Chapter 3

Key issues

3.1 This chapter examines the key issues raised by submitters during the course of this inquiry and contains the committee's recommendations. It first examines some general issues, before turning to issues with individual proposals. Again, these are examined under the three broad themes outlined by Mr Fletcher.

The importance of citizenship, the need for legislative change and the urgency of the Bill

3.2 A number of submitters sought to impress upon the committee the value and importance of Australian citizenship.[1] For example, Associate Professor Alexander Reilly told the committee that:

> …we should, as a rule, be encouraging Australian residents to become citizens. The primary right of citizenship is that a citizen can reside in Australia as a member of the Australian community until their death and have complete security of residence. It is important that the security of citizenship is equal for all Australians whether they are automatic citizens or citizens by application and conferral. We only want one citizenship in Australia.[2]

3.3 Many submitters to the inquiry queried whether the changes outlined in the Bill were truly necessary, suggesting that the case for them had not been made.[3] For example, the Asylum Seeker Resource Centre submitted that:

> Such significant changes to the ability to call oneself an Australian citizen need clear justification and the Government has failed to sufficiently explain the need for these changes. In fact, Australia's current migration scheme is incredibly robust and the current suite of visa cancellation and refusal powers set out in the *Migration Act 1958* more than adequately protects the security of the Australian community.
>
> The only attempt at a rationale in the explanatory memorandum are anecdotal stories of misrepresentation in citizenship cases. This is entirely insufficient for the broad and sweeping powers proposed in this Bill.[4]

3.4 Furthermore, there was concern at the speed within which the committee had been asked to conduct this inquiry, with many submitters noting that they had not had time to prepare a thorough examination of the Bill in the four business days allowed

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1 Asylum Seeker Resource Centre, *Submission* 1, p. 2; Australian Human Rights Commission, *Submission 4*, p. 3.

2 Associate Professor Alexander Reilly, Director, Public Law and Policy Research Unit, University of Adelaide, *Committee Hansard*, 10 November 2014, p. 1.

3 Asylum Seeker Resource Centre, *Submission* 1, p. 2.

4 Asylum Seeker Resource Centre, *Submission* 1, p. 2.

them.[5] The Australian Human Rights Commission (AHRC), for example, pointed to the fact that Mr Fletcher described the Bill as an update of Australian citizenship law on its 65th anniversary and submitted that:

> The reason given for the review of this legislation does not appear to justify the urgency with which it has been put forward, or the limited period of time allotted for its review. It may well be appropriate to review citizenship legislation on the occasion of its 65th anniversary, but that is not a reason why this Committee should be required to complete its review in a month.[6]

3.5 The AHRC and the Law Council of Australia recommended that the committee seek an extension of time so that a more thorough inquiry could be conducted.[7]

3.6 When asked about the urgency of the Bill, officers of the department explained that they had 'no special insight'[8] into the Bill's urgency because they were 'not privy'[9] to the relevant decision-making.

'Strengthening program integrity'

Extending character requirements to minors

3.7 As outlined in the previous chapter, the Bill proposes extending to minors the good character requirements that currently apply to adults seeking to become Australian citizens.

3.8 In relation to this proposal UNICEF Australia expressed concern that:

> The scope of these provisions could have devastating impacts in depriving young people who have committed offences at a young age from attaining Australian citizenship. This impact would extend to families who would have to deal with the challenging prospect of not being able to hold Australian citizenship with their children or to have their citizenship application delayed because of the situation of a child. It is well established both internationally and nationally, that the culpability of children before the law is less than adults due to the difference in psychological and physical development as well as their emotional and education needs.

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5 Asylum Seeker Resource Centre, *Submission* 1, p. 2; Professor Kim Rubenstein, *Submission 2*, p. 1; Australian Human Rights Commission, *Submission 4*, p. 3; UNICEF Australia, *Submission 8*, p. 1; Ethnic Communities Council of Western Australia, *Submission 11*, p. 1; Law Council of Australia, *Submission 12*, p. 1.

6 Australian Human Rights Commission, *Submission 4*, p. 3. See also Law Council of Australia, *Submission 12*, p. 1.

7 Australian Human Rights Commission, *Submission 4*, p. 5; Law Council of Australia, *Submission 12*, p. 1.

8 Mr Garry Fleming, First Assistant Secretary, Migrations and Citizenship Policy Group, Department of Immigration and Border Protection, *Committee Hansard*, 10 November 2014, p. 25.

9 Mr Garry Fleming, First Assistant Secretary, Migrations and Citizenship Policy Group, Department of Immigration and Border Protection, *Committee Hansard*, 19 November 2014, p. 3.

