

## **Responses requiring no further comment**

### **Australian Citizenship Amendment (Special Residence Requirements) Bill 2013**

*Portfolio: Immigration and Border Protection*

*Introduced: House of Representatives, 30 May 2013*

*Status: Act, received Royal Assent 20 June 2013*

*PJCHR comments: Eighth Report of 2013, tabled 19 June 2013*

*Response dated: 25 June 2013*

#### **Information sought by the committee**

3.73 The committee sought further information as to whether the Ministerial discretion to revoke a person's citizenship was consistent with the right to a fair hearing, the right of a child to a nationality and the requirement to act in the best interests of a child.

3.74 The former Minister's response is attached.

#### **Committee's response**

3.75 The committee thanks the former Minister for his response.

3.76 The information provided in the response has largely satisfied the committee's concerns. The committee notes it would have been useful had this information been included in the statement of compatibility.

3.77 The committee, however, notes the statement of the former Minister that under the 'best interests of the child' principle set out in article 3 of the Convention on the Rights of the Child (CRC),

the best interests of the child may be outweighed by countervailing primary considerations. An example of such a primary consideration is that States are permitted to determine and prescribe citizenship criteria (noting that the acquisition of citizenship is not a right), provided those criteria accord with their international obligations.

3.78 The committee wishes to underline the emphasis that the CRC and other treaties lay on ensuring that the best interests of the child are given significant weight in decisions affecting children. The committee considers that the impact of a decision on an individual child or group of children should weigh heavily in any decision, particularly when other asserted 'primary considerations' are broad policy objectives or refer to outcomes that may not be confidently predicted.

3.79 The committee also notes the statement in the former Minister's response that the power of a State to grant or revoke citizenship in accordance with international law obligations is a relevant primary consideration in this context. It is not clear that this is the type of primary consideration that might be placed in the balance against the primary consideration of the best interests of the child; rather it

simply states the existence of the power of a State under international law that the State has agreed to limit by becoming party to the CRC. The statement also appears to be circular, given that the question of consistency with international legal obligations depends on ensuring that the best interests of the child are a primary consideration.



**The Hon Brendan O'Connor MP**  
**Minister for Immigration and Citizenship**

**Mr Harry Jenkins MP**  
**Chair**  
**Parliamentary Joint Committee on Human Rights**  
**S1.111**  
**Parliament House**  
**CANBERRA ACT 2600**

Dear Mr Jenkins

I am writing in response to the Joint Standing Committee on Human Rights (the Committee) request for further information regarding the amendments made to the *Australian Citizenship Act 2007 (Cth)* (the Act) by the Australian Citizenship Amendments (Special Residence Requirements) Bill 2013 which was passed by the Senate on 20 June 2013.

The Committee has raised the following concerns:

1. There does not appear to be any right of review of a decision made by the Minister to revoke citizenship using the discretionary powers provided in section 34A.

The Minister alone can exercise the discretion to revoke a person's citizenship under section 34A. The circumstances where the Minister's personal discretion may be exercised are limited to those circumstances where a person has failed to meet the residence obligations set out in section 34A of the Act and agreed to in a written undertaking. Furthermore, the Act explicitly prohibits revocation where a person would become stateless.

The power to revoke citizenship under section 34A may only be exercised by the Minister personally and cannot be delegated. This differs to revocation powers under section 34 of the Act which can be delegated and are reviewable by the Administrative Appeals Tribunal (AAT).

While there is no avenue for merits review by the AAT all decisions made under the Act are judicially reviewable under section 39B of the *Judiciary Act 1903* and subsection 75(v) of the Australian Constitution.

2. That the Ministerial discretion to revoke a person's citizenship is consistent with the right of a person to have a fair hearing under Article 14(1) of the International Convention on Civil and Political Rights (ICCPR).

Article 14 of the ICCPR provides for the equality of persons before courts and tribunals and outlines procedural fairness requirements in the context of criminal and civil proceedings.

The reference by the Committee to Article 14(1) is presumably a reference to the second sentence which provides that "(i)n the determination... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

In its General Comment on Article 14, the UN Human Rights Committee describes the concept of determination of rights and obligations "in a suit at law" as complex. The Committee goes on to note that the concept of "suit at law" or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights. The concept encompasses judicial procedures aimed at determining rights and obligations pertaining to certain areas of private law as well as equivalent notions in the area of administrative law.

Assuming citizenship once obtained is a "right" for the purposes of Article 14(1), the creation of a personal discretion for the Minister to revoke citizenship is considered consistent with Article 14(1) given the carefully defined and limited circumstances for the exercise of the discretion set out in new section 34A of the Act and the availability of judicial review of that decision. The Minister's discretion under the section is not at large and judicial review proceedings to examine its exercise in a particular case would clearly provide "a fair and public hearing by a competent, independent and impartial tribunal established by law", within the meaning of Article 14(1).

