



**SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS**

**SEVENTEENTH REPORT
OF
2014**

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Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT OF 2014

The committee presents its *Seventeenth Report of 2014* to the Senate.

The committee draws the attention of the Senate to clauses of the following bills which contain provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Bills	Page No.
Australian Citizenship and Other Legislation Amendment Bill 2014	929
Stop Dumping on the Great Barrier Reef Bill 2014	951

Australian Citizenship and Other Legislation Amendment Bill 2014

Introduced into the House of Representatives on 23 October 2014
Portfolio: Immigration and Border Protection

Introduction

The committee dealt with this bill in *Alert Digest No.15 of 2014*. The Deputy Secretary of the Department of Immigration and Border Protection responded on behalf of the Minister to the committee's comments in a letter dated 28 November 2014. A copy of the letter is attached to this report.

Alert Digest No. 15 of 2014 - extract

Background

This bill amends the *Australian Citizenship Act 2007* to:

- extend good character requirements;
- clarify residency requirements and related matters;
- clarify the circumstances in which a person's approval as an Australian citizen may or must be cancelled;
- clarify the circumstances in which the minister may defer a person making the pledge of commitment to become an Australian citizen;
- clarify the circumstances in which a person's Australian citizenship may be revoked;
- enable the minister to specify certain matters in a legislative instrument;
- enable the use and disclosure of personal information obtained under the *Migration Act 1958* or the migration regulations; and
- make minor technical amendments.

The bill also amends the *Migration Act 1958* to enable the use and disclosure of personal information obtained under the *Australian Citizenship Act 2007* or the citizenship regulations.

Insufficiently defined administrative powers

Item 64, proposed section 33A

This proposed new section gives the Minister the discretion to revoke the citizenship of a person who had been registered as an Australian citizen by descent. The Minister is required to be satisfied that the approval should not have been given to register that person's citizenship on the basis that the requirements of the Act had not been met. The requirements for citizenship by descent include the requirement in paragraph 16(2)(c) of the Act that a person is of good character at the time they are approved for registration. This proposed amendment enables the Minister to revoke citizenship if the Minister later becomes satisfied that the person in fact was not of good character at the time they were registered as a citizen by descent.

The explanatory memorandum argues that this provision is similar to paragraph 25(2)(b) 'which allows approval of citizenship by conferral to be cancelled if the Minister is satisfied that the person is not of good character before they take the pledge' (at p. 56). The power of revocation is considered appropriate on the basis that because 'a citizen by descent acquires citizenship immediately upon registration, there is no time period whereby the Minister can consider whether to cancel this approval'. It may be observed, however, that in relation to the power to cancel an approval of citizenship by conferral before a person takes the pledge (at which point they gain citizenship), the power of revocation under proposed section 33A is not time-limited—that is, it may be exercised at any future time. Under proposed amendments (see item 49) the power to cancel citizenship by conferral could not be exercised after a 2 year period (which is the maximum period the Minister can defer a person the making of the pledge of commitment to become an Australian citizen). Thus whereas paragraph 25(2)(b) can be considered to enable errors to be corrected if detected relatively quickly after the original decision was made, proposed section 33A provides a standing power of revocation.

As the power of revocation under section 33A is discretionary, it may also be considered to condition an important right on insufficiently defined administrative powers. For example, an argument that a person was not of good character at the time they acquired citizenship by descent may be made at any future time leading to a discretionary decision to revoke citizenship of a person who may, by that time, be considered to have been integrated into the Australian community. Notably, if the decision was made personally by the Minister merits review of the decision would not be available (see item 72).

The committee seeks the Minister's advice about why this proposed amendment should not be considered to make rights unduly dependent on insufficiently defined administrative powers. If the power of revocation is considered necessary (including on the basis of a changed assessment of the character requirement), the committee seeks the Minister's advice as to whether consideration has been given to placing a time limit on the exercise of the power.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations

unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Deputy Secretary's response - extract

Item 64, proposed section 33A: Providing a discretion to revoke citizenship by descent in place of the current operation of law provision

2. The Committee asked for "the Minister's advice about why this proposed amendment should not be considered to make rights unduly dependent on insufficiently defined administrative powers. If the power of revocation is considered necessary (including on the basis of a changed assessment of the character requirement), the committee seeks the Minister's advice as to whether consideration has been given [to] placing a time limit on the exercise of the power."

3. This is a beneficial amendment which replaces an operation-of-law loss of citizenship with an administrative discretion to revoke citizenship by descent if approval should not have been given in the first place.

4. Therefore, while the Bill makes the continued holding of citizenship by descent in some circumstances dependant on administrative powers, this is an improvement on the current situation where there is no discretion to allow a person to retain their citizenship if they were incorrectly registered as a citizen by descent, regardless of matters such as:

- a. the age of the person
- b. whether they were an innocent party to the incorrect registration
- c. their integration into the community.

5. The power to revoke would include the case of a person who was assessed as being of good character at the time they were approved for registration as a citizen by descent but where the Minister becomes satisfied that the person in fact was not of good character at that time. This would not include matters which go to the applicant's character which occur after the decision to register them. The provision is similar to the power to cancel approval of citizenship by conferral if the Minister is satisfied that the person is not of good character before they take the pledge. As a citizen by descent acquires citizenship immediately upon registration, there is no time period whereby the Minister can consider whether to cancel this approval.

6. It is not necessary to place a time limit on the exercise of the power because the discretionary nature of the decision means that issues such as the length of time that the person has been a citizen, and the seriousness of any character concerns, would be taken into account. In addition, the revocation would take effect from the time of decision on

revocation rather than from the date of the decision to approve the person becoming an Australian citizen. This means that the person's status in the intervening period will not alter.

7. It is expected that this provision will be used rarely. There are fewer than five people a year who are taken never to have been citizens under the current operation of law provision.

Committee Response

The committee thanks the Deputy Secretary for this response and **requests that the key information above be included in the explanatory memorandum.** The committee notes that although the length of time that the person has been a citizen may be taken into account, given the discretionary nature of a revocation decision under section 33A the committee remains concerned that the power makes rights unduly dependent on insufficiently defined powers, particularly in light of the fact that merits review is not available in relation to decisions made personally by the Minister. **The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 15 of 2014 - extract

Insufficiently defined administrative powers

Item 66, proposed section 33AA

This proposed new section gives the Minister the discretion to revoke a person's citizenship in circumstances where the Minister is satisfied that the person became an Australian citizenship as a result of fraud or misrepresentation. The fraud or misrepresentation may be associated with the person's entry to Australia, the grant of a visa or the approval of citizenship. Paragraph 34AA(1)(c) provides that the Minister must also be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

It is important to note that proposed subsection 34AA(2) provides that the fraud or misrepresentation need not have constituted an offence by any person and may have been committed by *any* person (ie it need not have been committed by the person whose citizenship may be revoked). The revocation power can only be exercised if the fraud or misrepresentation occurred during the period of 10 years before the day of revocation.

This provision raises the concern that a right is made to depend unduly on insufficiently defined administrative powers. First, the fraud or misrepresentation need not be established by a court and, in some instances, is not subject to merits review. The question of whether fraud or misrepresentation has been established is left entirely to the Minister or his or her delegate's 'satisfaction'. In relation to decisions made personally by the Minister (which are not subject to merits review, see item 72) this means factual errors about the existence of fraud or misrepresentation could only be challenged by way of judicial review. However, as an error of fact (even a serious error) is not, in and of itself, an error of law, the availability of judicial review is not an answer to this concern.

Second, the power may be exercised even if the person whose citizenship is revoked is not responsible for the fraud or representation. The explanatory memorandum argues that as 'the power to revoke...is discretionary, it will be open to the Minister to consider arguments that the person was unaware of the fraud or misrepresentation in deciding whether to revoke their Australian citizenship' (at p. 57). The fact remains, however, that the power is framed as a broad discretion and there are no express constraints in the legislation which would prevent the revocation of citizenship in these circumstances. Third, these concerns are exacerbated by the fact that the power may be exercised for up to 10 years after the wrongdoing occurred (even if the citizen was not responsible for that wrongdoing).

