REFUGEE ADVICE & CASEWORK SERVICE

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Committee Secretary
Senate Legal and Constitutional Affairs Committee

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017

The Refugee Advice & Casework Service (**RACS**) is a specialist refugee legal centre and has been assisting people seeking safety in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to comment on provisions of the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (the **Bill**), which would amend the *Australian Citizenship Act 2007* (the **Citizenship Act**).

Although refugees make up only a small proportion of those who are affected by the Bill, the effect on refugees is disproportionate and severe. Whereas RACS supports an inclusive and non-discriminatory approach to citizenship, many of the proposed amendments would frustrate or remove existing pathways to Australian citizenship for refugees who live in Australia.

1. The special significance of citizenship for refugees

Citizenship carries particular significance in the context of the international refugee system. Whereas states are ordinarily responsible for protecting the rights of their citizens under international law, refugees are people for whom the ordinary relationship between an individual and their country of citizenship has broken down. Although some refugees are also stateless persons, most refugees are people whose citizenship is simply ineffective.

As refugees are unable to return to their country of origin due to a risk of persecution, Australian citizenship plays a central role in allowing people from refugee backgrounds to rebuild their lives with certainty and security.

The special importance of citizenship in this context is recognised by the *1951 Convention Relating to the Status of Refugees*, which requires Australia, like other parties to the

Convention, to facilitate refugees' access to citizenship.[1] The Bill may breach this obligation by making it harder, not easier, for refugees to become citizens, and by doing so in a manner that has a discriminatory effect on those Australian residents who are also refugees.

2. Citizenship by conferral: eligibility requirements

(a) Extended residence requirement

Proposed section 22(1A) would require an applicant for citizenship to have been a permanent resident for four years prior to applying for citizenship. Permanent residency is a legal status that applies to a small number of visa classes. Currently, a person meets the residence requirement if, prior to their citizenship application, they have spent at least four years in Australia, with one of those years as a permanent resident. Because many permanent residents only become permanent residents after many years of living in Australia (as temporary visa-holders), the effect of the amendment is to add three years to the residence requirement, even for people who have lived in Australia for decades.

The effect of this provision will be to delay citizenship for refugees who are permanent residents, including those who entered Australia as holders of temporary visas and have since been granted a permanent protection visa.

The Explanatory Memorandum attempts to justify the change by stating that the longer permanent residency requirement ensures that:

> aspiring citizens will be given a sufficient amount of time to integrate into the Australian community, gain an understanding of shared Australian values, and the commitment they must make to become an Australian citizen. It would also provide a basis for assessing aspiring citizens' commitment and contribution to Australia.[2]

The Explanatory Memorandum provides no explanation as to why the existing legislation is insufficient in this regard, but refers to the National Consultation Report's recommendation of four years. That report describes the value of a "probationary period."[3] Yet existing law already establishes a probationary period, with its strict requirements surrounding permanent residency. These requirements are already structured to facilitate the determination of whether a person is unsuitable to become a permanent member of the Australian community. Further, it is quite unclear how complicating or extending the path to citizenship would facilitate integration. It may well have the opposite effect.

This is a problem that already pervades the treatment of refugees under Australian law. Under existing law, citizenship by conferral is only available to permanent residents. Due to amendments in 2014 to the Migration Act, many refugees who live in Australia on temporary protection visas, some of whom are stateless or have no prospect of being able to return to their country of origin, are permanently ineligible for permanent residency and

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[1] Article 34 provides that:

> *The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.*

Australia has a similar obligation in relation to stateless persons under Article 32 of the 1954 *Convention relating to the Status of Stateless Persons*.

[2] Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, 70.

[3] Australian Government, *Australian Citizenship – Your Right, Your Responsibility – The National Consultation on Citizenship Final Report* (2015) 19.

therefore will never be able to access citizenship, irrespective of the length of their residence, the standard of their English or their contribution to the community. This threatens social cohesion and increases the marginalisation of refugees.

(b) Advanced English language requirement

Proposed section 21(2)(e) would require applicants to have "competent English" and the Bill would allow the Minister to determine the meaning of this term by legislative instrument. Given that existing law requires a command of English that is necessary in order to pass the citizenship test (which is available only in English), the extent to which the Bill would affect eligibility for citizenship depends on the level that is specified by the Minister. The Bill would therefore represent a significant delegation of power from the Parliament to the executive in this regard.

The standard that the current Minister has indicated as the government's preference should the Bill become law (IELTS General Stream Level 6) represents a very high level of English competency.

RACS recognises that some refugees have very strong English language skills and would have little difficulty satisfying a high standard of English testing. However, for many other refugees, a high standard is overly onerous and in many cases would unfairly exclude from citizenship people who nonetheless speak conversational English and are permanent members of the Australian community. In some cases it would also exclude some of the most persecuted and vulnerable refugees living in Australia from ever becoming Australian citizens, including those whose illiteracy in their own language is a consequence of their statelessness. In these cases, the Bill would have the effect of punishing the stateless for the consequences of their statelessness (by perpetuating their statelessness).

The high standard is also likely to have a particularly adverse impact on women. Women from refugee backgrounds are both less likely to have had English language education and less likely to have the opportunity to learn if they have domestic responsibilities in their households. Accordingly, the Bill threatens to have the effect of isolating and alienating refugee women in particular.

A measure of conversational English skills – a level which is approximated by the existing requirements – appears to be much more effectively geared towards the inclusion and integration of permanent residents from non-English speaking backgrounds. Basic, conversational English demonstrates a person's ability to contribute to society without discriminating against those who have not had the advanced, formal education necessary to satisfy the proposed standard.

