The Senate

Legal and Constitutional Affairs Legislation Committee

Australian Citizenship and Other Legislation Amendment Bill 2014 [Provisions]

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Members of the committee

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Secretariat

Ms Sophie Dunstone, Committee Secretary

Mr Patrick Wall, Parliamentary Graduate

Ms Leah Ferris, Senior Research Officer

Ms Jo-Anne Holmes, Administrative Officer

Suite S1.61 Telephone: (02) 6277 3560

Parliament House Fax: (02) 6277 5794

CANBERRA ACT 2600 Email: legcon.sen@aph.gov.au

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Recommendations

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.

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.

Recommendation 3

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

Chapter 1
Introduction

The referral

1.1 The Australian Citizenship and Other Legislation Amendment Bill 2014 (the Bill) was introduced into the House of Representatives by Mr Fletcher, the Parliamentary Secretary to the Minister for Communications, on behalf of the Minister for Immigration and Border Protection, on 23 October 2014.[1] On 30 October, the Senate referred the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) 'for inquiry and report by 1 December 2014'.[2]

Overview of the Bill

1.2 In his second reading speech, Mr Fletcher explained that the Bill 'supports the integrity and effectiveness of the citizenship program, providing a clear legislative framework to underpin the government's policy'.[3] Furthermore:

> The [B]ill has a range of amendments grouped into three broad themes:
>
> - strengthening program integrity;
> - underlining the importance of connection to Australia; and
> - improving decision-making.[4]

1.3 The Explanatory Memorandum (EM) explains further that:

> The Australian Citizenship and Other Legislation Amendment Bill 2014 (the Bill) amends the *Australian Citizenship Act 2007* (the Act) to insert, clarify and strengthen key provisions of the Act relating to:
>
> - extending good character requirements;
> - clarifying residency requirements and related matters;
> - circumstances in which a person's approval as an Australian citizen may or must be cancelled;
> - circumstances in which the Minister may defer a person making the pledge of commitment to become an Australian citizen;
> - circumstances in which a person's Australian citizenship may be revoked;

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1 House of Representatives, *Votes and Proceedings*, No. 76—23 October 2014, p. 913.

2 *Journals of the* Senate, No. 63—30 October 2014, pp. 1689-1691.

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

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

- the power of the Minister to specify certain matters in a legislative instrument;
- the use of personal information obtained under the *Migration Act 1958* (the Migration Act) or the *Migration Regulations 1994* (the Migration Regulations) for the purposes of the Act and the Australian Citizenship Regulations 2007 (Citizenship Regulations);
- the disclosure of personal information obtained under the Act or the Citizenship Regulations for the purposes of the Migration Act or the Migration Regulations; and
- minor technical amendments.

The Bill also amends the Migration Act to enable the use of personal information obtained under the Act or the Citizenship Regulations for the purposes of the Migration Act and the Migration Regulations, and to enable the disclosure of personal information obtained under the Migration Act or the Migration Regulations for the purposes of the Act and the Citizenship Regulations.[5]

Other parliamentary inquiries

1.4 The Senate Standing Committee for the Scrutiny of Bills examined the Bill in *Alert Digest No. 15 of 2014*. It noted eight concerns that fall within its terms of reference.[6]

Conduct of the inquiry

1.5 The committee advertised the inquiry on its website (www.aph.gov.au/senate_legcon) and wrote to a number of stakeholders inviting submissions. The committee set a deadline for submissions of 6 November 2014.

1.6 The committee received thirteen submissions. A list of submissions is at Appendix 1.

1.7 Public hearings were held in Sydney on 10 November 2014 and Canberra on 19 November 2014. A list of witnesses who appeared is at Appendix 2. The *Hansard* transcript of the committee's hearing can be accessed on the committee's website.

Acknowledgment

1.8 The committee recognises that, because of the short reporting deadline and the committee's other commitments, it was only able to give submitters four working days in which to make submissions. The committee apologises for this unavoidably short timeframe.

