Law Council
OF AUSTRALIA

Office of the President

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Mr Peter Khalil MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
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CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Chair

Review of the amendments made by the *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023*

1. The Law Council was grateful for the opportunity to appear before the Parliamentary Joint Committee on Intelligence and Security (the **Committee**) at its public hearing, held on 19 February 2024, in connection with its review of the amendments made by the *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (Cth) to the *Australian Citizenship Act 2007* (Cth) (the **Act**).

2. During the hearing, we were asked to consider further the adequacy of existing safeguards in the Act protecting against, both formal and de facto, statelessness.[1] Responses to these questions, along with related observations, are included to assist the committee.

3. Mr Julian Hill MP said:[2]

> *Your contention is that the bar, if we continue with this kind of regime, should be raised so that it should be proved that a person won't become stateless. In practical terms … that would boil down to two things: an establishment as a matter of fact that someone is a citizen or has an entitlement to citizenship in another country and then an assessment as to the practicality of them being able to exercise their rights of citizenship. Is that a non-legal but layperson's distillation of how we might understand it?*

[1] As the Australian Human Rights Commission explained in their evidence: Australian Human Rights Commission, Submission no. 2 to the Parliamentary Joint Committee on Intelligence and Security, Review of the citizenship repudiation provisions of the Australian Citizenship Act 2007 (Cth) (Submission, 7 February 2024), 15. ('***AHRC Submission***')

> *De facto statelessness is when a person may be a national or citizen of a country in name, but they cannot in reality effectively access their nationality or citizenship. For example, Faili Kurd refugees with paternal Iranian ancestry are considered Iranian nationals yet only a small number have succeeded in obtaining evidence of their Iranian citizenship.*

[2] Parliamentary Joint Committee on Intelligence and Security, Proof Committee Hansard—Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023, (Monday, 19 February 2024, Canberra), 12. ('***Committee Hansard***')

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4. Mr Richard Wilson SC responded:[3]

> *I think that's right. We haven't had time to fully consider and come to a position on de facto statelessness—we might take that on notice—but I think that is a distillation of where those arguments are going, including in the other submissions that we've had, certainly.*

Later in the hearing, Mr Wilson also said:

> *In circumstances where the exception is couched in terms of the court having to be satisfied, the exception seems to be the wrong way around. It seems to be that rather than an order must not be made unless the court is positively satisfied that they won't become stateless, it's if they're satisfied that they will become stateless they can't make the order. In law, onus of proof is a very important factor and often cases turn on that.*

International law

5. Article 1(1) of the 1954 *Convention relating to the Status of Stateless Persons*[4] *(*the **1954 Convention**), to which Australia is a party, defines a person who is stateless as a person 'who is not considered as a national by any State *under the operation of its law* [emphasis added]'.[5]

6. Article 8(1) of the 1961 *Convention on the Reduction of Statelessness*[6] (the **1961 Convention**) provides that '[a] Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless'. That general position is qualified by certain exceptions in Articles 8(2) and 8(3). However, as is explained in the evidence[7] of the Peter McMullin Centre on Statelessness, Australia did not, at the time of accession in December 1973, assert its right to deprive citizenship from persons who are only Australian nationals or citizens in accordance with Article 8(3). That means that, if a court were to deprive a person who is only a citizen of Australia, Australia would be in breach of its obligations under the 1961 Convention.

7. In 2022, referring to obligations under both the 1954 and 1961 Statelessness Conventions, the former United Nations Special Rapporteur (the **Special Rapporteur**) on the promotion and protection of human rights and fundamental freedoms while countering terrorism observed:[8]

> *States may not deprive a citizen of nationality based on their own assessment that the individual holds another nationality where the other implicated State refuses to*

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[3] Ibid.

[4] Opened for signature 28 September 1954 360 UNTS 117 (entered into force 6 June 1960). Australia acceded on 13 December 1973.

[5] Additionally, it is well-accepted in international law that '… it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation': *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4, 20.

[6] Opened for signature 30 August 1961 989 UNTS 175 (entered into force 13 December 1975) 989 U.N.T.S. 175. Australia acceded on 13 December 1973.

