



**Australian
Human Rights
Commission**

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

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Australian Citizenship Legislation (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Cth) introduced by the Australian Government.

2 Summary

2. The Commission welcomes the opportunity to make a submission to this inquiry.
3. The Commission made two written submissions and gave oral evidence in relation to this Committee's inquiry into the Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth).¹ That Bill did not proceed and lapsed at the prorogation of Parliament in April 2016. The current Bill incorporates large parts of the previous Bill. The Commission's present submission draws substantially on submissions previously made to this Committee.
4. This submission deals with three broad themes in the amendments proposed by the Bill.
5. The first theme involves the imposition of additional requirements on people seeking to obtain Australian citizenship by conferral. The proposed additional requirements include:
 - a. **residency:** changing the 'general residence requirement' from the current position of four years lawful residency including one year as a permanent resident, to four years permanent residency
 - b. **English language:** changing the language requirements from satisfaction that a person 'possesses a basic knowledge of the English language' to proof that a person has 'competent English'
 - c. **integration:** a new requirement that a person 'has integrated into the Australian community' as judged by reference to matters to be determined by the Minister
 - d. **'Australian values':** an ability for the Minister to determine the content of an 'Australian Values Statement' (in a form that is not disallowable by the Senate) and require, for example, that the statement be read, understood and signed by an applicant
 - e. **eligibility to sit test:** a limit of three attempts to pass the citizenship test before having to wait two years to apply again.
6. The second theme involves the centralisation of discretionary power in the hands of the Minister for Immigration and Border Protection to make decisions about who should and who should not be an Australian citizen.

7. This is done in a number of ways. For example, under the amendments the Minister would have the power to:
 - a. set aside certain decisions of the Administrative Appeals Tribunal that deal with whether a person was of good character
 - b. prevent administrative decisions about citizenship from being reviewed on the merits by the Administrative Appeals Tribunal by making the decision personally and stating that the decision was made in the public interest
 - c. revoke a person's citizenship for a period of up to 10 years after it was granted if the Minister becomes satisfied that there was a relevant fraud or misrepresentation (even if the applicant was not aware of it), without the safeguard of having to prove that fraud or misrepresentation in court
 - d. revoke a person's citizenship acquired by descent if the Minister later becomes satisfied that the person was not of good character at the time they were registered as a citizen.
8. The amendments would increase individual Ministerial discretion and reduce independent merits review of administrative decision-making. This is contrary to a primary focus of administrative law over the last 40 years, which has aimed at making administrative decisions more principled and consistent by allowing independent merits review of decisions that have a significant effect on individual rights.
9. The third theme that emerges from the amendments is a reduction in the ability of particular groups of people to qualify for citizenship. For example, the amendments would make it more difficult for the following groups to become citizens:
 - a. children born in Australia to asylum seeker or refugee parents, even after those children have been lawfully in Australia for up to 10 years
 - b. children born in Australia to parents who had a valid visa but overstayed the visa before the child's 10th birthday
 - c. children who are found abandoned in Australia
 - d. children as young as 10 years old that the Minister considers are not of good character
 - e. people with mental illness or cognitive impairment who come into contact with the criminal justice system.

3 Recommendation

10. The Australian Human Rights Commission recommends that the Bill not be passed in its current form. This submission identifies particular issues of concern with the Bill. The Commission is available to appear before the

Committee to provide further oral evidence in support of this submission including the extent to which any of the issues it has identified may be able to be addressed by way of amendment.

4 Additional requirements for people seeking citizenship by conferral

11. Some people acquire Australian citizenship automatically, for example if they are born in Australia and have a parent who is an Australian citizen or permanent resident, or if they were born in Australia and live in Australia for the next 10 years.²
12. Some people can apply to become Australian citizens. Broadly speaking, there are three categories of people who can apply for citizenship. These are:
 - a. people born outside Australia to an Australian citizen ('citizenship by descent')³
 - b. people adopted outside Australia to an Australian citizen ('citizenship by intercountry adoption')⁴
 - c. other people entitled to apply for citizenship, for example people who have been lawfully in Australia for four years and have been permanent residents for a year and have passed a citizenship test ('citizenship by conferral')⁵
13. The Bill proposes to impose a number of additional requirements on people who make an application for citizenship by conferral. These requirements are considered in more detail below.
14. The additional requirements are retrospective in nature. They will apply to any applications for citizenship by conferral made on or after 20 April 2017.⁶ The Explanatory Memorandum says that the Bill will apply retrospectively '[t]o reflect the announcement made by the Prime Minister and the Minister' on that date.⁷

4.1 Four years permanent residency

15. At present, applicants for citizenship by conferral must satisfy a 'general residence requirement'. They must have been lawfully present in Australia for 4 years prior to making an application and they must have been a permanent resident for at least 12 months.⁸
16. The Bill proposes to change this requirement so that the person must have been a permanent resident for at least 4 years (regardless of how long they have been lawfully present in Australia prior to obtaining permanent residency).⁹
17. The proposed changes to the residence requirement may create significant disparities between different groups of migrants in relation to their access to citizenship. For migrants who arrive in Australia on permanent visas, the

residence requirement will essentially remain the same. Those who initially arrive on temporary visas and are subsequently granted permanent residency, however, may face a significantly longer residence requirement than is the case under current legislation, even if they have lived in Australia lawfully for many years.

18. For example, a person arriving on a Skilled Independent visa becomes a permanent resident on arrival. Under the current residence requirement, such a person would become eligible for citizenship after residing in Australia on that visa for four years (they will have four years residency, with the last year as a permanent resident). Under the proposed amendments, the residence period for citizenship eligibility would in effect remain unchanged (the person would have four years residency, all as a permanent resident).
19. By contrast, a person who arrives in Australia on a temporary visa will have to wait longer to be eligible for citizenship. For example, a person may have arrived in Australia on a Student visa before transitioning to Temporary Graduate visa and after a few years transitioning again onto a (permanent) Skilled Independent visa. Under the current residence requirement, such a person would become eligible for citizenship after residing in Australia on the Skilled Independent visa for a year. Under the proposed amendments, this person would need to reside in Australia for an additional three years as a permanent resident in order to become eligible for citizenship – despite the fact that they may have already been living in Australia for close to a decade in total.
20. The Statement of Compatibility with Human Rights states that the new residence requirement:

is aimed at the legitimate objective of ensuring 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.¹⁰
21. That statement seems to ignore the fact that people here on temporary visas may be just as able to integrate into the Australian community and gain an understanding of shared Australian values as those on permanent visas. The differential treatment based on visa class does not advance the Government's stated objective of integrating aspiring citizens into the Australian community.
22. The Explanatory Memorandum further states that:

Extending the general residency period strengthens the integrity of the citizenship programme by providing more time to examine a person's character as a permanent resident in Australia.¹¹
23. However, as noted above, the general residency period is only extended for people who arrived in Australia on temporary rather than permanent visas. It is unclear why a four-year period is no longer considered sufficient to achieve these objectives in cases where a person arrives as a temporary resident, or why those who arrive on temporary visas may in some cases be required to wait more than twice as long as someone who arrives as a permanent

resident before being eligible to apply for citizenship. As such, there is a risk that the new residence requirement may create unreasonable distinctions between different groups of migrants on the basis of criteria which do not accurately reflect their level of commitment and contributions to Australia.

4.2 English language requirements

24. The Bill seeks to increase the level of English language ability required in order to obtain citizenship by conferral.
25. At present, a person is eligible to become an Australian citizen if the Minister is satisfied that the person ‘possesses a basic knowledge of the English language’.¹² This is assessed indirectly by applicants for citizenship having to complete a citizenship test in English.¹³
26. The Bill increases the level of language ability required to ‘competent English’,¹⁴ extends the requirement to 16 and 17 year olds,¹⁵ and gives a broad discretion to the Minister to determine:
 - a. the circumstances in which a person has ‘competent English’; and
 - b. the information or documents about a person’s English competency that must accompany a citizenship application in order for it to be valid.¹⁶
27. The Bill would maintain the existing exemption from the language requirement for people with a permanent or enduring physical or mental incapacity that means that they are not capable of having the required standard of English.¹⁷
28. The Explanatory Memorandum does not specify the level of English language proficiency necessary for the Minister to be satisfied that an applicant has ‘competent English’. It says that the Minister will be empowered to determine that a person has ‘competent English’:

for example ... where the person has sat an examination administered by a particular entity and the person achieved at least a particular score. The Minister could determine that the person must have completed this examination within, for example, three years ending on the day the person made an application for citizenship. The determination could specify other circumstances in which a person has competent English, for example, if they are a passport holder of the United Kingdom, the Republic of Ireland, Canada, the United States of America or New Zealand, or through specified English language studies at a recognised Australian education provider.¹⁸
29. A document released by the Government on 20 April 2017, said that aspiring citizens ‘will be required to undertake separate upfront English language testing with an accredited provider and achieve a minimum level of “competent”’.¹⁹ During the course of the announcement made on 20 April 2017, the Minister said that the English language requirement would be ‘IELTS Level 6 equivalent’.²⁰ In a 21 June 2017 media release the Minister noted ‘competent equates to Level 6 of the International English Language Testing System’.²¹

