Chapter 3

Key issues

3.1 A number of issues were raised by submitters about the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (the bill) during the inquiry. This chapter will outline the main issues as raised by submitters and witnesses, which will be grouped into three key areas.

1. Additional requirements for people seeking to obtain citizenship by conferral:

- retrospectivity;
- four years permanent residence requirement;
- English language skills test;
- citizenship test;
- integration within the Australian community;
- Australian Values Statement; and
- pledge of allegiance.

2. Additional powers provided to the Minister:

- power to cancel approval for citizenship;
- power to revoke a person's citizenship;
- personal decisions of the Minister being excluded from merits review;
- power of the Minister to set aside decisions of the Administrative Appeals Tribunal (AAT); and
- instrument making power.

3. Additional requirements impacting children:

- changes to the 10 year rule and citizenship by birth; and
- good character requirement.

3.2 Finally, the committee's views will be discussed as well as its recommendations on the bill.

Additional requirements for citizenship by conferral

3.3 On 20 April 2017 the Australian Government announced a package of reforms to 'strengthen citizenship' which would take effect from the date of the

announcement.[1] These reforms would apply to people who apply for citizenship by conferral and includes:

- increasing the general residence requirement;
- introducing an English language test;
- introducing the requirement for applicants to demonstrate their integration into the Australian community;
- strengthening the Australian Values Statement;
- strengthening the test for Australian citizenship; and
- strengthening the pledge of allegiance.[2]

Retrospectivity

3.4 In accordance with the announcement, items 136, 137 and 139 of the bill outlines that the provisions are to apply retrospectively—from 20 April 2017. The Explanatory Memorandum (EM) confirms that these provisions 'reflect the announcement made by the Prime Minister and the Minister'.[3]

3.5 The retrospective application of these provisions was raised as an area of concern by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) as well as a number of submitters.[4] The Scrutiny of Bills Committee explained that provisions that apply retrospectively challenge a basic value of the rule of law and that it was particularly concerned that the legislation may have a detrimental impact on individuals. It sought further information from the Minister about the number of persons likely to be affected by these provisions and whether it was likely that applications had been made on or after 20 April 2017, but before the passage of the bill, would not meet the criteria for eligibility for citizenship as a result of the retrospective application of these amendments.[5]

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1 Australian Government, *Strengthening the Test for Australian Citizenship,* 20 April 2017, p. 18; see also the Hon Malcom Turnbull, Prime Minister, and the Hon Peter Dutton, Minister for Immigration and Border Protection, 'Strengthening the Integrity of Australian Citizenship', *Media Release,* 20 April 2017.

2 Australian Government, *Strengthening the Test for Australian Citizenship,* 20 April 2017, pp. 6–7.

3 Explanatory Memorandum, p. 65.

4 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017,* 21 June 2017; Oz Kiwi, *Submission 339,* p. 8; Get Up, *Submission 372,* p. 14; Legal Aid NSW, *Submission 385,* pp. 9–10; Refugee Legal, *Submission 439,* p. 19; Refugee Council of Australia, *Submission 449,* p. 15; Australian Lawyers Alliance, *Submission 454,* p. 7; Law Council of Australia, *Submission 464,* p. 8; Labor for Refugees NSW, *Submission 469,* p. 1; The American Chamber of Commerce in Australia, *Submission 369,* p. 3; Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378,* pp. 16–17; Federation of Ethnic Communities' Councils of Australia, *Submission 410,* p. 4; Australian Human Rights Commission, *Submission 447,* p. 9 and 11.

5 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017,* 21 June 2017, p. 19.

3.6 In response, the Minister noted that as of 16 July 2017, 47,328 people had lodged an application on or after 20 April 2017 who would be affected by these provisions.[6] Of these, it was estimated that 25,788 (54 per cent) would not meet the new residence requirement.[7] In relation to the competent English requirement, and the integration requirement, the Minister advised that this would be a new requirement and as such, the Department was not able to determine the number of people likely to be affected.[8] In relation to the new pledge of allegiance, the Minister stated:

> An additional 429 applicants who have applied for citizenship by application (conferral, descent, adoption and resumption) on or after 20 April 2017 over 16 years of age will be required to make the pledge of allegiance who would not have been required to under the previous arrangements.
>
> Whilst the additional requirement may increase the time it takes these applicants to acquire citizenship it is not known how many of these applicants would fail to make the pledge and therefore not meet the eligibility requirements to become a citizen.[9]

3.7 The Scrutiny of Bills Committee reiterated its concerns and noted that it did not consider the retrospective application of the bill was adequately justified given the detrimental effect it would have on a large number of individuals.[10]

3.8 The committee notes that, regrettable as it is, this action of 'legislation by media release' is all too common in recent decades but for many valid reasons has become a fact of life.

3.9 At a public hearing the committee heard of the effect that the announcement had on individuals.[11] Dr Howard, of Fair Go for Migrants, noted that because applications have been placed on hold, even if they bill did not pass, individuals have already been directly affected. Another individual noted that applicants' lives were in a state of limbo as they do not know which set of criteria will apply to them.[12] In addition, a number of submitters raised concerns that they had submitted their

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6 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, Response to Scrutiny Digest No 7 of 2017 from the Senate Scrutiny of Bills Committee, p. 4.

7 Mr Dutton, Minister for Immigration and Border Protection, Response to Scrutiny Digest No 7 of 2017 from the Senate Scrutiny of Bills Committee, p. 5.

8 Mr Dutton, Minister for Immigration and Border Protection, Response to Scrutiny Digest No 7 of 2017 from the Senate Scrutiny of Bills Committee, p. 5.

9 Mr Dutton, Minister for Immigration and Border Protection, Response to Scrutiny Digest No 7 of 2017 from the Senate Scrutiny of Bills Committee, p. 6.

10 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017,* 9 August 2017, p. 60.

11 Dr Penny McCall Howard, Member, Fair Go For Migrants, *Proof Committee Hansard,* 23 August 2017, pp. 1–3. See also statements made by Ms Sara, Miss Shruti, and Mr Kon, *Proof Committee Hansard,* 23 August 2017, pp. 12–16.

12 Mr Kon, *Proof Committee Hansard,* 23 August 2017, p. 16.

application for citizenship after 20 April 2017 and paid a 'non-refundable' application fee, only to be told that their application was on hold.[13]

3.10 The Department of Immigration and Border Protection (the Department) confirmed that since 20 April 2017 to 31 July 2017, it had received 50,940 applications.[14] These applications are currently not being processed but applications received before 20 April 2017 are continuing to be processed. The Department also noted that the average processing time for 90 per cent of citizenship applications is 13 months from the date of lodgement.

Permanent resident for four years

3.11 The proposed change to the residency requirement was raised by many submitters. Currently, a person must be living in Australia for four years, with the last 12 months as a permanent resident, prior to being eligible to apply for Australian citizenship.[15] The bill proposes to increase the residency period to require a person to have been a permanent resident for four years to satisfy the residency requirement.[16]

3.12 The EM sets out the reason for the proposed amendment:

> A residence requirement is an objective measure of an aspiring citizen's association with Australia. This period allows a person the opportunity to gain an understanding of shared Australian values, and the commitment they must make to become an Australian citizen. It also allows them time to integrate into the Australian community and acquire English language skills required for life in Australia as a successful citizen. Extending the general residency period strengthens the integrity of the citizenship programme by providing more time to examine a person's character as a permanent resident in Australia. For these reasons the National Consultation Report on citizenship recommended increasing the permanent residency period to 4 years for the general residence requirement.[17]

3.13 The Department provided an international comparison of other countries' residency requirements before being eligible to obtain citizenship.[18] In summary, the Department noted the following residency requirements:

- New Zealand–five years;
- Canada–three out of five previous years (where up to one year under a temporary residence visa can be counted);

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13 Name withheld, *Submission 143*, p. 1; Name withheld, *Submission 97*, p. 1; and Name withheld, *Submission 376*, p. 1.

14 Mr Damien Kilner, Assistant Secretary, Family and Citizenship Programme, Department of Immigration and Border Protection, *Proof Committee Hansard*, 24 August 2017, p. 48.

15 Subsection 22(1) of the Act; see also Explanatory Memorandum, p. 28.

16 See paragraph 22(1)(a)(c) and subsections 22(1), 22(1A) and 22(1B) of the bill.

17 Explanatory Memorandum, p. 28.

18 Department of Immigration and Border Protection, *Submission 453*, pp. 35–38.

- United Kingdom–five years plus one year (usually after the five years) of being 'settled';
- United States of America–five years;
- France–five years;
- Germany–eight years in general, however lesser periods apply under certain circumstances;
- Netherlands–five years; and
- Denmark–nine years.[19]

3.14 The Department concluded that the new residency requirements 'are comparable with the low end of the scale of international standards'.[20] It also noted that the proposed requirement of residing in Australia as a permanent resident 'is unlikely to have an impact on these humanitarian migrants who first arrive in Australia as a permanent resident'.[21]

3.15 A number of organisational submitters raised concerns that the proposed amendment would not change the length of the residency requirement, but rather that it would change '*the visa status* required during residency'.[22] A joint submission from the Andrew & Renata Kaldor Centre of International Refugee Law and the Gilbert + Tobin Centre of Public Law (Kaldor and Gilbert + Tobin Centres) argued that while the stated reason for the proposed amendment was to allow more time to assess a person's character, it would not necessarily achieve this outcome.[23] This is because under the current framework, a person is required to be a resident in Australia for at least four years before being eligible to apply for citizenship, whereas the proposed provision would require a person to be a resident in Australia for four years, albeit as a permanent resident.[24] The following case study was provided as an example of the difference in time a person might spend in Australia prior to meeting the proposed residency requirement, based on the individual's visa status:

> …a non-citizen could apply offshore (i.e. from another country) to enter and reside in Australia on a permanent skilled independent visa (Subclass 189). This is a permanent visa, which would see the person meet the general residence requirement after 4 years of living in Australia. Another person could apply onshore for the same Subclass 189 visa after many years

19 Department of Immigration and Border Protection, *Submission 453*, pp. 35–38.

20 Department of Immigration and Border Protection, *Submission 453,* p. 42.

21 Department of Immigration and Border Protection, *Submission 453*, p. 46.

22 University of Adelaide, Public Law and Policy Research Unit, *Submission 398*, p. 5; Legal Aid NSW, *Submission 385,* p. 4; and Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 11.