[7] Peter McMullin Centre on Statelessness, Melbourne Law School, Submission no. 8 to the Parliamentary Joint Committee on Intelligence and Security, Review of the amendments made by the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023 (Submission, 13 February 2024), [2.4]. ('***Peter McMullin Centre***')

[8] Fionnuala Ní Aoláin, Position of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights consequences of citizenship stripping in the context of counter-terrorism with a particular application to North-East Syria (February 2022), 8. See further, United Nations High Commissioner for Refugees, Interpreting the 1961 Statelessness

recognize the individual as a national. The question relevant to whether an individual will be rendered stateless through withdrawal of nationality is whether the individual currently possesses and has proof of another nationality. This assessment should not be made on the basis of one State's interpretation of another State's nationality law but rather should be informed by consultations with and written confirmation from the State in question. [citations omitted]

8. The former Special Rapporteur's assessment is substantially drawn from the 2013 *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5–9 of the 1961 Convention on the Reduction of Statelessness*[9] (the **UNHCR Guidelines**) issued by the United Nations High Commission for Refugees.

9. The Law Council agrees with the Peter McMullin Centre[10] and the Australian Human Rights Commission[11] that consistency with Australia's obligations under article 8(1) of the 1961 Convention requires section 36C(2) of the Act to specify that a person must be established to be, as a factual question, a foreign national or citizen to be eligible for citizenship deprivation. In other words, the present test is the wrong way around. The court should have to be satisfied beyond reasonable doubt, as a prerequisite to the exercise of the power, that the person will not become stateless if a citizenship deprivation order is made. For reasons that will be explained below, this should include the possibility of becoming *de jure* stateless (e.g., by having citizenship of another country revoked) or by becoming *de facto* stateless (e.g., by being unable to enter the other country or exercise citizenship rights).

Common law legal principles governing determination of foreign citizenship

10. Statutory specification is required because of the risk that the common law approach to establishing foreign nationality or citizenship may be inconsistent with the international law obligations cited above. As a matter of common law, the general rule is that determination of whether a person is a subject or a citizen of a foreign power 'necessarily depends upon the law of the foreign power'[12] because 'it is only the law of the foreign power that can be the source of the status of citizenship or of the rights and duties involved in that status'.[13] In the context of judicial proceedings, '[t]he existence, the nature and the scope of any rules and principles of the law of a foreign jurisdiction is to be treated as an issue of fact upon which evidence is receivable'.[14]

11. However, that common law rule may be displaced in certain contexts. For example, the High Court in *Re Canavan* found that, in the context of applying section 44 of the Constitution, foreign law could not be 'determinative' of the operation of that section of the Constitution because it would undermine democratic principles.[15] As explained in the evidence of Professor Emerita Helen Irving, in that case, the High Court heard contrary expert evidence in relation to the application of foreign citizenship law, and

Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality: Summary Conclusions, Expert meeting convened by the Office of the United Nations High Commissioner for Refugees, Tunis, Tunisia 31 October – 1 November 2013 (2014), 3 [6].

[9] HCR/GS/20/05 (May 2020), 24 [81].

[10] Peter McMullin Centre, [1.3].

[11] AHRC Submission, 15 [68] Recommendation 1.

[12] *Re Canavan* (2017) 263 CLR 284, [37]; *Sykes v Cleary* (1992) 176 CLR 77, 105-106 (Mason CJ, Toohey and McHugh JJ).

[13] *Re Canavan*, [37].

[14] *National Mutual Holdings Pty Ltd v The Sentry Corporation* (1989) 22 FCR 209, 226 [48] cited by *BJB17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1683, [66] (Wigney J).

[15] *Re Canavan*, [39].

'did not seek an official decision about the citizenship status of such persons from the government of the countries in question'.[16]

The assessment of statelessness

12. Section 36C(2) of the Act is intended[17] to be a safeguard against formal statelessness, that is, to prevent citizenship deprivation of persons who are only nationals or citizens of Australia. It provides:

> *However, the court must not make an order under subsection (1) in relation to the person if the court is satisfied that the person would, if the court were to make the order, become a person who is not a national or citizen of any country.*

13. The Law Council considers that section 36C(2) is insufficient to comply with Australia's obligations under international law, and, thus, requires amendment for the following reasons.

14. Currently, section 36C(2) is framed as a negative, that is, it requires the court to **not** make a citizenship deprivation order if the court is satisfied citizenship deprivation would make the affected person stateless. That negative framing is significant because it would put an onus on the affected individual to lead evidence that they are not a dual-citizen.

