Executive Council of Australian Jewry Inc.

הועד הפועל של יהודי אוסטרליה

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14 July 2015

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

Dear Sir/Madam

Re: Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

The Executive Council of Australian Jewry (ECAJ), the elected representative organisation of the Jewish community in Australia, presents the following submission on behalf of the Australian Jewish community in response to the Committee's inquiry into the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* ("the Bill"), which was tabled in the Parliament on 24 June 2015. If passed, the Bill will effect substantial amendments to the *Australian Citizenship Act 2007* ("the Act").

Currently, under section 34 of the Act, a person's Australian citizenship can be revoked if it is proved that the person acquired Australian citizenship by fraudulent means. Under section 35 of the Act, Australian citizens who hold dual citizenship of a foreign country will automatically lose their Australian citizenship if they serve in the armed forces of a country at war with Australia.

Whilst it is relatively straightforward to determine if a person has served in the armed forces of a country at war with Australia, the loyalty to Australia of a person involved in some way with terrorist organisations overseas can sometimes be more difficult to gauge. For example, the fact that a person is a member of, or has fought on the side of, an organisation that is listed as a terrorist organisation under the *Criminal Code* does not necessarily mean that that person has been disloyal to Australia. One of those organisations is the Kurdistan Workers Party (PKK), whose members have been engaged, directly or indirectly, in combat in Syria and Iraq against another listed terrorist organisation, Islamic State. Arguably, the Kurds' military successes against Islamic State have been consistent with Australia's national interests, especially

as Australian forces themselves have been involved in assisting the Iraqi army to combat Islamic State in Iraq.

In our view, the revocation of any person's Australian citizenship is an extreme step that is justified only in the circumstances already provided for under the existing sections 34 and 35 of the Act or, alternatively, upon proof that the person:

(a) has committed terrorist offences or grave international crimes (genocide, war crimes or crimes against humanity) in Australia or on foreign soil; and

(b) has demonstrated that he or she has repudiated his or her allegiance to Australia. (For example, the person has acted in a manner that is contrary to Australia's national security interests, or caused or threatened physical harm to other Australians or exposed other Australians to increased threats to their physical safety).

Even in those circumstances, we believe that revocation 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, revocation of citizenship should not occur if the revocation 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.

If passed, the Bill will revoke the citizenship of dual citizens who:

1. Fight or serve outside Australia in the armed forces of a country at war with Australia or in a declared terrorist organisation (proposed new section 35);
2. Are convicted of certain terrorist offences under the exiting Commonwealth *Criminal Code* (proposed new section 35A); or
3. Engage in certain terrorist conduct, whether within or outside Australia (proposed new section 33AA).

The Bill provides that if the Minister becomes aware that a dual citizen fulfils any of these criteria, the Minister must give that person written notice to that effect, although there is also a power to rescind the notice and exempt the person from revocation of his or her citizenship. The Minister is expressly exempted from following the rules of natural justice.

We also note that in introducing the Bill, the Minister for Immigration and Border Protection told the Parliament that senior public servants, advised by government lawyers, will play a role in deciding whether an accused dual national in any particular case has met any of these criteria.

The Bill itself does not set out how a person would challenge a revocation of citizenship notice from the Minister which states that the person has engaged in proscribed conduct.

However, as a matter of law the person could seek judicial review of the notice by an application for a constitutional writ and certiorari pursuant to section 75(v) of the Constitution or under s 39B of the Judiciary Act (Cth), based on a declaration that the conditions under the relevant sections have not been made out. This of course is different to merits review before the Administrative Appeal Tribunal (cf s 52 of the *Australian Citizenship Act*, which has not been amended to include review of these sections), as the right is limited to a review for jurisdictional error or other error of law.[1]

The Australian Constitution places well-recognised limits on the exercise of judicial power. In particular, neither the Parliament nor the Executive branch of government, including a Minister, may exercise judicial power. It is well settled that:

> "*it is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to and constituted in accordance with s.72* [of the Constitution] *or a court brought into existence by a State."*[2]

