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, 6 FEBRUARY 2006

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

To search the parliamentary database, go to:
http://parlinfoweb.aph.gov.au

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Monday, 6 February 2006

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

Substitute members: Senator Hurley for Senator Crossin

Participating members: Senators Abetz, Allison, Barnett, Bartlett, Mark Bishop, Brandis, Bob Brown, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Heffernan, Hogg, Humphries, Hurley, Joyce, Lightfoot, Ludwig, Lundy, McGauran, McLucas, Milne, Nettle, Parry, Robert Ray, 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 Bill 2005 and Australian Citizenship (Transitionals and Consequentials) Bill 2005

WITNESSES

Committee met at 9.05 am

CHAIR (Senator Payne)—This is the 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 will replace the Australian Citizenship Act 1948, which governs the conditions under which Australian citizenship may be acquired, revoked and resumed.

The committee has received 67 submissions for this inquiry, which includes two confidential submissions. The remaining 65 have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

[9.06 am]

CRAWFORD, Dr David John, Partner, Fragomen Australia

CHAIR—Welcome. Fragomen Australia has lodged a submission with the committee, which we have numbered 43. Do you wish to make any amendments or alterations to that submission?

Dr Crawford—No, I do not.

CHAIR—I invite you to make an opening statement, after which we will go to questions.

Dr Crawford—I thank the committee for the opportunity to speak today and to offer some comments that I hope will inform the committee's considerations. As noted in the submission, I am a partner in a practice that specialises in assisting businesses with their visa requirements, predominantly with assignees coming to Australia—although we do help with people going to other parts of the world. The central issue in my submission relates to the residential period required for applicants to be eligible for grant of citizenship, envisaged in clause 22 of the bill. My submission argues that the bill may discourage some skilled labour from aiming to become citizens and ultimately settle here at a time when public policy is aiming at economic contributors coming to and remaining in Australia.

Our proposal is that temporary entrants who have spent at least 12 months in Australia as sponsored employees should have that 12-month period—and no longer—counted towards the qualifying period in an application for grant of citizenship. The submission of the Department of Immigration and Multicultural and Indigenous Affairs states that periods of temporary residence in Australia may be allowed to count a maximum period of 12 months towards the qualifying period. The department's submission restricts that concession, as I understand it, to cases where a person is engaged in activities beneficial to Australia. Without being able to establish that the activities in question are beneficial, the applicant would need to satisfy the three-year residential requirement anticipated in the bill.

Our concern relates to the interpretation of what constitutes 'activities beneficial to Australia'. There are similar provisions in section 13 of the existing act, and access to a determination in favour of the applicant is generally very difficult, and the cohort of eligible candidates would be small. Our contention is that there is nothing to be gained by obliging people who have spent at least three years here, with two as a permanent resident, to wait the additional 12 months to qualify for citizenship. Other submissions have made a similar point. My reading of the explanatory memorandum and stated security concerns do not make sense. In any case, the proposal I am making still obliges the applicant to have been living here for at least three years. It also accepts that applicants should retain a long-term commitment to living in this country.

HR staff and organisations are looking to long-term labour market challenges, and many businesses will need to attract staff from offshore. Attracting these people is only part of the challenge. Retention is just as important. One way businesses try to retain staff is to help them to stay permanently by sponsoring their permanent entry visa. We are witnessing increased interest by employers in this visa option, which is completely consistent with government

objectives. But for many of these people a permanent visa is not enough. The grant of citizenship offers security and allows people to plan their lives with more confidence. We believe that an additional 12-month qualifying period would discourage a number of would-be applicants.

More than 50,000 people are now entering Australia each year on assignment or as members of an assignee's family unit. I have spoken to a number of senior executives about the proposed change, and they agree that the draft bill would affect the numbers of assignees who may aim to become Australian citizens. This in turn would reduce the numbers who will ultimately settle here. None of us can say how many will be affected, but it will be a change that will have an impact potentially over many years. We know that many of these people will be attracted to positions overseas on assignment after they gain citizenship, but we are frequently seeing these people planning their lives, and they speak to us about gaining citizenship in terms of their plans to return to this country. Our view is that the bill, as it stands, will discourage some people from making that commitment to Australia, without any compensating advantage.

CHAIR—Thank you very much. The submission from Fragomen indicates that you have no real way of quantifying the number of people you are talking about. So in effect your submission is more anecdotal than an empirical assessment.

Dr Crawford—That is true. It has been, in my own case, a number of straw polls. I have spoken to executives and assignees, and the way that many of them view their period of time in Australia is initially as an assignment. They will come here for, by and large, two to four years. At some point, a number of them say: 'This is a good place. I would like to stay here permanently.' They or their HR people will ask us for some guidance about permanent visa options and ultimately about citizenship. They then chart a course.

The profile of the person I am talking about is by and large somebody who is an economic contributor and reasonably mobile. There is a point when a number of them—I suspect those in their 30s and early 40s with families—actually find that the attractions of keeping moving and earning more and more money has to be counterbalanced against the needs and preferable treatment of their own families. It is that conflict that I think leads them to say, 'Maybe I should be thinking about Australia.' At the moment we say to them, 'You are probably looking at a five-year period in Australia before acquiring citizenship.' That is because there is generally a waiting period before they can become permanent residents. If the change as drafted goes through and the access to the discretion about reducing the qualifying period is not that easy, then the window of time is going to be more like six or even seven years for those who have to keep travelling, and for many people I think that is just too long.

CHAIR—I understand the point that you are making; I understand it well. I am just not sure that I can see the way through amending the proposals to address it in a way that I suspect would satisfy the department and the minister. But it is very interesting. Could you tell us a little more about Fragomen: the sort of people you deal with, the number of people you deal with and what sort of business you do?

Dr Crawford—It is a cliche to say 'niche', but it is a business that deals entirely with migration matters and migration agents. Our business is a little different from most of those

that exist, because it is primarily there to assist larger businesses and corporate businesses. We operate in Sydney, Melbourne, Brisbane and Perth. We have in the order of 60 people in our business who assist assignees and businesses to get assignees to Australia. We also have a unit that assists people going to the United States, particularly with the introduction of the E-3 visa. We also have an Asia-Pac coordination centre for those people who are moving between different parts of Asia-Pac. That work is predominantly corporate related.

I do not know if it would be commercially sensible to talk about the number of visas we would be dealing with—

CHAIR—I understand that.

Dr Crawford—but we do not limit ourselves to helping large corporations. There are many small businesses. I would like to pause on that for a brief moment. However important a senior executive may be to a large corporate, a senior person in a small business coming into the country can make the world of difference on whether a business will stay or not. The nature of assignees coming to Australia is, in our view, changing. For a lot of businesses it has to do with bringing people in who can help their business, but there is almost as much, in some ways, new business being created.

I will give you an example. There is a large foreign based bank in Australia that is setting up a large derivatives trading facility in Sydney that is going to service Asia-Pac. Another financial institution is setting up a similar function in Sydney for a regionally based coordination centre. There is another client that has established three large operating units in Queensland that are new to Australia but service Asia-Pac. So it is not just about bringing people in to fill skills gaps; it is about bringing people in to work with Australians in new areas of business for these businesses and new areas of business for our economy. That means it is a fairly dynamic environment. As you know, visas and citizenship are just part of a much bigger picture about how we not only attract people to this economy but also remain an attractive economy for people to stay in, as well as come to, to work. I have probably moved a bit away from your question but, for us, it is a dynamic opportunity in terms of what is happening here. Let me say that I think the Australian government's policies by and large have been outstanding over the last number of years in remaining competitive in a visa sense.

Senator BARTLETT—Thank you for your submission. It raises a couple of interesting questions—well, probably more than that, but I will focus on a couple. As I understand it, the core of what you are saying is that if we make the ability to obtain Australian citizenship a bit more difficult it is going to impact on our ability to make a certain component of our migration program work effectively, in that it will act as a disincentive for fairly highly skilled businesspeople—in terms of your client base anyway—to come here. Is that accurate?

Dr Crawford—Yes, that is correct. Or at least from remaining here.

Senator BARTLETT—You may not feel that you have scope to comment on this, but it seems that one of the main rationales put forward for the increase of an extra year was, in a general sense, in the context of the security and terrorism debate. It was said that we need that extra year to double-check that people were not going to do something appalling. Firstly, do you think that such a move could actually have that affect? Would it assist in some way, in a security sense?

Dr Crawford—I have thought about that, and I am blowed if I know how it would help. I really don't.

Senator BARTLETT—In your submission you say that there are about 50,000 people coming each year on temporary business entry long-stay visas. At the end of that two-year visa there is scope for them to go on a permanent visa. You have also pointed to some of the criticisms about the general skilled migration stream not working as well as it should in matching people with jobs. On the temporary business entry long-stay subclass 457 visas, that is not a capped program at the moment is it?

Dr Crawford—No.

Senator BARTLETT—Is there a difficulty at the moment in finding people for the sort of client base you work for?

Dr Crawford—It is not a visa problem that businesses face; it is a recruitment challenge.

Senator BARTLETT—Right.

Dr Crawford—This is in a number of areas in the economy. We work with financial institutions, IT, mining, gas exploration and some manufacturing businesses. To greater or lesser degrees, they are having some difficulties in finding some experts. I think that engineers, for example, are a pretty rare breed; the Western Australian economy, for example, is desperately seeking as many good engineers as it can get. But recruitment or how to do it is a bit beyond my remit.

