Australian Government

Department of Immigration and Border Protection

14 November 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

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

Thank you for the opportunity for officers of the Department of Immigration and Border Protection (the department) to appear before the Senate Legal and Constitutional Affairs Committee (the Committee) by telephone on Monday 10 November 2014. We look forward to resuming the hearing next Wednesday, 19 November 2014, and will await the provision of any further questions. Following the department's appearance on 10 November 2014, I would like to provide the following initial comments on particular aspects of the Bill that were raised with and by the Committee.

Limiting automatic acquisition of citizenship at ten years of age to those persons who have maintained lawful residence in Australia throughout the ten years

2. The purpose of this proposed amendment is to ensure that citizenship by operation of law is only accorded to those persons who have maintained a lawful right to remain in Australia during the ten years from their birth. While this would prevent some people from acquiring Australian citizenship who otherwise would have done so, the amendment would not have the effect of rendering any person stateless.

3. The *Australian Citizenship Act 2007* (the Citizenship Act) provides, and would continue to provide, that a person born in Australia who is stateless has access to citizenship through subsection 21(8) of the Citizenship Act. Eligibility under subsection 21(8) is not in any way dependent on the migration status of the applicant's parents. The ten year rule amendments also do not prohibit children from applying under other pathways to Australian citizenship, such as citizenship by conferral, should they become eligible.

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4. The Public Law and Policy Research Centre submitted that there is a chance that this amendment is unconstitutional. They claim that there is a certain point where an alien will be automatically transformed into a non-alien simply by residing in Australia for ten years. They seek to support this argument by reference to the High Court decision in *Singh v Cth* (2004) 222 CLR 322. The department notes that the later decision of the High Court in *Koroitamana v Cth* (2006) 227 CLR 31 reconsidered the decision in Singh. In *Koroitamana*, Gleeson CJ and Heydon J stated:

> [14] Once one rejects the notion that birth in Australia (except in the case of children of foreign diplomats and members of armed forces) necessarily results in membership of the Australian community, then it is a short step to the conclusion that it is open to Parliament to decide that a child born in Australia of parents who are foreign nationals is not automatically entitled to such membership. It cannot be said of such a person that he or she could not possibly answer the description of alien.

In addition, Gummow, Hayne and Crennan JJ stated:

> [48] There is support in the decisions of this Court neither for the "constitutional citizenship" of those born in Australia, nor for the retention of that character until supervening dissociation with the Australian community by the constitutional citizen. The applicants could point to no authority for those propositions. That absence of authority is not surprising because to accept the applicants' argument would cut across the now settled position that it is for the Parliament, relying upon par (xix) of s 51 of the Constitution, to create and define the concept of Australian citizenship.

Master Mohammad Ferouz Myuddin

5. In her evidence to the Committee, Professor Triggs, of the Australian Human Rights Commission (AHRC), suggested a possible connection between the Bill's objectives and timing and potential applications for citizenship by children born in Australia to unlawful non-citizens, such as Master Myuddin.

6. The department refutes any such connection, as stated in the hearing. It has been reported in the press that lawyers acting for the Master Myuddin lodged an application for Australian citizenship on his behalf on the basis that he is stateless and meets the requirements of subsection 21(8) of the Citizenship Act. The Bill does not contain any provision that would impact on the requirements for citizenship set out in subsection 21(8) of the Citizenship Act.

Providing the Minister with power to set aside decisions of the Administrative Appeals Tribunal (AAT) if it would be in the public interest to do so and protecting personal decisions of the Minister from merits review

7. The Citizenship Bill provides the Minister with a power to personally set aside certain decisions of the AAT concerning character and identity if it is in the public interest to do so. It also provides that personal decisions made by the Minister in the public interest are not subject to merits review.

8. Possible alternatives to these measures which were raised during the hearing, such as further tightening of policy guidance in the Australian Citizenship Instructions (ACIs) or creation of a legislative instrument setting out the Minister's expectations, are not guaranteed to resolve the Minister's concerns. Further, too much direction in the ACIs runs the risk of fettering the discretion of decision-makers.

