Citizenship Amendment Bill

21 September 2010

ATTORNEY-GENERAL

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
CITIZENSHIP AMENDMENT BILL

1. We have considered whether the Citizenship Amendment Bill (PCO 14163/3.10) (‘the Bill’) is consistent with the New Zealand Bill of Rights Act 1990 (‘the Bill of Rights Act’). We understand that the Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on Thursday, 23 September 2010.

2. In our view, the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we considered potential issues of consistency with ss 19(1) (right to be free from discrimination) and 25(c) (presumption of innocence) of the Bill of Rights Act and assessed whether or not any limitations on these rights are justifiable under s 5 (Justified limitations) of that Act. To that end, we examined – following the guidance of the Supreme Court of New Zealand’s decision in Hansen v R [1] - whether the relevant clauses:

(a) serve a purpose sufficiently important to justify some limitation of the right or freedom.

(b) If so, then:

   (i) is the limit rationally connected with the objective?

   (ii) does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?

   (iii) is the limit in due proportion to the importance of the objective?

PURPOSE OF THE BILL

3. The stated aim of the Bill is to create a more inclusive citizenship system. To that end, the Bill amends the Citizenship Act 1977 (the Act) by changing various requirements migrants must usually meet before being eligible to receive a grant of citizenship. These changes include:

- reducing the period applicants must be present in New Zealand before applying for the grant of citizenship from 5 years to 2 years for regular members of the New Zealand Defence Force
- making better provision for families that travel overseas together for the Government or an international organisation, and
• providing the Minister of Internal Affairs with an ability to grant citizenship to applicants convicted of very minor offences.

CONSISTENCY WITH SECTION 19(1) OF THE BILL OF RIGHTS ACT

• Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993. The grounds of discrimination under that Act include (among others) family status, sex, disability, nationality and age.
• Drawing on the New Zealand case law on discrimination, we consider that the key questions in assessing whether there is a limit on the right to freedom from discrimination are: [2]

(a) does the legislation draw a distinction based on one of the prohibited grounds of discrimination, and if so,

(b) does the distinction involve disadvantage to one or more classes of individuals?

• In determining if a distinction arises, consideration is given to whether the legislation proposes that two comparable groups of people be treated differently on one or more of the prohibited grounds of discrimination. [3] The distinction analysis takes a purposive and untechnical approach to avoid artificially ruling out discrimination. [4] Once a distinction on prohibited grounds is identified, the question of whether disadvantage arises is a factual determination.[5]

Clause 7

• Clause 7 inserts a new s 7A into the Act. New s 7A(1) provides that every person born outside New Zealand before 1 January 1970 may register as a New Zealand citizen by descent if, at the time of the person’s birth, the person’s mother was a New Zealand citizen otherwise than by descent.
• We consider that this provision draws a distinction based on family status, age and sex. We have therefore considered whether these distinctions give rise to disadvantage for the purposes of s 19(1) of the Bill of Rights Act and, if so, whether these limitations on the right to be free from discrimination are justified under s 5 of that Act.
• New s 7A creates a distinction based on a person’s family status because only the descendants of a New Zealand citizen will be able to register as a New Zealand citizen by descent. Persons born overseas who do not meet this criterion are not entitled to be registered as New Zealand citizens by descent. This distinction therefore gives rise to a disadvantage.
• We note that the purpose of this distinction is to ensure that only those persons with a sufficiently close connection with New Zealand may claim citizenship as of right. Direct descendants of New Zealand citizens (other than by descent) are deemed to have such a connection due to their parentage. In our view, this is an important and significant objective.
The distinction involved is an incident of New Zealand’s sovereign power to define its own citizenry. Importantly though, a descendant of a non-citizen or citizen by descent may obtain citizenship by grant once certain criteria establishing their connection with New Zealand are met.

We, therefore, consider that the limitation on the right to be free from discrimination on the ground of family status is proportionally and rationally linked to the objective and can be justified under s 5 of the Bill of Rights Act.

New s 7A also creates a distinction based on a person’s age and sex. This is because, firstly, applicants must be born before 1 January 1970. This age-based distinction is designed to align the Bill with previous legislation, as people born overseas after this date to female citizens by birth or grant are already citizens by descent due to a law change effective from that point.

The provision also only allows mothers to pass on citizenship to children born overseas, creating a distinction based on sex. The purpose of this distinction is to rectify a discriminatory provision of the previous citizenship legislation, the British Nationality and New Zealand Citizenship Act 1948, which only allowed male citizens to pass on citizenship to children born overseas.

