Chapter 2

The proposed changes

2.1 As noted in the previous chapter, Mr Fletcher's second reading speech described the proposed amendments as falling into 'three broad themes'. This chapter examines each theme—and the associated amendments—in turn.

'Strengthening program integrity'

2.2 The first 'theme' of amendments is 'strengthening program integrity'.[1] This theme includes measures to:

- extend character requirements to minors;
- provide that only minors may become citizens by adoption;
- extend the bar on citizenship for offence-related reasons to all methods of obtaining citizenship by application;
- extend the power to cancel an approval to become a citizen; and
- extend the power to revoke citizenship in two circumstances, namely:
  - where a person is incorrectly registered as a citizen by descent; and
  - where the minister is satisfied that some fraud or misrepresentation has occurred.

Extending character requirements to minors

2.3 At present, subsection 16(2) of the *Australian Citizenship Act* sets out the criteria for a grant of citizenship to persons who were born outside Australia but who have at least one Australian parent. Subsection 16(2)(c) provides that the minister must be satisfied of such a person's good character:

- if the person has ever been a national or citizen of any country or if there are serious reasons for considering that the person has committed a serious crime; and
- if the person was aged 18 or over at the time that they applied for citizenship.

2.4 Similarly, if a person applies for citizenship as a person born to a former Australian citizen or following adoption in accordance with the Hague Convention on Intercountry Adoption or if a person seeks to resume Australian citizenship, the minister must be satisfied that the person is of good character if the person was aged 18 or over at the time that they applied for citizenship.[2]

2.5 The Act does not define the phrase 'good character'.

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1 Mr Fletcher, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 23 October 2014, pp. 1-2.

2 *Australian Citizenship Act 2007*, subsections 19C(2)(g), 21(6)(d), 29(2)(b), & 29(3)(b).

2.6 Items 17, 21, 26, 58 and 60 would remove the age limitations in these provisions, thereby requiring the minister to be satisfied that child applicants are also of good character. Likewise, Item 25 would insert a good character requirement into the criteria for minors holding permanent visas to become Australian citizens under subsection 21(5) of the Act.

2.7 The EM states that:

> The amendment recognises the fact that people under the age of 18 sometimes have significant character concerns and/or have committed particularly serious crimes, and that the Minister should therefore have the discretion to refuse to approve such a person becoming an Australian citizen under section 17 of the Act. In practice, the effect of the amendment is that the Minister would now seek criminal history records for 16-17 year-olds. However, if the Minister becomes aware of an applicant who has character issues and is aged younger than 16, it would be possible to assess that applicant against the character requirement.[3]

Limiting citizenship by adoption to minors

2.8 Item 13 would restrict the automatic conferral of citizenship by adoption to circumstances where the adoption process began when the adopted person was under the age of 18. The EM explains that:

> This amendment seeks to prevent people from becoming Australian citizens under section 13 of the Act by being adopted in Australia as adults. The amendment is particularly concerned with the potential for adults to seek to be adopted in Australia in order to circumvent the provisions of the Migration Act (for example, to avoid being removed from Australia after their visa has been cancelled).[4]

Extending the bar on citizenship for offence-related reasons

2.9 At present, the *Australian Citizenship Act* sets out the circumstances in which the minister must not approve a person's application to become an Australian citizen:

(a) by descent;[5]

(b) following adoption in accordance with the Hague Convention on Intercountry Adoption;[6]

(c) by conferral;[7] or

(d) by resumption.[8]

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3 Explanatory Memorandum, pp. 17, 22, 27, 28, 47.

4 Explanatory Memorandum, p. 15.

5 *Australian Citizenship Act 2007*, section 17.

6 *Australian Citizenship Act 2007*, section 19D.

7 *Australian Citizenship Act 2007*, section 24.

8 *Australian Citizenship Act 2007*, section 30.