9. Accountability and transparency is achieved through the tabling of a statement to Parliament whenever one of these personal decisions is made. This is appropriate as the Bill provides that Minister's personal powers can only be exercised when it is in the public interest to do so. Such a statement provides Parliament and the public with an opportunity to consider the Minister's actions.

10. Applicants affected by a personal decision would continue to have access to judicial review. 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. For a discretionary power such as personal decisions of the Minister under this Act, this would include consideration of whether the power has been exercised in a reasonable manner. It would also include consideration of whether procedural fairness has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.

11. An example of how the set aside power could be used is if the AAT made a decision that somebody was of good character, despite the fact that they had committed serious offences such as child sexual assault. The Minister could set aside that decision and substitute it with a decision that the person should not be approved for citizenship because the Minister is of the view that the person is not of good character and the nature of the crimes committed are such that conferring the privilege of citizenship would not be in the public interest.

12. The provisions in the Bill bring the Citizenship Act in line with similar powers under the *Migration Act 1958*. In particular, under sections 501A and 501B of the Migration Act, the Minister may set aside a decision and substitute it with a decision to refuse or to cancel a visa, if the Minister reasonably suspects that the person does not pass the character test, the person does not satisfy the Minister that the person passes the character test, and the Minister is satisfied that the refusal or cancellation is in the national interest.

13. The Citizenship Act does not have a national interest test, but does already refer to decisions being made in the public interest. It was therefore decided that it was appropriate to refer to the public interest in these provisions.

14. The included Attachment sets out a detailed comparison of existing and proposed personal powers under the Migration Act with the proposed powers contained in the Bill.

15. At the hearing, Professor Triggs was asked whether she would support a suggestion that the Minister might consider assisting the funding of a judicial review application concerning a personal decision of the Minister were no merits review was available. The department notes that legal aid and legal assistance programmes are administered by the Attorney-General's Department.

Allowing the Minister to revoke citizenship on the grounds of an individual's engagement in fraud or misrepresentation in the migration or citizenship process, without the requirement for a prior conviction of relevant criminal offences

16. The intention of this provision is to improve the integrity of the Australian citizenship program and create stronger disincentives for people to provide false and misleading information. This would be achieved by having a greater ability to revoke citizenship where it has been obtained by, or as a result of, fraud or misrepresentation.

17. Appropriate safeguards have been built in to the proposal through the discretionary nature of the decision to revoke and the requirement that any revocation be in the public interest. In addition, there is a time limit beyond which citizenship could not be revoked.

18. This provision is consistent with Australia's obligations under the UN *1961 Convention on the Reduction of Statelessness* because that Convention specifically allows for persons with fraudulently acquired citizenship to be deprived of their citizenship, even if that would render them stateless. In these circumstances, the person should never have been an Australian citizen in the first place. There is no explicit requirement in the Statelessness Convention that the fraud or misrepresentation must be established by criminal conviction, and the practice of other countries who are also party to that Convention suggests that this need not be required.

19. The Committee expressed concern about what might happen to a stateless child whose citizenship is revoked under this provision. The department notes that there are a number of steps in the process, all of which are discretionary and all of which require consideration of the best interests of the child. The first and third steps are decisions made under Citizenship Act. The second and fourth step is made under the Migration Act. Those steps would be:

i. Consideration of whether there are grounds to revoke the child's citizenship due to fraud on the child's citizenship application. The decision-maker would consider international law obligations when making this discretionary decision, including interpretation of the Statelessness Convention and the best interests of the child.

ii. If citizenship is revoked, the child would automatically acquire an ex-citizen visa which gives them the right to remain in Australia, although it does not give them a right to return to Australia should they depart.

iii. The client could reapply for citizenship after a year, although they would be subject to the character test.

iv. Depending on the circumstances surrounding the fraud or misrepresentation, consideration might be given to whether to cancel the ex-citizen visa. The Minister, or delegate, would consider the Statelessness Convention, best interests of the child and guidance material around international law obligations, in deciding whether to cancel the visa.

