Migration Institute of Australia

SUBMISSION

Australian Citizenship and Other Legislation Amendment Bill 2014

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The Migration Institute of Australia submission to the Legal and Constitutional Affairs Legislation Committee on the Australian Citizenship and Other Legislation Amendment Bill 2014

The Migration Institute of Australia, as the professional association of Registered Migration Agents, holds interests in all areas of migration legislation and policy development and appreciates the opportunity to provide comment to the Legal and Constitutional Affairs Legislation Committee on the proposed *Australian Citizenship and Other Legislation Amendment Bill 2014* (The Bill).

This Bill proposes to irrevocably change the nature of the requirements of the *Australian Citizenship Act 2007* (the Act).

While the Migration Institute broadly supports some of the changes to the Act such as the recognition of adopted children, there are three major areas of concern to the Institute. This submission provides comment on these three areas of the Bill: the changes to the character requirements; the changes to the residency requirements and the expanded ministerial powers conferred by the Bill.

The Migration Institute notes the short timeframe of only four business days given for the public and stakeholders to examine and provide comment on the provisions of the Bill and the ninety-three page Explanatory Memorandum to the Australian Citizenship and Other Legislation Amendment Bill 2014.

For many people, Australian citizenship is often the final step in an individual's long journey to Australia. With this privilege also comes an ongoing commitment to this country and its people, and the acceptance of the obligations of citizenship. This step is not taken lightly by those who apply for Australian citizenship and in many cases involves the revocation of their original citizenship and even the entitlements of their birth countries.

The proposed *Australian Citizenship and Other Legislation Amendment Bill 2014* (the Bill), seeks to irrevocably change the Australian Citizenship Act 2007 (the Act) and the nature of the requirements for citizenship for certain groups within the Australian community. These changes also afford the Minister for Immigration and Border Protection (the Minister) unconstrained power to determine and alter the requirements for obtaining citizenship, the power to refuse an individual's citizenship and the power to revoke an individual's citizenship, all outside the rule of law.

This submission focuses on the most concerning aspects of the proposed changes to the Bill, from the perspective of the Migration Institute of Australia (Migration Institute):

- The changes to the character requirements
- The refusal and revocation of citizenship
- The changes to the residency requirements, particularly the '10 year rule'
- The Ministerial powers to make decisions without transparency and oversight

Changes to the character requirements

Children

The proposed Bill allows the character of children to be assessed against what have until now been adult character requirements. The Bill allows the Minister to seek character and criminal history records for children under 18 years old at s19C(2)(g).[1]

Australian law recognises that children have a lesser capability to discern lawful behaviour and addresses this with differing standards of culpability and punishment. The Explanatory Memorandum (EM) advises the Bill 'allows decision makers to take into account a wide range of discretionary factors'[2]. However, the Department displays a history of inconsistent decision making, evidenced by the numbers of decisions overturned in the review tribunals. Simply 'allowing' decision makers the discretion to take a wide range of factors into consideration does not ensure consistency in decision making or that the resultant decision will be made without prejudice.

The consequences of youthful misdemeanours could have far reaching effects for the child. This proposed amendment to the character provisions has the potential to prevent a child being granted citizenship when other family members receive this. It is a principle of the

[1] Department of Immigration and Border Protection, Australian Citizenship and Other Legislation Amendment Bill 2014; Explanatory Memorandum, para 144.

[2] Department of Immigration and Border Protection Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Australian Citizenship and Other Legislation Amendment Bill 2014, p 6.

United Nations Convention on the Rights of the Child that "*laws and actions affecting children should put their best interests first and benefit them in the best possible way*."[3].

Reference to contemporary sentencing practices

The Bill seeks to update the meaning of 'term of imprisonment' to include contemporary sentencing practices, including those subject to good behaviour bonds[4]. Good behaviour bonds may be used instead of fines and may be imposed with or without a conviction. They are commonly ordered under the Young Offenders Act, again as recognition of the lesser culpability of youth, for attendance at drug or alcohol counselling or to reside at a rehabilitation centre. As a result the Minister may delay or delay citizenship to those who may have issues related to mental or addictive illnesses, rather than any criminal intent or record (s17(4C)(j)). The proposal to defer conferral of citizenship on an individual who is under a good behaviour bond is punitive. Good behaviour bonds should not be included with custodial sentences, home detention or residential detention programs as reason to delay or refuse citizenship.

Fraud and misrepresentation in the migration or citizenship

The DIBP submission to the Committee argues that the cost of prosecuting a case of migration or citizenship fraud is a drain on limited resources[5] and instead the Minister should be granted the power to revoke citizenship that has been obtained by fraudulent means or misrepresentation[6] of the Act. However, it is the very nature of the prosecution process that creates safeguards through the rule of law and separation of powers, that would not be available should the Minister have this ultimate discretion.