For the above reasons, the committee notes that the proposed amendment is of considerable concern and seeks advice about why it should not be considered to make rights unduly dependent on insufficiently defined administrative powers. If this provision is considered necessary, the committee also seeks advice about (1) the appropriateness of the 10 year period, and (2) why it is not possible for merits review to at a minimum be available in relation to findings that a person became an Australia citizen as a result of fraud or misrepresentation. In relation to (2) the committee notes that the AAT could review these determinations of fact and law, even if it were not able to second-guess the discretionary elements of the decision (including whether it would be contrary to the public interest for the person to remain in Australia).

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Deputy Secretary's response - extract

Item 66, proposed section 33AA: Providing a discretion to revoke citizenship where the Minister is satisfied that a person became an Australian citizen as a result of fraud or misrepresentation

8. The Committee stated: "the committee notes that the proposed amendment is of considerable concern and seeks advice about why it should not be considered to make rights unduly dependent on insufficiently defined administrative powers. If this provision is considered necessary, the committee also seeks advice about (1) the appropriateness of the 10 year period, and (2) why it is not possible for merits review to at a minimum be available in relation to findings that a person became an Australia citizen as a result of fraud or misrepresentation. In relation to (2) the committee notes that the AAT could review these determinations of fact and law, even if it were not able to second-guess the discretionary elements of the decision (including whether it would be contrary to the public interest for the person to remain in Australia)."

Administrative powers

9. The department notes that there is no constitutional right to citizenship. It is a privilege which is bestowed by the Australian people, generally subject to a favourable exercise of discretion, if a person meets relevant criteria. It is necessary for the integrity of the Australian citizenship programme that there be stronger disincentives for people to provide false and misleading information. The Australian community would expect that the government has the ability to remove citizenship from people who have acquired it fraudulently and were never entitled to it in the first place. This amendment is necessary to give effect to this expectation.

10. Currently under the *Australian Citizenship Act 2007* (the Citizenship Act), a conviction for a specified offence is required before citizenship can be revoked. In light of competing priorities, there are often limited resources to prosecute all but the most serious cases relating to migration and citizenship fraud. In addition, the conviction must be under Australian law, which in turn requires the person's presence in Australia. 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 has only been used eight times since 1949, even where the evidence of fraud is strong.

11. The proposed standard of decision making is that the Minister must be satisfied that fraud or misrepresentation has occurred. This means that the Minister must be *actually persuaded* of the occurrence or existence of the fraud or misrepresentation to attain the requisite level of satisfaction. Given that there are serious consequences attached to the decision to revoke citizenship, the Minister's satisfaction must be based on findings or inferences of fact that are supported by probative material or logical grounds.

12. The proposed power is consistent with Ministerial powers to revoke citizenship for fraud or false representation without conviction in Canada, New Zealand and the United Kingdom. We note that Canada has long allowed revocation of citizenship for fraud without conviction. A recent amendment to the *Citizenship Act 1977* allows the Minister to make this decision, rather than the Governor-in-Council. It is expected that the amendment will come into force by Spring 2015.

13. Further detail concerning the proposed revocation power will be set out in the Australian Citizenship Instructions (ACIs), which gives policy guidance on citizenship matters. The Senate Legal and Constitutional Affairs Legislation Committee (SLCALC) asked the department to provide draft policy guidelines on this power. The department notes that such policy guidelines would usually be prepared in the period of time between passage of the Bill and implementation, a period of six months. However, we were able to provide a draft of the guidelines to the SLCALC and have enclosed it at Attachment A to this letter.

The appropriateness of the 10 year period

14. The 10 year time period was considered to be an appropriate safeguard when moving from revocation based on a criminal conviction to revocation based on Ministerial satisfaction.

15. The department notes that between 1958 and 1997, section 50(1) of the former *Australian Citizenship Act 1948* contained a 10 year time limit for the commencement of prosecutions for fraud under the Citizenship Act.

Review rights

16. The department notes that each person being considered for revocation of their Australian citizenship would be afforded natural justice before the Minister, or delegate, makes a decision.

17. Any decision to revoke citizenship made by a delegate of the Minister would be subject to merits review at the Administrative Appeals Tribunal (AAT) and judicial review in the Federal or High Courts. As any AAT review would be *de nova*, it would include consideration of the factual basis for revocation.

18. Any decision to revoke citizenship made by the Minister personally would be subject to judicial review in the Federal or High Courts. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been properly exercised in accordance with the power conferred by Parliament. It would include consideration of whether procedural fairness has been afforded and whether the reasons given for the decision provide an evident and intelligible justification for why the balancing of relevant factors led to the outcome which was reached.

Committee Response

The committee thanks the Deputy Secretary for this response. The committee considers that the cumulative impact of a number of factors means that this provision is a matter of continuing concern on the basis that the provision makes rights unduly dependent on insufficiently defined administrative powers. Those factors are:

- the significance of the impact of the exercise of this discretionary power on affected individuals;
- the fact that the affected person need not have been responsible for the fraud or misrepresentation;
- that the power may be used up to 10 years after the grant of citizenship; and
- the absence of merits review in relation to decisions made personally by the Minister.

The committee notes that although judicial review of personal decisions made by the Minister would be judicially reviewable on the basis of lack of an 'evident and intelligible justification' for the decision (following the recent High Court decision in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332), this does not alleviate these scrutiny concerns. Although the extent of review available on this basis remains to be clarified by the courts, it is clear that this ground of review will not enable the courts to review for all errors of fact and that an 'intelligible' justification need not amount to a persuasive justification. **The committee therefore draws these concerns to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 15 of 2014 - extract

Merits review

Item 71, proposed subsection 52(2A)

The effect of this proposed amendment is to align access to merits review for conferral applicants under 18 years of age with citizenship eligibility requirements. The statement of compatibility explains that:

Persons 'aged 18 who apply under subs 21(5) to become an Australian citizen currently have a right of merits review even when that right to merit review is futile because [they] do not meet the objective legislative requirement that [they] must be a permanent resident to be eligible for citizenship' (at p. 16). The statement of compatibility continues:

The proposed amendments provide that persons under the age of 18 who are permanent residents or hold a permanent resident visa prescribed for the purposes of

subs 21(5) are eligible to apply for merit review of an adverse decision made under subs 21(5). This means that persons under the age of 18 who are applicants for conferral of citizenship under subs 21(5) and who are unable to meet the objective criteria of being a permanent resident or holding a prescribed visa will no longer have a futile right to review.

The justification for excluding merits review for persons who do not meet the objective criteria of being a permanent resident or holding a prescribed visa are that (see the statement of compatibility, p. 16):

- the review body is not burdened by a caseload that has no prospect of success at review;
- the availability of informal internal review where it is claimed that the finding that the person was not a permanent resident at the time of application was an error of fact that led to a jurisdictional error;
- the availability of judicial review.

However, the committee notes that it does not consider the availability of judicial review to be a factor that justifies the exclusion of merits review. It is further noted that the justification for excluding merits review accepts that errors of fact about whether a person is a permanent resident at the time of application (an objective criterion) may be made. Where there is an error of fact it cannot be said that all cases would have no prospect of success. As such, the explanation provided for excluding merits review in the AAT appears to be that any factual errors can be corrected through 'informal internal review' (see the second dot point outlined above).

The committee therefore seeks the Minister's advice as to a fuller explanation of the nature of factual errors that may arise in this context and, in particular, why what appears to be a non-statutory system of internal review is an adequate mechanism for correcting such errors. The committee's consideration of this provision would benefit from an explanation of whether there can be disagreement about the objective criteria based on the evidence or whether factual errors will only, in practice, occur due to administrative error.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Deputy Secretary's response - extract

Item 71, proposed sections 52(2A): Aligning access to merits review for conferral applicants under 18 years of age with citizenship eligibility requirements

19. The Committee asked for "the Minister's advice as to a fuller explanation of the nature of factual errors that may arise in this context and, in particular, why what appears to be a non-statutory system of internal review is an adequate mechanism for correcting such errors. The committee's consideration of this provision would benefit from an explanation of whether there can be disagreement about the objective criteria based on the evidence or whether factual errors will only, in practice, occur due to administrative error."

20. A relevant factual error would be that the child is, in fact, a permanent resident or the holder of a prescribed permanent visa. Another factual error would be that the child was under 18 at the time they made the application. These are not discretionary decisions.

21. If the decision maker had erroneously found that the child was not a permanent resident, and refused the application for this reason that decision would be legally tainted and could be overturned by a court or vacated by the department. As a decision made in these circumstances would legally be considered a nullity, it is possible to vacate such a decision with the consent of the child (or a responsible parent or legal guardian if the child is not capable of understanding and giving such consent due to their age) to allow the decision to be remade on the correct factual basis.