Senator BARTLETT—The issue your submission throws up, which is a bit of a vexed one, does come back to the debate about what Australian citizenship is and what it is for. That is something I have engaged a fair few people in debate about in recent months and the broader community has debated it following Cronulla and all those sorts of things. Ideally, citizenship should be distinct from migration, but there are obviously some overlaps. When we talk about citizenship we all tend to wrap ourselves in the flag and talk about commitment to the country and building a nation et cetera, and I do not dispute that, but the premise you are putting forward, which is a quite valuable one, points to the role of citizenship as, if you like, a component in the global market for migration. Would it be fair that at least in the business sector there is a market for skilled migrants and our citizenship criteria are one potential competitive advantage over some other counties?

Dr Crawford—I think so. It is an interesting way—and certainly a way I would endorse—to look at it.

Senator BARTLETT—In that context, if this change is going to make it harder for us to get certain types of migrants, what is the situation in other counties? We have had a little bit of evidence before this committee, but not heaps, and I am not across it. Is it much more difficult to get citizenship in counties in Asia, North America or western Europe?

Dr Crawford—The qualifying periods are lengthier. I think the New Zealand government may even be looking to extend it from three to five years. The approach has been in the direction of lengthening the residential component. I am sure the department could offer much more authoritative guidance on that. We need to march to the beat of our own drum. If we accept that people have been living in this country and have become a part of the fabric of this

community and, through an application for citizenship, willingly enter into a contract in which they will be long-term contributors, I do not see that as a bad thing. I do not see that what I am proposing is negative in any way.

Senator BARTLETT—I am certainly not meaning to give that impression but just trying to get a sense, using that framework, of a competitive market. Does it come up a lot in your day-to-day situation? When you have highly skilled people tossing up going to Australia or somewhere else, does that issue come up, or does it just come up at the end of their long-stay visa?

Dr Crawford—That is a very good question. It will vary, of course, but there are people who raise it at an early stage. Predominantly, they are the people who have families, it has to be said. I made a few notes before this morning's hearing on a number of people I have spoken with over the last week or so, four of whom were CEOs—I was talking to them anyway. In each case, they have been actively thinking about acquiring Australian citizenship for at least two years. A couple of them desperately want to get their applications in very soon because of the transitional arrangements, which is another reason we are talking about this.

There have even been a couple of cases where individuals have gone on assignment from Australia because their boss wanted them to go to another country, and they asked: 'Can you put an application in for me for citizenship and argue that I should get it?' We said, 'You are not going to qualify.' In a couple of case they have insisted that we do that and they have not qualified. The discretion was not exercised in their favour and the applications were refused. Those people are now disappointed and working out how they can get back here, which means changing their employer. They had put quite a number of years in, but there are those people who are struggling with how they can make this work. In some cases, they cannot. If that is the way it is, that is fine, but my general point is that there are people who see Australia as their long-term home and have to juggle that with their professional commitments. Sometimes they will have to compromise, and that is fine but, if they know the rules in advance, they will do that, as long as the horizon is not too distant.

Senator BARTLETT—I take it you are focused on the part of the bill that extends the two-year requirement to three years, particularly for your client base. Would you see it as workable to try and exempt people coming through the long-stay visa class, or do you think there is no credible need to extend it to three years for anybody and we are better off leaving it at two?

Dr Crawford—I have mixed views about this. I think it was at the hearing in Melbourne that you may have been asked to consider providing the concession to business migrants, for example, who have come in on provisional visas. I have mixed views because there has been long-term concern about the credibility of the business migration program and a concern that people actually do settle in Australia. Having said that, if they have come in on a provisional visa and spent a substantial period of time in Australia, I think there is a good case to be made. I did not go into those other areas, simply because I did not want to try and cover too much ground in my submission. My concern was to cover what I think is a real concern for the client base that we represent.

Senator BARTLETT—I appreciate that.

Dr Crawford—I would not like to make too many ill-informed comments right now.

Senator BARTLETT—That is fine. So there are no other comments that you have about the rest of the bill per se?

Dr Crawford—No. I am happy to think about this and write further if you would like me to do so, because I do know that there are many issues that are beyond my particular submission.

Senator BARTLETT—Thank you for that.

Senator SCULLION—Thank you, Dr Crawford, for your very concise submission. My colleagues have dealt with most of the issues of clarification that I wanted dealt with, but I would like in a general sense to clarify your submission. It appears that you are in business. The Australian government amending some legislation has an impact on the competitive environment under which your business operates, because it is substantially an Australian business. You made the comment that Australian laws over the last few years, in terms of visa classes generally, have been good. I am assuming—and you may wish to clarify—that that is a comparative analysis of other places. I am aware—and you have said that you understand—that New Zealand are looking at raising the bar in terms of the time under which you have to stay in New Zealand before you can become a citizen. I understand both the United States and Britain have substantially longer times than what Australia is even considering. In view of those things, would you still think that this legislation, should it proceed unamended, is going to provide one of the most competitive environments for a business of your type?

Dr Crawford—Yes, I think so. I think it is a contributing factor. As I said earlier, it is one of many things. Other issues will be way beyond the scope of this session and this committee. Taxation rates and the general competitiveness of the whole economy are factors that will influence whether a business wants to set up here, whether it wants to bring assignees to Australia and whether those assignees will find it an attractive place to come. In terms what we are discussing here, yes, I think it will contribute to the competitiveness of this economy.

Senator SCULLION—In your submission it appears that most of your work is dealing with executives in the business and technology sort of area. Do you have any information—even anecdotal—about the sort of impact it will have on other areas, like academics, scientists and other demographics of business? Or do you think we should assume that the points you make would extend generally to those demographics as well?

Dr Crawford—In terms of academics, I think that is certainly the case. We are working with a couple of universities bringing people into the country. They are bringing them in because there are desperate shortages in certain disciplines. I trained as a historian. I regret that there is a bit of an oversupply of historians. That is the way it lies.

CHAIR—Like lawyers, perhaps.

Dr Crawford—But in other disciplines there is going to be continuing strong demand for the right sort of labour. I think that the academics in those situations are much the same as specialists in other fields.

Senator SCULLION—Thank you, Dr Crawford.

CHAIR—Dr Crawford, thank you very much for your submission on behalf of Fragomen and for your assistance to the committee this morning. You bring us a perspective we had not previously considered, so that is certainly of interest to the committee. Thank you very much.

Dr Crawford—Thank you and thank you to the committee.

[9.30 am]

DUNCAN, Mrs Helen, Vice-President, Queensland Branch, Migration Institute of Australia

HITCHCOCK, Mr Neil Evan, Fellow, and Founding Member, Migration Institute of Australia

MAWSON, Mr David Thomas, Chief Executive Officer, Migration Institute of Australia

CHAIR—Welcome. The institute has lodged a submission with the committee which we have numbered 47. Do you need to make any amendments or alterations to that submission?

Mr Hitchcock—None in particular. I will make some remarks in my general address.

CHAIR—Certainly. Mr Hitchcock, 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 Hitchcock—We represent some 1,400 registered migration agents. We represent the more active registered agents who are out there practising. We have indicated that our submission is made by us as a professional body, not in our regulatory role. Our members, in the sense that they are constantly working on visa cases and, in particular, permanent resident cases offshore and onshore, are always asked about citizenship eligibility. So while we may not practise in that area in a major way, and many of our members are not actively practising purely on citizenship issues, some of us are. Virtually every day, all of us are asked about citizenship eligibility, the rules and any opportunity, for example, for a waiver of residential qualifications. In that sense, the new bill is particularly important and, should it be passed by parliament in its current form, it will be of particular interest to our members.

We would like to indicate our members' general support for the contents of the new bill. We understand it is an accumulation of several reviews and several things that have been wanted to be fixed up or amended in relation to the old act, which has been going for many years and has become relatively much more difficult to administer. We have a particular concern about the transitional arrangements for the new bill. We hope that it is possible to do what the department of immigration does in relation to the immigration act, and that is to allow procedural fairness for people who have arrived as residents and have a reasonable expectation of being able to qualify for citizenship under the existing act. The new act should apply to people who arrived as residents after the date of assent of the new act. We believe that to be procedurally fair.

I have indicated an example of how the department of immigration dealt with international students accessing permanent residency onshore when there was a change in the points test fairly recently. The department said that those people entering university with an expectation of applying for permanent residence on completion of their studies should be allowed to have the benefit of the act that applied at the time they entered university. We hope for the sake of consistency that the transitional arrangements for the new citizenship act will allow the same. At the present time, that is certainly not the case. Under the transitional arrangements, you must have lodged an application if you are to be granted your citizenship on a two-year residential qualification.

I am not going to go through each of these items, except section 36, at the end of our submission, which relates to children of responsible parents. Section 36 talks about children of 18 years of age whose parents cease to be citizens. In the current act, there is a bit of limbo in there for children between the ages of 16 and 18 years of age. We see that under the new act the age referred to is 18, yet there are two or three clauses in there where children of under 16 years of age are referred to in relation to whether the minister should cancel a person's citizenship. It refers to children of 16 years of age or under, and I cannot find any reference to what you do with a child between 16 and 18 years of age if the minister decides to cancel somebody's citizenship. I think it is section 24 or 25. Also, in the pledge, there is a reference to a child of 16 years of age but no reference to a child between 16 and 18 years of age. I just wanted to clarify that reference to section 36 of our submission. I am happy to answer any questions.

CHAIR—Thank you very much, Mr Hitchcock. Mrs Duncan or Mr Mawson, do you have anything to add?

Mrs Duncan—No.

Mr Mawson—No.

Senator HURLEY—In section 2 of your submission, which you have down as 'Transitional arrangements', you are talking about people who are already in Australia and may be eligible for citizenship now but will not be if the bill passes.

Mr Hitchcock—They would have to do another year.

Senator HURLEY—That is right. Do you believe it is widely known in the community that this bill is about to come in and that, if you have just made the two years now, you had better apply?

Mr Hitchcock—No, I do not believe so.

