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BAR ASSOCIATION OF QUEENSLAND

24 April 2018

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

By email: citizenshipbill@aph.gov.au

Dear Committee Secretary

Re: Inquiry into the Australian Citizenship Legislation Amendment (Strengthening the Commitments for Australian Citizenship and Other Measures) Bill 2018 (Cth)

Thank you, on behalf of the Bar Association of Queensland ('the **Association**'), for the invitation to make a submission in relation to the Senate Legal and Constitutional Affairs Committee's ('the **Senate Committee**') review of the *Australian Citizenship Legislation Amendment (Strengthening the Commitments for Australian Citizenship and Other Measures) Bill 2018* (Cth) ('the **2018 Bill**').

It is understood that the *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017* ('the **2017 Bill**') was passed by the House of Representatives on 14 August 2017 before being introduced to the Senate on 15 August 2017.[1] The 2017 Bill was then removed from the Senate Notice Paper on 18 October 2017.

The 2018 Bill was introduced as a private Senator's Bill by Senator Hanson on 7 February 2018. It appears the 2018 Bill mirrors the 2017 Bill with the only changes being:

1. change of the title of the Bill from *'...strengthening the requirements...'* to *'...strengthening the commitments...'*; and
2. change of the definition of residency period from 4 years to 8 years in clause 56 of the respective Bills.

It is understood that the Senate Committee will have regard to submissions made on the 2017 Bill as part of its inquiry into the 2018 Bill. In this regard, the Association wishes to express its support for the Law Council of Australia's submission on the 2017 Bill dated 21 July 2017 (submission number 464).

Without repeating points made in that submission, or detracting from the form of them, the Association does have significant concerns with the following aspects of the 2018 Bill:

[1] Commonwealth, *Parliamentary Debates,* Senate, 7 February 2018, 428 (Pauline Hanson).

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1. Powers of the Minister

Clause 126

Clause 126 of the 2018 Bill proposes to insert sub-section 52(4) into the *Australian Citizenship Act 2007* (Cth) ('the **Act**').

The proposed sub-section seeks to remove a person's right to apply to the Administrative Appeals Tribunal ('the **AAT**') for review of a decision of the Minister for Immigration and Border Protection ('the **Minister**') to:

1. refuse to approve a person becoming an Australian citizen under sections 17, 19D and 24;[2]
2. cancel an approval given to a person to become an Australian citizen under section 25;[3]
3. refuse to approve a person becoming an Australian citizen again under section 30;[4]
4. refuse to approve a person renouncing his or her Australian citizenship under section 33;[5] and
5. revoke a person's Australian citizenship under section 34;[6]

where the Minister is *'satisfied that the decision was made in the public interest'.*

In the Explanatory Memorandum for the 2018 Bill, the following justification for clause 126 is provided:

> *'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'.*[7]

The Association notes the Senate Committee agreed with, and supported, these reasons in its report on the 2017 Bill ('the **Senate Committee's 2017 report**').[8]

The Association is concerned that, as a consequence of the proposal in clause 126, an applicant will be unable, solely due to a decision made at the Minister's personal discretion, to access merits review for a decision which will have a significant impact on their livelihood and well-being.

The protection of individual rights and liberties in an Australian democracy without a Bill of Rights depends on systems of checks and balances to control the abuse of

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[2] *Australian Citizenship Act 2007* (Cth) ss 52(1)(a), (aa), (b).
[3] Ibid s 52(1)(c).
[4] Ibid s 52(1)(d).
[5] Ibid s 52(1)(e).
[6] Ibid s 52(1)(f).
[7] Explanatory Memorandum, *Australian Citizenship Legislation Amendment (Strengthening the Commitments for Australian Citizenship and Other Measures) Bill 2018* (Cth), 55.
[8] Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 [Provisions]* 33.

power. These systems are intended to maintain public confidence in the Government's protection of individual rights and liberties in an effort to avoid a breakdown in the community's respect for the rule of law.

One of these systems is the separation of powers. The separation of powers involves judicial oversight over decisions made by the executive in order to ensure these decisions are both correct and preferable (merits review) and made according to law (judicial review).

The AAT is an independent body charged with the function of determining the correct and preferable decision based on the evidence.[9] It plays a crucial role in facilitating the consideration and review, on the merits, of decisions made by the executive. In addition, the AAT process allows for the marshalling of relevant evidence (by way of evidence already presented, but to be re-considered and any further evidence) and the testing of evidence through cross-examination. These processes allow the weeding out of misapprehensions and false premises. The value of Tribunal processes of this kind is shown, every day, by the circumstance that our society in each of its State, territory and Commonwealth jurisdictions entrusts important decisions concerning individuals to them. The reservation of this particular decision of singular importance to the individuals affected to the political realm paves the way for injustice as political considerations and preconceptions are encouraged to hold sway.

It is urged upon the Committee to reflect upon the circumstance that the perceived good sense of a current incumbent of a particular office may not be present on future occasions when a different politician assumes the office.

The availability of judicial review of these decisions under the Act does constitute a safeguard. The Committee is reminded, however, of the confined function of judicial review. Judicial review is a supervisory jurisdiction limited to certain procedural requirements (for example, procedural fairness), notions of reasonableness and (without attempting to be exhaustive) an obligation to consider those factors prescribed by the statute. Availability of judicial review is no substitute for a full review on the merits by the AAT. In addition, the lawfulness of the AAT's jurisdiction is, and should continue to be, subject to judicial review (and appeals on questions of law) ensuring that the AAT's decision making processes and reasoning is according to law.