Committee Response

The committee thanks the Deputy Secretary for this response and **requests that the key information above be included in the explanatory memorandum.**

Alert Digest No. 15 of 2014 - extract

Merits review

Item 72, proposed subsection 52(4)

The effect of this subsection is that decisions which are generally reviewable by the AAT (under subsection 52(1)) will not be reviewable where the decision is made by the Minister personally and the Minister has issued a notice under section 47 that includes a statement that the Minister is satisfied that the decision was made in the public interest.

The explanatory memorandum states that the ‘purpose of new subsection 52(4) of the Act is to ensure that decisions personally made by the Minister under sections 17, 19D, 24, 25, 30, 33, 33A, 34 and subsection 36(1), where the notice under section 47 stated that the Minister is satisfied that the decision was made in the public interest, cannot be the subject of an application to the AAT for review’ (at p. 61).

In justifying the exclusion of decisions made by the Minister personally in these circumstances, the explanatory memorandum continues:

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.

New subsection 52B(1) of the Act, inserted by item 73 below, provides transparency and accountability measures concerning personal decisions of the Minister which are not reviewable by the Administrative Appeals Tribunal, by requiring a statement to be tabled in Parliament when such a decision is made.

Further, the statement of compatibility argues that, although the general policy is that administrative decisions which are apt to adversely affect the interests of a person should be subject to merits review, there may be factors that justify the exclusion of merits review. In this instance, the statement of compatibility suggests that exclusion is appropriate as ‘policy decisions of a high political content’, ‘particularly those made personally by the Minister may be justifiably excluded from merits review’ (at p. 14). The amendment is argued to be ‘aimed at the policy objective of protecting personal decisions of the minister, an elected public official, made in the public interest from review by an unelected administrative tribunal’ (at p. 14). The statement of compatibility also notes that the amendment ‘seeks to uphold the Minister’ role in representing the Australian community, having gained a particular insight into community standards and values’ (at p. 14).

In response it may be noted that the Administrative Review Council has emphasised (1999 paper on *What Decisions should be Subject to Merits Review?*), that the fact a decision-maker is a Minister ‘is not, of itself, relevant to the question of review’ and that attention should focus on the nature of the decision-making power ‘in particular its capacity to affect the interests of individuals’. Further, it is stated that although policy decisions of the ‘highest consequence to government or major political issues may be regarded as inappropriate for merits review’, the ‘high political content exception focuses upon the nature of the decision’ (see 5.20–5.23).

On the basis of this approach it is suggested that it is not appropriate to exclude merits review for the ‘policy objective’ of insulating decisions made by the minister, even if those decisions are declared to have been made in the public interest. The high political content exception should, it is submitted, focus on the nature of the decision, not the decision-maker. Although it is true that there are general policy questions that arise, for example, in applying ‘good character’ requirements, any explicit policy developed to guide the decision-making in these areas would be considered by the AAT in exercising its review function. (To avoid any doubt about this, the legislation could be amended to require the AAT to apply general policy on issues relevant to the application of requirements that have a public interest dimension). In this respect, it may be argued that the Minister’s role in ‘representing the Australian community’ can be pursued through developing applicable policy. Although personal intervention may be needed in exceptional circumstances, it is suggested that a reference to the decision being made in the public interest does not adequately explain the exclusion of review.

Finally, it may be noted that errors may occur in some decisions as to a question of fact or law, and review of these sorts of questions (e.g. whether there was a misrepresentation) would not require the AAT to second-guess judgments about what the public interest requires. This raises a more general question: why should all aspects of decisions made personally by the Minister be excluded from review? For example, the AAT could be given jurisdiction to review whether there are grounds to be satisfied that fraud or misrepresentation resulted in a person becoming an Australian citizen, but not to the further determinations about whether it would be ‘contrary to the public interest for the person to remain an Australian citizen’ (see proposed subsection 34AA(1)). For this reason, it appears to the committee that the case for excluding merits review should be made in relation to each of the reviewable powers and the particular elements of those powers.

The committee is therefore not yet persuaded that the exclusion of merits review is appropriate, and seeks the Minister's more detailed justification for the proposed approach.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Deputy Secretary's response - extract

Item 72, proposed section 52(4): Providing that personal decisions made by the Minister in the public interest are not subject to merits review

22. The Committee stated that it is "not yet persuaded that the exclusion of merits review is appropriate, and seeks the Minister's more detailed justification for the proposed approach."

23. This proposal would bring the protection of personal decisions of the Minister from merits review under the Citizenship Act more in line with similar provisions under the *Migration Act 1958*. In addition, the Citizenship Act itself has a precedent for non-reviewable personal decisions of the Minister, being paragraph 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.

24. In relation to the discussion of the Administrative Review Council's 1999 paper on *What decisions should be subject to merit review?*, the department agrees with the Committee that the high political content exception to exclude decisions from merits review should focus on the nature of the decision. The department submits that this focus on the nature of the decision is satisfied by the requirement that the Minister's personal decision be made in the public interest.

Committee Response

The committee thanks the Deputy Secretary for this response and **requests that the key information above be included in the explanatory memorandum**. However, the committee does not accept that the existence of similar legislative provisions is, of itself, a sufficient precedent that justifies the proposed amendment. Non-reviewable powers which have a direct and immediate effect on personal rights and interests should, in principle, be subject to merits review. The committee does not consider that a conclusion that a decision has been made in the public interest is in itself sufficient to exclude merits review where decisions have the capacity to directly have an impact on significant individual interests.

In this respect the committee reiterates the point that the AAT would routinely apply government policy on public interest considerations. For these reasons the committee retains its concern that personal powers exercised to determine individual cases on the basis of unspecified reference to the public interest may have the effect of undermining administrative justice unless accompanied by merits review.

(continued)

Finally, as originally noted, the committee is of the view that the argument for excluding merits review should be made in relation to each separate decision-making power and the particular elements of those powers. **The committee therefore draws these concerns to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 15 of 2014 - extract

Merits review

Item 73, proposed sections 52A and 52B

These proposed amendments provide the Minister with a power to set aside decisions of the AAT arising from review of decisions about the approval of a person to become an Australian citizen concerning character or identity if the Minister is satisfied that it would be in the public interest to do so. (The power does not extend to decisions to revoke citizenship.)

In justification of this provision the explanatory memorandum points to three significant decisions by the AAT which are claimed to be ‘outside community standards’ and three others in which people have been found to be of ‘good character despite having committed domestic violence offences’. The explanatory memorandum also notes that there ‘is the potential for some decisions made by the AAT on identity grounds to pose a risk to the integrity of the citizenship programme’ (at p. 62). However, the central justification for the approach appears to be that it ‘seeks to uphold the Minister’s role in representing the Australian community and protecting its interests’ (statement of compatibility p. 15). The statement of compatibility continues:

It is recognised that such a power to set aside AAT decisions is a serious one, and it 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. (statement of compatibility, p. 15)

The argument is further buttressed by reference to the ‘transparency and accountability’ that will ‘be provided by a statement tabled in Parliament within 15 sitting days of the decision being made’—which is a requirement also introduced by this item.

Although it may be accepted that the government has a legitimate interest in aligning citizenship decisions with community standards, it is suggested that this must be balanced with community expectations relating to the integrity of the system of independent merits review. The availability of merits review in relation to decisions which may adversely

affect important individual interests can be thought of as an essential part of the Australian administrative justice system. As such, aligning decisions with the Minister's view of community standards *in individual cases* is not the only consideration relevant to assessing the justification of the proposed power to override AAT determinations.

Any system of independent merits review runs the risk that a tribunal may reverse a decision preferred by the original decision-maker or the Minister. However, it remains unclear why it is not possible to incorporate community standards and other policy objectives of the government into AAT decision-making in a manner which does not enable the Minister to reverse AAT decisions in individual cases (given the risks that this poses to community perceptions about the availability of independent merits review and, also, the risk that individual cases may be unduly influenced by political considerations). The AAT long accepted that it will not depart from government policy unless there are 'cogent reasons' against its application in the individual circumstances of a case, especially in cases where the policy has been exposed to parliamentary scrutiny. (See *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634). This does not guarantee that in rare instances clear government policy will not be applied, but it does suggest that such cases will, in relative terms, be few. In this respect it may also be noted that the explanatory memorandum does not give a clear sense of the scale of the problem, other than to cite a handful of cases.

