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Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Introduction

The Federation of Ethnic Communities' Councils of Australia (FECCA) is the national peak body representing Australia's culturally and linguistically diverse (CALD) communities and their organisations. FECCA provides advocacy, develops policy and promotes issues on behalf of its constituency to Government and the broader community. FECCA supports multiculturalism, community harmony, social justice and the rejection of all forms of discrimination and racism so as to build a productive and culturally rich Australian society. FECCA's policies are developed around the concepts of empowerment and inclusion and are formulated with the common good of all Australians in mind.

Becoming a citizen provides a gateway to full participation in the Australian community, including access to voting rights, other forms of political participation, freedom of movement and employment in the public service and Australian Defence Force. Citizenship is also a symbol of acceptance into the Australian community and is highly valued amongst immigrant groups, particularly refugees. Pathways to citizenship are thus an important element of social cohesion.

Providing for the automatic cessation or revocation of citizenship for dual nationals in Australian law creates two categories of citizens – those who can have their citizenship ceased/revoked and those who cannot. Creating these two categories of citizenship has the potential to affect social cohesion in Australian society. The Bill will disproportionately affect migrants and their children.

FECCA's members across Australia held community consultations on this important issue. For example, the Ethnic Communities' Council of Victoria's roundtable attracted wide

participation of community leaders from various ethnic and faith groups which demonstrates the high level of interest and concern.

Elements common to proposed provisions

“A person who is a national or citizen of a country other than Australia”¹

Information on the number of Australians who hold dual citizenship is not available. The Department of Immigration and Border Protection does not have any figures, and there are no questions in the Australian Census on this topic. A 2000 Parliamentary Paper indicated that at that time, there may have been between 4 and 5 million dual Australian citizens.² In the same year, the Australian Citizenship Council estimated 4.4 million Australians held dual citizenship.³

It is not only Australians who were born overseas who may be nationals or citizens of a country other than Australia. Their children (second generation Australians) may also have dual-citizenship or nationality, even if they were born in Australia. In some cases, individuals can claim citizenship in other countries on the basis of their grandparents' previous affiliation with that country. Thus, many third generation Australians may be a national of a country other than Australia and be affected by the proposed laws.

Australian citizens who entered the country as humanitarian entrants may have an entitlement to citizenship in their country of origin, however revoking their Australian citizenship may leave them in the position of needing to claim asylum to avoid returning to the site of their persecution.

Australia is a signatory to the UN Convention on the Reduction of Statelessness. According to article 8 of the Convention, “contracting States shall not deprive a person of its nationality if such deprivation would render him stateless”. It also states that the power of deprivation of citizenship should not be exercised “except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body”. While the Explanatory Memorandum expressly states that the purpose of limiting the Bill to nationals or citizens of countries other than Australia is to ensure that a person will not become stateless, FECCA maintains concerns that there is still scope for this to occur.

FECCA is also concerned about the creation of two classes of Australian citizens and the effect that this could have on social cohesion.

“If the Minister becomes aware of conduct”⁴

The Minister is obliged to give written notice if they become aware of conduct that, because of ss 33A, 35 and 35A, results in a person ceasing to be an Australian citizen. There is no guidance in the Bill as to what the threshold of intelligence is for the Minister becoming aware of such conduct. Due to the lack of guidance and clarity in the Bill, the Minister and/or relevant public servants will have significant discretion to determine when an individual has engaged in conduct that satisfies ss 33A, 35 and 35A.

¹ ss33AA(1), 35(1)(a) and 35A(1)(b).

² Adrienne Millbank, ‘Dual Citizenship in Australia (Current Issues Brief No. 5 2000-01)’, Department of the Parliamentary Library, (November 2000)

³ Australian Citizenship Council, *Australian Citizenship for a New Century*, Commonwealth of Australia (2000).

⁴ ss 33AA(6), 35(5), 35A(5).

In the context of ss 33AA and 35, which do not involve a conviction by a court, this element is very concerning. Individuals should have a fair trial in accordance with the rule of law. These are central features of our judicial system. The criminal justice system provides a more appropriate avenue than the provisions inserted into the *Citizenship Act* by this Bill for dealing with individuals who engage in terrorism domestically or overseas, and ensures that fundamental rights are protected.⁵

“Section 39 of the Australian Security Intelligence Organisations Act 1979 does not apply”⁶

Under s 39 of the *ASIO Act*, a Commonwealth agency shall not take, refuse to take, or refrain from taking prescribed administrative action on the basis of any communication in relation to a person made by ASIO not amounting to a security assessment. This does not preclude agencies from taking actions of a temporary nature.

This element will potentially allow the Minister and/or relevant public servants to use intelligence which does not amount to a security assessment to issue notice that an Australian citizenship has ceased. Cessation or revocation of citizenship is a serious consequence which should not be based on intelligence that is ordinarily only used for actions of a temporary nature.

“The Minister does not have a duty to consider whether to exercise the power... whether he or she is requested to do so by any person, or in any other circumstances”⁷

The Bill gives the Minister the power to rescind a written notice, or exempt a person from the effects of ss 33AA, 35 and 35A, if they consider it in the public interest to do so. However, the Minister is under no duty to consider these options, even if they are requested by the person who will be affected to do so. While the Bill includes this safeguard, it does not include a duty for the Minister to consider exercising it.