2.10 At present, these include (for all four types of application) the minister not being satisfied of the person's identity, and the person being a specified threat to national security.[9]

2.11 For citizenship by conferral only, the minister is also required not to approve the application for citizenship for a number of offence-related reasons.[10] Items 44 and 45 would amend the offence-related reasons applicable to citizenship by conferral and Items 18, 22, and 61 would insert offence-related reasons for the other three types of application such that all four types of application would have identical offence-related reasons for not approving an application for citizenship, namely:

> The Minister must not approve the person becoming an Australian citizen at a time:
>
> (a) when proceedings for an offence against an Australian law (including proceedings by way of appeal or review) are pending in relation to the person; or
>
> (b) when the person is confined to a prison in Australia; or
>
> (c) during the period of 2 years after the end of any period during which the person has been confined to a prison in Australia because of the imposition on the person of a serious prison sentence;[11] or
>
> (d) if the person is a serious repeat offender[12] in relation to a serious prison sentence—during the period of 10 years after the end of any period during which the person has been confined to a prison in Australia because of the imposition of that sentence; or
>
> (e) if the person has been released from serving the whole or a part of a sentence of imprisonment on parole or licence—during any period during which action can be taken under an Australian law to require the person to serve the whole or a part of that sentence; or
>
> (f) if the person:
>
> (i) has been released by a court from serving the whole or a part of a sentence of imprisonment; and
>
> (ii) has been so released subject to conditions relating to the person's behaviour;

9 See *Australian Citizenship Act 2007*, subsections 17(3)-17(4B), 19D(4)-19D(7A), 24(3)-24(4D), 30(3)-30(6).

10 *Australian Citizenship Act 2007*, subsection 24(6).

11 'Serious prison sentence' is defined in section 3 of the *Australian Citizenship Act* to mean a sentence of imprisonment for a period of at least 12 months.

12 'Serious repeat offender' is defined in section 3 of the *Australian Citizenship Act* as follows:

> ***"serious repeat offender"***: a person is a ***serious repeat offender*** in relation to a serious prison sentence if the sentence was imposed on the person for an offence committed by the person at a time after the person ceased to be confined in prison because of the imposition of another serious prison sentence.

during any period during which action can be taken against the person under an Australian law because of a breach of any of those conditions;[13] or

(g) if, in respect of proceedings for an offence against an Australian law in relation to the person, a court releases the person subject to conditions relating to the person's behaviour—during any period during which action can be taken against the person under an Australian law because of a breach of any of those conditions;[14] or

(h) during any period during which the person is confined in a psychiatric institution by order of a court made in connection with proceedings for an offence against an Australian law in relation to the person; or

(i) when the person is subject to an order of a court for home detention, where the order was made in connection with proceedings for an offence against an Australian law in relation to the person;[15] or

(j) when the person is subject to an order of a court requiring the person to participate in:

(i) a residential drug rehabilitation scheme; or

(ii) a residential program for the mentally ill; or

(iii) any other residential scheme or program;

where the order was made in connection with proceedings for an offence against an Australian law in relation to the person.[16]

2.12 The EM explains that these amendments aim 'to bring consistency to the citizenship programme by applying the bar on approval for criminal offences to all application streams'.[17]

Extending the power to cancel an approval to become a citizen

2.13 Subdivision B of Division 2 of Part 2 of the *Australian Citizenship Act* is entitled 'Citizenship by conferral'. As explained in the simplified outline of the subdivision, there are seven ways in which a person can become an Australian citizen by conferral, the criteria for which are set out in section 21 as follows:

13 Subsection (f) has been updated insofar as it relates to citizenship by conferral. At present, it requires that the person be released upon the giving of a security but, as the Explanatory Memorandum notes, courts may release persons on condition without requiring the giving of a security: Explanatory Memorandum, p. 39.

14 Subsection (g) has been updated insofar as it relates to citizenship by conferral. At present, it requires that the person be released upon the giving of a security but, as the Explanatory Memorandum notes, courts may release persons on condition without requiring the giving of a security: Explanatory Memorandum, p. 39.

15 Subsection (i) does not currently exist in relation to citizenship by conferral.

16 Subsection (j) does not currently exist in relation to citizenship by conferral.

17 Explanatory Memorandum, pp. 17, 22, 49.

You may be eligible to become an Australian citizen under this Subdivision in 7 situations:

- you satisfy the general eligibility criteria and have successfully completed a citizenship test: see subsections 21(2) and (2A); or
- you have a permanent or enduring physical or mental incapacity: see subsection 21(3); or
- you are aged 60 or over or have a hearing, speech or sight impairment: see subsection 21(4); or
- you are aged under 18: see subsection 21(5); or
- you were born to a former Australian citizen: see subsection 21(6); or
- you were born in Papua: see subsection 21(7); or
- you are a stateless person: see subsection 21(8).[18]

2.14 Section 25 of the Act concerns the circumstances in which the minister may cancel an approval for a person to become an Australian citizen by conferral (if their Australian citizenship has not yet commenced because, for example, they have not yet made a pledge of commitment). The two key circumstances in which this can occur are (a) where the minister becomes satisfied that certain applicants do not meet certain key criteria for the grant of citizenship, or (b) where the person fails to make a pledge of commitment within 12 months of receiving notice of the approval. The approval for children must also be cancelled in certain circumstances where their parents' approval is cancelled.

