Australian Government

Department of Immigration and Border Protection

Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Australian Citizenship and Other Legislation Amendment Bill 2014

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The Department of Immigration and Border Protection (the department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Australian Citizenship and Other Legislation Amendment Bill 2014 (the Bill), following the introduction of the Bill into the House of Representatives on 23 October 2014.

The amendments themselves are fully explained in the Explanatory Memorandum (the EM) to the Bill. This submission provides additional information in relation to the Bill.

1. Purpose of the Bill

The Bill amends the *Australian Citizenship Act 2007* (the Citizenship Act) and the *Migration Act 1958* (the Migration Act) to reflect citizenship policy that seeks to maintain the correct balance between upholding the value of citizenship and facilitating access to citizenship.

Since coming into being on 26 January 1949, Australian citizenship continues to be highly valued and sought after. Australian citizenship bestows full, formal membership of Australian society to all those who make their home here and who are prepared to make a formal commitment to Australia's common future. Australian citizenship is a privilege to be given by the Australian people, rather than a right to be claimed by an individual.

The process of a person acquiring citizenship is the only opportunity to assess whether that person should benefit from formal membership of Australian society. Therefore, the policy settings of citizenship must be periodically re-calibrated to ensure that this privilege is appropriately extended and that mechanisms are in place to prevent, detect and respond to fraud or malpractice in the citizenship programme.

The Bill also promotes greater alignment between powers and safeguards under the Citizenship Act and the Migration Act. This is appropriate because citizenship is a more permanent status than holding a visa, and it is inconsistent for there to be a wider range of powers and safeguards under the Migration Act.

The proposed amendments are divided into the following themes:

- strengthening programme integrity
- underlining the importance of connection to Australia and
- improving decision-making.

Following is an analysis of each proposal within these three themes. There are also minor technical amendments which are discussed in the last section.

All proposals are within the power of the Commonwealth Parliament, specifically they are supported by the naturalisation and aliens power in section 51(xix). Human rights implications have been discussed in the *Statement of Compatibility with Human Rights*, attached to the EM.

2. Content of the Bill

2.1 Strengthening Programme Integrity

Allow the Minister to revoke citizenship on the grounds of an individual's engagement in fraud or misrepresentation in the migration or citizenship process, without the requirement for a prior conviction of relevant criminal offences *(Items 65, 66 of the Bill, paragraphs 403-419 of the EM)*

Currently under the Citizenship Act, a conviction for a specified offence is required before citizenship can be revoked. In addition, the power to revoke only arises if the offence was committed prior to the Minister giving approval for the citizenship application, or the offence was committed in relation to the person's application to become an Australian citizen.

To prosecute a case under a law of the Commonwealth, the Commonwealth Director of Public Prosecutions requires sufficient evidence from the facts of the case, and all surrounding circumstances, that the prosecution would be in the public interest. In light of competing priorities, there are often limited resources to prosecute all but the most serious cases relating to migration and citizenship fraud. Because of these considerations and the time it can take to secure a conviction, the power to revoke a person's citizenship on the basis of a conviction for a fraud-related offence is rarely used, even where the evidence of fraud is strong.

The Bill would therefore provide the Minister with a discretion to revoke citizenship where it has been obtained by, or as a result of, fraud or misrepresentation. This new revocation ground would include the provision of false or misleading information in visa and citizenship processes but would no longer require a conviction for a fraud-related offence.

This provision could be applied where, for example, subsequent to the acquisition of citizenship, it is discovered that a person provided false and misleading information in the visa process and the visa that was granted as a result of that fraud was the reason that the person met the residence requirement for the grant of citizenship.

This amendment is intended to improve the integrity of the Australian citizenship programme and create stronger disincentives for people to provide false and misleading information. Strengthening the ability to revoke citizenship would demonstrate that the privileges of citizenship will not continue for those who have obtained citizenship consequent to fraud in visa applications and processing or fraud in the application process for conferral of citizenship, including third-party fraud.

This new provision would include appropriate safeguards, including a public interest test, review rights and a time limit beyond which citizenship could not be revoked.

Extend the good character requirement to include applicants under 18 years of age *(Items 17, 21, 25, 26, 58, 60 of the Bill, paragraphs 97-100, 140-144, 176-185, 337-340, 344-346 of the EM)*

The 'good character' requirement currently applies to all citizenship streams (conferral, descent, adoption and resumption), but only to applicants aged 18 and over. However, the department is aware of a number of applicants less than 18 years of age who have had serious character concerns that were not covered by the existing bar on approval for criminal offences (section 24(6)), such as multiple convictions for common assault and stealing, robbery in company, reckless wounding in company and aggravated robbery.

The Bill proposes to extend the good character requirement to include applicants under 18 years of age. There is scope to lower the age at which an applicant must be of good character because all Australian jurisdictions recognise that children under the age of 18 may commit offences, setting the age of criminal intent at 10.

The proposal is an example of aligning the Citizenship Act with the Migration Act, as the latter does not have an age limit for 'good character'.

The character requirement for citizenship is defined in Australian Citizenship Instructions (ACIs) and it allows decision makers to take into account a wide range of discretionary factors, including the age of the offender, the circumstances of the offence, patterns of behaviour, remorse, rehabilitation and any other mitigating factors.

