Executive Council of Australian Jewry Inc.

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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House Canberra ACT 2600

Email: pjcis@aph.gov.au

Dear Sir/Madam

Re: Inquiry into *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*

The Executive Council of Australian Jewry (ECAJ), the elected national representative organisation of the Australian Jewish community, presents the following submission on behalf of the Australian Jewish community in response to the Committee's inquiry into the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* ("the Bill"), which was tabled in the Parliament on 28 November 2018. If passed, the Bill will effect substantial amendments to the *Australian Citizenship Act 2007* ("the Act").

1. General principles

We have been, and remain, broadly sympathetic to the government's program of legislative reform to update Australia's national security and citizenship laws so as to better protect Australians from the threats posed by the proliferation of international terrorism in recent years. We recognise that the first responsibility of government is to secure the physical security of its citizens. As representatives of a community which faces a demonstrably higher level of threat to our physical security than that of the general community, we readily acknowledge the need for effective measures to be taken by government to meet contemporary threats to Australia's security.

In our view, the most effective such measures are those which are solidly grounded in the very values which most terrorist groups seek to destroy and which Australia seeks to uphold – freedom, justice, democracy and the rule of law.

Based on those values, we remain of the view, as expressed in our written submission to this Committee dated 14 July 2015 in response to an earlier Inquiry, that the loss of a person's Australian citizenship is an extreme outcome

that is justified only in limited circumstances. One of those circumstances is where a person has been convicted of an offence, and the facts of the case, the nature and gravity of the offence, and other relevant facts are such as to demonstrate that the person has repudiated his or her allegiance to Australia.

Even in those circumstances, we remain of the view that loss of citizenship should apply only to persons who:

(i) have another citizenship to fall back on, that is dual nationals; or

(ii) have an indefeasible legal right of access to citizenship of another country under the laws of that country and are not barred for any reason from taking up residence in that country.

Except in the circumstances described in (ii) above, we believe that loss of citizenship should not occur if the loss would result in a person becoming stateless, as this would be contrary to Australia's obligations as a party to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

2. The effectiveness of loss of citizenship as a security measure

Professor Greg Barton, a terrorism expert at Deakin University, recently expressed the view that Australia's security would not be improved by revoking the citizenship of a terrorist like Melbourne-born Islamic State fighter Neil Prakash. Prakash's "skills" as a terrorist include the use of social and other online media to propagandise, to attract recruits and to direct and incite them to commit terrorist acts in Australia.

According to Professor Barton, with a terrorist of that background Australia's security interests are best served by keeping him in prison in Australia, rather than by taking the risk that at some future time he might be at large in another country, free to spread his propaganda and to resume his recruitment and incitement activities in Australia online. We think Professor Barton's arguments have merit in respect of terrorists with similar online communication capabilities to those of Prakash.

The analysis does not apply, at least not with the same force, to terrorists who lack online communication capabilities. A much stronger case can be made that Australia's security will be enhanced by denying citizenship to terrorists whose specialty lies, for example, in bomb-making or the use of particular weapons rather than in communications, and then barring them from Australia. For this reason we accept that loss of citizenship in appropriate cases should be included in the range of measures available in Australia to counter-act terrorism.

3. The Bill

The Act presently provides for automatic loss of citizenship of a person who engages in various kinds of conduct which are deemed to be inconsistent with allegiance to Australia: see sections 33AA, 35 and 35A. The Bill proposes, *inter alia*, to:

- Expand the range of offences for which a person may incur loss of citizenship;

- Remove the minimum sentence necessary before a person may incur loss of citizenship as a consequence of being convicted of a relevant terrorism offence; and
- Alter the Act's current provisions against rendering a person stateless.

4. Range of offences for which person may incur loss of citizenship

Currently, section 35A(1)(a) of the Act lists eight offences, conviction for which may result in a person ceasing to be an Australian citizen. The list expressly excludes the *Criminal Code* offence of associating with a terrorist organisation (section 102.8). The Bill now proposes to amend the Act so as to include that offence as a relevant terrorism offence that can result in loss of citizenship (proposed section 35A(1A)).