2.15 Item 49 would amend the first of these two circumstances by:

- applying it to different categories of citizenship by conferral (persons under 18 would be liable to cancellation, whereas persons with enduring physical or mental incapacity would not); and
- expanding the citizenship criteria to which it applies.

2.16 Item 47 would insert a new mandatory cancellation power, which would require the minister to cancel an approval if:

- the person had not yet become an Australia citizen;
- the approval was given on the basis that the person:
  - satisfied the general eligibility criteria and successfully completed a citizenship test (as detailed in subsection 21(2));
  - was aged 60 or over or had a hearing, speech or sight impairment (as detailed in subsection 21(4)); or
  - was under the age of 18 (as detailed in subsection 21(5)); and

18 *Australian Citizenship Act 2007*, section 19G.

- the minister is no longer satisfied of the person's identity *or* the person has been assessed as posing certain security-related risks to Australia.

2.17 If the minister is considering cancelling an approval under any of these powers, Item 55 would, if passed, allow the minister to prevent the person from making a pledge of commitment (and thereby becoming an Australian citizen) for a specified period. The EM explains that 'if the Minister requires additional time to investigate matters to determine whether to cancel the approval of a person as an Australian citizen under section 25 of the Act, it is intended that the Minister can defer the person making the pledge of commitment to prevent a person becoming an Australian citizen during this period'.[19]

2.18 Item 56 would extend the maximum period for which the minister could delay a person's pledge of commitment (on the grounds discussed above and on the grounds that the person's visa is liable to be cancelled or that the person has been or may be charged with an offence) from one year to two.

Extending the power to revoke citizenship

2.19 There are, broadly speaking, three ways in which a person can cease to be an Australian citizen: by renunciation, by revocation, and by service in the armed forces of a country at war with Australia. At present, the minister may revoke a person's citizenship:

- in certain circumstances of criminality or fraud if the minister is satisfied that 'it would be contrary to the public interest for the person to remain an Australian citizen';[20]
- if the person fails to comply with special residence requirements;[21] or
- if the person is a child and their responsible parent ceases to be an Australian citizen.[22]

2.20 The first two circumstances do not apply where the person automatically became an Australian citizen.

2.21 The Bill would make two key amendments to these provisions.

Persons incorrectly registered as citizens by descent

2.22 First, Item 64 would add a new circumstance in which citizenship may be revoked, namely where the minister has approved a person being registered as a citizen by descent and the minister is subsequently satisfied that the approval should not have been given. It would not allow the minister to revoke the person's citizenship if to do so would render the person stateless.

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19 Explanatory Memorandum, p. 45.

20 *Australian Citizenship Act 2007*, section 34.

21 *Australian Citizenship Act 2007*, section 34A.

22 *Australian Citizenship Act 2007*, section 36.

2.23 At present, section 19A provides that a person does not become a citizen by descent (even if the minister approves the person's application for citizenship) unless they meet the descent requirement (that is, because a parent of theirs was an Australian citizen at birth or became an Australian citizen on 26 January 1949). Item 19 would, if passed, repeal section 19A.

2.24 There are two key differences between current section 19A and the proposed new revocation power. First, the current section operates as a matter of law, whereas the proposed provision would give the minister a discretion. The EM explains that:

> …there have been a number of cases where a person was registered as an Australian citizen by descent and has been found not to have been eligible to be approved as an Australian citizen by descent (and consequently, to have never been a citizen). The fact that section 19A of the Act is an operation of law provision means that the Minister has no discretion to allow these people to retain their Australian citizenship. Once it is determined that a person was never entitled to be registered as an Australian citizen by descent, then a finding of fact is made that the person is not and never was a citizen, regardless of matters such as the age of the person, whether the person was an innocent party to the incorrect registration and the extent to which the person has integrated into the Australian community.[23]

2.25 Giving the minister the discretion to revoke citizenship in such circumstances is intended to avoid these undesirable consequences.