Police records are only available for minors aged 16 and over. With the applicant's consent, the department already obtains police records for all applicants aged 16 and over for the purposes of assessing whether the bar on approval for criminal offences (section 24(6)) applies to the applicant. However, this information will now also be able to be used for assessing whether the applicant is of good character. The department would only consider information about serious character concern for minors aged under 16 years of age if that material comes to the department's attention.

The best interests of the child must be taken into account in any decision concerning an applicant under 18. The acquisition of citizenship is not a right and countervailing considerations may be considered in relation to the best interests of the child. The ACIs will be updated accordingly to refer to the best interests of the child assessment.

A finding that an applicant is not of good character does not prevent them from making a subsequent application for citizenship, if they are able to show that they are of good character at the time of the decision on their later application.

Include the bar on approval for criminal offences in all citizenship streams *(Items 15, 18, 20, 22, 57, 61 of the Bill, paragraphs 90-93, 101-131, 136-139, 145-171, 333-336, 347-381 of the EM)*

The Citizenship Act includes a bar on approval of citizenship by conferral when the applicant is affected by a range of circumstances associated with criminal offences, such as when the person is confined to a prison in Australia or when proceedings for an offence against an Australian law are pending against the person. This bar on approval effectively requires that at the time of decision on the citizenship application the person be free of actions, penalties or obligations arising from specified proceedings.

In contrast, this prohibition is not present in the descent, adoption and resumption streams, meaning applicants in similar circumstances may be treated differently.

The Bill proposes to extend the bar on approval under the offences provisions to all citizenship streams. Extending the bar in this way would bring consistency across the citizenship programme and reduce integrity risk, particularly for adults who are applying for citizenship by descent.

This proposal does not alter the nature of an application for citizenship by descent. It is consistent with the character requirement which currently applies to descent applicants over 18 and will be extended to those under 18 years of age by the Bill.

Include reference to contemporary sentencing practices in the bar on approval for criminal offences ***(Items 15, 18, 20, 22, 44, 45, 57, 61 of the Bill, paragraphs 90-93, 101-131, 136-139, 145-171, 274-288, 333-336, 347-381 of the EM)***

The Bill extends the bar on approval when a person has been sentenced to a term of imprisonment to include contemporary sentencing practices, including home detention or residential programs. The Bill also makes it clear that a person cannot be approved for citizenship when they are not free of the obligations to the court, including when they are under a good behaviour bond even if no sentence of imprisonment was available.

The existing offence provisions were largely carried over from the *Australian Citizenship Act 1948 (the 1948 Act)* and were not updated to reflect modern sentencing practices in 2007.

These amendments enhance the integrity of the citizenship programme by preventing citizenship being conferred on people while they are still under an obligation to a court following a criminal offence. Although sentencing practices, such as home detention, are a deliberate decision of the courts as an alternative to imprisonment, they are only used if a person has been convicted of a criminal offence and needs to remain under some form of obligation to the court. From a citizenship programme perspective, it is not appropriate to confer citizenship upon applicants while the obligation remains.

Enable the Minister to cancel approval of citizenship by conferral prior to the Pledge of Commitment if the applicant is no longer eligible ***(Items 43, 46, 47, 49, 55 of the Bill, paragraphs 270-273, 289-297, 303-310, 323-327 of the EM)***

Most applicants for citizenship by conferral do not become citizens at the time their application is approved. Rather, they acquire citizenship on making the Pledge of Commitment (the pledge) at an official ceremony. Currently, approval of citizenship by conferral can be cancelled, prior to the applicant taking the pledge, if the applicant:

- is not a permanent resident
- is not likely to reside in Australia or
- is not of good character.

However, there is no power to cancel approval if:

- the Minister for Immigration and Border Protection (the Minister) has ceased to be satisfied of the identity of a client or
- a client comes within the bar on approval concerning national security.

The Bill proposes to divide the cancellation power into mandatory cancellation for those items which would have triggered a prohibition on approval had they been known before the original decision was made (identity and national security); and discretionary cancellation for other eligibility criteria (e.g. good character).

The Bill also extends the cancellation power to applicants below 18 years of age which is consistent with proposals in the Bill that that the character requirement be extended to under 18s. In addition, the prohibitions for identity and national security already exist in the Citizenship Act for applicants under 18 years of age.

Allow the Minister to defer the applicant taking the Pledge of Commitment for up to two years and align the grounds for deferral with the grounds for cancellation of approval ***(Item 55 of the Bill, paragraph 323-327 of the EM)***

Currently, the Minister may determine that a person cannot make the pledge until the end of a specified period if the Minister is satisfied that:

- a visa held by the person may be cancelled under the Migration Act (whether or not the person has been given any notice to that effect) or
- the person has been or may be charged with an offence under an Australian law.

The Minister must not specify a period that exceeds, or periods that in total exceed, 12 months.

The Bill proposes to extend the period that the Minister can defer an applicant from taking the pledge from 12 months to two years. It is envisaged that this will allow sufficient time for the decision-maker to obtain definitive information to decide whether to cancel an approval of citizenship by conferral.

Further, the Bill proposes to align the grounds for deferring an applicant making the pledge with the grounds for cancellation of approval. This would avoid a current situation where it is sometimes not possible to defer a person making the pledge while the department is considering whether to cancel approval of the person's citizenship. This issue occurs in approximately two cases a month.

