This legislative brief sets out the key features of the Australian Citizenship and Other Legislation Amendment Bill 2014. It also details some concerns about the Bill. In particular, the Bill has the potential to render a person stateless, and confers on the Minister for Immigration extraordinary powers to deprive a person of citizenship.

Overview

The Australian Citizenship and Other Legislation Amendment Bill 2014 proposes a number of significant changes to the current process for acquiring and retaining citizenship in Australia, including:

- empowering the Minister to set aside decisions by the Administrative Appeals Tribunal (AAT) and preventing review by the AAT of decisions made personally by the Minister
- extending conditions requiring citizenship applicants to be of good character
- extending the Minister's power to bar citizenship where a person has committed offences to
- extending powers to revoke citizenship, and
- restricting the right to access citizenship for those born in and resident in Australia for their first 10 years (the '10-year rule').

The Bill was introduced into Parliament on Thursday 23 October 2014. The Bill was referred to the Senate Legal and Constitutional Affairs Committee on 30 October 2014, and passed the House of Representatives on 24 November 2014. The Senate Legal and Constitutional Affairs Committee published its report on 1 December 2014, recommending that the Bill be passed subject to two minor recommendations, although the members of the Labor Party and the Greens on the Committee dissented. The Bill is likely to be considered by the Senate in early 2015.

Extending the powers to revoke citizenship

What the Bill will change

Currently, Australian citizenship by descent, adoption or conferral can be revoked if a person is convicted of fraud in relation to his or her citizenship application, or has otherwise obtained citizenship through fraud (including fraud by a third party).[1] At present, revocation is only permitted if the fraud is proven in criminal proceedings.

The Bill extends the Minister's power to revoke citizenship in three ways:

- a criminal conviction is no longer required to substantiate the fraud or misrepresentation, with the determination of fraud to be made by the Minister;

[1] See *Australian Citizenship Act 2007* (Cth) s 34.

- citizenship can be revoked on the basis of fraud or misrepresentation by a person other than the applicant in relation to visas or entry into Australia; and
- the fraud or misrepresentation need not have constituted an offence or part of an offence by any person.[2]

The fraud or misrepresentation must have been committed in the previous 10 years. Concealment of a material circumstance is taken to be a misrepresentation for the purposes of this section.

Importantly, unlike the existing power to revoke citizenship, the proposed section does not contain a safeguard which would prevent the Minister is prevented from depriving a person of citizenship if this would make the person stateless.[3]

Comment

The reduction of the requirement of proof from 'beyond a reasonable doubt', proved in a court, to the satisfaction of the Minister, creates an extraordinary administrative power to revoke citizenship on suspicion of fraud.

This proposed amendment is likely to have a disproportionate effect on refugees. Refugees often have to use false documents to exit a country or enter a country to seek asylum. This proposed amendment would have the effect of penalising refugees on the basis of irregular entry, in breach of Article 31 of the Refugee Convention. This is even more concerning considering that the power extends to situations in which another person (such as a migration agent) may have committed the fraud or misrepresentation.

The proposed amendment also has the potential to leave a person stateless. The fact that such fraud or misrepresentation does not have to be proved in a court of law (as discussed below) appears to be in breach of Article 8(4) of the Convention on the Reduction of Statelessness, which provides that that deprivation of citizenship resulting in statelessness on the ground of misrepresentation or fraud 'shall provide for the person concerned the right to a fair hearing by a court or other independent body'.

Further, the Bill would allow a child to become stateless as a result of misrepresentation or fraud by the child or a third party (for example, a migration agent or relative), although the child would have access to a visa allowing permanent residence in Australia.[4] The statement of compatibility suggests, wrongly, that a child could only become stateless as a result of his or her own misrepresentation or fraud (although, given children's vulnerability and the complexity of refugee status determination, this is still of concern).[5] However, the provision relied upon for that statement only applies in situations where a child is deprived of citizenship as a consequence of a parent's citizenship being revoked, and not if the fraud or misrepresentation relates to the child's own visa or citizenship applications. This raises concerns about its compatibility with Australia's obligations