23 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 11.

24 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 11.

> living in Australia on a series of temporary visas (visitor, student, temporary skilled), yet, if the proposed changes are passed, their years living in Australia on those temporary visas would not count towards their residence periods. The result is a perverse outcome whereby a person who has been in Australia *longer*—and who potentially has built a stronger association to Australia and made a significant contribution to our society—is penalised when it comes to accessing citizenship.[25]

3.16 The Department noted that:

> The Australian Government contends that the Australian community has higher expectations of permanent residents than temporary residents, in terms of their integration into and contribution to the Australian community. The Government considers that the increased length of the qualifying period of permanent residency will enable it to make a thorough examination of aspiring citizens' experience of integrating into life in Australia, before granting citizenship.[26]

3.17 The University of Adelaide's Public Law and Policy Research Unit pointed out that the visa status of a person does not affect their opportunity to integrate into Australian society, but rather, placed people who have entered Australia on a temporary or humanitarian visa at a significant disadvantage due to their visa status.[27]

3.18 The Kaldor and Gilbert + Tobin Centres also raised concerns that the bill was contrary to the spirit of Article 34 of the UN Convention Relating to the Status of Refugees which 'requires state parties to facilitate assimilation and expedite naturalisation proceedings for refugees as far as possible' and consequently, citizenship is often the first effective and durable form of protection for refugees and humanitarian entrants.[28] The submission concluded that, under the best of circumstances, a refugee would be entitled to apply for Australian citizenship after residing in Australia for seven-and-a-half years and that this period was 'well beyond what would be considered best practice when it comes to facilitating naturalisation of refugees and humanitarian entrants'.[29] Having said that, the committee notes the proposed rules are less strict than in many other countries as set out in paragraph 3.13.

3.19 Most submissions from individuals also expressed concern about the proposed changes to the residency requirements, and in particular that this provision would apply retrospectively. Many accounts from individual submitters noted the time they

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25 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, pp. 11–12.

26 Department of Immigration and Border Protection, *Submission 453*, p. 44.

27 University of Adelaide, Public Law and Policy Research Unit, *Submission 398*, p. 5. See also Diversity Council Australia, *Submission 141*, p. 7. Australian Human Rights Commission, *Submission 447*, p. 5.

28 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 12.

29 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 12.

had spent in Australia, how they had integrated into Australian society and that the proposed change would only prolong their citizenship application while also placing them in a state of uncertainty about their future. Many submitters asked that this particular section of the bill not be passed, or alternatively, that the provision have a transitional period. Below is an example of one such submission.

> My wife and I have been proud to call Australia home since moving to Sydney from the UK in 2011. I helped to set-up a successful business advisory firm, helping Australian businesses to succeed locally and internationally and providing employment to Australians. My wife, [redacted], is a filmmaker and charity sector worker. Recent initiatives include working with the team at [redacted], a charity that supports the most vulnerable Australians. For my sins, I'm a paid up Sydney Swans member.
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> Having lived in Australia for over 5 years and as Permanent Residents, we were entitled to apply for citizenship on 15th December 2016. At the time that our entitlement date came around, my wife was 5 months pregnant. We decided to focus our time and energy on ensuring all was set-up for our baby. After all, we were certain in the fact that we would be able to apply when our baby was safely home.
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> On April [redacted] 2017, my daughter [redacted] was born at The Royal Hospital for Women, Randwick. Our beautiful, Australian, daughter. Advance Australia Fair.
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> Two short weeks of paternity leave and I find myself back in the office. Two short weeks. I am greeted with the news that despite being fully entitled to apply for citizenship just a day ago, despite having an Australian daughter, despite employing Australians, despite helping Australian business to succeed to a global scale, despite advocating for friends and family to visit Australia, despite being upstanding members of the community, despite starting our application months earlier… Despite all of this we are told that Australia must be tougher on us. That we are to be watched. That we must prove ourselves further. That whilst our tax dollars count, our voices do not. That we are not even entitled to be second class citizens.[30]

Impact on tertiary students

3.20 Another issue raised by a number of submitters and witnesses was the effect the increased residency period would have on tertiary students.[31] The Law Council of Australia (Law Council) explained that the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (the Higher Education Bill) was currently before the House of

30 Name withheld, *Submission 386,* p. 1.

31 Oz Kiwi, *Submission 339*, pp. 5–6; Law Council of Australia, *Submission 464*, pp. 11–12; University of Melbourne Student Union, *Submission 417*, p. 1. See also Matthew, *Proof Committee Hansard,* 25 August 2017, pp. 12–15; and Mr Kevin Balshaw, *Proof Committee Hansard*, 31 August 2017, pp. 16–17.

Representatives.[32] Currently, permanent residents are entitled to a Commonwealth supported place for their university education. However, if the Higher Education Bill passes, most permanent residents will no longer be entitled to a Commonwealth supported place, which will mean substantially higher fees for these students.[33] The combined effect of extending the residency requirement with the Higher Education Bill will mean that students who may have thought that they would soon be eligible for a Commonwealth supported place would no longer qualify as Australian citizens, however, in the fullness of time they would clearly be eligible for all the benefits available to an Australian citizen.

3.21 While the Law Council acknowledged that the Higher Education Bill would also allow permanent residents to access student loans, it concluded:

> …the combination of the proposed reforms in the Higher Education Bill and the increased residence requirement may operate to reduce the opportunities for migrants to pursue tertiary education and, having done so, make a valuable contribution to the Australian community.[34]

3.22 The committee acknowledges the compelling evidence from submitters and witnesses who have made plans for the future, including significant financial commitments, based on the current residency requirements and other legislative frameworks. The committee is of the view that the Government should consider introducing transitional provisions for those people who held permanent residency visas on or before 20 April 2017, so that the current residency requirements apply to this cohort of citizenship applicants.

English language test

3.23 The bill seeks to amend the English language requirement so that the Minister must be satisfied that an applicant has 'competent English' as opposed to the current requirement of 'possesses a basic knowledge of the English language'.[35] 'Competent English' is not defined in the Act, however, proposed paragraph 21(9)(a) of the bill provides that the Minister may make a legislative instrument that determines the circumstances in which a person has 'competent English'. The EM provides an indication of what the Minister's determination might include:

> This determination will enable the Minister to determine, for example, that a person has competent English where the person has sat an examination administered by a particular entity and the person achieved at least a particular score. The Minister could determine that the person must have completed this examination within, for example, three years ending on the day the person made an application for citizenship. The determination could specify other circumstances in which a person has competent English, for example, if they are a passport holder of the United Kingdom, the Republic

32 Law Council of Australia, *Submission 464*, p. 11.

33 Law Council of Australia, *Submission 464*, p. 11.

34 Law Council of Australia, *Submission 464*, pp. 11–12.

35 Item 41, paragraph 21(2)(e) of the bill.

> of Ireland, Canada, the United States of America or New Zealand or through specified English language studies at a recognised Australian education provider.[36]

3.24 The EM also sets out the rationale for this amendment:

> This amendment reflects the Government's position that English language proficiency is essential for economic participation and promotes integration into the Australian community. It is an important creator of social cohesion and is essential to experiencing economic and social success in Australia.[37]

3.25 The Department explained that the current English language requirement is for 'basic' English which is the equivalent of an International English Language Testing System (IELTS) 4 test score.[38] Further, the English language is currently assessed by applicants passing the multiple choice citizenship test.[39]

3.26 A number of submitters and witnesses questioned the evidence relied upon by the Government as the basis for the change as proposed by the bill.[40] For example, Professor Alexander Reilly from the Public Law and Policy Unit from the University of Adelaide questioned the impartiality of the consultations and consequently the legitimacy of relying on the results of the consultation as the basis for the proposed changes to citizenship legislation.[41] The Forum of Australian Services for Survivors of Torture and Trauma (FASSTT) noted that the recommendation in the final report of the National Consultation on Australian Citizenship was for the Government to improve the Adult Migrant English Program (AMEP) and for new citizens to have 'adequate' English language ability.[42] However, it was submitted that the bill requires 'competent', as opposed to 'adequate' English, and that no justification for the change had been put forward.[43]

3.27 The Scrutiny of Bills Committee raised concerns that 'competent English' was not defined in the Act or the proposed bill, and sought further clarification from the

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36 Explanatory Memorandum, pp. 26–27.

37 Explanatory Memorandum, p. 27.

38 Department of Immigration and Border Protection, *Submission 453,* p. 52.

39 Department of Immigration and Border Protection, *Submission 453,* p. 52.

40 See for example the Forum of Australian Services for Survivors of Torture and Trauma (FASSTT), *Submission 451,* p. 7; and Professor Alexander Reilly, Director, Public Law and Policy Unit, University of Adelaide, *Proof Committee Hansard,* 23 August 2017, pp. 24–25.

41 Professor Alexander Reilly, Director, Public Law and Policy Research Unit, University of Adelaide, *Proof Committee Hansard,* 23 August 2017, pp. 24–25.

42 Forum of Australian Services for Survivors of Torture and Trauma (FASSTT), *Submission 451,* pp. 7–8. See also Senator the Hon. Concetta Fierravanti-Wells and the Hon. Philip Ruddock, *Australian Citizenship—Your right, your responsibility*, National Consultation on Citizenship, Final Report, 2015, Recommendation 15, p. 22.

43 Forum of Australian Services for Survivors of Torture and Trauma (FASSTT), *Submission 451,* pp. 8. See also Centre for Human Rights Education, *Submission 377,* p. 3; and White Ribbon Australia, *Submission 388,* p. 2.