Require those who automatically acquire citizenship on adoption in Australia to have commenced the adoption process before turning 18 years of age ***(Item 13 of the Bill, paragraphs 84-87 of the EM)***

Section 13 of the Citizenship Act provides that a person in Australia as a permanent resident automatically acquires Australian citizenship on completion of their adoption under Australian law. The department is aware of cases where people have sought adoption as adults in order to acquire citizenship and bypass migration provisions, including two cases that involved attempts to avoid removal from Australia after visa cancellation on character grounds. There is no power in the Citizenship Act to revoke the citizenship of a person who becomes a citizen under section 13.

Consequently, the Bill proposes to limit the operation of this provision to cases where the adoption commenced before the person turned 18 years of age. This proposal enhances the integrity of the citizenship programme by preventing adoption in Australia being used by adults to circumvent Migration Act provisions to cancel a visa on character grounds and remove a person from Australia. Genuine applicants would still have a path to citizenship through an application for citizenship by conferral.

Bring consistency to resumption of citizenship by requiring a standardised 12 month waiting period ***(Items 57, 61 of the Bill, paragraphs 333-336, 347-381 of the EM)***

Under the Citizenship Act, a person may resume citizenship if they have previously ceased to be a citizen. In the 2013-14 programme year, 383 applications for resumption of citizenship were approved.

There are a number of reasons why a person may cease to be citizen: they may renounce it to acquire or retain a foreign citizenship and the benefits that come with that citizenship, such as inheritance rights; they may have lost Australian citizenship when they became a citizen of another country prior to 2002; or they may have had their citizenship revoked by the Minister.

Currently, a person may apply for resumption of citizenship and be approved at any time, but must wait for 12 months if they have been a former citizen and apply for citizenship by descent, Hague adoption or conferral. A uniform 12 month waiting period would bring consistency to the Citizenship Act and would reinforce the value of Australian citizenship.

This proposal provides equality of treatment between clients seeking to resume citizenship. It reinforces the value of Australian citizenship and emphasises that any decision to renounce it should not be taken lightly in the expectation that it can be immediately resumed should the client so desire.

2.2 Underlining the importance of connection to Australia

Clarify the residence requirements by specifying when the four year lawful period commences and that the 12 month period as a permanent resident must be continuous *(Items 27, 28, 29, 31, 39 of the Bill, paragraphs 186-201, 204-206, 255-258 of the EM)*

The majority of applicants for citizenship by conferral must be resident in Australia for four years prior to their citizenship application, including at least 12 months as a permanent resident. The Citizenship Act does not specify how to calculate the start date for the four year period and it has been interpreted broadly and in a number of different ways by the AAT, whereas it is desirable that a narrower interpretation be applied. The Bill proposes to specify that four years immediately before applying, an applicant:

- must have been lawfully present in Australia or
- if outside Australia, must have held a visa which permits them to travel to, enter and remain in Australia:
    - which was granted while the person was in Australia or
    - was granted when the applicant was outside Australia and on which the applicant had previously entered Australia.

This will ensure that the four year period may only be comprised of periods when the person was in Australia or had previously been in Australia and maintained a lawful right to re-enter Australia.

The Bill also proposes to put beyond doubt that the minimum period of time as a permanent resident must be continuous. 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.

Clarify who is covered by the partner discretion in the residence requirement and insert a minimum physical presence requirement for those claiming the partner discretion for absences from Australia (*Items 4, 6, 35, 36 of the Bill, paragraphs 19-31, 36-44, 219-246 of the EM)*

The Citizenship Act provides a discretion to assist applicants with an Australian citizen spouse or de facto partner to meet residence requirements by counting time spent outside Australia as a permanent resident as time in Australia.

This provision has been broadly interpreted by the Administrative Appeals Tribunal (the AAT), whereas a narrower interpretation is desirable. For example, in *Plange and Minister for Immigration and Border Protection* [2013] AATA 837, the AAT upheld a client's argument that the partner discretion should be exercised favourably when the applicant:

- was working in Papua New Guinea while his Australian citizen spouse was living in Fiji and
- had only lived in Australia for 131 days in the four years prior to applying for citizenship.

In other cases, the AAT has exercised the partner discretion favourably where applicants:

- lived in Dubai and Qatar since 2001, spending 36 days in Australia in the four years prior to application (*Saba and Minister for Immigration and Border Protection* [2014] AATA 579)
- worked in Ireland, spending 50 days in Australia in the four years prior to application (*XQMD and Minister for Immigration and Border Protection* [2014] AATA 633)
- continued to live and study in Brazil while their spouse lived in Australia, spending 253 days in Australia in the four years prior to application (*Paula and Minister for Immigration and Citizenship* [2012] AATA 543)
- spent time outside Australia with a spouse who was not Australian citizen for the whole period of the absence (*Sapronov and Minister for Immigration and Citizenship* [2011] AATA 126).

It is important that applicants for citizenship have a connection to Australia, rather than a connection to an Australian. Therefore, the Bill proposes to legislate existing policy guidance to make it clear that the discretion can only be applied if:

- the applicant had an Australian citizen partner throughout the period of absence for which the discretion is sought and that the relationship is genuine and continuing at the time of citizenship application; and
- the applicant has spent at least 365 days in Australia over the four year period (except where the applicant was the partner of an Australian citizen working offshore as a Commonwealth or State/Territory officer).

