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Law Council
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Law Council of Australia Immigration Law Conference 2024 – Opening Remarks

Speech delivered by Law Council of Australia President, Mr Greg McIntyre SC at the 2024 Immigration Law Conference, Melbourne.

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I echo the acknowledgement of Traditional Owners made by our Chair, Ms Carina Ford.

Lawyers practising in the field of Immigration Law have been the foot-soldiers in a decades long battle. A battle between the Executive and Parliament, on the one hand, and the Judiciary, on the other.

A battle in which the Judiciary seeks to maintain the Rule of Law, human rights in accordance with international standards, procedural fairness and appropriate levels of access to judicial review of legislative and executive action, consistent with a democracy underpinned by the separation of powers between the Executive, Legislative and Judicial arms of government.

As Justice Sackville commented in an article in the University of New South Wales Law Journal in the year 2000:

> "[f]ew areas of Australian law have attracted such sustained public attention in recent years as judicial review of migration decisions. Successive governments have either enacted, or proposed, legislation designed to curtail the power of the courts to override the determinations of administrative decision-makers ..."

Justice McHugh commented in an address to an Australian Bar Association Conference in 2002 that –

> “Friction has risen from concerns that mirror those in administrative law generally … judicial review of migration decisions conflicts with Executive goals of timeliness and efficiency. But a greater cause of tension is the desire of the Executive to exercise control over migration matters to the exclusion of the courts. Irrespective of what political party is in government, migration law has seen a "bipartisan governmental mistrust of the role performed by the courts in reviewing migration decisions". From the Executive point of view, courts have little or no business being in the migration area.

In 1989, the *Migration Act* was amended, as the Minister for Immigration at the time said, to replace "broad discretions vested in decision-makers with sets of statutory criteria for the making of decisions".

It was amended again in 1992 by inserting Part 8, which excluded migration decisions from the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Part 8 restricted access to judicial review of migration decisions to "all but exceptional circumstances".

In 2001 the government persuaded the Parliament to introduce further changes into the law to restrict the jurisdiction of the federal courts in migration matters. Their effect was to repeal Part 8 of the *Migration Act* 1958 (Cth) and replace it with a new Part 8. It provided in section 474 that a privative clause decision is final and conclusive, must not be challenged, appealed against, reviewed, quashed or called into question in any court and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account. The Act defined a privative clause decision as a decision of an administrative character made, proposed to be made, or required to be made under the Act or a regulation. "Decision" included decisions about the issuance of visas, imposition of conditions on visas, conduct preparatory to the making of a decision and a failure or refusal to make a decision.

In *Plaintiff S157* the High Court in 2003 concluded that an administrative decision which involved jurisdictional error was not a decision under the *Migration Act* and so not a privative clause decision for the purposes of s 474 of the Act.

The *Migration Act* was further amended in 2013 to attempt to exclude from judicial scrutiny administrative steps in support of a reinstated ‘Pacific solution’ of processing asylum seeker applications offshore. Operation Sovereign borders introduced Temporary Protection Visas.

The *Migration Act* was amended with effect from April 2015 to create a new ‘fast track review process’ to be administered by the Immigration Assessment Authority. It is now proposed with advent of the Administrative Review Tribunal that the IAA will be abolished.

However, as outlined in the Law Council’s submission regarding the relevant proposed legislation, key areas of concern persist, such as the codification of the natural justice hearing rule – which is adjusted, but nevertheless retained.

Much of the history I have briefly outlined is all too familiar to members of this audience.

It is worth emphasising that the battle between the Judiciary and Parliament/the Executive has also been playing out in another key area of interest to migration lawyers, our citizenship laws.

In that context, the Law Council is presently concerned about the impact of the *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* – which was, unfortunately, rushed through Parliament without prior scrutiny.

Citizenship deprivation measures challenge key political and legal principles on which our democracy was founded. Citizenship provides formal membership of the Australian community, which comes with privileges and responsibilities. Citizenship deprivation removes those privileges and has significant consequences for a person, including the potential for: deportation; detention; prevention from entering Australia; and no longer receiving consular assistance. The Law Council has consistently advocated that such measures should be reserved for the most extraordinary of cases.

Citizenship deprivation (a form of de-naturalisation which is restricted to Australian citizens who will not be rendered stateless) risks discriminatory operation in that it means that there will always be three classes of Australians: those who are born in Australia without any deemed allegiance to any other country, dual-national Australians who can be stripped of their citizenship and Australian citizens who are at risk of statelessness if subjected to citizenship deprivation.

The Law Council expresses doubt about the utility of citizenship deprivation as an effective tool for punishing and deterring serious terrorism-related behaviour because of the suite of counter-terrorism tools that apply to all offenders irrespective of their citizenship status.

Citizenship deprivation must occur only in exceptional circumstances and following an independent, impartial judicial process which identifies a necessity to protect the public from predictable significant harm.

The 2023 Citizenship Amendment is an improvement on previous regimes because it addresses the issues of constitutional validity arising from the decision of the High Court in *Alexander* and *Benbrika.* The power to deprive a person of citizenship as punishment for conduct repudiatory of the shared values of the Australian community, is exclusively judicial and, therefore, must be imposed by judges, not executive officials.

The 2023 Citizenship Amendment, however, has potentially far-reaching impacts because it applies to Australian dual citizens. As a vibrant multicultural society, a large proportion of Australian citizens are dual nationals, including those who are born overseas and have parents who were born overseas.

The 2023 Citizenship Amendment engages and limits multiple human rights including criminal process rights, the right to equality and non-discrimination, the rights of the child, and the rights to freedom of movement, protection of the family, and liberty.

Given that the 2023 Citizenship Amendment envisages a significant departure from orthodox principles of sentencing in respect of similar offending behaviour, only in respect of dual citizens, it risks undermining consistency in sentencing of federal offenders.

Stripping citizenship at the time of sentencing is antithetical to our criminal justice system which is based upon not only punishment and retribution but the encouragement of rehabilitation for the benefit not only of the offender but of the community.

A persuasive case for the necessity of the 2023 Citizenship Amendment, in light of the changed security assessments of the national terror threat level, has not been provided.

The 2023 Citizenship Amendment should have been subject to greater deliberation and scrutiny in Parliament. It is unnecessary, disproportionate and unjustified and should be repealed.

I make this opening address in company with the Honourable Justice Kyrou AO, President of the Administrative Appeals Tribunal, who will, in due course, preside over the Administrative Review Tribunal. He should not, of course, be associated with the views I have just expressed. What he brings to this opening is an exemplary Judicial career founded in a personal history of being a migrant to this country at a young age, now being one of our foremost citizens, and the hope and expectation we have in his leadership of a new and improved administrative review process which will emerge from the enactment and implementation of Administrative Review Tribunal legislation in the course of the coming year.