30. The proposed change to require specific testing to IELTS Level 6 standard would involve a significant increase on the current requirements. For example, undergraduate academic admission to many Australian universities requires minimum overall band scores of between 5.5 and 6.5.²² Many Australia-born citizens would not possess a written or spoken command of English equivalent to this standard.
31. The impact of this change would likely be considerable. One recent analysis of immigrants in the Adult Migrant English Program (AEMP) indicates that anywhere between 30,000 and 40,000 new migrants each year are highly unlikely to meet the proposed English proficiency level for Australian citizenship in their first decade of settlement.²³ Those on humanitarian visas may be disproportionately affected. The Government's 2015 report into Australian citizenship noted there is already 'strong evidence' that humanitarian entrants have difficulty in achieving citizenship, apparently due to their level of English language ability.²⁴
32. Such a scenario represents a concerning prospect. There is a danger that this cohort of immigrants could find it difficult to become Australian citizens within a reasonable time.
33. The 2015 report recommended that the Government should improve the AMEP and increase the language ability on exit. The report further stated that:

The AMEP provides up to 510 hours of free English language tuition to eligible new migrants and humanitarian entrants. The recent evaluation of the AMEP revealed that it is valued but the findings indicate a number of areas where further improvement can be sought. In particular the review also found that the proficiency level at exit is generally insufficient for employment.²⁵
34. The Commission is of the view that rather than introducing a higher English language requirement as a prerequisite for citizenship, the Government could consider strengthening English language support for migrants and humanitarian entrants to assist them in attaining English proficiency. This would include supporting those who are children to complete their primary and secondary education, which may have been disrupted.

4.3 *Integration into the Australian community*

35. The Bill introduces a new requirement that an applicant for citizenship by conferral must have 'integrated into the Australian community'.²⁶
36. The Bill would give the Minister a broad discretion to determine the matters that the Minister may or must have regard to when determining whether a person has 'integrated into the Australian community'.²⁷
37. The Explanatory Memorandum does not specify the matters that the Minister may or must have regard to. It says that the Minister will be empowered to determine that regard may be had to:

for example, a person's employment status, study being undertaken by the person, the person's involvement with community groups, the school

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participation of the person's children, or, adversely, the person's criminality or conduct that is inconsistent with the Australian values to which they committed throughout their application process.²⁸

38. The announcement made by the Prime Minister and the Minister for Immigration and Border Protection on 20 April 2017 said that examples of steps applicants would be required to take to demonstrate integration 'would include evidence of employment, membership of community organisations and school enrolment for all eligible children'.²⁹
39. The document released by the Government on 20 April 2017 provided further detail, saying:

Applicants will need to demonstrate their integration into the Australian community, by providing, for example, documentation to the effect that people who can work are working, or are actively looking for work or to educate themselves; or that people are contributing to the community by being actively involved in community or voluntary organisations; that people are properly paying their taxes, adhering to social security laws and ensuring their children are being educated. Applicants' criminal records are also relevant.

In addition to existing police checks which are undertaken as part of any application for citizenship, an applicant will also be assessed for any conduct that is inconsistent with Australian values, such as domestic or family violence, criminality including procuring or facilitating female genital mutilation and involvement in gangs and organised crime.³⁰
40. The lack of certainty around these issues is a concern given that the relevant provisions of the Bill will apply retrospectively, from 20 April 2017.
41. In principle, the Commission welcomes the Government's interest in strengthening citizenship and promoting a more cohesive society. Australia's multicultural society is only successful because immigrants and their descendants, over time, become full members of Australian society.
42. It should, however, be noted that the path of integration can traverse more than one generation.³¹ This reality should inform the design of any citizenship test. It would be misplaced to measure integration only by the contribution that immigrants currently make to Australian society, without recognising the future contributions they and their children will make.
43. Moreover, the task of civic integration is not confined to aspiring citizens. There is considerable scope for improving the civic literacy of Australian-born citizens. Research surveys indicate there is a poor average level of knowledge that citizens have about the operation of the political system.³² It would be anomalous to hold naturalised citizens to a standard that is significantly more stringent than the standard expected of Australian born citizens (who are not tested on their civic knowledge or participation in society).
44. The Commission also notes the disproportionate impact that the change could have on humanitarian entrants and others who may not have significant capacity to participate in formal community work. Accessing forms of employment, upgrading qualifications, and learning English may be priorities for these groups. Moreover, what is characterised as formal volunteering or

community involvement for the purpose of proving ‘integration’ may not capture more informal work which is often carried out through decentralised community groups or structures. Research has found that refugee-driven refugee community organisations play a critical role in settling and integrating new humanitarian entrants. These groups can include ‘informal social and cultural groups that come together for mutual support’.³³ Activities might include fostering social participation, economic wellbeing, and community connectedness. This is on top of the regular voluntary interpersonal support that new migrants and refugees provide each other, outside of any group or structure.

4.4 ‘Australian values’

45. The Bill would give the Minister the ability to determine the content of an ‘Australian Values Statement’ and require, for example, that the statement be read, understood and signed by an applicant.³⁴
46. The form of the Australian Values Statement determined by the Minister would not be disallowable by the Senate.³⁵ The Explanatory Memorandum asserts that the statement should be exempt from disallowance because it ‘concerns matters which should be under Executive control’.³⁶ By contrast, the Scrutiny of Bills Committee has said that these matters, going to the substance of citizenship policy, would appear to be appropriate for parliamentary oversight.³⁷ Similarly, the Australian Law Reform Commission in its recent report on *Traditional Rights and Freedoms* has said that laws that have a significant impact on individual rights should be made by Parliament and not subject to delegation to the executive.³⁸
47. There is currently an Australian Values Statement that applicants for provisional, permanent and a small number of temporary visas are required to sign. The form of this statement is set out in a schedule to this submission. The Government has said that it intends to ‘strengthen’ the Australian Values Statement by adding a reference to the requirement of allegiance to Australia and by requiring applicants to make an undertaking to integrate into and contribute to the Australian community.³⁹ It is not clear whether any other changes to the Australian Values Statement are proposed.
48. When announcing these legislative changes on 20 April 2017, the Prime Minister suggested that our common values included ‘the rule of law, democracy, freedom, mutual respect, equality for men and women’.⁴⁰ At the same time, the Minister for Immigration and Border Protection said in relation to ‘the issue around Australian values and integration’ that:

There will be further tests, further questions placed in the test as it currently operates, and there will be opportunity for people to comment on some of these changes over the course of the next, over the course of the period between now and 1 June. So we will consult around the questions around the values issues and we can provide further detail.⁴¹
49. As one example, the Minister said:

We would ask questions for example, as we're seeing in Melbourne at the moment, if kids are roaming the street at night as part of gangs in the Apex gangs or elsewhere in cities like Melbourne, whether or not that is adopting an Australian value. Clearly it's not.⁴²

50. The comments by the Minister above may have been intended to refer to changes to the citizenship test under s 23A of the Australian Citizenship Act, rather than changes to the Australian Values Statement.
51. Again, as noted above, the lack of certainty around these issues is a concern given the lack of Parliamentary oversight and given that the relevant provisions of the Bill will apply retrospectively, from 20 April 2017.
52. The rights and responsibilities of citizenship are defined by Australia's liberal democratic tradition and values – its parliamentary democracy, its rule of law, its respect for rights and freedoms. Citizenship is not defined by ancestry, ethnicity, race or lifestyle. Becoming an Australian citizen leaves room for a citizen to express their cultural heritage and identity, so long as they uphold their civic responsibilities.
53. The Bill would also rename the 'pledge of commitment' the 'pledge of allegiance' and amend the pledge to require a person to pledge their allegiance to Australia and its people. The Commission has stated in previous submissions to the Department of Immigration and Border Protection that the current Pledge of Commitment contains an appropriate statement of the rights and responsibilities of Australian Citizenship.⁴³

4.5 Eligibility to sit the citizenship test

54. The Australian Citizenship Act currently provides that applicants for citizenship by conferral must pass a citizenship test. If a person passes the citizenship test, they are taken to have satisfied the requirements that they: understand the nature of the application for citizenship, possess a basic knowledge of the English language and have an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship.⁴⁴
55. The Minister currently has the power to determine the eligibility criteria a person must satisfy in order to be able to sit the test.
56. The Bill lists a number of specific eligibility criteria that the Minister would be able to include, such as criteria relating to the fact that a person has previously failed the test.⁴⁵
57. The Prime Minister and the Minister for Immigration and Border Protection announced on 20 April 2017 that they intended to limit the number of times an applicant could fail the citizenship test to three,⁴⁶ and that after three unsuccessful attempts their application will not be approved.⁴⁷
58. In addition, the document released by the Government on 20 April 2017 says that it intends to introduce 'a two-year ban on making a new application after a previous application is refused'.⁴⁸