The rationale for this proposed change was given by the Attorney General in his second reading speech introducing the Bill:

> *A relevant terrorism offence will now include the Criminal Code offence of associating with a terrorist organisation, an offence punishable by three years imprisonment. This recognises that knowingly associating with a terrorist organisation, on multiple occasions, for the purposes of supporting the terrorist organisation to expand or continue to exist, is itself a serious offence. A person who is convicted of such an offence has demonstrated their repudiation of Australian values through their association with, and support of, a terrorist organisation proscribed under Australian law.*

- **Associating with a terrorist organisation – repudiation of allegiance to Australia**

We do not believe that the conclusion drawn in the final sentence of the passage cited above is necessarily true in all cases in which a person is convicted of the offence of associating with a terrorist organisation. It is not inconceivable that such a person may have been acting under a degree of threat or duress or a vitiated mental state, serious enough perhaps to reduce the penalty, but not so as to avoid a conviction altogether.

Under sub-section 35A(1) of the Bill, it is proposed that the Minister for Home Affairs may determine in writing that a person ceases to be an Australian citizen if certain conditions are fulfilled. One of those conditions is that "*the person has a relevant terrorism conviction or a relevant other conviction*" (paragraph (a)). Another condition is that "*the Minister is satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia*" (paragraph (c)).

While theoretically paragraphs (a) and (b) involve distinct, albeit overlapping, inquiries, the Attorney General's statement cited above appears to conflate entirely the two conditions. We apprehend this conflation may affect the practical application of the provision.

For the reasons we have stated, our concern is that being convicted of the offence of associating with a terrorist organisation should not in and of itself be regarded as proof that the convicted person has repudiated his or her allegiance to Australia. The elements of the offence that need to be proved do not include repudiation of the defendant's allegiance to Australia. The same could be said of the other offences where conviction may lead to loss of citizenship.

- **Recommendation 1**

We therefore recommend that a safeguard provision be added to the Bill. It would stipulate that for the purposes of sub-section 35A(1)(c) the Minister for Home Affairs must not rely solely on the conduct underlying the conviction in order to be satisfied that the convicted person has repudiated his or her allegiance to Australia, and that the Minister must arrive at any such conclusion by a separate assessment of *all* the relevant circumstances, subjective and objective.

- **Recommendation 1A**

As an alternative to Recommendation 1 above, we propose that the court which convicts a person of a relevant offence be invested with the power to determine the question of whether the person's allegiance to Australia has been repudiated. Evidence could be taken, submissions heard and the question decided during the sentencing phase of the trial. Information that may have been inadmissible as evidence during the conviction phase of the trial, could be deemed admissible for the purpose of determining whether there has been a repudiation of allegiance to Australia.

An advantage of this approach would be that the determination would ensue after the convicted person had had a fair hearing before a court that was fully conversant with the facts of the case. In terms of due process, safeguards against error and public perceptions of fairness, we believe that this would be preferable to a determination being made by the Minister on the advice of senior public servants "behind closed doors".

We accept that the judicial process we are recommending could result in relevant information relating to the convicted person's allegiances not being put forward by the Commonwealth because, for example, its disclosure in court might prejudice national security, put at risk ongoing operations by law enforcement agencies or intelligence agencies, or put at risk the safety of the community, law enforcement officers or intelligence officers. On the other hand, we believe it is inherently unsafe to conclude that a person's allegiance to Australia has been repudiated if that conclusion cannot be reached without relying on material that the person has not had a fair opportunity to challenge. To take the serious step of revoking a person's citizenship on that basis seems to us to be inappropriate, especially in a free society.

- **Constitutional questions**

We have assumed, for the purposes of Recommendation 1, that the process by which the Minister becomes satisfied that a person convicted of a relevant offence "*has repudiated their allegiance to Australia*" does not involve the exercise of a judicial power. If that assumption is incorrect, then proposed sub-section 35A(1)(c) of the Bill would be invalidated by the Australian Constitution, which requires judicial powers to be exercised only by a court created pursuant to and constituted in accordance with s.72 of the Constitution, or by a State court exercising federal jurisdiction: *R v Kirby; Ex parte Boilermakers' Society of Australia ("Boilermakers' case")* [1956] HCA 10, para 5, per Dixon C.J., McTiernan, Fullagar and Kitto JJ.

We also accept that any legislation implementing our Recommendation 1A could incur the risk of constitutional challenge upon the basis that the determination may involve the conferral of non-judicial powers upon a court contrary to Chapter III of the Australian Constitution. It could be argued that the question of whether a person's allegiance to Australia has been repudiated is so broad and non-specific and involves consideration of such a diffuse range of factors that the conferral of this question for decision on a court would be inconsistent with the court exercising

the judicial power of the Commonwealth. This type of argument was advanced by the appellants, albeit unsuccessfully, in challenging the validity of certain provisions of the *Criminal Code* in *Thomas v Mowbray* [2007] HCA 33. In our view, on the current state of the authorities, a provision conferring upon a court the power to decide the question of a person's repudiation of allegiance to Australia, if carefully drafted, would survive a similar challenge.