Minister about the level of English that an applicant would be required to demonstrate to satisfy the new requirement.[44] In response, the Minister provided the following explanation:

> The Government announced that applicants must provide results of an approved English language test at competent level in listening, speaking, reading, and writing skills. This is comparable to an International English Language Testing System score of 6 or the equivalent score from a test accepted by the Department. This is consistent with the current 'competent English' test score requirement in the *Migration Regulations 1994* (the Migration Regulations).[45]

3.28 In relation to the Scrutiny of Bills Committee's concerns that competent English was not defined in primary legislation, the Minister stated:

> The Government considers it appropriate to set out the technical details of the level of English language required in a legislative instrument. This gives the Minister the opportunity to determine particular circumstances such as the approved test providers and test scores. It also provides the Minister flexibility to update the instrument in instances where, for example, there is a change in the approved test providers, without going through the legislative amendment process.
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> This instrument that will be made to set out the detail of the English language requirement will be subject to scrutiny and disallowance when it is tabled in the Parliament. This approach mirrors the definition of 'competent English' in regulation 1.15C and the 'Language Tests, Score and Passports 2015' instrument in the Migration Regulations.[46]

3.29 During public hearings there was some discussion about what 'competent' English would equate to. As outlined above, the Minister has indicated that it will be comparable to an IELTS 6 score.[47] The Department notes that the IELTS offer a general or academic test, and that there is a difference in the reading and writing modules.[48] However, at a public hearing Professor Catherine Elder of the Language Testing Research Centre at the University of Melbourne stated that the academic IELTS test and the general IELTS test both report performance on the same scale.[49]

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44 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, 21 June 2017, p. 5.

45 Mr Dutton, Minister for Immigration and Border Protection, Response to Scrutiny Digest No 7 of 2017 from the Senate Scrutiny of Bills Committee, p. 2.

46 Mr Dutton, Minister for Immigration and Border Protection, Response to Scrutiny Digest No 7 of 2017 from the Senate Scrutiny of Bills Committee, p. 2.

47 Mr Dutton, Minister for Immigration and Border Protection, Response to Scrutiny Digest No 7 of 2017 from the Senate Scrutiny of Bills Committee, p. 2.

48 Department of Immigration and Border Protection, *Submission 453*, p. 49.

49 Professor Catherine Elder, Principal Fellow and Acting Director, Language Testing Research Centre, University of Melbourne, *Proof Committee Hansard*, 25 August 2017, pp. 44–45.

Professor McNamara, a linguistic expert at Melbourne University, said 'the tasks are different but the standard required is the same'.[50]

3.30 The Australian Council of TESOL Associations (ACTA) noted that the proposed level of IELTS 6 was higher than the literacy levels of more than one quarter of the general Australian population and that according to figures obtained in 2012–13, at least seven million Australians were below the IELTS 6 level.[51] It concluded that for a migrant to move from the basic level of IELTS 4 to the IELTS 6 'is virtually impossible without extensive English tuition' and '[f]or adults with limited educational backgrounds, it is generally impossible'.[52] The University of Melbourne's Language Testing Research Centre referred to the proposed level as 'unreasonably high'.[53]

3.31 Evidence from witnesses also noted that competence should be considered in light of the purpose of the skill. As explained by ACTA:

> Competent English in the famous Victoria markets in Melbourne or the Sydney Fish Market is quite different from what counts as competent for a lawyer in an Australian courtroom, a real estate agent auctioning a property or a politician in Parliament. Many nursing staff in retirement communities are quite competent in spoken English, reading medicine labels, completing hand-over reports and maintaining patient records. However, their reading and writing in English may easily not be what is labelled "competent" in the IELTS.[54]

3.32 Most submitters and witnesses agreed that achieving adequate English language skills was important for integration. For example, the Kaldor and Gilbert + Tobin Centres agreed that English proficiency is something which aspiring citizens should strive for and that it is a necessary skill in order to become part of the wider community.[55] However, it argued that the language test should not be used as a tool to exclude people and that the proposed English language test would be unfair and unreasonable, especially for the humanitarian and refugee cohort.[56]

3.33 As explained by Mr Peter Mares at a public hearing, the majority of migrants arriving in Australia are skilled migrants and international students whose level of

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50 Professor Tim McNamara, quoted in ABC Fact Check, 'Fact check: Will the Government's new citizenship test demand a university-level standard of English?', *ABC News Online*, 28 June 2017.

51 Australian Council of TESOL Associations, *submission 292*, p. 5.

52 Australian Council of TESOL Associations, *submission 292*, p. 8.

53 University of Melbourne Language Testing Research Centre, *Submission 398*, p. 7.

54 Australian Council of TESOL Associations, *submission 292*, p. 22. See also Jesuit Refugee Service Australia, *Submission 387*, 4; Refugee & Immigration Legal Service, *Submission 415*, p. 2; Refugee Council of Australia, *Submission 449*, p. 7.

55 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 13.

56 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 13.

English is already tested.[57] However, the cohort of migrants that this provision would affect includes individuals arriving in Australian on a humanitarian program, partners of Australia citizens or partners of permanent residents, or secondary visa holders such as the partner of a primary applicant for skilled migration.[58]

3.34 However, the Department noted that applicants would have at least four years to develop their English ability and noted the services available to humanitarian entrants:

> The Government recognises the particular challenges for refugees and humanitarian entrants. There is a range of Settlement Services and English language, literacy and numeracy programmes available for such vulnerable migrants to access. Technical colleges and other English language courses and programmes are also widely available.[59]

3.35 Additionally, the Department stated that in July 2017 the Government had introduced a new business model for AMEP whereby people who had not attained functional English after completing the legislated entitlement of 510 hours, may be able to access an additional 490 hours of tuition.[60]

3.36 A number of witnesses endorsed education-based methods to assess a person's English skills, rather than having a stand-alone English language test.[61] Dr Michelle Kohler from the Applied Linguistics Association of Australia noted that there were two alternatives—an achievement oriented test or an achievement oriented assessment.[62] Dr Kohler explained the difference between the two tests:

> The achievement based test is one that attempts to capture performance based on a clearly defined language learning program that precedes the test. The test is designed in close relation to a specific learning program that recognises the authentic and real-world contexts and purposes for learners' language use. For the current purpose that we're talking about here, the current context, such a program would focus on communication demands in the workplace and in community settings. In this way, the test has greater validity, as it would be designed to capture everyday communication experiences and would integrate the four skills—listening, speaking, reading and writing—in more authentic ways, rather than disaggregate them as some commercial tests do. In my view, it is also fairer in that the content is somewhat known to the test takers and is not too distant from the

57 Mr Peter Mares, *Proof Committee Hansard,* 25 August 2017, p. 32.

58 Mr Peter Mares, *Proof Committee Hansard,* 25 August 2017, p. 32. See for example Edmund Rice Centre, *Submission 303,* p. 5 and St Vincent de Paul Society, *Submission 419,* p. 3.

59 Department of Immigration and Border Protection, *Submission 453,* p. 60.

60 Department of Immigration and Border Protection, *Submission 453,* p. 54.

61 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378,* p. 40; and Dr Helen Moore, Spokesperson, Australian Council of TESOL Associations, *Proof Committee Hansard,* 24 August 2017, pp. 39–40.

62 Dr Michelle Kohler, President, Applied Linguistics Association of Australia, *Proof Committee Hansard,* 25 August 2017, pp. 45–46.

> preparation course. So there are no…surprises for them that might trip them up.
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> At the end of the day, a test is a one-off performance. It may not adequately represented what a person can do both in a range of contexts and over time. Hence, another possibility is an achievement-oriented assessment that does not have a test as the end point but aims to capture performance on a range of tasks. Examples of this include portfolios, where a number of tasks may be set and completed over time.[63]

3.37 Ms Annie Brent from ACTA noted that an example of such a course, which is now no longer being used, was a course developed in 2000 called 'Let's Participate'.[64] The course was designed as a 20 hour module to be taught within the AMEP; consisted of workbooks, videos, CD-ROMS as well as fact sheets in 26 languages.[65]

3.38 Some submitters explained that English language is currently tested in the Citizenship test and indicated that while the current legislation only requires the applicant to possess a 'basic' level of English, completion of the Citizenship test requires more than basic ability.[66] Professor Rubenstein noted that the current level of English being tested is equivalent to year 12 English and argued that the current arrangement works well and should not be changed.[67] Professor Helen Moore from ACTA explained the reasons why the current test is 'fair enough':

> The reason the current test is fair enough, as it were, is that it allows what's known in the trade as accommodations. So, if you don't have good literacy skills and if you don't have good computer skills, there are ways in which you can take that test orally, so someone will read the question to you. The other reason that test is good enough is that people can study for it. You can read the book, you can do the trial test.[68]

3.39 The committee notes the evidence provided to the inquiry, and notes that much of it is based in witness expectations of what the test might be, which the committee does not necessarily accept. However, the committee does believe that there is a need for greater certainty in either the legislation, the EM or the relevant regulations. The committee does not necessarily expect that the English language standard should be at university entrance level.

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63 Dr Michelle Kohler, President, Applied Linguistics Association of Australia, *Proof Committee Hansard,* 25 August 2017, pp. 45–46.

64 Ms Annie Brent, Teacher, Australian Council of TESOL Associations, *Proof Committee Hansard,* 24 August 2017, pp. 39–40.

65 Ms Annie Brent, Teacher, Australian Council of TESOL Associations, *Proof Committee Hansard,* 24 August 2017, pp. 39–40.

66 Professor Kim Rubenstein, *Proof Committee Hansard,* 24 August 2017, pp 2–3; and Dr Helen Moore, Spokesperson, Australian Council of TESOL Associations, *Proof Committee Hansard,* 24 August 2017, p.37.

67 Professor Kim Rubenstein, *Proof Committee Hansard,* 24 August 2017, p. 3.

68 Dr Helen Moore, Spokesperson, Australian Council of TESOL Associations, *Proof Committee Hansard,* 24 August 2017, p. 37.

3.40 The committee accepts evidence that many worthwhile would-be Australian citizens would be excluded by these rules, and committee members know from their own experience that many current Australian citizens would never have passed a higher standard English language test such as the one some witnesses are suggesting will be applied. The committee agrees that a good understanding and use of the English language is essential in order to enjoy the benefits, and fulfil the obligations, of Australian citizenship. The committee cautions, however, against the adoption of a standard that many current citizens could not reach.

