



Australian
Human Rights
Commission

Australian Citizenship and Other Legislation Amendment Bill 2014

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUPPLEMENTARY SUBMISSION TO THE SENATE
LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION
COMMITTEE**

14 November 2014

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1 Introduction

1. This supplementary submission of the Australian Human Rights Commission responds to issues raised during the public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth) introduced by the Australian Government.

2 Revoking citizenship for fraud or misrepresentation

2. Section 4 of the Commission's primary submission dealt with the proposal to introduce new section 34AA into the *Australian Citizenship Act 2007* (Cth) (Australian Citizenship Act). This new section would allow the Minister to revoke a person's citizenship if the Minister was 'satisfied' that the person obtained approval to become a citizen as a result of fraud or misrepresentation connected with:
 - a. the citizenship approval granted by the Minister;
 - b. the person's entry into Australia;
 - c. the grant of any visa to the person prior to the approval to become a citizen.¹
3. The Commission's primary objections to the amendment were that:
 - a. the threshold for demonstrating fraud or misrepresentation would be reduced from proof in court beyond reasonable doubt, to a state of satisfaction by the Minister or the Minister's delegate;
 - b. if the decision was made by the Minister personally and included a statement that the Minister was satisfied that the decision was made in the public interest, there would be no merits review of this decision;²
 - c. the power could be exercised by the Minister for a period of up to 10 years after a person obtained citizenship, leading to considerable uncertainty of citizenship status.
4. The Commission agrees with the view expressed by the Australian Citizenship Council that 'there should be certainty of Australian Citizenship status, that the status should not be easily taken away, and should not be taken away simply by an administrative action by government'.³
5. The current procedure provides a balance between ensuring certainty of citizenship status while allowing serious cases of fraud and misrepresentation involved in the citizenship process to be prosecuted and result in a revocation of citizenship.
6. It is a power that has been used rarely, but is available in appropriate cases. The Australian Citizenship Council in its February 2000 report identified five cases where individuals had been convicted of making false statements in

their applications for Australian Citizenship and had their citizenship revoked as a result.⁴

7. An issue that was raised with the Commission during the public hearing was whether the requirement for a criminal prosecution meant that it was too difficult to address cases of potential fraud and misrepresentation. For example the Commonwealth Director of Public Prosecutions might decide that there was no reasonable prospect of obtaining a conviction because relevant witnesses were not available.⁵ This may not mean that there was no fraud or misrepresentation, only that the Commonwealth DPP was not in a position to be able to prove it.
8. The Commission was asked whether the power in s 34AA could be retained to deal with such cases, along with 'safeguards—which are capable of being exercised on the basis of merit, on the decisions of the minister in these areas'.⁶
9. The Commission considers that if s 34AA is retained in the Bill, two safeguards would be necessary. First, there should be merits review of all decisions under s 34AA to ensure that any errors in the decision making process are able to be adequately addressed. Secondly, any administrative action to revoke citizenship for fraud or misrepresentation based on this lower threshold should be taken promptly. This would increase the certainty of citizenship status and provide more fairness to applicants in being able to respond to allegations of misrepresentation.
10. The requirement for prompt action in relation to revocation based on fraud and misrepresentation applies equally to revocation based on an assessment that a person who acquired citizenship by descent was not of 'good character' at the time citizenship was registered.
11. These two safeguards are dealt with in more detail below.

2.1 Merits review

(a) Revocation based on fraud or misrepresentation

12. The Bill provides that the new power in s 34AA (to revoke citizenship as a result of satisfaction of fraud or misrepresentation) is subject to merits review in the Administrative Appeals Tribunal (AAT).⁷
13. If either the applicant or the Minister considers that there were legal errors in the decisions of the AAT on review, then they may appeal to the Federal Court.⁸ This is a right to appeal on questions of law (not questions of fact). However, the legal issues are not limited to jurisdictional error.⁹
14. Ordinarily, the fact that s 34AA is subject to merits review would mean that the power would attract merits review regardless of whether it was exercised by the Minister personally or by a delegate of the Minister.