1.9 In these circumstances, it is all the more appropriate to acknowledge those who participated in the inquiry and thank them for their assistance.

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5 Explanatory Memorandum, p1.

6 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 15 of 2014*, 19 November 2014, pp. 6-18.

Note on references

1.10 References in the report to the committee *Hansard* are to the proof committee *Hansard*. Page numbers between the proof committee *Hansard* and the official *Hansard* may differ.

Structure of the report

1.11 This report has been divided into three chapters. Chapter 2 summarises the key changes brought about by the Bill and Chapter 3 canvasses the submissions received and contains the committee's recommendations.

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.
>
> 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.
>
> 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.

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:
>
> …
>
> (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
>
> (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
>
> …
>
> (j) when the person is subject to an order of a court requiring the person to participate in:
>
> …
>
> (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.
>
> 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.
>
> 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:
>
> a. the nationalities of people applying under the ten year rule; and
>
> 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

Dissenting Report by Australian Labor Senators

Overview

1.1 This bill seeks to strengthen the programme integrity of citizenship by specific tightening of the ability to obtain citizenship. It seeks to strengthen the requirement in some circumstances for a connection with Australia before citizenship can be granted and it provides an increase to ministerial decision making powers under the Australian Citizenship Act 2007.

Introduction

1.2 Labor Senators have significant concerns about the two following elements of this Bill and therefore cannot support the Bill in its current form.

Revocation of citizenship

1.3 The Bill seeks to amend the legislation so that a conviction is not required for the revocation of citizenship so long as the Minister is satisfied that the fraud has occurred.

1.4 This would in effect lower the threshold for revocation of citizenship in this circumstance from "beyond reasonable doubt" to the much lower administrative standard of being in the "reasonable" view of the decision maker.

1.5 The Law Council noted in its submission that these changes 'appear to undermine the rule of law principle that all people are entitled to the presumption of innocence and to a fair and public trial'.[1]

1.6 Labor believes the removal of citizenship should not be taken lightly. It is at least as serious a step as convicting a person of a crime. The criminal threshold should remain as the test for the revocation of citizenship in cases of fraud.

1.7 The public policy reason given in the Minister's second reading speech for this change is that "*law enforcement agencies and courts have limited capacity to prosecute all cases of fraud, or any other type of criminal behaviour*".

1.8 This reasoning was not supported by the majority of submitters, for example the Law Council stated:

> The loss of a person's citizenship has serious consequences for an individual and their family, and as such, it is appropriate that this decision should follow a criminal conviction in instances of fraud. If there are concerns that law enforcement agencies and courts have insufficient resources to prosecute such matters, it would be preferable to instead address these resourcing issues rather than lowering the applicable standard. In this context, the Law Council notes that "fraud" and "misrepresentation"

1 Law Council of Australia, *Submission 12*, p. 2.

> are very wide terms and may be used to justify sanctions well beyond the gravity of the misrepresentation itself.[2]

1.9 Labor Senators believe this is an extremely weak justification for diminishing the status of Australian Citizenship by giving the Minister the power to decide whether or not something in someone's citizenship application constitutes fraud and therefore demands the revocation of citizenship. The granting of this unrestrained power would allow a much more cavalier approach to the revocation of citizenship.

Limitations on the 10-year rule

1.10 At present a person who is born in Australia and lives in Australia until they are ten years old automatically acquires citizenship.

1.11 This bill seeks to amend the legislation so that an additional requirement would be that at every point in the ten year period, a parent and therefore the child, has been in Australia lawfully.

1.12 Under this change to the legislation, it would prevent a child born in Australia to parents who arrived seeking asylum obtaining citizenship, despite the child having been lawfully present in Australia for his or her entire life.