Citizenship test

3.41 In addition to the new English language test, the bill also proposes to introduce a new citizenship test. Currently, the Minister can make a determination as to the eligibility criteria for sitting the citizenship test. Proposed subsection 23(3A) provides examples of what the determination may cover, including that the eligibility criteria may relate to the fact that a person has previously failed the test, did not comply with one or more rules of conduct relating to the test, or was found to have cheated during the test. The EM provides the further details in relation to the proposed change:

> At present applicants are able to sit the citizenship test an unlimited number of times. Not only does this reduce the integrity of the testing arrangements but is also administratively and financially burdensome for the Government. A person who repeatedly fails the test does not meet the eligibility requirements and should have their application refused. This amendment will better support decision makers. Limiting the number of times a person can take a test and imposing penalties for cheating on the test was a recommendation from the National Consultation on Citizenship and had strong community support. New subsection 23A(3A) makes clear that the Minister may determine, for example, that a person who fails the citizenship test three times is not eligible to re-sit the citizenship test. Another example would be where a person is found to have cheated during the test. In this circumstance, the Minister is empowered to determine that the person is not eligible to re-sit the test.[69]

3.42 The Department noted that the number of people who pass the current citizenship test on first attempt is high because many applicants are skilled migrants.[70] The Department confirmed that a limit of three tests would be imposed whereby applicants who fail the test three times would be barred for two years from making a further application for citizenship.[71] The Department provided the following figures in relation to attempts to pass the citizenship test:

> Over the past three programme years (2013-2016), the highest number of test attempts by a single applicant was 47 times. Over the same period, 1830 applicants attempted the test 11 or more times and 15,401 applicants

69 Explanatory Memorandum, p. 36.

70 Department of Immigration and Border Protection, *Submission 453,* p. 68.

71 Department of Immigration and Border Protection, *Submission 453,* p. 68.

> attempted the test three or more times. In 2015-2016, 102,029 people sat the citizenship test and 3447 people failed the citizenship test more than three times.[72]

3.43 The Law Council argued that there should not be a limit imposed on the number of times a person can sit the citizenship test noting that it was 'not clear how these proposed limitations could advance any of Australia's objectives under its migration and citizenship programs'.[73] In relation to the Department's comments about the administrative and financial burden on the Government to allow a person to repeatedly re-sit a test, the Law Council suggested that the Department could potentially consider additional fees provided the cost is not prohibitive and still includes a concession rate.[74] Finally, if the concern was in relation to keeping a citizenship application open indefinitely, the Law Council suggested that the order could be reversed so that a person could be required to pass the citizenship test before they are able to lodge an application for citizenship.[75]

3.44 Other submitters such as the Australian Lawyers Alliance referred to the proposed three-test limit as 'unduly harsh'.[76] The University of Melbourne's Language Testing Research Centre noted that 'repeated attempts to pass the test…are more likely to be a measure of determination to become a full voting member of Australian society, than an indication of any fundamental incapacity or unsuitability'.[77]

3.45 However, the Department made the important point that:

> A person who fails to meet the requirements for citizenship will remain a permanent resident unless their conduct results in the cancellation of their visa under the *Migration Act 1958.*[78]

3.46 Notwithstanding this the committee feels that there is some merit in the suggestions of the Law Council, the Australian Lawyers Alliance, and the University of Melbourne's Language Testing Research Centre, and suggests to the Government that it would be worth considering allowing additional tests on a cost-recovery basis for applicants who are not able to pass the citizenship test in three attempts.

Integration within the Australian community

3.47 Proposed paragraph 21(2)(fa) introduces a new criterion to the general eligibility for Australian citizenship by conferral—that the Minister is satisfied that the person 'has integrated into the Australian community'. Proposed paragraph

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72 Department of Immigration and Border Protection, *Submission 453,* p. 68.

73 Law Council of Australia, *Submission 464*, p.16.

74 Law Council of Australia, *Submission 464*, p.16.

75 Mr David Prince, Chair, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard*, 24 August 2017, p. 17.

76 Australian Lawyers Alliance, *Submission 454*, p. 18.

77 University of Melbourne, Language Testing Research Centre, *Submission 312*, p. 6.

78 Department of Immigration and Border Protection, *Submission 453,* p. 69.

21(9)(e) states that the Minister may determine by legislative instrument the matters to which the Minister may or must have regard when determining whether a person has integrated into the Australian community. The EM outlines that such a legislative instrument could have regard to a person's employment status, study being undertaken by the person or the person's children, involvement with community groups, or, conversely, that the person's conduct that is inconsistent with the Australian values, including criminal conduct.[79]

3.48 The Scrutiny of Bills Committee noted that the question of whether a person has integrated into the Australian community is not a technical question but rather one of substantive policy and therefore should not be broadly delegated to the executive branch of Government.[80] The Scrutiny of Bills Committee suggested that it would be more appropriate for the bill to be amended to provide guidance in the primary legislation as to what is meant by 'has integrated into the Australian community' and how this criterion should be applied.[81]

3.49 The committee tends to agree with this approach. The committee notes that the current Minister may not always be the decision-maker and believes that some legislative guidance may be necessary.

3.50 A number of organisational submitters raised similar concerns—that the discretion vested in the Minister to determine matters by legislative instrument was too broad.[82] Some submitters objected to the Government placing too much emphasis on linking integration with employment. The Law Council warned that refugee or humanitarian entrants may be disadvantaged for a variety of reasons and concluded that this requirement 'may further discourage migrants from applying for citizenship by making the criteria administratively overwhelming and uncertain, with potentially negative consequences'.[83] Anglicare Sydney provided the following explanation:

> We have particular concerns for vulnerable migrants and refugees who may not be able to demonstrate this defined type of community integration across their period of residence in Australia. We refer to those people who have experienced one or more of the following pre-arrival factors: disrupted or no formal education; trauma or torture through persecution and war or conflict; periods of time in refugee camps and in transit fleeing war and conflict; family unit separation; and loss of immediate family members. Further, significant post-arrival factors which should be considered in a person's capacity to integrate in these ways include: primary caregiving roles in the family unit; language barriers; physical and mental health

79 Explanatory Memorandum, p. 27.

80 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017,* 21 June 2017, p. 3.

81 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017,* 21 June 2017, p. 3.

82 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378,* p. 15; University of Adelaide, Public Law and Policy Research Unit, *Submission 398,* p. 8; Legal Aid NSW, *Submission 385,* p. 7; and Law Council of Australia, *Submission 464,* p. 16.

83 Law Council of Australia, *Submission 464,* pp. 16–17.

> issues, especially for refugees; long periods of separation from immediate family members; protracted and complex visa processes; periods of time in immigration detention; and difficulty in having previous qualifications and employment experience recognised in the Australian context. As previously discussed, each individual and family's trajectory in their settlement years in Australia is unique and dynamic.[84]

Australian Values Statement

3.51 Proposed subsection 46(5) provides that the Minister may determine an Australian Values Statement and any requirements relating to the Statement. The EM states that the Minister may, for example, 'determine the text of the Australian Values Statement and determine that the statement must be read, understood and signed by an applicant'.[85] Proposed subsection 46(6) of the bill notes that a determination under proposed subsection 46(5) is a legislative instrument, however, it will not be subject to disallowance. The justification for the Australian Values Statement to be exempt from disallowance was outlined in the EM:

> The instrument provides the wording of the Australian Values Statement that an applicant must sign to make a valid application for citizenship. This aligns with the process for a visa application under the Migration Act which many applicants will have already signed as part of their visa application process. Australian citizenship is core Government policy and aligns with national identity and as such matters going directly to the substance of citizenship policy such as Australian Values should be under Executive control, to provide certainty for applicants and to ensure that the Government's intended policy is upheld in its application.[86]

3.52 The Scrutiny of Bills Committee argued that matters that go 'directly to the substance of citizenship and policy' would appear to be matters that are appropriate for parliamentary oversight.[87] Also, while the EM argues that by putting the determination of the Australian Values Statement under executive control provides certainty to applicants, certainty could equally be provided by increasing parliamentary oversight of this matter rather than including it in a legislative instrument that was not subject to disallowance.[88]

3.53 These concerns were also shared by a number of submitters.[89] The Australian Multicultural Council supported the inclusion of an Australian Values Statement provided it was consistent with the core values articulated in the Australian

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84 Anglicare Sydney, *Submission 308,* p. 9.

85 Explanatory Memorandum, p. 53

86 Explanatory Memorandum, p. 53.

87 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017,* 21 June 2017, p. 10.

88 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017,* 21 June 2017, pp. 10–11.

89 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378,* p. 14 and p. 28; NSW Council for Civil Liberties, *Submission 436,* pp. 8–9

Government's new multicultural statement, *Multicultural Australia: united, strong, successful.*[90] These values include 'equality of opportunity, equality between men and women, rule of law, support of parliamentary democracy, and acknowledgement of basic freedoms and civil liberties, including protection of minority rights'.[91] While the Multicultural Council supported the proposed new requirement for an Australian Values Statement, it suggested that 'sensible guidelines and supports are developed' and that 'new requirements are not onerous to the point of becoming a deterrent'.[92]

Pledge of allegiance

3.54 Proposed section 32AB requires a person over the age of 16 to make a pledge of allegiance (currently referred to as the pledge of commitment) to become an Australian citizen. Exemptions apply where the person has a permanent or enduring physical or mental incapacity that makes them incapable of taking the pledge (proposed paragraph 32AB(1)(b)). Additionally, proposed section 32AB provides the Minister the power to issue a written determination preventing a person making the pledge of allegiance for up to two years under three circumstances:

- where the Minister is satisfied that the person's visa may be cancelled;
- where the Minister is satisfied that the person has been or may be charged with an offence under Australian law; or
- where the Minister is considering cancelling a person's visa under specified sections of the Act.