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15. However, as a result of proposed s 52(4), if the Minister exercised the power personally and stated that the decision was made in the public interest, then merits review would be excluded.
 16. For the reasons set out in section 6 of the Commission's primary submission, the Commission has concerns about the range of decisions that could be made without independent scrutiny on the merits if proposed s 52(4) is enacted. The Commission is particularly concerned that the power to revoke citizenship under s 34AA could be exercised without any merits review.
 17. The Administrative Review Council notes that 'review tribunals make a strong contribution to openness and accountability of government by providing persons affected by government decisions with a fair and open process for testing those decisions'.¹⁰
 18. The overall objective of the merits review system is to ensure that all administrative decisions of government are correct and preferable.¹¹ A 'correct' decision is one made according to law. The 'preferable' decision is the best decision that could have been made on the basis of the relevant facts.¹²
 19. If there are factual errors made by a primary decision maker, merits review provides an opportunity to correct these errors. There are also other reasons why a review tribunal could come to a different conclusion from a primary decision maker. For example, there may be new information provided to a review tribunal that was not before the original decision maker and that is relevant to consider. Tribunals tend to deal with a lower volume of decisions than primary decision makers and can therefore devote more time and resources to the consideration of individual cases. This gives them a greater prospect of coming to the best possible (preferable) decision.¹³
 20. Where the consequences for individuals from an administrative decision are particularly serious, as they are when considering whether a person's citizenship should be revoked, then it is appropriate for the decision to be subject to merits review. If not, there is a higher risk of a making the wrong decision.
 21. The simplest way to address the issue of lack of merits review is for the proposed s 52(4) to be removed from the Bill.
- (b) *Refusal to approve based on character or identity*
22. Different merits review issues are raised by proposed s 52A which would allow the Minister to set aside certain decisions by the AAT based on character or identity issues. This supplementary submission does not deal with those issues.
 23. As set out in more detail in section 5 of the Commission's primary submission:
 - a. this is contrary to the usual process of merits review
 - b. the usual course for the Minister to take if the Minister is dissatisfied with a decision of the AAT is to appeal to the Federal Court.

2.2 Decisions to revoke citizenship should be made promptly

24. The Bill provides that a person's citizenship could be revoked under the new power in s 34AA for a period of up to 10 years after it was granted.
25. Similarly, proposed s 33A would allow the Minister to revoke citizenship acquired by descent for an undefined period after it was granted if the Minister becomes satisfied that the person was not of good character at the time they were registered as a citizen.¹⁴
26. The Commission submits that decisions to revoke citizenship under either s 33A or s 34AA should be made promptly.
27. Allowing citizenship to be contingent on the satisfaction of the Minister about various matters for a period of 10 years after it is granted creates significant uncertainty about citizenship status. It is apt to create two classes of citizen: one whose rights are secure and one whose rights may be removed by a simple administrative decision by Government.
28. In one sense, those who are granted citizenship following application would be on a period of probation for up to 10 years, albeit citizenship could only be revoked based on events that occurred prior to its acquisition.
29. The longer the period of time before a decision to revoke citizenship, the greater the potential unfairness to the citizen. For example, if a decision is made to revoke citizenship because of an alleged misrepresentation in relation to an application for a visa that was made by the citizen many years ago, the citizen may no longer have access to documents or witnesses to meet this claim.
30. When considering what time limit should apply to these revocation powers, the Commission submits that guidance can be obtained from other parts of the Bill dealing with the time required to investigate questions of fraud.
31. In particular, the Bill proposes to increase the period of time that the Minister could delay a person making the pledge of commitment from one year to two years.¹⁵ The reason given for extending this period of time was as follows:

*This amendment recognises the fact that investigation into some matters that may lead to the cancellation of approval, including criminal offences such as fraud, can take longer than 12 months, and that a period of 12 months' delay in making the pledge of commitment is not sufficient to allow the Minister to determine whether or not approval should be cancelled.*¹⁶

(emphasis added)

32. The proposed extension to two years was put forward so that the Minister would have sufficient time for investigation into relevant matters, including questions of fraud.
33. The Minister may cancel a person's approval to become a citizen by conferral before the pledge of commitment is made if the Minister is satisfied that the person is not of good character. This does not apply to citizenship by descent

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because people acquiring citizenship by decent become Australian citizens on the day that the Minister gives approval (s 19). There is no requirement for this group to make the pledge of commitment.