Without attempting an exhaustive definition of the term "judicial power", Chief Justice Samuel Griffith stated in *Waterside Workers' Federation v J.W. Alexander Ltd*:

> "*If…the only powers conferred upon a so-called tribunal are in the nature of calculation, or the mere ascertainment of some physical fact or facts, and not the declaration of or giving effect to a controverted matter of legal right, it may be that they do not appertain, except incidentally, to the judicial power. It is not disputed that convictions for offences and the imposition of penalties and punishments are matters appertaining exclusively to that power.***"**[3]

Given the relevant constitutional background, we make the following comments about the specific provisions of the Bill.

(i) Proposed new section 35

We support the proposal. In our view, it is the most straightforward of the legislative changes proposed by the government because, in the words of Chief Justice Griffith, the proposed section requires "*the mere ascertainment of some physical fact or facts*"

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[1] Unless amendments are made to the *Administrative Decisions (Judicial Review) Act* 1977 to exclude actions taken by the Minister under the new sections proposed by the Bill from the coverage of that Act, the issuing of any Commonwealth notice pursuant to the proposed new sections would also be subject to judicial review under the *Administrative Decisions (Judicial Review) Act*.

[2] *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.

[3] (1918) 25 CLR 434, at page 443, line 29.

by the Minister, namely whether a person has been fighting or serving as a member of the armed forces of a country with which Australia is at war, or with a named terrorist organisation that has been declared as such by the Minister specifically for the purposes of the *Australian Citizenship Act*. No additional judgement needs to be made about the repudiation of the person's allegiance to Australia. Such repudiation is simply presumed. Whilst that presumption will be justified in most such circumstances, there might be some circumstances where it is not: for example, where a person serves in armed forces as medical personnel, or in a terrorist organisation fighting another terrorist organisation that is hostile to Australia.

The difficulty could be overcome by giving the Minister a discretion not to issue a notice of revocation of citizenship of a dual citizen to whom section 35 applies if the Minister is satisfied in the circumstances that the person's allegiance to Australia has not been repudiated.

(ii) Proposed new section 35A

In principle we support the proposal, although we have certain reservations. The automatic revocation of citizenship if a person is convicted of any of the five specified offences under the *Criminal Code* lacks flexibility. There is an assumption that persons convicted of any of these offences have necessarily severed their bond and repudiated their allegiance to Australia. In many, perhaps most, cases such an assumption will be justified, but not in all cases. No account is taken of the degree of culpability of the person or the nature of their involvement in the commission of the offence (eg as an unwitting accessory). Some of the categories of convictions that can lead to loss of citizenship (eg defacement of government property) seem to us to be too broad.

Further, the Bill makes no provision for reinstatement of the person's citizenship if the conviction is quashed or overturned on appeal. Subsection (7) would permit, but not require, the Minister to rescind the revocation notice, and to exempt the person from the effect of revocation in relation to the matters that were the basis for giving the notice. Further, there is no process by which the person would be able to prove that there was no valid revocation of the person's citizenship under that section in the first place.

Again, this difficulty could be overcome by the relevant Minister having a discretion not to issue a notice of revocation of citizenship, at least until such time as any appeal against the conviction had been exhausted or, alternatively, the time for any appeal had expired without an appeal having been commenced.

We note that the Attorney-General has also asked the Committee to consider whether proposed section 35A of the Bill should apply retrospectively with respect to convictions prior to the commencement of the Act. In our view such retrospectivity would be contrary to the spirit, if not the letter, of the basic principle of justice: *Nulla poena sine lege certa*. (There is to be no penalty without *definite* law). This rule requires a penal statute to define both the punishable conduct and the penalty with

sufficient definiteness to allow citizens to foresee not only when a specific action will be punishable by law but also what penalty will attach to that conduct. The rule expresses the general principle of legal certainty in matters of criminal law, which holds that the law must provide those subject to it with the ability to regulate their conduct. It is recognised or codified in many national jurisdictions, and by the European Court of Justice as a "general principle of Union law".[4] Although revocation of citizenship is not a punishment under a criminal statute, it is in our view a form of penalty, indeed a severe penalty, to which the same principle of legal certainty properly applies.