In addition, the Bill proposes new definitions of 'spouse' and 'de facto partner'. Spouse is currently not defined in the Citizenship Act and there is no requirement that the marital relationship be genuine and continuing. The effect is that an applicant who separated from an Australian citizen spouse but not yet divorced can count the period of separation for the purposes of the partner discretion. However, as 'de facto partner' is defined by reference to the *Acts Interpretation Act 1901*, there is a requirement that de facto relationships be genuine and ongoing at the time of application for citizenship. The Bill therefore propose to define 'spouse' and 'de facto partner' by reference to the Migration Act. This would incorporate the Migration Act requirements for a genuine and continuing relationship, ensuring that applicants have to meet the same relationship test regardless of whether they are the married or de facto partners of Australian citizens.

These amendments enhance the integrity of the citizenship programme by addressing abuse of partner discretion provisions. They support the underlying intention of the residence requirement that a person spends sufficient time in Australia to gain an understanding of what being an Australian citizen means.

At the same time, the bill recognises the value of Commonwealth and State/Territory officers serving Australia abroad by still enabling their partners to count periods of residence abroad and not requiring them to meet the minimum residence period.

Provide the power to make a legislative instrument setting out when a period of unlawful presence may be treated as lawful presence *(Items 33, 38, 40, 41, 42 of the Bill, paragraphs 211-216, 250-254, 259-269 of the EM)*

The Bill proposes that a power be inserted into the Citizenship Act to make a legislative instrument allowing the Minister to set out those circumstances which s/he considers consider warrant treating a period of unlawful presence in Australia as lawful for the purposes of a citizenship application.

Currently, in order to meet the residence requirements for citizenship a person may not be present in Australia as an unlawful non-citizen at any time during a relevant period immediately before applying for conferral of citizenship. This means that any period of lawful presence in Australia prior to a period of unlawfulness cannot be counted as presence in Australia. The exception to this requirement is when the Minister accepts that the period of unlawfulness was due to an administrative error. In the period September 2009 to January 2014 there were 3,351 applicants approved using the administrative error discretion.

There are, however, a number of circumstances that may not be due to administrative errors but where it would be reasonable to treat the period of unlawfulness as being one of lawfulness. One particular caseload, for example, includes students on packaged student visas where they had completed their bachelor degree component but had not yet commenced their masters/PhD degree, and who have since applied for a General Skilled Migration visa. Such students have often approached the department for a voluntary cancellation of their visa, with the immediate grant of a Bridging Visa E (BVE) and eligibility to apply for a further BVE with full work rights while their permanent visa applications were being finalised. Previously there was a 'workaround' where a Bridging Visa A was granted prior to the student visa cancellation taking effect. Changes to the Migration Regulations now mean that such cancellations take immediate effect, resulting in a momentary period of unlawfulness between the time of cancellation and the grant of the BVE.

Another example is where, under the Human Trafficking Visa Framework, a trafficked person requests the cancellation of another visa to transition to the Criminal Justice Stay visa and they subsequently obtain a permanent visa.

This provision offers enhanced client service practices by alleviating circumstances where clients are adversely impacted by brief periods of unlawfulness, with details set out in a legislative instrument to ensure transparency and integrity.

Put beyond doubt that children born in Australia to parents with diplomatic and other privileges and immunities are not eligible for Australian citizenship *(Item 12 of the Bill, paragraph 60-83 of the EM)*

Under section 12 of the Citizenship Act it may be possible for a child born in Australia to a foreign diplomat or representative to claim that they should become an Australian citizen on the child's tenth birthday. This is not the intention of the provision and it is departmental policy that a person on a diplomatic visa is not "ordinarily resident" in Australia for the purposes of the tenth birthday acquisition of citizenship.

However, to remove any doubt, the Bill proposes to specify that a person born in Australia is not eligible to acquire citizenship on their tenth birthday if they are born to a parent who, at the time of birth of the person's birth or at any time during the subsequent ten years, had privileges or immunities under the:

- *Diplomatic Privileges or Immunities Act 1967*
- *Consular Privileges or Immunities Act 1972*
- *International Organizations (Privileges and Immunities Act) 1963* or
- *Overseas Missions (Privileges and Immunities Act) 1995*.

This is consistent with Australia's international obligations.

A child born in Australia who had an Australian citizen or permanent resident parent acquires citizenship by operation of law at birth, regardless of whether that parent or the other parent has diplomatic or other privileges and immunities. This action would not be affected by the proposed amendment.

This proposal is consistent with international obligations and positions of like-minded countries (Canada, New Zealand, the United States, and the United Kingdom). It is not expected that the proposal would give rise to any concern in the diplomatic community as it is consistent with Australia's international obligations.

Provide a discretion to revoke citizenship by descent in place of the current operation of law provision *(Items 16, 19, 64 of the Bill, paragraphs 94-96, 132-135, 388-402 of the EM)*

Currently, section 19A of the Citizenship Act provides that where a person was approved for citizenship by descent but in fact was not entitled to such citizenship because they did not have an Australian citizen parent at the time of their birth, they are taken to have never become a citizen.

While a natural justice process is followed once the department becomes aware that a person may have been incorrectly registered as a citizen by descent, if it is determined by that process that the person was incorrectly registered then the only possible outcome is a finding that the person is not a citizen. There is no discretion to allow the person to retain their citizenship, regardless of matters such as the age of the person, whether they were an innocent party to the incorrect registration and their integration into the community.

