Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Australian Citizenship and Other Legislation Amendment Bill 2014

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> *The Public Law & Policy Research Unit (PLPRU) at the University of Adelaide contributes an independent scholarly voice on issues of public law and policy vital to Australia's future. It provides expert analysis on government law and policy initiatives and judicial decisions and contributes to public debate through formulating its own law reform proposals.*

The submission has been read and endorsed by the following PLPRU members:
Dr Gabrielle Appleby, Dr Peter Burdon, Dr Laura Grenfell, Associate Professor Anne Hewitt, Professor Lisa Hill, Dr Cornelia Koch, Dr Rebecca LaForgia, Anna Olijnyk, Professor Rosemary Owens

1. General Principles of Citizenship

At its core, citizenship determines which people are irrevocably members of the Australian community, and whose residence in Australia is secure against legislative or executive interference. Citizenship in Australia is also associated with particular membership rights such as the right to participate in the Australian political system, either as a candidate for elected office, or as a voter.

There are two pathways to becoming an Australian citizen. Some people become citizens as a result of a combination of birth, ancestry and long term residence in Australia and do not

have to apply for citizenship (automatic citizenship). Others become citizens through application and conferral after a period of residence (citizenship through application).
Countries vary considerably in their attribution of citizenship. Under US Constitution, a person born in the US is automatically a citizen. In Germany, German ancestry alone is sufficient for citizenship even if a person has not resided in Germany. All countries recognize citizenship on the basis of some combination of ancestry (*jus sanguine*), birth (*jus soli*), and residence.

Despite there being two pathways to citizenship in Australia, it is a fundamental principle that there is a single Australian citizenship; that is, citizenship conferred by application is as secure as, and has the same rights and duties attached to it as, automatic citizenship. The primary and irrevocable benefit of citizenship is that people can reside in Australia as a member of the Australian community until their death. Their citizenship cannot be revoked thereby leaving them either stateless or forcing them to rely on the protection of another country in which they may have residency rights. This is a necessary incidence of citizenship in a world organized into nation-states.

The irrevocable nature of citizenship means that conferral of citizenship through application needs to be performed diligently to ensure applicants meet the criteria for citizenship. On the other hand, those applying for citizenship are already permanent residents in Australia, and in most cases have participated fully in Australian cultural, economic and social life. More than anything, citizenship is a confirmation of this connection to Australia, adding security of residence and political participation to the existing membership rights of permanent residents. It is also important to acknowledge that most permanent residents applying citizenship have already been through a rigorous investigation of their identity and character. In our submission, then, it is important not to add substantial barriers to the conversion of permanent residence to citizenship.

In this submission, we focus on provisions in the Australian Citizenship and Other Legislation Amendment Bill 2014 that makes a number of changes to the process for becoming an Australian citizen automatically and by application. We submit that the Bill places additional barriers on the application process that are unnecessary, not properly justified or which we submit are inconsistent with the core notion of Australian citizenship. We also submit that the diminution of merits review places an unwarranted and unchecked power of decision making in the Minister for Immigration.

2. Criteria for Citizenship

a. Character requirements extended to minors

Currently, a person 18 years and older needs to be of good character to be eligible to apply for citizenship. The primary check of character is whether the applicant has been convicted of the commission of a serious offence. The Bill extends the character requirement to applicants under 18, on the basis that character is also relevant to applicants who are minors.

There are two concerns here. First, if parents of minors successfully apply for citizenship, the citizenship of minors should not be refused on character grounds, as this risks the permanent separation of the nuclear family, which is contrary to the best interests of the family themselves, and also the Australian community. Second, the commission of offences by minors is an unreliable measure of character. We distinguish between adults and minors in the criminal law precisely because there is a much greater prospect for the rehabilitation of minors.

b. Changing the 10 year residence requirement for persons born in Australia

Under the Australian Citizenship Act 2007, people are eligible to acquire citizenship automatically if they are ordinarily resident in Australia for 10 years from their birth. The bill introduces a new subsection 12(4) that limits automatic acquisition of citizenship to those persons who have maintained lawful residence in Australia throughout the 10 years since their birth. This amendment will affect two groups of prospective citizens in particular. First, children of asylum seekers who are designated unlawful non-citizens until they are granted a protection visa; second children of illegal immigrants living in the community with no visa who have had children while living illegally and undetected in Australia.

If parents of a child who has lived in Australia since birth remain or become unlawful non-citizens, this does not reflect on the behavior or the needs of the child. In our submission, it is wrong in principle to deny automatic citizenship to a child who was born in Australia and spent their first 10 years living in Australia, regardless of their immigration status. There is no ground to deny full membership in the Australian community to a person who speaks Australian English, has only Australian and Australian-based friends, has lived only in the Australian landscape, is steeped in Australian culture, and has experienced all of their education in Australia. Young people in this position should have the full security of residence and other rights and duties of an Australian citizen, whether or not they have citizenship status in another country. Their immigration status, or that of their parents, is irrelevant to the depth of their connection to Australia. To use immigration status as a ground to deny citizenship is to put form over substance.