The committee therefore seeks the Minister's advice as to whether consideration has been given to clarifying government policy as an adequate and more appropriate mechanism to provide general input relevant to reflecting community standards, rather than overriding outcomes in individual cases.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Deputy Secretary's response - extract

Item 73, proposed sections 52A and 52B: Providing 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

25. The Committee asked for "the Minister's advice as to whether consideration has been given to clarifying government policy as an adequate and more appropriate mechanism to provide general input relevant to reflecting community standards, rather than overriding outcomes in individual cases."

26. Guidance will continue to be provided and updated as appropriate to reflect government policy in relation to community standards and other matters. The potential nevertheless remains for AAT decisions to be made which are inconsistent with such policies.

27. While the number of cases that may be of concern may be few, they are still potentially serious in themselves and may have implications for the value of Australian citizenship as a whole.

Committee Response

The committee thanks the Deputy Secretary for this response and **requests that the key information above be included in the explanatory memorandum.** The committee reiterates its concern as to whether it is more appropriate to clarify government policy as a mechanism for providing general input relevant to reflecting community standards, rather than overriding outcomes in individual cases. **However, the committee draws these concerns to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 15 of 2014 - extract

Delegation of legislative power

Item 76, new subsection 54(2)

This item will provides that 'subsection 54(2) of the Act provides that without limiting subsection 54(1), the Citizenship Regulations may confer on the Minister the power to make legislative instruments' (explanatory memorandum, p. 66).

The explanatory memorandum, at page 66, states that the purpose of the amendment is to:

...enable the Minister to specify instruments in writing under the Citizenship Regulations. This will enable the Minister to make legislative instruments under the Citizenship Regulations that include (but will not be limited to) the payment of citizenship application fees in foreign currencies and foreign countries.

While the use of delegated legislation in technical and established circumstances (such as the payment of fees) is not controversial, it appears unusual for primary legislation to provide for the making of a regulation which, in turn, provides a minister with a wide

power to make further delegated legislation for unspecified purposes. **The committee therefore seeks the Minister's advice as to why an appropriately described power, or powers, to make delegated legislation cannot be included in the primary act. The committee is also interested in whether this type of power exists in other legislation.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Deputy Secretary's response - extract

Item 76, proposed section 54(2): Providing that the Citizenship Regulations may confer on the Minister the power to make legislative instruments

28. The Committee asked for "the Minister's advice as to why an appropriately described power, or powers, to make delegated legislation cannot be included in the primary act. The committee is also interested in whether this type of power exists in other legislation."

29. It is appropriate for this instrument making power to be in the regulations because it is the regulations which set the fees to accompany citizenship applications (see regulations 12 to 13 of the *Australian Citizenship Regulations 2007*). Parliamentary scrutiny is maintained because the legislative instrument will be disallowable.

30. This provision is consistent with section 504(2) of the Migration Act, which impliedly authorises regulations allowing the Minister to make instruments in writing specifying matters that affect the operation of such regulations. The key legislative purpose of that subsection is that the regulations may prescribe matters to be specified by the Minister in an instrument in writing. The proposal to allow the Citizenship Regulations to empower the making of legislative instruments will likewise give effect to the purpose and objects of the legislative scheme in the Citizenship Act.

Committee Response

The committee thanks the Deputy Secretary for this response. The response indicates that it 'is appropriate for this instrument making power to be in the regulations because it is the regulations which set the fees to accompany citizenship applications'. However, on its face, proposed subsection 54(2) does not appear to limit the minister's power to make further delegated legislation to matters relating to the setting of fees. **The committee therefore seeks the minister's further advice as to whether the minister's power to make further delegated legislation can be limited in the legislation. If it is considered that this is not possible, the committee seeks the minister's further advice as to why such a broad power to make further delegated legislation is considered necessary.**

Alert Digest No. 15 of 2014 - extract

Retrospective application Subsections 78(3) and (4)

Proposed new subsections 12(4) and 12(5) provide that a person born in Australia can no longer acquire citizenship automatically on the basis of being ordinarily resident throughout the 10 year period beginning on the day the person is born if at any time during that period (i) they were an unlawful non-citizen or (ii) the person was outside Australia and, at that time, the person did not hold a visa permitting the person to travel to, enter and remain in Australia.

The effect of subitem 78(3) is to apply the new exceptions in subsections 12(4) and (5) to a person's right to acquire citizenship automatically pursuant to subsection 12(1) of the Act to persons who were born before the commencement of those provisions. Subitem 72(4) clarifies (see explanatory memorandum at 71) that the exceptions will apply even if the time a person was an unlawful non-citizen or outside Australia without the requisite visa occurred prior to the commencement of the provision. The practical effect of these subitems is that a person who may be expecting to acquire citizenship on the basis of the existing provisions will not be able to do so, even in circumstances where they are due to acquire citizenship very soon after the commencement of the provisions.

This position may be contrasted with the application provision relevant to proposed new subsection 12(3), which also provides for an exception to the normal rule applicable to the automatic acquisition for persons born in Australia. Subsection 12(3) provides that a person will not be ordinarily resident in Australia throughout the period of 10 years from the day of their birth if a parent of the person had diplomatic privileges and immunities. Subitem 78(2) provides that this proposed amendment will only apply in relation to births that occur after that date of commencement.

Although it may be argued that subitem 78(3) and subitem 78(4) do not commence retrospectively because they merely take account of antecedent facts as the basis for applying a new rule, it may also be argued that these applications raise a real question of fairness. That question of fairness arises because a person who, in some cases, may have spent a lengthy period in Australia (up to 10 years) and who reasonably expects, on the basis of the current provisions, to soon acquire citizenship, will no longer acquire citizenship. In these circumstances there is a risk that a person may have reasonably relied on the existing provisions on the assumption that any changes would not apply to persons born before commencement. The explanatory memorandum argues that:

If the provisions only applied prospectively, it would enable a person to acquire citizenship automatically if they turned 10 years of age after commencement of the provision even if, for example, they had extended periods as an unlawful non-citizen prior to commencement of the provision. This would be contrary to the purpose of the amendments.

The committee seeks the Minister's fuller justification for the approach on the basis that the explanation provided does not address the fairness of the intended purpose of the amendments. The committee also seeks advice as to why it is considered fair to apply the provisions retrospectively (in the sense described above) in relation to subsection 12(4) and (5) but that only prospective application is provided for in relation to subsection 12(3).

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Deputy Secretary's response - extract

Retrospective application sections 78(3) and (4): Limiting automatic acquisition of citizenship at 10 years of age to those persons who have maintained lawful presence in Australia throughout the 10 years

31. The committee asked for "the Minister's fuller justification for the approach on the basis that the explanation provided does not address the fairness of the intended purpose of the amendments. The committee also seeks advice as to why it is considered fair to apply the provisions retrospectively (in the sense described above) in relation to subsection 12(4) and (5) but that only prospective application is provided for in relation to subsection 12(3)."

32. Proposed subsections 12(4) and 12(5) provide that a person born in Australia can no longer acquire citizenship by birth on the basis of being ordinarily resident throughout the 10 year period beginning on the day the person is born if at any time during that period: (i) they were present in Australia an unlawful non-citizen; or (ii) the person was outside Australia and, at that time, the person did not hold a visa permitting the person to travel to, enter and remain in Australia.

33. Collectively, the amendments seek to encourage the use of lawful pathways to migration and citizenship by making citizenship under the '10 year rule' available only to those who had a right to lawfully enter, re-enter and reside in Australia throughout the 10 years. People who do not meet the proposed requirements would no longer have an

incentive to delay their departure from Australia until a child born to them in Australia has turned 10 years of age, 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.

34. The proposed amendments are considered to be fair because they are reasonable and proportionate within the context of Australia's border security, visa and citizenship framework, which:

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

35. Further, new subsection 12(5) promotes consistency and transparency in decision making by putting into legislation a factor that is currently taken into account by departmental decision makers when making a finding of fact as to whether a person has been ordinarily resident in Australia throughout the first 10 years of their life.