15. Crucially, at sentencing, there is no general onus of proof on the prosecution. If the offender seeks to have the sentencing judge take a matter into account 'it will be for the offender who seeks to bring a matter to the attention of the judge to do so and, again, if necessary, call evidence about it'.[18] As pointed out by the Law Council's expert representative, Mr Wilson: '[i]n law, onus of proof is a very important factor and often cases turn on that'.[19]

16. Putting the onus on the affected individual is likely to be disproportionate given the gravity of citizenship deprivation and the inequality—in the capacity to bring necessary evidence before the court—between the affected individual and the Commonwealth. It is also likely to be inconsistent with international law because, as the UNHCR Guidelines note:[20]

> *… procedures that place the burden of proof solely on the individual to prove statelessness would not be consistent with the Contracting State's obligation to determine whether statelessness would result from the act of deprivation.*

17. In this regard, the Law Council reiterates Recommendation 11 from our submission[21] that, if a citizenship deprivation forms part of the sentence, the orthodox approach to fact finding and the standard of proof must apply. That is, the sentencing judge may

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[16] Professor Emerita Helen Irving, Submission no. 6 to the Review of the amendments made by the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023 (Submission, 8 February 2024).

[17] See for example, the Explanatory Memorandum, 13 [29]:

> *In certain circumstances, cessation of a person's Australian citizenship may not be the preferred outcome, having regard to Australia's bilateral relationships, international relations more broadly, or national security interests. A Ministerial application model, such as that provided for by the Bill, ensures that citizenship cessation remains narrow in scope, with Australia's international obligations considered prior to a prospective order being made by the court.*

[18] *R v Olbrich* (1999) 199 CLR 270, [25] (Gleeson CJ, Gaudron, Hayne and Callinan JJ).

[19] Committee Hansard, 11.

[20] Guidelines, 14 [45].

[21] Law Council of Australia, Submission no. 11 to Parliamentary Joint Committee on Intelligence and Security, Review of the amendments made by the Australian Citizenship Amendment (Citizenship Repudiation) Act 2023 (15 February 2024), 25. ('***Law Council Submission***')

not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. If there are facts that the sentencing judge proposes to take into account favourable to the accused, 'it is enough if those circumstances are proved on the balance of probabilities'.[22]

18. The Law Council considers that the reference in section 36C(2) to the court's satisfaction that the person 'would … become' stateless as a result of citizenship deprivation introduces undesirable ambiguity. The Law Council agrees with the Peter McMullin Centre on Statelessness that, on a plain reading of the provision, section 36C(2) '… allows for a temporal gap and predictive element to the Court's assessment'.[23] Thus, it is possible for a court to be satisfied that the affected person 'would' not 'become' stateless (because of a future opportunity or right to apply for citizenship in a country other than Australia) even where the person does not have a second nationality or citizenship at the time the citizenship deprivation order is made.

19. The Law Council welcomes the Department of Home Affairs' clarification[24] at the hearing that it does not intend to bring citizenship deprivation order applications in relation to individuals who may have an opportunity to obtain foreign nationality or citizenship at some time in the future (but who are only citizens of Australia at the time the citizenship deprivation order is determined). Nonetheless, this should be more accurately reflected in the drafting of section 36C(2).

20. However, the Law Council was not persuaded by the Department's argument that section 36C(2) is justifiable simply because it has been transplanted from the previous legislation enabling citizenship deprivation. As the Law Council has explained at length in its previous submission, because section 36C(1) enables a court to impose citizenship deprivation 'as part of the sentence or sentences' that a person receives, provisions that applied to ministerial determination may not be fit for purpose in the current regime. For example, issues of onus and standard of proof discussed above do not arise under the ministerial determination model of citizenship deprivation.

21. For the reasons outlined above, the Law Council **recommends** amendment of section 36C(2) as set out below.

> *The court must not make an order under subsection (1) in relation to the person unless the court is satisfied beyond reasonable doubt that the person would not, if the court were to make the order, become stateless.*

Adequate safeguards to protect against de facto statelessness

22. The Law Council shares the concern expressed by other witnesses that—even if section 36C(2) is amended in the way suggested above—it still leaves open the risk that a person may be rendered de facto stateless. Even if a person is nominally a dual citizen or national at the time of the citizenship deprivation determination, that person may be de facto stateless because they may not be able to exercise rights attaching to citizenship in practice.

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[22] *R v Storey* [1998] 1 VR 359.