We consider that the distinctions based on age and sex do not create a disadvantage.

**Clause 8**

Clause 8 repeals s 8 of the Act and substitutes new ss 8-8F. New s 8(1) sets out the core requirements for an application for citizenship by grant. These requirements include that the applicant must be of full capacity and must satisfy the Minister that he or she has sufficient knowledge of the English language.

‘Full capacity’

Section 2(3)(c) of the Citizenship Act 1977 defines full capacity as being a person who is not of unsound mind. New s 8(1), therefore, draws a distinction based on disability.

We note that the Minister is unable to accept an application for the grant of citizenship under new s 8(1) from an applicant who is not of full capacity and the application must in such cases be referred to the Minister as a submission. Therefore, despite meeting all the other requirements, the applicant will not be automatically entitled to the grant of citizenship. For that reason, the distinction based on disability gives rise to a disadvantage.

When determining whether this disadvantageous distinction is justified for the purposes of s 5 of the Bill of Rights Act, we note that there are important consequences attached to taking up New Zealand citizenship, such as applicants losing (where applicable) the citizenship of their country of origin. Loss of citizenship of their country of origin could have significant ramifications which the applicant needs to be fully aware of. Requiring an applicant to be of full capacity is intended to ensure that he or she is fully aware of the consequences of obtaining New Zealand citizenship. This is an important and significant objective.
We have been advised by the Department of Internal Affairs that in cases where there is evidence that an applicant has a mental illness, the Citizenship Office considers carefully whether the applicant is still able to meet the full capacity requirement despite that illness. For instance, there have been cases where an applicant has been detained under the Criminal Procedures (Mentally Impaired Persons) Act 2003 but has been considered to have sufficient understanding of the nature and effect of the act of applying for New Zealand citizenship and, therefore, of full capacity for citizenship purposes.

Moreover, we also note that s 9(1)(c) of the Citizenship Act 1977 allows the Minister to authorise the grant of citizenship to any person, including a person who may be a New Zealand citizen by descent, if he or she is satisfied that granting a certificate of New Zealand citizenship to the applicant would be in the public interest because of exceptional circumstances of a humanitarian or other nature relating to the applicant. When exercising this discretionary power, the Minister must – pursuant to s 6 of the Bill of Rights Act – ensure that his or her decisions are consistent with the Bill of Rights Act, including s 19(1). [6]

We have concluded that the limitation in new s 8(1) is rationally and proportionally connected to the objective and, therefore, justified under s 5 of the Bill of Rights Act.

'Knowledge of the English language' - Indirect Discrimination

New s 8(1)(h) of the Act provides that the Minister must be satisfied that the applicant has sufficient knowledge of the English language. Neither the Bill of Rights Act, nor the Human Rights Act includes "language" as a prohibited ground of discrimination. Nonetheless, the language requirement appears to give rise to an issue of indirect discrimination on the grounds of ethnic or national origin, as it disadvantages applicants who come from ethnic or national communities where English is not the native language. We have, therefore, considered whether this limitation on the right to be free from discrimination is justified.

We note that the purpose of the language requirement is to enable migrants to integrate into the New Zealand community and, more importantly, to ensure that they can fully access educational, health and social services in this country. We consider that these are significant and important objectives.

We further note that the degree of language proficiency is not set at an unreasonably high level. Applicants are only required to have a sufficient knowledge of English, as opposed to being fluent in the language. Moreover, in recognition of the difficulties that certain applicants may have learning English, the Minister of Internal Affairs may under new s 8E waive the language requirement when an applicant, because of his or her age or standard of education, or for any other reason personal to the applicant, would suffer undue hardship if compliance with this requirement were insisted upon. Again, the Minister is – pursuant to s 6 of the Bill of Rights Act – responsible for ensuring that this discretion is exercised in a manner that is consistent with that Act.

In our view, the language requirement is rationally and proportionally connected to the above-mentioned objectives. We consider that it is justifiable in terms of s 5 of the Bill of Rights Act.
**Clauses 8C(2) and 8F(3)**

- Clause 8 inserts new ss 8C(2) and 8F(3). These provisions allow applicants who are accompanying their citizen spouse, civil union or de facto partner or parents overseas on Crown or public service to have that time count towards the five year period a person must be present in New Zealand to:

  (a) meet the requirement in ss 8A(1) or 8B(1), or

  (b) be treated as intending to continue to reside in New Zealand for the purpose of satisfying the Minister that he or she intends, if granted New Zealand citizenship, to continue to reside in New Zealand as required in s 8(1)(i).