Senator HURLEY—So this would adversely affect some people who might be able to qualify now but who will not if the bill passes in a couple of months time?

Mr Hitchcock—Yes. It would be fair to say that a person who had not become a citizen and had held a permanent resident visa, by using a resident return visa, which I referred to, may have been a resident of this country for 10 or 15 years and not taken citizenship up. They may even have lived here all the time. I do not know that it would be fair for them to have to do an extra year, because they have already done it. But it is the people who are arriving now, who have been residents for two years or six months or three months and are living in Australia who I believe are adversely affected, and I would certainly agree with you that there is not enough information out there about the switch from two to three years—definitely not.

Senator HURLEY—I have had some correspondence from people who say they have reached the two-year qualifying period and who now want to do things like travel overseas to visit their family or for work. This would in fact extend their period because you have to have been living in Australia for that three-year period. From your point of view, do you think that will have a significant effect for people seeing family or conducting business?

Mr Hitchcock—That is just another example of people adversely affected who had reasonable expectation of being able to qualify under the two-year rule. I thought I heard the

previous speaker talk about situations where somebody is posted overseas with a corporate employer. That is another example. If they have got one year and 10 months, for example, they might say to the employer, 'Will you send me in two months time so I can qualify for my citizenship?' If that were happening and this bill were passed tomorrow, that person would be adversely affected.

Senator HURLEY—I would like to move on to clause 17, 'Minister's Decision', about the risk to security aspects of decision making. You say:

> An example might be where an adverse assessment is provided for a person who has been living in Australia for many years with an Australian citizen partner and several children.

Presumably you are talking about where that person who has been living with the Australian citizen partner applies to become a citizen themselves—

Mr Hitchcock—That is right.

Senator HURLEY—and receives an adverse risk assessment and then it is mandatory that they not be allowed to be a citizen. That seems to me to indicate that you do not have a good deal of faith in the assessment process, if you think it might be something so minor that they should then be allowed to become a citizen. Why do you not think, if there is an adverse security risk, that that person should not be allowed to become a citizen, regardless of the fact that they might have an Australian partner and children?

Mr Hitchcock—I suppose I worry about who measures the adversity of the security risk and if this act is going to last as long as the old act did—1948 until now, almost 60 years. It may be that in 50 years time adverse security assessments as we know them now are very different. The minister, under the Migration Act, has the discretion to grant a visa, under section 351 and section 417. I was talking about resident return visas earlier. The delegates of the minister have wide-ranging discretion and flexibility. I suppose I am looking for more consistency between the way the Citizenship Act operates and the way the Migration Act operates. I believe that, in a rare case like that, the minister should have that discretion without having to go through what can be a fairly painful review process with the Administrative Appeals Tribunal when there is an adverse security assessment. It may even be that the person knows not all the detail of that adverse assessment. It is just having the discretion. It is the same as the minister having discretion in the Citizenship Act in relation to counting a period of more than five years under the current act. That discretion is extremely rarely used, but it is there.

Senator SCULLION—Again, my colleagues have covered much of the area of interest. I have a couple of points for clarification. You talk about your concerns that a mandatory requirement to reject an application for citizenship may cause some hardships, particularly for non-citizen spouses. What do you think we should do in those circumstances where quite legitimately we say, 'I'm sorry; we're going to reject your citizenship, on an ASIO basis'? Let us assume that that is quite a legitimate exposure. The spouse was connected in the original. The only reason that they had the basis for residency, the reason that they are in Australia, is attached to that person. I agree that on the face of it it does seem that that is providing for hardship where that was not our targeted issue. What would you suggest that we do in those circumstances?

Mr Hitchcock—If significant hardship were to be suffered by the spouse and the children, and an adverse security assessment and a nonapproval of citizenship might put at risk the person's right of residence in Australia or might in the long-term do damage to that person ever becoming an Australian citizen, the minister should have a right to say, 'Despite there being an adverse ASIO assessment, I am inclined to grant citizenship, in the community interest, because of the impact that it is having on the other family members,' in much the same way as discretion under section 351 in the Migration Act operates.

It is more that the minister is making a decision to grant a visa in the community interest. In that sense, just because there is an adverse ASIO assessment it does not necessarily mean that it is not in the community interest to grant that person their Australian citizenship. It may be that the ASIO assessment in the community interest is for some deed or act that is not criminal and that the community believes to be mild and not as strong as an ASIO officer might believe it to be. That is the environment in which a minister should have the right of discretion. Whether the minister exercises it very often or not is not the issue. Cases will arise where the minister should. The minister has many other discretions across the portfolio.

Senator SCULLION—I suspect that perhaps that was the reason for the legislation—that that particular minister may not have the purview over what is in the wider national interest. That is something that I will be putting to the department at some later stage.

Senator BARTLETT—You have mentioned in your submission that there is probably a variance of views across your membership about whether or not this extension from two to three years is a good idea, so I will not press you on that per se. You have made a general comment that those that support the move from two to three years do so because it increases the sense of privilege and pride and the significance attached to being a citizen. I wonder if you would feel able to comment—if you do not that is fine—on whether you can see any way that this change would have any significant benefit in identifying security problems, potential terrorists and the like, which is the main public rationale that we were given for the change.

Mr Hitchcock—I really cannot see it. It would be difficult for me to say I am speaking for all of the membership on this. There was not enough time, because of the short period of time for submissions, to really canvass our membership. On the general issue of two and three years, some of our members have clients who want to come to Australia to live in order to obtain their Australian citizenship, obtain an Australian passport and leave Australia and go and work overseas. Those members would be very happy if it was left as it is. There are other members—and I suppose my gut feeling would be that it is probably split fifty-fifty—who place more significance on the store of value and the privilege of citizenship. They would support the move to three years. I suppose I should say I am one of those, but I do not want to say that all of our membership is, because that would not be correct. I do not know that very many of our members at all would think that the best reason for the change relates to security and international terrorism. I think most of our members—and I think I can speak in a fairly balanced way here—would not consider that the reason for the change.

Senator BARTLETT—On that comment you made about a group of people who specifically seek Australian citizenship so they can get the passport to go overseas, what would the context of that be? Is it because it is easier to get work in certain areas as an

Australian or that is it better to have an Australian passport than an American one if you are going to the Middle East?

Mr Hitchcock—Some examples might relate to the way that the business migration program was significantly changed a few years ago. It was significantly changed because too few businesspeople, in particular from South-East Asia, were coming to Australia, starting a small business or not doing any business at all, putting their children through our education system, living here for two years, obtaining citizenship and going back to South-East Asia because things like business conditions and opportunities and taxation rates were much better than they were in Australia. That comes back to the store of value issue. They want the passport because it is a significant store of value for them. If things go horribly wrong in countries that may be more volatile than Australia, they have somewhere to go. In that sense they were still placing a significant store of value in obtaining Australian citizenship. It was to get the passport. Is that background helpful?

Senator BARTLETT—Yes, thank you. Could you give me a bit of background on how the resident return visa currently operates?

Mr Hitchcock—There are several types. The main one, the one of interest, is when you receive an initial migrant visa that is valid for five years of unlimited multiple travel.

Senator BARTLETT—When you say migrant visa do you mean permanent residency?

Mr Hitchcock—Yes. If that is expiring and, for example, you come from somewhere like Singapore, where you have significant assets, if you take Australian citizenship you will lose your Singaporean assets. So it would not be uncommon for the wife and children of that family to take Australian citizenship and for the husband not to take it. If the husband then applies for a thing called a resident return visa on expiry of their initial five-year permanent resident visa, that visa is granted if that applicant has close ties with Australia. One particular form of close tie is if you have family in Australia who are in fact Australian citizens. The department is in fact generous in the discretion that it has to grant that individual a further five years and a further five years and a further five years. That person may be travelling backwards and forwards on business and may never take Australian citizenship because it would put at risk his and the family's assets in a country where you are only allowed to have one citizenship. So it is not uncommon in practice to keep somebody's permanent resident visa alive for 15 or 20 years by using resident return visas.

Senator BARTLETT—So what would be the impact of the change from two to three years? I might be wrongly detecting the vibe that there is potential for a negative outcome here so I would appreciate your comments on it.

Mr Hitchcock—It may in fact have a positive benefit in that it may cause people who think they have five years to finally get here and who are then going to have to live here for three years after that to perhaps think again and speed that particular process up. Looking at the young skilled component of the migrant intake, by moving from two to three years it will do one of two things: it may speed people up in getting here because they know they have to do three years or it may deter people from applying because they think: 'I only ever had to do two to years. I know I can do three years in Canada or New Zealand.' It means that what you have to do to qualify residentially for citizenship in Australia becomes the same as for Canada

or New Zealand. I think those things may in fact balance each other out. At the moment, if you live here for two years in your first five years you automatically get another five years of the right of residence. If the citizenship thing becomes three years, that in effect throws it out of kilter with the two-year qualification for having a further five years as a permanent resident. I do not think that matters so much, but it is an interesting change in that sense.

Senator BARTLETT—I might ask the department whether that has been considered because I guess one of the issues with this is the interface between the migration program and citizenship—much as citizenship can be seen as stand alone, every little tweak over here can impact on how the migration program operates. That leads to my next question. I think you heard the evidence from Mr Crawford. Would you broadly concur with his view that this may make it harder for business in Australia to access certain types of skilled or business migrants in what is, at least in some areas, a fairly competitive global market?

Mr Hitchcock—I do not think I would agree with him. The five-year migrant visa is what is initially attracting people. They make that decision first. They know they can stay a permanent resident. You can remain a permanent resident of the United States forever; you do not have to take up citizenship. In that sense, in terms of the global market for young skilled people, Australia is a part of that and we seem to be doing better at it. Our numbers are increasing. I think it is the acquisition of a five-year migrant visa and the knowledge that you can extend it and keep it alive for a long time that is the first thing a person thinks about. There has also been a major increase in our temporary resident program. We are seeing more of the global village effect, with people even being prepared to come temporarily on a four-year visa. A lot of those people are also changing over to permanent residency inside Australia. So I do not think I would agree with David on that point.