36. It is also considered fair to apply the amendments to any person who would otherwise come within the operation of existing paragraph 12(1)(b) on or after the date of commencement. While an individual may hold an expectation that at some point in the future they will benefit under the existing paragraph 12(1)(b), there is no right to citizenship in these circumstances. A person can acquire citizenship through the conferral process and a stateless person may apply for citizenship at any time under subsection 21(8) of the Citizenship Act. Consequently, the amendments do not trespass unduly on personal rights; nor do the amendments impact on the individual's liberty or obligations.

37. It is proposed that new subsection 12(3) applies in relation to children born on or after the day of commencement. Currently the definition of 'ordinarily resident' in section 3 of the Act excludes those persons who were present in Australia for a special or temporary purpose only. It is a long standing policy position that a person who holds diplomatic or consular privileges does so for a special or temporary purpose and is not eligible for citizenship under the 10 year rule. While the new subsection sets out this exclusion more clearly, it is considered that applying the new subsection only to children born on or after its commencement would not undermine the purpose of the amendment.

Committee Response

The committee thanks the Deputy Secretary for this response and **requests that the key information above be included in the explanatory memorandum. In light of the information provided the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 15 of 2014 - extract

**Retrospective application
Subsection 78(18)**

This amendment relates to AAT decisions reviewing a decision made by a delegate of the Minister. It will enable the Minister to set aside a decision made by the AAT and make a new decision apply to the AAT decision. Although the amendment only applies to AAT decisions made after commencement, it is possible that the decision under review, the application for review, and the hearing of the review may all have occurred prior to commencement.

The explanatory memorandum explains the effect of the provision, but does not address whether it may be considered unfair for the review process applicable to a decision to be changed to apply to decisions made prior to commencement. This unfairness is arguably exacerbated when more stages of the review process have been completed. Public perceptions of the integrity of any system of review may also suffer where there is a willingness to change the rules governing the process of appeal (including who is the final appellate decision-maker) after an appealable decision has been made and an appeal has been initiated.

The committee therefore seeks the Minister's more detailed explanation for the approach.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Deputy Secretary's response - extract

Retrospective application subsection 78(18): Providing 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

38. The committee asked for "the Minister's more detailed explanation for the approach" concerning the application provisions for this amendment.

39. It is not unfair for the provision to apply to decisions made by the AAT after commencement of the provision, even if the primary decision was made before commencement of the provision. This is because AAT review is *de nova* and an AAT decision which does not uphold the decision under review substitutes the original decision. In this way, the original decision ceases to have effect.

40. Therefore, the proposed commencement provision for the amendment would not result in the amendment trespassing on personal rights and liberties.

Committee Response

The committee thanks the Deputy Secretary for this response and **requests that the key information above be included in the explanatory memorandum. In light of the information provided the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Stop Dumping on the Great Barrier Reef Bill 2014

Introduced into the Senate on 4 September 2014

By: Senator Waters

Introduction

The committee dealt with this bill in *Alert Digest No.12 of 2014*. The Senator responded to the committee's comments in a letter dated 24 November 2014. A copy of the letter is attached to this report.

Alert Digest No. 12 of 2014 - extract

Background

This bill seeks to ban new offshore dumping of dredge spoil in the Great Barrier Reef World Heritage Area.

Trespass on personal rights and liberties—penalties

Item 2, proposed subsection 10AA(1)

Subsection 10AA(1) provides that it is an offence to dump dredged material within the Great Barrier Reef World Heritage Area, and imposes a penalty of 250 penalty units, 12 months' imprisonment, or both.

The committee's expectation is that the rationale for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties. This issue is not addressed in the explanatory memorandum. **The committee therefore seeks the Senator's further advice as to the justification for the penalties imposed by these subsections.**

Pending the Senator's advice, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Senator's response - extract

Item 2, proposed subsection 10AA(1) – penalties

Subsection 10AA(1) provides that it is an offence to dump dredged material within the Great Barrier Reef World Heritage Area (GBRWHA), and imposes a penalty of 250 penalty units, 12 months' imprisonment, or both.

I consider the maximum penalty imposed by the Bill to be justified in the light of the overriding public interest in protecting the GBRWHA.

Committee Response

The committee thanks the Senator for this response and **leaves the question of whether the proposed approach is appropriate in these circumstances to the Senate as a whole.**

Alert Digest No. 12 of 2014 - extract

Strict liability offence

Item 2, proposed subsection 10AA(2)

Subsection 10AA(2) provides that strict liability applies to the element of the offence that the dumping of dredged material occurs within the Great Barrier Reef World Heritage Area. The explanatory memorandum justifies this approach as follows:

It is appropriate that strict liability apply to the Great Barrier Reef element of the offence as a defendant can reasonably be expected, because of his or her professional involvement in the dredging industry, to know the requirements of the law and the location of the Great Barrier Reef World Heritage Area.

In light of this information **the committee leaves the question of whether strict liability is appropriate in these circumstances to the Senate as a whole.**

The committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Senator's response - extract

Item 2, proposed subsection 10AA(2) - strict liability offence

Subsection 10AA(2) provides that strict liability applies to the element of the offence that the dumping of dredged material occurs within the GBRWHA.

As explained in the explanatory memorandum, I consider a strict liability offence to be justified on the basis that defendant can reasonably be expected, because of his or her professional involvement in the dredging industry, to know the requirements of the law and the location of the GBRWHA.

Committee Response

The Committee thanks the Senator for this additional information and **leaves the question of whether strict liability is appropriate in these circumstances to the Senate as a whole.**

Alert Digest No. 12 of 2014 - extract

Retrospective commencement

Item 4

This item provides that 'the amendments made by this Schedule do not apply in relation to dumping or loading if an approval or permission for the dumping or loading was granted on or before 9 December under the *Environment Protection and Biodiversity Conservation Act 1999*, the *Environment Protection (Sea Dumping) Act 1981* or the *Great Barrier Reef Marine Park Act 1975* (including regulations made under those Acts)'. The explanatory memorandum (at p. 3) indicates that:

This item prevents the amendments applying retrospectively in cases where a permit or approval was given for the activities prohibited by this Schedule on or before 9 December 2013. However, this provision makes sure that the dumping approved at Abbot Point on 10 December 2013, or any other offshore dumping approved after 9 December 2013, cannot proceed.

While the explanatory memorandum is explicit in stating that permits or approvals given before 9 December 2013 will not be subject to the amendments, it is not clear whether approvals given after this date, but before the bill has gained Royal Assent, will be. **The committee therefore seeks clarification as to whether there are any cases where the amendments are capable of applying retrospectively and, if there are, a detailed justification for their application.**

Pending the Senator's advice, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Senator's response - extract

Item 4 - commencement

This item provides that 'the amendments made by this Schedule do not apply in relation to dumping or loading if an approval or permission for the dumping or loading was granted on or before 9 December 2013 under the *Environment Protection and Biodiversity Conservation Act 1999*, the *Environment Protection (Sea Dumping) Act 1981* or the *Great Barrier Reef Marine Park Act 1975* (including regulations made under those Acts)'.

In response to the Committee's request, I confirm that dumping or loading in the GBRWHA pursuant to any approval or permission which was given on or after 10 December 2013 would be prohibited by the amendments. To be clear, the amendments only apply to dumping or loading which occurs after they commence, rather than criminalising past conduct.

The amendments do alter currently existing legal rights. For example, any dumping which has already occurred before the amendments commence would not be criminalised, whereas any future dumping in the GBRWHA at Abbot Point under the permit granted by Minister Hunt on 10 December 2013 would be prohibited.

I consider that the overriding public interest in protecting the GBRWHA, 69,000 jobs which it provides and the clearly expressed concerns of the World Heritage Committee opposing offshore dumping at Abbot Point justify the amendments.

Please feel free to contact my office if I can be of further assistance.

Committee Response

The committee thanks the Senator for this response and notes her advice that it is not intended that the amendments will criminalise past conduct. In light of this the committee **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Senator Helen Polley
Chair



Australian Government

Department of Immigration and Border Protection

28 November 2014

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600

Dear Senator

Responses to Alert Digest No. 15 of 2014 from the Senate Standing Committee for the Scrutiny of Bills - Australian Citizenship and Other Legislation Amendment Bill 2014

Thank you for your letter of 20 November 2014 to the Senior Advisor to the Minister for Immigration and Border Protection (the Minister), inviting the Minister to respond to issues identified by the Senate Standing Committee for the Scrutiny of Bills (the Committee) in its Alert Digest No. 15 of 2014 concerning the Australian Citizenship and Other Legislation Amendment Bill 2014. The Minister has asked me to reply on his behalf.