- These provisions create a distinction based on marital and family status, which is disadvantageous as non-citizens who cannot meet the criteria in these provisions will have to continue to reside in New Zealand for the full five years to meet the residence requirement to apply for citizenship.
- We consider that these limitations on the right to be free from discrimination are justified under s 5 of the Bill of Rights.
- New ss 8C(2) and 8F(3) prevent the situation in which a person would have to continue to reside in New Zealand to meet the residence requirement and be separated from his or her spouse, partner, or parent who is undertaking Crown or public services overseas. We consider that allowing families to stay together without jeopardising their ability to be granted citizenship is an important objective, and the limitation on the right to be free from discrimination will achieve that objective. Also, the provisions only apply to a very narrowly described situation and are, therefore, proportional to their objective.

**Clause 13 (1)**

- Clause 13 repeals s 15 of the Act and substitutes ss 15(1) and 15(1A). New s 15(1) sets out the requirements for a New Zealand citizen to make a declaration of renunciation of his or her citizenship. The requirements include being 18 years old and being of full capacity. This clause creates a distinction based on disability and age.
- In our view, these distinctions give rise to a disadvantage. This is because the Minister is unable to accept an application of renunciation of citizenship from an applicant who is under 18 or who lacks full capacity. These applications can only be accepted if the Minister decides to waive either or both of the requirements (see below paragraph 34). Despite meeting all the other requirements, applicants who are under 18 or lack full capacity will not be automatically entitled to renounce New Zealand citizenship.
- Renunciation of citizenship involves the applicant giving up a number of significant rights, including the unconditional right to enter and remain in New Zealand indefinitely, the right to a New Zealand passport, any other rights that may exist by virtue of the fact that someone is a New Zealand citizen, and potentially the right of any children born to that person to be New Zealand citizens. Once a person has
renounced his or her New Zealand citizenship, there is no ability to regain that citizenship automatically should the person change his or her mind. Instead, the former citizen must meet the same grant requirements as any other applicant for the grant of citizenship. Renunciation is a significant decision for a person to make and the person must be fully aware of the consequences of doing so. The requirements in new s 15(1) have the purpose of ensuring that the applicant has this awareness. We consider this an important and significant objective.

- We note that, under new s 15(1A) of the Bill, the Minister may waive either or both of the requirements in subsection (1) for the person to have attained the age of 18 years and to be of full capacity, if the Minister is satisfied that it is in the best interests of the person to do so. When exercising this discretionary power, the Minister is – pursuant to s 6 of the Bill of Rights Act – responsible for ensuring that his or her decisions are consistent with that Act, including s 19(1).
- We consider that the age and full capacity requirements in new s 15(1) are rationally and proportionally linked to the objective and, therefore, justified under s 5 of the Bill of Rights Act.

**Clause 14**

- Clause 14 amends s 17(2) of the Act and inserts a new subsection (2A). New s 17(2) sets out the grounds on which the Minister may deprive a person of his or her citizenship. Under new s 17(2)(b), a person may be deprived of his or her citizenship if the person has committed an offence before acquiring New Zealand citizenship but was convicted, and received a sentence of imprisonment, in relation to that offence after he or she acquired New Zealand citizenship. New s 17(2A) clarifies that s 17(2)(b) does not apply to a New Zealand citizen who has been granted citizenship under the Citizenship (Western Samoa) Act 1982. This exception creates a distinction based on nationality as citizenship can only be granted under the Citizenship (Western Samoa) Act 1982 to West Samoan nationals.
- Applicants who do not qualify to be granted citizenship under that Act will not benefit from the exception created in new s 17(2A) of the Bill. This provision, therefore, gives rise to a disadvantage.
- New Zealand administered Western Samoa from 1914 until 1962. In 1962, Western Samoa and New Zealand signed the Treaty of Friendship, which provided that the two governments would consult on matters relating to citizenship and immigration. The Citizenship (Western Samoa) Act 1982 enacts the Treaty of Friendship in New Zealand domestic law.
- New s 17(2A) recognises the fact that, under s 7 of the Citizenship (Western Samoa) Act 1982, Samoan citizens are able to receive the grant of New Zealand citizenship as of right without having to meet the same grant requirements as other applicants. Samoan citizens do not have to meet the good character requirement or the requirement not to have any disqualifying convictions under s 9A of the Citizenship Act 1977. Accordingly, a Samoan applicant should not be deprived of citizenship under new s 17(2)(b) when the fact that he or she had committed an offence would not have been relevant to the Minister’s decision-making. In comparison, for all other grant applicants, the fact that they had committed an offence would likely
have meant that they did not meet the good character requirement, and would not have been granted citizenship if the Minister had been aware of the offence.