[23] Peter McMullin Centre, [1.2]. See also, Associate Professor Rayner Thwaites, Submission no. 12 to the Parliamentary Joint Committee on Intelligence and Security, Review of the amendments made by the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023 (16 February 2024), 12 [37].

[24] Committee Hansard, 29; Ms Sharp representing Department of Home Affairs said:

> *The person does need to actually be a dual citizen … That will depend on the country—maybe not a travel document but a birth certificate. They need to be recognised by the other country as a citizen. That might vary depending on the country. If you take a look at the way section 36D(4)(c) is drafted, we need to include information about the person's nationality or citizenship of another country. So it's not their prospective or potential; it's their actual citizenship of another country.*

23. The Law Council also refers to the cases cited by Professor George Williams where a dual national or citizen who is subject to citizenship deprivation becomes stateless at the point that they are sought to be deported.[25] The Law Council has previously noted that the case of Neil Prakash demonstrates the likelihood that a person will be practically stateless where there is a disagreement between Australia and the foreign state as to the existence of the dual citizenship.

24. Section 36C(6)(c) of the Act is intended[26] to be a safeguard against de facto statelessness and states that, in deciding whether to make a citizenship deprivation order, the court must have regard to, among other matters:

> *… the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person.*

25. The Law Council supports retention of section 36C(6)(c). However, to address the issue of new information coming to light after a citizenship deprivation order has been made, the Law Council recommends the following changes to the appeals process.

Appeals process for citizenship deprivation orders

26. At the hearing, there was some discussion between the Committee and other witnesses of the nature, and limitations, of the right to appeal citizenship deprivation orders. Professor Williams noted the absence of a provision that would allow a new review of factual findings made by the sentencing judge, noting '[t]he sort of scenario that concerns me is where someone is genuinely a citizen of another country but, before they can be deported, that other country revokes their citizenship'.[27]

27. In that context, the Deputy Chair, Mr Wallace MP said:[28]

> *I take that point, and it is a possibility that that could happen, or fresh evidence could become available—rather than an appeal, it would be more like a review de novo, if you like, when that fresh material has come to light. That fresh material could be that the second citizenship country, if I can call it that, has revoked that citizenship after the order was made in the Federal Court or the Queensland Supreme Court, and this person now would be stateless if they were deported. My first question is that it appears, on your advice, that there's nothing in the act which covers that relooking at the material de novo. Is that a suggestion that could be included to improve things? Would there be an opportunity for that?*

28. The Law Council offers some tentative observations in response to that question.

29. There is limited guidance in the Act regarding the appeals process. Given that a citizenship deprivation will occur 'as part of' the sentence or sentences, the Explanatory Memorandum states that a '[citizenship deprivation] order will be subject to review or appeal by a higher court as in the ordinary course'.[29] Furthermore, subsection 36B(2) provides that, if an order made under new section 36C(1) is overturned or quashed, and the time for appealing or applying for leave to appeal has expired without an appeal or application being lodged, or the decision is not appealable, then the person's citizenship is taken never to have ceased.

[25] See for example, the UK case of Abu Hamza al-Masri, Committee Hansard, 16 and 24 (Professor Williams).
[26] See for example, Committee Hansard, 32 (Mr Cunnington).
[27] Committee Hansard, 24 (Professor Williams).
[28] Ibid, 24 (Mr Wallace MP).
[29] Explanatory Memorandum, 28.

30. As the right of appeal in relation to a sentence is a 'creature of statute',[30] the exact test will be determined by the relevant statutory provision in each state or territory.[31]

31. In general, the appeal of a sentence requires the applicant to establish that the sentencing judge made an error in the sense described in *House v The King*.[32] That standard has been expressed in the following terms:[33]

> *As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in House v The King … itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy".*

32. As stated above, the sentencing judge's finding of whether a person is a national or citizen of a country other than Australia is a factual finding. A sentencing judge's finding as to the person's connection to the country other than Australia and the 'availability of the rights of citizenship' is also a factual finding.

33. It is possible that an applicant might argue that a citizenship deprivation order that makes them experience de facto statelessness is unreasonable or plainly unjust in the sense described in *House v The King.* However, there is limited basis to challenge directly factual findings made by the sentencing judge.

