COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Australian Citizenship (Transitionals and Consequentials) Bill 2005; Australian Citizenship Bill 2005

MONDAY, 30 JANUARY 2006

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Monday, 30 January 2006

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Kirk, Mason and Scullion

Substitute members: Senator Hurley to replace Senator Crossin

Participating members: Senators Abetz, Allison, Barnett, Bartlett, Mark Bishop, Brandis, Brown, George Campbell, Carr, Chapman, Colbeck, Conroy, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Heffernan, Hogg, Humphries, Hurly, Joyce, Lightfoot, Ludwig, Lundy, McGauran, McLucas, Milne, Nettle, Parry, Robert Ray, Scullion, Sherry, Siewert, Stephens, Stott Despoja, Trood and Watson

Senators in attendance: Senators Bartlett, Hurley, Payne and Scullion

Terms of reference for the inquiry:

Australian Citizenship (Transitionals and Consequentials) Bill 2005; Australian Citizenship Bill 2005.

WITNESSES

Committee met at 9.04 am

BROOKS, Ms Alison, Paralegal, Administrative Law and Human Rights Section, Law Institute of Victoria

RODAN, Mr Erskine Hamilton, Councillor and Board Member, Law Institute of Victoria

CHAIR (Senator Payne)—Welcome to this inquiry into the provisions of the Australian Citizenship Bill 2005. This is a hearing for the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the Australian Citizenship Bill 2005 and the Australian Citizenship (Transitionals and Consequentials) Bill 2005. The inquiry was referred to the committee by the Senate on 30 November 2005, for report by 27 February 2006. The Australian Citizenship Bill 2005 and the Australian Citizenship (Transitionals and Consequentials) Bill 2005 Bill replace the Australian Citizenship Act 1948, which governs the conditions under which Australian citizenship may be acquired, revoked and resumed.

The committee has received 52 submissions for this inquiry, which have been authorised for publication and are available on the committee's website. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies of those notes are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee does prefer all evidence to be given in public, but under the Senate's resolutions witnesses have a right to request to be heard in private session. It is important that witnesses give the committee notice if they do intend to ask to give evidence in camera.

I now welcome Mr Erskine Rodan and Ms Alison Brooks from the Law Institute of Victoria. The Law Institute of Victoria has lodged a submission with the committee, which we have numbered 51. Do you wish to make any amendments or alterations to that submission?

Mr Rodan—No.

CHAIR—Thank you very much. I invite you to make an opening statement. At the conclusion of that, I will go to members of the committee to ask questions. I thank the Law Institute for appearing. I know it is that period of time between the end of the vacation period and the beginning of the working year, so we are very grateful both for your submission and for your appearance today.

Mr Rodan—Fine. If I could just start by saying that many of the provisions in the new bill are welcome, particularly the ones relating to children of resumptees, if I could put it that way—those people who want to resume citizenship. The facility for resuming citizenship I think is very helpful.

I want to look at some of the other issues. One of the things we do worry about is the increase in the minister's discretion. That increase in discretion seems to appear quite regularly around the various areas of the citizenship bill. At one stage I think it becomes quite bland—in section 24 of the bill. I have not got the particular section with me at the moment, but I am aware of it, and it is quite bland.

I want to look at the ASIO assessments. I understand that we are living in a different age now and we have to have ASIO assessments. But, if we are going to have assessments in which people can be assessed adversely, then they should have an opportunity to challenge that adverse assessment or to qualify an assessment. I do not see any opportunity for that to happen under the current bill. I may have misread it, but I just do not see it there at the present moment.

Going back to the minister's discretion, I understand that under section 24(2) the minister may refuse, despite the person meeting the criteria. Under section 65 of the Migration Act, if a person meets the criteria—that is, health, character and all the other specific criteria—then the minister must grant the visa. Here, in this bill, the minister may not necessarily grant the application for citizenship, despite the applicant meeting the criteria. Section 24(2) needs to be looked at again.

Going back to the ASIO assessments, we have to ask, under section 24(4): how long is an ASIO assessment in force? Is it in force for a lifetime, is it in force for a few years or is it reviewed? Are there any issues about the opportunity to review whether it should be still in force or not?

There is a minor problem I have about proposed section 24(6)(a). It seems to be a broad brush. If I can go to that section, it says something like this: regarding offences, proposed subsection (6) prevents the minister from approving the application for citizenship of a person who is subject to the following offence related provisions:

> (a) when proceedings for an offence against an Australian law (including proceedings by way of appeal or review) are pending in relation to the person ...

That seems to be a fairly wide berth. It could include a traffic offence, I suppose—not necessarily a parking offence, but a very minor offence. I think the later part of that section talks about bonds in a similar tone. It could be that someone has got a bond on a drink driving matter, just on 0.05 or whatever the reading is. Does that stop that person from applying for Australian citizenship and being granted it? That is another issue.

Regarding the issue of three years out of five, we say it should be kept down to two. Although when you look at it you see that Sweden has got five years, New Zealand has three years and America and the United Kingdom have longer periods of time, those countries now are not wanting migrants so much. We are, but will we be saying in our new lot of TV ads, 'Come up and enrol to be an Australian citizen, but you've got to wait another year'? Do we change our TV ads to reflect this new attitude? Or are we saying to every person who wants to apply for citizenship, 'We believe that you're a nice person, but then again you may be a terrorist'? The underlying message here for a country like ours which wants migrants is not necessarily a positive one.

Already we have obstacles in the way of people getting permanent residence. Business migrants have to wait two years before they can get approval for a permanent visa. Partners have to wait two years before they can get a permanent visa. Some of the skilled visas are going to be moved into temporary visas as well as permanent visas. So you have got a two-year wait to get to permanent residency and another two-year wait to get citizenship. That is four years of your life that is basically in limbo. Now we are going to make it five. I think it is an unnecessary penalty. If you are going to say to partners or business migrants or skilled

migrants, 'We'll grant you permanent residence straightaway,' then perhaps the three-year term for waiting for citizenship is appropriate. But you have got a very long wait already, so why make it longer? They are probably the main issues we want to raise with you now, apart from the matters we have already raised in our submission.

CHAIR—Thank you very much, Mr Rodan. Ms Brooks, did you wish to add anything?

Ms Brooks—Expanding on the area of the ministerial discretion that is available, the Law Institute considers that the government policy should not be able to have an impact. If someone fulfils all the criteria for citizenship then the government policy should not be able to have an impact on whether or not citizenship is granted.

CHAIR—Thank you very much. Mr Rodan, in your opening remarks you made some observations about the process of ASIO assessment and the duration for which such an assessment should be in place. I think in making your observations you said, 'Should it be without end or should it last for 12 months or so on?' Does the Law Institute actually have a view as to the duration of force of such an assessment?

Mr Rodan—No, we do not have a considered view at the moment, but it is something which I think has to be up for discussion and which we all have to think about. I can understand it from the Attorney-General's point of view and I can understand it from ASIO's point of view but I can also understand it from an applicant's point of view. Say it was a person like Scott Parkin, who I acted for, he did not get an opportunity to look at his assessment. It may have been an assessment that was right on the border. It may be one of those that just tip over the border and are no longer an assessment in force. It may be that 12 months later they say, 'The world has changed now and we've allowed Greenpeace people to do this or say that.' It is flexible. It is something that I think a lot more thought has to go into.

CHAIR—I appreciate the point that you are making. The only other question I have at the moment concerns the length of time now being proposed in the bill before citizenship can be granted—three years. What do you say to the observation that essentially that is a reflection of the change in circumstances that we see around the world now? The granting of citizenship is a very significant privilege in a nation and, as you say, some nations hold with five years, some hold with three and two and so on, and increasing the term to three years gives a greater opportunity to the authorities and to the system in Australia to make the assessments that need to be made to give the individual a chance to appreciate the Australian system, norms and environment. So really it is a way to adjust to the new international circumstances in which we find ourselves but still be in a position to grant citizenship to those in Australia who are keen to seek it.

Mr Rodan—Yes, I accept that point of view. But the problem, I think, is that we do have a long lead-up time before a person can get citizenship. For instance, you already have to request clearances from ASIO and the Australian Federal Police to ensure that a person is suitable for censorship. If it is two years, what difference does 12 months make, apart from, say, passing a message through to those people that they may not be wanted as much as we wanted them last year? What is going to be our message in our citizenship drive—because we are always asking people to become citizens?