> Children's psychosocial capacity is not fully developed and evolving throughout childhood heightening the propensity of children to take risks, and increasing general susceptibility to peer influence and to immediate reward. Children are therefore at increased risk of contact with the criminal justice system as their ability to make decisions, control impulses and understand long term consequences isn't completely developed.
>
> The denial of any prospects of citizenship on this basis could therefore be inconsistent with established knowledge and practice regarding the capacity and culpability of children, and render a disproportionate consequence for mistakes that are not uncommonly made by young people.
>
> Due to the developmental nature of many such catalysts for youth offending, mistakes made by young people should not be automatically considered a 'serious character concern' which would deny young people citizenship.[10]

3.9 The Law Council noted that these concerns were compounded by the fact that there are no 'criteria or guidance as to what may constitute "good character" for the purposes of the Act'.[11] They recommended that, if the character test age was to be lowered, 'an appropriate age limit should be clearly specified, rather than leaving it up to the discretion of departmental officers to choose the age at which the requirement will be enforced'.[12] They suggested that sixteen would be an appropriate age.[13]

3.10 The department submitted that:

> The character requirement for citizenship is defined in Australian Citizenship Instructions (ACIs) and it allows decision makers to take into account a wide range of discretionary factors, including the age of the offender, the circumstances of the offence, patterns of behaviour, remorse, rehabilitation and any other mitigating factors.
>
> Police records are only available for minors aged 16 and over. With the applicant's consent, the department already obtains police records for all applicants aged 16 and over for the purposes of assessing whether the bar on approval for criminal offences (section 24(6)) applies to the applicant. However, this information will now also be able to be used for assessing whether the applicant is of good character. The department would only consider information about serious character concern for minors aged under 16 years of age if that material comes to the department's attention.
>
> The best interests of the child must be taken into account in any decision concerning an applicant under 18. The acquisition of citizenship is not a right and countervailing considerations may be considered in relation to the

10 UNICEF Australia, *Submission 8*, p. 2. See also Associate Professor Alexander Reilly, *Submission 6*, p. 3; Law Council of Australia, *Submission 12*, pp. 3-4.

11 Law Council of Australia, *Submission 12*, p. 3.

12 Law Council of Australia, *Submission 12*, p. 4.

13 Law Council of Australia, *Submission 12*, p. 4.

> best interests of the child. The ACIs will be updated accordingly to refer to the best interests of the child assessment.
>
> A finding that an applicant is not of good character does not prevent them from making a subsequent application for citizenship, if they are able to show that they are of good character at the time of the decision on their later application.[14]

Extending the bar on citizenship for offence-related reasons

3.11 Chapter 2 outlines the way in which the Bill seeks to extend the bar on citizenship for specified offence-related reasons. As outlined at paragraph 2.11 above, proposed subsections (g), (h) and (j)(ii) provide that:

> The Minister must not approve the person becoming an Australian citizen at a time:
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> …
>
> (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; or
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> (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
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> …
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> (j) when the person is subject to an order of a court requiring the person to participate in:
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> …
>
> (ii) a residential program for the mentally ill;
>
> …
>
> where the order was made in connection with proceedings for an offence against an Australian law in relation to the person.

3.12 In relation to proposed subsection (g), which would prevent someone on a good behaviour bond from becoming an Australian citizen, the Migration Institute of Australia submitted that:

> Good behaviour bonds may be used instead of fines and may be imposed with or without a conviction. They are commonly ordered under the Young Offenders Act, again as recognition of the lesser culpability of youth, for attendance at drug or alcohol counselling or to reside at a rehabilitation centre…The proposal to defer conferral of citizenship on an individual who is under a good behaviour bond is punitive. Good behaviour bonds should

14 Department of Immigration and Border Protection, p. 6.

> not be included with custodial sentences, home detention or residential detention programs as reason to delay or refuse citizenship.[15]

3.13 In relation to proposed subsections (h) and (j)(ii), the AHRC expressed concern that they apply only to the mentally ill and would apply in circumstances where the person was not convicted.[16] The AHRC argued, therefore, that they:

> …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 the mentally ill" or requiring them to be confined in a psychiatric institution. 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.[17]

Revocation for fraud or misrepresentation without conviction

3.14 As noted in the previous chapter, the Bill proposes to give the minister the power to revoke a person's citizenship when satisfied that the person became a citizen as a result of fraud or misrepresentation, even in the absence of a criminal conviction.

3.15 This proposal was the subject of significant attention by submitters, who raised four areas of concern.

3.16 The first of these was the lowering of the standard of proof required to revoke citizenship for reasons of fraud from 'beyond a reasonable doubt' to the satisfaction of the minister. The AHRC expressed concern about this change as follows:

> As the law presently stands, allegations of fraud or misrepresentation must be proved in court beyond a reasonable doubt.
>
> The Australian Citizenship Council explained [in 2000] 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.
>
> The Council noted that the requirement for conviction of an offence in relation to fraud or misrepresentation was "an important safeguard" and recommended that it continue.
>
> The Bill proposes to change the threshold for revocation in exactly the kind of way that the Council warned against.[18]

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15 Migration Institute of Australia, *Submission 14*, p. 4.

16 Australian Human Rights Commission, *Submission 4*, p. 17.

17 Australian Human Rights Commission, *Submission 4*, p. 18. See also Ethnic Communities Council of Western Australia, *Submission 11*, p. 1.