59. The document further states that ‘the course-based test will no longer be offered to applicants who are unable to pass the standard or assisted citizenship test’.⁴⁹ The current course-based test is designed to assist people who experience difficulties in passing the standard test, particularly those with a low level of English literacy or schooling, and is available by referral to people who have failed the standard or assisted test three or more times.⁵⁰
60. Based on the two years to June 2015, approximately 4,000 applicants each year would find themselves in the situation of not passing the test on three occasions and having to wait two years before applying again, without the current ability to take advantage of the course-based test.⁵¹
61. The proposed limit on citizenship test attempts and the length of the subsequent ban on new applications may significantly delay access to citizenship and its associated rights for some migrants. In a similar manner to the proposed English language requirement, these measures are likely to have a disproportionate impact on people who are vulnerable or disadvantaged, such as those from refugee backgrounds. This is of particular concern given that the course-based test will no longer provide an alternative pathway to citizenship for people who face difficulties in passing the standard test.
62. The Explanatory Memorandum states that these amendments are intended to strengthen the integrity of the citizenship testing arrangements, noting that they would also allow the Minister to determine that a person is not eligible to sit the citizenship test if they did not comply with the rules of conduct relating to the test, or if they are found to have cheated during the test.⁵²
63. However, the imposition of a lengthy ban on new applications may not be a reasonable and proportionate measure to ensure the integrity of testing arrangements in cases where a person has failed the test but has otherwise complied with all necessary rules of conduct and has not engaged in fraudulent or deceptive conduct. Indeed, merely failing the test due to factors such as low English literacy or schooling does not threaten the integrity of testing measures.
64. The Statement of Compatibility with Human Rights does not address the proposed restrictions on citizenship test attempts. However, this measure may engage Australia’s international human rights obligations because it may unreasonably delay access to citizenship and its associated rights and is likely to have a disproportionate impact on particular groups.

5 Centralisation of Ministerial power

65. This section of the submission considers a number of ways in which the Bill seeks to increase the power of the Minister for Immigration and Border Protection (Minister)⁵³ personally to decide whether someone should be a citizen, and to reduce the ability of the Administrative Appeals Tribunal (AAT) to provide independent oversight of administrative decision-making.

5.1 Minister to have power to overrule Administrative Appeals Tribunal

(a) Australia's system of merits review

66. For the past 40 years, Australia has a strong and robust system for seeking review of decision making by government. This system seeks to ensure that administrative decision-making is principled and consistent.
67. A wide range of government decisions is subject to merits review by independent tribunals. Merits review is a process by which a person or body:
- a. other than the primary decision maker
 - b. reconsiders the facts, law and policy aspects of the original decision; and
 - c. determines what is the correct and preferable decision.
68. This process is often described as 'stepping into the shoes' of the primary decision maker. The starting point is that an administrative decision that is likely to affect the interests of a person should ordinarily be subject to merits review.
69. The Administrative Review Council noted that 'review tribunals make a strong contribution to openness and accountability of government by providing persons affected by government decisions with a fair and open process for testing those decisions'.⁵⁴ The former Chief Justice of the High Court described merits review as 'in a way more important than judicial review because it can offer a complete answer, not available through the courts, to a person affected by a decision'.⁵⁵
70. The overall objective of the merits review system is to ensure that all administrative decisions of government are correct and preferable.⁵⁶ A 'correct' decision is one made according to law. The 'preferable' decision is the best decision that could have been made on the basis of the relevant facts.⁵⁷
71. If there are factual errors made by a primary decision maker, merits review provides an opportunity to correct these errors. Typically, a review tribunal may also take into account new information that was not before the original decision maker and that is relevant to consider. Tribunals tend to deal with a lower volume of decisions than primary decision makers and can therefore devote more time and resources to the consideration of individual cases. This gives them a greater prospect of coming to the best possible (preferable) decision.⁵⁸
72. The usual stages available in review of administrative decisions involve:
- a. an original decision, for example by a Minister, a delegate of a Minister, or another public official with power to make decisions
 - b. merits review of that decision by an independent tribunal

- c. judicial review, if it is alleged that there were legal errors in the decision of the tribunal.

(b) *Right to a fair and public hearing by an independent and impartial tribunal*

73. Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR)⁵⁹ contains due process guarantees in relation to legal proceedings. It relevantly provides:

All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

74. The concept of 'suit at law' encompasses judicial procedures aimed at determining civil rights and obligations as well as equivalent notions in the area of administrative law.⁶⁰ It includes procedures for determining applications for citizenship.
75. The current process of review by the AAT satisfies the criteria of review of administrative decisions by a competent, independent and impartial tribunal.
76. The right of access to courts and tribunals and equality before them, is not limited to citizens. The United Nations Human Rights Committee has said that it must also be available to all individuals, regardless of nationality or statelessness who find themselves in the territory of a state.⁶¹

(c) *Minister to be able to set aside certain AAT decisions*

77. The *Australian Citizenship Act 2007* (Cth) (Australian Citizenship Act) contains a system for independent merits review of decisions made by either the Minister or a delegate of the Minister.
78. Merits review is conducted by the AAT. Among other things, the AAT may review decisions to refuse to approve a person becoming an Australian citizen.⁶²
79. At present, if the Minister considers that the AAT's decision is legally flawed, the Minister may seek judicial review of that decision.
80. Proposed s 52A of the Bill would change the usual process followed in the review of administrative decision making by allowing the Minister to set aside certain decisions of the AAT.⁶³ In particular, if a delegate of the Minister refuses to approve a person becoming an Australian citizen because the delegate is not satisfied that the person was of good character or is not satisfied of the identity of the person, and the AAT sets that decision aside, then the Minister would be able to set aside the AAT's decision and make a decision in accordance with the original decision by the Minister's delegate.
81. The only criterion required to be met is that the Minister is satisfied that it is in the public interest to set aside the AAT's decision. If the Minister sets aside a

decision of the AAT, the Minister would be required to table in Parliament a statement that includes the reasons for setting aside the AAT's decision.⁶⁴

82. The proposed amendment significantly reduces the scope of independent merits review. The aim of an independent merits review tribunal is to provide for a check on executive decision-making. These amendments provide the opposite: an executive check on independent tribunal decisions.
83. As the Senate's Scrutiny of Bills Committee has said in relation to these proposed amendments:

Any system of independent merits review runs the risk that a tribunal may reverse a decision preferred by the original decision-maker or the Minister. However, 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 unduly influenced by political considerations.⁶⁵
84. The Government suggests that this change will have no impact on due process rights under article 14 of the ICCPR because if a Minister sets aside a decision of the AAT and refuses to approve citizenship, the person 'will still be entitled to seek judicial review of the Minister's decisions under s 75(v) of the Constitution and s 39B of the *Judiciary Act 1903*'.⁶⁶ This suggestion ignores a number of points:
 - a. the applicant has already been successful at the AAT, and these amendments effectively require the applicant to win twice: once at the AAT and then again on judicial review;
 - b. in any judicial review, a court will not be able to consider the merits of the application – that is, there will be no reassessment of the substantive question of whether the applicant was of 'good character';
 - c. in any judicial review, a court will be limited to considering only whether the Minister made a jurisdictional error in overruling the AAT.
85. The judicial review identified by the Government is the minimum level of judicial review required by the Constitution. It is the only type of judicial review that cannot be removed by statute. It is narrower in scope than that available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) in respect of most forms of administrative decision-making. In other words, certain legal errors that could be reviewed and corrected by the courts if the Minister's decisions were amenable to judicial review under the ADJR Act cannot be addressed by the courts. Such errors, if made by the Minister, simply cannot be corrected.
86. It is incorrect to suggest that a limitation of review rights to the minimum level of review possible will have no impact on a person's rights under article 14 of the ICCPR. Because the Government assumes that there will be no impact, there is no attempt to justify the limitation of rights as being reasonable, necessary and proportionate to a legitimate object.

87. The primary rationale given in the Explanatory Memorandum for the proposed amendment is that since early 2011 the AAT has made six decisions that the Government does not agree with.⁶⁷ Over the period from 1 July 2010 to 30 June 2016 the AAT finalised 1,250 cases dealing with citizenship.⁶⁸ When the 2014 Bill was being considered, the department identified these six cases in an answer to a question taken on notice.⁶⁹ The cases involved people who had been previously convicted of criminal offences.