There are arguments on both sides and it is a question of balance, I suppose. I suppose, in one way, the government could turn around and say, 'We could have made it five years; we could have made it four years or three years.' But who are the people that are affected? Are they, say, refugees coming from Middle Eastern countries? Those people have been on temporary visas for 2½ years or three years and then they go on to permanent visas for a couple of years, so the government has had five years to look at them anyhow, to see what they are about and to see if they are people who should not or should be citizens. If that is the worry, then our observation systems are not working well. To me it seems a slight on those people who come to Australia, consider it their home, sell up everything from their other places and think that now they have to wait another year because of the particular situation that is occurring around the world at the present moment. As I said before, it is a matter of balance and it is a matter in which the government has to choose anyhow. We are just putting our point of view.

Senator HURLEY—My question is in regard to the period before you can apply for citizenship. Once the bill is passed, it will affect everyone who is already in Australia. You might have been in Australia for two years and six months and will not be able to apply for citizenship for another six months. Is that a normal kind of provision? Is there any justification for saying that people who came into Australia with a view that it only takes two years to acquire citizenship should not have to wait for the three years?

Mr Rodan—That is a question I should ask you! I would have thought the transitional and consequential amendments would have dealt with that much more leniently and ensured that people who already have their two years up would have the opportunity to apply for citizenship here and now. But, if that is the way the law is going to be, unfortunately that is the way the law is going to be. Generally, I thought that the law was that you would look at things beneficially for those who have the time up already. Generally speaking, the laws of immigration and citizenship are like that. For instance, the old 1948 act—the current act—looks at cases much more beneficially on an individual basis if the opportunity arises.

Senator SCULLION—Thank you very much for your submission. I think many of the issues have been covered in it. There is a common theme in many of the submissions which relates to ministerial discretion. Interestingly, your own institute and many of the law societies in other submissions have spoken vigorously against the concept of strict liability offences because circumstances in the world are such that there is flexibility outside of statutes that you may not understand and know well when you are writing that statute. I would have thought that ministerial discretion allowed some flexibility within that statute to deal with a plethora of issues—whether it is identification or a whole range of issues that change so quickly in the world—and gave some latitude to the minister to be able to provide some discretion beyond the statute. Normally, you would be arguing that that would be the case. We need people with a bit more flexibility. We cannot rely on just a piece of statute. The world evolves. We need a bit of commonsense and flexibility. I would have thought in this context that discretion—and you can look at the potential mischievous side—generally speaking would have been a very sensible position to have.

Mr Rodan—I think positive discretion is something we have to look at as appropriate, but then there is the negative discretion. For example, proposed section 24(2), which says that the

minister may still refuse despite the fact that the person satisfies all the criteria, is going too far. I think a person would not want to waste their money on making an application if they can then be told, 'Sorry, we are not going to have you, despite the fact that you have satisfied all the criteria, including an ASIO assessment, a Federal Police check or whatever.' I think negative discretions have to be governed by much more specific legislation. There must be checks and balances against that particular discretion.

Senator SCULLION—I would like to ask a question—which is perhaps a supplementary question to the chairman's questions—about whether you see citizenship as a right or a privilege, which I think is the fundamental difference in how you approach some of the material that is before us today. You have asserted in some of your opening submissions that, because Australia confers important rights, they should not be unnecessarily delayed. The confusion I have with that—and perhaps you can explain this—is that, whilst I accept that the rights are important, why do you think the conferral of these rights is so important that we have to put aside slightly the value that these rights are maintained by ensuring that they are not conferred on those people who do not perhaps reflect the values? You talk about an extra year. An extra year is neither here nor there. So, first of all, do you think it is a right or a privilege that people have citizenship? It is such an important part of our nation—the conferral of what eventually becomes a right, I suppose, once it has been conferred upon someone.

Mr Rodan—I think you answered the question there. I think citizenship by application is a privilege in many ways because it is something that the Australian nation is giving to you. Citizenship by birth is a right, of course. We are looking at two different groups. But with the ones that we presently call citizenship by grant, which is going to be citizenship by application, that is citizenship by privilege. It is a privilege given to a person. That is, they have the opportunity to join our community. But we have been saying to those people in our advertising and in our public relations, 'We want you to become citizens.' So it may be a privilege, but we are trying to persuade people to become citizens. It is a privilege for those people and, once they have had that particular privilege conferred on them, they then have all the rights of Australian citizens.

Senator SCULLION—I have one comment. Generally, things that are associated with a privilege are associated with some discretion about that privilege. I understand the differential—you explained it very well—between those who are afforded the right by birth and those who are privileged because it is in a different process. Would you agree that when we are talking about a privilege it is normally associated with some sort of level of discretion?

Mr Rodan—Yes, of course it is. That pervades the old act as well as the new bill, but we are just saying that we think that some of the discretions that are placed in the new bill are a bit over the top because they allow for negativity. We think that any kind of discretion that the minister is able to give should have a positive outcome. For instance, a partner of an Australian citizen at the present moment only has to wait for up to 12 months before they can apply for citizenship. Secondly, some Olympians and Commonwealth Games persons have obtained citizenship and they have not waited for two years. That still stays in the new bill. That is very good. Those kinds of privileges are positive privileges. But section 24(2) gives us a lot of worries. We are concerned about how a person who passes all the tests can be refused

citizenship. That is an issue which everyone has to face, and we have to really think about that particular issue.

Senator BARTLETT—I offer my apologies for missing part of your contribution earlier. I want to tease out the issue of discretion a little bit more. There are some discretionary powers at the moment, which I suppose are more what you might call positive discretions, to waive some requirements. I am presuming you are comfortable with those staying there. I would be interested to know if you have any views on transparency, which is one of the things you seemed to raise. It is something that has been chewed over in great detail in the migration area—when a minister makes a decision to use discretion and says, 'You can't have it, but I'm not going to tell you why, and that's that.' Firstly, what sort of degree of detail in reasons would you think would be appropriate for a minister to use to explain, if they were to use that discretion negatively? Secondly, are you aware, from your current experience, of whether there is much detail given when a minister uses discretion in the citizenship area?

Mr Rodan—What—negatively? What do you mean? Do you mean a negative decision?

Senator BARTLETT—Any use of it, I guess. People are less worried about details when they get a positive one, I realise. One of the downsides, even from the positive use of discretion, in not having details is that you do not know why it is used in some circumstances and not in others. I am wondering, as I have not had as much to do with this area, whether there is much detail provided when positive discretion is exercised.

Mr Rodan—They do have the Australian citizenship instruction sheets and they do have guiding policy in relation to issues relating to section 13 especially, which is the grant provision. It has a detailed list of criteria and also a list of opportunities for people to have the two-year rule waived. We do use them quite a lot. I find that, providing you have enough positive information and enough assistance, you can persuade the regional director here. When there is a negative decision made, then there is the right of review to the AAT. For instance, in the Pixie Skase case there was a right of review in that case, and there has been a right of review in numerous other cases. If you have not had the reasons properly spelt out at the time of a decision, they are properly spelt out by the time that it gets to the AAT. But that is an expensive way of getting your rights properly spelt out.

If, for instance, section 24(2) were to stay—and I do not want it to stay, because I see it as an overriding provision—you would have to have strict guidelines. You would have to have much more measured legislation to ensure that that negative aspect would be governed through either parliamentary scrutiny or tribunal scrutiny, or both. But it is one that I do not want there. I do not know if I have answered your question properly. With regard to positive assessments, there are plenty of guidelines at the present moment which I imagine will be readopted in most cases in the new bill. With regard to negative ones, as I said to Senator Scullion I am very cautious and very worried about that particular section—section 24(2).

Senator BARTLETT—I have a final question on that. You used the example of the Pixie Skase case. Obviously the final outcome of that was successful in that the minister's exercise of discretion was set aside. Do the new powers contained in this bill remove that appeal?

Mr Rodan—No. I do not think the right of review has been removed at all. I think that right of review is still there.

Senator BARTLETT—So potentially there would still be scope for review—which is one of the problems with the migration discretion?