Further, a person whose citizenship may be revoked by operation of section 34A of the Act will be given an opportunity to provide information to the Minister in support of their case. It is accepted legal principle that the exercise of a statutory power/discretion that adversely affects a person's rights or interests is conditioned on the obligation to provide an opportunity to be heard unless the obligation is excluded by express words or necessary implication. There is no such exclusion in relation to the exercise of power under section 34A of the Act.

3. That the Ministerial discretion to revoke a child's citizenship is consistent with the right of a child to a nationality and the requirement that the best interests of a child be a primary consideration.



The Act engages, but does not limit rights set out in either the Convention on the Rights of the Child (CRC) or by the ICCPR.

Article 24(3) of the ICCPR and Article 7(1) of the CRC both provide that a child has the right to acquire a nationality. It is noted that "in international law, the terms 'nationality' and 'citizenship' are used interchangeably" and the right to a nationality "does not necessarily require countries to give their nationality to every child born in their territory" (Human Rights Guidance Papers, *Right to a name and acquire a nationality*).

If the child is born in Australia the nationality obligations under Article 7 are already given effect by the Act, as a child born in Australia to permanent residents or Australian citizens is entitled to Australian citizenship by operation of law (section 12 of the Act). This would also apply to a child born to a person who acquired citizenship through the exercise of the new Ministerial discretion.

For children born overseas, as a starting point the Department notes that no human rights obligations arise for Australia until the child is in Australia's jurisdiction. However, for children born overseas to Australian citizen parents, access to Australian citizenship is provided for under section 16 of the Act and this would also apply to children of those persons who have acquired citizenship through the new ministerial discretion.

Article 3 of the CRC provides that:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

The Australian Citizenship Instructions already contain approved policy and guidance to decision makers on assessing the best interests of the child in regards to any decision made under the Act. From 1 July 2013 additional policy guidelines on assessing the best interests of the child will be provided to decision makers exercising their powers under the Act - see Attachment A for approved policy guidelines.

These policy guidelines would ordinarily be taken into account by the Minister when exercising the section 34A discretion. However, it is noted that the best interests of the child may be outweighed by countervailing primary considerations. An example of such a primary consideration is that States are permitted to determine and prescribe citizenship criteria (noting that the acquisition of citizenship is not a right), provided those criteria accord with their international obligations.

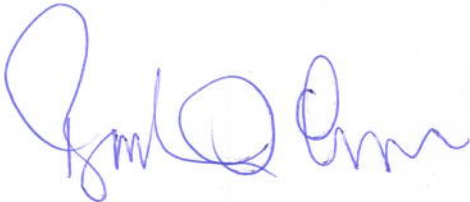
The responsible parent of such a child would be accorded the common law right of procedural fairness in relation to the child.

In addition, there is an inbuilt protection, such that a child's citizenship cannot be revoked if they have another responsible parent who is an Australian citizen.

The Act also prevents the revoking of a child's citizenship if such revocation would render the child stateless. This is clearly articulated in section 36(3) of the Act which relates to children of parents who cease to be citizens in that the child's Australian citizenship must not be revoked if the child would then become a person who is not a national or citizen of any country.

Thank you for the opportunity to respond to the issues raised by the Committee. I trust this response addresses those concerns.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Brendan O'Connor', with a large initial 'B' and a stylized 'O'.

**BRENDAN O'CONNOR**

25 JUN 2013



## Chapter 18 – best interests of the child

**1 Overview**

This chapter provides guidance on when and how to consider the best interests of a child.

**1.1 The status of international conventions in Australian law**

The power to approve or refuse citizenship in accordance with the Act is a fundamental exercise of Australian sovereignty.

Any obligations Australia has under international conventions have no domestic legal force in Australia unless they are incorporated into, or may be considered under, an Australian law.

**1.1.1 The Convention on the Rights of the Child**

Australia is a signatory to the Convention on the Rights of the Child (CROC). Article 3 of the CROC states:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Australia's obligations under the CROC only apply to children (ie, persons under the age of 18) within Australia's territory or jurisdiction.

**1.2 When to assess the best interests of the child**

As Article 3 is worded "all actions concerning children", officers should assess the best interests of a child in relation to:

- decisions under the Act directly relating to the child; and
- decisions under the Act about a family member, primary care giver or other person who has claimed responsibility for the child, even if the decision does not directly relate to the child. This is because a decision about a parent or primary care giver may affect the child. The child concerned may be a non-citizen or an Australian citizen child of a non-citizen parent.