88. As the Australian Citizenship Council has noted:

The fact that a person has a criminal record does not itself automatically preclude the grant of Citizenship. Length of time since the offence, seriousness of the offence and the chance of recidivism are all matters that are taken into consideration.⁷⁰

89. A review of the six cases identified by the Government indicates that, in addition to considering the criminal conduct engaged in by the applicant, the AAT also took into account a range of other relevant factors including: the period of time since the offending conduct, whether the incident was an isolated one, whether the applicant has demonstrated remorse, whether the applicant has demonstrated that they have engaged in rehabilitation, whether the applicant was suffering from a psychiatric illness at the time of the offending conduct that is now being treated, and character references from reputable Australians.

90. Significantly, it appears that the Minister did not seek judicial review of the decision of the AAT in any of these cases. That is, although these are the instances that the Government has identified as being the most problematic decisions made by the AAT, no attempt was made by the Government to challenge those decisions using the currently available judicial review mechanisms.

91. The Commission considers that a case has not been made out for a change to the current structure for review of administrative decision-making.

5.2 *Personal decisions of Minister no longer reviewable by Administrative Appeals Tribunal*

92. As noted above, the current position is that decisions by the Minister or the Minister's delegate can be reviewed by the AAT.

93. Proposed s 52(4) would exempt from review any decision that the Minister makes personally, provided that the Minister's notice of reasons includes a statement that the Minister is satisfied that the decision was made in the public interest.⁷¹ The Minister would be required to table in Parliament a statement that sets out the decision and the reasons for making the decision.⁷²

94. Personal decisions of the Minister that could be exempted from independent merits review by the AAT include:⁷³

- a. a decision to refuse to approve a person becoming a citizen by descent (s 17)

- b. a decision to cancel an approval of citizenship by descent (proposed s 17A)
 - c. a decision to refuse to approve a person becoming a citizen as a result of intercountry adoption (s 19D)
 - d. a decision to cancel an approval of citizenship by intercountry adoption (proposed s 19DA)
 - e. a decision to refuse to approve a person becoming a citizen by conferral (s 24)
 - f. a decision to cancel an approval of citizenship by conferral (s 25)
 - g. a decision to refuse to approve a person resuming citizenship if they have ceased to be an Australian citizen (s 30)
 - h. a decision to cancel an approval of a person resuming citizenship if they have ceased to be an Australian citizen (proposed s 30A)
 - i. a decision to revoke a person's citizenship (ss 34 and 36(1), and proposed ss 33A and 34AA).
95. The justification given by the Government for removing independent merits review for such decisions is that as an elected Member of Parliament the Minister has 'a particular insight into Australian community standards and values and what is in Australia's public interest' and that the Minister's personal decisions should be protected from 'an unelected administrative tribunal'.⁷⁴
96. However, this seems to ignore the extent to which administrative tribunals will have regard to government policy. Justice Brennan, in his then capacity as the President of the AAT, considered this issue in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634. In that case, his Honour said (at 644-645):
- When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. Where the policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to parliamentary scrutiny.
97. Prior to its abolition in 2015, the Administrative Review Council advised the Attorney-General on the classes of administrative actions that should be subject to merits review. The Council said that, as a matter of principle, an administrative decision that will or is likely to affect the interests of a person should be subject to merits review.⁷⁵

98. There is a limited range of factors that may justify excluding merits review for particular decisions. However, factors that do not justify excluding merits review include:

- a. the fact that the decision maker is an expert; and
- b. the fact that a decision maker is of a high status.⁷⁶

99. In relation to the second of these categories, the Council said:

The status of the primary decision-maker is not a factor that, alone, will make decisions of that person inappropriate for merits review.

For example, the fact that the decision-maker is a Minister or the Governor-General, is not, of itself, relevant to the question of review. Rather, it is the character of the decision-making power, in particular its capacity to affect the interests of individuals, that is relevant.⁷⁷

100. The Explanatory Memorandum says that this proposal 'would bring the exclusion of personal decisions of the Minister from merits review under the Citizenship Act more in line with similar provisions involving personal decisions of the Minister under the Migration Act'.⁷⁸ However, these provisions of the *Migration Act 1958* (Cth) should be considered to be exceptional. Good reasons would need to be shown to apply such a regime to the Australian Citizenship Act, particularly where it impacts on the rights and interests of individuals who are affected by decisions.

5.3 Minister to have power to revoke citizenship if 'satisfied' of fraud or misrepresentation

(a) Removal of safeguard of court findings

101. The Australian Citizenship Act currently provides that if a person applied for and was granted Australian citizenship as a result of descent, intercountry adoption or conferral, the Minister may revoke the person's citizenship if:

- a. the person was convicted of a criminal offence involving fraud or misrepresentation in relation to the citizenship application; or
- b. the person obtained citizenship as a result of fraud for which a third party was convicted.⁷⁹

102. As the law presently stands, allegations of fraud or misrepresentation must be proved in court beyond a reasonable doubt.

103. The Australian Citizenship Council explained the rationale for this threshold as follows:

Generally speaking, the policy underlying the power of government to deprive an Australian citizen of his or her Citizenship is based on the idea that there should be certainty of Australian Citizenship status, that the status should not

be easily taken away, and should not be taken away simply by an administrative action by government.⁸⁰

104. The Council noted that the requirement of conviction for an offence in relation to fraud or misrepresentation was ‘an important safeguard’ and recommended that it continue.⁸¹
105. The current procedure provides a balance between ensuring certainty of citizenship status while allowing serious cases of fraud and misrepresentation involved in the citizenship process to be prosecuted and result in a revocation of citizenship.
106. It is a power that has been used rarely, but is available in appropriate cases. The Australian Citizenship Council in its February 2000 report identified five cases where individuals had been convicted of making false statements in their applications for Australian Citizenship and had their citizenship revoked as a result.⁸²
107. The Bill proposes to change the threshold for revocation in exactly the kind of way that the Council warned against.
108. Proposed s 34AA would allow the Minister to revoke a person’s citizenship if the Minister was ‘satisfied’ that the person obtained approval to become a citizen as a result of fraud or misrepresentation connected with:
 - a. the citizenship approval granted by the Minister;
 - b. the person’s entry into Australia;
 - c. the grant of any visa to the person prior to the approval to become a citizen.⁸³
109. This would significantly decrease the degree of proof of fraud or misrepresentation required. There would no longer be any requirement for the allegations to be tested in court. The Minister’s satisfaction would be sufficient. Citizenship could be taken away ‘simply by an administrative action by government’.
110. The person need not have engaged in any fraud or misrepresentation themselves or even have known that there was any fraud or misrepresentation involved. For example, the Explanatory Memorandum suggests that a person’s citizenship could be revoked if the Minister becomes satisfied that a misrepresentation was made by a person’s migration agent of which the person was unaware.⁸⁴
111. Given the grave consequences involved for an individual if citizenship is revoked, the Commission considers that any allegations of fraud or misrepresentation used as the basis for revoking citizenship should be established as a result of a fair and public hearing by a competent, independent and impartial tribunal established by law.

112. The proposal to remove this important safeguard and allow citizenship to be taken away simply by an administrative action by government is contrary to these principles of due process.

(b) Potential of revocation for 10 years after grant of citizenship

113. A person's citizenship could be revoked under this provision for a period of up to 10 years after it was granted.⁸⁵

114. Similarly, proposed s 33A would allow the Minister to revoke citizenship acquired by descent for an undefined period after it was granted if the Minister later becomes 'satisfied' that the person was not of good character at the time they were registered as a citizen (see section 5.4 below).

115. Allowing citizenship to be contingent on the satisfaction of the Minister about various matters for a period of 10 years (or more) after it is granted creates significant uncertainty about citizenship status. It is apt to create two classes of citizen: one whose rights are secure and one whose rights may be removed by a simple administrative decision by Government.

116. In one sense, those who are granted citizenship following application would be on a period of probation for 10 years, albeit citizenship could only be revoked based on events that occurred prior to its acquisition.

117. The longer the period of time before a decision to revoke citizenship, the greater the potential unfairness to the citizen. For example, if a decision is made to revoke citizenship because of an alleged misrepresentation in relation to an application for a visa that was made by the citizen many years ago, the citizen may no longer have access to documents or witnesses to meet this claim.

(c) Potential for children to become stateless

118. When the 2014 Bill was introduced, the Government said that the Minister could use the power under proposed s 34AA to revoke a child's citizenship, 'even if [this] would make that child stateless'.⁸⁶ This was confirmed by officers of the Attorney-General's department during this Committee's public hearing into the Bill,⁸⁷ and by the department's subsequent written submission to the Committee.⁸⁸ The department's supplementary written submission sought to justify this outcome by saying that the child thus rendered stateless 'should never have been an Australian citizen in the first place'.⁸⁹

119. This was an issue of significant concern for the Government members of this Committee in relation to the 2014 Bill.⁹⁰

120. Unlike s 36(3) in the Act as it currently stands, there is no provision in proposed s 34AA which provides that the Minister must not revoke a child's Australian citizenship under that section if that would result in the child becoming stateless.