The Bill proposes to replace this provision with a discretionary power to revoke citizenship by descent when the person was registered despite not meeting the requirements for registration. This would allow consideration of a person's particular circumstances when deciding if citizenship by descent should be revoked.

Consistent with the administrative law framework, it is proposed to attach review rights to such a decision. It is not expected that the amendment would result in a significant increase in applications to the AAT as the number of cases that have come to the attention of the department in the last three years has averaged fewer than five per year.

While this provision maintains the integrity of the citizenship programme by allowing revocation of citizenship if the person should not have been registered as a citizen by descent the proposed discretionary provision means the circumstances surrounding the erroneous decision to approve the person's citizenship can be taken into account when deciding whether or not to revoke citizenship.

Revocation would take effect from the time of decision on revocation rather than from the date of the decision to approve citizenship, meaning the person's status in the intervening period is not altered.

Limit automatic acquisition of citizenship at ten years of age to those persons who have maintained lawful residence in Australia throughout the ten years *(Items 7, 12 of the Bill, paragraphs 45-47, 60-83 of the EM)*

Section 12 of the Citizenship Act provides, among other matters, that a person born in Australia who is not otherwise an Australian citizen becomes a citizen on their tenth birthday if they were 'ordinarily resident' in Australia for the first ten years of their life. This is known as the 'ten year rule'.

Section 3 of the Citizenship Act provides that a person is taken to be 'ordinarily resident' in a country if they have their home in that country or it is the country of their permanent abode. There is no requirement that the person's residence in Australia was lawful, but they cannot have been present in Australia for a temporary or special purpose. The person may have been temporarily absent from Australia during the ten years provided they maintained their permanent abode in Australia throughout the ten year period.

The ten year rule applies equally and provides Australian citizenship to children who were born in Australia, have spent their formative years here and have their established home here, regardless of their visa status.

In its February 2000 report, *Australian Citizenship for a New Century,* the Australian Citizenship Council recommended that the provisions relating to the acquisition of Australian citizenship by birth remain unchanged, but that the Government monitor the use of paragraph 10(2)(b) [the then equivalent of current paragraph 12(1)(b)] and take appropriate action to tighten the provision if evidence of abuse emerges.

Concerns have since been raised that the ten year rule has the effect of encouraging some temporary residents and unlawful non-citizens to have children in Australia and to keep their child onshore until at least their tenth birthday, whether lawfully or unlawfully, in the expectation that the child will obtain citizenship and provide an anchor for family migration and/or justification for a ministerial intervention request under the Migration Act.

An average of 400 children a year apply for evidence of citizenship under this rule. The nationalities that feature predominantly in this caseload are:

- Republic of Korea
- New Zealand
- China
- Japan
- Indonesia
- Fiji and
- Tonga.

The Bill proposes specify that citizenship is available to those who have been ordinarily lawfully resident in Australia until their tenth birthday, by excluding:

- a person who was an unlawful non-citizen at any time during the ten years from their birth in Australia; or
- a person who was outside Australia without a visa to return at any time during the ten years from their birth; or
- a person whose parent did not hold substantive visa at the time of the person's birth and had entered Australia on one or more occasions before the person's birth, and was an unlawful non-citizen at any time between that parent's last entry to Australia prior to the person's birth and the person's birth.

It is also proposed that these exclusions do not apply when the person travelled outside Australia as a New Zealand citizen. This reflects the treatment given to New Zealand citizens under the Trans-Tasman Travel Agreement, which includes access to a special category visa, the subclass 444 visa. This visa is granted on arrival in Australia and ceases on departure from Australia. There is no facility to retain a subclass 444 visa for the duration of any absence from Australia.

The Bill proposes to define 'substantive visa' in accordance with the definition in the Migration Act.

It is proposed the amendments to the ten year rule apply to persons who turn ten years of age on or after the date of commencement. This is necessary if the changes are to have any practical effect in the next few years. Applying the changes only to children born after commencement would mean that children born in Australia in the last ten years, regardless of their migration status, would continue to obtain citizenship by operation of law throughout the next ten years.

The proposed amendments are reasonable and proportionate within the context of Australia's border security, visa and citizenship framework, which:

- requires that non-citizens hold a visa to enter and remain in Australia
- provides citizenship by birth in Australia to children of Australian citizens and permanent residents and
- with the exception of stateless applicants, requires that an applicant for citizenship by conferral not be an unlawful non-citizen.

Examples of impact on children

The amendment does not affect the child of a person who had been an unlawful non-citizen but had regularised their status by obtaining a substantive visa prior to the child's birth. For example:

- where the parent is granted a permanent visa before the child's birth the child will become a citizen at birth by operation of law, as is currently the case
- where the parent is granted a temporary visa and the child acquires that visa at birth, the child will remain eligible under the 10 year rule, subject to their remaining lawfully resident in Australia.

Where the child is granted a permanent visa at some point after the child's birth, the child will be eligible for citizenship by conferral.

A child who does not acquire a substantive visa at birth but is subsequently granted a temporary visa will be subject to the conditions of that visa.

A child born to unlawful non-citizens and who does not acquire a visa to remain in Australia is subject to removal along with their parents. Children subject to removal undergo a best interest of the child assessment prior to the removal decision being made.