3.55 A number of submitters noted their support for the proposed changes relating to the pledge of allegiance.[93] For example, the Australian Multicultural Council stated that it 'supports this amendment as it makes explicit the expectation that aspiring citizens make a strong commitment of allegiance to Australia'.[94]

3.56 In relation to potential delays to an applicant taking the pledge, the Kaldor and Gilbert + Tobin Centres reflected on research conducted by the Refugee Council of Australia which concluded that refugees subject to citizenship delays experience 'high levels of stress and anxiety', 'suffer extreme helplessness and despair', and that the delay caused 'acute and severe mental distress'.[95]

3.57 The Kaldor and Gilbert + Tobin Centres concluded:

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90 Australian Multicultural Council, *Submission 334*, p. 2.

91 Australian Multicultural Council, *Submission 334*, p. 2.

92 Australian Multicultural Council, *Submission 334*, p. 3.

93 Australian Multicultural Council, *Submission 334*, p. 3;

94 Australian Multicultural Council, *Submission 334*, p. 3.

95 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 19. See also Refugee Council of Australia, *Delays in Citizenship Applications for Permanent Refugee Visa Holders*, October 2015, p. 9; University of Adelaide, Public Law and Policy Research Unit, *Submission 398*, pp. 9–10; Muslim Legal Network (NSW), *Submission 413*, p. 9; and Queenscliff Rural Australians for Refugees, *Submission 320*, p. 1.

> In light of these impacts, stronger justification for the need to increase the maximum length of delays is required, as well as some mechanism via which to ensure that the ministerial power to impose delays is exercised in a manner that is proportionate to the circumstances that trigger it.
>
> It is our recommendation that before any increase to the maximum length of delays is enacted, the Minister should provide to the Parliament a detailed explanation about how often, and in what circumstances, the current maximum period of 12 months is insufficient. Based on this evidence, the Bill should enumerate and limit the circumstances in which delay of more than 12 months will be permitted under the Act, and require that any delay imposed is proportionate to the circumstances that trigger it.[96]

3.58 Other concerns raised by submitters relating to the pledge include:

- the term 'allegiance' being an outdated concept and that terms currently used such as 'loyalty' and 'commitment' are more accessible and more widely understood terms, as such, the pledge should not be amended;[97]
- that Australian-born citizens are not required to make the same pledge of allegiance which suggests there was 'considerable room for improving the civic literacy of Australian-born citizens';[98] and
- that the pledge should be to 'Australia's sovereign head of state', the Queen of Australia.[99]

3.59 The committee makes no comment on most of these submissions, but is not persuaded that the Government's proposal is wrong. The committee does, however, agree with the view provided at dot point two that the civic literacy of many existing Australian citizens could do with some improvement.

Additional powers of the Minister

Minister's power to cancel approval for citizenship

3.60 The bill proposes to provide the Minister with additional powers to cancel the approval for citizenship by conferral under two circumstances: where the Minister is satisfied that approval should not be granted due to identity or national security grounds (proposed subsection 25(1A)); and where the person otherwise fails to meet the eligibility criteria for citizenship (proposed subsections 25(1) and 25(2)).

3.61 A number of submitters raised concern with the second area of cancelation—where the person otherwise fails to meet the eligibility criteria. The Kaldor and Gilbert + Tobin Centres noted that the proposed provision, in combination with the proposed

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96 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 19.

97 Professor Kim Rubenstein, *Submission 404*, p. 5; see also Australian Monarchist League, *Submission 462*, p. 1.

98 Lutheran Church of Australia, *Submission 364*, p. 4.

99 Australian Monarchist League, *Submission 462*, p. 1

expansion of ministerial discretion in respect of the eligibility criteria for those who apply for citizenship by conferral, was particularly concerning:

> As an example of how these discretions interact, the Minister, under proposed s 21(2)(fa), may look holistically at the question of whether an applicant has 'integrated' into the Australian community. The Bill provides no guidance about how this ministerial power will be exercised, and, indeed, the Minister is not required to develop guidelines that clarify this. Where the Minister determines that the applicant has integrated into the community, and that all other eligibility requirements have also been met, there still remains a ministerial discretion to refuse to approve the person for citizenship. The effect of the proposed ss 25(1) and 25(2) is that, even after the Minister decides to approve a person's application for citizenship, they may continue to monitor the person up until the day of their citizenship ceremony, and may retract approval for citizenship if they form the view that integration is no longer present.[100]

Minister's discretion to revoke citizenship

3.62 In addition to the Minister's proposed power to cancel approval of a person's citizenship, the bill also proposes to provide the Minister with the discretion to revoke a person's citizenship based on two grounds: where the Minister is satisfied that the approval should not have been given to the person because the requirements of the Act had not been met (proposed section 33A); or where the Minister is satisfied that the person became an Australian citizen as a result of fraud or misrepresentation (proposed section 34AA).

Revocation if requirements of Act not met

3.63 Section 16 of the Act covers citizenship by descent and allows a person to make an application for citizenship if they were born outside of Australia but a parent was an Australian citizen at the time of the person's birth and the Minister is satisfied that the applicant meets a number of requirements outlined in the Act. The Minister's decision to approve or refuse an application under section 16 is made under section 17 of the Act.

3.64 Proposed section 33A of the bill provides the Minister with the discretion to revoke a person's citizenship if it was acquired by virtue of section 17 of the Act and if the Minister is satisfied that the approval should not have been given. Proposed subsection 33A(2) provides that the Minister cannot revoke a person's citizenship if the revocation would result in the person being stateless. Proposed subsection 33A(3) notes that the person ceases to be an Australian citizen at the time of the revocation.

3.65 The EM notes that the purpose of the amendment is to allow the Minister to take into account the circumstances of a particular case, such as the length of time that the person has been a citizen and the seriousness of any character concerns.[101]

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100 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 20.

101 Explanatory Memorandum, p. 49.

3.66 In response to concerns raised by the Scrutiny of Bills Committee in relation to an identical provision in the 2014 bill, the Minister stated:

> It is not necessary to place a time limit on the exercise of the power because the discretionary nature of the decision means that issues such as the length of time that the person has been a citizen, and the seriousness of any character concerns, would be taken into account. In addition, the revocation would take effect from the time of decision on revocation rather than from the date of the decision to approve the person becoming an Australian citizen. This means that the person's status in the intervening period will not alter.[102]

3.67 A number of submitters were also concerned that the Minister was provided a broad discretionary power with no legislative guidance on the circumstances in which the Minister may decide that approval should not have been given.[103] The Kaldor and Gilbert + Tobin Centres explained how lack of legislative guidance could potentially create uncertainty:

> The possibility that the provision may be read in a way that empowers the Minister to change what constitutes a person of good character retrospectively also raises the prospect that persons who gain citizenship by descent may be subject to changing standards. Further, while the Minister may exercise his or her discretion not to exercise this power if a long time has passed since the person attained citizenship, there are no time limits imposed on the Minister's power to exercise his power under proposed s 33A. This exacerbates the potential uncertainty faced by persons who gain citizenship by descent.
>
> … We do not believe that a person's right to citizenship by descent should be disturbed because the Minister subsequently believes they 'got it wrong'. Grounds for revocation on such broad terms may potentially give rise to a situation where a citizen or class of citizens is under ongoing scrutiny.[104]

3.68 The committee does not share these concerns and appreciates that in these times of heightened security environments, situations may arise that would not previously have been apprehended.

Revocation due to fraud or misrepresentation

3.69 New section 34AA of the bill provides that the Minister may revoke a person's citizenship if the Minister is satisfied that the citizenship was approved as a result of fraud or misrepresentation. The fraud or misrepresentation must have been connected with the person's Australian citizenship approval, the person's entry to Australia prior to citizenship approval, or the grant of a visa or permission to enter and

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102 Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2014,* pp. 1031–1032.

103 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378,* p. 21; and Australian Human Rights Commission, *Submission 47,* p. 22.

104 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378,* p. 21.

remain in Australia prior to the citizenship approval (proposed paragraph 34AA(b)). Additionally, the Minister must be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen (proposed paragraph 34AA(c)). The fraud or misrepresentation may have been committed by 'any person' and need not have constituted an offence (proposed subsection 34AA(2)), however it must have occurred during the 10 year period prior to the day of revocation (proposed subsection 34AA(3)). Subsection 34AA(4) notes that 'the concealment of material circumstances constitutes a misrepresentation', and subsection 34AA(5) specifies that the person ceases to be an Australian citizen from the time of the revocation. The EM also outlines that a note to the new section, which provides that a child of the person who has had their citizenship revoked, would also cease to be an Australian citizen at the time of their parent's citizenship being revoked.

3.70 The Department stated:

> Currently, a conviction for a specified offence is required before a person's citizenship can be revoked. In light of competing priorities, there are often limited resources to prosecute all but the most serious cases relating to migration and citizenship fraud. In addition, the conviction must be under Australian law, which in turn requires the person's presence in Australia. Because of these considerations and the time it can take to establish a conviction, the power to revoke a person's citizenship on the basis of a conviction for a fraud-related offence has only been used ten times since 1949, even where the evidence of fraud is strong.[105]

3.71 Some submissions from legal organisations raised concerns with this proposed section. The Law Council argued that, given the serious consequences, revocation of citizenship should be subject to independent review.[106] Further, that revocation due to fraud or misrepresentation should require a criminal conviction and that the suspicion or belief of the Minister or their delegate should not be sufficient.[107] Legal Aid NSW noted that the proposed provision placed too much power with the executive and that the precondition of a conviction prior to the revocation of citizenship would ensure that the decision is made on objective grounds.[108] Refugee Legal (formerly the Refugee and Immigration Legal Centre) referred to the proposed provision as 'a significantly lower standard premised on a "more likely that not" level of satisfaction by a public servant is deeply concerning'.[109]

3.72 Refugee Advice and Casework Service (RACS), argued that the proposed provision 'degrades the value of Australian citizenship by treating it like a visa, even for Australian citizens born in Australia'.[110] It noted that the bill would have the effect

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105 Department of Immigration and Border Protection, *Submission 453,* p. 84.

106 Law Council of Australia, *Submission 464,* p. 20.

107 Law Council of Australia, *Submission 464,* p. 20. See also Australian Lawyers Alliance, *Submission 454,* p. 11 and Refugee Legal, *Submission 439,* p. 7.