121. The Explanatory Memorandum to the present Bill says that ‘the potential for the child to be rendered stateless’ is one of the ‘[f]actors to be considered’ when deciding whether to revoke a child’s citizenship and that, in practice, ‘[t]he Department would not act to render a child, or adult, stateless’.⁹¹ If this is the intention, then the legislation should not provide a discretion to do so.
122. The Statement of Compatibility with Human Rights also seems to suggest that the note at the end of proposed s 34AA somehow ‘confirms’ that the Department would not act to render a child, or adult stateless.⁹² That note draws attention to the fact that a child may have their citizenship revoked under s 36 if their parent loses their citizenship under one of a number of provisions. However, as the Explanatory Memorandum also recognises:
- The power under section 36 of the Act to revoke a child’s citizenship would be enlivened if the fraud related to the parent’s application. However, if the fraud is in relation to the child’s application, then the relevant revocation provision would be new section 34AA.⁹³
- As noted above, the new proposed s 34AA does not contain a legislative protection against statelessness.
123. The potential for children to be rendered stateless raises a serious risk of conflict with article 15(2) of the *Universal Declaration of Human Rights* which provides that ‘no one shall be arbitrarily deprived of his nationality’. It also raises a serious risk of conflict with provisions of the *Convention on the Rights of the Child* (CRC)⁹⁴ and the *Convention on the Reduction of Statelessness*.⁹⁵
124. Article 8 of the CRC provides that children have the right to preserve their identity, including their nationality, without unlawful interference. Article 7 of the CRC provides that States Parties must ensure the implementation of the right of the child to acquire a nationality in accordance with their obligations under relevant international instruments, in particular where the child would otherwise be stateless.
125. Article 8(1) of the *Convention on the Reduction of Statelessness* provides that a state shall not deprive a person of its nationality if such deprivation would render the person stateless. There is an exception in article 8(2)(b) if the nationality has been obtained by misrepresentation or fraud. However, there are limitations to this exception.
126. First, based on the *travaux préparatoires*, there is a reasonable basis to conclude that ‘misrepresentation’ in the context of this exception means ‘dishonest misrepresentation’.⁹⁶
127. Secondly, deprivation would not be justified if the person whose citizenship may be revoked was not aware and could not have been aware that the information provided during the application for citizenship was untrue.⁹⁷
128. On these bases, it appears that the current drafting of the Minister’s powers of revocation are broader than permitted under the *Convention on the Reduction of Statelessness* as they could result in the revocation of a person’s citizenship as a result of a misrepresentation by a third party (such as a migration agent) of which they were unaware.

5.4 Minister to have power to revoke citizenship by descent if later ‘satisfied’ that applicant was not of good character

129. A person qualifies for citizenship by descent, in broad terms, if they are born outside Australia and one of their parents is an Australian citizen.⁹⁸ People applying for citizenship by descent currently also need to satisfy the Minister that they are of good character.⁹⁹
130. Currently, s 19A provides that a person does not become an Australian citizen by descent, even if approved, unless a parent of the person was in fact an Australian citizen. The Government recognises that the mandatory nature of this provision has the potential to cause unfairness, for example if a person has been in Australia for a long period of time as a citizen but it is later discovered that they did not have an Australian citizen parent when they were born.
131. The Bill proposes to remove the mandatory s 19A and replace it with a broader discretionary power vested in the Minister to revoke citizenship by descent. Proposed s 33A would give the Minister the discretion to revoke a person’s citizenship obtained by descent ‘if the Minister is satisfied that the approval should not have been given’.¹⁰⁰ However, this discretion would apply to **all** elements of the eligibility requirements for citizenship by descent, including the character requirements.
132. Significantly, this means that s 33A will allow the Minister to revoke citizenship by descent if the Minister later becomes satisfied that the person was not of good character at the time they were registered as a citizen.¹⁰¹ There is no time limit for the exercise of this discretion.
133. This amendment raises similar problems as those set out in section 5.3(b) above of uncertainty of citizenship status for a prolonged period of time and the prospect of citizenship being revoked ‘simply by an administrative action by government’. It also creates problems of retrospectivity. The Minister will be given the power to interfere with vested rights of citizenship based on a later assessment that a person did not satisfy the requirement to be of good character when the application for citizenship was made.¹⁰²

6 Reduced ability of particular groups to qualify for citizenship

6.1 Ten year old children who were born in Australia

134. The Australian Citizenship Act currently provides that if a child is born in Australia and lives in Australia for 10 years then the child becomes an Australian citizen on his or her tenth birthday.¹⁰³ This provision is referred to below as the ‘10 year rule’.
135. The Australian Citizenship Council explained that the intention behind the 10 year rule is:

to ensure that young children who have only known Australia as their home country in the first ten years are able to become Australian Citizens.¹⁰⁴

136. If passed, the Bill would mean that the 10 year rule no longer applies to several groups of children who were born in Australia. Broadly speaking, these groups are:¹⁰⁵
- a. children of foreign diplomats
 - b. children who were ‘unlawful non-citizens’ at any time before their tenth birthday
 - c. children (other than New Zealand citizens) who left Australia at any time before their tenth birthday and did not hold a visa entitling them to return to Australia
 - d. children who have a parent that was an ‘unlawful non-citizen’ and who did not hold a substantive visa when the child was born.
137. This submission will focus on two categories of children born in Australia: children of refugees and children of people who lawfully entered Australia but overstayed their visa.
- (a) *Children of asylum seekers and refugees*
138. Under this Bill, children born in Australia to parents who are asylum seekers and refugees may be denied citizenship when they turn 10 years old. There are two ways in which this could occur.
139. First, if a child is born in Australia to parents who are in immigration detention or in community detention, then the child will be an unlawful non-citizen when they are born. Proposed s 12(4) means that the 10 year rule would not apply to that child. That is, even if the child’s parents are ultimately found to be refugees and are granted protection visas, and the child is lawfully in Australia from that point until they turn 10 years old, the child will not be entitled to citizenship under the 10 year rule. Significantly, s 12(4) applies with retrospective effect. That is, it applies to children who have already been born in Australia, but who have not yet turned 10 years old, if they were unlawful non-citizens for any period of time, however brief.¹⁰⁶ The Scrutiny of Bills Committee has raised concerns about the fairness of the retrospective application of this provision.¹⁰⁷ As noted by the Australian Law Reform Commission in its report on *Traditional Rights and Freedoms*, the Scrutiny of Bills Committee will typically seek a detailed explanation of the reasons why a Bill seeks to operate retrospectively, particularly when it will ‘trespass unduly on personal rights and liberties’ such as the eligibility of a person for citizenship.¹⁰⁸
140. Secondly, if a child is born in Australia to parents who arrived in Australia as unlawful non-citizens but had been released from immigration detention into the community on a bridging visa, then the child will be taken to have been granted a bridging visa when they are born.¹⁰⁹ A bridging visa is not a substantive visa,¹¹⁰ but a child who holds a bridging visa when they are born is a lawful non-citizen.¹¹¹ Proposed s 12(7) means that the 10 year rule would not apply to that child. This will be because the child’s parents did not hold a ‘substantive visa’ when the child was born, the parents entered Australia

before the child was born, and when they first entered Australia the parents were unlawful non-citizens. Even if the child's parents are ultimately found to be refugees and are granted protection visas, and even if the child has been lawfully in Australia for his or her entire life up to the age of 10, the child will not be entitled to citizenship under the 10 year rule. Section 12(7) applies to children born in Australia after the commencement of the section.

141. These proposed sections would deny citizenship by birth to certain children born in Australia solely based on the immigration status of the child's parents. The child may have held valid visas and been lawfully present in Australia for his or her entire life, but will be denied citizenship under the 10 year rule because his or her parents arrived in Australia without a valid visa.

142. In its report to the Australian Government in 2000, the Australian Citizenship Council noted that a central role of Australian citizenship laws in the foreseeable future would be to include migrants and humanitarian entrants as full participants in a multicultural Australian society.¹¹² The Council recommended that:

the overall inclusive and non-discriminatory approach to Australian Citizenship, that is characterised in current Australian Citizenship law, of welcoming, without undue barriers, migrants and humanitarian entrants who come to Australia as part of the planned migration and humanitarian program, continue to be accepted by governments as the basis for future Australian Citizenship policy and law.¹¹³

143. The Commission agrees with the 'inclusive and non-discriminatory approach' articulated by the Council and considers that this should apply to refugees in Australia to whom Australia has acknowledged it has protection obligations.