Item 64, proposed section 33A: Providing a discretion to revoke citizenship by descent in place of the current operation of law provision

2. The Committee asked for “the Minister’s advice about why this proposed amendment should not be considered to make rights unduly dependent on insufficiently defined administrative powers. If the power of revocation is considered necessary (including on the basis of a changed assessment of the character requirement), the committee seeks the Minister’s advice as to whether consideration has been given placing a time limit on the exercise of the power.”

3. This is a beneficial amendment which replaces an operation-of-law loss of citizenship with an administrative discretion to revoke citizenship by descent if approval should not have been given in the first place.

4. Therefore, while the Bill makes the continued holding of citizenship by descent in some circumstances dependant on administrative powers, this is an improvement on the current situation where there is no discretion to allow a person to retain their citizenship if they were incorrectly registered as a citizen by descent, regardless of matters such as:

- a. the age of the person
- b. whether they were an innocent party to the incorrect registration
- c. their integration into the community.

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5. The power to revoke would include the case of a person who was assessed as being of good character at the time they were approved for registration as a citizen by descent but where the Minister becomes satisfied that the person in fact was not of good character at that time. This would not include matters which go to the applicant's character which occur after the decision to register them. The provision is similar to the power to cancel approval of citizenship by conferral if the Minister is satisfied that the person is not of good character before they take the pledge. As a citizen by descent acquires citizenship immediately upon registration, there is no time period whereby the Minister can consider whether to cancel this approval.

6. It is not necessary to place a time limit on the exercise of the power because the discretionary nature of the decision means that issues such as the length of time that the person has been a citizen, and the seriousness of any character concerns, would be taken into account. In addition, the revocation would take effect from the time of decision on revocation rather than from the date of the decision to approve the person becoming an Australian citizen. This means that the person's status in the intervening period will not alter.

7. It is expected that this provision will be used rarely. There are fewer than five people a year who are taken never to have been citizens under the current operation of law provision.

Item 66, proposed section 33AA: Providing a discretion to revoke citizenship where the Minister is satisfied that a person became an Australian citizen as a result of fraud or misrepresentation

8. The Committee stated: "the committee notes that the proposed amendment is of considerable concern and seeks advice about why it should not be considered to make rights unduly dependent on insufficiently defined administrative powers. If this provision is considered necessary, the committee also seeks advice about (1) the appropriateness of the 10 year period, and (2) why it is not possible for merits review to at a minimum be available in relation to findings that a person became an Australia citizen as a result of fraud or misrepresentation. In relation to (2) the committee notes that the AAT could review these determinations of fact and law, even if it were not able to second-guess the discretionary elements of the decision (including whether it would be contrary to the public interest for the person to remain in Australia)."

Administrative powers

9. The department notes that there is no constitutional right to citizenship. It is a privilege which is bestowed by the Australian people, generally subject to a favourable exercise of discretion, if a person meets relevant criteria. It is necessary for the integrity of the Australian citizenship programme that there be stronger disincentives for people to provide false and misleading information. The Australian community would expect that the government has the ability to remove citizenship from people who have acquired it fraudulently and were never entitled to it in the first place. This amendment is necessary to give effect to this expectation.

10. Currently under the *Australian Citizenship Act 2007* (the Citizenship Act), a conviction for a specified offence is required before citizenship can be revoked. In light of competing priorities, there are often limited resources to prosecute all but the most serious cases relating to migration and citizenship fraud. In addition, the conviction must be under Australian law, which in turn requires the person's presence in Australia. 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 has only been used eight times since 1949, even where the evidence of fraud is strong.

11. The proposed standard of decision making is that the Minister must be satisfied that fraud or misrepresentation has occurred. This means that the Minister must be *actually persuaded* of the occurrence or existence of the fraud or misrepresentation to attain the requisite level of satisfaction. Given that there are serious consequences attached to the decision to revoke citizenship, the Minister's satisfaction must be based on findings or inferences of fact that are supported by probative material or logical grounds.

12. The proposed power is consistent with Ministerial powers to revoke citizenship for fraud or false representation without conviction in Canada, New Zealand and the United Kingdom. We note that Canada has long allowed revocation of citizenship for fraud without conviction. A recent amendment to the *Citizenship Act 1977* allows the Minister to make this decision, rather than the Governor-in-Council. It is expected that the amendment will come into force by Spring 2015.

13. Further detail concerning the proposed revocation power will be set out in the Australian Citizenship Instructions (ACIs), which gives policy guidance on citizenship matters. The Senate Legal and Constitutional Affairs Legislation Committee (SLCALC) asked the department to provide draft policy guidelines on this power. The department notes that such policy guidelines would usually be prepared in the period of time between passage of the Bill and implementation, a period of six months. However, we were able to provide a draft of the guidelines to the SLCALC and have enclosed it at Attachment A to this letter.

The appropriateness of the 10 year period

14. The 10 year time period was considered to be an appropriate safeguard when moving from revocation based on a criminal conviction to revocation based on Ministerial satisfaction.

15. The department notes that between 1958 and 1997, section 50(1) of the former *Australian Citizenship Act 1948* contained a 10 year time limit for the commencement of prosecutions for fraud under the Citizenship Act.

Review rights

16. The department notes that each person being considered for revocation of their Australian citizenship would be afforded natural justice before the Minister, or delegate, makes a decision.

17. Any decision to revoke citizenship made by a delegate of the Minister would be subject to merits review at the Administrative Appeals Tribunal (AAT) and judicial review in the Federal or High Courts. As any AAT review would be *de novo*, it would include consideration of the factual basis for revocation.

18. Any decision to revoke citizenship made by the Minister personally would be subject to judicial review in the Federal or High Courts. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been properly exercised in accordance with the power conferred by Parliament. It would include consideration of whether procedural fairness has been afforded and whether the reasons given for the decision provide an evident and intelligible justification for why the balancing of relevant factors led to the outcome which was reached.

Item 71, proposed sections 52(2A): Aligning access to merits review for conferral applicants under 18 years of age with citizenship eligibility requirements

19. The Committee asked for “the Minister's advice as to a fuller explanation of the nature of factual errors that may arise in this context and, in particular, why what appears to be a non-statutory system of internal review is an adequate mechanism for correcting such errors. The committee’s consideration of this provision would benefit from an explanation of whether there can be disagreement about the objective criteria based on the evidence or whether factual errors will only, in practice, occur due to administrative error.”

20. A relevant factual error would be that the child is, in fact, a permanent resident or the holder of a prescribed permanent visa. Another factual error would be that the child was under 18 at the time they made the application. These are not discretionary decisions.

21. If the decision maker had erroneously found that the child was not a permanent resident, and refused the application for this reason that decision would be legally tainted and could be overturned by a court or vacated by the department. As a decision made in these circumstances would legally be considered a nullity, it is possible to vacate such a decision with the consent of the child (or a responsible parent or legal guardian if the child is not capable of understanding and giving such consent due to their age) to allow the decision to be remade on the correct factual basis.

Item 72, proposed section 52(4): Providing that personal decisions made by the Minister in the public interest are not subject to merits review

22. The Committee stated that it is “not yet persuaded that the exclusion of merits review is appropriate, and seeks the Minister's more detailed justification for the proposed approach.”

23. This proposal would bring the protection of personal decisions of the Minister from merits review under the Citizenship Act more in line with similar provisions under the *Migration Act 1958*. In addition, the Citizenship Act itself has a precedent for non-reviewable personal decisions of the Minister, being paragraph 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.

24. In relation to the discussion of the Administrative Review Council’s 1999 paper on *What decisions should be subject to merit review?*, the department agrees with the Committee that the high political content exception to exclude decisions from merits review should focus on the nature of the decision. The department submits that this focus on the nature of the decision is satisfied by the requirement that the Minister’s personal decision be made in the public interest.

Item 73, proposed sections 52A and 52B: Providing 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

25. The Committee asked for “the Minister’s advice as to whether consideration has been given to clarifying government policy as an adequate and more appropriate mechanism to provide general input relevant to reflecting community standards, rather than overriding outcomes in individual cases.”

26. Guidance will continue to be provided and updated as appropriate to reflect government policy in relation to community standards and other matters. The potential nevertheless remains for AAT decisions to be made which are inconsistent with such policies.