---

[2] Sch 1, item 66, inserting new s 34AA. Previously, the Minister could only revoke the citizenship of a person on the basis of fraud or representation in relation to visas or entry into Australia if that fraud or misrepresentation was committed by the person applying for citizenship.
[3] *Australian Citizenship Act 2007* (Cth)) s 34(3).
[4] Explanatory Memorandum, 3.
[5] This is further explained in Australian Human Rights Commission, *Submission No 4*, [30]-[31].

under Article 8 of the Convention on the Rights of the Child to respect the right of a child to preserve his or her identity, including nationality, without unlawful interference, as well as its compatibility with the Convention on the Reduction of Statelessness.[6]

Restricting the operation of the '10-year rule'

What the Bill will change

Under existing law, a person who was born in Australia and is 'ordinarily resident' in Australia for the first 10 years of their life can apply for citizenship.[7] This is known as the '10-year rule'.

The proposed amendments will exclude application of this rule to:

- children of foreign diplomats
- children who were 'unlawful non-citizens' in Australia at any time during the first 10 years of their life
- children who left Australia without a visa to return at any time during those first 10 years
- children who have a parent who was an 'unlawful non-citizen' and did not hold a substantive visa at the time of the child's birth. [8]

Comment

This amendment will disproportionately affect the children of asylum seekers who have arrived irregularly. The Bill will deprive such children of Australian citizenship solely on the basis of their parents' immigration status, which is inconsistent with Article 2 of the Convention on the Rights of the Child. The Bill will also mean that, if a child of parents holding temporary protection visas leaves Australia before their tenth birthday, the child would no longer be granted citizenship on their tenth birthday.

The exclusion fails to recognise the policy intent of the 10-year rule, which seeks to recognise that children who spend their first 10 years in Australia have formed an identity as an Australian on the basis of their experience with education, language and integration into the community.

Restricting the review of decisions by the Administrative Appeals Tribunal

What the Bill will change

Currently, the Administrative Appeals Tribunal (AAT) can review seven types of decisions relating to citizenship.[9] These include refusals to approve a person becoming an Australian citizen, cancellations of approvals to gain citizenship and decisions in relation to revocation of citizenship.

---

[6] See also Australian Human Rights Commission, *Submission No 4*, [34]-[36].
[7] *Australian Citizenship Act 2007* (Cth) s 12.
[8] Sch 1, Pt 1, item 12, inserting s 12(3)-(7).
[9] *Australian Citizenship Act 2007* (Cth) s 52.

The Bill would change the current situation in two ways. First, it would prevent the AAT from reviewing citizenship decisions made personally by the Minister.[10] Second, if the AAT had set aside a Departmental decision denying citizenship because the person was not of good character or was not satisfied of the identity of the applicant, the Minister could replace the decision of the AAT.[11] In both cases, the Minister must table a statement of reasons in Parliament.[12]

The stated rationale behind the first of these changes is that:

> As an elected Member of Parliament, the Minister represents the Australian community and has a particular insight into Australian community standards and values and what is in Australia's public interest. As such, it is not appropriate for an unelected administrative tribunal to review such a personal decision of a Minister on the basis of merit, when that decision is made in the public interest. As a matter of practice it is expected that only appropriate cases will be brought to the Minister's personal attention, so that merits review is not excluded as a matter of course.[13]

The second of these changes is said to be justified by three recent decisions of the AAT in relation to good character which have been 'outside community standards', according to the Explanatory Memorandum.[14]

Comment

These proposed amendments fundamentally misunderstand and undermine the role of merits review, and key public law principles including the rule of law. The objectives of merits review are: to ensure the 'correct and preferable' decision is made, to ensure fair treatment of persons affected by a decision, to improve the quality and consistency of decisions, and to enhance the openness and accountability of government decisions.[15]

As a matter of principle, generally an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review.[16] As the Administrative Review Council has stated, 'the fact that the decision-maker is a Minister … is not, of itself, relevant to the question of review', and 'is not a factor that, alone, will make decisions of that person inappropriate for merits review'.[17]

As the Australian Human Rights Commission has noted in its submission to the Senate and Legal Constitutional Affairs Committee:

