7 November 2014

Law Council
OF AUSTRALIA

Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
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Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Dunstone

Inquiry into the Australian Citizenship and Other Legislation Amendment Bill 2014

Thank you for the opportunity to comment on the Australian Citizenship and Other Legislation Amendment Bill 2014 (the Bill).

Unfortunately, only five working days have been set aside for the public to comment on this Bill. In the timeframe available, the Law Council regrets that it has not been able to conduct a thorough analysis of the Bill and restricts its comments to highlighting a few preliminary issues below.

The Law Council considers that citizenship is one of the most fundamental and valuable privileges available to an individual. It is essential that the Australian public be given a proper opportunity to fully assess and comment on this Bill, which appears to include a number of substantive amendments.

As the Bill does not appear to be urgently required for national security reasons, the Law Council recommends that the Committee should seek a delayed reporting date to Parliament by early 2015 and further public consultation. This would, permit the Australian community a more reasonable timeframe within which to respond to the Bill.

The Law Council is concerned that the Bill conflicts with a number of principles which underpin the rule of law, as discussed in the following sections. It may also conflict with Australia's international human rights obligations, such as Article 12 of the *International Covenant on Civil and Political Rights.*[1]

[1] Article 12 provides that:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

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Revocation

The Bill proposes to provide the Minister with the power to revoke a person's Australian citizenship if the Minister is satisfied that the person obtained Australian citizenship as a result of fraud or misrepresentation in certain circumstances. This is regardless of whether the person was convicted of an offence in relation to the fraud or misrepresentation (and regardless of whether the fraud or misrepresentation was perpetuated by the Australian citizen themselves, or some other person).[2] The Minister has to be satisfied that it is in the public interest.

Currently, the power to revoke citizenship on fraud grounds rests on a conviction being obtained for a relevant offence eg. for the section 50 offence of false statements or representations.[3]

There is no definition which contains the meaning of "fraud" or "misrepresentation" – so it would appear that the relevant misrepresentation could be relatively minor.

The second reading speeches for the Bill include the statement that:

> *This bill expands the minister's power to revoke citizenship when satisfied that a person became a citizen as a result of fraud or misrepresentation, by allowing revocation without a prior criminal conviction for fraud. Identity fraud is a major concern for the Australian government. Unfortunately, law enforcement agencies and the courts have limited capacity to prosecute all cases of fraud and in some cases, after having approved a person becoming an Australian citizen, new information may come to light questioning the legitimacy of the person's identity.*[4]

The Explanatory Memorandum is clear that citizenship can be revoked regardless of whether the fraud or misrepresentation was perpetrated by the Australian citizen themselves, or some other person. A child of the person may also cease to be an Australian citizen as a result of this decision.[5]

These changes, based on the Minister's own determination of guilt of fraud or misrepresentation outside of any criminal proceedings, appear to undermine the rule of law principle that all people are entitled to the presumption of innocence and to a fair and public trial. In particular, the Law Council considers that no one should be subject to punitive action by the state unless he or she has first been found guilty of an offence by an independent, impartial and competent tribunal.[6] ".

The loss of a person's citizenship has serious consequences for an individual and their family, and as such, it is appropriate that this decision should follow a criminal conviction in instances of fraud. If there are concerns that law enforcement agencies and courts have insufficient resources to prosecute such matters, it would be preferable to instead address these resourcing issues rather than lowering the applicable standard. In this context, the Law Council notes that "fraud" and "misrepresentation" are very wide terms and may be used to justify sanctions well beyond the gravity of the misrepresentation itself.

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[2] Proposed new section 34AA
[3] Section 34
[4] Ms Karen McNamara MP, Second Reading Speech, House of Representatives, Hansard, page 73
[5] Section 36
[6] Principle 3, Law Council's Rule of Law Policy Principles Statement (2010)

The Explanatory Memorandum states that the proposed provision allows for a child's citizenship to be revoked due to the child's own act or acts of fraud or misrepresentation, even if it would make that child stateless.[7] While it is noted that the child would hold an ex-citizens visa (a permanent visa), the prospect that a child should become stateless - on such a reduced threshold - is particularly concerning, and does not rest well with the principle that a child's best interests should be a primary consideration in State decision-making.[8]

For these reasons, the Law Council does not support the above changes.