Mr Rodan—Yes. There is a straightforward review, but it is expensive.

Senator BARTLETT—I appreciate that. Pixie Skase may have had more legal assistance than some other people would be able to manage.

Mr Rodan—Yes, okay.

Senator BARTLETT—I just wanted to establish that point.

CHAIR—Thank you very much, Senator Bartlett. As we do not have any further questions for the Law Institute, Mr Rodan and Ms Brooks, thank you both very much for appearing. As I said at the commencement, we do appreciate the Law Institute's submission and your agreement to appear today. It has been very helpful to the committee.

Mr Rodan—Thank you.

[9.38 am]

EVANS, Dr Simon Charles, Director, Centre for Comparative Constitutional Studies, Faculty of Law, University of Melbourne

CHAIR—Welcome, Dr Evans. I understand that the submission provided by the centre was a submission provided jointly by you and your colleague Mr Daniel McCluskey. The committee are most regretful to have heard the news of Mr McCluskey's untimely passing, and we convey our condolences to both the centre and his family.

Dr Evans—I thank the committee for that.

CHAIR—The centre has lodged a submission with the committee which we have numbered 33. Do you need to make any amendments or alterations to that submission?

Dr Evans—No.

CHAIR—I now invite you to make a brief opening statement and, at the conclusion of that, we will go to questions from members of the committee.

Dr Evans—Thank you very much for the opportunity of speaking to the submission and thank you for the expression of condolence to the centre and to Daniel's family. The Citizenship Act and the reforms proposed by the present bill are an important part of Australia's constitutional fabric, not its large 'c' constitutional fabric but small 'c'—the legal instruments, the conventions and the principles that make up the character of the nation. It is fundamentally important not only that the Australian Citizenship Act be considered carefully by the people and the parliament but also that it be capable of being understood by the people and the parliament.

Therefore, we welcome very much the redrafting of the old act in the present bill to make it clearer and more accessible to the Australian people and to people who are potentially affected by the Australian Citizenship Act. We very much welcome the attention of the drafters and the minister in pursuing the recommendations of the Australian Citizenship Council. We think that on the whole the bill is a very positive step towards simplifying the citizenship regime and clarifying the constitutional fabric of citizenship.

There are, however, eight matters about which we think there is room for further improvement. Some of those matters are matters that affect only a relatively few number of people but are nonetheless significant; but most of them are matters of constitutional principle: the principles of the rule of law, the clarity of legislation, the accessibility of legislation and the appropriate statutory control of discretion. Those matters are as follows, and I am happy to amplify them in response to questions. The first is a matter that has already exercised the committee this morning: ministerial discretion. This matter is in relation to the unnecessary ministerial discretion to refuse citizenship even where all criteria for eligibility have been met. We proposed that it be either eliminated or structured—that is, provided with relevant criteria for its exercise rather than left as an unstructured discretion.

Secondly, it is proposed that there be changes to the bill to improve accessibility. The first and most significant of those changes is in relation to the transitional provisions. A question that will commonly exercise readers of the act—Australian citizens as users of the act—is: what is the status of my citizenship? The act does not spell out in its own terms that existing

citizens remain citizens on the commencement of the new act. That is left to the Australian Citizenship (Transitionals and Consequentials) Bill 2005. It seems to us that that is a matter of such fundamental importance regarding Australian citizenship that it properly belongs in the principal act.

Also in the interests of accessibility, it is proposed that there be some kind of narrative or tabular explanation of the operation of the act. The explanation would be of the various ways in which someone can be a citizen—by descent, by conferral and so on—and their relationship to the bases for citizenship under the old act.

Thirdly, it is proposed that there be a small extension to the right of review in the Administrative Appeals Tribunal. On the whole, we welcome the continuation of wide-ranging review in the AAT of decisions made under the act. But there is a small category where review is, we submit, unnecessarily restricted.

Fourthly, it is proposed that provisions relating to applications by children for citizenship be clarified in the act. The act does not make clear whether children apply in their own right or are included in an application on behalf of the parent, or the relationship between those respective applications. Fifthly, on discretion—which I touched on earlier—and specifically in relation to the discretion to grant citizenship in children, it is proposed that that discretion be structured as well.

It is also proposed that there be some minor changes to citizenship by adoption. In addition, in relation to residency requirements we do not make any submission on the extension of the duration of residency required for permanent residents to become citizens, but we do note that the extension of that period will have the effect of delaying citizenship for some people and they should be made aware of that. There ought to be a public awareness campaign or some appropriate measures taken by the department to ensure that people who are affected by that delay know of it.

Penultimately, we submit that the statelessness provisions are unduly restrictive. Finally, we would like to make a point about renunciation of citizenship where later-born children are unable to resume citizenship in cases in which, prior to their birth, their parents have renounced citizenship. Those are the points touched on in this submission. I am happy to expand on any or all of them.

CHAIR—Thank you very much, Dr Evans. I thank you and the centre for your submission. I want to clarify one point. You make, by way of footnote, the observation on page 2 of your submission that the discretion that is provided for in this bill is essentially the same as the discretion which existed in the old act; the bill merely seeks to clarify the wording. That is the case, isn't it?

Dr Evans—That seems to be the case, yes.

CHAIR—So there is no change with regard to that. Thank you. I appreciate that. Some of the suggestions that the centre has made in relation to the clarity and accessibility of information about citizenship are quite valuable, and the committee will consider them. We will have an opportunity to speak to the department at the beginning of next week, so we can certainly take those up with them. If I understand you correctly, you are saying that for the

purposes of achieving those ends of clarity and accessibility the thing to do would be to put the transitionals and consequentials bill into the head act as a schedule.

Dr Evans—I do not think that all of the transitionals and consequentials bill needs to go into the head act. There are long schedules of changes to a raft of legislation, such as the Australian Citizenship Act, the Migration Act, the Higher Education Funding Act and so on, that properly belong in the transitionals and consequentials bill. subsection (1) of clause 2 of schedule 3 of the transitionals bill spells out the following:

> For the purposes of the new Act, the definition of Australian citizen ... includes a person who was an Australian citizen under the old Act immediately before the commencement day.

So that is a matter of definition that could properly go in the definition provisions of the new act. Subsection (2) of clause 2 of that schedule says:

> If the person, immediately before the commencement day, was an Australian citizen ... the person is taken, on and from that day, to be an Australian citizen ...

That is a substantive provision about who is entitled to Australian citizenship, and it deserves to be a substantive provision, not a schedule, of the head act, near the outset of the act.

CHAIR—I appreciate that, and I thank you very much for clarifying that for me.

Senator HURLEY—I want to focus a little on the children of people who are forced to renounce citizenship. You referred to Maltese people specifically. I have had a number of representations from Maltese people and children of Maltese people. Do you know of any other group that might be similarly affected?

Dr Evans—I do not. I imagine that parliamentarians receive direct representations from many communities whom this affects. The Maltese community is one that is particularly well known.

Senator HURLEY—The minister said in his second reading speech that people who have renounced their citizenship should have understood the effect of it on their children and that that was the reason for separating them from people who have just lost their citizenship by way of acquiring another citizenship. Do you see any significant difference between renouncing and losing citizenship in that way? Is there any way that that might have unintended consequences if it is changed?

Dr Evans—A person who renounces their citizenship is taking a conscious and deliberate act and ought to do so with full knowledge of the consequences. That is not to say that they necessarily will have full knowledge of the consequences or that the effects of their act should flow through to their children, where there are exceptional circumstances affecting those children. I would not suggest that children born later automatically retain Australian citizenship. That clearly would be inappropriate. We are proposing that in exceptional circumstances, where there is particular hardship for the later born child, they be eligible to apply to reacquire citizenship. It seems to us that that strikes an appropriate balance between the seriousness of the step taken by their parents of severing the connection with the Australian community and the reality that, notwithstanding that formal severance by their parents, the child may retain an effective bond with the Australian community such that if

they were to lose their Australian citizenship there would be extraordinary disruption to their lives.

Parents might renounce their citizenship in order to return to a country overseas to take up work, for example, but later have children who are able to come and study and live in Australia over a long period and develop extensive connections through extended family who remained in Australia and retained Australian citizenship. If those children were later unable to take up Australian citizenship based on their parental connection, that could cause them significant hardship. I acknowledge that there may be alternative routes for those children to take in order to obtain citizenship other than through reliance on their parents' former citizenship, but it would seem that they are really claiming that they have a direct connection to Australia through their family.