3. Expanded Ministerial powers

A number of proposed changes in the Bill are designed to increase Ministerial discretion and weaken the Citizenship Act as a free-standing determinant of outcome of citizenship applications. The effect is that outcomes that would ordinarily have been determined according to legislative criteria would be determined according to the Minister's perception of the public interest. This is a considerable and unnecessary expansion of the Minister's personal powers, with serious implications for the rule of law.

(a) Ministerial powers in relation to Administrative Appeals Tribunal decisions

Proposed section 52(4) would allow the Minister to exclude a person who is applying for citizenship from access to review by the Administrative Appeals Tribunal (AAT) if exclusion is in the "public interest" as determined by the Minister. Proposed section 52A would allow

an AAT decision to be set aside if the Minister determines that the decision is not in the public interest.

Both provisions remove safeguards from the process of determining who becomes an Australian citizen. These provisions constitute an overreach of executive power that threatens the rule of law and the separation of powers upon which the Australian legal system is based.

The current Minister has argued that these provisions are necessary because the AAT, in its merits review function, has made decisions with which the Minister disagrees.[4] A personal power to overturn tribunal decisions with which one disagrees has serious implications for the rule of law, for which the independence of the judiciary and respect for the role of courts and tribunals is fundamental.

Legislative proposals that concentrate decision making power in the executive are commonly accompanied by assurances in relation to the continuing availability of judicial review. While the availability of judicial review is important, its corrective capacity should not be overstated in situations where legislation itself creates power that undermines the rule of law. Judicial review is capable of ensuring that decision-making power is exercised within the ambit of the power established by Parliament, but the power that would be established by the Bill would be far-reaching.

(b) Revocation of citizenship

Whereas proposed sections 52(4) and 52A concern the Minister's power to overturn AAT decisions relating to applications for citizenship, proposed section 34AA would establish a new Ministerial power to revoke an Australian citizen's citizenship. The provision would allow the Minister to revoke citizenship in circumstances where the Minister believes fraud or misrepresentation was associated with a person's entry to Australia, the grant of a previous visa, or the grant of citizenship. This fraud or misrepresentation may have been committed by a third party and would not need to constitute a criminal offence. This revocation power would represent the introduction of a visa cancellation model to Australian citizenship law.

The Citizenship Act already allows for the revocation of citizenship where a person (including a third party) has been convicted of an offence involving fraud or misrepresentation in relation to their citizenship application.[5] The threshold for revocation that is established by the requirement of a conviction (and the criminal standard of proof beyond reasonable doubt) is an appropriate and important precondition to the exercise of this power.

Importantly, the proposed changes would also allow the revocation of the citizenship of some children who are Australian citizens by birth but whose parents were not. Section 36 of the Citizenship Act currently allows, when a person's citizenship is revoked for certain reasons, for the revocation of their child's citizenship as well (unless one parent remains a citizen or the child would become stateless). The Bill would amend section 36 to include new section 34AA among the reasons that permit the revocation of a child's Australian citizenship in these circumstances.

The absence of a knowledge requirement and the low threshold of the Minister's "belief" degrades the value of Australian citizenship by treating it like a visa, even for Australian citizens who were born in Australia. The Bill would have the effect of entrenching

[4] Ray Hadley, Interview with Peter Dutton, Minister for Immigration and Border Protection (Radio Interview, 22 June 2017).
[5] *Australian Citizenship Act 2007,* s 34(2).

citizenship by a conferral as a second class of Australian citizenship, which is less secure than that of other Australian citizens and perpetually subject to the risk of revocation by the Minister.

4. Citizenship by birth: the ten-year rule

Under existing law, a child born in Australia who lives in Australia throughout their first ten years of life automatically acquires Australian citizenship on their tenth birthday. This form of citizenship by birth accompanies other modes of automatic acquisition of Australian citizenship, such as being born in Australia to a parent who is an Australian citizen or permanent resident.

The Bill would severely narrow the application of this rule. Not only would proposed section 12(4) require a child to have held a visa on every day of that ten-year period, but proposed section 12(7) would exclude a child from citizenship if either of the child's parents was ever an unlawful non-citizen in the time between their arrival in Australia and the birth of the child.

The resulting regime would effectively punish Australian-born children for irregularities in the historical immigration status of their parents. The closest the Explanatory Memorandum comes to articulating a justification for this amendment is that denying a child Australian citizenship in these circumstances would act as a deterrent for parents seeking to take advantage of the rule. However, RACS is not aware of any evidence of systematic abuse of the provision and none is referred to in the Explanatory Memorandum.

This is despite the serious impact of the amendment on the children who will be affected. Those children will be, by definition, children who were born in Australia and who have grown up in Australia and know no other country. The amendments deny citizenship by birth to these children based solely on the immigration status of the parents, including their status even many years before the child was born.

In particular, the amendments to the ten-year rule would have a disproportionate and adverse impact on the Australian-born children of refugees who did not have a visa when they arrived in Australia. Because these children and their families, since amendments in 2014, are not eligible for permanent protection visas, the amendments would remove the ten-year rule as a means for Australian-born children of refugees to escape the cycle of temporariness that now prevails in the Migration Act. The establishment of a permanent category of long-term residents whose ineligibility for citizenship is hereditary is plainly contrary to the goal of facilitating integration and social cohesion.

We oppose the Bill in its entirety and recommend that it should not be passed.

Please do not hesitate to contact us for further information or clarification.

Sincerely

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