Good character requirements

The current requirements concerning "good character" for the purposes of citizenship eligibility apply only to certain applicants who are aged 18 and over.[9] The Bill proposes that all applicants will need to be of good character, and does not include any age limit.[10]

The Explanatory Memorandum proposes that, in practice, the character requirement will be applied to applicants aged 16 and over, and that the department would only seek information on the character of applicants under 16 years of age if "serious concerns" come to the Government's attention. The Explanatory Memorandum further states that:

- the department would not seek criminal history records of children under the age of ten, being below the age of criminal intent in Australia;

- the proposed change is similar to provisions which currently exist in the Migration Act, which does not have an age limit for "good character". In order to preserve the integrity of the citizenship programme, being the final stage of assessment of a person's rights to reside in Australia and to access rights and privileges, it is appropriate that the assessment of the character of applicants for citizenship is at least as thorough as the assessment of character in the migration context.[11]

This leaves open the possibility that a ten year old may fail the character test for citizenship, assuming that the department considers that there are "serious concerns" in relation to his or her character. The Law Council questions such amendments. This concern is compounded by the apparent lack of any criteria or guidance as to what may constitute "good character" for the purposes of the Act.

The Law Council's view is that every child accused or convicted of a criminal offence should be treated in a manner which takes into account the desirability of promoting his or her reintegrating and assuming a constructive role in society.[12] The Australian criminal justice system generally recognises this principle – for example, by providing that for young offenders, rehabilitation is the overarching or core consideration in sentencing.[13]

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[7] Page 2, Appendix A, Explanatory Memorandum
[8] Article 3.1, United Nations *Convention on the Rights of the Child*
[9] Section 16(1)(c))
[10] Item 17
[11] Explanatory Memorandum, pages 4-5, Appendix A
[12] As set out in the Law Council's Policy Statement on Principles applying to Detention in a Criminal Law Context 8(c)(iii), see also Articles 37(c) and 40.1,United Nations *Convention on the Rights of the Child*, and Rule 26, United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules)
[13] Sentencing Advisory Council, *Sentencing Children and young People in Victoria* (April 2012), page vii

Administrative processes should not run counter to this principle, such as by denying citizenship to young people on the basis of criminal record.

For these reasons, the Law Council does not support the above proposals. If the character test age is to be lowered, however, then an appropriate age limit should be clearly specified, rather than leaving it up to the discretion of departmental officers to choose the age at which the requirement will be enforced. It would be more appropriate that the Bill restrict the relevant age to those applicants aged 16 and over.

Review of Ministerial decisions

The Act currently provides for merits review for all decisions made under the Act (except certain Ministerial decisions regarding alternative residence requirements).

The Bill provides that adverse decisions which are made by the Minister personally (eg. to revoke or refuse citizenship) will not be subject to review by the AAT if a notice is provided that the Minister is satisfied that the decision was made in the "public interest".[14] A statement concerning this decision would instead be tabled in Parliament which would not include the name of the affected person.[15]

In support of these amendments, the Explanatory Memorandum states that:

> *"As an elected Member of Parliament, the Minister represents the Australian community and has a particular insight into Australian community standards and values and what is in Australia's public interest. As such, it is not appropriate for an unelected administrative tribunal to review such a personal decision of a Minister on the basis of merit, when that decision is made in the public interest. As a matter of practice it is expected that only appropriate cases will be brought to the Minister's personal attention, so that merits review is not excluded as a matter of course."* [16]

It also notes that judicial review would remain available for such decisions.[17]

The Explanatory Memorandum also refers to the Administrative Review Council's (ARC's) statement that "policy decisions of a high political content", particularly those made personally by the Minister, may be justifiably excluded from merits review.[18]