Senator BARTLETT—Can I also ask you about your comment about the ministerial discretion and residence requirements. Firstly, on your general comment where you support the introduction of some extra ministerial discretions which go beyond those in the current act, even though these are broadly what one might call positive discretions, there has certainly been an issue in the migration arena about how the continuing expansion of ministerial discretion, even if they are positive discretions, can lead to a lot of frustration because of perceptions of it applying arbitrarily or of not knowing why you get it in some circumstances and not in others. If it starts being able to be applied in a whole range of areas it could just become this big unknown, where you have lots of people all hoping to get discretion, and there will be less clarity about it. I just wondered if you have considered that aspect of it.

Mr Hitchcock—Prior to the introduction of the migration regulations in the late 1980s—for my sins I was a senior policy officer of the department in Canberra in the early 1980s—

Senator BARTLETT—That is when the culture was good, was it?

Mr Hitchcock—when there were wide-ranging discretions, the writing into regulations of the act virtually changed that overnight. As time has gone on, under the regulated environment of the way the Migration Act is administered, those discretions are gradually creeping back. In relation to citizenship, what we are trying to say—and this is important for our members—is that the resident return legislation in the Migration Act is administered generously in a balanced and flexible way and administered in a way that shows that the

department is trying to help people. It is common, for example, if you lodge an application for a resident return visa for it to not be rejected but for the person to be told, 'Would you please go away and find this piece of information and give us some more detail on that and we will have another look at it.'

In relation to the way the discretions in the existing Citizenship Act have been administered over the years, I do not know if any of you have seen in hard copy the *Australian Citizenship Instructions* but it is a mammoth volume. It has been gradually administered in a more and more strict way over the years, to the extent now that we in our firm have not put up and would not put up a case under section 13(4)(b)(i), economic benefit to Australia, because they have just become too hard, where five or 10 years ago they were being considered more openly and more positively and some were actually getting through. What we have been trying to say in our submissions on that subject is that we would love to see the department take a more positive and community spirited approach in the way they are going to administer these new discretions, which are better except for the remark I made about onshore spouses as well as offshore spouses.

Senator BARTLETT—To clarify that: on the change you pointed to, where it has now become so difficult that you just do not bother anymore, has there been any change in the act or regulations that has corresponded with that or has that just basically been a change in policy?

Mr Hitchcock—It has been a change in the interpretation of the *Australian Citizenship Instructions*, which is the policy guide to the act.

Senator BARTLETT—On the aspect to do with the spouse that you have mentioned in your submission, can you just clarify for me how you see that working—that a spouse who is offshore would get different and potentially better treatment than one who is onshore?

Mr Hitchcock—The way the new act is worded, it is aimed at a situation where an Australian offshore is marrying, finishing a work commitment and wants to bring their spouse back to Australia and it would only apply to those spouse situations. It is very common nowadays for that Australian to bring their spouse into Australia on a visit visa—on an electronic travel authority—and apply onshore because it is convenient. The Migration Regulations and act certainly allow that. Such applications are processed onshore in their thousands every year. I do not see why those people cannot also have the benefit of the concession. They are still married to Australians. The Australian has come back from offshore. Why should it be any different, in particular because the department has brought a large or major chunk of its processing onshore?

Senator BARTLETT—So it would only affect that type of situation where people have married offshore? It is a matter of where they are when they put in the application? It is not so much, to use your Singapore example from before, where the wife and kids might have taken up citizenship and the husband has not been resident here for long enough?

Mr Hitchcock—That is right. Then the husband has to look at section 13(4)—are they doing something with economic benefit or of benefit to the community? The spouse concession is more that the spouse may suffer hardship or disadvantage. It is a different sort of concession. That concession existed. It existed in the Australian Citizenship Act years ago.

If an Australian married a foreign resident on hardship grounds or compassionate grounds there would be a waiver of the two-year residential rule. That was removed from the act some years ago. It is now in effect coming back in, but only for offshore cases. With a large part of the department's processing of spouses onshore, I cannot see the reason for just having offshore. It sort of discriminates.

Mrs Duncan—Can I add a comment to that. I guess what we are saying is that at the moment if a spouse is approved onshore they are on a two-year provisional visa before they become a permanent resident. With the changes in the act, they would need the two years on the provisional visa and a further three on a permanent visa before they would be eligible for citizenship. A spouse on a provisional visa I think has made a commitment to be in Australia. While, say, the business provisional visas are catered for in the new act, in that you can claim benefit to Australia, there is really nothing for those spouses who in fact have to spend five years in Australia before they can apply for citizenship. I guess what we are saying is that some period on the provisional visa could perhaps be counted towards their time in Australia for citizenship.

Senator BARTLETT—And you think that could work through some sort of formula or specific mention or would you be comfortable enough with it being under a discretion as long as it was positively interpreted?

Mrs Duncan—Yes, I think it could be catered for under discretion, much like the offshore spouses. The offshore spouses have to be permanent residents overseas, but I think if they are living onshore on a provisional visa, perhaps just 12 months of that provisional time could be counted towards permanent residence for citizenship.

CHAIR—Thank you very much for your submission and for assisting the committee today. We are very grateful for that. We will report in due course.

[10.10 am]

DIMECH, Mr Lawrence, President, Maltese Welfare Association, New South Wales

CHAIR—Mr Dimech, thank you very much for assisting the committee by joining us today. The Maltese Welfare Association has lodged a submission with the committee which we have numbered 7. Do you need to make any amendments or alterations to that submission?

Mr Dimech—No, but I would like to make a short statement.

CHAIR—I will invite you to do that. I was just checking that we did not need to make any changes. I would like you to make a brief opening statement, then we will go to questions from members of the committee.

Mr Dimech—The Maltese Welfare Association presented your inquiry with a plain English submission. We are of the view that we should be debating less about how the technicalities and the interpretation of sections 17 and 18 affected these people and more about finding a just way to facilitate the bill so that these disenfranchised persons born to parents who are Australian by birth should reclaim their citizenship. We would like to leave the technical and legal examination of sections 17 and 18 to the lawyers.

The Maltese Welfare Association look at the bill being examined as dealing with not just statistics but real people. We are of the view that this bill has been enacted to put the past right and to adequately serve in the best interests of Australia and its people, wherever they reside, in the 21st century. Without getting into the complexities of the argument, the Maltese Welfare Association are of the view that it makes better sense all round to offer citizenship to the children of Australian-born persons. These children would have been Australian citizens by descent if their parents had not been forced by Maltese law to renounce their Australian citizenship.

We are dealing here with people from a country that has a tremendously good record on the migration of people to Australia. There is hardly any person living in Malta who has no connection with Australia. The Maltese in Australia have been a success story of good and exemplary settlement. Most importantly, the Australian-born parents, who have spent their formative years in Australia, will have passed on their Australian heritage to these children whom this bill so carelessly wants to exclude from citizenship. I strongly appeal to you to accept the recommendation of the March 2005 committee and provide access to Australian citizenship by inserting in the bill just two additional words—that is, insert ‘or 18’ after ‘17’.

As to the second part of the submission, the Maltese Welfare Association wishes to put forward the notion that the Australian government makes it harder for permanent residents to acquire Australian citizenship. The emphasis should be not on residential qualification but on what a person can contribute to the one Australia concept.

CHAIR—Thank you very much, Mr Dimech. We are very grateful for your submission. I think your association agrees that this bill is a significant improvement on previous citizenship law.

Mr Dimech—Definitely, because a lot of people are going to be brought back into the fold, so to speak.

CHAIR—In terms of the concern that you have raised in relation to a number of Maltese children who you feel will not be assisted by the legislation, have you had contact from them or their families in relation to this?

Mr Dimech—Mostly we have been working with the Southern Cross Group, and they have in turn been in contact with a lot of these children and their parents in Malta, because most of these people are living in Malta.

CHAIR—Thanks very much.

Senator BARTLETT—Thanks for your submission. This issue has been around for a while and, as you point out, it was mentioned in the Senate committee report into Australian expatriates, among other things. Have you had any particular explanation from the government, the department, the minister or whomever about why this particular issue has not been taken up in this bill?

Mr Dimech—There seems to be a debate about sections 17 and 18 and where these people fit in—and, as I said, I get confused as well. My concern here is that these are children of Australian-born persons, and it would be a tremendously good thing for them to regain citizenship. I leave it to you and the other people to sort out how sections 17 and 18 apply to these people.

Senator BARTLETT—I presume you or others from your association have lobbied the government or the minister about this issue.

Mr Dimech—We have been trying to lobby for a number of years.

Senator BARTLETT—You have certainly been lobbying me, so I assume you have been lobbying them.

Mr Dimech—We have first of all been lobbying for the people who were born in Australia and had to renounce citizenship when they turned 19 because of the Maltese laws. Now we are faced with the situation where their children are going to be disenfranchised because of, I think, section 18 of the act.

Senator BARTLETT—My understanding is that this issue seems to basically apply almost solely to Maltese children. From what we can ascertain there does not seem to be anybody else in the situation.

Mr Dimech—Exactly, and this is why we think it even tends to be discriminatory.

Senator BARTLETT—What rationale has the minister or the government given for this?

Mr Dimech—We have been given quite a few interpretations. We have also been confused by what the government has put out as to how the new law should be interpreted. This is why I said I am not going to get into it. I am sure Ms MacGregor will talk about that more eloquently than me. I think the government has been a little confused on this issue based on statements we have received from various ministers—the last three ministers—in the last seven months or so. This needs to be sorted out.