2.26 Secondly, whereas the current section only applies to persons who do not qualify for citizenship by descent because they do not meet the descent criterion, the new provision would apply to any criterion for receiving Australian citizenship by descent. This would mean, for example, that the minister could revoke a person's citizenship if he or she were to become satisfied that the person was not of good character at the time that they were registered as a citizen by descent.[24]

Revocation for fraud or misrepresentation without conviction

2.27 The second amendment, made by Item 66, would expand the minister's power to revoke a person's Australian citizenship when satisfied that the person became a citizen as a result of fraud or misrepresentation by allowing revocation without a prior criminal conviction. At present, section 34 allows the minister to revoke a person's citizenship if the person became a citizen by descent, by conferral or following adoption in accordance with the Hague Convention on Intercountry Adoption, if the person (or another person) has been convicted of certain offences connected with the minister's approval, and if the minister is satisfied that 'it would be contrary to the public interest for the person to remain an Australian citizen'. In the case of a person granted citizenship by conferral, further offences are specified that need not be connected with the approval.

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23 Explanatory Memorandum, p. 55.

24 Explanatory Memorandum, p. 56.

2.28 The new provision—section 34AA—would allow the minister to revoke a person's citizenship if:

- the person became a citizen by descent, by conferral or following adoption in accordance with the Hague Convention on Intercountry Adoption; and
- the minister is satisfied that the minister's approval for the person to become a citizen was obtained as a result of certain types of fraud or misrepresentation; and
- the minister is satisfied that revoking the person's citizenship is in the national interest.

2.29 The fraud may have been committed by any person and need not have constituted an offence, or part of an offence, but the revocation must occur within ten years of the fraud or misrepresentation.

2.30 Mr Fletcher's second reading speech explained the necessity of enabling the minister to revoke citizenship for fraud or misrepresentation in the absence of a conviction on the basis that '[l]aw enforcement agencies and courts have limited capacity to prosecute all cases of fraud, or any other type of criminal behaviour, thereby reducing the ability of the government to ensure that high community expectations of behaviour are maintained in respect of those who obtain Australian citizenship'.[25]

'Underlining the importance of connection to Australia'

2.31 The second 'theme' of amendments nominated by Mr Fletcher in his second reading speech was 'underlining the importance of connection to Australia'.[26] The amendments under this theme seek to:

- restrict the operation of the 'ten year rule';
- amend the definition of 'de facto partner' and insert a definition of 'spouse';
- clarify the general residence requirement;
- clarify the position of abandoned children; and
- extend citizenship to certain children outside Australia.

Restricting the operation of the 'ten year rule'

2.32 Section 12 of the *Australian Citizenship Act* provides for two routes by which a person can acquire Australian citizenship by birth. The first is where they were born in Australia and where one of their parents was an Australian citizen or a permanent resident at the time of their birth. The second route—which is referred to as the 'ten

25 Mr Fletcher, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 23 October 2014, p. 2.

26 Mr Fletcher, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 23 October 2014, pp. 2-3.

year rule'—is where the person was born in Australia and they are 'ordinarily resident in Australia' for the first ten years of their life.[27] There is an exception to both routes for the children of enemy aliens born in territory occupied by the enemy.[28]

2.33 Item 12 would—if passed—restrict the operation of the ten year rule in four ways. First, the ten year rule would not be available to any child who was present in Australia as an unlawful non-citizen during that ten-year period.[29] The EM does not provide a policy justification for this amendment, but the Department wrote to the committee explaining that:

> The purpose of this proposed amendment is to ensure that citizenship by operation of law is only accorded to those persons who have maintained a lawful right to remain in Australia during the ten years from their birth.[30]

2.34 Second, the ten year rule would not be available to any child who, during that ten-year period, was outside Australia and, whilst outside Australia, did not hold a visa permitting them to 'travel to, enter and remain in Australia'.[31] This exception does not apply to children who were citizens of New Zealand throughout their absence from Australia.[32] The EM does not provide a policy justification for this amendment, but it would appear to be covered by the justification set out in the previous paragraph.

2.35 Third, the ten year rule would not be available to any child with a parent who:

- did not hold a 'substantive visa' at the time of the child's birth;[33] and
- entered Australia on one or more occasions before the child's birth; and
- at any time between the parent's last entry into Australia and the date of the child's birth, the parent was in Australia as an unlawful non-citizen.[34]

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27 Section 3 of the *Australian Citizenship Act 2007* defines 'ordinarily resident' as follows:

> "***ordinarily resident***" : a person is taken to be ordinarily resident in a country if and only if:
>
> (a) he or she has his or her home in that country; or
>
> (b) that country is the country of his or her permanent abode even if he or she is temporarily absent from that country.
>
> However, the person is taken not to be so resident if he or she resides in that country for a special or temporary purpose only.

