Submission to the Legal and Constitutional Affairs Legislation Committee of the Senate

Inquiry into the Australian Citizenship and Other Legislation Amendment Bill 2014

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I am grateful to the Committee for the opportunity to make a submission on this Bill, albeit within a very short time frame and I would be happy to appear before the Committee in person if practically possible. I am based in Canberra and if I am unable to be present at your Sydney hearing on Monday 10 November I would be very happy to meet with the Committee on another occasion shortly after, or via teleconference on another occasion.

I am the author of *Australian Citizenship Law in Context* (2002, Law Book Co) and in 2015 a second edition of the book, *Australian Citizenship Law* will be printed by Thomson Reuters.

In addition, as a practitioner on the roll of the High Court of Australia, I have been Counsel in three High Court matters concerning Australian citizenship and am presently counsel in a matter before the Full Federal Court regarding the interpretation of the 2007 Act.

Between November 2004 and 30 June 2007, I was a consultant to the Commonwealth of Australia, represented by the then Department of Immigration and Multicultural and Indigenous Affairs, now the Department of Immigration and Border Control (the Department) in relation to its review and restructure of the Australian Citizenship Act 1948 which resulted in the Australian Citizenship Act 2007 which came into force on 1 July 2007 and which this current Bill seeks to amend.

I would like to stress that I have *not* been a consultant to the Department and have not been involved in any way with this amendment Bill.

In 2008 I was a member of the Independent Committee established by the then Minister for Immigration and Citizenship, Chris Evans, reviewing the Australian Citizenship Test. I therefore assisted in the drafting of its report *Moving Forward: Improving pathways to Citizenship* http://www.citizenship.gov.au/_pdf/moving-forward-report.pdf

Purpose of this Bill:

I understand that this Bill: " is a government bill that seeks to amend key provisions of

the Citizenship Act 2007(Cth) related to character requirements, residency requirements, cancellation of an approval, deferral of a citizenship pledge, revocation of citizenship, the use and disclosure of personal information and other ministerial powers to enable the expanded use and disclosure of personal information."

I would like to comment on the following 5 aspects set out as subheadings below, and given the limited time allowed for preparing submissions, I'd be grateful to have an opportunity to amplify my comments in person.

The Citizenship Act is concerned with broader matters than the migration program, and these changes highlighted below place too much weight on migration policy over inherent issues about membership of a nation-state that the Citizenship Act is directed to.

I refer the Committee to look the preamble to the Act and I am happy to discuss this further in person.

1. Breaking the linking of residence with birth for automatic citizenship

There are significant policy issues in altering the impact of section 12 (1) (b) by adding in exceptions to its application. The exceptions are all set out in paragraphs 67 through 75 of the EM.

I am concerned that all these exceptions undermine the purpose of s 12(1)(b).
The policy underpinning s 12 (1) (b) is to include as automatic citizens children born in Australia who do not satisfy 12 (1) (a) but who are identified as citizens due to developing a significant connection to Australia through residence in the first 10 years of their life. Before 1986 all children born in Australia were Australian citizens by birth. When the Act changed, there was a desire that a further connection through a PM parent or Citizen parent was needed, but also that birth and residence together represented a significant connection to Australia that should be automatically recognized at the age of ten.

Those first ten formative years are crucial and the amendment proposed undermines the significance of those significant years as an expression and acceptance of membership through residence, regardless of one's formal visa status.

As Attachment A to the Bill regarding the Statement of Compatibility with Human Rights states at page 9:

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

I would caution against an approach that impacts upon this important principle and am happy to expand on this in person.

2. Altering the principles of Citizenship By Descent and by Adoption

Changes proposed to Sections 16 and 19 reflect a departure in my view from foundational principles associated with passing on one's citizenship to one's children – either through citizenship by descent provisions or through adoption provisions.

Throughout the world, individuals are entitled to citizenship either through birth in a territory or through descent of a parent who has the connection to the State. In addition of course, all countries do provide for citizenship by conferral to those who migrate to the country and different countries have their own policies about conditions associated with conferral through migration. But there is a strong resemblance regarding citizenship by birth and citizenship by descent throughout the world.

This Act seeks to limit citizenship by ***Descent***, in similar terms to limitations on citizenship by ***conferral*** through migration routes – ie through requiring the child to now be covered by the character provisions.

This is a significant departure from citizenship policy that broadly recognizes a connection to a State through a parent, regardless of the character of the children. Character was previously only relevant to a child who was essentially no longer a child, and was over 18 and had not taken up their citizenship by descent as a child, and so who as adults were required to be considered for character purposes.

As the EM explains at paragraph 100:
The amendment recognises the fact that people under the age of 18 sometimes have significant character concerns and/or have committed particularly serious crimes, and that the Minister should therefore have the discretion to refuse to approve such a person becoming an Australian citizen under section 17 of the Act. In practice, the effect of the amendment is that the Minister would now seek criminal history records for 16-17 year-olds. However, if the Minister becomes aware of an applicant who has character issues and is aged younger than 16, it would be possible to assess that applicant against the character requirement.

I would be concerned that character matters for children would be the beginning of an unfair assessment of a child that should be not relevant to determining access to citizenship. This proposed change is not dissimilar for instance to deciding to put a limit on automatic citizenship in territory, conditional upon the character of the child at the age of 10 for instance. That child is still a child of an Australian citizen and there is a presumption that by virtue of that family relationship there is a connection to the Australian people.

Again I would caution very strongly against such an approach as undermining of broader citizenship principles.

3. Broader concerns about Children and Character

I am also concerned about this amendment bill seeking to more broadly see character as important to children's access to citizenship. This is also seen through the proposed changes to s 21 (5).

I am not re-assured by the statements in Attachment A – *Statement of Compatibility with Human Rights* that the ACIs will provide a necessary protection to the principles under the Convention on the Rights of the Child being given sufficient weight in decisions concerning children and character. Unless this is specifically written into the Act, that the Minister in making decisions relating to character MUST take into account the Convention and give it appropriate weight, then it is difficult to see how character and the supposed interests of the State won't take precedence in a way that prejudices the best interests of the child.

4. Linking questions of identity with character

I would also challenge the statement in the last sentence of paragraph 452:

"In addition, the provision of a false identity is intrinsically related to the question of whether the person is of good character."

There are many examples where this is not intrinsic at all, and this presumption is undermining of many members of the community who for a range of reasons, not linked to their own good character, have a 'false identity' in the sense that there are inconsistencies between their birth certificates for example and other aspects of their life. They should not be denied membership of the community that they will remain a part of due to this presumption.

5. Comments regarding Attachment A – Statement of Compatibility with Human Rights

I am concerned that some of the comments in Attachment A are not entirely accurate.

On page 5 of the attachment it says:

"The proposed amendments will insert the equivalent of subsection 24(6) *Offences* into the descent, adoption and resumption provisions so that the same bar applies to all citizenship streams. This will ensure that applicants in all citizenship streams must meet the same requirements in relation to criminal history. This upholds the intent of the Act, as expressed through the Preamble, where the full and formal membership of the Australian community is available to people who will accept to undertake obligations of citizenship, including respecting the rights and liberties of others and upholding and obeying the laws of Australia."

I do not agree that this upholds fully the intent of the Act – the Preamble distinguishes between paragraphs 1 and 2 regarding conferral. Citizenship by descent and adoption are different to the general eligibility terms for persons transitioning from permanent residence to citizenship.

There is a difference between entitlement to citizenship through a family relationship and through migration and this has not been factored into the Statement of Compatibility.

I would be happy to elaborate upon this submission in person.

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