18 Australian Human Rights Commission, *Submission 4*, p. 6.

3.17 The Refugee Council of Australia noted its concern that 'the amendments would permit revocation of citizenship on the basis of the Minister's personal opinion alone'.[19] It expressed its view that:

> ...the Government has provided no explanation as to why such broad discretionary powers are needed to achieve the stated aims of the Bill. The proposed amendments would lower the threshold for revocation from a conviction of fraud by a court to the mere suspicion of fraud in the opinion of a single Minister. [The Refugee Council] can see no reason why this threshold must be lowered so dramatically or why the amendments could not include safeguards, such as a requirement that there be objective evidence of fraud or an exemption for individuals who were unaware that fraud had occurred.[20]

3.18 The Scrutiny of Bills Committee expressed concern that the Bill includes insufficiently-defined administrative powers where it comes to revocation.[21]

3.19 The department submitted that:

> To prosecute a case under a law of the Commonwealth, the Commonwealth Director of Public Prosecutions requires sufficient evidence from the facts of the case, and all surrounding circumstances, that the prosecution would be in the public interest. In light of competing priorities, there are often limited resources to prosecute all but the most serious cases relating to migration and citizenship fraud. Because of these considerations and the time it can take to secure a conviction, the power to revoke a person's citizenship on the basis of a conviction for a fraud-related offence is rarely used, even where the evidence of fraud is strong.[22]

3.20 In subsequent correspondence with the committee, the department noted that:

> Concern was raised at the hearing about an administrative decision about fraud being less certain than a criminal conviction which is found beyond reasonable doubt. The department notes that the test in the Bill is that the Minister must be satisfied that the elements to ground the revocation have been made out. That is, the Minister must be satisfied that the person obtained approval to become a citizen as a result of fraud or misrepresentation connected with their visa or citizenship application.
>
> *The department's view is that the Minister must be actually persuaded of the occurrence or existence of the fraud or misrepresentation to attain the requisite level of satisfaction. Given that there are serious consequences attached to the decision to revoke citizenship, the Minister's satisfaction*

19 Refugee Council of Australia, *Submission 13*, p. 2.

20 Refugee Council of Australia, *Submission 13*, pp. 2-3.

21 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 15 of 2014*, 19 November 2014, pp. 6-9.

22 Department of Immigration and Border Protection, *Submission 3*, p. 5.

> *must be based on findings or inferences of fact that are supported by probative material or logical grounds*.[23] (Emphasis added.)

3.21 During the public hearing in Canberra, the department explained that the matters that would be considered by it when deciding whether or not to bring a particular case to the minister to consider revocation would be inserted into the Australian Citizenship Instructions. Departmental officials explained that the text emphasised in the previous paragraph was '[t]he state of our thinking'.[24]

3.22 The second area of concern was the fact that the evidence of the fraud or misrepresentation could not be tested in a court or tribunal. The AHRC explained its view that:

> 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.[25]

3.23 The department stated that:

> This new provision would include appropriate safeguards, including a public interest test, review rights and a time limit beyond which citizenship could not be revoked.[26]

3.24 As many submitters explained, however, the Bill also seeks to remove all merits review rights in respect of decisions made by the minister personally.[27] The Department explained that it has been the policy of successive governments to have the minister make all revocation decisions personally,[28] so it would appear that these decisions would not be subject to merits review (were the Bill to pass).

3.25 The third area of concern was that the fraud could be perpetrated or the misrepresentation could be made by a third party without the knowledge or consent of the person whose citizenship was to be revoked. The AHRC explained that, according to the proposed changes:

> The person need not have engaged in any fraud or misrepresentation themselves or even have known that there was any fraud or

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23 Department of Immigration and Border Protection, Letter received as additional information, 14 November 2014, p. 5.

24 Mr Garry Fleming, First Assistant Secretary, Migrations and Citizenship Policy Group, Department of Immigration and Border Protection, *Committee Hansard*, 19 November 2014, p. 4.

25 Australian Human Rights Commission, *Submission 4*, p. 7. See also Law Council of Australia, *Submission 12*, p. 2; Migration Institute of Australia, *Submission 14*, p. 4.

26 Department of Immigration and Border Protection, *Submission 3*, p. 5.

27 See paragraphs 3.48 to 3.51 below.

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

> 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.[29]

3.26 The fourth concern revolved around the argument that there may be legitimate reasons why people engage in misleading conduct during the migration process. The Migration Institute of Australia expressed the view that:

> Many people come to Australia from countries where official records no longer exist due to war, natural disaster or are refugees within the UNHCR definition. In these circumstances they may provide information that is inaccurate or have obtained false documents to aid their escape. Similarly, personal information can become inaccurate through transcription, translation and illiteracy. It is conceivable that these individuals could be caught by such a provision, as could the child of parents who misrepresented their claim to citizenship. The new subsection 34AA(10) does not allow applicants, such as asylum seekers, the opportunity to address the circumstances of the accused fraud or misrepresentation, thereby denying them natural justice.[30]

3.27 Finally, there were concerns that the exercise of the power to revoke in circumstances of fraud or misrepresentation without conviction could render people stateless. The AHRC noted that