28 *Australian Citizenship Act 2007*, subsection 12(2).

29 The Bill, Schedule 1, Item 12 (proposed subsection 12(4)).

30 Department of Immigration and Border Protection, Letter received as additional information, 14 November 2014, p. 1.

31 The Bill, Schedule 1, Item 12 (proposed subsection 12(5)).

32 The Bill, Schedule 1, Item 12 (proposed subsection 12(6)).

33 Item 7 would insert a definition of 'substantive visa' into the *Australian Citizenship Act*. That phrase would mean the same as it does in the *Migration Act* (that is, a visa other than a bridging visa, a criminal justice visa or an enforcement visa): see section 5.

34 The Bill, Schedule 1, Item 12 (proposed subsection 12(7)).

2.36 The EM does not provide a policy justification for this amendment. This amendment would not appear to be covered by the justification quoted in paragraph 2.33 above because it would prevent children who *have* 'maintained a lawful right to remain in Australia during the ten years from their birth' from becoming a citizen.

2.37 Finally, the ten year rule would not be available to the children of any person who, during those ten years, was entitled to any privileges or immunities under the *Diplomatic Privileges and Immunities Act 1967*, the *Consular Privileges and Immunities Act 1972*, the *International Organisations (Privileges and Immunities) Act 1963* or the *Overseas Missions (Privileges and Immunities) Act 1995*.[35] The EM states that this amendment 'reflects the policy position' that the children of foreign diplomats should not, without more, be entitled to Australian citizenship.[36]

2.38 This final exception would have no impact on the citizenship rights of children born to a parent who is an Australian citizen or permanent resident where that parent or the other parent were entitled to any privileges or immunities under any of the above legislation.[37]

De facto partners and spouses

2.39 At present, 'de facto partner' is defined in section 3 of the *Australian Citizenship Act* to have the same meaning as in the *Acts Interpretation Act 1901*. 'Spouse' is not defined in the *Australian Citizenship Act*. Items 4 and 6 would—if passed—result in both phrases having the same meaning as in the *Migration Act 1958*.

2.40 The *Migration Act* provides that two people are spouses if they:

- are in a valid marriage with one another; and
- 'have a mutual commitment to a shared life as husband and wife to the exclusion of all others'; and
- have a 'genuine and continuing relationship'; and
- live together or 'do not live separately and apart on a permanent basis'.[38]

2.41 The *Migration Act* provides that two people are de facto partners if they are not spouses but meet the other criteria outlined above and are not related by family.[39]

2.42 The EM explains that:

> The definition in the Migration Act makes more explicit reference to the need for a de facto couple to be in a relationship "to the exclusion of all others", for their relationship to be "genuine and continuing" and for them

35 The Bill, Schedule 1, Item 12 (proposed subsection 12(3)).

36 Explanatory Memorandum, p. 12.

37 Explanatory Memorandum, p. 12.

38 *Migration Act 1958*, section 5F.

39 *Migration Act 1958*, section 5CB.

> not to be living "permanently apart". These considerations are also relevant to the Government's policy intent in relation to the Act.[40]

2.43 Regulations made under the *Migration Act* may provide for the manner in which the criteria for spouses and de facto partners are determined to exist.[41] The present regulations made for this purpose only apply, at present, to visa applications.[42]

Clarifying the general residence requirement

2.44 A person applying for citizenship by certain types of conferral is only eligible if he or she 'satisfies the general residence requirement (see section 22) or the special residence requirement (see section 22A or 22B), or satisfies the defence service requirement (see section 23), at the time the person made the application'.[43]

2.45 The 'general residence requirement' is met if a person was in Australia for the four years before they made the application for citizenship, if they were not an unlawful non-citizen at any time during that four-year period and if they were present in Australia as a permanent resident for the year before they made the application.[44] (This rule is not as strict as it seems, as there are certain circumstances in which people will be deemed to have been—or not to have been—in Australia in the lead-up to their application for citizenship.[45])

2.46 Item 27 would amend this rule, in the words of the EM, 'to clarify exactly when the 4 year period of a person's residence in Australia commences for the purposes of paragraph 22(1)(a) of the Act'.[46] (In fact, paragraph 22(1)(a)—both before and after the proposed amendments—concerns the person's *presence*, not *residence*, in Australia.)

