



ADMINISTRATIVE REVIEW COUNCIL

REPORT TO THE
ATTORNEY-GENERAL

CITIZENSHIP REVIEW AND APPEALS SYSTEM

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INTRODUCTION

As was indicated in its First Annual Report, the Administrative Review Council early in its history prepared a program of priorities which selected immigration and citizenship powers for early examination. The Committee on Administrative Discretions (the Bland Committee) had reported in 1973 that there were inadequate provisions made in the immigration legislation for external review on the merits, and had recommended several important new rights of review in this area, only some of which had been implemented. The Council's study was to extend to all powers conferred by legislation administered by the Minister for Immigration and Ethnic Affairs and of decision making under those powers for the purpose of considering the review of those decisions and other matters that come within the statutory functions of the Council.

2. The legislation administered by the Minister for Immigration and Ethnic Affairs comprises:

Aliens Act 1947 and Regulations
Australian Citizenship Act 1948 and Regulations
Australian Institute of Multicultural Affairs Act 1979 and Regulations
Departure Tax Act 1978
Departure Tax Collection Act 1978 and Regulations
Immigration (Education) Act 1921
Immigration (Guardianship of Children) Act 1946 and Regulations
Migration Act 1958 and Regulations
Nationality and Citizenship (Burmese) Act 1959 and Regulations
Overseas Students Charge Act 1979 and Regulations
Overseas Students Charge Collection Act 1979 and Regulations
Temple Society Trust Fund Act 1944

3. The Council has divided its project, and now reports upon powers conferred by the laws other than the Migration Act and the related Overseas Students Charge legislation.

4. In the course of the council's study, members of its Secretariat visited the Department's Sydney and Melbourne regional offices, and held discussions with officers of the Department. The Department also provided comments upon a Working Paper prepared by the Secretariat. The Council appreciates the Department's cooperation, and has taken account of its views. In particular, the Council has noted the Department's concern that a decision to introduce new rights of review should take account of the resources, particularly in manpower, which the review process will require.

REVIEW AND THE AUSTRALIAN CITIZENSHIP ACT

5. The *Australian Citizenship Act 1948* contains the most important administrative powers considered in this Report, and the one of central concern is the Minister's power under section 14 to grant a certificate of citizenship. The exercise of this power occupies major resources of the Department, and would be the only source of significant numbers of review applications were the recommendations of this Report to be implemented by the Government.

6. *The Department's View.* The Bland Committee reported that the Department considered that there was justification for review by a General Administrative Tribunal of discretions to grant or refuse citizenship and to deprive a person of citizenship under the Citizenship Act, but subject to the provisos that the review process had safeguards to protect security and was not entitled to question government policy (see para. 90 of its Final Report). However, although the Bland Committee endorsed the Department's suggestion, no rights of review have yet been introduced. It appears that, when the Administrative Appeals Tribunal Act was passed, decisions under the Australian Citizenship Act were omitted from its Schedule of jurisdiction pending consideration of the report of the Royal Commission on Intelligence and Security (the Hope Inquiry). That Commission reported in 1977, and its recommendations have been enacted in the *Australian Security Intelligence Organisation Act 1979*.

7. In a letter to the Council, the Department has now expressed strong reservations about the conferring of review rights, particularly in relation to certain citizenship decisions. Its reservations are chiefly based upon the view that the advantages of a Tribunal review would not outweigh the cost of a review process, particularly in relation to refusals of citizenship for failure to satisfy section 14 (1) (f), i.e. lack of an adequate knowledge of the English language. It states that a refusal on security grounds is the main aspect of citizenship decisions upon which a genuine case for a review could be argued, and notes that this is now provided by the ASIO legislation.

8. The Council does not accept the reasons put forward by the Department for not introducing external review on the merits for citizenship decisions. It considers that, subject to the qualification in relation to cases involving security discussed below, an external review tribunal would offer an improved process of reconsideration which may have a beneficial influence on the relevant administration of the Department, and would not unduly disrupt that administration. Equally important, in the view of the Council are the general social benefits flowing from the introduction of rights of review by an independent adjudicatory tribunal. When the Council invited the Department to present a calculation of the costs of introducing review, the Department indicated that it lacked the statistical data and was unable to provide a costing. Notwithstanding this uncertainty on costs, the Council believes that the important personal interests

concerned in decisions on citizenship warrant the system of external review recommended by it in paragraph 22 of this Report.

