Executive Council of Australian Jewry Inc.

הועד הפועל של יהודי אוסטרליה

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18 April 2019

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: Review of the operation, effectiveness and implications of sections 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007*

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 review of the operation, effectiveness and implications of sections 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007* ("the Act"), and any other provision of 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. (We expanded on these views in our written submission to this Committee dated 22 January 2019 concerning the

Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, which ultimately was not enacted). 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

Earlier this year, Professor Greg Barton, a terrorism expert at Deakin University, 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 Act

The Act currently 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.

- **Range and seriousness 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 current requirement in section 35A(1)(b) of the Act is 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 cessation of a person's Australian citizenship is a serious matter with potentially grave consequences for the person concerned. The maintenance of the minimum sentence requirement in section 35A(1)(b) of the Act is necessary in our view in order to avoid the possibility that even a minor infraction of one of the relevant offences can result in a loss of citizenship. That would be excessive in our view.

The current list of offences that may lead to loss of citizenship expressly excludes the *Criminal Code* offence of associating with a terrorist organisation (section 102.8). This offence is of a lower order of seriousness than the eight offences which are listed and, on balance, we accept its exclusion from the citizenship loss provisions. It is not inconceivable that a person convicted of the offence of associating with a terrorist organisation 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. 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. We therefore previously recommended that a safeguard provision be added to the legislation. It would stipulate that for the purposes of sub-section 35A(1)(c) the Minister for Home Affairs (whether acting alone or on the advice of the Citizenship Loss Board) 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.

- **Administrative versus judicial determination of loss of citizenship**

As an alternative to determination by the Minister for Home Affairs and/or the Citizenship Loss Board, we previously proposed 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 administratively "behind closed doors".

We accept that the judicial process we have recommended 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 any such basis seems to us to be inappropriate, especially in a free society, and risks undermining public support for citizenship loss more generally, even in cases where it is manifestly merited.

- **Constitutional questions**

We accept that any legislation implementing a scheme for judicial determination of loss of citizenship could incur a 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.

- **Provisions against Statelessness**

Section 35A(1)(c) of the Act currently requires 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.

We confirm that in our view the question of whether an alternative nationality is available must remain a matter of fact, rather than 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 and support for the citizenship loss scheme, we previously proposed 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".

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	**Peter Wertheim**	**Alex Ryvchin**
President	**Co-CEO**	**Co-CEO**

Summary of Recommendations

- A provision should be added to the Act 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, 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.

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