27. While the number of cases that may be of concern may be few, they are still potentially serious in themselves and may have implications for the value of Australian citizenship as a whole.

Item 76, proposed section 54(2): Providing that the Citizenship Regulations may confer on the Minister the power to make legislative instruments

28. The Committee asked for “the Minister's advice as to why an appropriately described power, or powers, to make delegated legislation cannot be included in the primary act. The committee is also interested in whether this type of power exists in other legislation.”

29. It is appropriate for this instrument making power to be in the regulations because it is the regulations which set the fees to accompany citizenship applications (see regulations 12 to 13 of the *Australian Citizenship Regulations 2007*). Parliamentary scrutiny is maintained because the legislative instrument will be disallowable.

30. This provision is consistent with section 504(2) of the Migration Act, which impliedly authorises regulations allowing the Minister to make instruments in writing specifying matters that affect the operation of such regulations. The key legislative purpose of that subsection is that the regulations may prescribe matters to be specified by the Minister in an instrument in writing. The proposal to allow the Citizenship Regulations to empower the making of legislative instruments will likewise give effect to the purpose and objects of the legislative scheme in the Citizenship Act.

Retrospective application sections 78(3) and (4): Limiting automatic acquisition of citizenship at 10 years of age to those persons who have maintained lawful presence in Australia throughout the 10 years

31. The committee asked for “the Minister's fuller justification for the approach on the basis that the explanation provided does not address the fairness of the intended purpose of the amendments. The committee also seeks advice as to why it is considered fair to apply the provisions retrospectively (in the sense described above) in relation to subsection 12(4) and (5) but that only prospective application is provided for in relation to subsection 12(3).”

32. Proposed subsections 12(4) and 12(5) provide that a person born in Australia can no longer acquire citizenship by birth on the basis of being ordinarily resident throughout the 10 year period beginning on the day the person is born if at any time during that period: (i) they were present in Australia an unlawful non-citizen; or (ii) the person was outside Australia and, at that time, the person did not hold a visa permitting the person to travel to, enter and remain in Australia.

33. Collectively, the amendments seek to encourage the use of lawful pathways to migration and citizenship by making citizenship under the ‘10 year rule’ available only to those who had a right to lawfully enter, re-enter and reside in Australia throughout the 10 years. People who do not meet the proposed requirements would no longer have an incentive to delay their departure from Australia until a child born to them in Australia has turned 10 years of age, 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.

34. The proposed amendments are considered to be fair because they are reasonable and proportionate within the context of Australia’s border security, visa and citizenship framework, which:

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

35. Further, new subsection 12(5) promotes consistency and transparency in decision making by putting into legislation a factor that is currently taken into account by departmental decision makers when making a finding of fact as to whether a person has been ordinarily resident in Australia throughout the first 10 years of their life.

36. It is also considered fair to apply the amendments to any person who would otherwise come within the operation of existing paragraph 12(1)(b) on or after the date of commencement. While an individual may hold an expectation that at some point in the future they will benefit under the existing paragraph 12(1)(b), there is no right to citizenship in these circumstances. A person can acquire citizenship through the conferral process and a stateless person may apply for citizenship at any time under subsection 21(8) of the Citizenship Act. Consequently, the amendments do not trespass unduly on personal rights; nor do the amendments impact on the individual's liberty or obligations

37. It is proposed that new subsection 12(3) applies in relation to children born on or after the day of commencement. Currently the definition of 'ordinarily resident' in section 3 of the Act excludes those persons who were present in Australia for a special or temporary purpose only. It is a long standing policy position that a person who holds diplomatic or consular privileges does so for a special or temporary purpose and is not eligible for citizenship under the 10 year rule. While the new subsection sets out this exclusion more clearly, it is considered that applying the new subsection only to children born on or after its commencement would not undermine the purpose of the amendment.

Retrospective application subsection 78(18): Providing 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

38. The committee asked for "the Minister's more detailed explanation for the approach" concerning the application provisions for this amendment.

39. It is not unfair for the provision to apply to decisions made by the AAT after commencement of the provision, even if the primary decision was made before commencement of the provision. This is because AAT review is *de novo* and an AAT decision which does not uphold the decision under review substitutes the original decision. In this way, the original decision ceases to have effect.

40. Therefore, the proposed commencement provision for the amendment would not result in the amendment trespassing on personal rights and liberties.

41. The contact officer in my department is Suzanne Ford, Director, Citizenship Policy Section, who can be contacted on (02) 6198 7438.

Yours sincerely


Wendy Southern PSM
Deputy Secretary
Department Immigration and Border Protection

DRAFT outline of policy guidance on power to revoke citizenship for fraud or misrepresentation without prior conviction

Revocation decisions under section 34AA

Table of contents

Background.....	7
What is ‘fraud’? What is ‘misrepresentation’?.....	8
Definitions	8
Fraud in the citizenship context.....	8
Who has committed the fraud?.....	9
What if the fraud does not constitute an offence?	9
When to bring a case to the Minister for personal decision.....	9
When can a person’s citizenship be revoked?	9
Citizenship streams.....	9
Reviewing allegations of fraud or misrepresentation.	9
Minister must be ‘satisfied’	10
Time limit	10
Factors to take into account.....	10
Public interest test.....	10
Statelessness	11
Best interests of the child.....	11
Procedural fairness / natural justice.....	11
Preparing a matter for the Minister.....	12

Background

The Citizenship Act provides a power under section 34AA for the Minister to revoke a person’s citizenship in cases of fraud or misrepresentation where no conviction has been recorded. The purpose of this chapter is to provide guidance on the application of this provision and to define the meaning of ‘fraud’ and ‘misrepresentation’.

This chapter also provides a framework for making a decision under section 34AA. Officers need to look at the circumstances of each case in determining whether the section 34AA provision has been enlivened, whether it is appropriate to refer the case to the Minister, and what factors an officer should take into consideration.

What is ‘fraud’? What is ‘misrepresentation’?

This section takes decision-makers through the meaning of ‘fraud’ and ‘misrepresentation’ for this provision, and places the concepts within the context of citizenship. It gives guidance to officers so that appropriate cases can be brought to the Minister’s attention.

Definitions

This section provides general definitions of ‘fraud’ and ‘misrepresentation’ for the purposes of section 34AA.

The terms ‘fraud’ and ‘misrepresentation’ are not defined in the Citizenship Act. Therefore, the ordinary meaning of the words, including dictionary definitions, are relevant.

‘**Fraud**’ is a well-known concept at common law with a plain and ordinary meaning. It has been well recognised by the courts across a myriad of circumstances. ‘**Fraud**’ has the following ordinary meaning in the Macquarie Dictionary:

“deceit, trickery, sharp practice, or breach of confidence, by which it is sought to gain some unfair or dishonest advantage”

The Macquarie Dictionary gives the following **common law definition of ‘fraud’**:

“advantage gained by unfair means, as by a false representation of fact made knowingly, or without belief in its truth, or recklessly, not knowing whether it is true or false”

‘**Misrepresent**’ has the following ordinary English meaning in the Macquarie Dictionary:

“to represent incorrectly, improperly, or falsely”.

Fraud in the citizenship context

Fraud may occur at any stage in a person’s migration or citizenship journey. In assessing whether to exercise the power under section 34AA to revoke a person’s citizenship, the type of fraud that is relevant to the assessment is fraud that has contributed to the person’s acquisition of citizenship. Therefore, it is necessary to assess whether a person has gained citizenship unfairly, dishonestly or as a result of misrepresentation.

For example, fraud may occur in the visa application process, with the result that a person is granted a visa which has enabled them to meet the residence requirement for citizenship. Other general examples include, but are not limited to:

- Fraudulent documents – these may be altered documents or counterfeit documents used to support an identity or an application, including requests for residence discretions.
- Identity fraud – this may include imposters or document fraud.
- Non-disclosure of criminal convictions or other activities of concern – this may include the signing of the character declaration stating no criminal convictions where criminal history checks show otherwise.
- Fraudulent relationship claims– this may include in some circumstances, claims to citizenship by descent through non-biological parents or adoptive parents or non family members being included as part of a family unit in the migration context.

- Non-compliance with the rules of conduct for taking a citizenship test.

In addition, subsection 34AA(4) makes it clear that the concealment of material circumstances constitutes a misrepresentation.

Who has committed the fraud?