Senator HURLEY—Just to clarify, you are saying that, rather than those children having to apply to come back to Australia as migrants, as part of the official migration program, a case can be made that they should be able to apply for citizenship by conferral, given their links to Australia via their parents.

Dr Evans—Yes.

Senator SCULLION—I have a clear understanding of most of your submission, but I am somewhat confused about the last paragraph in the section relating to citizenship by application for children. You recommend that section 36 be amended in the same way as section 24—

Dr Evans—Yes.

Senator SCULLION—notwithstanding your recommendation regarding the removal of subsections (2) and (3) of section 52 to allow all decisions made under section 24 to be reviewed. I want to have a clear understanding of this: is that a suggested amendment?

Dr Evans—I was suggesting that section 36 be amended in a parallel way to the way we recommend that section 24 be amended in order to provide a structured discretion for the minister to take into account the best interests of the child and so on—the three factors shown in bullet point form on page 4 of the submission.

Senator SCULLION—It is effectively extending the discretionary powers in the same way as those areas of discretionary powers that are currently appealable via the AAT. Is that effectively the same?

Dr Evans—Not so much extending them as spelling out the factors that the minister takes into account.

Senator SCULLION—These are the areas under which he can exercise that discretion?

Dr Evans—These are the matters that he has to take into account in exercising the discretion.

Senator BARTLETT—In your submission you raise the issue of the denial of the opportunity for a merits review to non-permanent residents. You mention a few specific examples—people born in Papua, stateless persons, children of former citizens. Are you

suggesting that there should be a blanket opportunity for merits review or are you suggesting that people in those circumstances should be—

Dr Evans—The suggestion is that section 52 be amended by omitting subsections (2) and (3) so that it is not a requirement for seeking merits review that the person be an Australian permanent resident. The references to people born in Papua and so on are specific instances where that is likely to be engaged, rather than recommendations about amendments to the bill.

Senator BARTLETT—All three of those instances have some idiosyncrasies, for want of a better word, or one might even suggest anomalies. You address the statelessness instance elsewhere in your submission as well. That is one that I am also interested in. There are provisions in this legislation to ensure that people do not end up stateless by virtue of cancellation of citizenship and also regarding application on the ground of statelessness. I know, having dabbled a little regarding this in the migration area, that it is not as precise a concept as people assume it is. I wonder whether the use of the term is clear enough in this legislation or whether we need to nail it down more tightly.

Dr Evans—I will respond first to the point about merits review and then come to statelessness in a moment. It seems to us that the general approach to administrative law and administrative justice in Australia is that merits review be available unless there is some exceptional reason for precluding it. That is the approach that is consistently being taken by the Administrative Review Council and that is largely reflected in legislation. It seems to us that there is no compelling case for excluding from merits review persons who are not permanent residents. If there is a fear of a flood of applications, that can be controlled by the AAT with its well-established procedures for dealing with unmeritorious applications. It is not as if the cases where people are not permanent residents raise particular issues that are inappropriate for merits adjudication and so on. It seems to us that the heads of review under proposed sections 52(1)(a) to (f) are appropriate but that the carve-out in proposed subsections (2) and (3) are unnecessary.

On statelessness, I take your point that the bill contains several provisions which aim to reduce the risk of persons being rendered or left stateless by the operations of the Citizenship Act. The bill does not pursue that object fully, nor should it. Clearly enough there is no obligation on Australia to accept every person who is stateless and to give them a state. But the bill means that a formerly stateless person need not be given the protections of the legislation. That is in accordance with the convention on statelessness. It is permissible for Australia in crafting its citizenship law to say, 'We will act to give citizenship to people who are now stateless and have always been stateless.'

It seems to us that where the bill oversteps is where it says that a person who is now, and always has been, stateless can nonetheless be refused citizenship notwithstanding that at some point in the past they had reasonable prospects of obtaining citizenship somewhere else, even though they no longer have those reasonable prospects. So a person who is now stateless and has no reasonable prospects of obtaining citizenship elsewhere can nonetheless be refused citizenship in Australia. It is the 'no longer having reasonable prospects' that is problematic. I also take your point about statelessness being a somewhat fuzzy concept depending on adjudication of facts equally as complex as Australia's protection obligations under the

refugee convention. It is a minefield. Nonetheless, this provision in the act is unnecessary and does not help.

Senator BARTLETT—You talk about the issue of citizenship by application for children. You do not mention it specifically but an issue that came into my mind when I was reading that—and you mention our obligations under various treaties and conventions—is the prospect of a parent trying to confer citizenship on a child who may have been the subject of a custody dispute and brought here. It is not overly common but it does happen. I know there is a convention—I cannot remember the name of it—that deals to some extent with that. Have you turned your mind at all to whether this section of the legislation adequately addresses any potential risks in the situation where there is an attempt to prevent a child being returned to another country by making them a citizen here? I imagine it would be fairly rare but, given the few cases I am aware of, it is also not out of the question.

Dr Evans—It is a particularly important area. The whole question of how applications are made by and on behalf of children is left largely to implication in this act. This is too important to leave to implication precisely because of the kind of examples that you give. A contrast with this act is the regime in the passports act, which spells out in quite exhaustive detail who may apply for a passport on behalf of a child. It also picks up the definitions of 'responsible parent' that appear in this bill but uses them to control who is able to make an application, so you do not have the situation of a non-custodial parent—to use the old terminology—making an application on behalf of a child when they ought not have that responsibility. It seems to us that there ought to be a regime spelt out in this act to say, for example—and this is just one possibility—that a child under 18 or 16 may not apply for a passport on their own behalf but a responsible parent or two responsible parents jointly may apply on their behalf, or the child may be included in the application of a responsible parent or an appropriate third party if no parents are available to make an application on their behalf.

The act does spell out the consequences when an application by a parent for citizenship is refused. The implications for the child's application follow. However, the act does not say who initiates that application in the first place, who is authorised to initiate that application or who is authorised to take steps in pursuing the application on behalf of the child. It is important to avoid the kind of situation that you mention.

Senator BARTLETT—My last question to do with children is the issue of overseas adoption. I take it from what you wrote in your submission that you think that the provisions in this bill are potentially contradictory to the Hague convention or at least do not fulfil it.

Dr Evans—Yes, there is that potential.

Senator BARTLETT—And you do have a recommendation there which I think spells out a way to address that fairly clearly. The question on top of that is: what would the potential negative consequences of the provision as it stands be? Would it simply take a bit longer for people to get citizenship, or is there a risk of people not getting around to it until the child is 18 and falling through those cracks?

Dr Evans—Those are the two risks: delay and falling through the cracks. That seems to be a relatively small discretion to add to deal with potentially increasing numbers of children

who are adopted overseas from Hague convention countries, where the adoption takes effect on issue of the certificate of compliance.

Senator BARTLETT—If children are adopted quite young, I could imagine the circumstance arising where the children would just assume they are citizens and would not get around to it and would not know anything until something happens to bring the fact that they are not citizens to light, which of course occurs currently in various circumstances. There is no automatic mechanism at the moment with adoption or anything else with children where people are prompted, reminded or encouraged with this sort of thing to regularise. Sometimes I think it is the last thing on people's minds, particularly with overseas adoption. It is pretty fraught a lot of the time. The last thing you would think of is this issue of making sure your child was a citizen. You might assume it yourself. It is that issue of how much people are made aware of actually needing to do something proactive about it.

Dr Evans—I think it is an information issue. It is also a risk that arises with overseas-born children of Australians—the need to take the proactive steps. People may assume that acquiring the passport necessary to re-enter Australia is sufficient, whereas there are other steps to be taken. I do not think something can be directly addressed in the act. Automatic citizenship for children adopted overseas may be problematic. The parents may not wish to acquire Australian citizenship automatically for the children. I think the discretionary route is the better one. That is a policy judgment, and people better informed than I am about intercountry adoption may take different views. But, just looking at consistency with the structure of the act and the other discretionary provisions, it seems that the discretionary route is the better one—discretion coupled with the information made available, particularly through the organised intercountry adoption agencies.