> The Government says that a child could only be deprived of his or her citizenship and made stateless if the child was responsible for the fraud or misrepresentation him or herself. If this is what was intended, the Commission welcomes the clarification and an appropriate amendment should be made to the Bill. However, the Government's statement appears to be a misreading of the Bill and the Australian Citizenship Act as they currently stand. The Explanatory Memorandum refers to s 36 of the Act which relevantly provides that if a *parent's* citizenship is revoked, then the Minister may also revoke his or her child's citizenship, unless the child would otherwise be stateless.
>
> However, if the child's visa is revoked directly as a result of the proposed s 34AA, there is no saving provision if the child would otherwise be stateless. The mistake in the Explanatory Memorandum is assuming that a child's visa can only be revoked directly if the child was responsible for the fraud or misrepresentation. On the contrary, it is clear from proposed s 34AA(2) that a child could have his or her citizenship revoked, and become stateless, if the Minister was satisfied that there was a misrepresentation by *any* person in connection with the child's citizenship application, entry into Australia or grant of a visa. Further…such misrepresentation need not be proved in court proceedings. It is enough that

29 Australian Human Rights Commission, *Submission 4*, p. 6.

30 Migration Institute of Australia, *Submission 14*, p. 4.

> the Minister is personally satisfied that someone engaged in misrepresentation.[31]

3.28 The Refugee Council also expressed concern that

> …the Bill fails to outline a process or mechanism whereby children rendered stateless by the revocation of citizenship could resolve their status. Merely granting a stateless child an ex-citizen visa will do nothing to address their statelessness, nor will it provide them with the rights and protections associated with citizenship. In the absence of a clear status resolution process for stateless people, the passing of this Bill could result in some children being permanently disenfranchised.[32]

3.29 At the hearing in Sydney, the department conceded that 'it would seem possible' that children could be rendered stateless under the operation of these provisions.[33] The department subsequently wrote to the committee as follows:

> The Committee expressed concern about what might happen to a stateless child whose citizenship is revoked under this provision. The department notes that there are a number of steps in the process, all of which are discretionary and all of which require consideration of the best interests of the child. The first and third steps are decisions made under Citizenship Act. The second and fourth step is made under the Migration Act. Those steps would be:
>
> i. Consideration of whether there are grounds to revoke the child's citizenship due to fraud on the child's citizenship application. The decision-maker would consider international law obligations when making this discretionary decision, including interpretation of the Statelessness Convention and the best interests of the child.
>
> ii. If citizenship is revoked, the child would automatically acquire an ex-citizen visa which gives them the right to remain in Australia, although it does not give them a right to return to Australia should they depart.
>
> iii. The client could reapply for citizenship after a year, although they would be subject to the character test.
>
> iv. Depending on the circumstances surrounding the fraud or misrepresentation, consideration might be given to whether to cancel the ex-citizen visa. The Minister, or delegate, would consider the Statelessness Convention, best interests of the child and guidance material around international law obligations, in deciding whether to cancel the visa.

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31 Australian Human Rights Commission, *Submission 4*, pp. 7-8. See also Law Council of Australia, *Submission 12*, p. 3; Refugee Council of Australia, *Submission 13*, p. 3.

32 Refugee Council of Australia, *Submission 13*, pp. 2-3.

33 Mr Garry Fleming, First Assistant Secretary, Migrations and Citizenship Policy Group, Department of Immigration and Border Protection, *Committee Hansard*, 10 November 2014, p. 28.

3.30 The department also provided to the committee, in answers to questions taken on notice, a draft 'outline of policy guidance on power to revoke citizenship for fraud or misrepresentation without prior conviction'.[34] The draft policy guidance includes definitions of 'fraud' and 'misrepresentation', and outlines issues which are to be included in any submission to the minister (as discussed in paragraph 3.21 above) including:

- details of the fraud or misrepresentation;
- any evidence relied upon;
- the source(s) of the evidence;
- the response of the applicant to the natural justice letter;[35]
- public interest analysis;
- 'best interests of the child' analysis, if applicable; and
- discussion of statelessness, if applicable.[36]

3.31 In respect of evidence upon which the minister may make a decision to revoke a person's citizenship, the draft policy guidance states:

> The Minister must be 'satisfied' that the elements to ground the revocation have been made out…This means the Minister must be actually persuaded of the occurrence or existence of the fraud or misrepresentation to attain the requisite level of satisfaction. Given that there are serious consequences attached to the decision to revoke citizenship, the Minister's satisfaction must be based on findings or inferences of fact that are supported by probative material or logical grounds. Probative material is material that establishes or contributes to proof of a fact or issue.
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> Officers should recognise that the process of reasoning that is necessary to arrive at the decision to revoke a person's citizenship must reflect the seriousness of such a decision. This means that the evidence relied upon needs to be exact, definite and result in a direct inference that approval of the person's acquisition of citizenship was a result of fraud or misrepresentation. The decision to revoke citizenship must therefore be legally defensible, based on the evidence at hand.[37]

34 DIBP, *Answers to questions taken on notice*, received 26 November 2014, p. 5.

35 The draft policy guidance states that adverse information that may lead to revocation of a person's citizenship under section 34AA should be put to the person at interview or in writing in a "natural justice letter".