“The rules of natural justice do not apply”⁸

The rules of natural justice are an important part of our legal system. They include a number of rights in relation to a fair hearing such as the right to know key elements of the case against them and the right for an individual to present their own case. Natural justice also includes the bias rule, ensuring that power is exercised independently and with neutrality.

Given the gravity of the consequences of the proposed cessation and revocation provisions, FECCA opposes the Bill excluding rules of natural justice in relation to the Minister’s powers in ss 33AA, 35 and 35A.

Children

There are two issues with relation to children: (1) children who engage in terrorist activities and may receive notice from the Minister that they have renounced their citizenship and (2) children whose parents have renounced their citizenship and as a result, may have their own citizenship revoked by the Minister.

⁵ Canadian Citizenship Act, Part II – Los of Citizenship, 10.1(2) Revocation for Engaging in Armed Conflict with Canada – Declaration of Court.

⁶ ss 33AA(12), 35(11), 35A(11).

⁷ ss 33AA(8), 35(7), 35A(7).

⁸ ss 33AA(10), 35(9), 35A(9).

The Explanatory Memorandum makes it clear that the proposed cessation and revocation provisions apply to all Australian (dual) citizens, regardless of age. FECCA considers that there are not appropriate safeguards in the Bill to protect children. For example, the Explanatory Memorandum states:

[T]he cessation or renunciation of a child's Australian citizenship would only occur as a result of extremely serious conduct. The Minister's ability to exempt the child from the cessation of their Australian citizenship allows consideration of all the circumstances of the case in determining whether it is in the public interest to do so.⁹

Despite this statement, the Minister is not under any obligation to consider the exemptions provided for in the Bill, even if they are requested to do so. In the case of children who may be considered to have renounced their citizenship, this is particularly alarming.

Children of individuals who the Minister provides written notice to that they have ceased to be an Australian citizen under the proposed ss 33AA, 35 and 35A can cease to be Australian citizens under s 36 of the *Citizenship Act*. Given the lack of safeguards in the Bill, particularly the ambiguity as to the process through which the Minister will 'become aware of conduct' satisfying the relevant provisions, FECCA opposes the Minister's power to revoke a child's citizenship under s 36 of the *Citizenship Act* on the basis that their parents' citizenship has ceased/been revoked.

Australia's has international obligations with respect to children under the *Convention on the Rights of the Child*. These include:

- a child's right to non-discrimination (article 2);
- for all actions concerning children, the best interests of the child shall be a primary consideration (article 3);
- a child's right to nationality (article 7);
- rights relating to infringements of penal law (article 40);

FECCA believes that any legislation providing for the cessation or renunciation of an individual's Australian citizenship should exclude children.

Sections 33AA and 35

The revocation or cessation of an individual's Australian citizenship is a considerable consequence, and as such should be applied only as a result of a conviction of a terrorist offence by a court. FECCA thus opposes ss 33A and 35, which allow for the cessation of citizenship on the basis of conduct rather than a conviction.

Section 35A: Conviction for terrorism offences and other certain offences

If an individual is to have their citizenship revoked on the basis of engaging in terrorism, FECCA believes that it is appropriate for the individual to first have been convicted of terrorist offences under Australian criminal law. We support the judicial system, the rule of law, and the right to a fair trial. Being charged and tried for a terrorist offence under the Australian justice system will enable for the individual's rights to be maintained and proper legal processes to be adhered to.

The Bill sets out a number of offences for which a conviction of a dual national can lead to revocation of citizenship. Given the significance of having one's citizenship revoked, the

⁹ Explanatory Memorandum, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), [44].

threshold of criminality for any offences included in such a scheme must be such that the revocation of citizenship is warranted by the seriousness of the offence.

FECCA maintains the concerns relating to s 35A which are addressed in this submission, and believes that the section requires amendment.

Conclusion

FECCA understands that there is a need for the Government to consider stronger safeguards to protect the population from the threat of terrorism. However, we object to the Bill in its current form.

The Explanatory Memorandum to the Bill states that the Government does not consider that the right to a fair trial and fair hearing are not limited by the proposal.¹⁰ Given that there is no guidance as to the process through which the Minister will ‘become aware of the conduct’, and s 39 of the *ASIO Act* does not apply, FECCA believes that the proposed Bill does limit these fundamental rights.

FECCA highlights the importance of citizenship policy to achieving and maintaining social cohesion in the Australian community by giving migrants a sense of belonging and acceptance.

Recommendations

FECCA recommends that the *Australian Citizenship Amendment (Allegiance to Australia) Bill* is not passed in its current form.

We recommend that the Bill is re-drafting and presented for public consultation, providing for a confined power for the Minister to revoke the citizenship of dual nationals who have been convicted of terrorist offences under the *Commonwealth Criminal Code*. Such a Bill should ensure the protection of fundamental rights, including application of rules of natural justice, appropriate appeal rights and exemptions for minors.

¹⁰Ibid, [25].