144. Article 7(1) of the CRC provides that every child has 'the right to acquire a nationality'. The same provision appears in article 24(3) of the ICCPR. The UN Human Rights Committee has said that:

While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory.¹¹⁴

145. Nevertheless, where rights to citizenship are implemented by states 'in accordance with their national law',¹¹⁵ these rights are to be ensured without discrimination of any kind including the status of the children's parents.¹¹⁶ The Human Rights Committee has emphasised that there should be no discrimination in accessing citizenship, for example, based on whether children are legitimate or based on the nationality status of one or both of the parents.¹¹⁷

146. This Bill would discriminate against certain children who were born in Australia and have been lawfully present in Australia for up to 10 years (and in some cases for the whole of their lives), based on the initial immigration status of their parents. The Explanatory Memorandum to the Bill does not deal with this issue at all, despite it being raised by the Commission in relation to the 2014 Bill.¹¹⁸ No legitimate object has been put forward in order to justify the

discriminatory treatment. In the absence of a legitimate object, the provisions will be in breach of articles 2 and 7 of the CRC and articles 2 and 24(3) of the ICCPR.

147. In some instances, the proposed changes to the 10 year rule may result in children facing long-term exclusion from effective citizenship. While the children of asylum seekers and refugees may remain citizens of their parents' country of origin, they may be unable to enjoy the benefits of that citizenship due to having a well-founded fear of persecution in that country. This lack of access to effective citizenship may amount to *de facto* statelessness. For example, it has been argued that refugees, by virtue of being unable or unwilling to avail themselves of the protection of their country of nationality, are in effect *de facto* stateless.¹¹⁹
148. If children in these circumstances can no longer obtain citizenship under the 10 year rule, they may have no means of accessing effective citizenship and its associated rights. As a result, the proposed changes may in some cases engage Australia's obligations relating to stateless people.¹²⁰ In particular, the Commission notes Australia's obligation under Article 7(2) of the CRC to ensure the implementation of the right of the child to acquire a nationality in accordance with its obligations under relevant international instruments, in particular where the child would otherwise be stateless. Australia also has an obligation under Article 34 to of the *Convention relating to the Status of Refugees* to facilitate and expedite the naturalisation of refugees.

(b) Children of parents who overstayed their visa

149. A second category of children born in Australia who will be denied citizenship when they turn 10 years old comprises children who born to parents who arrived in Australia lawfully but who overstayed their visas and became unlawful non-citizens at any time prior to the child's tenth birthday.¹²¹
150. As noted above:
 - a. proposed s 12(4) provides that a child who is born in Australia and lives in Australia until he or she turns ten does not become a citizen if at any time he or she was an unlawful non-citizen; and
 - b. this provision has retrospective effect in that it applies to children who have already been born in Australia, but who have not yet turned 10 years old, if they were unlawful non-citizens for any period of time.¹²²
151. The Government says that the aim of this amendment is to discourage 'abuse of the 10 year rule by unlawful non-citizens'.¹²³ The Australian Citizenship Council reported on the 10 year rule in February 2000 and said that 'there is no strong evidence of abuse of this provision occurring'.¹²⁴ It recommended that the provisions relating to acquisition of citizenship by birth remain unchanged but that the Government monitor the use of the 10 year rule and take appropriate action to tighten the provision if evidence of abuse emerged.¹²⁵

152. The Explanatory Memorandum does not identify any ‘strong evidence of abuse’. Instead, there are assertions in general terms that:

The ten-year rule has the practical effect of encouraging some temporary residents and unlawful non-citizens to have children in Australia and to keep their child onshore until at least their tenth birthday, whether lawfully or unlawfully. These parents would then expect that their children would obtain Australian citizenship and provide an anchor for family migration and/or justification for a ministerial intervention request under the Migration Act.¹²⁶

And:

People who do not meet the proposed requirements will no longer have an incentive to delay their departure from Australia until a child born to them in Australia has turned 10 years of age, in the expectation that the child will obtain citizenship and provide an anchor for family migration or justification for a ministerial intervention request under the Migration Act.¹²⁷

153. The use by the Government of the terminology ‘anchor’ echoes debates in the United States about ‘anchor babies’.¹²⁸ However, there are very significant differences between citizenship law in the United States and in Australia. The major difference is that the fourteenth amendment to the US Constitution provides that all persons born in the United States are citizens of the United States. This is often referred to as *jus soli* or birthright citizenship. The fourteenth amendment overruled the *Dred Scott* decision of the US Supreme Court in 1857 which had denied citizenship status to people of African descent born in the United States.¹²⁹
154. Birthright citizenship was the legal position in Australia prior to 1986 but is no longer the position. Now, the 10 year rule provides that a person who is born in Australia and lives in Australia for 10 years after birth qualifies for citizenship.
155. There may be good policy reasons not to provide citizenship to anyone born in Australia at the time of their birth. However, very different questions arise when assessing whether someone who was born in Australia and has lived continuously in Australia for 10 years should be accorded citizenship. After 10 years, a person will have become integrated into the Australian community. As the Australian Citizenship Council noted above, the intention of the 10 year rule is to ensure that young children who have known only Australia as their home country in the first 10 years are able to become Australian citizens.
156. The Government says that the aim of the amendment denying citizenship to 10 year olds if they have been an unlawful non-citizen at any point is to ‘encourage the use of lawful pathways to migration’.¹³⁰ In assessing the balance between the desirability of a provision that encourages lawful pathways to migration and the obligation to take into account the best interests of children born in Australia as a primary consideration (article 3, CRC), the fact that the child’s parents arrived in Australia lawfully, that the child has lived in Australia continuously for 10 years and that Australia may be the only country the child knows will weigh much more heavily in favour of retaining the present provision.

157. The difficulties that can arise are illustrated by the following case study:

Case study: the Pak family

In 2012, the Commission published a report about a complaint by a family of four who were at risk of being removed from Australia.¹³¹

Mr Pak and Ms Mun were originally from South Korea. They first came to Australia when they were 33 and 31 years old respectively and had resided in Australia for more than 20 years.

For the first 10 years that they were in Australia, Mr Pak and Ms Mun were employed as cleaners. In 2001, they established a small cleaning business. For the next 10 years they successfully operated this business and employed two Australian citizens. Each year since their arrival in Australia they declared their income and paid income tax. With the proceeds from their business, they purchased a family home and were paying off a mortgage.

Their daughter came to Australia with them when she was 14 months old. She grew up in Australia and completed primary school and high school here. At the time of the Commission's report she was studying at university.

Their son was born in Australia in 1998. In 2003 he was enrolled in kindergarten and has since completed primary school. When he turned 10 years old, he acquired Australian citizenship. The Assistant Principal at his school described him as self-motivated, well behaved and a somewhat shy and sensitive child. At the time of the Commission's report was 13 years old and had started high school.

Mr Pak and Ms Mun originally entered Australia as the holders of tourist visas. Following the expiration of those visas, they remained in Australia. Mr Pak claims that he did not approach the Department of Immigration and Citizenship as he was frightened of the consequences of not holding a valid visa.

The issue before the Commission was the potential separation of Mr Pak and Ms Mun from their son if they were now required to leave Australia. A significant question was the community's expectations about whether a family that had been present in Australia for more than 20 years should be permitted to remain here.

The Commission referred to decisions of the United Nations Human Rights Committee which had found that separation of families in similar cases would amount to an unlawful interference with family contrary to article 17 of the ICCPR where 'substantial changes to long settled family life would follow'.

158. This is an extreme example. The Pak family was in Australia without a visa for the vast majority of the time that they were in Australia. However, the proposed Bill would deny a right to citizenship under the 10 year rule to a person born in Australia if he or she did not have a valid visa for *any* period prior to his or her tenth birthday.

159. There is no discussion in the Explanatory Memorandum of any evidence supporting the claim of abuse of the 10 year rule. The only reference in the Explanatory Memorandum for the 2014 Bill to something said to support the amendment was a suggested ‘correlation’ between:
- a. the nationalities of people applying under the 10 year rule; and
 - b. the nationalities of people seeking a ministerial intervention under the *Migration Act 1958* (Cth).¹³²
160. No data was provided at that time about how often either of these kinds of applications are made or the trend in applications over time. When the Commission was considering the Pak family’s case in 2012, the available evidence was that requests for ministerial intervention from the relevant cohort had been steadily declining.¹³³ The reference to this ‘correlation’ has been removed from the Explanatory Memorandum to the present Bill.
161. As the Australian Citizenship Council noted, ‘strong evidence of abuse’ of the 10 year rule would be required in order to justify any amendment.¹³⁴ This would then need to be balanced against the requirement that the best interests of the child be taken into account as a primary consideration.
162. In the absence of strong evidence of abuse, the Commission considers that the proposed amendments lack reasonable justification and are therefore inconsistent with Australia’s obligations under articles 2 and 7 of the CRC and articles 2 and 24(3) of the ICCPR.