36 DIBP, *Answers to questions taken on notice*, received 26 November 2014, p. 10.

37 DIBP, *Answers to questions taken on notice*, received 26 November 2014, p. 8.

'Underlining the importance of connection to Australia'

Restricting the operation of the 'ten year rule'

3.32 As explained in the previous chapter, the Bill proposes restricting the operation of the ten year rule so as to prevent certain categories of people from relying upon it to become Australian citizens.

3.33 Professor Kim Rubenstein pointed to the explanation in the Statement of Compatibility with Human Rights that 'the ten year rule provides Australian citizenship to children who were born in Australia, have spent their formative years here and have their established home here, regardless of their visa status' and expressed concern that these changes undermine this principle.[38]

3.34 Associate Professor Reilly explained the effect of the proposed change as follows:

> This amendment will affect two groups of prospective citizens in particular. First, children of asylum seekers who are designated unlawful non-citizens until they are granted a protection visa; second children of illegal immigrants living in the community with no visa who have had children while living illegally and undetected in Australia.
>
> If parents of a child who has lived in Australia since birth remain or become unlawful non-citizens, this does not reflect on the behavio[u]r or the needs of the child. In our submission, it is wrong in principle to deny automatic citizenship to a child who was born in Australia and spent their first 10 years living in Australia, regardless of their immigration status. There is no ground to deny full membership in the Australian community to a person who speaks Australian English, has only Australian and Australian-based friends, has lived only in the Australian landscape, is steeped in Australian culture, and has experienced all of their education in Australia. Young people in this position should have the full security of residence and other rights and duties of an Australian citizen, whether or not they have citizenship status in another country. Their immigration status, or that of their parents, is irrelevant to the depth of their connection to Australia. To use immigration status as a ground to deny citizenship is to put form over substance.
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> We acknowledge that the motivation for this amendment is a concern that the ten year rule has the 'effect of encouraging some temporary residents and unlawful non-citizens to have children in Australian and to keep their child onshore until at least their tenth birthday'. We note that no evidence is given in support of this concern. Regardless, we submit that denying citizenship to children resident in Australia for 10 years from birth is not the means by which to prevent illegal immigration practices. Furthermore, young people born in Australia who are not subject to illicit immigration

38 Professor Kim Rubenstein, *Submission 2*, p. 1. See also Australian Human Rights Commission, *Submission 4*, p. 14; Multicultural Development Association, *Submission 5*, p. 2; Refugee Council of Australia, *Submission 13*, p. 2.

> practices, such as children of asylum seekers born in Australia, will be affected by the law.[39]

3.35 The AHRC, referring to the views of the Australian Citizenship Council that Australia should maintain its 'inclusive and non-discriminatory approach to Australian Citizenship', expressed concern that:

> This Bill would discriminate between children who were born in Australia and have been lawfully present in Australia for 10 years, based solely on the initial immigration status of their parents. The Explanatory Memorandum to the Bill does not deal with this issue at all. No legitimate object has been put forward in order to justify the discriminatory treatment.[40]

3.36 The Commission further noted the views of the Australian Citizenship Council that the so-called 'ten year rule' should not be changed unless there is strong evidence of its abuse[41] and submitted that:

> There is little discussion in the Explanatory Memorandum of any evidence supporting the claim of abuse of the ten year rule. The only reference to something said to support the amendment is a 'correlation' between:
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> a. the nationalities of people applying under the ten year rule; and
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> b. the nationalities of people seeking a ministerial intervention under the *Migration Act 1958* (Cth).
>
> No data is provided about how often either of these kinds of applications are made or the trend in applications over time.[42]

3.37 The department recognised that the Australian Citizenship Council has recommended that the ten year rule be retained unless there is evidence of its abuse and explained that:

> Concerns have since been raised that the ten year rule has the 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, in the expectation that the child will obtain citizenship and provide an anchor for family migration and/or justification for a ministerial intervention request under the Migration Act.[43]

3.38 The committee was not provided with evidence of any identified cases of abuse. The department explained that there are about 400 applications under the ten year rule annually.[44]

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39 Associate Professor Alexander Reilly, *Submission 6*, p. 3. See also Refugee Council of Australia, *Submission 13*, p. 2.