To enliven section 34AA, fraud or misrepresentation may have been committed by “any person”. This includes, but is not limited to:

- the person whose acquisition of citizenship is in question
- the parent of a child whose acquisition of citizenship is in question
- the family member of a person whose acquisition of citizenship is in question
- another third party.

What if the fraud does not constitute an offence?

This section will provide guidance on subsection 32AA(2) which provides that the fraud or misrepresentation does not need to have constituted an offence or part of an offence.

When to bring a case to the Minister for personal decision

The power to make a decision under section 34AA has not yet been delegated by the Minister. Pending further instructions, any case that may enliven the power under section 34AA is to be referred to the Citizenship Policy Section through the Citizenship Helpdesk.

When can a person’s citizenship be revoked?

This section will explain the different elements of the revocation power under section 34AA, and what is needed to make out each element.

Citizenship streams

This section will explain the citizenship streams that are affected by the section 34AA revocation power.

Reviewing allegations of fraud or misrepresentation.

This section will explain the process for referring a citizenship matter to Investigations for additional review and further action. It is anticipated that a citizenship officer would only refer a matter when there are reasonable grounds to suspect that fraud or misrepresentation has occurred. It is anticipated that the reviewer Criminal Investigations area would then either confirm that suspicion, to enable the Minister to be persuaded that fraud/misrepresentation has occurred, or indicate that there is not enough information evidence to pursue the matter.

Minister must be ‘satisfied’

The Minister must be ‘satisfied’ that the elements to ground the revocation have been made out. That is, the Minister must be satisfied that the person obtained approval to become a citizen as a result of fraud or misrepresentation connected with their visa or citizenship application.

This means that the Minister must be *actually persuaded* of the occurrence or existence of the fraud or misrepresentation to attain the requisite level of satisfaction. Given that there are serious consequences attached to the decision to revoke citizenship, the Minister’s satisfaction must be based on findings or inferences of fact that are supported by probative material or logical grounds. Probative material is material that establishes or contributes to proof of a fact or issue.

Officers should recognise that the process of reasoning that is necessary to arrive at the decision to revoke a person’s citizenship must reflect the seriousness of such a decision. This means that the evidence relied upon needs to be exact, definite and result in a direct inference that approval of the person’s acquisition of citizenship was a result of fraud or misrepresentation. The decision to revoke citizenship must therefore be legally defensible, based on the evidence at hand.

This section will be expanded to include a non-exhaustive list of examples of the type of evidence and material that might be needed for the Minister to be satisfied of the existence of fraud or misrepresentation. For example, documentary evidence that a person acquired citizenship using a false identity is likely to be more probative than a mere allegation.

Time limit

Subsection 34AA(3) states that the power to revoke citizenship under section 34AA is only available if the fraud or misrepresentation occurred during the period of 10 years before the day of the revocation. This means that where a person has become an Australian citizen and become a long-standing member of the Australian community, such a person will not have their citizenship revoked.

Factors to take into account

This section sets out a range of considerations for officers to take into account when assessing whether to bring a case to the Minister for consideration under section 34AA. These considerations include international law obligations, such as interpretation of the *Convention on the Reduction of Statelessness 1961* and the *Convention on the Rights of the Child 1989*.

Public interest test

Section 34AA contains a public interest test at subsection (1)(c):

“the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.”

This means that the public interest is a mandatory consideration when making decisions under section 34AA.

This section will outline the factors an officer should take into account when considering the public interest. It will make clear that the public interest is focused on issues of concern to the community or a segment of the community. For example, it may be in the public interest to ensure that citizenship is not acquired by a person whose identity is in question.

Statelessness

The Citizenship Act permits a person to have their citizenship revoked even if it would render them stateless, if the citizenship was acquired by fraud or misrepresentation. This is consistent with Article 8 of the *Convention on the Reduction of Statelessness 1961*.

However, it may not be reasonable to render a person stateless if the fraud was committed by a third party without the knowledge of the person whose citizenship is in question.

Any person who has their citizenship revoked in Australia will automatically acquire an ex-citizen visa. Officers should refer to section 8.1 of the ACIs, which discusses the ex-citizen visa.

This section will contain detailed guidelines on how to consider and discuss statelessness when bringing a section 34AA case to the Minister. The issues that officers must consider include, but are not limited to:

- *the likelihood of the person's ex-citizen visa being cancelled and of the person being liable to be removed from Australia*
- *any particularly vulnerability that the person might face as a result of statelessness*
- *whether the person can be removed to another country despite their being stateless*
- *whether the person might be eligible to avail themselves the temporary care of the International Organization for Migration.*

Best interests of the child

Officers should refer to chapter 18 of the ACIs, which provides guidance on how to consider the best interests of child.

Where the Minister is considering whether to revoke a child's citizenship under section 34AA, because of fraud on the child's visa or citizenship application, the Minister must take into account the best interests of the child.

A child may also lose their citizenship if the Minister revokes their parent's citizenship under section 36 of the Act because of fraud on the parent's visa or citizenship application. In this case, the Minister must not revoke the child's citizenship if this would render the child stateless. This is because the fraud is not related to the child's application.

Procedural fairness / natural justice

This section will outline the natural justice procedures that decision-makers must follow when making a decision under section 34AA.

Adverse information that may lead to revocation of a person's citizenship under section 34AA should be put to the person, at interview or in writing in a 'natural justice letter'. Detailed file notes should be made of any conversations with the person. The person should be invited to respond to, or comment on, the information within the time periods set out in ACI [section 17.4.3 Policy guidelines](#). The ultimate revocation decision record must detail the information relied on, the applicant's response and the basis for the decision.

Preparing a matter for the Minister

This section will outline issues which are to be included in any submission to the Minister, including:

- *details of the fraud or misrepresentation*
- *any evidence that has been relied upon*
- *the source(s) of the evidence*
- *the response of the applicant to the natural justice letter*
- *public interest analysis*
- *'best interests of the child' analysis, if applicable*
- *discussion of statelessness, if applicable.*



Parliament of Australia
The Senate

Senator Larissa Waters

Australian Greens Senator for Queensland



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24 November 2014

Response in relation to the *Stop Dumping on the Great Barrier Reef Bill 2014*

Dear Chair,

I write in response to the Committee's *Alert Digest No. 12 of 2014* (24 September 2014) concerning the *Stop Dumping on the Great Barrier Reef Bill 2014* (**the Bill**).

My responses to the Committee's comments are as follows.

Item 2, proposed subsection 10AA(1) - penalties

Subsection 10AA(1) provides that it is an offence to dump dredged material within the Great Barrier Reef World Heritage Area (GBRWHA), and imposes a penalty of 250 penalty units, 12 months' imprisonment, or both.

I consider the maximum penalty imposed by the Bill to be justified in the light of the overriding public interest in protecting the GBRWHA.

Item 2, proposed subsection 10AA(2) – strict liability offence

Subsection 10AA(2) provides that strict liability applies to the element of the offence that the dumping of dredged material occurs within the GBRWHA.

As explained in the explanatory memorandum, I consider a strict liability offence to be justified on the basis that defendant can reasonably be expected, because of his or her professional involvement in the dredging industry, to know the requirements of the law and the location of the GBRWHA.

Item 4 – commencement

This item provides that 'the amendments made by this Schedule do not apply in relation to dumping or loading if an approval or permission for the dumping or loading was granted on or before 9 December 2013 under the *Environment Protection and Biodiversity Conservation Act 1999*, the *Environment Protection (Sea Dumping) Act 1981* or the *Great Barrier Reef Marine Park Act 1975* (including regulations made under those Acts)'.

In response to the Committee's request, I confirm that dumping or loading in the GBRWHA pursuant to any approval or permission which was given on or after 10 December 2013 would be prohibited by the amendments. To be clear, the amendments only apply to dumping or loading which occurs after they commence, rather than criminalising past conduct.

The amendments do alter currently existing legal rights. For example, any dumping which has already occurred before the amendments commence would not be criminalised, whereas any future dumping in the GBRWHA at Abbot Point under the permit granted by Minister Hunt on 10 December 2013 would be prohibited.

I consider that the overriding public interest in protecting the GBRWHA, 69,000 jobs which it provides and the clearly expressed concerns of the World Heritage Committee opposing offshore dumping at Abbot Point justify the amendments.

Please feel free to contact my office on 07 3367 0566 or 02 6277 3581 if I can be of further assistance.

Kind regards,

Senator Larissa Waters

Australian Greens Senator for Queensland