CHAIR—Dr Evans, there are some issues raised in other submissions—although not particularly referred to in yours—about the use of personal identifiers, which could be sought under the bill, and privacy issues. Do you have a view on any of those matters?

Dr Evans—Establishing the identity of persons applying for Australian citizenship is clearly important, and the provisions that preclude the minister from granting a person citizenship unless satisfied about their identity are appropriate. In that context, it is utterly appropriate that the legislation allow the minister to use technologies that enable him or her to make the best possible identification of persons. Nonetheless, whenever identification is an issue, there are privacy issues. The bill contains what seems to be a robust set of provisions on the misuse of that information—in particular, it contains a prohibition on the use of information for purposes other than under the act. I have not, however, worked through those provisions with the Privacy Act and other privacy regimes to look for any particular issues. I will leave my comments at the level of generality.

CHAIR—Dr Evans, I again thank you very much for your submission, which has been of assistance to the committee. Some of your suggestions are ones which we will pursue further with the agencies when we have a chance to talk to them. Thank you very much for your appearance today.

Proceedings suspended from 10.06 am to 10.21 am

ESZENYI, Ms Deej, President, Law Society of South Australia

LOWES, Ms Sasha Jane, Member, Human Rights Committee, Law Society of South Australia

STIRLING, Ms Paula Denise, Member, Justice Access Committee, Law Society of South Australia

Evidence was taken via teleconference—

CHAIR—Welcome. I thank you for appearing via teleconference. I know it is difficult for parties at both ends, but we are very grateful to you for appearing to support your submission. The Law Society of South Australia has lodged a submission with the committee, which we have numbered 49. Do you need to make any amendments or alterations to that submission?

Ms Eszenyi—No.

CHAIR—Then I will ask you to make an opening statement, and at the conclusion of that we will go to questions from members of the committee.

Ms Eszenyi—Ms Lowes and Ms Stirling have prepared for me a short opening statement which I will read into the record. The Law Society of South Australia thanks the committee for the opportunity to make submissions in relation to the citizenship bills and to provide further information at today's hearing. Much has been said in recent days about the value of Australian citizenship. It is certainly the case that Australian citizenship is a status to which many aspire. Citizenship is not merely a symbolic status; it is by and large the key to full membership of the Australian community and to the tangible rights which flow from that status, including full rights of political participation. The importance of this cannot be overstated.

The Law Society is of the opinion that any changes which affect entry to and membership of the Australian community must be closely scrutinised. Changes which increase the barriers to membership of the Australian community should be soundly justified. The society is disappointed that a number of opportunities have been missed in this overhaul of Australia's citizenship laws and wishes to emphasise three key themes to the committee.

Firstly, the society is of the opinion that individuals should be able to clearly understand their legal position in relation to Australian citizenship. The citizenship bills go some way towards achieving this through the use of plain English drafting, and in this respect the bills improve upon the current Australian Citizenship Act. However the society feels that the goal of clarity and accessibility is diminished in the bills through overuse of ministerial discretion and/or regulation by the executive. In the society's opinion this is part of a disturbing broader legislative trend to increase the power of the executive, particularly in relation to security issues at the expense of individual rights. This is manifested in at least two aspects of these citizenship bills.

Under the new bills the minister retains the power to refuse to confer citizenship even when all expressed eligibility criteria are satisfied. We oppose the retention of this overarching discretion. The society would prefer to see the bills clearly set out the criteria for eligibility and to require citizenship to be granted when such criteria are met. We endorse the comments in the Centre for Comparative Constitutional Studies' submission No. 33, HREOC's

submission No. 50, and the Law Institute of Victoria's submission No. 51A on this point. The bills also propose the collection of personal identifiers which include fingerprints, photographs and iris scans. While the bills purport to introduce safeguards for the access, disclosure and use of personal identifiers, the existence of the safeguards is entirely dependent on executive action.

The power of the state to collect personal information from citizens and residents is a very significant power. If it is to be included at all, our view is that the scope of the power should be clearly defined in legislation and be subject to amendment only through the parliamentary process. Overuse of broad executive powers is undesirable because it increases the appearance of an arbitrary decision-making process and in doing so diminishes the rule of law. It may expose the minister and the Department of Immigration and Multicultural Affairs to criticism on the basis that their decision making is, or is perceived to be, capricious or arbitrary. The society recommends removing the extensive ministerial discretions and executive powers with respect to conferral of citizenship and the collection, use and disclosure of personal identifiers. The scope of such powers should instead be defined in legislation. We refer the committee to the specific recommendations for amendment in our submission.

A second point is this: the society believes that a number of miscellaneous sections of the bills require closer examination in terms of their interaction with other state and federal legislation. The society has only conducted a brief examination of the bills' interaction with state criminal sentencing principles, however it is apparent that the new bills effectively penalise certain offenders through reduced eligibility for citizenship in a manner which is inconsistent with established state criminal law sentencing practices. Further, division 5 relating to personal identifiers may require closer examination in terms of its interaction with state and federal privacy legislation. The society expects that it is not parliament's intention to introduce inconsistencies between the citizenship law and other state and federal laws and the society recommends that greater attention be given to these areas.

Thirdly, the society wishes to draw the committee's attention to the human rights implications of a number of changes which purport to be based on security needs. The society is of the opinion that these changes will have significant impacts on individual rights and yet they have not been adequately justified as necessary, reasonable or appropriate to meet the goal of improved security measures.

The new personal identifiers framework provides for the storage of personal information after an application for citizenship has been approved. The society can see little justification for the retention of identifying information if the purpose of these provisions is only to verify an applicant's identity for the purposes of the citizenship act. Instead, the effect of the personal identifiers provisions will be to create a large database of personal information which will be accessible for a very wide range of purposes.

The society is particularly concerned that the bills provide inadequate protections for the use of personal identifiers in criminal investigations and proceedings. The collection of such information should be regulated by the criminal law and the privacy law, not the law of citizenship. In their present form, the bills may force citizenship applicants to give up their rights of nondisclosure of their personal information in exchange for their citizenship status and, in doing so, the bills risk creating two categories of citizens, with citizens under the new

bills having fewer rights than existing citizens. If the personal identifiers provisions are to be retained, the society recommends that the bills be amended to provide for the destruction of the identifying information once the identity of an applicant has been confirmed.

Further, the bills introduce new security provisions which have ramifications for human rights. The new provisions operate to prevent the minister from approving an application for citizenship while an adverse security assessment or qualified security assessment is in force. The relevant definitions under the ASIO Act are extremely broad and require the minister to deny an application for citizenship on the most tenuous suggestion of alleged risk to security. While applicants have a prima facie right of appeal, the Attorney-General may deem that the person should not be notified of the security assessment if withholding of notice is essential to the security of the nation. As Human Rights and Equal Opportunity Commission has noted in its submission, the use of this power has the effect of removing review rights. In addition, applicants who are notified of the assessment and seek review may be denied any information about the reasons for the assessment and may be excluded from their own hearing.

This denial of the most basic aspects of procedural fairness has been problematic when applied in other areas of law, and its extension to the area of citizenship is of serious concern to the society. At the very least, the society recommends amendments to ensure that the Attorney-General is not empowered to prevent a review, and to ensure that a hearing is conducted into the merits of disclosure of information to the applicant and his or her legal adviser in the interests of justice. We endorse the detailed comments of HREOC in submission No. 50 on this point.

Finally, the society notes that the increase in the residential qualifying period has been described as a counter-terrorism measure and was announced simultaneously with the antiterrorism laws. The amendments will increase the barriers to citizenship and are likely to operate particularly harshly for refugee entrants to Australia, many of whom have already endured lengthy periods of uncertainty. The society considers that no adequate justification has been put forward to support the change in the residential qualifying period on security or other grounds.

The existing legislation already requires applicants for citizenship to demonstrate knowledge of the English language and the responsibilities and privileges of citizenship, and to meet character requirements. The increase in the residential qualifying period merely serves to delay the time at which applicants are judged against these criteria. The linking of the proposed change to terrorism fears may further marginalise members of the community who possess the desire and potential to make a valuable contribution to Australian society as Australian citizens. We recommend that the bills be amended to retain the existing residential qualifying period.