9. *The Review Tribunal.* The Council recommends that the Administrative Appeals Tribunal should be the tribunal to review decisions made under the Australian Citizenship Act. The issues likely to arise in the recommended jurisdiction are capable of proper resolution by that Tribunal, and the Council considers that the Tribunal will be able to adopt procedures within the provisions of the Administrative Appeals Tribunal Act for handling review applications efficiently and expeditiously. The Council suggests that an extension of the Administrative Appeals Tribunal's jurisdiction along the lines recommended by it would be in conformity with the Government's stated policy of progressively extending the jurisdiction of the Tribunal. If made in the near future, this extension would assist the Tribunal to develop as a readily accessible institution of Commonwealth administrative review.

10. *The Form of the Power.* In framing the jurisdiction it proposes for the Administrative Appeals Tribunal, the Council considered the interpretation taken by the Department on legal advice that s.14 (1) confers a discretion to refuse to grant a certificate of Australian citizenship notwithstanding that the factual conditions (a) to (h) of that sub-section have been satisfied. In fact most decisions refusing citizenship are made by delegates of the Minister upon the grounds that one or more of the factual conditions have not been satisfied. The Council considers that these decisions should clearly be reviewable, as also should be the rare decisions by the Minister himself on the satisfaction of the factual conditions. Concerning the residual discretion, it appears that refusals are made for discretionary reasons based upon policies defined by the Minister for refusing applications by persons having an adverse security assessment or seeking to rely on periods of unlawful residence. Beyond this, the Department states that its officers working in the area cannot recall one case where an applicant, having satisfied the provisions of section 14 (1), was refused citizenship on the ground of general unsuitability.

11. A question arises whether refusals made in the exercise of the Minister's discretion should be reviewable, the doubts arising not because the Administrative Appeals Tribunal is inherently unable to review the exercise of discretionary powers of Ministers (it already does this satisfactorily in several areas), but because of a view that conferral of citizenship has traditionally been a prerogative of the executive. However, the Act and its current administration show an intention that citizenship should be conferred according to stated criteria or uncontroversial policies, and are clearly separated from the issues involved in admitting persons to residence in Australia, which are fully determined under the Migration Act. Security matters apart, the Council has not been able to anticipate any case arising in the future where it would be inappropriate for a refusal of citizenship on a discretionary ground to be reviewed by the Administrative Appeals Tribunal. For this reason, the Council recommends that

there should be no exception in its proposed jurisdiction over decisions refusing citizenship, other than for security matters (see paragraph 13 below).

12. *The Policy Question.* As the Administrative Appeals Tribunal Act has been interpreted by the Federal Court in *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, the Tribunal is entitled to take account of relevant ministerial policy, but is not entitled to abdicate its function of determining whether the decision under review is the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general policy might be. The approach of the Tribunal to relevant policies has been further explained by decisions of the Tribunal itself, particularly in *Re Drake and the Minister for Immigration and Ethnic Affairs (No.2)* (21 November 1979). It appears that the Tribunal adopts a practice of applying lawful Ministerial policy, unless there are cogent reasons to the contrary. The Council expects that, because of the respect likely to be shown by the Tribunal to policies on the interpretation of the Australian Citizenship Act and on the exercise of the discretions it confers, the recommended review jurisdiction would not disrupt the fair and orderly administration of the Act by the Minister.

13. *The Security Question.* The Council has considered the effect of the *Australian Security Intelligence Organisation Act 1979* on proposals to give a review jurisdiction over citizenship to the Administrative Appeals Tribunal. That Act provides a mechanism for the review by the Security Appeals Tribunal of adverse security assessments furnished by ASIO to the Department and relating to the making of decisions under the Australian Citizenship Act. It would, however, also permit the introduction of rights of review by the Administrative Appeals Tribunal of those decisions. Under the scheme of the Act the two Tribunals would operate con-currently, their mutual concerns being carefully defined by the ASIO Act so as not to overlap. Thus, the Security Appeals Tribunal is concerned to verify the correctness of the assessment but not its proper significance in making an overall decision, and the Administrative Appeals Tribunal in reviewing the final decision would be prevented from examining the assessment.