108 Legal Aid NSW, *Submission 385,* p. 8.

109 Refugee Legal, *Submission 439,* p. 9.

110 Refugee Advice and Casework Service, *Submission 441,* p. 4.

of entrenching citizenship by conferral as a second class of Australian citizenship, which is less secure than that of other Australian citizens and perpetually subject to the risk of revocation by the Minister.[111]

3.73 Another potential consequence of the proposed provision, as noted by a number of submitters, was the possibility that it may result in children being made stateless.[112] While the Australian Human Rights Commission (AHRC) acknowledged that the EM noted the potential for a child to be rendered stateless would be a factor to be considered, the AHRC pointed out that the proposed provision does not contain a legislative provision against statelessness.[113]

Minister's decision excluded from merits review

3.74 Item 126 of the bill seeks to add new subsection 52(4) providing that certain decisions of the Minister, which are made in the public interest, would be excluded from merits review.[114]

3.75 The EM sets out the following reasons for this proposed changed:

> 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.[115]

3.76 The committee agrees with and supports this statement.

3.77 Proposed subsection 52B(1) of the bill outlines that where the Minister makes a decision that is not reviewable by the Administrative Appeals Tribunal (AAT), the Minister is required to table in each House of the Parliament, within 15 sitting days, the Minister's decision and the reasons for the decision. The EM notes that the proposed subsection 52B(1) of the bill 'provides transparency and accountability measures concerning personal decisions of the Minister which are not reviewable by the Administrative Appeals Tribunal'.[116] The EM also notes that it remains open to a person to seek judicial review of these decisions and that the exclusion of the

111 Refugee Advice and Casework Service, *Submission 441*, pp. 4–5. See also Australian Human Rights Commission, *Submission 447*, p. 20.

112 Australian Human Rights Commission, *Submission 447*, p. 20. See also Multicultural Youth Advocacy Network, *Submission 443*, pp. 3–4.

113 Australian Human Rights Commission, *Submission 447*, p. 21.

114 These decisions relate to the refusal to approve or cancel the approval of citizenship, or to revoke a person's citizenship under sections 17, 19D, 24, 25, and 30 of the Act and proposed sections 17A, 19DA, 30A, 33A and 34AA of the bill.

115 Explanatory Memorandum, p. 55.

116 Explanatory Memorandum, p. 55.

Minister's personal decisions from merits review was more in line with similar provisions under the *Migration Act 1958.*[117]

3.78 Submitters also questioned the ambiguity of the term 'public interest'. Refugee Legal outlined that the term 'public interest' has been determined by the High Court to be a term which was 'difficult to give a precise content', and as such, it noted that the Minister would be liable to exercise his powers in accordance to his personal or political whim.[118]

3.79 The Public Law and Policy Research Unit argued that Ministerial decisions 'in the public interest' should be confined to discretionary exercises of power that are beneficial to the person concerned, for example, waiving the general residency requirement, not revoking citizenship, or setting aside adverse AAT decisions.[119] The Australian Lawyers Alliance expressed the same view and argued that Ministerial discretion should be limited to circumstances where merits and judicial review options have been exhausted and the outcome remains unjust in the view of the Minister.[120]

3.80 The use of proposed section 52B, which requires the Minister to table a statement setting out the Minister's decision within 15 sitting days, was criticised as a deficient accountability mechanism for a number of reasons.[121] The Kaldor and Gilbert + Tobin Centres explained that proposed section 52B may assist with transparency, but not with accountability as the consequence may be that the Minister has to answer questions in Parliament, but not to review the decision.[122] Secondly, the time period of 15 sitting days could mean that a significant period of time elapses from the date of the decision to the date of the Minister's statement being tabled in Parliament, which would result in the immediacy of the consequence of the decision being lost.[123] The committee suggests that this approach ignores the realities of the Parliamentary process.

Minister's power to set aside decisions of the AAT

3.81 New section 52A of the bill would provide the Minister the power to set aside certain decisions of the AAT where the Minister is satisfied that it is in the public interest to do so. The power would not apply to decisions to revoke citizenship but can apply to decisions to refuse to approve citizenship, or to cancel an approval for

117 Explanatory Memorandum, p. 55.

118 Refugee Legal, *Submission 439,* p. 4.

119 University of Adelaide, Public Law and Policy Research Unit, *Submission 398,* p. 11

120 Australian Lawyers Alliance, *Submission 454,* p. 6.

121 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378,* p. 34.

122 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378,* p. 34.

123 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378,* p. 34.

citizenship, where the delegate was satisfied that the person was not of good character, or of the identity of the person, where the AAT set aside the delegate's decision.

3.82 Where the Minister has set aside an AAT decision under the new section 52A, proposed subsection 52B(3) would require the Minister to table a statement in both Houses of Parliament within 15 sitting days, which sets out the AAT's decision, the decision made by the Minister, and the reasons for the decision.[124] The EM notes that this 'ensure[s] that such decisions remain transparent, accountable and open to public comment'.[125]

3.83 In setting out the reasons for the proposed amendment, the EM notes three decisions of the AAT which were 'outside community standards' because the AAT had found that people were of good character despite one having been convicted of child sexual offences, another of manslaughter and the third of people smuggling.[126] The EM notes a further three cases where the AAT found people to have been of good character despite having committed domestic violence offences.[127] Finally, the EM states that there is potential for some of the AAT's decisions on identity grounds 'to pose a risk to the integrity of the citizenship programme'.[128]

3.84 Concerns in relation to this proposed power were raised by a significant number of organisational submitters, for largely the same reasons as put forward by submitters opposed to proposed section 52(4).[129] The Committee however supports the Government's view that Ministers are ultimately responsible to the Australian people whereas both the AAT and the AHRC are accountable to no one.

Broad instrument making power of the Minister

3.85 New subsection 54(2) provides that 'the regulations may confer on the Minister the power to make legislative instruments'. The EM states that this will enable the Minister to make legislative instruments under the Regulations relating to,

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124 Explanatory Memorandum, p. 56.

125 Explanatory Memorandum, p. 57.

126 Explanatory Memorandum, p. 55.

127 Explanatory Memorandum, p. 55.

128 Explanatory Memorandum, p. 55.

129 Oz Kiwi, *Submission 339,* p. 8; Curtain University, Centre for Human Rights Education, *Submission 377,* pp. 2–3; Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378,* pp. 33–34; Legal Aid NSW, *Submission 385,* pp. 8–9; University of Adelaide, Public Law and Policy Research Unit, *Submission 398,* pp. 11–13; Muslim Legal Network, *Submission 413,* pp. 22–24; St Vincent de Paul Society National Council, *Submission 419,* p. 5; NSW Council for Civil Liberties, *Submission 436,* pp. 7–8; Castan Centre for Human Rights Law, *Submission 437,* pp. 6–7; Refugee Legal, *Submission 439,* p. 2–4; Refugee Advice & Casework Service, *Submission 441,* pp. 3–4; Asylum Seeker Resource Centre, *Submission 444,* p. 2; National Ethnic Disability Alliance, *Submission 446,* p. 4; Australian Human Rights Commission, *Submission 447,* pp. 14–16; Refugee Council of Australia, *Submission 449,* pp. 14–15; Australian Lawyers Alliance, *Submission 454,* p. 6; Law Council of Australia, *Submission 464,* pp. 7–8; and Queensland Council for Civil Liberties, *Submission 481,* p. 1.

for example, the payment of citizenship application fees in foreign countries and currencies. The rationale for the proposed amendment was explained as follows:

> It is appropriate for this instrument making power to be in the Regulation because it is the Regulation which address issues such as setting the fees to accompany citizenship applications (see Regulation 16). Parliamentary scrutiny would be maintained because the legislative instrument would be disallowable.[130]

3.86 The Scrutiny of Bills Committee acknowledged that, while it was not controversial to use delegated legislation in technical and established circumstances such as the payment of fees, 'it is unusual for primary legislation to provide for the making of a regulation which, in turn, provides a Minister with a wide power to make further delegated legislation for unspecified purposes'.[131] It was the view of the Scrutiny of Bills Committee that the primary Act, rather than the regulations, should provide a power to make delegated legislation.[132] The Scrutiny of Bills Committee explained that the effect of the regulations conferring a power to delegate legislation would be to provide the Minister with a wide power for unspecified purposes.[133] This concern was also shared by the Kaldor and Gilbert + Tobin Centres.[134]

3.87 The Scrutiny of Bills Committee noted that it raised these same concerns in relation to an identical provision within the 2014 bill and that the following explanation was provided in response:

> …while it would be possible to limit the Minister's power to make further delegated legislation to specified matters in the Citizenship Act, it was not necessary to do so as the (now) *Legislation Act 2003* provides that any instrument made under the Regulations would be read so as not to exceed the authorising powers in the Act and the Regulations.[135]

Additional requirements impacting children

Citizenship by birth

3.88 Currently, a child born in Australia will automatically become an Australian citizen once they turn 10, provided they are ordinarily resident in Australia.[136] This provision applies regardless of whether the child's parents are Australian citizens. The bill proposes to limit the automatic acquisition of Australian citizenship by birth so that the 10 year rule will no longer apply under the following circumstances:

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130 Explanatory Memorandum, p. 59.

131 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017,* 21 June 2017, p. 15.

132 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017,* 21 June 2017, p. 15.

133 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017,* 21 June 2017, p. 15.

134 Andrew & Renata Kaldor Centre of International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378,* pp. 30–31;

135 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017,* 21 June 2017, p. 16.

136 Paragraph 12(1)(b) of the *Australian Citizenship Act 2007*.

- if during the 10 year period a parent of the person had diplomatic privileges or immunities under relevant legislation (proposed subsection 12(3));
- if at any time during the 10 year period the person was an unlawful non-citizen (proposed subsection 12(4));
- if at any time during the 10 year period, the person did not hold a valid visa permitting them to travel to, enter and remain in Australia (proposed subsection 12(5)), unless the person was a New Zealand citizen (proposed subsection 12(6));
- if the parent of the person did not hold a substantive visa at the time of the person's birth and was an unlawful non-citizen at any time between that parent's last entry into Australia and the person's birth (proposed subsection 12(7)); or
- if the person was found abandoned in Australia and it is proved that the person was physically outside Australia before they were found abandoned in Australia, or born in Australia to a parent who is not a citizen or permanent citizen at the time of the person's birth (proposed subsection 12(9)).

