



# Refugee Council of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

## **AUSTRALIAN CITIZENSHIP AND OTHER LEGISLATION AMENDMENT BILL 2014**

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing 200 organisations and more than 900 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the *Australian Citizenship and Other Legislation Amendment Bill 2014*. We have a number of concerns regarding the potential impacts of this legislation on refugee and humanitarian entrants, particularly children. RCOA believes that the Bill fails to include adequate safeguards against permanent disenfranchisement and statelessness and allows for too high a degree of Ministerial discretion in decision-making related to citizenship. As such, RCOA recommends that the Bill not be passed in its current form.

### **1. Significance of citizenship for refugee and humanitarian entrants**

- 1.1. While the amendments proposed in this Bill do not apply exclusively to refugee and humanitarian entrants, RCOA believes that they are likely to have a disproportionate impact on this group. Unlike migrants, refugee and humanitarian entrants are unable to return to their country of origin due to having a well-founded fear of persecution or other forms of serious harm. As such, even if their citizenship of that country is recognised, their capacity to exercise and enjoy the rights associated with citizenship is inherently limited.
- 1.2. Measures which limit eligibility for citizenship or allow greater scope for revocation of citizenship could thus have a particularly negative impact on refugee and humanitarian entrants as opposed to other migrants, as they do not have the option of exercising their citizenship rights elsewhere. The passing of this Bill in its current form could effectively result in the permanent disenfranchisement of some individuals from refugee backgrounds, including people who have lived in Australia for their entire lives.
- 1.3. RCOA is similarly concerned about the potential impacts of this legislation on stateless people, for whom access to citizenship is a primary concern. The provisions of the Bill may restrict access to citizenship for some stateless people and even allow for some individuals to be rendered stateless through revocation of citizenship. As Australia currently lacks clear processes for assessing and resolving the status of stateless people, there is a risk that the Bill could result in some individuals facing permanent statelessness.

### **2. Changes to the ‘ten year rule’**

- 2.1. The changes to the ‘ten year rule’ outlined in this Bill could have significant implications for children born in Australia whose parents arrived in Australia as asylum seekers without valid visas. Under the proposed amendments to section 12 of the *Citizenship Act*, these children would be ineligible for Australian citizenship by birth, solely on the basis of their parents’

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migration status. The amendments would also affect children who (through no fault of their own) became unlawful at any time between their birth and tenth birthday, even if their parents arrived in Australia lawfully.

- 2.2. The proposed changes to the 'ten year rule' would thus essentially allow children to be penalised for the actions of their parents. In our view, this is incompatible with the principle that, in all actions concerning children, the best interests of the child should be a primary consideration. We do not believe that the imperative to maintain the integrity of the citizenship program justifies the denial of citizenship, on the basis of actions over which they had no control, to children who (as noted in the Statement of Compatibility) "were born in Australia, have spent their formative years here and have their established home here". RCOA believes that denying the right of citizenship by birth to these children is an unjustifiably severe penalty when weighed against concerns about the current operation of the 'ten year rule'.
- 2.3. RCOA is also concerned that the changes to the 'ten year rule' could permanently disenfranchise some refugee children. The Statement of Compatibility for Human Rights accompanying the Bill notes that stateless children affected by these amendments would still have access to citizenship under section 21(8) of the *Citizenship Act*. However, it fails to consider the situation of refugee children who may have no other avenue through which to obtain Australian citizenship.
- 2.4. The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* currently before Parliament seeks to reintroduce Temporary Protection Visas (TPVs) for refugees who arrived in Australia without valid visas. Under the model currently proposed by the Government, TPV holders would not be permitted to apply for permanent residency or citizenship in Australia except at the discretion of the Minister. As such, some TPV holders may never be eligible for Australian citizenship even if they reside in Australia for many years.
- 2.5. Consequently, children born in Australia whose parents are TPV holders may have no means of acquiring Australian citizenship other than through the 'ten year rule'. Passing the Bill in its current form could render these children permanently ineligible for Australian citizenship. Unable to return to the country of their parents' origin due to fear of persecution and barred from obtaining citizenship in the country where they have lived for their entire lives, they may never have the opportunity to enjoy the rights associated with citizenship.

### **Recommendation 1**

RCOA recommends that the proposed amendments to section 12 of the *Citizenship Act*, relating to the 'ten year rule', not be passed.

## **3. Revocation of citizenship on the basis of fraud or misrepresentation**

- 3.1. RCOA believes that the proposed changes to section 34 of the *Citizenship Act* would grant the Minister too high a degree of discretion in revoking citizenship on the basis of fraud or misrepresentation. If these amendments are passed, the only requirement which must be satisfied in order for the Minister to validly revoke citizenship on the basis of fraud or misrepresentation is that the Minister be satisfied that such fraud or misrepresentation has occurred. There is no requirement that a person be found guilty of fraud or even that evidence of fraud must exist. Essentially, the amendments would permit revocation of citizenship on the basis of the Minister's personal opinion alone.
- 3.2. RCOA is concerned that the introduction of such broad discretionary powers would be incompatible with standards of procedural fairness. While the Statement of Compatibility states that it will be "open to the Minister to consider arguments that a client was unaware of the fraud when deciding whether to revoke" citizenship, the Bill itself does not *require* the Minister to do so. As such, it will also be "open to the Minister" *not* to consider such arguments. The Statement of Compatibility similarly claims that the Minister would afford children affected by these amendments "the opportunity to be heard" but again, this is not

stipulated in the Bill itself. In RCOA's view, procedural fairness in decision-making on such significant matters should not rely on the Minister's goodwill but should be considered a basic entitlement.