6.2 Children found abandoned in Australia

163. The Bill will make it easier to refuse citizenship to certain children found abandoned in Australia.
164. At present, section 14 of the Australian Citizenship Act provides:
- A person is an Australian citizen if the person is found abandoned in Australia as a child, unless or until the contrary is proved.
165. Although the provision is somewhat ambiguous, recent case law suggests ‘the contrary’ refers to proof that a person is not an Australian citizen rather than proof that a person was not abandoned or found abandoned.¹³⁵
166. The Bill proposes to repeal s 14¹³⁶ and insert s 12(8) and (9).¹³⁷
167. Article 2 of the *Convention on the Reduction of Statelessness* provides that:
- A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.
168. The Explanatory Memorandum suggests that the purpose of the amendments is to bring the Act into line with ‘the historical policy intention’ of Article 2, namely that ‘a child found abandoned be dealt with as a citizen by birth unless

and until it is determined that they are not a citizen by birth'.¹³⁸ However, the proposed amendments go beyond what is necessary to achieve this.

169. It appears that s 12(8) and (9)(b) would be sufficient to pick up the language of article 2 of the Convention. If these provisions were inserted, then:
- a. a person found abandoned in Australia as a child would be taken to have been born in Australia to a parent who was an Australia citizen or permanent resident (s 12(8)),
 - b. unless and until it is proved that they were not born in Australia to a parent who was an Australia citizen or permanent resident (s 12(9)(b)).
170. However, s 12(9)(a) provides an additional ground to refuse citizenship to an abandoned child. This provision means that a child found abandoned would not automatically acquire Australian citizenship if it is proved that the child was outside Australia at any time before they were found abandoned in Australia.
171. The Explanatory Memorandum does not sufficiently explain either why this fact (presence at some point outside Australia) should deprive an abandoned child of citizenship or why it is necessary given the other provisions. It says that if the child is known to have been outside Australia, then the child has either arrived in Australia lawfully and its identity and nationality will be known, or it will have arrived as an unlawful non-citizen.¹³⁹ This is not a true dichotomy and seems to contain some assumptions about the accuracy of Australia's immigration system. For example, it seems to ignore the possibility that the child left Australia irregularly and returned irregularly before being found abandoned.

6.3 Children considered not to be of 'good character'

172. The Australian Citizenship Act currently requires that adults applying for citizenship satisfy the Minister that they are of 'good character' in order to have their application approved.¹⁴⁰
173. The proposed amendments will remove the age limits in relevant sections so that all applicants, including children, will need to satisfy the Minister that they are of good character.¹⁴¹ The amendments aim to ensure the safety of the Australian community.¹⁴²
174. The Government says that in practice an assessment of whether someone is of good character would be conducted by examining their criminal history record.¹⁴³ Criminal history records would typically be sought for applicants aged 16 years and over. However, the Government says that it could seek criminal history records for children as young as 10.¹⁴⁴
175. The Government says that the instructions given to decision makers will be amended, so that decision makers consider the best interests of the child as a primary consideration, amongst other things, in making a character assessment for applicants under 18 years old.¹⁴⁵ The same comment was made when the 2014 Bill was introduced. Given the passage of time since

then, it would be reasonable to ask the Department of Immigration and Border Protection to produce this guidance now, while the Bill is being considered.

176. The Committee on the Rights of the Child has emphasised that:

The expression 'primary consideration' means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness ...

Viewing the best interests of the child as 'primary' requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.¹⁴⁶

177. The Commission is concerned that the protection of the rights of children in relation to this new process will be limited to administrative guidelines which have not yet been made public. In the circumstances, the Commission is unable to conclude that the rights of children, including the best interests of the child, will be adequately protected.

178. The Commission considers that decisions about whether children are of good character need to take into account their unique circumstances. The Committee on the Rights of the Child has observed that '[c]hildren differ from adults in their physical and psychological development, and their emotional and educational needs'.¹⁴⁷ Studies of brain maturation show that children and young people are still developing the ability to make careful judgements, delay gratification, restrain impulsive behaviour and consider consequences. These differences require different treatment for children.¹⁴⁸ For children in conflict with the law, policies and practices should be aimed at promoting the child's rehabilitation, reintegration and assuming a constructive role in society, in accordance with article 40(1) of the CRC. The Committee on the Rights of the Child notes that this can be done in concert with attention to effective public safety.¹⁴⁹

179. The Commission considers that examining a child's criminal history to determine whether they should be granted citizenship is inconsistent with the principles of rehabilitation and reintegration of child offenders, and therefore contrary to article 40(1) of the CRC.

180. The Commission notes that many children in conflict with the law, particularly those in youth justice detention, have experienced abuse, neglect and trauma. Past traumatic experiences may emerge as difficulty in managing interpersonal relationships, including disruptive or violent behaviours.¹⁵⁰ The Commission considers that trauma-informed, positive interventions and rehabilitative programs are needed to support these children.

181. The Commission also queries whether the amendment is reasonably justifiable or proportionate. According to the latest statistics from the Australian Bureau of Statistics, the predominant principal offence committed by youth offenders (i.e. children aged 10 to 17 years) was theft, which comprised 35% of all youth offenders. Approximately half of those offenders were proceeded

against for public transport fare evasion. Furthermore, over the period 2008–09 to 2015–16, the number of youth offenders declined across most offence categories.¹⁵¹ Without strong evidence that there is a need to protect the Australian community from children who have committed ‘particularly serious crimes’ and that this measure would be proportionate to achieving this objective, the Commission queries the justification for extending this generalised ‘good character’ requirement to children.

182. A more constructive approach, in the Commission’s view, would be to pursue measures aimed at promoting the education, inclusion and participation of all children and young people in Australian society (including targeted, youth-specific settlement services). This approach would also assist in promoting positive settlement outcomes for young people from migrant and refugee backgrounds more generally.

6.4 People with intellectual disability or cognitive impairment

183. The Australian Citizenship Act currently provides in s 24(6) that a Minister must not approve an application by a person for citizenship by conferral if criminal proceedings are on foot in relation to the person or, if the person was convicted of a criminal offence, until a certain period of time has passed after the person is released from prison or the person’s parole period expires.¹⁵²
184. The Bill proposes to extend this prohibition on citizenship based on criminal proceedings or criminal conduct in two ways:
- a. it will apply not just to applications for citizenship by conferral, but also to:
 - i. applications for citizenship by descent;¹⁵³
 - ii. applications for citizenship by intercountry adoption;¹⁵⁴ and
 - iii. applications for resumption of citizenship that had ceased.¹⁵⁵
 - b. in relation to all of these types of applications, the scope of the prohibition will be extended beyond the matters currently in s 24(6).¹⁵⁶
185. In this submission, the Commission focuses on the impact of these changes on people with an intellectual disability or cognitive impairment who come into contact with the criminal justice system. There are two provisions that the Commission has concerns about.
186. First, the Bill proposes that the Minister must not approve an application for citizenship of any kind when the applicant is subject to an order of a court requiring him or her to participate in ‘a residential program for persons with a mental illness’, where the order was made ‘in connection with’ proceedings for an offence.¹⁵⁷
187. Secondly, the Commission has concerns about the existing s 24(6)(h) and the proposal to extend this provision to all categories of applicants for citizenship. Under this provision (taking into account the amended terminology in the

Bill),¹⁵⁸ the Minister must not approve an application for citizenship during any period during which the person is confined in a mental health care facility by order of a court made 'in connection with' proceedings for an offence.

188. There are two factors that distinguish these prohibitions from the other prohibitions currently in s 24(6):
- a. they apply only to people with a mental disability;
 - b. they apply to situations where a person was charged but was not convicted of any criminal offence.
189. Article 5 of the Convention on the Rights of Persons with Disabilities relevantly provides:
- (1) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
 - (2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.¹⁵⁹
190. When these provisions were first put forward in the 2014 Bill in the same terms, the Government recognised that, on their face, 'these amendments discriminate against persons with a mental illness'.¹⁶⁰ The language used in the current Explanatory Memorandum now only concedes that the proposed amendments 'may engage' the provisions of the CRPD.¹⁶¹
191. The Government submits that to the extent that there is discrimination it is necessary and proportionate to the legitimate objective that:
- a. 'the privileges of Australian citizenship are only given to those who are of good character and have not committed certain criminal offences';¹⁶²
or
 - b. 'citizenship is only available to those people who can demonstrate that they respect the laws of Australia'.¹⁶³
192. There are two responses to the question of proportionality. First, there is a need to separate the question of good character from a person's criminal record. As noted earlier in these submissions, the Australian Citizenship Council has said:
- Each applicant is assessed against 'good character' policy requirements [including the ones now in s 24(6)]. The fact that a person has a criminal record does not itself automatically preclude a grant of Citizenship. Length of time since the offence, seriousness of the offence and the chance of recidivism are all matters that are taken into consideration.¹⁶⁴
193. Secondly, a key difference in the two provisions identified by the Commission in paragraphs 186 and 187 above is that a person who meets the criteria may not have been convicted of an offence at all. For example, the court may have determined that the person was unable to plead to any criminal charges, or

the person may have been found not guilty of any offence by reason of mental impairment. Neither of those circumstances leads to the conclusion that the person is not of good character.