We acknowledge that the motivation for this amendment is a concern that the ten year rule has the 'effect of encouraging some temporary residents and unlawful non-citizens to have children in Australian and to keep their child onshore until at least their tenth birthday'. We note that no evidence is given in support of this concern. Regardless, we submit that denying citizenship to children resident in Australia for 10 years from birth is not the means by which to prevent illegal immigration practices. Furthermore, young people born in Australia who are not subject to illicit immigration practices, such as children of asylum seekers born in Australia, will be affected by the law.

We submit further that there is a chance that the amendment is unconstitutional. Citizenship is not conferred in the Constitution. The Constitution creates a distinction between aliens and

non-aliens, and invests the Federal Parliament with the power over naturalization and aliens. The existence of a power over aliens suggests there is a constitutional status of 'non-alien', and the existence of a power to naturalize suggests there are people who are already 'natural' and not in need of naturalization. The High Court has held that non-aliens and citizens in Australia are effectively synonymous (*Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28).

In *Singh v Commonwealth* (2004) 222 CLR 322, a 5:2 majority of the High Court rejected the claim that a person born in Australia was automatically a non-alien. However, *Singh* does not resolve the extent to which Parliament's power with respect to aliens is limited. There must be a point at which a person's length of residence alone will mean they are automatically Australian. We would submit that for a child born in Australia, 10 years is at the outer limit of what the Court is likely to require under the Constitution for automatic non-alien status.

c. Revocation of citizenship

It is important to note that the grounds for revocation are limited to fraud in the application process. The rationale for revocation in these circumstances is that the person's application for citizenship was not a valid application and as a result they never effectively became an Australian citizen. Being limited to fraud in the application, the fundamental principle of the security of citizenship is maintained.

Under the current law, citizenship can only be revoked if a person has been convicted of an offence of fraud in relation to the citizenship application, or has failed to disclose the commission of a serious criminal offence for which they are subsequently convicted and sentenced to imprisonment for more than 12 months. If a person satisfies one or more of these criteria, the minister must also be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

The Bill introduces a new s 34(AA) that broadens the grounds upon which citizenship can be revoked. First, it does not require that a person be *convicted* of fraud for citizenship to be revoked. Under s 34AA(1), the Minister only needs to be personally satisfied that there was fraud involved in the application. Under s 34AA(2), the fraud may have been committed by any person and it need not to constitute an offence under the law. In our submission, these new provisions lower the bar too far, and have the perverse effect of rendering citizenship less secure.

For citizenship to be revoked the fraud should be personal to the applicant, it should constitute an offence, and the applicant should have received a conviction for the fraud offence. Furthermore, there ought to be an independent confirmation of the existence of these criteria. These limitations are important to safeguard the security of a person's citizenship. Although it is right and proper for the Department of Immigration to make rigorous and proper inquiries into a person's character and the integrity of their application *before* citizenship is granted, after citizenship is granted, the onus must fall squarely on the

Department to present clear evidence of fraud. The primary value of citizenship is the security it provides to the applicant. If grounds for revocation are too broad, and they can involve circumstances outside of the knowledge of the citizen, security of citizenship is compromised.

3. Improved decision making

We commend the measures in the Bill that are aimed at improving decision making. In particular, we commend the measures in the Bill improving access to citizenship by conferral for children who are granted an adoption visa overseas and whose adoption is finalised overseas, allowing them to enter Australia as citizens.

We agree that if personal information collected by the Department of Immigration and Border Protection is relevant to citizenship applications, but only for the limited purpose of establishing a person's identity and national security status.

We submit that provisions in the bill empowering the minister to personally set aside certain decisions of the AAT should be abandoned. In relation to applications for citizenship, which have important implications for applicants, it is of utmost importance that the 'correct and preferable' decision is made. Administrative review ensures decisions of the executive government satisfy this criterion.

It is not at all clear why the Act removes certain types of decision from review in the AAT. The new s 52(4) of the Bill provides that personal decisions of the Minister are not subject to review by the AAT if the Minister includes a statement that he/she is satisfied the decision was made in the public interest. The public interest criterion is very vague. For proper decisions to me made based on this criterion, the Minister needs to specify what matters he/she will take into account. With these matters specified, there is no reason why a Tribunal could not apply the same criteria to make the correct decision.

The new s 52A empowers the Minister to set aside decisions of the AAT if the Minister is 'satisfied it is in the public interest to do so'. The explanatory memorandum ([451], [452]) points to decisions of the AAT which is states are not consistent with community standards. If this is the opinion of the government, the best way to remedy it is to make a ministerial direction that will guide the AAT in future decision making, not to remove merits review in the AAT.

The new s 52B provides that the Minister must 'table a statement in Parliament where he or she has set aside a decision of the AAT under new s 52A. This requirement indicates the importance of transparency in the decision making process. However, in our submission, tabling a decision in Parliament is a cumbersome mechanism and provides no remedy for a person who is aggrieved by a decision that is made in error. Both transparency and good process are better served through the established merits review process.