Senator BARTLETT—We can certainly ask a couple of our subsequent witnesses, including the department, about that. Your submission states:

> We are of the opinion that, residential qualifications in the past became rather a political football aimed mostly to attract votes.

And it states further that the requirements for residential qualification were amended three times since the act was brought in. Could you elaborate on that?

Mr Dimech—I feel very strongly about this. I have worked in citizenship for a long time, and I feel that we give Australian citizenship too cheaply after two years residence. Sure there are provisions other than residential qualification, but it is basically the residential qualification provision—two years out of five and you are in. I think we need to look a little deeper when we accept people to be Australian citizens; that they are not receiving Australian citizenship for many other reasons than being good citizens. Therefore, as we said in our submission, we should be looking at what these people can contribute and what they have contributed in the last two or three years of their lives.

I remember when citizenship was after five years. I think two years is too short a period for a person, and I am a migrant. In my first two years in this country, I did not even know where I was, let alone apply for Australian citizenship. I think we make a lot of fuss about giving citizenship to children with Australian parents, and then we just throw away citizenship after two years. This is mainly what we are saying.

Senator BARTLETT—While this is probably outside the scope of the bill, but not completely, it flows on from what you said that the emphasis should be more on commitment to Australian laws and traditions rather than on residential qualifications. The idea has been floated that we should have some sort of test—and I know it is being talked about in the UK at the moment. Do you have any views about how you would demonstrate that, what things you could do that would not become at risk? We all know the history of how the immigration act has been used in the past in a discriminatory way, with a dictation test to keep out people we do not want. We would want to make sure that any test was not able to be twisted in the same way.

Mr Dimech—A dictation test in Japanese or something, because we did that in the past.

Senator BARTLETT—The concern I have with some sort of test is that a test can be twisted.

Mr Dimech—The test should be on what a person can contribute. We should go through reasons why they want to be Australian citizens, not the airy-fairy reasons they usually give. I suppose nowadays we need to have criteria which are politically correct. It would be very hard to come up with the right formula, but I think it could be worked out in consultation with groups and the department. I am certainly not against residential qualifications—although I would rather extend them a little bit more—but I think we should concentrate more on what that person can contribute, with an absolute agreement that once he is an Australian citizen he is an Australian citizen and nothing else.

Senator HURLEY—I want to go back to that issue of children of Maltese people who had renounced their citizenship. When you were talking about lobbying over a number of years

and submissions to the Senate report on expatriates, was it your understanding that this was being addressed?

Mr Dimech—Definitely, yes. This just came out of the blue. If you are going to give back citizenship to the parents, obviously you would give citizenship to their children. Otherwise, you are going to create a lot more problems than you solve.

Senator SCULLION—I have a couple of comments that I would like you to respond to, Mr Dimech. There seems to be a common theme. I suspect one response I will get from the department when I put these questions to them will be along the lines that the two principles under which the application is made are that (a) you were not born in Australia—and I am not talking about your parents—and (b) at the time you were born you were not born of an Australian citizen. That is pretty much a description of the entire globe, apart from people who have Australian citizenship. I understand that this is a very small demographic that happened over a relatively short period of time. The position that many people put in this regard is that it just seems discriminatory. Why would you make such a fuss over such a short demographic? The issues between sections 17 and 18 are clear, in that those people caught under section 17 appear not to have even been aware in many of the circumstances that citizenship was in fact being taken from them.

Mr Dimech—Yes, that is an interpretation.

Senator SCULLION—Certainly, the moves by the government in 1984 ensured that you could get citizenship back if you lost it under section 17. That has been available since 1984. Section 18 is what I want you to help me with. Under section 18, some people said, 'There are some benefits about maintaining my citizenship in another country that have nothing to do with Australia, or I do not have to do that and I can remain an Australian citizen.' It was simply a matter of choice. At the time those people chose—and I am not placing any weight on whatever those reasons were—that their citizenship should be maintained in another country, that they did not want to be an Australian citizen any more but that they wanted to be a citizen of another country.

I understand the background. It is a terrible choice to have to make. As you said, they were forced to make the choice, but they were not forced to make one choice or the other. I know it is difficult circumstances, but I sometimes find it difficult to understand why someone says, 'I'm making this choice: I'm renouncing my Australian citizenship to get some other benefits.' There may be benefits about how you feel about your own country, or there may be a wider range of benefits. But one of the things you knew when you made that choice was that the outcome would be that children born to you after that date would not be Australian citizens or have the benefits of that. You knew that at the time, and you made that conscious decision. Why should it then be the case that, after you have made such an informed decision, we should now say, 'You should still have those benefits in any event?'

Mr Dimech—As I said, sure, they made a conscious decision—most of them under duress. I think this is very important: they had to make that decision. They were taken back to Malta. They had no choice in the matter anyway. By age 18, when people are not really in full control of what they want to do in the future—

Senator SCULLION—Because they are with their family. I understand.

Mr Dimech—they had to make a choice. They had started education in Malta, had to work in Malta, whatever. But these children—and this is my main point—whether their parents have renounced the citizenship or they are going to get it back anyway, are of Australian heritage. What better people do we want in this country than people who have such a strong connection with Australia? If my father was born in Australia, he would surely pass on to me everything that is Australian. This is what I am saying. If they decide to come here, these are people who would make very good citizens because of their heritage. They have certainly got an 80 per cent advantage over everybody else. I am trying to make it as simple as I can.

Senator SCULLION—I was just asking for your views on the matter. Thank you.

CHAIR—Mr Dimech, we will now ask you to stay there, and we will introduce Ms MacGregor from the Southern Cross Group, who is joining us by videoconference. Unfortunately, you cannot see the videoconference because the screens are down in front of your feet but, when we go to questions and discussion, if there are any issues on which you would like to make a further contribution, please just indicate that.

[10.28 am]

MacGREGOR, Ms Anne, Co-founder, Southern Cross Group

CHAIR—I now welcome Ms Anne MacGregor, representing the Southern Cross Group, who is appearing by video link from Brussels. The Southern Cross Group has lodged a submission with the committee which we have numbered 52. Do you need to make any amendments or alterations to that submission?

Ms MacGregor—No, we do not.

CHAIR—Mr Dimech, from the Maltese Welfare Association, has already made some opening remarks. As you may have been able to hear for a few moments, we have been engaging in questions and answers with him. If you would make an opening statement, we will then go on to questions with you and potentially Mr Dimech as well.

Ms MacGregor—I would like to start by saying that the Southern Cross Group generally congratulates the government on the tabling of this bill. Many of the reforms in the bill will positively impact thousands of people in the Australian diaspora. A number of them are watching this public hearing from around the world as it is streamed live on the internet today.

On the one hand, we urge the speedy adoption of this legislation because there are many people outside Australia who are waiting for it to become law so that they can apply to resume their Australian citizenship or apply to become Australian citizens for the first time. We would stress that time is of the essence, in particular for some very elderly former Australian citizens—in particular, the group of some 12,000 to 15,000 war brides who went to the United States at the end of Second World War. The women in that group who are still with us today are in their very late 70s, 80s and 90s but are unfortunately ever diminishing in number.

On the other hand, while the bill contains many positive changes, it is the view of the Southern Cross Group that, as tabled on 9 November 2005, it falls far short of being the comprehensive reform of Australia's current citizenship laws that some have claimed. There are a surprising number of issues that concern the Australian expatriate community this bill has failed to address.

In our primary submission, we focussed on what we have termed the 'section 18 offspring issue'. This committee will recall that it recommended providing access to Australian citizenship for those people in its March 2005 report at the conclusion of the inquiry into Australian expats. The largest number of affected individuals in that group is clearly in Malta but people in other countries will also be affected, albeit we estimate in lesser numbers. As we said in our submission, the Department of Immigration and Multicultural Affairs should be able to provide the committee with statistics on cases of section 18 renunciations, which will help to illuminate how many offspring of section 18 cases may exist or may be born in the future. The SCG has provided an indicative list of 20-plus countries which have required or may still require section 18 renunciations in annex 7 to its primary submission.

The section 18 offspring issue can perhaps be singled out from all the other points which have been left out of the bill because we have had clear statements from the government that

the omission of the section 18 offspring group from the bill was intentional. Our submission, as you would be aware, looks at the various reasons put forward by the government that purport to justify that policy decision. It is our view that those reasons do not in any way withstand intellectual scrutiny.

As to the other matters of concern to expat Australians which the government has left out of the bill, it is our feeling that some of them have simply not been spotted or properly worked through by the department, consultants on contract or indeed by former ministers for citizenship involved in drafting this legislation. It must be said that a number of matters omitted from the bill have been raised by the Southern Cross Group on previous occasions, most notably in the context of the inquiry into Australian expats before this committee—in particular, in our supplementary submission to that inquiry dated 23 July 2004. I would like to list now those of greatest concern to us.

The first impacts in particular a subset of our surviving war brides in the United States. It appears that a woman born in Australia, say, in 1920 who married a US serviceman, for example, in 1945 and went to America with him and became a naturalised US citizen before 25 January 1949 will not have access to Australian citizenship under the bill as it stands. The quirk here is that such individuals simply never became Australian citizens when the current Australian Citizenship Act 1948 came into force on 26 January 1949. They had lost their British subject status by taking US citizenship prior to that date. Never having formally been Australian citizens, it is not appropriate to speak of resumption for these people and it is clear that clause 29(3) of the bill cannot apply. Rather, we are talking about conferral or grant of citizenship for such people. Subdivision B of the bill does not appear to contain provisions which would allow these individuals access to Australian citizenship.