194. In this sense, the provisions discriminate against people with a mental disability or a cognitive impairment who have not been convicted of a crime but have been made the subject of orders either requiring them to participate in 'a residential program for persons with a mental illness' or requiring them to be confined in a mental health care facility. This discrimination is not proportionate to the end of identifying whether the people are of good character because there is no necessary relationship with this end.

Schedule: Australian Values Statement

The current form of the Australian Values Statement that applicants for provisional, permanent and a small number of temporary visas are required to sign is in the form set out below. Applicants are also required to have read, or had explained to them, a booklet titled *Life in Australia*.¹⁶⁵

I confirm that I have read, or had explained to me, information provided by the Australian Government on Australian society and values.

I understand:

- Australian society values respect for the freedom and dignity of the individual, freedom of religion, commitment to the rule of law, Parliamentary democracy, equality of men and women and a spirit of egalitarianism that embraces mutual respect, tolerance, fair play and compassion for those in need and pursuit of the public good
- Australian society values equality of opportunity for individuals, regardless of their race, religion or ethnic background
- the English language, as the national language, is an important unifying element of Australian society.

I undertake to respect these values of Australian society during my stay in Australia and to obey the laws of Australia.

I understand that, if I should seek to become an Australian citizen:

- Australian citizenship is a shared identity, a common bond which unites all Australians while respecting their diversity
- Australian citizenship involves reciprocal rights and responsibilities. The responsibilities of Australian Citizenship include obeying Australian laws, including those relating to voting at elections and serving on a jury.

If I meet the legal qualifications for becoming an Australian citizen and my application is approved I understand that I would have to pledge my loyalty to Australia and its people.

Signature of Applicant

Endnotes

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- 4 Citizenship by intercountry adoption is dealt with in Part 2, Division 2, Subdivision AA of the Australian Citizenship Act.
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- 15 Proposed s 21(5)(d), Bill, item 51, pp 17-18.
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- ¹¹⁷ Human Rights Committee, *General Comment 17, Article 24 (Rights of the child)*, UN Doc HRI/GEN/1/Rev.8, para 8. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6623&Lang=en (viewed 21 July 2017).
- ¹¹⁸ EM, Statement of Compatibility with Human Rights, pp 84-85.
- ¹¹⁹ Hugh Massey, *UNHCR and De Facto Statelessness* (April 2010) United Nations High Commissioner for Refugees, p 62. At www.unhcr.org/4bc2ddeb9.pdf (viewed 21 July 2017).
- ¹²⁰ The Conference which established the *Convention on the Reduction of Statelessness* recommended that 'persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality'. *Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness*, 989 UNTS 175 (30 August 1961) Resolution I.
- ¹²¹ Proposed s 12(4), Bill, item 20, p 7.
- ¹²² Application and transitional provisions, Bill, item 135(2) and (3).
- ¹²³ EM, Statement of Compatibility with Human Rights, p 83.
- ¹²⁴ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 41.
- ¹²⁵ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 41.
- ¹²⁶ EM, Statement of Compatibility with Human Rights, p 75.
- ¹²⁷ EM at [50].
- ¹²⁸ There is a large body of academic literature dealing with this issue. See for example, E Kendall 'Amending the Constitution to Save a Sinking Ship? The Issues Surrounding the Proposed Amendment of the Citizenship Clause and "Anchor Babies"' (2012) 22 *Berkeley La Raza Law Journal* 349; M Ormonde 'Debunking the Myth of the "Anchor Baby": Why Proposed Legislation Limiting Birthright Citizenship is not a Means of Controlling Unauthorized Immigration' (2012) 17 *Roger Williams University Law Review* 861; D Gayeski 'Give Me Your Tired, Your Poor, Your

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- Legal: Why Efforts to Repeal Birthright Citizenship are Unconstitutional and Un-American' (2011) 21(1) Temple Political and Civil Rights Law Review 215.
- ¹²⁹ *Dred Scott v Sandford* 60 US 393 (1857).
- ¹³⁰ EM at [50].
- ¹³¹ *Pak family v Commonwealth of Australia* [2012] AusHRC 54. At <http://www.humanrights.gov.au/publications/aushrc-54-pak-family-v-commonwealth-australia-department-immigration-citizenship> (viewed 21 July 2017).
- ¹³² Explanatory Memorandum, Australian Citizenship and Other Legislation Amendment Bill 2014, Statement of Compatibility with Human Rights, p 10.
- ¹³³ *Pak family v Commonwealth of Australia* [2012] AusHRC 54 at [38]. At <http://www.humanrights.gov.au/publications/aushrc-54-pak-family-v-commonwealth-australia-department-immigration-citizenship> (viewed 21 July 2017).
- ¹³⁴ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 41.
- ¹³⁵ *Nicky v Minister for Immigration and Border Protection* [2015] FCA 714 at [43]-[45].
- ¹³⁶ Bill, item 22, p 8.
- ¹³⁷ Bill, item 20, pp 7-8.
- ¹³⁸ EM at [54]-[55].
- ¹³⁹ EM at [57].
- ¹⁴⁰ See, for example, ss 16(2)(c), 16(3)(c), 19C(2)(g), 21(2)(h), 21(3)(f), 21(4)(f), 21(6)(d), 21(7)(d), 29(2)(b), 29(3)(b).
- ¹⁴¹ EM, Statement of Compatibility with Human Rights, p 80; Bill, items 26, 34, 52, 100 and 102.
- ¹⁴² EM, Statement of Compatibility with Human Rights, pp 80-81.
- ¹⁴³ EM, Statement of Compatibility with Human Rights, p 73.
- ¹⁴⁴ EM, Statement of Compatibility with Human Rights, p 73.
- ¹⁴⁵ EM, Statement of Compatibility with Human Rights, p 81.
- ¹⁴⁶ Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14, paras 37, 40, p 10. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en (viewed 21 July 2017).
- ¹⁴⁷ Committee on the Rights of the Child, *General Comment No. 10 (2007): Children's rights in juvenile justice*, UN Doc CRC/C/GC/10, para 10, p 5. At <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> (viewed 21 July 2017).
- ¹⁴⁸ Committee on the Rights of the Child, *General Comment No. 10 (2007): Children's rights in juvenile justice*, UN Doc CRC/C/GC/10, para 10, p 5. At <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> (viewed 21 July 2017).
- ¹⁴⁹ Committee on the Rights of the Child, *General Comment No. 10 (2007): Children's rights in juvenile justice*, UN Doc CRC/C/GC/10, para 10, p 5. At <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> (viewed 21 July 2017).
- ¹⁵⁰ Australian Human Rights Commission, *Children's Rights Report 2016*, 2016, pp 165-166. At <https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2016> (viewed 21 July 2017).
- ¹⁵¹ Australian Bureau of Statistics, 'Youth offenders', 7 February 2017, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2015-16~Main%20Features~Youth%20offenders~4> (viewed 21 July 2017).
- ¹⁵² Australian Citizenship Act, s 24(6).
- ¹⁵³ Proposed s 17(4C), Bill, item 27, pp 9-11.
- ¹⁵⁴ Proposed s 19D(7B), Bill, item 35, p 13-14.
- ¹⁵⁵ Proposed s 30(8), Bill, item 103, pp 30-32.
- ¹⁵⁶ The amendments that extend the scope of the prohibition in s 24(6) for applicants for citizenship by conferral are in items 86 to 88 of the Bill, pp 26-27.
- ¹⁵⁷ Proposed ss 17(4C)(j)(ii), 19D(7B)(j)(ii), 24(6)(j)(ii) and 30(8)(j)(ii).
- ¹⁵⁸ Bill, item 87, p 27 proposes to replace the term 'psychiatric institution' with 'mental health care facility'.
- ¹⁵⁹ Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, [2008] ATS 12 (entered into force generally on 3 May 2008; entered into force for Australia on 16 August 2008).
- ¹⁶⁰ Explanatory Memorandum, Australian Citizenship and Other Legislation Amendment Bill 2014, Statement of Compatibility with Human Rights, p 6.
- ¹⁶¹ EM, Statement of Compatibility with Human Rights, p 82.
- ¹⁶² EM, Statement of Compatibility with Human Rights, p 81.

¹⁶³ EM, Statement of Compatibility with Human Rights, p 73,

¹⁶⁴ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 53.

¹⁶⁵ Australian Government, Department of Immigration and Border Protection, *Life in Australia: Australian Values and Principles*, 2016. At https://www.border.gov.au/LifeinAustralia/Documents/lia_english_full.pdf (viewed 21 July 2017).