The removal of merits review is likely to have a significantly detrimental impact on access to justice for individuals in matters that touch importantly upon their lives.

Clause 127

Clause 127 of the 2018 Bill seeks to insert section 52A into the Act to give the Minister a non-delegable personal power to set aside a decision of the AAT where *'it is in the public interest to do so'*.

In the Explanatory Memorandum for the 2018 Bill, the following justification for clause 127 is provided:

[9] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60.

> *'In the last few years, the Administrative Appeals Tribunal has made three significant decisions outside community standards, finding that people were of good character despite having been convicted of child sexual offences, manslaughter or people smuggling. Three other recent decisions of the Administrative Appeals Tribunal have found people to have been of good character despite having committed domestic violence offences'.*[10]

In the Senate Committee's 2017 report, the Committee noted *'concerns in relation to this proposed power were raised by a significant number of organisational submitters'*. The Committee, however, agreed with clause 127 on the basis that *'Ministers are ultimately responsible to the Australian people whereas both the AAT and the AHRC are accountable to no one'*.[11] However, the point of the separation of powers principles is that the decision maker who is applying the law to individuals is wholly independent and making the '*correct and preferable*' decision according to law (which is subject to the Court's supervisory jurisdiction) and, therefore, unlikely to be swayed by temporary waves of public emotion. This approach is based on the principles upon which the Australian government and jurisprudence have been founded.

The Association is concerned that the Minister's power to override an independent decision of the AAT in favour of a decision, initially, made by their delegate is anathema to a true separation of powers. It is the separation of powers which is relied upon to control abuses of power and to avoid a breakdown in the community's respect for the rule of law.

There is also a pointlessness to saying to individuals to expend resources to persuade an independent umpire only to have the captain of the other team overrule the decision. Again, very little consideration is required to appreciate the damage such a system is likely to have to the public's respect for the law and their belief in the virtues of the rule of law. Such a system is likely also to have a damaging impact on the morale and work of the tribunal who will also perceive that they are engaged in an exercise in pointlessness extending fairness in decision making only to have their work overthrown by one of the parties engaged before them.

The Scrutiny of Bills Committee shared these concerns, and concluded the following in relation to clause 127 of the 2017 Bill:

'... overriding a decision by an independent decision-maker poses a risk to community perceptions about the availability of independent merits review and the risk that individual cases may be influenced by political considerations'. [12]

2. Retrospectivity

The Government made it clear that the provisions of the 2017 Bill would apply retrospectively from 20 April 2017,[13] being the date citizenship law reform was announced.[14] It is presumed the same intent lies behind the 2018 Bill.

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[10] Explanatory Memorandum, *Australian Citizenship Legislation Amendment (Strengthening the Commitments for Australian Citizenship and Other Measures) Bill 2018* (Cth), 55.
[11] Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 [Provisions]* 35.
[12] Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 7 of 2017* 14.
[13] Commonwealth, *Parliamentary Debates,* House of Representatives, 15 June 2017, 6611 (the Hon Peter Dutton MP, Minister for Immigration and Border Protection).
[14] The Hon Malcom Turnbull, Prime Minister, and the Hon Peter Dutton, Minister for Immigration and Border Protection, 'Strengthening the Integrity of Australian Citizenship', Media Release, 20 April 2017.

As noted in the Senate Committee's 2017 report,[15] the Scrutiny of Bills Committee criticised the introduction of retrospective provisions in the 2017 Bill and concluded the following:

> *'... the retrospective application of these provisions would have a detrimental effect on a large number of individuals which has not been adequately justified'.*[16]

The Association is opposed to the creation of retrospective provisions which have the potential both to adversely affect the rights of applicants and cause unpredictable results where a significant number of applicants have relied on the existing provisions. As at 16 July 2017, the Minister estimated that 54% of the 47,328 people who had lodged an application for citizenship on or after 20 April 2017 would not meet the new residency requirement in the 2017 Bill.[17]

The number of applicants who will be adversely affected by the proposed retrospective provisions is likely to be even greater when one considers that ten months have elapsed since the Minister provided these statistics and the 2018 Bill proposes to increase the residency requirement to eight years (as opposed to the four years proposed in the 2017 Bill).

The Association notes that, in the Senate Committee's 2017 report, the Senate Committee concluded the following in relation to the retrospective provisions:

> *'... regrettable as it is, this action of 'legislation by media release' is all too common in recent decades but for many valid reasons has become a fact of law'.*[18]

The Association finds this justification unconvincing and it is, indeed, irrelevant to the question whether retrospectivity is justified in the present case. The Parliament has a constitutionally entrenched duty to legislate through a process which is completely separate to media releases made by members of the executive. The Association does not consider, in these circumstances, the existence of a media release to be sufficient justification to confer upon the executive a power to retrospectively invalidate applications that were made in good faith on the basis of the law as it existed at the time.

Conclusion

Thank you again for the opportunity to contribute to the Senate Committee's review of the 2018 Bill.

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[15] Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 [Provisions]* 13.
[16] Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 8 of 2017* 60.
[17] Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 [Provisions]* 13 citing the Hon Peter Dutton MP, Minister for Immigration and Border Protection, Response to Scrutiny Digest No 7 of 2017 from the Senate Scrutiny of Bills Committee, 4-5.
[18] Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 [Provisions]* 13.

Whilst there are likely to be further issues with the 2018 Bill which are not addressed in this submission, the Association has focused on articulating its strong opinion that clauses 126 and 127 of the 2018 Bill should be removed and that the 2018 Bill should not operate retrospectively.

The Association would be pleased to provide further feedback, or answer any queries you may have.

Yours faithfully

G A Thompson QC
President