The society thanks the committee for the opportunity to comment further on its submission. We thank our two committee members, Sasha Lowes from the Human Rights Committee and Paula Stirling from the Justice Access Committee, for preparing our submission. Both Sasha and Paula are here and ready to expand on the matters raised in our submission or to provide further information to the committee in writing at a later date.

CHAIR—Thank you. One of the issues we have been pursuing this morning with other witnesses—though relatively briefly because it is not such a large component of their submission—and which is a focus of your society's submission is the question of privacy and the use of personal identifiers, amongst other things. I am interested in some of the suggestions that you make in relation to safeguards. Hopefully, we will have an opportunity to hear from the Privacy Commissioner in Canberra early next week. Have you had a chance to look at that submission?

Ms Stirling—We had a brief look through that submission, but not in great detail.

CHAIR—If you have an opportunity to have another look at that, we would be pleased to receive any brief views you might have on the suggestions that the commissioner makes.

Ms Stirling—We would be happy to do that.

CHAIR—I would appreciate that. I invite Senator Hurley to begin questioning.

Senator HURLEY—Regarding personal identifiers, what comparison is there with other acts where personal identifiers are required—for example, when a person applies for a passport? What comparison is there and have any problems arisen from the disclosure of information?

Ms Stirling—There are probably two acts that are of most relevance. As you suggest, the Passports Act is one. There are provisions in the Passports Act for the collection of certain personal identifiers, largely covered by section 42. The sections covering the disclosure and collection of personal identifiers are expressed somewhat differently in the Passports Act. We have not commented on that in any detail, but there are a couple of points which could be made. One is that the Passports Act makes direct reference to the national privacy legislation, so there has been some attention given to how those two acts would interact with one another. The second point is that, while there are some similarities in the Passports Act with the sorts of information that can be collected, we would very much urge that an approach not be taken that says, 'If they can get it under the Passports Act, why don't we just let them have it under the Citizenship Act?' There are certain classes of people who will not have passports and who have no desire to get passports, and we do not think that these people should necessarily be forced to give up these rights as part of a citizenship application in a separate process.

The other relevant legislation is the Migration Act, and a similar comment applies there: similar sorts of personal identifiers can be collected under that act. The criticisms that we make of the citizenship bills could also be made of the existing provisions in the Migration Act, and we would say that the citizenship legislation should not contain bad law just because the Migration Act contains certain bad law. The final point about the Migration Act is that there are a lot of people who have been permanent residents of this country for a very long time and would not have been required to give up that information when they applied for their visas. If they were to apply for citizenship now, they would effectively be forced to give up that information, which would represent a real loss of rights to those people. We have not considered in detail the way that the Passports Act might interact with the new citizenship bill, but we would be happy to look at that and provide a short written statement at a later date if that would be helpful to the committee.

Senator HURLEY—Yes, that would be helpful. Moving to a different area, I wish to discuss subsection 24(6) of the citizenship bill, regarding sentences imposed and whether people are eligible for citizenship if they are under a good behaviour bond. In your submission you talk about South Australian law, where those bonds might be for quite minor offences that perhaps would not warrant prohibition from citizenship. Are there other instances where bonds might be imposed for serious unlawful behaviour or, in your view, are bonds only ever put in place in the case of relatively minor infringements?

Ms Lowes—I suppose there are several purposes to the use of the discretion to impose a bond. It can be used for purposes other than those which we have described in our submission. An example is that it might be used for rehabilitation purposes. However, the essential point that we are making is that the duration of a bond is often much longer than a sentence of imprisonment that might be imposed for similar or, in fact, more serious offences. This creates an inconsistency which may already be in existence under the act, because the present act allows for denial of citizenship in circumstances where a suspended sentence and a bond are imposed. The criticism that we are making is that this inconsistency appears to be expanded under the citizenship bills. It affects the situation where a sentencing discretion is exercised to impose a bond, whether it is for the purpose of rehabilitation, the recognition of minor offending or other circumstances that weigh in favour of a more lenient penalty. The other example that we have given in our submission is about young offenders—impecunious offenders for whom other forms of sentencing, like a fine, may not be appropriate. The point is that it would disadvantage particular categories of people, in terms of the way it operates with state sentencing principles, and the period of the bond is likely to be longer than the period of imprisonment, and that creates the inconsistency.

Senator HURLEY—Thank you. Your remedy is that the section be removed from the bill, but there might be occasions when bonds are imposed and perhaps less time would be more appropriate. Do you see the removal of that subsection as the only way to deal with this issue?

Ms Lowes—In the preparation of our submission, that was the recommendation that we thought was the most appropriate way of dealing with the anomaly. If we were to consider our views of alternative mechanisms we would need to spend some time thinking about it. Again, we would be happy to take that question on notice if the committee would like us to do that.

Ms Eszenyi—We would also say that it is difficult to imagine a system to review bond cases on a case-by-case basis that would not be an offensive exercise of double sentencing—for example, where you receive one sentence for your shoplifting offence, or other fairly minor offence, in the state court and then undergo a second process of review to work out your sentence in relation to your citizenship application.

Senator HURLEY—Yes, that is the exact difficulty. Thank you very much. I have no more questions.

Senator SCULLION—I thank you, Ms Eszenyi, and your colleagues for a very comprehensive submission. I have a brief question regarding the very clear position you put on the discretionary powers of the minister. Whilst you reflect in section 2.3 of your submission that you are disappointed that the wide discretions in the Citizenship Act have been carried on to the new bills, in your oral submission today you obviously reflected that

you would have preferred the legislation to be run against strict criteria. Quite sensibly, in your submission you went on to say:

... the Society acknowledges that a discretion may well be required for use in extraordinary cases—

Perhaps you could clarify that. There are issues in circumstances regarding individuals who were unknown to us when we wrote the very strict criteria. You also say that the society would:

... prefer to see the use of discretions reserved for genuinely exceptional cases.

Exactly how do you think that may work? What would you call an exceptional case? I am not asking you to find some fictitious examples, but explain how that would work. What would be an exceptional case where the discretion may or may not be used?

Ms Lowes—We are aware that the explanatory memorandum to the bill states the purpose of retaining that discretion. I think that the example given of an exceptional case is where someone wants to become a citizen but is viewed as someone who would promote hatred of a particular group in the Australian community. That may be the intention—and we are aware that the memorandum states that the discretion will only be used in exceptional circumstances—but nonetheless that assurance is not reflected in the drafting of the bill. What the bill actually says is that the minister, for each and every application, can refuse it for a person who satisfies all the criteria. It does not give any guidance as to the exercise of that discretion and the grounds on which it may be exercised. We would suggest that, if the intention is to capture exceptional cases like that example that was given, they might be appropriately dealt with through the use of the existing character test or, otherwise, by the very specific delineation of the circumstances in which an exceptional discretion may apply in the legislation, as opposed to leaving that as an aspect of executive power.

Senator SCULLION—Thank you very much for that. If I could just ask another question to clarify the part of your submission that reflects on division 5. You assert that it is inappropriate to make accidental disclosure by an employee of the department a strict liability offence. You suggest that, instead of that fairly punitive approach to accidental or mischievous disclosure, the legislation should include express provisions requiring the minister not to disclose identifying information. I clearly understand your submission, but I just wondered why you have used the words 'instead of'. Is it because you believe that we should not consider accidental or other disclosures from a departmental person to be an offence at all?

Ms Stirling—I would not necessarily take the position that there should be no offence. The disclosure of someone's personal information is a particularly serious matter and it can have very serious ramifications for that reason. The point that we have picked up on is that on a bare reading of that section that disclosure would appear to be an offence of strict liability; that is, there is no requirement of intention or recklessness for that to be an offence. Offences of strict liability are not the norm in criminal law, and our criticism of this section is in part that it does not establish front-end obligations, if you like, on the minister to ensure a system of proper collection and disclosure mechanisms. It says, rather, that the minister has very broad powers to disclose these personal identifiers but, should there be anyone else who accidentally makes a mistake, then the full weight of the law will come down that person. I think taking the approach of punishing the individual who may make a mistake rather than

putting in proper systemic protection for that sort of information is probably going about it the wrong way. It is putting the wrong emphasis, if you like.

Senator SCULLION—Thank you very much for that clarification.