When exercising a power that does not specifically address the best interests of the child and which does not allow the decision-maker any discretion, there is generally no scope to consider the best interests of the child. For example, section 16 of the Act requires that an applicant for citizenship by descent had an Australian citizen parent at the time of the applicant's birth. If that requirement is not met then the decision-maker is required under section 17 to refuse to approve citizenship for the applicant, without considering the best interests of the child. However, wherever possible, decision-makers should consider the best interests of the child when

making a decision.

Officers must consider a child's best interests when exercising a discretionary power under the following provisions of the Act:

- paragraph 19D(3) - refusal of an application for citizenship by a child adopted in accordance with the Hague Convention on Inter-country Adoption;
- paragraph 19D(7A) – discretion to not apply subparagraph 19D(6)(a)(ii) (convicted of certain offences);
- subsections 22(4A) and 22(5) – ministerial discretion – administrative error;
- subsection 22(5A) – ministerial discretion – confinement in prison or psychiatric institution;
- subsection 22(6) – ministerial discretion – person in Australia would suffer significant hardship or disadvantage;
- subsection 22(9) – ministerial discretion – spouse, de facto partner or surviving spouse or de facto partner of Australian citizen;
- subsection 22(11) – ministerial discretion – person in an interdependent relationship;
- subsection 22A(3) – confinement in prison or psychiatric institution;
- subsection 22A(4) and (5) - ministerial discretion – administrative error;
- subsection 22B(3) – confinement in prison or psychiatric institution;
- subsections 22B(4) and (5) - ministerial discretion – administrative error;
- subsection 24(2) – refusal of an application for citizenship by conferral;
- subsection 24(4C) - discretion to not apply subparagraph 24(4A)(a)(ii) (convicted of certain offences);
- section 25 – minister may cancel approval;
- subsection 26(3) – determination that a person cannot make a pledge;
- subsection 26(5) – revocation of determination that a person cannot make a pledge;
- subsection 30(2) – refusal to approve a person becoming a citizen again;
- subsection 30(7) - discretion to not apply subparagraph 30(5)(a)(ii) (convicted of certain offences);
- subsection 33(5) – minister may refuse to approve the person renouncing his or her citizenship;
- section 34 – revocation of citizenship;
- section 36 – minister may revoke the citizenship of the child of a responsible parent who ceased to be a citizen
- section 37 – evidence and cancellation of evidence of citizenship;
- section 38 – minister may request a person surrenders an evidentiary notice;
- section 40 – request for personal identifiers.

### **1.3 What are the best interests of the child?**

The meaning of 'best interests of the child' is not defined, but is informed, in part, by the principles in the CROC. The factors that are most likely to be relevant to citizenship decisions are:

- children should be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse;
- families should be able to stay together, as far as possible;



- the rights and duties of parents and other relevant family members should be respected and it should be recognised that both parents have common responsibilities for the upbringing and development of the child;
- the child has the right to preserve his or her identity, including nationality, name and family relations as recognised by law;
- prevention of the illicit transfer and non-return of children abroad;
- freedom of religion;
- the views of the child should be given weight in accordance with the child's age, maturity and level of understanding; and
- the degree of the child's integration into the Australian community.

Those factors raised by the applicant or a third party, or evident on the available material, must be considered. Decision-makers are not required to request further material for consideration regarding the rights of a child.

Although the CROC provides that minors are entitled to access public education, public health services and social welfare, and to not be subject to economic exploitation, these generally will not be an issue when deciding citizenship applications. This is because:

- there is no discretionary power to refuse citizenship applications under Division 2, Subdivisions A (Descent) and AA (Hague Adoption); and
- most applicants under Division 2 Subdivision B (Conferral) are permanent residents, who have appropriate access to education, health and social welfare services, and when in Australia are covered by the same labour laws as Australian citizens.

### **1.3.1 Weighing the best interests of the child against other matters**

Article 3 requires that the best interests of the child be a primary consideration in all actions concerning children; Article 3 does not require that the best interests of the child be the only primary consideration. The best interests of the child must be weighed with or against any other primary considerations in the specific circumstances. Other primary considerations may include (but are not limited to): the objectives of the relevant provision/s in the Act; community protection; and community expectations. This means that although it may be assessed that a particular decision would be in the best interests of a child, it does not automatically follow that it is the decision that should be made. For example, it may be in the best interests of a child for a delegate to decide not to revoke an associated person's Australian citizenship under section 34 but, depending on the particular facts and after taking into account the other primary considerations, the decision-maker may conclude that revocation of the person's citizenship is the decision that should be made.

### **1.4 Recording the assessment**

The assessment of the best interests of the child should be included in the decision record.

## **1.5 Further information**

For the full text of the CROC see:

<http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html>

Delegates may obtain advice about assessing the best interests of the child in specific cases from the Citizenship Helpdesk.

Advice on the CROC should be sought from Legal Policy Section through the Citizenship Helpdesk.