> The aim of an independent merits review tribunal is to provide for a check on executive decision making. These amendments provide the opposite: an executive check on independent tribunal decisions.[18]

---

[10] Sch 1, item 72, inserting new subsection 52(4).
[11] Sch 1, item 73, inserting new section 52A. The ground of 'character' or identity need not be the sole reason for the decision: see Explanatory Memorandum, [453].
[12] Sch 1, item 73, inserting new section 52B.
[13] Explanatory Memorandum, [445].
[14] Explanatory Memorandum, [451].
[15] Administrative Review Council, *What decisions should be subject to merits review?* (1999), [1.3]-[1.5].
[16] Ibid, [2.2].
[17] Ibid, [5.21]-[5.22].
[18] Australian Human Rights Commission, *Submission 4*, [41].

Extending character requirements to minors

What the Bill will change

Currently, adults applying for Australian citizenship must satisfy the Minister that they are of good character.[19] The Bill would extend this requirement to children.[20] According to the Explanatory Memorandum, these amendments:

> recognise … 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.[21]

The Bill also extends the Minister's discretion to revoke citizenship by descent if the Minister later becomes satisfied that the person was not of good character.[22]

Comment

These proposals will mean that youthful misdemeanours will have far-reaching consequences for children and their families. As UNICEF Australia notes, children are at increased risk of contact with the criminal justice system based on their diminished capacity to make decisions, and withholding citizenship is a disproportionate consequence for common mistakes.[23] Further, the 'commission of offences by minors is an unreliable measure of character'.[24]

The proposal to extend revocation of citizenship by descent also significantly alters the fundamental principle of citizenship policy associated with passing citizenship on to one's children. This principle is reflected in the existing Act.[25]

Extending the bar on citizenship for offence-related reasons

What the Bill will change

Under the *Australian Citizenship Act 2007* (Cth), person can obtain Australian citizenship automatically: by descent (being born to an Australian citizen); by adoption by an Australian citizen; and by 'conferral' (by satisfying certain residence and other requirements).

Currently the Minister cannot approve an application for citizenship by conferral in certain circumstances relating to a person being involved in criminal proceedings.[26] The

---

[19] Australian Citizenship Act 2007 (Cth) ss 16, 21(2)(h).
[20] Sch 1, items 17, 21, 25, 26, 58, 60. However, stateless children would still be able to become Australian citizens under s 21(8) , as the Minister cannot refuse an application made under that section: see s 24.
[21] Explanatory Memorandum, [100], [144], [182], [185], [340], [346].
[22] Sch 1, Pt 1, item 64, inserting proposed s 33A.
[23] UNICEF Australia, *Submission 8*, 2.
[24] University of Adelaide Public Law & Policy Research Unit, Submission 6, 3.
[25] See Professor Kim Rubenstein, Submission 2, 3.
[26] *Australian Citizenship Act 2007* (Cth) s 24(6).

Bill would extend these bars on approval to applications for citizenship by descent and by adoption, and to those resuming citizenship.[27]

The Bill also extends the list of circumstances that would bar a person from being approved for citizenship to circumstances in which a court releases a person on conditions of good behaviour, on an order for home detention, or if ordered to participate in residential drug, mental health or other programmes.

Comment

The scope of offence-related restrictions is wide and the proposed amendments may result in disproportionate consequences for minor offences. An area of particular concern includes the proposed subsection (g), which would prevent someone on a good behaviour bond from becoming an Australian citizen. The Migration Institute of Australia has noted that young people may be affected since good behaviour bonds are regularly ordered instead of fines under the *Young Offenders Act* and can be imposed without a conviction.[28] The extension of the bar could also have the effect of discriminating against people with mental disabilities, since it automatically bars citizenship to those ordered to complete a residential mental health program.[29]

Authors: Stephanie Lee, Dr Joyce Chia

[27] Sch 1, items 18, 22, 61.
[28] Migration Institute of Australia, *Submission 14*, 4.
[29] It also operates to bar approval of citizenship for those confined to psychiatric institutions, although this provision already exists in the *Australian Citizenship Act* (see s 24(6)(h). See further Australian Human Rights Commission, *Submission 4*, [85]-[97].