CHAIR—I am fairly sure that Senator Bartlett would have questions for the Law Society but he is not currently in the room. What we might do to deal with that—and I am sorry for any inconvenience—is that if he did have specific questions we might provide those to you on notice, if that is acceptable to the Law Society.

Ms Eszenyi—That would be fine.

CHAIR—Thank you very much. The committee has no further questions at this stage. Your submission, as I think I mentioned at the beginning, is a very comprehensive one and we are very grateful for that and for its specific detail on a number of points. It has helped the committee very much, as has your provision of evidence to the committee today. We do appreciate it being done by teleconference; we know that it is not the easiest way to do this, so thank you very much for your assistance. I appreciate your presence here this morning.

Ms Eszenyi—Thank you, Senator. We are always grateful for the opportunity to engage in the debate if it contributes to the development of good legislation.

CHAIR—Thanks very much.

[10.50 am]

LENEHAN, Mr Craig Lindsay, Deputy Director, Legal Services, Human Rights and Equal Opportunity Commission

CHAIR—Welcome. The Human Rights and Equal Opportunity Commission has lodged a submission with the committee which we have numbered 50. Do you wish to make any amendments or alterations to that submission?

Mr Lenehan—No.

CHAIR—I invite you to make an opening statement, and at the end of that we will go to questions from members of the committee.

Mr Lenehan—The Human Rights and Equal Opportunity Commission thanks the committee for inviting it to appear before this inquiry. The commission believes that citizenship is an important source of rights in Australia. For example, Australian citizens are not able to be the subject of criminal deportation orders. They also possess important rights of political participation.

In that context, the Australian Citizenship Bill 2005 represents a unique opportunity to ensure that the process for granting those rights is consistent with Australia's international human rights obligations. The commission has made a modest number of recommendations for amendments which are designed to achieve that end. I will not go to those recommendations in detail now, as they appear in the written submission; however, I will mention a few brief points.

First, the commission has raised concerns about limitations on review rights. Those concerns relate to citizenship applications by people who are not permanent residents and the rejection of citizenship applications on the basis of adverse or qualified security assessments. The human rights committee has commented on the need to establish review rights for citizenship applications, and the commission sought to draw your attention to those comments. The commission has also noted that the approach to review of security assessments is inconsistent with the right to a fair hearing.

The second point that I will briefly mention now is that the commission is concerned by the approach adopted in the bill to applications made for citizenship by children of parents who renounced Australian citizenship and also by same same-sex partners of Australian citizens. In each case, the commission believes that the bill has adopted a discriminatory approach which is in breach of Australia's human rights obligations.

The third point that I will briefly mention is that the commission has concerns about the rights of children. Under the bill, the minister is to retain a discretionary power to strip children of their citizenship in certain circumstances. This is contrary to some specific recommendations made to Australia by the United Nations Committee on the Rights of the Child. The commission also believes that it would be desirable to include in the bill a general provision reflecting the principle that decision makers should have regard to a child's best interest as a primary consideration.

I am happy to elaborate on these points and any other matters on which the committee considers that the commission could be of assistance.

CHAIR—Thank you very much. I want to ask you some questions about the material the commission has put together in relation to statelessness and, particularly, the Convention on the Reduction of Statelessness. I think it is fair to say that this is sometimes a very complex area of law, but I think the convention is reasonably clear in relation to its application. Was HREOC consulted in the preparation of the bill, particularly on these sorts of issues?

Mr Lenehan—Not to my knowledge. For thoroughness, I will take that on notice and check that no-one else within the commission was consulted.

CHAIR—That would be helpful. I assume that, if HREOC had been consulted, the concerns that you outlined in your submission in relation to statelessness and the impact of the convention would have been raised in that process.

Mr Lenehan—Yes. The only caveat that I should add to my response to your earlier question is that we had some discussions with the department in the lead-up to this hearing. So there certainly has been interaction between the commission and the department on the bill.

CHAIR—So they are aware of the concerns that you have raised? We will be speaking with them next week.

Mr Lenehan—I cannot speak for the department, but I am assuming that they have read the submission and the other submissions that have been made to the committee, some of which have also addressed the issue of statelessness.

CHAIR—In relation to the recommendations that you have made on statelessness—three parts under recommendation 3, I think—in your submission, would they in your view address most of the concerns that the bill currently presents?

Mr Lenehan—That is our view. To recap, the recommendations are designed to rectify the areas in which the bill imposes criteria which are impermissible under the statelessness convention. That is the way that we have structured those recommendations.

CHAIR—This may not be a question that you can answer, and if it is not then we will go searching. I am not sure which part of government administers our compliance or interaction with the Convention on the Reduction of Statelessness—whether it is the Attorney-General's Department or Foreign Affairs and Trade.

Mr Lenehan—Those two would be my guesses.

CHAIR—We will pursue that and see if we can perhaps invite some of their views on that matter.

Senator HURLEY—I wanted to deal with recommendation 5, which is about children of people who lost their citizenship via renunciation. You go through it fairly clearly. Are you aware of any children other than the Maltese children who may be affected if your recommendation is implemented? Are you aware of any other significant group? I am thinking of whether, if those people who renounced their citizenship were brought back in, that would have any unintended consequences for the Australian—

Mr Lenehan—I do not think the commission has that direct knowledge. It would probably be better to take that up with the Department of Immigration and Multicultural and

Indigenous Affairs. We saw in the submission of the Southern Cross Group the reference to other people being affected by the provision, but that is really the only information that we have. We do not have any direct information. This is not answering the question at all but, to add to what we have said about sections 17 and 18, we have set out the relevant provisions of the International Covenant on Civil and Political Rights as they deal with nondiscrimination and set out an argument as to why the approach in the bill breaches those rights. Another equally valid way of looking at it is that it is a commonsense approach that we are suggesting. That is the point that has been made in other submissions. When you get to the end of it, that is really what the right of nondiscrimination in the covenant guarantees.

Senator SCULLION—Thank you for your very comprehensive submission. I wonder if you could amplify the reasons that you do not think that reliance on the ASIO security assessment is necessarily appropriate, particularly in view of clear public support for stronger border security and, I suppose, security that is integral to our national security.

Mr Lenehan—We have not sought to take issue with the idea that some sort of security assessment should be made in determining whether a person should qualify for citizenship. What we have sought to deal with is the process for that. The process which is not directly enacted by this bill but which this bill slots into is that which exists under the Administrative Appeals Tribunal Act and the ASIO Act. There are, as we have sought to set out in the written submissions, limitations on, first, whether a person even gets to have any of those review rights if the minister issues a fairly extraordinary certificate which provides that there is to be no notification of the adverse security assessment and on, second—and this has not just been an issue in relation to citizenship; it has been a broader issue in relation to security assessments in the AAT—the way in which that review process is conducted and the minister's ability to determine conclusively that, for example, a person and their lawyer should be excluded from proceedings or not get access to particular information. In our view that raises issues about a right to a fair hearing, which is one of the rights guaranteed by the covenant.

What we have suggested as a commonsense way of dealing with concerns that legitimately apply to security information is to apply the provisions of the National Security Information Act, which is an act that this committee is very familiar with, having considered the bills that brought it into place. The advantages of that act are, in particular, that under the act it is left with the court. If you extended it to apply to a tribunal, the tribunal would have the ultimate discretion as to what information is revealed to whom. It does that in a way that still protects national security and specifically says that, in effect, national security interests are to be paramount. But it also gives the tribunal member, if it were to extend to a tribunal, the power to have regard to things like the right to a fair hearing. That is the effect of our submission. We are not saying, 'Don't have regard to national security considerations.' We are talking about the way in which they are brought into the process.

CHAIR—Mr Lenehan, further to that question and the process about the issuing of a certificate under 38(2A) of the ASIO act, you are really cutting off any avenues of pursuit for the individual to have that decision reviewed. This committee has contemplated these issues before, as you know, particularly in the national security information context both in civil and criminal proceedings. We have made some recommendations, some of which have been taken

up and some of which have not. I think the suggestions you make, if we were minded to take them up, would end up down the latter avenue rather than down the former avenue. I am just trying to think of a way to make it work better for the individual so that there is some access in the process, some capacity to seek review, particularly in relation to something as important as the granting of citizenship. My brief efforts at lateral thinking on this have not come up with anything, so if you get a flash of brilliance at some stage that you would like to share with us please be my guest. It is a difficult area, particularly when you read it in conjunction with the National Security Information Act.