I would point out in passing that the vast majority of war brides that the Southern Cross Group has in its database in fact were naturalised in the US after 26 January 1949 so they did in fact become Australian citizens on that date and went on to lose their citizenship later under the now repealed section 17. So they are covered by clause 29(3)(a)(i) of the bill, which deals with resumption. We believe, however, that there must be at least a handful of surviving Australian born people who were naturalised abroad and lost their British subject status before 26 January 1949. It seems enormously random, if not mean spirited, not to provide these people with access to Australian citizenship simply because they were unfortunate enough to have been naturalised abroad just a bit too early. Any children born to such Australian-born individuals are also denied access to Australian citizenship by descent under clause 16(3) of the bill because their parent did not become an Australian citizen on 26 January 1949.

The second issue of importance is the case of individuals who were adopted by Australian citizens living abroad under the adoption laws of another country who are now adults. Those adopted people did not qualify to be registered as Australians by descent while they were minors under section 10B and do not presently qualify for Australian citizenship by descent under section 10C of the current act because they did not have a natural parent who was Australian at the time of their birth.

This issue was raised by the Southern Cross Group in its submission to the expats inquiry of 23 July 2004 and by email correspondence with the committee secretary of that inquiry on

11 August 2004. However, no mention of the matter was made in the committee's March 2005 report in the expats inquiry.

Two cases have come to our attention over the last few years—one in Canada, the Salisbury family, and one in the UK, the Spalding family—but we are sure there must be more. Indeed, the case of Heald in the AAT in 2001 is another such case. We will be sending the committee complete details of these two families in a further supplementary submission in the next day or so. Mrs Beryl Spalding in London has had correspondence with the Australian authorities about this problem over many years. This is documented and will also be provided to the committee. She was told in writing by the then minister for citizenship, in April 2003, that her situation was one which he had firmly in his gaze 'should there be a change to the act'.

Despite this, our reading of the bill is that it does not contain a fix for these cases, although we would point out that the language used is not wholly unambiguous. Specifically, we note that clause 16(2)(a) of the bill requires that 'a parent of the person was an Australian citizen at the time of the birth'. The use of the term 'natural parent' in the current section 10C is gone. Could this mean that having a present adoptive parent who was Australian at the time of the child's birth, even if the adoption occurred after birth, is enough? There is no definition of 'parent' in the bill—only 'responsible parent'—and we ask the committee to seek clarification from the department on this matter.

A third issue is that of access to citizenship for offspring born overseas after their parent lost citizenship under sections 19, 20 or 23 of the current act. Clause 21(6)(c) of the bill excludes these people. The greatest concern here is offspring born to those who lost under section 23. We note that, where parents lost Australian citizenship under the former section 17, their children lost Australian citizenship under section 23 of the act.

Many of these children who lost under section 23 could well have been born in Australia. While the section 23 loss cases will themselves be allowed to resume Australian citizenship under clause 29(3) of the bill, many of these individuals will now be adults and will have their own children born overseas who will not be eligible for Australian citizenship under the bill as it stands. This will result in cases where an Australian-born parent who lost under 23 has a child overseas and that child will not qualify for Australian citizenship, whereas if the parent's loss had occurred under section 17 the bill would cater for both parent and child.

We have been discussing the potential numbers affected by this omission from the bill with the department and will pass on our estimates to the committee after this hearing. It seems reasonable to assume, however, based on the figures that we have, that section 23 losses globally are at least as numerous as section 17 losses and may in fact be greater.

Based just on UK naturalisation figures for Australians, we estimate that in the UK alone approximately 6,500 Australian minors lost their Australian citizenship under section 23 in the period 1949 to 2001. In view of the fact that approximately one-third of all overseas Australians at any one time are in the UK, we may be looking at a global figure of section 23 loss cases in the order of 18,000 to 20,000 individuals. They themselves will be able to resume under clause 29(3)(a)(iv) of the bill, but their children will miss out under clause 21(6)(c).

A fourth issue is what we at the SCG have labelled the 'Michael Young cases'. Nine such cases are presently known to the SCG. The committee has received two submissions from Michael Young as part of this inquiry. This issue concerns former permanent residents from the UK and other Commonwealth countries who resided in Australia as children. Many believed they were Australian citizens although they were not, and they subsequently lost their Australian permanent resident status as a result of living offshore for extended periods. We draw the committee's attention to pages 16 to 20 of the SCG'S submission to the expats inquiry dated 23 July 2004.

Further, we submit that any fix which the bill could feasibly be amended to provide for these people would in no way give rise to any sort of unwanted flood of new Australian citizens. The group of affected persons is extremely limited. Mr Young has calculated that approximately only 700 people would be eligible under the criteria he suggests; even then, not all would apply for citizenship, should the law change to include them. Seen in that light, we ask the committee to give serious consideration to recommending an amendment to subdivision B of the bill to cover those cases.

Additional to these points, we briefly note that we do not believe that minor children should lose citizenship with their parents. This issue has been partially addressed in the bill, in that clause 36 provides that the minister may revoke the child's citizenship in writing by notice. However, we query how that ministerial discretion will be exercised in practice. We submit that clause 36 in its entirety should be deleted from the bill.

We also put on record that we do not believe it is appropriate to provide a mechanism in the bill, as currently in clause 33, that allows minors to renounce their Australian citizenship. In Canada, the UK, Ireland and New Zealand, it is simply not possible for a minor to renounce their citizenship. Those countries have a policy that a person should be of full age and capacity in order to make such a significant decision. That concludes my opening statement.

CHAIR—Thank you very much. I know that it is quite late in Brussels, so we appreciate your assisting the committee with its timetable. I would not have been confident about getting my colleagues—or myself, for that matter—here at 7 o'clock in the morning, had we tried to start any earlier at our end, so thank you very much. I guess I would describe your submission, broadly speaking, as welcoming the initiatives and the legislative platform in the bill but identifying some issues that you think remain to be addressed.

Ms MacGregor—That is correct.

CHAIR—Thank you. I just want to make sure that we are on the same wavelength.

Senator SCULLION—Thank you, Ms MacGregor. Your oral presentation today was extremely comprehensive. I am sure that the chair will give us an opportunity to put some questions on notice, because I will need time to get my head around many of the issues you have raised. Substantively, one issue is that a number of children born to people whose citizenship status has changed have been caught in that change. There is a variety of classes and I do not think it is appropriate at this stage for me to go into any debate about the particular classes. In a general sense, I understand that these children could be sponsored into Australia or that other mechanisms that exist effectively would allow them eventually to

become Australian citizens. Why do you think that citizenship should be offered in those circumstances, when we can get them into Australia through a sponsorship process?

Ms MacGregor—We have addressed that point towards the end of our submission of 20 January. By using case examples in our submission we have tried to explain that, although you are allowing a number of Australian-born parents in Malta now to resume their lost Australian citizenship, if a fix for the section 18 offering is not provided in the bill going forward, those children will have access to Australian citizenship but only if the family moves to Australia while the children are dependent children. In other words, the family has to make a decision to uproot their lives and move to Australia. Then the non-Australian-citizen spouse with dependent children would go in on family visas and would then qualify for Australian citizenship by grant or conferral.

We are not denying that that mechanism exists, and that mechanism will work for some families, but we are saying—we have tried to illuminate this somewhat in our submission—that some families will just not be able to pack up and move to Australia. We have also said that the criteria for whether these children should be entitled to citizenship should not be based on whether they move to live in Australia. We have a million Australians now who live abroad and it is a valid thing to be an Australian citizen and live your life abroad.

In particular, one of the reasons why these families will not be able to move to Australia is the issue of their ageing parents in Malta. Most of these people who were born in Australia and had to renounce between their 18th and 19th birthdays now have parents who are in their 70s and 80s, some of whom are not in good health. For the family to move to Australia means taking the grandchildren, at the very least, away from grandparents—and in many cases taking away the children of these elderly people, who are actually being cared for. We outlined one case, that of Norman Bonello, where he and his wife faced that particular issue.

You are looking at people who are in perhaps their late 30s, 40s or even 50s, who have minor children and who could in theory move to Australia. But their lives are so enormously settled in Malta now. They have good jobs or they have businesses; it is not quite as easy as all that to just pack up and move to Australia. Some will do it. Some have told us they will do it, but there will be some who have very valid reasons not to do it. For those families, the children will not have access to Australian citizenship by grant.

Senator SCULLION—Thank you. I know your own personal history of representing the expatriate community. There is an important piece of advice you can provide to us. Historically, people have lost or gained aspects of citizenship completely without their knowledge, simply because they were unaware of the processes of the amendment of law in Australia. How would you recommend that we ensure, in whatever state this bill goes through, that the expat community are aware of the changes, what impact it will have on their lives and what actions they may need to take to ensure that their own best interests are served? How do we communicate with them so that they understand the ramifications of the changes?

Ms MacGregor—Communication with the Australian diaspora is going to remain a challenge, but there are certainly many things the government could do to improve what it is doing presently. We raised a lot of these issues in the context of the expats inquiry. For

example, we could still very well use one single government portal—one web site—for Australian expats that draws together all the relevant information from different government agencies. We do have the *citizenship.gov.au* web site, which has improved vastly over the last few years—partially, I suspect, at the prompting of the Southern Cross Group. I think it is now quite a good web site with some very clear answers. But not everybody has access to the internet, particularly in far-flung countries and among the older demographic.

Also, it is important to make information available in the public areas of embassies. We have outlined that issue in particular in the annexes of our submission—that there is a certain traffic of people coming in and out of Australian embassies and missions around the world, although we do not catch everybody. People go in for passport renewals or to get documents certified. They have different things to do: they may go in to register a child who has been born overseas. There is a certain amount of through traffic in each mission, and if posters and flyers are constantly displayed in those public areas you are going to catch some people you might not otherwise catch. In particular in countries where a large number of people are affected by the changes that are going to come in, it is even going to be appropriate for the government to take out advertisements in newspapers. In Malta that is something that has been mooted before and I strongly urge the Australian High Commission in Malta to put advertisements in both the Maltese and English language press, clearly setting out what the changes are, giving relevant web site links and making information sheets available to people who come into the High Commission.