40 Australian Human Rights Commission, *Submission 4*, p. 13.

41 Australian Human Rights Commission, *Submission 4*, p. 14.

42 Australian Human Rights Commission, *Submission 4*, p. 16.

43 Department of Immigration and Border Protection, *Submission 3*, p. 13.

44 Department of Immigration and Border Protection, *Submission 3*, p. 13.

3.39 The Refugee Council of Australia expressed concern that, when combined with the reintroduction of temporary protection visas (as proposed in the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, on which this committee has recently reported), this meant that

> …children born in Australia whose parents are TPV holders may have no means of acquiring Australian citizenship other than through the 'ten year rule'. Passing the Bill in its current form could render these children permanently ineligible for Australian citizenship. Unable to return to the country of their parents' origin due to fear of persecution and barred from obtaining citizenship in the country where they have lived for their entire lives, they may never have the opportunity to enjoy the rights associated with citizenship.[45]

3.40 The department asserted that '[t]he proposed amendments are reasonable and proportionate within the context of Australia's border security, visa and citizenship framework'.[46]

Retrospectivity

3.41 In relation to the retrospectivity of these provisions, the department submitted that:

> It is proposed the amendments to the ten year rule apply to persons who turn ten years of age on or after the date of commencement. This is necessary if the changes are to have any practical effect in the next few years. Applying the changes only to children born after commencement would mean that children born in Australia in the last ten years, regardless of their migration status, would continue to obtain citizenship by operation of law throughout the next ten years.[47]

Constitutionality

3.42 Associate Professor Reilly expressed a concern that these amendments may be unconstitutional.[48] This argument relied on the fact that the High Court has held that 'there must be some limit to the circumstances in which parliament can exclude someone from citizenship'; Associate Professor Reilly suggested that there is 'a good chance' that these proposals go beyond this limit and are therefore beyond the parliament's power to make laws with respect to naturalisation and aliens in subsection 51(xix) of the *Constitution*.[49] The department appeared to accept that this is the only constitutional head of power that could support the Bill,[50] though it also

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45 Refugee Council of Australia, *Submission 13*, p. 2.

46 Department of Immigration and Border Protection, *Submission 3*, p. 14.

47 Department of Immigration and Border Protection, *Submission 3*, p. 14.

48 Associate Professor Alexander Reilly, *Submission 6*, pp. 3-4, citing *Singh v Commonwealth* (2004) 222 CLR 322.

49 Associate Professor Alexander Reilly, Director, Public Law and Policy Research Unit, University of Adelaide, *Committee Hansard*, 10 November 2014, p. 2.

50 Department of Immigration and Border Protection, *Submission 3*, p. 4.

pointed to other comments made by members of the High Court that suggest that the purported limit does not exist.[51]

'Improving decision-making'

Restricting review of decisions in the Administrative Appeals Tribunal

3.43 As explained in Chapter 2, the Bill seeks to exclude review of certain decisions made by the minister, and to allow the minister to set aside decisions of the AAT.

3.44 Submitters expressed significant concern about these proposed changes.[52] In support of existing arrangements, the Law Council of Australia noted that:

> AAT review is generally designed to promote good decision making and provide individuals affected by adverse decisions with a relatively straightforward, inexpensive mechanism by which to seek review. This accords with the rule of law principle that Executive powers should be carefully defined by law.[53]

3.45 The Refugee Council of Australia agreed, noting that it was

> …particularly troubled by statements in the Explanatory Memorandum which assert that personal Ministerial powers are necessary to ensure that the findings of "an unelected administrative tribunal" will reflect "community standards and values". The purpose of independent merits review is to ensure that individuals subject to the decisions of government officials are able to receive a fair hearing, in accordance with Australian law. Administrative tribunals are intentionally "unelected" and independent to ensure that their decision-making will not be influenced by political considerations or the vagaries of public opinion. Allowing the Minister to overturn the findings of the AAT and limiting the AAT's remit in the manner proposed in this Bill would essentially defeat the purpose of independent merits review.[54]

3.46 Professor Jane McAdam described these proposals as making

> …a mockery of the merits review process by undermining procedural fairness and the independent powers of the Tribunal, and interfering in due process and the rule of law.[55]

3.47 The Scrutiny of Bills Committee considered that the changes that seek to limit access to merits review (or to set aside the decisions of the AAT) 'may be considered

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51 Department of Immigration and Border Protection, Letter received as additional information, 14 November 2014, p. 2, citing *Koroitamana v Commonwealth* (2006) 227 CLR 31.

52 Asylum Seeker Resource Centre, *Submission* 1, p. 3; UNICEF Australia, *Submission 8*, p.3; Law Council of Australia, *Submission 12*, p. 5.

53 Law Council of Australia, *Submission 12*, p. 5.

54 Refugee Council of Australia, *Submission 13*, p. 4.

55 Professor Jane McAdam, *Submission 9*, p. 1.

to make rights, liberties or obligations unduly dependent upon non-reviewable decisions'.[56]

Excluding review of the minister's decisions

3.48 Submitters expressed concern about the exclusion of decisions made personally by the minister from merits review, noting the views of the Administrative Review Council that:

> 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.[57]