(iii) Proposed new section 33AA

Although we support the intention behind the proposal, we believe the specific provisions in this section are an over-reach. The section specifies eight categories of conduct which will trigger revocation of citizenship. Each category is defined in terms of the *Criminal Code*. The section therefore requires the Minister, before issuing a notice under subsection (6), to have come to the conclusion that a person has engaged in conduct that is in breach of the relevant section or sections of the *Criminal Code*. It is not clear whether this conclusion can be based upon the civil standard of proof - balance of probabilities - or the criminal standard - beyond reasonable doubt. In either case, this may amount to what Chief Justice Griffith referred to as a "*declaration of or giving effect to a controverted matter of legal right*", which would be an exercise of judicial power. Proposed section 33AA also assumes that persons who receive notice from the Minister that they have engaged in the specified conduct have necessarily severed their bond and repudiated their allegiance to Australia, without any consideration having to be given as to whether or not this assumption is justified in the particular circumstances.

We accept that the constitutionality of proposed section 33AA is not a straightforward question. It can be argued that the government's proposed legislative changes would not be a purported exercise of judicial power by the Parliament[5] or require an exercise of judicial power by the Executive. We are also aware of the following dicta of Isaacs J (as he then was) in *Re Yates; Ex parte Walsh*:

> "*I am unable to see why Parliament could not, in protection of the Commonwealth in respect of defence, customs, coinage or immigration, for instance, enact that any person who was shown to the satisfaction of the Minister to be a spy, a traitor, a smuggler, a coiner or an importer of prostitutes, might be summarily deported. Such legislation on admitted subjects of power might be considered arbitrary and even dangerous; but those are elements entrusted to the wisdom of Parliament when weighing in its own*

[4] Case C-308/06, International Association of Independent Tank Owners (Intertanko) & Ors v Secretary of State for Transport [2008] *European Court Reports* I-4057.

[5] For the reasons given in *Duncan v New South Wales; NuCoal Resources Limited v New South Wales; Cascade Coal Pty Limited v New South Wales* [2015] HCA 13 (15 April 2015) at para [43].

> *scales of social justice the comparative claims of individuals and the nation. If it says Yea, no Court can say Nay.*"[6]

If citizenship is to be revoked under proposed section 33AA on any basis that falls short of a determination of criminal guilt under Australian law, then in our view that basis will be manifestly inadequate to justify so drastic a measure. It would violate the long-established principle that a citizen may be punished for a breach of law, but can be punished for nothing else.[7]

If, on the other hand, a determination of criminal guilt under Australian law will be a precondition for revoking citizenship under section 33AA, then such a determination could be an exercise of judicial power[8] which, under Chapter III of the Australian Constitution, may only be done by a court.

Whatever the constitutional position may be, proposed section 33AA would make it possible to decide on a person's allegiance to Australia on the sole basis of untested interpretations of alleged evidence, with no opportunity for the accused person to face his or her accusers and challenge the case against him or her. This opens the door wide to error and abuse. We think that a right of judicial review of a Minister's action in giving effect to the section is not a sufficient safeguard, especially as the review is limited, and does not permit a complete review of the merits of the decision. The rule of law – which is one of the citizenship values that the government has proposed – demands that citizens not be subjected to punishment by administrative fiat, but only through the due process of the law, which remains the most reliable method for testing the merits of allegations of wrongful conduct.

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We consent to the publication of this submission by the Committee.

Yours sincerely

Robert Goot SC AM
President

Peter Wertheim AM
Executive Director

[6] [1925] HCA 53; (1925) 37 CLR 36 (18 December 1925).
[7] Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (1959), p 202, cited in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64 at para [23] *per* Brennan, Deane and Dawson JJ.
[8] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64 at para [23] *per* Brennan, Deane and Dawson JJ. See also section 80 of the Constitution.