2.47 If the amendment were to pass, the new general residence requirements would be that the person applying for citizenship:

- must either:
  - be in Australia (except as an unlawful non-citizen) 'on the first day (the ***start day***) of the 4-year period ending on the day before the day the person made the application'; or

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40 Explanatory Memorandum, p. 8.

41 *Migration Act 1958*, subsections 5CB(3) & 5F(3).

42 Migration Regulations 1994, regulations 1.09A & 1.15A.

43 *Australian Citizenship Act 2007*, subsections 21(2)(c), 21(3)(c) & 21(4)(d).

44 *Australian Citizenship Act 2007*, subsection 22(1).

45 For example, a person will be deemed to have been in Australia for the four years prior to the making of the application for citizenship if the total period of their absence or absences was less than 12 months: *Australian Citizenship Act 2007*, subsection 22(1A). On the other hand, a person is not taken to have been in Australia for the four years before the making of the application if they were in prison at any time during that four years: *Australian Citizenship Act 2007*, subsection 22(1C)(a).

46 Explanatory Memorandum, p. 28.

- on the start day, be outside Australia *and* be the holder of a visa entitling them to travel to, enter and remain in Australia *so long as* the visa was granted when the person was in Australia; or
- on the start day, be outside Australia *and* be the holder of a visa entitling them to travel to, enter and remain in Australia *even if* the visa was granted outside Australia *so long as* the person had previously entered Australia as the holder of that visa; and

- must be in Australia 'throughout the period (the ***relevant period***) beginning on the day after the start day and ending on the day before the day the person made the application'; and
- must not be in Australia as a non-citizen at any time during the relevant period; and
- must be in Australia as a permanent resident for the year before they made the application.

2.48 The EM states that '[t]his amendment is a response to an interpretation that has been taken regarding current paragraph 22(1)(a) that there is no clear requirement that a person must be in Australia on the exact date 4 years before making their application for Australian citizenship in order to meet the general residence requirement'.[47] This appears to be referring (although this is nowhere made clear) to the possibility that, because of the subsequent provisions of section 22 that deem people to be in Australia when they are not, they need not physically be in Australia at the commencement of the four-year period.

2.49 The EM also explains that this change 'reflects the policy position that there are specific circumstances where a person will meet the residence requirement even if they were not physically present in Australia on the start day'.[48]

2.50 Item 33 would allow the minister to prescribe by legislative instrument the circumstances in which the minister may treat a period as a period in which an applicant was *not* in Australia as an unlawful non-citizen. The EM explains that the circumstances prescribed could include, but are not limited to, 'situations where a person has unintentionally become an unlawful non-citizen for a brief period'.[49] Similar powers are provided in respect of the special residence requirements.[50]

2.51 Item 35 would amend one of the exceptions to the general residence requirement, namely the minister's discretion to treat the spouse, de facto partner or surviving spouse or de facto partner as having been in Australia (including as a permanent resident) when they were not, provided that certain conditions are met. The amendment clarifies that the person must have been in Australia for at least 365 days

47 Explanatory Memorandum, p. 29.

48 Explanatory Memorandum, p. 29.

49 Explanatory Memorandum, p. 31.

50 The Bill, Schedule 1, Items 38 & 40.

of the four years prior to the making of the application. Mr Fletcher's second reading speech explained that this minimum period was required because '[i]t is important that applicants spend a sufficient amount of time here to understand what being Australian means'.[51] This 365-day requirement would not apply, however, if the person was working outside Australia as a Commonwealth officer or a state or territory officer throughout the period, in which circumstance that person would be treated as having been in Australia. Item 36 provides the definitions of 'Commonwealth officer', 'State or Territory officer' and 'surviving spouse or de facto partner'.

Clarifying the position of abandoned children

2.52 At present, section 14 of the *Australian Citizenship Act* provides that '[a] person is an Australian citizen if the person is found abandoned in Australia as a child, unless and until the contrary is proved'.

2.53 Item 14 would repeal section 14. Item 12 would replace it with new subsections 12(8) and 12(9). Proposed subsection 12(8) would provide that a child found abandoned in Australia would be presumed to have been born in Australia to a parent who was an Australian citizen or permanent resident at the time of their birth (and would, therefore, be an Australian citizen under subsection 12(1)(a)). Proposed subsection 12(9) would provide that this presumption would apply 'unless and until it is proved' that (a) the child was outside Australia at any time before they were found abandoned, or (b) the child does not have a parent who was an Australian citizen or permanent resident at the time of their birth.