14. There is, however, one aspect of the scheme, which has concerned the Council. This is the effect of section 61(2) of the ASIO Act. That provision appears to mean that a decision maker who is subject to review by the Administrative Appeals Tribunal may decide not to follow the advice of an adverse security assessment if it has not been reviewed by the Security Appeals Tribunal, and that the Administrative Appeals Tribunal would be in the same position in reviewing the decision maker's decision. The Council considers that while it is appropriate that the Minister should be able to consider whether there are factors in favour of granting citizenship which outweigh the effect of an adverse security assessment, it is not appropriate that the Administrative Appeals Tribunal should be able so to decide. It would be able to do this if its jurisdiction were conditioned solely by the ASIO Act, so that it was not bound by an adverse security assessment when an affected person chose not to challenge the

assessment by appeal to the Security Appeals Tribunal.

15. The Council therefore believes that persons the subject of an adverse security assessment should, where the Minister decides to act upon it, be limited to their rights under the ASIO Act, and should not have a right to appeal to the Administrative Appeals Tribunal. It therefore recommends that it be a condition of the jurisdiction proposed by the Council for the Administrative Appeals Tribunal that a decision the subject of an application has not been made by the Minister acting upon an adverse or qualified security assessment within the meaning of section 35 of the ASIO Act. With this condition, the recommended review process will, in the Council's view, provide adequate safeguard for security matters.

16. *The Reviewable Grounds of Refusal.* The Council does not agree with the Department's suggestion that a review jurisdiction should not extend to refusals of citizenship for failure to satisfy paragraphs 14 (1) (f) or (g), or any other particular conditions. Those paragraphs provide the requirement that an applicant has an adequate knowledge of the English language, and that he has an adequate knowledge of the responsibilities and privileges of Australian citizenship. At present, the Department assesses them by personal interview, the latter requirement having become a formalised test of memory.

17. The Council has some sympathy with the Department's reservations as to whether a Tribunal would be able to make a better judgment in what is a straightforward assessment than that made by a departmental review. However, it sees a clear benefit in providing aggrieved persons with access to a second opinion from a body independent of the Department. That such an appeal would frequently be sought may be open to some doubt, since it seems likely that many people initially refused on these grounds would prefer a second application perhaps accepting the Department's assistance in improving their English and memorising the responsibilities and privileges pamphlet, rather than appealing to the Administrative Appeals Tribunal. In any case, appeals on these decisions would not be time consuming or expensive, since it could be expected that the Tribunal would determine the matter upon a personal assessment of the appellant and not by extrinsic evidence. This would be achieved without the need for special procedural provisions. In recommending that all decisions made under section 14 should be within a review jurisdiction, the Council also draws on the principle that it would be unacceptable to exclude from review one or two of the possible reasons for making a decision which is otherwise reviewable, since otherwise there would be distrust of a review structure appearing to allow an administrator to escape review by giving an unreviewable reason for his decision. This has particular force where the unreviewable decision may seem to be a latter day dictation test.

18. *The Reconsideration Prerequisite.* The Department has also suggested that the review structure should encourage the reduction of review costs by requiring internal

reconsideration within the Department of all disputed decisions before external review may proceed. This proposal is a common feature in the jurisdictions of the Administrative Appeals Tribunal, and no reason appears for not including such a procedure in citizenship matters. It may also enable the Department to arrange its first instance procedures so that thorough collection of material supporting a refusal need only occur at a reconsideration stage.

19. A common form of reconsideration provision is to require an aggrieved person to request a decision maker to reconsider his decision and then allow him to apply to the Tribunal for review of that reconsidered decision (e.g. s.154 *Superannuation Act 1976*). The Council considers that this form has disadvantages in the context of citizenship in that it requires two initiatives by an aggrieved person before his appeal will come before an external tribunal, and that the decision maker is not required to conduct his reconsideration within a reasonable time. The Council therefore recommends that there be provision for applications to be made directly to the Tribunal from decisions, but that the decision maker be empowered, for a period of 28 days after he is notified of an application, to reconsider his decision and alter it. The hearing and progress of the application should be delayed for that period, and the Tribunal should be empowered to review any new or altered decision.

20. *The Provision of Statements of Reasons.* Officers of the Department have expressed the fear that the provisions of the Administrative Appeals Tribunal Act requiring decision makers to provide statements of reasons would be unduly onerous on the Department in that they would require the Minister personally to sign all statements even though decisions were taken by his delegates, and would require exhaustive reference to material and statements related to grounds in s.14 which the Department considered were satisfied and were not in dispute. In the Council's view, the Act required neither of these; a statement need only be made by the *actual* decision maker, and need refer only briefly to matters not connected to the ground upon which the refusal was in fact made. However, if these fears are thought to have some substance, it is recommended that the Act be amended to make this clear.