3.49 Associate Professor Reilly noted that:

> It is not at all clear why the Act removes certain types of decision from review in the AAT. The new s 52(4) of the Bill provides that personal decisions of the Minister are not subject to review by the AAT if the Minister includes a statement that he/she is satisfied the decision was made in the public interest. The public interest criterion is very vague. For proper decisions to [be] made based on this criterion, the Minister needs to specify what matters he/she will take into account. With these matters specified, there is no reason why a Tribunal could not apply the same criteria to make the correct decision.
>
> The new s 52A empowers the Minister to set aside decisions of the AAT if the Minister is 'satisfied it is in the public interest to do so'. The explanatory memorandum ([451], [452]) points to decisions of the AAT which is states are not consistent with community standards. If this is the opinion of the government, the best way to remedy it is to make a ministerial direction that will guide the AAT in future decision making, not to remove merits review in the AAT.[58]

3.50 The department submitted that:

> As an elected Member of Parliament and Minister of the Crown, the Minister has the privilege of representing the Australian community and has gained a particular insight into community standards and values. It is not appropriate for an unelected administrative tribunal to review such a personal decision of a Minister on its merits. However, such personal decisions would still be subject to judicial review in the Federal or High Courts.[59]

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56 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 15 of 2014*, 19 November 2014, pp. 9-15.

57 Australian Human Rights Commission, *Submission 4*, p. 11.

58 Associate Professor Alexander Reilly, *Submission 6*, p. 5.

59 Department of Immigration and Border Protection, *Submission 3*, p. 18.

3.51 The Refugee Council of Australia, however, submitted that judicial review was an insufficient safeguard because:

> The role of judicial review is to assess whether a legal error was made in the handling of a particular case, not whether the case itself has merit. As such judicial review must be seen as a complement to (not a substitute for) merits review, as its purpose is fundamentally different. It is not acceptable, in RCOA's review, to justify the denial of merits review on the basis that a person would have the opportunity to seek judicial review.[60]

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

3.52 In relation to the ministerial power to override decisions of the Administrative Appeals Tribunal, the Asylum Seeker Resource Centre submitted that:

> This power is alarming, for no person or institution should sit beyond the reach of the legal system. This Bill and others recently proposed by the Minister for Immigration and Border Protection…seek to grant the Minister sweeping powers to decide on a range of migration matters with serious consequences for individuals with no court oversight whatsoever.
>
> This power puts the Minister's decisions beyond the reach of the courts and denies procedural fairness to applicants.
>
> For asylum seekers and refugees, decisions about cancellation and refusal of visas are, without overstating it, matters of life and death. It is only appropriate that decisions with such serious consequences undergo appropriate levels of scrutiny and review. Appropriate procedural safeguards are fundamental to any such decisions. This Bill seeks to remove them.
>
> …
>
> The ASRC firmly believes that decisions relating to the revocation of citizenship must be subject to legislative safeguards, including access to merits review. In the situation of refugees, such decision making has the potential to render a person stateless, see them indefinitely detained or force them to return to face persecution. In light of these consequences, it is wholly inappropriate for the Minister to hold such unchecked power.[61]

3.53 The AHRC expressed concern that:

> 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.
>
> …

60 Refugee Council of Australia, *Submission 13*, p. 4.

61 Asylum Seeker Resource Centre, *Submission* 1, p. 3.

> 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.[62]

3.54 The department assured the committee that this power was similar to that currently in section 501A of the *Migration Act*, pointing to remarks by the former President of the AAT—Justice Downes—that the power in section 501A is 'rare, if not unique', but that it does not threaten the independence of the AAT.[63] The department continued that:

> It is arguably more important for the Minister to be able to overturn an adverse AAT decision in the citizenship context than in the migration context. The acquisition of citizenship by a client who is, for example, of questionable character is far more serious than the acquisition of a visa because citizenship is a stable status which by design and in practice is extremely difficult to remove. Although a visa can give a person the right of permanent residence, it is always subject to cancellation. It is anticipated that such a power would be used rarely, in matters where the facts of the crimes were particularly egregious and the decision clearly beyond community values.[64]

Use and disclosure of personal information

3.55 As outlined in the previous chapter, the Bill proposes allowing the minister and specified public servants to disclose and use information obtained under the *Australian Citizenship Act* or the *Migration Act* (or their regulations) for the purposes of the other (and their regulations).

3.56 The Australian Privacy Commissioner, whose submission was limited to these changes, noted that he had not been consulted in relation to these proposals and was unaware whether a Privacy Impact Assessment had been carried out.[65] He queried

> …whether the broad range of information sharing proposed under items 74 and 77 is necessary, proportional and the least privacy invasive option. It would appear that for some of this information sharing, other exceptions in Australian Privacy Principle (APP) 6 might be available to the [Department] which would obviate the need for the broad authorisation in items 74 and 77 of the Bill. Further, those other exceptions would allow [the Department] to share information, while also enabling individuals to maintain control over how their personal information is handled (for example, where the [Department] obtains the individual's consent).[66]

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62 Australian Human Rights Commission, *Submission 4*, pp. 4, 8-9.

63 Department of Immigration and Border Protection, *Submission 3*, p. 19, quoting *Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690.