20. The Committee raised a concern from the AHRC's submission that the potential for leaving a child stateless would be in contravention of Article 8 of the *Convention on the Rights of the Child* (CRC). Article 8 of the CRC states:

> States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

The department is of the view that the amendments are consistent with Article 8 because if the Bill is passed, any revocation would not constitute 'unlawful interference'.

21. Concern was raised at the hearing about an administrative decision about fraud being less certain than a criminal conviction which is found beyond reasonable doubt. The department notes that the test in the Bill is that 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.

22. The department's view is 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.

23. The department confirms that it would still be pleased to also address any further questions that the Committee may wish to provide in advance of the hearing.

24. The contact officer in my department is Suzanne Ford, Director, Citizenship Policy Section,

Yours sincerely

Garry Fleming
First Assistant Secretary
Migration and Citizenship Policy Division
Department Immigration and Border Protection

Attachment

Comparison of personal powers of the Minister to set aside decisions of merits review Tribunals in the *Migration Act 1958* and the *Australian Citizenship Act 2007*

The summary includes provisions in the *Migration Act 1958* (the Migration Act) that allow the Minister to substitute for decisions of a merits review tribunal decisions that are both more favourable and less favourable to the applicant or visa holder.

Migration Act 1958

This summary includes current personal powers of the Minister and new personal powers of the Minister that are proposed to be inserted into the Migration Act by the Migration Amendment (Character and General Visa Cancellations) Bill 2014, which is currently before the Senate.

The following are the current personal powers of the Minister to set aside decisions of merits review Tribunals under the Migration Act:

- Section 351 of Division 3 of Part 5 of the Migration Act – this provision allows the Minister to substitute for a decision of the Migration Review Tribunal (the MRT) under section 349 of the Act another decision that is more favourable to the applicant (whether or not the MRT had the power to make that other decision);

- Section 391 of Division 9 of Part 5 of the Migration Act – this provision allows the Minister to substitute for a decision of the Administrative Appeals Tribunal (the AAT) in relation to an MRT-reviewable decision another decision that is more favourable to the applicant (whether or not the AAT had the power to make that other decision);

- Section 417 of Division 2 of Part 7 of the Migration Act – this provision allows the Minister to substitute for a decision of the Refugee Review Tribunal (the RRT) under section 415 of the Act another decision that is more favourable to the applicant (whether or not the RRT had the power to make that other decision);

- Section 454 of Division 8 of Part 7 of the Migration Act – this provision allows the Minister to substitute for a decision of the AAT in relation to an RRT-reviewable decision another decision that is more favourable to the applicant (whether or not the AAT had the power to make that other decision);

- Section 501A of Part 9 of the Migration Act – this provision applies if a delegate of the Minister or the AAT decides not to refuse to grant a visa to a person or to cancel a visa that has been granted to a person under section 501 of the Act (regardless of whether or not the person satisfies the delegate or the AAT that the person passes the character test in subsection 501(6) of the Act and regardless of whether or not the delegate or the AAT reasonably suspects that the person does not pass the character test). Under this provision, the Minister may set aside the original decision and refuse

to grant a visa to a person or cancel a visa that has been granted to a person if the Minister reasonably suspects that the person does not pass the character test, the person does not satisfy the Minister that the person passes the character test, and the Minister is satisfied that the refusal or cancellation is in the national interest. This power can be exercised either with natural justice (under subsection 501A(2)) or without natural justice (under subsection 501A(3)).

- Section 501B of Part 9 of the Migration Act – this provision applies if a delegate of the Minister makes a decision under section 501 of the Act to refuse to grant a visa to a person or to cancel a visa that has been granted to a person. Under this provision, the Minister may set aside the original decision and refuse to grant a visa to a person, or cancel a visa that has been granted to the person if the Minister reasonably suspects that the person does not pass the character test, the person does not satisfy the Minister that the person passes the character test, and the Minister is satisfied that the refusal or cancellation is in the national interest. If the Minister were to exercise this power, the decision by the delegate to refuse to grant a visa or to cancel a visa under section 501 of the Act would not be merits reviewable.