- 3.3. RCOA rejects the argument put forward in the Statement of Compatibility that discretionary Ministerial powers are necessary due to the limited availability of resources to "prosecute all but the most serious fraud cases in light of competing prosecutorial priorities". Resource constraints are not, in RCOA's view, a sufficient justification for the denial of procedural fairness, particularly in light of the potentially serious consequences of citizenship revocation for the individual concerned.
- 3.4. Furthermore, the Government has provided no explanation as to why such broad discretionary powers are needed to achieve the stated aims of the Bill. The proposed amendments would lower the threshold for revocation from a conviction of fraud by a court to the mere suspicion of fraud in the opinion of a single Minister. RCOA can see no reason why this threshold must be lowered so dramatically or why the amendments could not include safeguards, such as a requirement that there be objective evidence of fraud or an exemption for individuals who were unaware that fraud had occurred.
- 3.5. RCOA is particularly concerned by provisions of the Bill which would allow a child's citizenship to be revoked due to the child's own acts of fraud or misrepresentation, even if doing so would render that child stateless. We believe that these amendments are fundamentally incompatible with Australia's obligations under the 1961 Convention on the Reduction of Statelessness, which stipulates that states should not deprive a person of their nationality if doing so would render them stateless.
- 3.6. While the Convention does allow for exceptions in cases where citizenship has been obtained through misrepresentation or fraud, RCOA believes that it would be inappropriate to apply this standard to children without taking into account their unique needs and vulnerabilities. There is a long-standing international consensus that children are inherently more vulnerable than adults and are therefore entitled to special care and protection. We do not accept that a child should be held to the same standards as an adult in relation to culpability for (alleged) acts of fraud – particularly where the consequences for the child concerned could be so serious.
- 3.7. RCOA is also greatly concerned that the Bill fails to outline a process or mechanism whereby children rendered stateless by the revocation of citizenship could resolve their status. Merely granting a stateless child an ex-citizen visa will do nothing to address their statelessness, nor will it provide them with the rights and protections associated with citizenship. In the absence of a clear status resolution process for stateless people, the passing of this Bill could result in some children being permanently disenfranchised.

#### **Recommendation 2**

*RCOA recommends that the proposed amendments to section 34 of the Citizenship Act, relating to the discretionary revocation of citizenship in cases of suspected fraud or misrepresentation, not be passed.*

#### **4. Limitations on merits review**

- 4.1. RCOA is concerned by the proposed amendments to section 52 of the *Citizenship Act*, which would grant the Minister discretionary powers to overturn the findings of the Administrative Appeals Tribunal (AAT) and prevent merits review of decisions made personally by the Minister in the public interest. We believe that these provisions would grant the Minister an inappropriate level of discretion in decisions relating to citizenship and would thereby significantly undermine the rule of law and the purpose of independent merits review.
- 4.2. RCOA acknowledges the assurances provided in the Explanatory Memorandum that the Minister's discretionary powers "would be used sparingly" and that cases would not be excluded from review "as a matter of course". While this may be the intention of the proposed amendments, the Bill places very few restrictions on the exercise of these discretionary

powers, relying largely on an undefined “public interest” test. As such, the potential application of these powers is very broad and there is no legislative guarantee that they will indeed be used “sparingly”.

- 4.3. RCOA is particularly troubled by statements in the Explanatory Memorandum which assert that personal Ministerial powers are necessary to ensure that the findings of “an unelected administrative tribunal” will reflect “community standards and values”. The purpose of independent merits review is to ensure that individuals subject to the decisions of government officials are able to receive a fair hearing, in accordance with Australian law. Administrative tribunals are intentionally “unelected” and independent to ensure that their decision-making will not be influenced by political considerations or the vagaries of public opinion. Allowing the Minister to overturn the findings of the AAT and limiting the AAT’s remit in the manner proposed in this Bill would essentially defeat the purpose of independent merits review.
- 4.4. Furthermore, RCOA can see little justification for the introduction of such broad discretionary powers. The Explanatory Memorandum cites only six cases in which findings of the AAT are alleged to be at odds with “community standards and values” and provides no information as to why the AAT chose to overturn the Minister’s decision in these cases. It would appear that the scale of the problem is very small even by the Government’s own admission, which raises questions as to why such broad and potentially far-reaching powers are needed.
- 4.5. RCOA rejects the assertion that judicial review is an adequate substitute for administrative merits review. The role of judicial review is to assess whether a legal error was made in the handling of a particular case, not whether the case itself has merit. As such judicial review must be seen as a complement to (not a substitute for) merits review, as its purpose is fundamentally different. It is not acceptable, in RCOA’s review, to justify the denial of merits review on the basis that a person would have the opportunity to seek judicial review.

***Recommendation 3***

*RCOA recommends that the proposed amendments to section 52 of the Citizenship Act, relating to merits review of decisions related to citizenship, not be passed.*