3.89 Sub-item 135(2) of the bill provides that these amendments would apply in relation to a 10 year period that ends on or after the commencement of the item, whether the birth occurred before the commencement. Sub-item 135(3) of the bill clarifies that in relation to a birth that occurred before the commencement of the bill, the amendments would apply to any part of the 10 year period. As such, this provision would operate retrospectively. It is noted that an identical provision was proposed in the 2014 bill.

3.90 The EM outlines the rationale for these proposed amendments:

> Collectively, the amendments made by this item seek to encourage the use of lawful pathways to migration and citizenship by making citizenship under the '10 year rule' available only to those who had a right to lawfully enter, re-enter and reside in Australia throughout the 10 years.[137]

3.91 In relation to these provisions the Department noted that:

> The changes to the 10-year rule do not prevent a person applying for citizenship by a conferral process. Also, a stateless person may apply for citizenship at any time. Consequently, this measure does not trespass unduly on personal rights, nor does it impact on the individual's liberty or obligations.[138]

3.92 A number of submitters raised concerns with how this provision would affect three particular categories of children, namely children of asylum seekers and refugees, children of parents who overstayed their visas, and children found abandoned.

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137 Explanatory Memorandum, p. 13.

138 Department of Immigration and Border Protection, *Submission 453*, p. 82.

Children of asylum seekers and refugees

3.93 The AHRC submitted that, by virtue of proposed subsection 12(4), children of parents who are in immigration detention or community detention when the child is born would no longer automatically qualify for citizenship when the child turns 10.[139] This would also be the case for a child of parents who arrived in Australia as unlawful non-citizens, were released from immigration detention into community detention on bridging visas, and the child was born while the parents held a bridging visa.[140]

3.94 The AHRC noted that in both cases, even if the parents of the child had been found to be refugees and granted protection visas, and the child had been lawfully in Australia for their entire life up to the age of 10, the child would not be entitled to citizenship under the 10 year rule.[141] In other words, under the proposed sections the child's eligibility for the automatic acquisition of citizenship would be denied on the basis of the parents' immigration status.[142]

3.95 These concerns were shared by the Kaldor and Gilbert + Tobin Centres which noted that the proposed amendments 'present a particular risk for children of asylum seekers'.[143] The Kaldor and Gilbert + Tobin Centres explained that the combined effect of this proposed amendment with the reintroduction of temporary protection visas in 2014 would make it very difficult for children of asylum seekers who arrived in Australia by boat to obtain citizenship.[144]

3.96 The Public Law and Policy Research Unit also expressed their concern and reiterated the comments they made in relation to this provision of the 2014 bill:

> 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.[145]

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139 Australian Human Rights Commission, *Submission 447*, p. 23.

140 Australian Human Rights Commission, *Submission 447*, p. 23. This would be by virtue of proposed section 12(7) of the bill as a bridging visa is not a substantive visa.

141 Australian Human Rights Commission, *Submission 447*, pp. 23–24.

142 Australian Human Rights Commission, *Submission 447*, p. 24.

143 Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 6.

144 Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 6.

145 Adelaide University, Public Law and Policy Research Unit, *Submission 398*, p. 3.

3.97 Both the Law Council and the AHRC expressed the view that these provisions may be in contravention of the Convention on the Rights of the Child (CRC).[146] Article 7(1) of the CRC, as well as article 24(3) of the International Covenant on Civil and Political Rights (ICCPR), states that every child has 'the right to acquire a nationality'. The AHRC acknowledged the comments made by the UN Human Rights Committee that the provision 'does not necessarily make it an obligation for States to give their nationality to every child born in their territory'.[147] However, the UN Human Rights Committee also state that:

> …there should be no discrimination in accessing citizenship, for example, based on whether children are legitimate or based on the nationality status of one or both of the parents.[148]

Children of parents who overstayed their visa

3.98 The second category of children identified by the AHRC who would be negatively affected by the proposed changes to the 10 year rule are children of parents who arrived in Australia lawfully but subsequently overstayed their visas and became unlawful non-citizens at any time prior to the child's tenth birthday.[149]

3.99 The Kaldor and Gilbert + Tobin Centres argued that these proposed amendments were inconsistent with the rationale underpinning the 10 year rule:

> Regardless of their immigration status or the immigration status of their parents, any child who has resided in Australia for the first 10 years of their life is immersed in Australian culture, shaped by Australian relationships and education, and likely to have little to no substantive connection with any country besides Australia.[150]

3.100 The Kaldor and Gilbert + Tobin Centres noted the motivation provided for these amendments as outlined in the EM, is to address concerns that the 10 year rule encouraged temporary residents and unlawful non-citizens to have children in Australia and keep their child in Australia whether lawfully or unlawfully, until at least their tenth birthday.[151] However, a number of submitters noted that there appeared to be insufficient evidence that the 10 year rule was being abused.[152] The Law Council went further and stated the following:

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146 Law Council of Australia, *Submission 464*, p. 18; and Australian Human Rights Commission, *Submission 447*, p. 24.

147 Australian Human Rights Commission, *Submission 447*, p. 24.

148 Australian Human Rights Commission, *Submission 447*, p. 24.

149 Australian Human Rights Commission, *Submission 447*, p. 24.

150 Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 7.

151 Explanatory Memorandum, p. 75.

152 Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 7; Law Council of Australia, *Submission 464*, p. 18; and Australian Human Rights Commission, *Submission 447*, p. 24.

> It is the experience of our members that this deemed grant of citizenship arises in only a modest number of situations per year and almost without exception in the situation where the child has been unlawful for all or most of their short lives. It is the opinion of the Law Council that this very long standing provision serves a very important public policy objective in protecting the interests of vulnerable children. As currently drafted, the Bill would remove the benefit of this provision from the children in actual need of this legislative protection and instead in essence only leave the provision open to children who in effect have little need of it.[153]

Children found abandoned in Australia

3.101 Currently, a person who is found abandoned in Australia as a child is an Australian citizen unless the contrary is proved.[154] The bill proposes to repeal this section and amend it to clarify that a child found abandoned in Australia is presumed to be born in Australia to a parent who is an Australian citizen or a permanent resident at the time the child is born (proposed subsection 12(8)). This presumption applies unless and until it is proved that the child was physically outside Australia before being found abandoned in Australia, or born in Australia to a parent who is not a citizen or permanent citizen at the time of birth (proposed subsection 12(9)).

3.102 The United Nations High Commissioner for Refugees (UNHCR) raised concerns with proposed paragraph 12(9)(a) of the bill noting that it may result in a child being stateless.[155] The UNHCR explain that under article 15 of the Universal Declaration of Human Rights, each individual has a right to nationality.[156] Furthermore, that the purpose of the 1961 Statelessness Convention, to which Australia is a State Party, is to prevent and reduce statelessness.[157] The UNHCR noted that articles 1 to 4 of the Convention specifically concerns the acquisition of nationality by children who would otherwise be stateless, and who have ties to the Contracting state either by birth or descent.[158] The UNHCR provided the following example to illustrate how proposed paragraph 12(9)(a) may be contrary to Australia's obligations under the 1961 Statelessness Convention:

> …a child may have been born in Australia, to an Australian parent, lawfully taken overseas, returned and then abandoned without any documentation at such an age that the child would not be able to communicate its own nationality or that of its parents.[159]

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153 Law Council of Australia, *Submission 464*, p. 18.

154 *Australian Citizenship Act 2007,* section 14.

155 United Nations High Commissioner for Refugees, *Submission 438*, p. 8.

156 United Nations High Commissioner for Refugees, *Submission 438*, p. 8.

157 United Nations High Commissioner for Refugees, *Submission 438*, p. 8.

158 United Nations High Commissioner for Refugees, *Submission 438*, p. 8. These concerns were also raised by the Australian Human Rights Commission, see *Submission 447*, pp. 28–29.

159 United Nations High Commissioner for Refugees, *Submission 438*, pp. 9–10.

3.103 As noted above, the Department argued that these provisions do not trespass unduly on personal rights as a stateless person may apply for citizenship at any time.[160]

Good character test

3.104 Currently, adults are required to pass a 'good character' test. The bill proposes to remove the age limits in relevant sections of the Act so that children will need to satisfy the Minister that they are of 'good character'. The EM reflects the justification for the amendments:

> 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...
>
> The Department is aware of children aged under 18 with serious character concerns. The amendment would not have a significant impact on children overall, but will capture those young people who are of character concern and that the Australian community reasonably expects should not be extended the privilege of Australian citizenship at that time.[161]

3.105 In relation to its compatibility with human rights obligations, the EM provided the following explanation:

> In the context of engaging with Article 3(1) of the CRC, while it may be in the best interests of the child to obtain citizenship the best interests of the child must be weighed against other competing interests. The proposed change is similar to provisions which currently exist in the Migration Act, which does not have an age limit for "good character". Similarly, in order to preserve the integrity of the citizenship programme, being the final stage of assessment of a person's rights to reside in Australia and to access the rights and privileges of citizenship, it is appropriate that the assessment of the character of applicants for citizenship is at least as thorough as the assessment of character in the migration context. The amendment therefore aims to ensure the safety of the Australian community by upholding the value of citizenship and ensuring uniformity and integrity across the citizenship and migration programmes.
>
> Finally, the Australian Citizenship Instructions (ACIs) will ensure the good character amendment will positively engage with Article 3(1) of the CRC. The Australian Citizenship Instructions (ACIs) set out the policy considerations to be taken into account by decision makers when assessing whether an applicant meets the good character requirements. After the amendment comes into force, the ACIs will set out instructions to ensure that decision makers relevantly consider Australia's obligations under the

160 Department of Immigration and Border Protection, *Submission 453*, p. 82.

161 Explanatory Memorandum, pp. 16, 20 and 26.

> Convention on the Reduction of Statelessness, and the best interest of the child as a primary consideration, amongst other things.[162]

3.106 A number of submitters also noted that the term 'good character' was not defined in the Act.[163] The Kaldor and Gilbert + Tobin Centres noted that the Citizenship Policy states that the question of whether a person is of good character includes:

- characteristics which have been demonstrated over a very long period of time;
- distinguishing right from wrong; and
- behaving in an ethical manner, conforming to the rules and values of Australian society.[164]

3.107 It argued that it may be difficult, if not impossible, to judge whether a minor, particularly a young minor, possesses these qualities. The Kaldor and Gilbert + Tobin Centres also explained that a person's criminal conduct is usually weighed against other factors such as the person's contribution to society or steps to rehabilitate. However, due to the age of the minor, they may lack the life opportunity to demonstrate such mitigating factors.[165]

3.108 The AHRC also outlined that article 40 of the CRC requires that the focus be placed on promoting 'the child's rehabilitation, reintegration and assuming a constructive role in society'.[166] The AHRC argue that the proposed provision is inconsistent with article 40 of the CRC.[167]

3.109 Further, the AHRC questioned whether the proposed amendment was reasonably justified or proportionate given that:

> According to the latest statistics from the Australian Bureau of Statistics, the predominant principal offence committed by youth offenders (i.e. children aged 10 to 17 years) was theft, which comprised 35% of all youth offenders. Approximately half of those offenders were proceeded against for public transport fare evasion. Furthermore, over the period 2008–09 to 2015–16, the number of youth offenders declined across most offence

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162 Explanatory Memorandum, pp. 80–81.