Mr Lenehan—I am happen to seek the commission's collective inspiration on that issue and come back to the committee.

CHAIR—I am sure it will be more inspiring than my collective inspiration.

Mr Lenehan—In defence of the recommendations we make, the National Security Information Act, as you are aware, came out of a very extensive review conducted by the ALRC. One of the ALRC's original recommendations was that this apply across the board, not just in courts. In developing the regime that is going to apply now to citizenship applications where there is an adverse security assessment, there seems to be a piecemeal approach to how you protect security-sensitive information. It seems to us, as it did to the ALRC, that it is a matter of commonsense to have a uniform approach which may address some anomalies, without wanting to be at all offensive, that have crept in in that piecemeal legislative approach that has naturally occurred in setting up tribunals and courts.

CHAIR—I think we have examined it three separate times, so I do not think it brings any offence at all. I understand the point that you make. Of course whether it is a matter for this bill and for recommendations through this process is another issue altogether.

Mr Lenehan—We also had those concerns, but we are always happy to try.

CHAIR—Thank you for giving us some material to work with.

Senator BARTLETT—You may have heard some of the previous evidence regarding parents applying for citizenship on behalf of children, specifically the issue of children who might be part of some of those unfortunate international custody disputes and also the potential discrepancy between children adopted overseas who were still overseas when the adoption was formalised and children who were adopted in Australia. I wonder whether you think those areas need tightening up and also whether they present some breaches of our obligations under various conventions. There are a few of them, and I lose track of what they are all called, but I am thinking of the ones dealing with international custodial things and the rights of the child in general.

Mr Lenehan—I unfortunately missed that evidence, which I think was from the Centre for Comparative Constitutional Studies, but I have seen their submission. I do not have the commission's view on that issue, but I am happy to seek it and provide it to the committee on notice. Just to be clear, I think that the convention you are referring to is the Hague convention on the protection of children, which is what Dr Evans has sought to address in his submission.

Senator BARTLETT—You mentioned the issue of same-sex couples, which got a little bit of coverage over the break. If Elton John happens to want to become an Australian citizen, he might want his new spouse to be able to do so as well. Given that Tasmania now has—and I think the ACT is about to have it—the prospect of people being able to register relationships in Australia, and Australians are now able to have their relationships recognised in various ways in places like Canada and the UK, I wonder whether this presents a growing prospect for anomalies down the track for Australians who marry or register a relationship with someone from overseas or someone who is a permanent resident in Australia. If we did seek to act on your recommendation here, would that cut across any of the federal legislation that has been put through regarding the Marriage Act or any other areas under the Migration Act or elsewhere that have different definitions of 'spouse'?

Mr Lenehan—Not to my knowledge, and our recommendation addresses one specific discretion that the minister has to exempt a person from the residence requirement under the Australian Citizenship Bill. All we have done is to suggest that same-sex partners should also be entitled to the benefit of that discretion. It would not require that they have their relationship recognised in any particular way under Australian law, and in my view it would not therefore raise those sorts of problems that you are referring to.

Senator BARTLETT—How open ended is the ministerial discretion and what might be called positive discretions, where the minister can waive requirements? Some of the submissions which focus, naturally enough, on the negative discretions have concerns about it being open ended. Can it be exercised only with the specific criteria that are outlined, or is there general public interest?

Mr Lenehan—That is a really good question, and it would be a mistake to assume that the discretions in the bill are going to be completely open ended. If we have implied that, we have been careless with our wording. There is a fairly settled body of administrative law which says that when you have got a statutory discretion which does not specify any particular criteria, the standard principles of statutory construction apply in working out what a decision maker can do under that discretion. So you look at the act, you look at the purposes of the act and how the discretion fits into that. There are a lot of cases dealing with the Migration Act which talk about those sorts of principles.

The difficulty with not specifying clear criteria in the act—and this is something that Dr Evans has also picked up on—is that it is very difficult to predict in advance how a court will interpret those sorts of discretions. That is something that raises concerns quite apart from the human rights perspective in terms of the rule of law and people being able to know their rights in advance.

Senator BARTLETT—Thank you for that. One other group of people that have been mentioned, perhaps a bit in passing, are the many thousands of refugees who have been here on temporary protection visas—for four, five and six years in some cases. I assume that as the discretion currently exists it would be open to the minister to waive the time requirements for permanent residency on the grounds that these people have basically been residents here for years—but that would require the minister to be so inclined. Would there be any value in specifying that as a potential criteria that should be given special consideration when people have been residents here for a number of years and the only reason they have not been

permanent residents is that they have not been able to apply for it? Would it be an appropriate thing to specify or would that be just something that could be left generally for the minister to think about if they feel like it?

Mr Lenehan—That seems to me to be an appropriate thing to specify. One reason for doing so is that it may more clearly indicate to the minister that that is an appropriate area in which to exercise the discretion. So with that in mind it would be a reason for doing what you are suggesting.

Senator BARTLETT—Another point that you mention in your conclusion is that citizens possess important rights of political participation. It might seem a little bit of a tangent. I have not noted it mentioned much in other submissions. The current prohibition against dual citizens being able to nominate for parliament is one that strikes me as a bit of an anomaly of the past. I know it is in the Constitution, so there is probably not much we can do about it in the context of the bill, but I wonder whether that issue is one that has at all arisen, as far as you are aware, in the work of the commission. As far as I know there are not terribly clear statistics about exactly how many Australians are dual citizens, but I gather it is a pretty big chunk.

Mr Lenehan—I am not aware of any work being conducted within the commission specifically on that area, but again I am happy to take that on notice and check if it will be of assistance.

Senator BARTLETT—Thank you for that. It seems discriminatory to me. As much as we have eminently capable people in the current parliament, I am sure that if we can open up the pool by another 20 to 25 per cent of Australians then—you never know—we might get a few more good people in.

Senator HURLEY—I just want to turn briefly again to page 3 of your submission, in which you deal with the discretion of the minister to refuse a person's application for citizenship despite the fact that that person satisfies all of the criteria. You say that general discretion will protect against unforeseen situations. That was part of the explanatory memorandum. The example given is that of a person considered likely to incite hatred or religious intolerance. You go on to say that such a case could arguably be dealt with under the character test. Would that be clearly dealt with under the character test? You then go on to cast some sort of doubt as to whether that might be the case.

Mr Lenehan—Yes, that is very well picked up. Our caveat arises from the fact that the character test in the Migration Act was the subject of some proceedings involving David Irving, where a differently worded character test which was more specific in dealing with things that would make a person of bad character, was found not to include, in this case, somebody who was considered to promote intolerance within the Australian community. Some amendments were then made to the Migration Act. The test in the bill in its present form is, in contrast, general. It does not have either exhaustive or non-exhaustive specifications of what will put a person in the bad character basket. So that may, if it ever came to a court decision, be construed quite differently. But if there is doubt about that then that is something that can be dealt with in the way that it is being dealt with in the Migration

Act, which is to say, for an abundance of clarity, that that will result in a person being of bad character for the purposes of the act.

Senator HURLEY—In other words, you would have to think of all the reasons why a minister might refuse citizenship and then address them within the act.

Mr Lenehan—If there are matters of concern in terms of specifically the character test that looking at the pre-existing case law leads you to consider may not be in the area of bad character but that you would want to be, then it is sensible to clarify in the bill that they do fall within that category. That is really all we are saying there. However, just to go back to my first point, this is a very generally worded character test as compared to the one that was the subject of the Irving proceedings. I think we have actually footnoted that in our submission. If it did come to court, it seems to us that there would be a good argument for saying that it should be construed more broadly than was done by the court in Irving.

Senator HURLEY—I see. Thank you.

CHAIR—As there are no further questions, thank you very much for assisting the committee and, as a number of my colleagues have said, for HREOC's extremely comprehensive submission. We have some important issues to consider and this has been very helpful. I thank all the witnesses who have given evidence to the committee today. The committee will meet again on these bills in Canberra on Monday, 6 February.

Committee adjourned at 11.16 am