The Law Council questions the characterisation of decisions regarding an individual's citizenship which fall under the broad category as "taken in the public interest" as "of a high political content". The relevant ARC report also emphasizes that:

- As a matter of principle, the ARC believes that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review. That view is limited only by the small category of decisions that are, by their nature, unsuitable for merits review;

- The "policy decisions of a high political content" exception "relates to decisions that involve the consideration of issues of the highest consequence to

[14] Proposed subsections 52(4) and 47(3A))
[15] Proposed section 52B)
[16] Explanatory Memorandum, page 61
[17] Ibid.
[18] ARC Paper, What decisions should be subject to merits review? (1999), available online at http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx

the Government. Only rarely will decision-making powers fall within this exception, and it is unlikely that a decision-making power not personally vested in a Minister would suffice." The report notes examples of decisions which are likely to fall within this exception as decisions: affecting the Australian economy, affecting Australia's relations with other countries, concerning national security or concerning major political controversies.

- the fact that the decision-maker is of a high status. eg. a Minister is not, of itself, relevant to the question of review. Rather, it is the character of the decision-making power, in particular its capacity to affect the interests of individuals, that is relevant.[19]

The Law Council considers that AAT review is generally designed to promote good decision making and provide individuals affected by adverse decisions with a relatively straightforward, inexpensive mechanism by which to seek review. This accords with the rule of law principle that Executive powers should be carefully defined by law. Mechanisms should be in place to safeguard against the misuse or overuse of Executive powers.[20]

On this basis, the Law Council questions the proposal to exclude personal decisions by the Minister regarding a person's citizenship taken "in the public interest". Decisions which are "in the public interest" should be defined and limited to decisions affecting the Australian economy, affecting Australia's relations with other countries, concerning national security or concerning major political controversies.

Power to set aside AAT decisions

The Bill also proposes to provide the Minister with a power to set aside certain decisions of the Administrative Appeals Tribunal (AAT) concerning character or identity if it would be in the public interest to do so.[21]

A statement must instead be tabled in Parliament in respect of the exercise of this power.[22] The Explanatory Memorandum states that this power would be used sparingly in cases where a decision of the AAT about the character and identity of a citizenship applicant is outside community standards and expectations.[23] The proposed provision is similar to the power under s 501A of the Migration Act.

The Law Council questions this proposal, which undermines the independent review process which is provided by the AAT. The Explanatory Memorandum does not canvass the possibility that parties may appeal to the Federal Court on questions of law in respect of AAT decisions.[24] The Law Council notes that it has previously raised its concerns regarding the limitations placed upon review under the Migration Act for visa cancellation or refusal, including due to the operation of section 501A.[25]

[19] Ibid.
[20] Principle 6, Law Council's Rule of Law Policy Principles Statement (2010)
[21] Proposed section 52A – such decisions relate to the refusal or cancellation of approval of citizenship.
[22] Proposed subsection 52B(3)
[23] Explanatory Memorandum, page 15
[24] Subsection 44(1), *Administrative Appeals Tribunal Act 1975* (Cth)
[25] For example, in the Law Council's submission to this Committee regarding the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* (Cth) (page 72-73).

On the basis of the rule of law principles highlighted in the section above, the Law Council is concerned by this proposal, and any proposal which concentrates, unfettered Executive decision making powers.[26]

Thank you once again for the opportunity to make these preliminary observations. The Law Council is aware that there may be further issues in this Bill which deserve careful public consideration, including by the Law Council's own constituent bodies, sections and committees, but the timeframes available have simply not permitted this to occur. The relationship between the Bill's proposals and existing and proposed Migration Act powers[27] also deserve further consideration. For this reason, it reiterates its primary recommendation that the Committee should seek a delayed reporting date until early 2015 on this important Bill.

Yours sincerely,

MARTYN HAGAN
SECRETARY-GENERAL

[26] Migration Amendment (Character Test and General Visa Cancellation) Bill 2014 and the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014
[27] Including the provisions contained in the bills listed above at n27.