The Bill seeks to allow the Minister to revoke citizenship on the grounds of fraud and misrepresentation, even if there is no conviction associated with the alleged fraud or misrepresentation. This fraud or misrepresentation could be perpetrated by a party other than the Australian citizen, and even without that citizen's knowledge. Many people come to Australia from countries where official records no longer exist due to war, natural disaster or are refugees within the UNHCR definition. In these circumstances they may provide information that is inaccurate or have obtained false documents to aid their escape. Similarly, personal information can become inaccurate through transcription, translation and illiteracy. It is conceivable that these individuals could be caught by such a provision, as could the child of parents who misrepresented their claim to citizenship. The new subsection 34AA(10) does not allow applicants, such as asylum seekers, the opportunity to address the circumstances of the accused fraud or misrepresentation, thereby denying them natural justice.

[3] http://www.unicef.org.au/Discover/What-we-do/Convention-on-the-Rights-of-the-Child.aspx
[4] DIBP submission, p 6.
[5] DIBP submission, p 5.
[6] Australian Citizenship Act, s34.

Changes to residency requirements

Children

Children who were born and have lived in Australia for ten years are currently eligible to apply for citizenship. The DIBP submission[7] raises concerns that the 'ten year rule' encourages temporary residents and unlawful non-citizens to give birth to children in Australia and to use them as a means to eventually acquire Australian permanent residence or citizenship through family migration or an appeal for Ministerial intervention. Departmental statistics however, do not reveal this to be an overwhelming number of children, with an average of just 400 applying for citizenship under the ten year rule each year[8].

The use of such concerns to justify the changes to s12 of the Act limiting citizenship to only those children whose parents have maintained lawful residence in Australia for the ten years since their birth, while excluding others whose parents do not hold substantive visas, including bridging visas, is unreasonable.

The DIBP submission[9] acknowledges that children who were born in Australia have spent their formative years here and have their established home here, regardless of their visa status. This proposed change to the Act contradicts this position, discounting this connection to Australia for children who have been born in Australia to parents who are not permanent residents. This position also ignores the basic tenets of the CRC, that 'children should neither benefit nor suffer...because of any political or other opinion'... and ... 'The authorities in each country must protect children and help ensure their full development'[10].

Twelve months continuous stay immediately before citizenship application

The specified period of permanent residence in Australia under s22(1)(c) of the Bill is proposed to be changed to a *continuous* period of 12 months immediately before application for citizenship.

The DIBP submission explains this 'would provide clarity on when the residence period commences and may reduce review applications where the person has been refused on the ground they did not meet the residence requirement'[11]. However, this change is out of step with the realities of modern society, global labour markets and visa classes such as the Significant Investor and the new Premium Investor visas. Such a change will prevent permanent residents to travel for their business or work, and restrict the movement of families with overseas relatives. How would a business owner with offshore branches, suppliers or clients conduct business during this period? Should an Australian permanent resident be penalised for rushing overseas in the event of a family emergency? This

[7] p 13.
[8] ibid.
[9] ibid.
[10] UNICEF; http://www.unicef.org.au/Discover/What-we-do/Convention-on-the-Rights-of-the-Child.aspx
[11] DIBP Submission, p 9.

proposed amendment to the Act will prevent, disadvantage and discourage permanent residents from applying for citizenship.

Ministerial powers: the absence of transparency and accountability

The Bill proposes to impart in the Minister significant powers that potentially lack due process, transparency and accountability. This proposed change creates the situation where any personal decision of the Minister is protected from merits review, if the decision is made in the public interest, and a statement is tabled in both Houses of Parliament within 15 sitting days (new subsection 52B(1)).

The proposed changes substantially increase the Minister's personal powers under the Act. They also remove the independent review of those decisions by giving the Minister the ability to set aside decisions of the AAT and to prevent merits review. The EM[12] argues that such decisions will take into account factors considered essential to Australia's public interest. However, the notion of 'the public interest' is a fluid concept, that may be dependent on the ideological beliefs and attitudes of the Government of the day.

The EM further states 'as an elected Member of Parliament and Minister of the Crown, the Minister has the privilege of representing the Australian community and has gained a particular insight into community standards and values. It is not appropriate for an unelected administrative tribunal to review such a personal decision of a Minister on its merits'[13]. The notion of an elected Government Minister and Department being independent and acting impartially is the reason why 'unelected' administrative tribunals were established to provide an independent and impartial review. Australia still works under the rule of law with a clear separation of powers still in force between the government and the judiciary, who are unelected.

This proposal erodes the legislative safeguards provided in the Australian legal system and denies natural justice to citizenship applicants. It allows the Minister excessive powers to override the judicial and legal systems which have been regarded as the benchmark of our democratic society.

[12] Explanatory Memorandum, p 17.
[13] ibid, p 61.