1.13 The Refugee Council of Australia argued that these changes 'would thus essentially allow children to be penalised for the actions of their parents' and were incompatible with the principle that the best interests of the child should be the primary consideration:

> We do not believe that the imperative to maintain the integrity of the citizenship program justifies the denial of citizenship, on the basis of actions over which they had no control, to children who (as noted in the Statement of Compatibility) "were born in Australia, have spent their formative years here and have their established home here". RCOA believes that denying the right of citizenship by birth to these children is an unjustifiably severe penalty when weighed against concerns about the current operation of the 'ten year rule'.[3]

1.14 Labor Senators are concerned that a child born in Australia and lawfully present for 10 years would be denied citizenship if at any point during that ten year period a parent was deemed an unlawful citizenship – including if they spent any time in immigration or community detention while awaiting processing of their claim.

Conclusion

1.15 The Australian Labor Party has serious concerns about the significant increase in discretionary power this legislation would provide the Minister. It is crucial that the Australian Parliament deal with matters relating to citizenship with the highest diligence. It is the greatest gift a nation can bestow on a migrant. Labor will not support the passing of legislation that has the potential to unfairly affect a person's citizenship.

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2 Law Council of Australia, *Submission 12*, p. 2.

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

Recommendation 1

1.16 Labor Senators recommend that the Bill not be passed.

Senator Jacinta Collins
Deputy Chair

Dissenting Report of the Australian Greens

1.1 The Senate inquiry into the Australian Citizenship and Other Legislation Amendment Bill revealed a number of serious concerns with the legislation, particularly in relation to the grounds on which citizenship may be revoked or refused and the broadening of the Minister for Immigration and Border Protection's discretionary powers.

1.2 The Australian Greens are concerned that the proposed amendments will have serious consequences for Australian citizens as they unnecessarily and unjustifiably broaden the criteria on which citizenship may be cancelled or refused.

1.3 The provisions provide the Minister of the day with unprecedented power to overrule a decision of the Administrative Appeals Tribunal if the Minister is satisfied that it is in the public interest to do so. This is an unprecedented power which places the Minister above the judicial system and denies individuals procedural fairness by barring them from merits review. As stated by Professor Jane Mc Adam:

> This makes a mockery of the merits review process by undermining procedural fairness and the independent powers 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.[1]

1.4 Further to this, the amendments allow all decisions by the Minister regarding the revocation of citizenship non-reviewable, provided the Minister has included a statement that he/she is satisfied that the decision is in the 'public interest'. Any decision made to refuse or cancel an individual's citizenship or visa must provide the individual access to merits review. A decision of this kind could make a person stateless,[2] see them indefinitely detained or see them returned to danger or serious harm.[3]

1.5 The Bill will also give the Minister for Immigration the power to deny and revoke the Australian citizenship of people who have suffered severe mental illness or drug addiction. This is just another power grab which has gone too far. This power will give the Minster of the day the authority to strip the most vulnerable Australians of their very citizenship.

1.6 The amendments go further by allowing the Minister to revoke citizenship for reasons of fraud and misrepresentation, even when the person may not be aware of such acts or has never been convicted of an offence.[4] This amendment has significant implications for refugees should they seek Australian Citizenship. The amendments fail to recognise the realities of seeking asylum and do not provide the individual with

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1 Professor Jane McAdam, Andrew and Renata Kaldor Centre for International Refugee Law, UNSW Australia, *Submission 9*.

2 Ibid.

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

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

the opportunity to explain the circumstances by which fraud or misrepresentation may have come about.

1.7 Changes proposed in this Bill also extend the 'good character' provisions to children (under the age of 18 years) and give the Minister the power to revoke citizenship by decent if he/she is satisfied that the individual was not of good character at the time of registered citizenship. These amendments have the potential to render a child stateless and could have devastating impacts and young people who may have committed minor offences at a young age from later becoming citizens.[5]

1.8 Under these amendments the ten year residence requirement for persons born in Australia will be amended to limit this automatic acquisition. These amendments will have a significant impact of the children of asylum seekers born in Australia. As stated by Adelaide University Public Law and Policy Research Unit:

