the new provisions.
33. The broader differentiation at the heart of the cessation and renunciation amendments, i.e. that by acting against the interests of Australia by choosing to engage in terrorism, they have evidently repudiated their allegiance to Australia, thereby renouncing their Australia citizenship, is proportionate to the seriousness of the conduct.

The best interests of the child - Article 3 CRC

34. Article 3 of the CRC provides:

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.

35. This right is engaged by the amendments.
36. This right would be engaged in two broad circumstances: in respect of a minor directly, and in respect of the parent of a minor.
37. There are documented cases of children fighting with extremist organisations overseas and being otherwise involved in terrorist activities, so the question of the cessation and renunciation power applying to minors should be addressed. The proposed amendments apply to all Australian (dual) citizens regardless of age.

38. The Government has considered the best interests of the child in these circumstances where conduct of a minor is serious enough to engage the cessation or renunciation provisions and has assessed that the protection of the Australian Community and Australia's national security outweighs the best interests of the child.
39. Cessation or renunciation of a parent's Australian citizenship does not automatically result in the cessation or renunciation of the child's Australian citizenship. Any exercise by the Minister of his discretionary power to revoke the Australian Citizenship of a child in circumstances where the Australian citizenship of the parents has ceased under the new provisions must take into consideration all relevant circumstances, including the best interests of the child.

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

40. 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.”
41. 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.
42. 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.
43. 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. Cessation or renunciation of a child's Australian citizenship may only occur if the child is an Australian citizen, and if they are a national or citizen of a country other than Australia. That is, the 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.
44. While the new cessation and renunciation provisions engage Article 24(1), as noted above, the cessation or renunciation of a child's Australian citizenship would only occur as a result of extremely serious conduct. The Minister's ability to exempt the child from the cessation of their Australian citizenship allows consideration of all the circumstances of the case in determining whether it is in the public interest to do so.
45. The cessation or renunciation of the Australian citizenship of a parent may engage the right of a child to be cared for by his or her parents in Article 7(1) and the right to family in Article 23(1). However, they would only be engaged in circumstances where the actions of the parent whose citizenship has ceased or been renounced casts serious doubt on their suitability as a parent, and where the safety and security considerations and Australia's national security are likely to justify a limitation of the right.

46. The right to family may also be engaged in circumstances without children, for example in circumstances where a husband's Australian citizenship ceases or renounces but his wife's citizenship does not. The Government has considered this right and has assessed that the security and safety considerations of Australians and national security outweigh the rights of the individuals affected.

Right to preservation of identity - Article 8 CRC

47. Article 8 of the CRC states:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

48. The new cessation and renunciation provisions engage Article 8(1) in that they may limit the right of the child to preserve his or her nationality. Cessation and renunciation are expressly not available in circumstances where they would render a child stateless; as such, the provisions cannot deprive a child of their nationality, only their Australian citizenship.
49. Any automatic cessation or renunciation of a child's citizenship will only apply in circumstances where the child themselves meets the criteria for automatic cessation or renunciation. Lawful as a matter of domestic law by virtue of the proposed amendments, such a result would in the circumstances be reasonable, proportionate and necessary in light of the serious conduct of the child that gives rise to the cessation or renunciation coming into effect.

Right to participation - Article 12 CRC

50. Article 12 of the CRC provides:

- (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

51. The Minister's power to exempt a person from the application of the new cessation provisions expressly excludes the rules of natural justice. The Government considers that this limitation on the right to be heard is necessary and proportionate in the circumstances, given the serious conduct on the part of a child that has given rise to the cessation provisions in the first place. Any impact that cessation may have on the child, and the child's best interests, will be considered by the Minister as part of the public interest component relating to exemption.
52. When considering whether to revoke a child's citizenship under section 36 in light of the new cessation provisions, the Minister must accord natural justice. Natural justice may involve inviting the child or parent of the child to make representations to the Minister about excusing the person. If the child or parent makes such representations to the Minister, the Minister may, having regard to these representations and any other matters the Minister considers relevant,

decide not to revoke the Australian citizenship of the child. These provisions give the child, the child's parent or the child's representative the opportunity to be heard, thereby satisfying Article 12. The government considers that this strikes the appropriate balance between giving a person a fair opportunity to address any issues raised in the information before the Minister while ensuring the effectiveness of cessation as a measure to protect the public interest.

53. In other circumstances, where cessation or renunciation has occurred due to a child's conduct, any decisions that would be made after the cessation or renunciation would take into account relevant considerations, be subject to procedural fairness and would be reviewable by a court.

No resumption of citizenship where cessation or renunciation of citizenship under sections 33A, 35 or 35A

54. This amendment provides in effect that if a person's citizenship is ceased or renounced, the person cannot become an Australian citizen again.

Human rights implications

55. This change may engage several of the 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 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 and national security.
56. 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 sections will not entail the making of any decisions, being operation of law provisions, it is the Government's view that this measure is necessary to ensure the integrity of the citizenship programme, the protection of Australia's national security interests and the protection of the Australian community.

Conclusion

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