We have to face it: citizenship law is a very complicated area. It is extremely easy to get confused. Not everything that is published in the media is precise and correct. A lot of people are terminally confused by some of these issues, and a lot of what we do is simply sorting people out. We get a lot of email queries. People are confused; they have read something in the media or someone has told them something and they really do not know what the real story is. We spend a lot of time just explaining to people what their situation is and how the law applies to them. Advertising may also be appropriate in the United States, in some of the major national dailies such as *USA Today*, where you have for example a large group of Australian war brides and their children—many of whom will have absolutely no inkling at present that they are about to become eligible for Australian citizenship again. They are spread out all over the United States; I do not think we will ever reach all of them but I think there is a place for specific advertising.

We see in Australia, for example, a call for public consultation if there is a new bilateral social security agreement between Australia and another country, and when it comes into force there is a notice in the newspaper. But you only catch people in Australia there. We have to face it: the major changes introduced by this bill—apart from changing the eligibility for taking up citizenship for migrants in Australia from two years to three years—essentially affect people overseas. It is always going to be a challenge to reach them, but we can do more than we are doing now.

Senator SCULLION—Thank you.

CHAIR—I can tell you from personal experience, Ms MacGregor, that the embassy in Vientiane has a well-posted and prominent sign in relation to this inquiry in its front office.

Ms MacGregor—That is good to hear.

CHAIR—Yes. It came as something of a surprise to me, I must say.

Senator BARTLETT—Just flowing on a little from your comment that the vast majority of people likely to be affected by this bill in a positive way are people from overseas: as I raised with the previous witness and earlier this morning as well, there is a broader debate and issues about what is to be an Australian citizen and what sorts of obligations and responsibilities and significance we should attach to it. The previous witness floated in a very general sense whether or not there should be some sort of test to determine people's awareness or acceptance of basic Australian norms or laws. Do you have any comment on that sort of thing—it is a debate that is happening in the UK as well at the moment, as I understand—beyond being a citizen because you have resided there for two or three years or because your parent was or whatever, and whether there should be some other aspects attached to it?

Ms MacGregor—On the issue of whether there should be a test before people qualify to become Australian citizens by conferral or indeed any other means, I do not think we would have any great problem with that. It is a reasonable thing to consider that people becoming Australian should have a basic knowledge about Australia. Something similar exists in the United States. Indeed, Australians who have been naturalised in the UK are going through that sort of process and now a ceremony, which the UK never had before. I do not think we have any problem with that. You have to have the basic level of understanding. There are some countries that do not have that. For example, I recently applied to be naturalised in Belgium, which is by way of parliamentary decree. My name will basically be published in an act of parliament. That is the mechanism in Belgium. There are also no language requirements anymore. That was changed five years ago. Although Belgium has three official languages and I can speak one of them, I am not required to prove that I can. There is also no test, although I would be perfectly prepared to submit to one if there were.

Senator BARTLETT—Do you think it would actually be a positive if we explored doing anything more formal here in Australia? I am thinking in the context, particularly with this legislation, of opening up the scope for a lot of people who have been overseas for a long time to apply for citizenship. That is not anything I have a personal problem with, I hasten to add. In the context of some of the other debates in Australia at the moment and elsewhere, do you think something like that would be desirable? I am not talking about anything massively onerous but something slightly more than just good character and the other bits that are in the act at the moment.

Ms MacGregor—If you are talking about whether many of the groups in the Australian diaspora who will qualify to apply for citizenship under this bill should be subject to some additional requirement such as a basic general knowledge test about Australia, I think we as an organisation would have no problem with such a basic test. I would point out that we do have issues with some other criteria which presently exist under current section 23AA for resumption.

For example, you need to have been resident at some point in your life for two years in aggregate in Australia or, if you are still overseas at the present time and want to resume any

loss under section 17, you have to declare an intention to go home and reside in Australia within three years. We feel that they are not appropriate in the global community that we live in. So that sort of restriction, or added burden, to what is in the bill at the present time we would certainly not be happy to see. But a sort of general knowledge test about Australia we would not have a problem with.

On the issue of a citizenship ceremony I know that there are many people in the diaspora who did not qualify for citizenship at the time of the bill or who lost it many years ago but now qualify to get it back under the simplified resumption provisions that are foreseen who have said to me, 'Will I have to go to a ceremony at my local high commission or at the local Australian embassy? This is a very meaningful thing for me. This will be a great and important moment for me.' I am not sure whether one could do so in every corner of the globe but I think it would be a nice idea to have citizenship resumption ceremonies and citizenship conferral ceremonies in some of the major centres overseas, such as London, Los Angeles and Canada. A lot of people would find that quite a moving and special moment.

Senator HURLEY—Obviously, migration has been a great benefit to Australia and almost certainly will continue to be a great benefit. Today we are seeing a lot more mobility among people. That is valuable in terms of their being ambassadors for Australia, the cross-exchange of skills and trade. So the use of this bill to free up people's ability to become dual citizens and to resume citizenship has been very valuable. The Southern Cross has been very strong in supporting that move and made a number of submissions to the Senate committee on expatriates, including at that time the children of people from Malta who had renounced their citizenship. A number of submissions made by the Southern Cross have been accepted in this bill. Did you get any feedback at any time that the situation in relation to the Maltese children would not be accepted? Were you led to believe that it would be covered under the changes to the act?

Ms MacGregor—We have not had any specific feedback directed particularly at us on that issue. I can say that when the then minister for citizenship made his announcement that there would be a number of reforms to the current act in July of 2004, we read through the media release that was put out at that time and we identified fairly quickly, within a few hours, that it did not look as if section 18 offspring were covered.

At that point I telephoned Mary-Anne Ellis in the department and said to her, 'It does not look to us as if they are covered. Are they covered? It seems to us there are parallels to section 17 offspring. You have covered section 17 offspring, and section 18 offspring have not been covered. Is that intentional, deliberate? What was the thinking behind that?' It seemed to me from her reaction—and I may be mistaken—and she responded in a way that led me to believe that perhaps the department had not thought about the issue at all; that it just had not moved that one step further from the Australian born Maltese to their children in its thinking. I got the distinct impression at that time that the department just had not considered that issue. She said, 'If people want to make representations about that, we will certainly consider that,' which we then proceeded to do and have done quite vigorously ever since. We have contacted the expats inquiry. We did not know until 9 November that the children would not be covered. We only knew it when the bill was tabled.

Senator HURLEY—And the explanation by the minister in the second reading speech was that people at the time of renunciation understood what they were doing and that their children would be affected. We have heard already that there is a requirement in Malta to take up citizenship, to own land, to properly complete education. So I guess the argument in that sense is that, although they were aware that they were renouncing their Australian citizenship, they did not intentionally renounce their connection with Australia.

Ms MacGregor—I think that is the argument, and you have to understand that these people were quite young. Strictly speaking, in the eyes of the law, they were adults; they were 18 or over. But all of us would admit that, although we may think we know everything when we are 18, we actually do not know very much at all. As your life goes on, you become a lot older and wiser and you think back to the decisions you made in the past and sometimes wish you could have done things differently. We are not denying that these people signed a piece of paper and that was a conscious decision in that sense. To talk about things now and to imply that the people signing those pieces of paper all those years ago thought through the implications this would have for their lives down the track and also gave serious thought to whether their children would ever be Australian citizens—I do not think they really sat down and thought about it. A lot of them did it under great pressure. They got letters from the Maltese authorities saying they had to do it, or their parents were putting pressure on them to go and get it done, because otherwise they faced going back to Australia without their parents, and a life as a young person in Australia without parents to support them—they did not make that decision. So they were very difficult circumstances.

Senator HURLEY—Thank you. I certainly have received a great deal of correspondence from people who will be affected by this, and obviously there are a number of affected people who are in fact very keen to have the possibility of taking up Australian citizenship. I am aware that the Southern Cross Group have a provision on their website to enable people to indicate if they have been affected. Can you tell me how many people have responded and how many people have responded with their personal information?

Ms MacGregor—You will see from the list of submissions that are listed on the inquiry website that there are various different templates on our website that people can use. They can choose which paragraphs to add to their submissions and which ones to leave out. They can also choose to write a personal story at the end if they so choose. Where we have submissions from Australian born Maltese people, we have asked them to list the birth dates and birthplaces of their children. From both that data and data which we have collected as the Southern Cross Group over the last three, four or five years, we have significant statistics on the group, and we did give that data in annex form in our primary submission. So, in terms of the number of submissions to the inquiry, it is in the hundreds. Of the Australian born people with children, some of the offspring themselves have made handwritten submissions as well as template submissions through our website. Indeed, a number of the minor children have sent in drawings to the committee which do not necessarily appear in the submissions on the committee website at present because I believe they are too big in terms of file size to be put up—many of them were A3 sized drawings. But we are talking about hundreds, probably three, four or five hundred people who, particularly for this inquiry, have had a say, and many

of them also stated their views in the expats inquiry and have written to the minister for citizenship over the last year independently of that.

Senator HURLEY—Thank you. A number of affected people will have their families in Malta and their lives in Malta, and they would not wish to take up the possibility of citizenship even if it were offered. But, for those who are keen to return, it would probably be fair to say that it is because they have extensive connections with Australia, through family in particular, and in a sense have something to come back to. They may not ever have been to Australia but they have that strong connection through a family link. Is that your feeling?