21. *The Other Powers.* Apart from the power to grant or refuse certificates of citizenship, the Australian Citizenship Act confers many other powers on the Minister, the Secretary of the Department, and authorised officers. The exercise of some of these may have a substantial adverse affect on a person's interests in citizenship matters, and in the Council's view deserve to be equally reviewable as a refusal of citizenship. In this category, the Council would place the powers to:

- extend times for registration of foreign birth or resumption of citizenship (ss. 11 (1), 23A (1), 236B (1), 30(2));
- include children in, and amend, certificates (ss. 14 (9), 47 (1));
- refuse to register declarations renouncing citizenship (s. 18 (6));

- deprive a person granted citizenship of his citizenship (ss. 21, 23 (2));
- register stateless persons as citizens (s. 23D (1));
- register women as British subjects without citizenship (s. 26A);
- register Australian protected persons (reg. 5 (4));
- forward particulars of a legitimated child for registration in Register of Births Abroad (reg. 7A(1));
- approve the re-registration of a legitimated child (reg. 7A (2));
- direct persons not to act as citizenship agents (reg. 23 (1)).

Some other powers are of a minor nature, which would not necessarily need to be reviewable by the Administrative Appeals Tribunal, but which could be included without risk of difficulty. In the Council's view it is convenient to include them in a jurisdiction, since this enables the jurisdiction to be defined by a general conferral which excludes only the clearly unsuitable powers. Such a formulation has the advantage of limiting unnecessary disputation on technical points of jurisdiction.

22. *The Council's Recommendation.* The Council therefore recommends that jurisdiction be conferred on the Administrative Appeals Tribunal to review all decisions of the Minister and Secretary made under the Australian Citizenship Act except those made under sections 15 (2) (b), 18 (5), 32, 40A, 41, 46A, 48 and 48A, and also to review decisions of the Minister made under Regulations 5 (4), 7A (2), and 23 (1) of the Australian Citizenship Regulations, and decisions of officers made under Regulation 7A (1) and (2) of the Australian Citizenship Regulations.

23. The enactment-conferring jurisdiction should contain provisions:

- excluding from review those decisions made acting upon an adverse or qualified security assessment within the meaning of s.35 of the *Australian Security Intelligence Organisation Act 1979*; and
- giving an opportunity for any reviewable decision to be reconsidered, whether by the person by whom it was made or by another person, for a period of 28 days after notification of an application to the Tribunal and, where a decision is so reconsidered and is altered as a result of the reconsideration, authorising the Tribunal to review the decision as so altered.

24. The Council also recommends the repeal of two sections of the Act which are inconsistent with external review. These are section 39, which permits the Minister to determine finally questions under the Act whether a person was ordinarily resident in Australia or New Guinea, and section 40, which states that the Minister may grant or refuse an application made to him without assigning any reason. Possibly these provisions would be impliedly repealed by the conferral of an Administrative Appeals Tribunal jurisdiction, and it may be that neither section needs to be repealed before a review jurisdiction can be conferred. Even if they remained in force at law, it would be

expected that the Minister would not exercise his powers once review was possible.

25. *The Amendment Proposal.* The Department has indicated to the Council that it is developing a legislative proposal, which will remove as far as possible the subjective elements from citizenships decisions so that in most cases a legal right to citizenship will be conferred. It suggested that there be consultation with the Council 'in an examination of the need for Tribunal review of the administrative discretions conferred by the proposed legislation'.

26. The Council has promised to assist in any way that it is able. However, it appears that the Department's proposal is still in its infancy, and no date has been set for its presentation to the Government. Two other advisory Councils are also to be involved in its development if the Minister decides to proceed with it. The Council considers that the interests at stake warrant the early introduction of rights of review under the Australian Citizenship Act, and recommends that this not be delayed by the consideration of other possible amendments.

27. The Council also recommends that the views expressed by it in this Report should be taken into account in preparing any amending legislation. The personal interests involved in granting citizenship will remain important, and are likely to justify review on the merits of any administrative decisions involved. If a discretionary element is to be removed, this will ease the path to introducing review by removing the possible difficulties referred to above at paragraph 11. Were the proposal to elevate citizenship into a 'right', it seems likely that it will be conditional upon the existence of factual circumstances, if only a residency qualification. Where an administrator will be exercising powers requiring him to form judgments on the existence of those facts, it will probably be appropriate, in the Council's view, that his decisions be open to review on the merits. Even if citizenship will be acquired by immigrants by force of law and without the exercise of administrative power, there may still be the need for some process of administrative adjudication of the acquisition of the status.