5. Gravity of sentence required for a person to incur loss of citizenship

The Bill proposes removal of the current requirement in section 35A(1)(b) of the Act that a person be sentenced to at least six years imprisonment for a relevant terrorism offence or offences before being liable to lose their Australian citizenship. The six years imprisonment requirement would be maintained for a relevant other offence or offences.

We can accept that even a person who has been convicted of a less serious infraction of a relevant terrorism offence may be a person who has repudiated their allegiance to Australia. As noted earlier in this submission, the question of whether there has been such a repudiation is separate from the question of guilt or innocence and should also be separate from the question of the seriousness of the conduct where a person has been found guilty.

Nevertheless, the cessation of a person's Australian citizenship is a serious matter with potentially grave consequences for the person concerned. The complete removal of the minimum sentence requirement in section 35A(1)(b) of the Act in respect of relevant terrorism offences without substituting a lesser requirement opens up the possibility that even a minor infraction of one of the relevant terrorism offences can result in a loss of citizenship. That would be excessive in our view.

We note that the *Criminal Code* offence of associating with a terrorist organisation, which the Bill now proposes be included as a relevant terrorism offence that will result in loss of citizenship, carries a penalty of imprisonment for 3 years. Accordingly, in our view the minimum sentence requirement presently provided for in section 35A(1)(b) of the Act in respect of relevant terrorism offences should be changed to imprisonment for 3 years.

- **Recommendation 2**

We therefore recommend that in respect of relevant terrorism offences the words "3 years" be substituted for "6 years" wherever appearing in section 35A(1)(b) of the Act.

6. Provisions against Statelessness

The Bill proposes to remove the current requirement in section 35A(1)(c) of the Act that the convicted person facing a loss of Australian citizenship must be a national or citizen of a country other than Australia at the time when the Minister makes the determination that a person ceases to be an Australian citizen, and to replace it with a requirement that the Minister must be satisfied that "*the person would not, if the Minister were to determine that the person ceases to be an Australian citizen, become a person who is not a national or citizen of any country*" (section 35A(1)(b) of the Bill). In other words, the requirement that the person will not be rendered stateless will no longer be a matter of fact, but rather a matter of the Minister's opinion, albeit an opinion that must be reasonable.

A reasonable opinion is not necessarily one that is factually correct. We have seen in connection with dual citizenship cases under section 44 of the Australian Constitution how prone to error MPs, including Ministers, can be in making judgments about whether or not they themselves (let alone other persons) are citizens or nationals of another country. In the case of *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 (27 October 2017), the High Court found that several members of the Federal parliament, including a Deputy Prime Minister (the Hon Barnaby Joyce MP) and a Cabinet Minister (Senator the Hon Fiona Nash), were dual nationals, even though each of them had held a contrary view.

In the interests of due process, safeguards against error and public perceptions of fairness, we propose that the question of alternative nationality (and hence statelessness) be referred to a court for final determination. Both the Commonwealth and the person whose Australian citizenship is at stake would have the right to be represented and heard.

As to the constitutional issues that might arise with the conferral of power to decide this question on either the Minister or a court, we refer to the earlier part of this submission under the heading "Constitutional Questions".

- **Recommendation 3**

The question of statelessness should be referred to a court for final determination, rather than being left to the Minister.

We thank the Committee for the opportunity to make this submission and we consent to the submission being made public.

Yours sincerely

[redacted]
Anton Block
President

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Co-CEO

[redacted]
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Summary of Recommendations

Recommendation 1

A provision should be added to the Bill stipulating that for the purposes of sub-section 35A(1)(c) the Minister for Home Affairs must not rely on the conviction alone in order to be satisfied that the convicted person has repudiated his or her allegiance to Australia, and that the Minister must arrive at any such conclusion by a separate assessment of all the relevant circumstances.

Alternatively:

Recommendation 1A

The court which convicts a person of a relevant offence should be invested with the power to determine the question of whether the person's allegiance to Australia has been repudiated.

Recommendation 2
In respect of relevant terrorism offences the words "3 years" should be substituted for "6 years" wherever appearing in section 35A(1)(b) of the Act.

Recommendation 3
The question of statelessness should be referred to a court for final determination, rather than being left to the Minister.