The proposed amendment does not affect a child's right to nationality. Children born in Australia who do not acquire Australian citizenship by operation of law and who are stateless will continue to have access to Australian citizenship from birth through the statelessness provision in subsection 21(8) of the Act.

Clarify the provision giving citizenship to a child found abandoned in Australia *(Items 10, 12, 14 of the Bill, paragraphs 53-54, 60-83, 88-89 of the EM)*

The proposed amendment to the abandoned child provision seeks to restore the original intent of the legislation and directly link the presumption of citizenship for abandoned children with the citizenship by birth provisions. It reduces the potential for the abandoned child provision to be exploited by unlawful non-citizens.

Section 14 of the Citizenship Act provides:

> "A person is an Australian citizen if the person is found abandoned in Australia as a child, unless and until the contrary is proved."

Since the introduction of the Citizenship Act in 2007, section 14 has not reflected the historical basis for the abandoned child provision. Section 14 is the successor to a provision introduced into the 1948 Act in 1969 to meet Australia's obligations under Article 2 of the *Convention on the Reduction of Statelessness* (CRS). Article 2 of the CRS provides:

> "A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State."

Article 2 of the CRS effectively requires that a foundling be dealt with as a citizen by birth unless and until it is determined that they are not. The relevant provision in the 1948 Act initially was similar to Article 2. In 1986 the provision in the 1948 Act became more complicated, reflecting amendments to the citizenship by birth provision that required the child have an Australian citizen or permanent resident parent. When the current Citizenship Act was introduced, the abandoned child provision was simplified by removing the linkage with the citizenship by birth provision. The practical effect of this is that when considering a claim under section 14 the department has to specifically address each possible way that a person may have become an Australian citizen, rather than simply address the question of whether they are a citizen by birth. This means the decision process includes findings not envisaged under Article 2 of the CRS that may provide the unsuccessful applicant with additional grounds to challenge the decision, either at merits or judicial review. It is proposed therefore to amend the Act to link the presumption of citizenship specifically to citizenship by birth as defined in section 12 of the Citizenship Act.

The department is currently facing litigation in which it is claimed that the wording of the abandoned child provision is open to the interpretation that a person is an Australian citizen if the person is found abandoned in Australia as a child, unless and until it is proved that the person was not found abandoned. Such an interpretation is contrary to the policy intention of the provision, which is that a person is an Australian citizen if the person is found abandoned in Australia as a child,

unless and until it is proved that the person was not an Australian citizen. To remove this element of doubt about what has to be proven, the Bill relates the presumption for abandoned children to citizenship by birth. It also makes it clear that the presumption applies unless and until it is proven that the person does not meet the requirements of the citizenship by birth provisions.

The final concern with the abandoned child provision is that the absence from the Citizenship Act of a definition of 'found abandoned' means the phrase takes its ordinary or dictionary meaning. This, combined with the delinking of the provision from the citizenship by birth provision, raises concern that it may be open to exploitation by people seeking to bypass migration requirements.

For example, it could be claimed that a child who arrived unlawfully ostensibly unaccompanied by a parent or guardian, was found abandoned in Australia. The onus would then be on the Minister's delegate to prove that the child either was not found abandoned or is not a citizen. If no-one accepts or is shown to have had responsibility for the child at the time the child was found, it would be difficult to conclude that the child was not abandoned. If the identity of the child is unknown, it would not be possible for the department to prove that the child is not a citizen even though, for example, it is known that the child arrived by boat.

It is therefore proposed to amend the abandoned child provision to clarify that the presumption of citizenship by birth does not apply if the child is known to have been physically outside Australia on or before the day on which it is claimed the child was found abandoned. This would ensure that the presumption is not available to anyone who can be identified as having been born outside Australia.

2.3 Improving decision-making

Make holders of prescribed visas eligible for citizenship by conferral before entering Australia *(Items 5, 8, 25 of the Bill, paragraphs 32-33, 48-50, 176-182 of the EM)*

Adopted children can sometimes have difficulty acquiring a foreign travel document to travel to Australia if they are not an Australian citizen.

The Bill proposes to facilitate access to citizenship by a child under 18 years of age who is the holder of a permanent visa prescribed in a legislative instrument but has not yet entered Australia on that visa, as long as they have Australian citizen adoptive parent/s. It is anticipated that the subclass 102 Adoption visa will be prescribed.

The instrument would prescribe that the enhanced access to citizenship is available only to prescribed visa holders whose adoption has been completed in the child's country of origin. Connection to Australia will have been assessed as part of the visa application process. To obtain the visa, the child must have been assessed as likely to reside in Australia.

The proposal is not likely to present increased risk to the citizenship programme as a whole, as only approximately 200 Adoption visas are issued per year.

Enable use and disclosure of personal information collected about a client under the Migration Act 1958 to be used for the purposes of the Australian Citizenship Act 2007 and vice versa *(Items 74, 77 of the Bill, paragraphs 463-481, 488-510 of the EM)*

To put the matter beyond doubt, the Bill proposes that the Migration Act and Citizenship Act be amended to provide that personal information collected about a client under one Act and the associated regulations may be used and disclosed for the purposes of the other Act and associated regulations. This will facilitate better decision-making as all relevant information can be taken into

account. The provision would be consistent with the *Privacy Act 1988* and provides for the lawful use and disclosure of such information in accordance with Australian Privacy Principle 6.2(b).