> It is wrong in principle to deny automatic citizenship to a child who was born in Australia and spent the first ten years living in Australia, regardless of their immigration status.[6]

1.9 These amendments may contravene Australia's human rights obligations, in particular article 15(2) of the Universal Declaration of Human Rights and principles contained in the Convention on the Rights of the Child and the Convention on the Reduction of Statelessness.[7]

1.10 In conclusion, the amendments proposed in this Bill will have serious implications for Australian citizens. The unchecked and unprecedented power that is placed in the hands of the Minister, should this Bill pass, is unwarranted and has not be sufficiently justified by the government. As rightly noted by the Asylum Seeker Resource Centre, no Minister or government authority should be exempt from independent oversight. This is inconsistent with the rule of law and democratic principles.[8] Similarly, attempts to extend the 'good character' provisions to children may result in Australia contravening a number of human rights obligations. For these reasons, the Australian Greens recommend that this Bill not be passed.

Recommendation 1

1.11 The Australian Greens recommend that this Bill be rejected by the Senate.

Senator Sarah Hanson-Young
Australian Greens

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5 UNICEF Australia, *Submission 8*, p. 2.

6 Adelaide University Public Law and Policy Research Unit, *Submission 6*, p. 3.

7 Australian Human Rights Commission, *Submission 4*, p. 7.

8 Asylum Seeker Resource Centre, *Submission 1*, p. 5.

Appendix 1

Public submissions

1 Asylum Seeker Resource Centre (ASRC)

2 Professor Kim Rubenstein, Centre for International and Public Law, The Australian National University

3 Department of Immigration and Border Protection

4 Australian Human Rights Commission

5 MDA Ltd

6 Associate Professor Alexander Reilly, Adelaide Law School

7 Office of the Australian Information Commissioner

8 UNICEF Australia

9 Professor Jane McAdam, Andrew & Renata Kaldor Centre for International Refugee Law, UNSW

10 Professor Alan Hayes AM, Australian Institute of Family Studies

11 Ethnic Communities Council of Western Australia Inc.

12 Law Council of Australia

13 Refugee Council of Australia

14 The Migration Institute of Australia Limited

Appendix 2

Public hearings and witnesses

Monday 10 November 2014—Sydney

REILLY, Associate Professor Alexander, Director, Public Law and Policy Research Unit, University of Adelaide

EMERY Ms Xanthe Alana, Senior Solicitor, Immigration Advice and Rights Centre

MOJTAHEDI, Mr Ali, Principal Solicitor, Immigration Advice and Rights Centre

WILLIAMSON Ms Jessica, Human Rights Law Program Manager, Asylum Seeker Resource Centre

EDGERTON, Mr Graeme, Senior Lawyer, Australian Human Rights Commission

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

FINNEY, Ms Frances, Assistant Secretary, Citizenship Branch, Migration and Citizenship Division, Department of Immigration and Border Protection

FLEMING, Mr Gary, First Assistant Secretary, Migration and Citizenship Policy Group, Department of Immigration and Border Protection

SEKHON, Ms Shireen, Principal Legal Officer, Legislation and Framework Branch, Legal Division, Department of Immigration and Border Protection

Wednesday 19 November 2014—Canberra

FINNEY, Ms Frances, Assistant Secretary, Citizenship Branch, Migration and Citizenship Division, Department of Immigration and Border Protection

FLEMING, Mr Garry, First Assistant Secretary, Migrations and Citizenship Policy Group, Department of Immigration and Border Protection

PHILLIPSON, Mr Greg, Assistant Secretary, Legislation and Framework Branch, Legal Division, Department of Immigration and Border Protection

Appendix 3

Tabled documents, answers to questions on notice and additional information

Answers to questions on notice

1 Department of Immigration and Border Protection – answers to questions taken on notice at a public hearing on 19 November 2014 (received 26 November 2014)

Additional information

1 Information provided by the Department of Immigration and Border Protection (received 19 November 2014)