The following are the personal powers of the Minister to set aside decisions of merits review tribunals that are proposed to be inserted into the Migration Act by the Migration Amendment (Character and General Visa Cancellations) Bill 2014:

- Proposed new section 501BA (to be inserted into Part 9 of the Migration Act) – this provision would apply if a delegate of the Minister or the AAT makes a decision under proposed new section 501CA to revoke a decision under proposed new subsection 501(3A) to cancel a visa that has been granted to a person. Under proposed new subsection 501(3A), the Minister must, without notice, cancel a visa of a person who does not pass the character test in certain specified circumstances, and is in prison. Under proposed section 501CA, the Minister may revoke the cancellation decision under subsection 501(3A) if (among other things) the Minister is satisfied that the person passes the character test, or there is another reason why the decision under subsection 501(3A) should be revoked. Under proposed subsection 501BA(2), the Minister may set aside the decision to revoke the cancellation under section 501CA and cancel the visa if the Minister is satisfied that the person does not pass the character test in certain circumstances, and the Minister is satisfied that the cancellation is in the national interest;

- Proposed section 133A of proposed Subdivision FA (to be inserted after Subdivision F of Division 3 of Part 2 of the Migration Act) – this provision would apply where the MRT, the RRT, the AAT or a delegate of the Minister either decided that the ground for cancellation of a visa in section 109 of the Act did not exist, or decided not to cancel the visa under section 109 (despite the existence of that ground). Under that provision, the Minister may set aside the decision and cancel the visa if the Minister considers that the ground for cancellation exists, the visa holder does not satisfy the Minister that the ground does not exist, and the Minister is satisfied that it would be in

the public interest to cancel the visa. This power may be exercised with natural justice (under subsection 133A(1)) or without natural justice (under subsection 133A(3)).

- Proposed section 133C of proposed Subdivision FA (to be inserted after Subdivision F of Division 3 of Part 2 of the Act) – this provision would apply where the MRT, the RRT, the AAT or a delegate of the Minister decided that a ground for cancellation in section 116 of the Act did not exist, or decided not to cancel the visa under section 116 (despite the existence of that ground). Under that provision, the Minister may set aside the decision and cancel the visa if the Minister considers that the ground exists, the visa holder does not satisfy the Minister that the ground does not exist, and the Minister is satisfied that it would be in the public interest to cancel the visa. This power may be exercised with natural justice (under subsection 133C(1)) or without natural justice (under subsection 133C(3)).

Australian Citizenship Act 2007

New section 52A is proposed to be inserted into the Citizenship Act by the Australian Citizenship and Other Legislation Amendment Bill 2014. That provision would apply where a delegate of the Minister makes one of the following decisions:

- a decision to refuse to approve a person becoming an Australian citizen;
- a decision to cancel the approval of a person as an Australian citizen;
- a decision to refuse to approve a person becoming an Australian citizen again;

on the basis that the delegate was not satisfied that the person was of good character at the time of the decision or was not satisfied of the identity of the person, the person applied to the AAT for review of that decision, the AAT set aside the decision, and the person has not become an Australian citizen.

Under proposed section 52A, the Minister may make a decision setting aside the decision of the AAT and make a decision to refuse to approve the person becoming an Australian citizen, a decision to refuse to approve the person becoming an Australian citizen again or a decision to cancel the approval of the person as an Australian citizen (as the case may be). The Minister may only exercise this power if he or she is satisfied that it is in the public interest to do so.

Under proposed section 52B, if the Minister makes a decision under section 52A, the Minister must cause to be tabled in each House of the Parliament a statement that:

- sets out the Tribunal's decision; and
- states that the Minister has set aside the Tribunal's decision; and
- sets out the decision made by the Minister in connection with the decision to set aside the Tribunal's decision; and
- sets out the reasons for the Minister's decision to set aside the Tribunal's decision.