An example of where there could be a use for personal information received under one Act for purposes of the other Act is where identity information in a person's visa application is used in connection with their citizenship application. Conversely, character information relied upon in a decision to refuse an application for citizenship may be relevant to a subsequent consideration of whether the applicant's visa should be cancelled.

It is not intended that the amendment overrides existing restrictions on the use of information provided by other law enforcement agencies or intelligence agencies, such as the Australian Federal Police or the Australian Security Intelligence Organisation. The department would continue to seek permission from other agencies to use or disclose such information when the use or disclosure is not already permitted.

This provision will not affect the operation of section 503A of the Migration Act, concerning protection of information supplied to the Department by law enforcement agencies or intelligence agencies. That is, any information provided under that section would not be available for use for citizenship purposes unless express permission is received.

The Citizenship Act does not contain protected information provisions; therefore information is only used where it can be put to the applicant and should the case be refused, to the AAT.

Provide that personal decisions made by the Minister, taken in the public interest, are not subject to merits review *(Items 69, 72 of the Bill, paragraphs 425-429, 439-446 of the EM)*

The Bill proposes that any personal decision of the Minister be protected from merits review if the decision is made in the public interest, and that a statement be tabled in both Houses of Parliament within 15 sitting days if such a personal decision is made. It is anticipated that such decisions will be rarely made, but if they are made on public interest grounds, it is not appropriate for such decisions to be reviewed by the AAT. This would bring the protection of personal decisions of the Minister from merits review under the Citizenship Act in line with a similar protection under the Migration Act.

Currently, the only powers which the Minister cannot delegate under the Citizenship Act are approval of a citizenship test and application of an "alternative residence requirement" to an application for citizenship. However, in practice, decisions about revocation of citizenship for fraud or serious offences have not been delegated to departmental officers and have been made personally by the Minister. These are serious powers and have been used sparingly. Some cases currently under consideration for revocation involve convictions for murder, paedophilia, incest and fraud.

Also, on occasion it is appropriate for the Minister to make a personal decision to refuse an application for citizenship by conferral where the Minister decides that the circumstances are such that it would not be in the public interest for the applicant to become a citizen at that time, despite the applicant being otherwise eligible.

In both revocation and discretionary refusals, the decisions involve consideration of the public interest and consideration of Australian community standards and values. In particular, the revocation provisions require the Minister to be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

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. However, such personal decisions would still be subject to judicial review in the Federal or High Courts.

The Australian Administrative Law Policy Guide states 'As a matter of policy, an administrative decision that will, or is likely to, adversely affect the interests of a person should be reviewed on the merits, unless there are factors justifying the exclusion of merits review'.

The Administrative Review Council (ARC) has set out factors that may justify excluding merits review. They specifically include policy decisions in a high political context. The ARC states that it is unlikely that a decision making power not personally vested in the Minister would suffice (1999 paper on What Decisions should be subject to Merits Review? http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx).

In addition, the Citizenship Act itself has a precedent for non-reviewable personal decisions of the Minister, being section 52(3)(b). In this instance, the AAT cannot review any exercise, or failure to exercise, of the Minister's personal discretionary power under sections 22A(1A) or 22B(1A) concerning alternative residence requirements.

The Bill provides that if a decision is made by the Minister personally, the notice of reasons for decision (under section 47) may include a statement that the Minister is satisfied that the decision was made in the public interest. It then provides that AAT review is not available when a notice under section 47 includes a statement that the Minister is satisfied that the decision was made in the public interest. Examples of personal decisions which could be made in public interest grounds include

- refusing citizenship if the applicant is not of good character (whether conferral, descent, resumption or adoption)
- refusing citizenship on a discretionary basis despite the applicant being otherwise eligible
- cancellation of approval of citizenship by conferral
- revocation of citizenship for offences or fraud
- overturning a decision of the AAT (see below).

To provide for transparency and accountability, the Bill proposes that the Minister report to Parliament if s/he makes a personal decision which is not subject to merits review, but that such a statement not disclose the name of the client. This is consistent with sections 22A(9)-(10) and 22B(9)-(10) of the Act, which require a report to be tabled if the personal discretion to apply the alternative residence requirements is applied, and for that report to not disclose the client's name.

The department will enhance its current ACIs and case escalation matrix to ensure consistency of advice and that only appropriate cases are brought to the Minister's personal attention, so that merits review is not excluded as a matter of course.

The proposal preserves the significance of an elected official making a decision in the public interest by not allowing that decision to be subject to merits review.

Provide the Minister with power to set aside decisions of the Administrative Appeals Tribunal concerning character and identity if it would be in the public interest to do so *(Item 73 of the Bill, paragraphs 447-462 of the EM)*

In recent years, the AAT has made three significant decisions outside community standards, finding that people were of good character despite having been convicted of child sexual offences manslaughter and people smuggling.

In addition, three recent decisions have found people to have been of good character despite having been convicted of domestic violence offences. In all of these cases, there were no grounds for the Minister to seek judicial review in the Federal Court.

The Bill proposes that the Citizenship Act be amended to give the Minister power to set aside a decision of the AAT which overturns a delegate's decision to refuse to approve a citizenship application on either character or identity grounds, if it is in the public interest to do so. Identity grounds are included as this is a significant risk to the integrity of the citizenship programme and is often tied closely to the question of whether a person is of good character.