REVIEW AND THE OTHER LEGISLATION

28. The Council has few observations on the legislation other than the Australian Citizenship Act considered in its present study. The Aliens Act contains three discretionary powers of possible significance: the power administratively to determine a fine for a failure to register (s.18); the power to exempt from registration (s.8 (1) (a)); and the power to consent to the use of another surname (s. 11 (1)). Only the last of these, in the view of the Council, is appropriate for review by the Administrative Appeals Tribunal. The Department has stated that these powers are not used in contentious circumstances, and proposes to repeal the whole Act. However, the Bland Committee was also told of this proposal, and the Council recommends that decisions made under section 11 (1) be made reviewable by the Administrative Appeals Tribunal, unless the Act is to be repealed in the immediate future.

29. The Immigration (Guardianship of Children) Act presents problems for administrative review. Under it, the Minister is established as the guardian of every immigrant child arriving in Australia to the exclusion of its parents or other guardians (s. 6), and is given all the rights, powers, duties, obligations and liabilities of a guardian in respect of the child. An 'immigrant child' is a child entering Australia as an immigrant who does not enter in the charge of or for the purpose of living in Australia under the care of a parent or relative. The Minister is given express power to consent to the child leaving Australia and to place the child in the custody of a willing and suitable person (ss. 6A and 7). As is apparent from the sweeping power of delegation in section 5, and from the Regulations, the legislation contemplates the delegation of the Minister's powers to State Authorities performing child welfare and wardship functions. It appears that in practice the Minister seldom personally exercises his powers except the power to exempt children from the Act, but relies upon the delegate State Authorities. The constitutional validity of the Act was upheld in *R. v. Director-General of Social Welfare for Victoria; ex parte Henry* (1975) 8 A.L.R 233, a case concerning a Vietnamese war orphan, which shows the potential for disputes on custody under the Act.

30. At present no court or tribunal has a clearly conferred power to review decisions of the Minister or his delegates on the custody or welfare of an immigrant child, although it is arguable that Courts of relevant jurisdiction with inherent powers over infants' custody would have supervisory control over the Minister (c.f. *Johnson v. Director of Social Welfare (Vic.)* (1976) 9 A.L.R 343, and *Re Adoption of S.* (1977) 15 A.C.T.R. 29). The Bland Committee recommended that a review process should be considered in relation to the Minister's powers under sections 6a and 7 of the Act, but did not suggest what was the appropriate process since it noted that the Act was to be repealed. However, it appears that the Department has no current proposal to repeal the Act.

31. Proposals to establish a review process must consider the problem of reviewing actions of State officers exercising powers adopted from varying pieces of State

legislation (see reg. 4.). There seem to be no legal impediments to allow these actions to be reviewed by a Commonwealth tribunal. However, there are practical problems involving Commonwealth-State relations, and the complexity of the various State child welfare laws, which are given partial Commonwealth effect by the Regulations. Apart from the supervising jurisdiction of the Courts, which in some jurisdictions is excluded, State welfare laws do not usually provide rights of review of custodial decisions of statutory State guardians. Moreover, if review were to be introduced into the Commonwealth law, jurisdiction would probably not be suitable for the Administrative Appeals Tribunal, since it would concern questions of the custody and guardianship of children. It might be that the Family Court of Australia would be an appropriate review body.

32. The Council lacks the resources to investigate all these problems, and in particular, to explore the ramifications of the State child welfare laws. It therefore is able only to draw their existence to the attention of the Government, and to recommend that they be considered by it or be referred to the Family Law Council or the Law Reform Commission when they are considering child welfare laws.

33. The other legislation not discussed in this report has been considered by the Council, and is thought not to confer powers of decision, which at present either require or are suited for rights of review on the merits. The Council has, however, been informed that the Department is preparing regulations to control the payment of living allowances to persons attending approved courses of instruction and training courses under sections 6 and 7 of the Immigration (Education) Act. These will tighten the criteria for eligibility and specify the amounts to be paid. The Council recommends that in the drafting of these regulations inclusion of a right of review should be considered.

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