- The objective of new s 17 (2A) is, therefore, to ensure consistency with existing legislation that reflects New Zealand’s international obligations and recognises the close historical relationship between New Zealand and Western Samoa. This is an important and significant objective, and the limitation on the right to be free from discrimination is rationally and proportionally linked to this objective.
- We have, therefore, concluded that the limitation in new s 17(2A) on the right to freedom from discrimination can be justified under s 5 of the Bill of Rights Act.

**CONSISTENCY WITH SECTION 25(c) OF THE BILL OF RIGHTS ACT**

- Section 25(c) of the Bill of Rights Act affirms the right of everyone charged with an offence to be presumed innocent until proved guilty according to law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof. [7]
- Reverse onus offences give rise to a *prima facie* issue of inconsistency with s 25(c) because the accused is required to *prove* (on the balance of probabilities) a defence to avoid liability; whereas, in other criminal proceedings an accused must merely *raise* a defence in an effort to create reasonable doubt. This means where the accused is unable to prove the defence, he or she could be convicted even though reasonable doubt exists as to his or her guilt.
- Clause 15 inserts a new s 20A into the Act that requires certain persons to return certificates of New Zealand citizenship to the Secretary. Clause 16 inserts new s 27(3), which provides that a person commits an offence and is liable on summary conviction to a term of imprisonment not exceeding 3 months or a fine of $2000 who, knowingly and without reasonable excuse, fails to return a certificate in contravention of s 20A.
- New s 27(3) can therefore be read as providing for a statutory defence to the offence contained in new s 20A, and for this reason shifts the burden to the defendant to prove the existence of a reasonable excuse. It is a reverse onus offence and accordingly raises a *prima facie* issue of inconsistency under s 25(c) of the Bill of Rights Act.

*Is the limit on the right to be presumed innocent justified?*

- The objective of new s 27(3) is to place a greater onus on defendants to ensure that citizenship certificates are returned to the Department of Internal Affairs when a person is no longer a citizen. This is particularly important to prevent fraud as a person could fraudulently use a citizenship certificate that has to be returned as evidence in order to obtain entry into New Zealand (or Australia), to stand as a candidate in general or local elections, or use publicly funded services (e.g health care). We consider the prevention of fraud to be a significant and important objective.
- The limitation on the right to be presumed innocent is rationally linked to this objective as it provides a legal deterrent to fraudulently using or retaining a citizenship certificate.
• Important for the justification of reverse onus offences is also whether the offence turns on a particular matter that is peculiarly within the knowledge of the defendant. In such cases, it is easier for the defendant to explain why he or she took (or failed to take) a particular course of action than it is for the Crown to prove the opposite. In the present case, there could be genuine reasons why the citizenship certificate was not returned such as the person being sick or being overseas. The defendant is best placed to show why he or she did not return the certificate.

• We note that as a general principle, reverse onus offences should carry penalties at the lower end of the scale. A reversal of the burden of proof is a concern when the penalty involves imprisonment. In this case, the penalty level reflects the fact that the citizenship certificate could be used to conduct fraud if it were not returned. Providing a strong deterrent and punishment reflects the seriousness of what can be obtained through having evidence of New Zealand citizenship. In our view, the penalty is clearly associated with the importance of the objective of the offence.

• We consider that new s 27(3) appears to impair the right to be presumed innocent no more than is reasonably necessary for sufficient achievement of the objective of the reverse onus offence. The limitation is in due proportion to the importance of that objective.

• Accordingly, we have concluded that new s 27(3) appears to be justifiable under s 5 of the Bill of Rights Act.

CONCLUSION

• We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

Footnotes:

1. The proportionality test under s 5 of the Bill of Rights Act, as applied in Hansen v R [2007] NZSC 7, draws on the test articulated by the Canadian Supreme Court in R v Oakes [1986] 1 SCR 103, R v Edwards Books and Art Ltd [1986] 2 SCR 713 and R v Chaulk [1990] 3 SCR 1303. See for example, Hansen, at [42] per Elias CJ; [64] and [79] per Blanchard J; [103], [104] and [120]-[138] per Tipping J; [185] and [217] per McGrath J; and [272] per Anderson J.


6. Section 6 states that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act, that meaning shall be preferred to any other meaning.


8. See, for example, Sheldrake v Director of Public Prosecutions [2005] 1, AC 264.

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Citizenship Amendment Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.