2.54 The EM explains these amendments as follows:

> 80. Since the introduction of the Act in 2007, section 14 has not accurately reflected the historical basis for the introduction of the provision on abandoned children. Current section 14 is the successor to a provision introduced into the *Australian Citizenship Act 1948* (the 1948 Act) to meet Australia's obligations under Article 2 of the Convention on the Reduction of Statelessness (CRS). Articles 2 [sic] of the CRS 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*.
>
> 81. Article 2 of the CRS generally requires that a child found abandoned be dealt with as a citizen by birth unless and until it is determined they are not a citizen by birth. Originally the 1948 Act reflected this intention.
>
> 82. The amendment in new subsection 12(8) of the Act clarifies the intention of the abandoned child provision and ensures the language more closely reflects the original intent. The amendments provide that a child found abandoned in Australia is presumed to be a citizen by birth as provided in current paragraph 12(1)(a) of the Act. That is, the child is presumed to be born in Australia with a parent who is an Australian citizen, or a permanent resident at the time the child is born.

51 Mr Fletcher, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 23 October 2014, p. 3.

> 83. New subsection 12(9) of the Act provides for the exceptions to the presumption in new subsection 12(8). New paragraph 12(9)(a) provides that the presumption of citizenship by birth, in new subsection 12(8), does not apply if the child is known to be physically outside Australia at any time before the child was found abandoned in Australia. 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. New paragraph 12(9)(b) provides that the presumption of citizenship by birth does not apply if the child does not meet the requirements of citizenship by birth in paragraph 12(1)(a) of the Act. That is, if it has become clear that the child was not born in Australia, or if the child was born in Australia a parent of the child was not an Australian citizen or a permanent resident at the time of the child's birth.[52]

Extending citizenship to certain children outside Australia

2.55 At present, subsection 21(5) provides that a person is eligible to become an Australian citizen if they are under the age of 18 at the time of their application and if they are a permanent resident at the time of the application *and* at the time of the minister's decision on the application. The EM explains that:

> Subsection 21(5) of the Act as currently drafted has the effect of preventing a person aged under 18 who is outside Australia, has never been in Australia and is the holder of a permanent visa (for example, an Adoption (subclass 102) visa) from becoming an Australian citizen without first entering Australia. This is not consistent with the policy intent.[53]

2.56 Item 25 would amend these criteria to allow persons who hold a prescribed type of permanent visa, who have not entered Australia as the holder of that visa and who have an Australian parent also to be eligible for Australian citizenship by conferral. Mr Fletcher's second reading speech explained that this change 'improves access to citizenship by conferral for children who are granted an adoption visa overseas and whose adoption is finalised overseas, allowing them to enter Australia as citizens', '[i]n line with the Prime Minister's commitment to facilitate adoptions'.[54]

'Improving decision-making'

2.57 The third 'theme' of amendments nominated by Mr Fletcher in his second reading speech was 'improving decision-making'.[55] The amendments under this theme would—if passed—restrict the review of decisions made under the Act by the Administrative Appeals Tribunal (AAT) and enable information gathered for the purposes of the *Australian Citizenship Act* to be used for the purposes of the *Migration Act*, and *vice versa*.

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52 Explanatory Memorandum, pp. 14-15.

53 Explanatory Memorandum, p. 26.

54 Mr Fletcher, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 23 October 2014, p. 3.

55 Mr Fletcher, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 23 October 2014, pp. 3-4.

Restricting review of decisions by the Administrative Appeals Tribunal

2.58 The Bill seeks to restrict the review of decisions by the AAT in two ways: by prohibiting review of certain decisions made by the minister, and by allowing the minister to set aside decisions of the AAT.

Excluding review of the minister's decisions

2.59 At present, subsection 52(1) lists seven types of decision made under the *Australian Citizenship Act* that can be reviewed by the AAT. They all relate to refusals to approve a person becoming an Australian citizen, cancellation of such a person's approval, refusals to approve a person renouncing their Australian citizenship and decisions to revoke a person's Australian citizenship.

2.60 Item 72 would—if passed—prevent any of these decisions from being reviewed by the AAT if the minister made the decision personally and included a statement that he or she was satisfied that the decision was made in the public interest in his or her notice to the person.