163 Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 9; Adelaide University, Public Law and Policy Research Unit, *Submission 398*, p. 4.

164 Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 10. The Citizenship Policy is guidance document published by the Department which is non-binding.

165 Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 10.

166 Australian Human Rights Commission, *Submission 447*, p. 30.

167 Australian Human Rights Commission, *Submission 447*, p. 30. See also Muslim Legal Network, *Submission 413*, pp. 10–11; and Multicultural Youth Advocacy Network, *Submission 443*, pp. 1–3.

> categories. Without strong evidence that there is a need to protect the Australian community from children who have committed 'particularly serious crimes' and that this measure would be proportionate to achieving this objective, the Commission queries the justification for extending this generalised 'good character' requirement to children.[168]

3.110 As such, a number of submitters suggested that the provisions be amended so that they applied only to 'serious character concerns' or 'particularly serious crimes'.[169]

3.111 The Law Council also questioned the utility of this section applying to all minors, regardless of their age given that children under 10 years of age are deemed to not be criminally responsible for conduct that would otherwise amount to a criminal offence.[170] Consequently, the Law Council suggested that if good character requirements are introduced for minors, that the provision be amended to apply to applicants who are 10 years of age or older.[171] It is noted that the EM acknowledges that children under 10 years of age are not held criminally responsible:

> …the Department will not seek criminal history records of children under the age of ten, as this is below the age of criminal responsibility in Australia.[172]

Committee views

3.112 The committee believes that an important role of Government is to review Commonwealth laws to ensure that they continue to serve their intended purpose. Governments are formed by elected parliamentarians who, in a representative democracy, reflect and represent the views and beliefs of Australians. Such a Government is, therefore, responding to broad community concerns in relation to the integrity and effectiveness of the current Australian citizenship framework. As well, the Government conducted extensive consultation in 2015 and sought further comment in 2016 in response to the discussion paper *Strengthening the Test for Australian Citizenship*. The results of the consultation indicate that the Australian community believes that requirements for Australian citizenship should be strengthened. It is fundamentally for this reason that the committee recommends that the bill be passed.

Strengthening citizenship requirements

3.113 The committee acknowledges that it has received a very large number of submissions to this inquiry and thanks all submitters and witnesses for their time and

168 Australian Human Rights Commission, *Submission 447*, pp. 30–31.

169 Australian Human Rights Commission, *Submission 447*, p. 31; Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, *Submission 378*, p. 11; and Adelaide University, Public Law and Policy Research Unit, *Submission 398*, p. 5.

170 Law Council of Australia, *Submission 464*, p. 18.

171 Law Council of Australia, *Submission 464*, p. 19.

172 Explanatory Memorandum, p. 73.

for sharing their personal stories. In particular, the committee notes the concerns raised by submitters and witnesses in relation to the proposal to amend general residency requirements, the new English language test, the limitation on sitting the citizenship test, the requirement to integrate into the Australian community, the Australian Values Statement, and the new pledge of allegiance. The committee notes, with no reflection on the sincerity of submitters, that most submissions (apart from campaign letters) were from groups, organisations, lawyers, and those directly or personally impacted by the proposed changes, and very little active response from 'ordinary individual' Australians who expect the Government to action their views. However, the committee also notes that consultations were conducted in relation to these provisions in 2015 and 2016 and that 2,544 responses were received to the National Consultation on Citizenship's on-line survey, the results of which were as follows:

- 64 per cent of people felt that Australian citizenship is not sufficiently valued;[173]
- 88 per cent of people believed that areas for the citizenship test and the pledge should be examined, as well as the qualification criteria including English language, more rigorous entry processes, identity, and criminal history;[174]
- 91 per cent supported examining the role of the existing citizenship test and pledge to ensure the integrity of the citizenship program;[175] and
- widespread recognition of the importance of English language for full integration in Australian society and support for raising the minimum standard of English from 'basic' to 'adequate'.[176]

3.114 The results of the consultation show strong support for the Government to implement changes to encourage greater integration and participation within the Australian community, as well as promote greater understanding of the rights, responsibilities and privileges attached to Australian citizenship. The committee is of the view that the bill achieves these objectives and indeed enhances the value of Australian citizenship.

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173 Senator the Hon. Concetta Fierravanti-Wells and the Hon. Philip Ruddock, *Australian Citizenship—Your right, your responsibility*, National Consultation on Citizenship, Final Report, 2015, p. 11.

174 Senator the Hon. Concetta Fierravanti-Wells and the Hon. Philip Ruddock, *Australian Citizenship—Your right, your responsibility*, National Consultation on Citizenship, Final Report, 2015, p. 14.

175 Senator the Hon. Concetta Fierravanti-Wells and the Hon. Philip Ruddock, *Australian Citizenship—Your right, your responsibility*, National Consultation on Citizenship, Final Report, 2015, p. 17.

176 Senator the Hon. Concetta Fierravanti-Wells and the Hon. Philip Ruddock, *Australian Citizenship—Your right, your responsibility*, National Consultation on Citizenship, Final Report, 2015, p. 18.

Additional powers of the Minister

3.115 While the committee acknowledges that concerns raised by submitters in relation to additional powers the bill proposes for the Minister, the committee considers that these powers are necessary and proportionate to ensure the integrity of the Australian citizenship program. The committee also notes that an overwhelming majority of participants to the National Consultation on Citizenship (91 per cent) supported more rigorous migration and border entry processes.[177]

3.116 The committee notes that where the Minister has personally made a decision, which he determines to be in the public interest, to refuse to approve, or cancel the approval for citizenship pursuant to proposed section 52(4), the Minister must table his decision, including the reasons for the decision, within 15 sitting days of Parliament. The committee is satisfied that this provides a sufficient level of transparency. Ultimately the Minister is accountable to the Australian public for his actions over three years.

3.117 This same requirement also applies for decisions the Minister makes under proposed section 52A of the bill to overturn a decision of the AAT. The decisions of the AAT which were referred to in the EM are concerning and clearly fall well outside community standards. Where the Minister exercises his discretion to overturn a decision of the AAT, the applicant will still have access to judicial review, and the committee considers this to be appropriate. As well, the committee notes that the Minister is accountable to the Parliament and ultimately the Australian public whereas AAT members are not 'judiciary' and may not necessarily have any better learning, appreciation or ability to make a decision than the Minister and are generally accountable to no one on the merits or otherwise.

3.118 The committee considers that the additional powers of the Minister are necessary to ensure integrity and confidence in the citizenship program as well as bringing the Minister's powers closer in line with similar provisions under the Migration Act.

Additional requirements for children

3.119 In relation to the proposed limitation to the 10 year rule, the committee is satisfied that children who may be rendered stateless because of the provision will have an opportunity to apply for citizenship through the conferral process. The committee is of the view that it is important to encourage lawful pathways to migration and citizenship and that the restrictions to the 10 year rule would assist to achieve this objective.

3.120 In relation to the proposed amendment to require applicants under the age of 18 years to pass a character test, the committee again reflects on the views of the community as reported through the National Consultation—that a more rigorous entry

177 Senator the Hon. Concetta Fierravanti-Wells and the Hon. Philip Ruddock, *Australian Citizenship—Your right, your responsibility*, National Consultation on Citizenship, Final Report, 2015, p. 16.

process is conducted including consideration of a person's criminal history.[178] Accordingly, the committee considers that this aligns with community expectations.

3.121 For the reasons outlined above, the committee is satisfied that the bill is reasonable and justified, and therefore recommends that the Senate pass the bill. However the committee makes a number of other recommendations to the Government to consider some of the concerns raised during public hearings of the committee, which also reflect the experiences of committee members as Parliamentary representatives in a representative democracy.

Recommendation 1

3.122 That the Government clarify the standard for English-language competency required for citizenship, noting that the required standard should not be so high as to disqualify from citizenship many Australians who, in the past, and with a more basic competency in the English language, have proven to be valuable members of the Australian community.

Recommendation 2

3.123 That the Government reconsider the imposition of a two-year ban on applications for citizenship following three failed attempts of the citizenship test, and consider other arrangements that allow additional tests on a cost-recovery basis that would deter less-genuine applicants.

Recommendation 3

3.124 That the Government consider introducing some form of transitional provisions for those people who held permanent residency visas on or before 20 April 2017 so that the current residency requirements apply to this cohort of citizenship applicants.

Recommendation 4

3.125 That the Senate pass the bill.

Senator the Hon Ian Macdonald
Chair

178 Senator the Hon. Concetta Fierravanti-Wells and the Hon. Philip Ruddock, *Australian Citizenship—Your right, your responsibility*, National Consultation on Citizenship, Final Report, 2015, p. 14.