The provision is similar to that in the existing section 501A of the Migration Act, where the Minister can set aside and substitute a non-adverse decision of a delegate or the AAT, exercising powers under subsections 501(1) or (2) not to refuse to grant a visa to a person or not to cancel a visa on character grounds if the Minister is satisfied that the refusal or cancellation is in the national interest.

The AAT has stated that its independence has not been threatened by this power in the Migration Act. Indeed the then president of the AAT, Justice Downes, in *Visa Cancellation Applicant and Minister for Immigration and Citizenship [*2011] AATA 690 emphasised the role of the AAT as part of the executive government of the Commonwealth, noting that the AAT does not exercise judicial power, but is rather part of the Commonwealth administration which should work together with the Minister, through their respective roles, to advance of good administration. In relation to section 501A of the Migration Act, he said:

> "In making a decision under section 501A the Minister is in a special position. The section gives the Minister power to set aside the decision of the Tribunal.… A necessary consequence of the Minister having this unusual power to overrule the Tribunal is that the Tribunal should take note of occasions in which the power is exercised.
>
> *None of this affects or threatens the independence of the Tribunal, which has never been in doubt, as the Tribunal's recent decisions show.*
>
> …It is not appropriate, as some commentators have done, to identify a supposed competition or conflict between a Minister and the Tribunal and to support one side or the other. We are all constituent parts of the one Commonwealth administration which should work together through our respective roles to advance of good administration. Where the Tribunal makes a final decision within power; where a Minister makes a final decision within power, they are both contributing to good administration." [87, 88 and 91, emphasis added]

It is arguably more important for the Minister to be able to overturn an adverse AAT decision in the citizenship context than in the migration context. The acquisition of citizenship by a client who is, for example, of questionable character is far more serious than the acquisition of a visa because citizenship is a stable status which by design and in practice is extremely difficult to remove. Although a visa can give a person the right of permanent residence, it is always subject to

cancellation. It is anticipated that such a power would be used rarely, in matters where the facts of the crimes were particularly egregious and the decision clearly beyond community values.

As this proposal would be a personal decision of a Minister made in the public interest, the Bill proposes that the Minister must table a statement in Parliament within 15 sitting days of a set-aside decision being made.

It is expected that this proposal would have only minor impact on the number of clients seeking judicial review as, based on experience to date, the number of cases in which the Minister would set aside a decision of the AAT is small, no more than a few a year, and not all such cases would necessarily seek judicial review.

At this stage, it is not anticipated that these proposals will be affected by the separate work on amalgamation of Tribunals.

Align access to merits review for conferral applicants under 18 years of age with citizenship eligibility requirements *(Item 71 of the Bill, paragraphs 433-438 of the EM)*

Currently, subsection 52(1) provides a general right to merits review for applicants refused citizenship by conferral under section 24. However, subsection 52(2) provides that adults over the age of 18 years of age can only access merits review if they are a permanent resident, unless they are stateless. This reflects a key eligibility requirement for citizenship by conferral for adults, which is that applicants are permanent residents.

Since 2009, applicants for conferral aged under 18 have also been required to be permanent residents, but the merits review provisions were not amended at the same time. This meant that applicants under 18 years of age could still apply for merits review even if they were not permanent residents, despite having no prospect of success.

The Bill proposes to resolve this situation by requiring applicants for citizenship by conferral who are under 18 years of age to be permanent residents or the holder of a prescribed permanent visa, before they have a right to merits review.

This proposal would prevent unnecessary use of the AAT and departmental resources in responding to review applications from applicants under 18 years of age who are not eligible for citizenship because they are not permanent residents. Non-frivolous applications will still be able to be brought forward in the AAT if the applicant is a permanent resident.

Judicial review would remain available in the Federal or High Courts.

This proposal will not affect access to citizenship for stateless persons.

Provide that the Australian Citizenship Regulations 2007 (the Citizenship Regulations) may confer on the Minister the power to make legislative instruments *(Item 76 of the Bill, paragraphs 485-487 of the EM)*

The Bill proposes that the Minister have a general power to make legislative instruments under the Citizenship Regulations. Such instruments would be used to specify matters that require regular updating, such as the places, currencies and exchange rates for payment of application fees. Currently these matters are specified every six months in an instrument under the Migration Act; each time that instrument is issued it is necessary to update a reference to the instrument number in the Citizenship Regulations.

It is also anticipated that a power to make legislative instruments under the Citizenship Regulations would allow for an instrument in relation to the credit card surcharge associated with applications made under the Citizenship Act. The credit card surcharge is to recover the cost of certain administrative fees charged to the department by credit card issuers and the department's banking service provider on any transaction paid to the department via credit card. A power to make a legislative instrument would enable changes to the surcharge rate to be made by legislative instrument rather than by amendments to the Citizenship Regulations.

This proposal would lead to increased administrative efficiencies in updating matters set out in the Citizenship Regulations. It complies with the Government's deregulation agenda by eliminating regulatory amendments every six months to update matters such as the places, currencies and exchange rates for application fees.

2.4 Minor Technical Amendments

Item 3 of the Bill proposes to remove a redundant definition of 'artificial conception procedure'. This definition is only used in the heading of section 8 but is not used in the body of the section itself.

Item 11 of the Bill amends a subheading in section 12, making it clear that provisions concerning enemy occupation are an exception to the ten year rule.