2.61 Mr Fletcher's second reading speech explained that 'it is not appropriate for merits review to be available in respect of decisions that have been made by the minister personally'.[56] The EM notes that judicial review of these decisions would still be available[57] and explains as follows:

> As an elected Member of Parliament, the Minister represents the Australian community and has a particular insight into Australian community standards and values and what is in Australia's public interest. As such, it is not appropriate for an unelected administrative tribunal to review such a personal decision of a Minister on the basis of merit, when that decision is made in the public interest. As a matter of practice it is expected that only appropriate cases will be brought to the Minister's personal attention, so that merits review is not excluded as a matter of course.

2.62 The Department of Immigration and Border Protection explained that successive governments have only allowed the minister to make revocation decisions, so it would appear that these decisions would not be subject to merits review.[58]

2.63 It should be noted that this provision would exclude *all* review by the AAT of such decisions and would not merely exclude review of the minister's determination that the decision was in the public interest.

Allowing the minister to set aside decisions of the Administrative Appeals Tribunal

2.64 Item 73 would—if passed—insert sections 52A and 52B. Proposed section 52A would provide that, if a delegate of the minister refuses to approve a

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56 Mr Fletcher, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 23 October 2014, p. 3.

57 Explanatory Memorandum, p. 61.

58 Ms Frances Finney, First Assistant Secretary, Migrations and Citizenship Policy Group, Department of Immigration and Border Protection, *Committee Hansard*, 19 November 2014, p. 6.

person becoming an Australian citizen or cancels such a person's approval on character grounds and the AAT sets aside the decision, the minister may set aside the decision of the AAT and make a decision to refuse or cancel the approval, if satisfied that to do so is in the public interest. This decision (by the minister) would not be subject to merits review.

2.65 The EM explains the amendment as follows:

> 451. In the last few years, the AAT has made three significant decisions outside community standards, finding that people were of good character despite having been convicted of child sexual offences, manslaughter or people smuggling. Three other recent decisions of the AAT have found people to have been of good character despite having committed domestic violence offences.
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> 452. In addition to the above specific instances, there is the potential for some decisions made by the AAT on identity grounds to pose a risk to the integrity of the citizenship programme. That is, a decision to refuse to approve a person becoming an Australian citizen, or to cancel such approval, where identity is the basis for that decision is critical to ensuring that the value of Australian citizenship is not diminished. In addition, the provision of a false identity is intrinsically related to the question of whether the person is of good character.
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> 453. Therefore, this amendment gives the Minister the power to make a decision setting aside the Tribunal's decision and make a new decision if the Minister is satisfied that it is in the public interest to do so. This power of the Minister is restricted to decisions where the initial decision of the delegate included the fact that the delegate was not satisfied that the person was of good character at the time of the decision or was not satisfied of the identity of the person. However, this does not need to be the sole reason for the initial decision of the delegate.[59]

2.66 Mr Fletcher's second reading speech explained that the amendments that 'protect the minister's personal decisions from merits review and to allow the minister to set aside decisions of the AAT in certain circumstances will bring the minister's powers under the Citizenship Act in line with similar powers under the Migration Act'.[60]

2.67 Proposed section 52B would require the minister to table in Parliament a statement of reasons each time he or she makes a decision (a) that is not reviewable by the AAT because of the amendment brought about by Item 72, or (b) to set aside a decision of the AAT under proposed section 52A.

Use and disclosure of personal information

2.68 Items 74 and 77 would insert a new section 53A into the *Australian Citizenship Act* and a new section 488B into the *Migration Act*. These would allow for

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59 Explanatory Memorandum, p. 62.

60 Mr Fletcher, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 23 October 2014, p. 4.

the minister or specified public servants to disclose and use information obtained under one of these Acts (or its regulations) for the purposes of the other (and its regulations). Mr Fletcher's second reading speech explained the desirability of this as follows:

> Most applicants for citizenship have come to Australia as migrants and the Department of Immigration and Border Protection has collected personal information about them under the Migration Act. This personal information is relevant when the person applies for citizenship. Likewise, personal information collected about a person under the Citizenship Act can be relevant if the department is considering whether to cancel the person's visa after a citizenship application has been refused. To ensure that the use and disclosure of personal information within the department complies with the requirements of the Privacy Act 1988, the bill provides that personal information collected under one act and associated regulations may be used and disclosed for the purposes of the other act and associated regulations.[61]

2.69 The EM explains that the *Privacy Act 1988* applies to such disclosure and use.[62]

61 Mr Fletcher, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 23 October 2014, p. 3.

62 Explanatory Memorandum, pp. 65, 68.