34. Crucially, factual findings are binding on the appellate court unless they come within certain parameters.[34] For example, in New South Wales, the applicant must show that the relevant factual finding was not open,[35] that is, 'if there is no evidence to support a particular factual finding, or if the evidence is all one way, or if the judge has misdirected himself or herself'.[36]

35. The Law Council **supports** consideration of a tailored statutory right of appeal where a citizenship deprivation order is made and, subsequently, new evidence comes to light regarding the affected person's formal or de facto statelessness. It should then be open to the appellate reviewer to substitute its factual finding for the sentencing judge's first finding regarding the matter specified in section 36C(6)(c) or 36B(2).

36. In the time available, the Law Council has been unable to consider this matter further. However, it would welcome the opportunity to provide further comment within longer timeframes, should this assist the Committee.

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[30] A creature of statute, the precise nature of a sentence appeal depends on the language and context of the statutory provision(s): *Dinsdale v The Queen* (2000) 202 CLR 321, [57]; *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573, [8].

[31] See for example, *Crimes (Appeal and Review) Act 2001* (NSW), s. 77(1)(b); *Crimes (Appeal and Review) Act 2001* (NSW), s. 78; *Criminal Procedure Act 2009* (Vic), *s. 327.*

[32] *House v The King* (1936) 55 CLR 499, 505 ('***House v the King***')

[33] *Markarian v The Queen* (2005) 228 CLR 357, [25] (Gleeson CJ, Gummow and Callinan JJ) citing *House v the King*.

[34] *AB v R* [2014] NSWCCA 339, [44], [50], [59] ('***AB v R***'); *R v Kyriakou* (1987) 29 A Crim R 50 ('***Kyriakou***'); *Kentwell v The Queen* (2014) 252 CLR 601, [35].

[35] *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278, [26].

[36] *Kyriakou*, 60-61;

The need for guidelines to constrain executive discretion

37. The Law Council reiterates the importance of its Recommendation 15 that the Minister should issue guidelines providing further specification of the considerations applicable to the Minister's decision to bring an application for citizenship deprivation under section 36D(1).

38. The Law Council **recommends** that those guidelines address in detail the information required to be included under section 36D(4), including information about the person's nationality or citizenship of other countries. Consideration should be given to setting out the steps that will be taken to determine the nationality or citizenship of an affected person and the steps to be taken to determine whether someone will be rendered practically stateless. In addition, the following matters should be addressed:

- The assessment of whether a person has a second nationality or citizenship of a country other than Australia is to be assessed at the time the citizenship deprivation order is determined.

- Applications for citizenship deprivation orders will only be brought in respect of persons who are found to hold dual citizenship or nationality. In other words, someone should not be considered a dual citizen or national where that person has previously held, or is eligible for, or may (re-)acquire another nationality. As stated in the UNHCR Guidelines, 'withdrawal of nationality may only occur where the individual is already in possession of another nationality' and '[t]his assessment should not be made on the basis of one State's interpretation of another State's nationality law but, rather, should be informed by consultations with and written confirmation from the State in question'.[37]

- The Minister should make reasonable inquiries across relevant government agencies, including the Department of Foreign Affairs and Trade, to establish whether the affected person either currently encounters, or is likely to in the future to encounter, practical barriers to exercising the rights attaching to a foreign citizenship or nationality. The Law Council notes that the Act requires the Minister to consult with the Foreign Minister prior to making an application. However, there is no specific requirement to seek advice in relation to the risk that an affected individual will be rendered practically stateless.[38]

- In line with the Commonwealth Director of Public Prosecutions' established procedures for disclosure,[39] and the Minister's obligation to include certain information in the citizenship deprivation application under section 36D(4), there should be timely disclosure of relevant documents underpinning the Minister's assessment of foreign citizenship or nationality. If there are documents or information adverse to the Minister's assessment, this should also be disclosed. The Law Council notes recent examples where the Minister persistently failed to disclose relevant documents in relation to post-sentence orders under Division 105A.[40]

[37] UNHCR Guidelines, [80] – [81].
[38] The Act, s. 36D(3).
[39] Commonwealth Director of Public Prosecutions, Statement on Disclosure in Prosecutions Conducted by the Commonwealth (March 2017), 7 [25].
[40] 4th Independent National Security Legislation Monitor, Grant Donaldson SC, Annual Report 2022-23 (Report, 2023) 13 – 14 [38] - [43].

Contact

39. If the Law Council can be of any further assistance to the Committee in the course of its inquiry, please contact Ms Leonie Campbell, General Manager, Policy on (02) 6276 3754 or at leonie.campbell@lawcouncil.au.

Yours sincerely

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President