34. The difference in timing is put forward as one reason for the proposed power of revocation of citizenship acquired by descent in s 33A (on the basis that the person was not of good character at the time their citizenship was registered). The Explanatory Memorandum says:

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. 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.¹⁷

35. Given the similarity between the provisions dealing with:

- a. cancellation of approval of citizenship by conferral on character grounds; and
- b. revocation of citizenship by descent on character grounds,

the Commission considers that revocation under s 33A on character grounds should be time limited in the same way as cancellation on character grounds. That is, revocation under s 33A on character grounds should be limited to a period of two years after registration.

36. Similarly, given that the Explanatory Memorandum suggests that a delay of two years in taking the pledge is sufficient to investigate issues of fraud, the Commission considers that revocation under s 34AA (for fraud or misrepresentation) should also be limited to a period of two years after citizenship is granted.

3 Recommendations

37. The Commission's primary position is that revocation for fraud or misrepresentation under s 34AA is unnecessary because s 34 already strikes an appropriate balance between certainty of citizenship status and dealing with serious fraudulent conduct.

38. However, if the Government proceeds with s 34AA in the Bill, the Commission recommends that this only occur subject to the safeguards provided by the following amendments:

- a. in item 64, amend s 33A to provide that the Minister must not decide under subsection (1) to revoke a person's Australian citizenship because of a failure to comply with s 16(2)(c) or (3)(c) if a period of two years has elapsed since the person was registered as a citizen under s 18
- b. in item 66, replace the words '10 years' with '2 years' in s 34AA(3)

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- c. delete item 72, containing proposed s 52(4) which would make the Minister's personal decisions unreviewable in the AAT.

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- ¹ Proposed s 34AA, Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth) (**Bill**), Sch 1, Pt 1, item 66, p 21.
- ² This was because of the operation of proposed s 52(4) of the Bill, dealt with in section 6 of the Commission's primary submission.
- ³ Australian Citizenship Council, Australian Citizenship for a New Century (February 2000), p 67.
- ⁴ Australian Citizenship Council, Australian Citizenship for a New Century (February 2000), p 68.
- ⁵ Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Committee Hansard*, Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth), 10 November 2014, p 19 (Senator Barry O'Sullivan).
- ⁶ Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Committee Hansard*, Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth), 10 November 2014, p 19 (Senator Barry O'Sullivan).
- ⁷ Proposed amendments to s 52(1)(f), Bill, Sch 1, Pt 1, item 70, p 22.
- ⁸ *Administrative Appeals Tribunal Act 1975* (Cth), s 44.
- ⁹ See paragraphs 45 to 47 of the Commission's primary submission.
- ¹⁰ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39 (1995) at [2.31]. At <http://www.arc.ag.gov.au/Documents/ARC+REPORT+39.pdf> (viewed 11 November 2014).
- ¹¹ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39 (1995) at [2.9]. At <http://www.arc.ag.gov.au/Documents/ARC+REPORT+39.pdf> (viewed 11 November 2014).
- ¹² Administrative Review Council, *What decisions should be subject to merit review?* (1999) at [1.3]. At <http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjectto meritreview1999.aspx> (viewed 11 November 2014).
- ¹³ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39 (1995) at [2.53]-[2.63]. At <http://www.arc.ag.gov.au/Documents/ARC+REPORT+39.pdf> (viewed 11 November 2014).
- ¹⁴ See section 9.2 of the Commission's primary submission.
- ¹⁵ Proposed s 26(4), Bill, Sch 1, Pt 1, item 56, p 17.
- ¹⁶ EM at [332].
- ¹⁷ EM at [401].