64 Department of Immigration and Border Protection, *Submission 3*, pp. 19-20.

65 Australian Privacy Commissioner, *Submission 7*, p. 1.

66 Australian Privacy Commissioner, *Submission 7*, p. 1.

3.57 The Commissioner outlined three possible exceptions under APP 6.[67]

Committee comment

3.58 The committee believes that it is important to review Commonwealth laws regularly to ensure that they are continuing to serve their intended purposes. As part of such a review, the department has identified that the *Australian Citizenship Act* requires amendment in order to strengthen the integrity of Australia's citizenship program, underline the importance of new citizens having a connexion to Australia and improve decision-making under the Act. These are all worthy goals. It is for this reason that the committee recommends that the Bill be passed, subject to a number of comments and recommendations.

Timing

3.59 As was noted by many submitters, this inquiry was conducted within a very limited period of time. Even following questioning of departmental officials, the reason for this Bill's urgency remains unclear to the committee. It is regrettable that the committee did not have more time for detailed consideration of the Bill's provisions.

3.60 The committee appreciates that all governments have a legislative program and associated deadlines. In future, however, the committee would very much prefer to be given more time to scrutinise proposed legislation and, where this is not possible, to be given a clear justification of why it is not possible, particularly when a Bill's urgency is not immediately obvious.

Revocation for fraud or misrepresentation without conviction

3.61 The committee understands why it is undesirable for revocation for fraud or misrepresentation to require a conviction in all circumstances. There is a wide range of factors that must be considered by prosecutors when deciding whether to prosecute an individual for fraud, many of which do not relate to the guilt or innocence of the accused. These include competing priorities, resource limitations and the seriousness of the alleged conduct.

3.62 The committee appreciates, therefore, the need for the proposed power to revoke a person's citizenship for fraud or misrepresentation without a conviction. The committee is concerned, however, that the standard of proof required for a person's citizenship to be revoked for fraud or misrepresentation without conviction has been reduced too far; that is, from 'beyond a reasonable doubt' to the satisfaction of the minister.

3.63 Motivated by this concern, the committee asked a number of witnesses before it about possible alternatives. Associate Professor Reilly, for example, responded by

67 Australian Privacy Commissioner, *Submission 7*, pp. 2-3.

discussing in some detail the role that ministerial directions could play in providing further clarity for decision-makers.[68]

3.64 In response, the department wrote to the committee to stress that:

> Possible alternatives to these measures which were raised during the hearing, such as further tightening of policy guidance in the Australian Citizenship Instructions…or creation of a legislative instrument setting out the Minister's expectations, are not guaranteed to resolve the Minister's concerns. Further, too much direction in the [Australian Citizenship Instructions] runs the risk of fettering the discretion of decision-makers.[69]

3.65 The department also provided the committee with draft policy guidance in relation to revocation of a person's citizenship for fraud or misrepresentation. This draft policy guidance provides some greater detail about how and on what bases the minister may make such decisions.[70]

3.66 The AHRC agreed to take on notice the committee's questions about what possible safeguards could ameliorate some of these issues. It suggested two, namely:

(a) ensuring that decisions to revoke citizenship are subject to merits review by removing proposed subsection 52(4) (which excludes from merits review any decision made by the minister personally that the minister states is in the public interest); and

(b) requiring that revocations under proposed sections 33A and 34AA must take place within two years of conferral.[71]

3.67 As noted above, the department sought to assure that committee that, although the legislation only required that the minister be satisfied that the grounds for revocation exist, the department would—as a matter of policy—seek to ensure that this satisfaction is 'based on findings or inferences of fact that are supported by probative material'.[72]

3.68 The committee welcomes these assurances. However, given the seriousness of revoking a person's citizenship and the need for all Australians to have security of citizenship, the committee asks the minister to confirm the basis and material upon which his decisions under proposed s 34AA would be exercised.

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68 Associate Professor Alexander Reilly, Director, Public Law and Policy Research Unit, University of Adelaide, *Committee Hansard*, 10 November 2014, pp. 2-4.

69 DIBP, *Additional information*, 14 November 2014, p. 3.

70 DIBP, *Answers to questions taken on notice*, received 26 November 2014, Attachment A.

71 Australian Human Rights Commission, Supplementary Submission, *Submission 4*.

72 DIBP, *Additional information*, 14 November 2014, p. 5 and Answers to questions taken on notice, received 26 November 2014, p. 8.

Recommendation 1

3.69 The committee draws the Commonwealth government's attention to Item 66 of Schedule 1 to the Bill and asks that the minister confirm the basis and material upon which his decisions are to be exercised.

Revocation making children stateless

3.70 The committee notes the perceived inconsistency between the Bill and the EM on the question of whether the fraud of a third party could be used to revoke a child's citizenship and thereby makes them stateless (s 34AA). The EM suggests that it could not, but the Bill states that it could. The committee suggests that the Bill should clarify the discretionary nature of the minister's power.

Recommendation 2

3.71 The committee recommends that the Bill clarify the discretionary nature of the minister's power to revoke citizenship under this provision.

3.72 Subject to this recommendation, the committee recommends that the Bill be passed.

Recommendation 3

3.73 Subject to the preceding recommendation, the committee recommends that the Bill be passed.

Senator the Hon Ian Macdonald
Chair