Ms MacGregor—Definitely. I had never been to Malta before November, but I have been down to Malta twice from Brussels in the last three months and I met a lot of these affected families. Even just driving around Malta, you see Australian flags on the tops of houses, which you would never expect. You see names on houses which have an Australian connection. It is quite funny, because, in Malta, people do not always have a house number; sometimes they just have a street name and then their house has a particular name which has a particular meaning for them.

Malta is an island of 400,000 people. In the last census, in 2001, something like 150,000-odd people in Australia said that they had been born in Malta or considered themselves to be of Maltese ancestry. There are really vast numbers of people in Australia with Maltese ancestry or who were born in Malta. And, because the island is so small, the connections are many and great. A lot of the section 18 offspring that we are talking about here have cousins in Australia. Sometimes they have aunts and uncles in Australia. In many cases, they have had many visitors from Australia over the years.

CHAIR—Thank you very much. As there are no further questions, I particularly thank Mr Dimech, who I understand has travelled from Sydney early this morning. We are very grateful to you for doing that, Mr Dimech, and for your submission. I also thank Ms MacGregor for appearing by videoconference at such a late hour in Europe. We also appreciate your assistance and your submission. If we require any further information, we will be in touch with both of you. Thank you very much.

Ms MacGregor—Thank you.

[11.07 am]

RUBENSTEIN, Professor Kim, Private capacity

CHAIR—Welcome. Do you have any comments on the capacity in which you appear?

Prof. Rubenstein—I am appearing in my individual academic capacity. I am currently in limbo, in the sense that I am on holiday leave from my position as associate professor at the University of Melbourne in anticipation of becoming, in two days, the Professor and Director of the Centre for International and Public Law at ANU.

CHAIR—We congratulate you on your appointment—

Prof. Rubenstein—Thank you.

CHAIR—and thank you for filling your holiday time with an appearance before our committee. We have a submission from you, labelled No. 65, which was provided to us at the end of last week. Do you need to make any amendments or alterations to that submission?

Prof. Rubenstein—No, I do not.

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

Prof. Rubenstein—I would like to begin by saying that I am grateful for having the opportunity—even in my holiday time—to make this submission this morning. As the committee may be aware, citizenship is an area that I am passionate about, both on a personal level and of course in my academic pursuits. I am the author of this book on Australian citizenship law, so I feel that I know the area of citizenship rather intimately. In addition, I have maintained my practising certificate and I am on the roll of the High Court of Australia, so over the last several years I have also been involved with several High Court cases that have dealt with issues to do with citizenship. Then, lastly but certainly not least, I have had the pleasure of being a consultant to the Commonwealth with regard to the development of this legislation, working and providing advice to DIMIA, so I have been involved with the development of these bills. But, that being said, I do want to stress before I begin that my statements today are purely my own personal statements, standing aside and just reflecting in the light of my interests in the area.

The first point that I want to make is perhaps by drawing the committee's attention to something which may seem as banal as the contents page of an act. But I think that this proposed act really stands out as a marked improvement on the previous act, which was of course the very purpose of the whole process of reviewing the Australian Citizenship Act as a result of this report from the Australian Citizenship Council in 2000. My book and of course this report spend a lot of time talking about the difficulties of public access to the act, and that is something that, as a practitioner as well as an academic, I have been acutely aware of.

Looking at the contents page, any practitioner in this area would have to sigh a sigh of relief in terms of access to, or navigating one's way around, the Australian Citizenship Act. It is an excellent improvement on the previous act, and I think achieves very well its objectives of setting out in a systematic and clear way, to anyone looking at the act, the framework for

Australian citizenship. Really, it is about the status of Australian citizenship. If we look at the divisions in part 2 we see the clarity in those divisions. They explain, which had not been clear from the previous act, that there is actually an automatic acquisition of citizenship. The terminology in the old act was 'citizenship by operation of law', which is a confusing term for nonpractitioners. 'Automatic acquisition' is a very clear statement, right up front, that there are people who automatically become Australian citizens by virtue of these provisions. Again under division 2, 'Acquisition of Australian citizenship by application', there is clarity about the process of application, as opposed to an automatic status, which is very important. Within that application section there is clarity about the different types of processes of applying, whether you are a citizen by descent or you want to apply to be conferred citizenship or you are a person who for some reason has lost citizenship and wants to make an application to resume citizenship. I think those frameworks are very clear and commendable.

The remainder of the act is clear in that once you have acquired citizenship the only other matters of relevance to the act are the cessation of Australian citizenship and matters to do with the practicalities of evidence of Australian citizenship. The personal identifiers section is one that was introduced by virtue of the government's policy to do with needs for identification of individuals in the country. That is something that I have not put my mind or paid much attention to in relation to the broad issue of citizenship. The other matters relate to matters that previously might have been a mixture of act and regulations; there has been some attention given to sorting out what is appropriate to be in the act as opposed to what will be in the regulations that flow from it. So, as a matter of broad approach and overall achievement, I commend the overall accessibility of the act. That is one of the points that I would be very pleased to emphasise. It is a marked improvement on the previous act. That also relates to my second dot point in terms of the language.

The one extra point that I would like to make from a personal level goes to the definition of 'Australian citizenship' under section 4. This is a definition of the current act. It says that 'for the purposes of this act an Australian citizen is someone who falls under' those various parts that I have just outlined. I think the note underneath is very important, and it is good that it is there. It says:

A person who is an Australian citizen under the *Australian Citizenship Act 1948* immediately before the commencement day is taken to be an Australian citizen under this Act:

It emphasises, even though it is actually not from the terms of this act, that a person who was an Australian citizen before this act was implemented remains an Australian citizen. I am not an expert in parliamentary drafting but, as a practitioner, I would prefer to see a statement in the act, rather than just a note, reaffirming that people who were citizens beforehand remain citizens under this act. That is provided for in the transitionals and consequentials piece of legislation, and so it is certainly part of the legislation and the law. But, as a matter of accessibility, if someone is not familiar with looking to see if there is a transitional and consequential act, that would not be part of their image of the act, even though the note does emphasise that there is that reference. That is one point that I would like to make in relation to that definition.

That is my contribution in terms of the overall framework of the act. I have several points that I would like to make from my academic involvement. The first is that reference to the

definition of good character. There is no definition in the act, although it is a term that is used frequently throughout the act and is entirely relevant to the process of becoming an Australian citizen—not for automatic citizenship, and there are many citizens born here who would sigh a sigh of relief in relation to the fact that they may not necessarily satisfy notions of good character but are still protected to the extent that citizenship is protected. That is another submission of itself in terms of constitutional issues with citizenship.

There is a distinction in essence between the notion of 'good character' for people who are applying to become citizens and those who automatically become citizens. As a matter of transparency, my preference would be for something in the act which outlines matters that are relevant to the question of good character rather than it being a pure policy decision in terms of the minister's decision-making power in relation to good character. For instance, section 21, subsections (2) to (8)—the section in the bill that is proposed—has, as one of the general eligibility requirements, that the person is of good character at the time of the minister's decision on that application. That mirrors the previous provision, 13(1)(f), in relation to good character.

I refer the committee to a section in my book which shows some of the inconsistencies in decision making in relation to the Administrative Appeals Tribunal reviewing some of those issues. Again, as a matter of good administrative law practice, I cannot see that there would be any harm in referring to matters that are obviously of guidance to the minister in the decision-making process as a matter of policy that may be matters that would be included—certainly it would not be an exclusive list, recognising that there may be other matters—and, again, would provide for better transparency in the decision-making processes related to the discretions associated with the application of citizenship.

My other point, which is again a small one, is about citizenship by descent. One of the commendable aspects of the policy associated with this bill as opposed to the overall structure is the desire to include more people in relation to the entitlement to citizenship by descent. One of the themes of my book is that law often errs on the side of exclusion rather than inclusion, that the normative notion of citizenship is a very engaging, inclusive one but that sometimes the way in which the law presents leads to an exclusive notion. I think this policy, which is evident through the act, is ultimately one that is being more inclusive about allowing more people to claim their descent of citizenship.

I have noticed that one provision excludes a small number of people just by virtue of the wording, and that is in relation to people born before 26 January 1949. Effectively, at that last dot point in the excerpt that I had from the statement made at the time of the policy announcement relating to this bill, the act will be amended to extend the registration of Australian citizenship by descent for people born overseas before 26 January 1949 to a mother who became an Australian citizen on commencement of the act on 26 January. That deals with some of the gender anomalies that existed in the act in terms of descent that was preferenced to fatherhood as opposed to motherhood.

When we look at proposed provision 16(3) in relation to people born outside of Australia before 26 January 1949, we see that one of the conditions is 'a parent was born in Australia or New Guinea or was naturalised in Australia before the person's birth'. There was a group of people who did not need to be naturalised and who became an Australian citizen by virtue of

their residence in Australia at that time. There was a transitional provision when the first act was introduced that allowed British subjects who had resided in Australia to acquire citizenship. I think children of those people will not be entitled to citizenship by descent. That is my reading of that provision. There will be a group of people who will not be entitled to citizenship by descent by virtue of that. The way of dealing with that would be to take out subparagraph (b) so that in essence their parent became a citizen on the 26 January 1949, they are a child of that parent and the minister is satisfied that person is of good character.

My second last point is that the citizenship by conferral section—again in the same nature as I said earlier—is a much clearer provision in relation to the way someone can apply and the matters that are relevant to the minister's decision in conferring citizenship by application. I have a couple of points in relation to provisions within section 21. I will elaborate on section 21(5) as my last point. Referring to it in the first instance, 21(5) gives the minister power to bestow citizenship on a person under the age of 18. It says:

> A person is eligible to become an Australian citizen if the Minister is satisfied that the person is aged under 18 at the time the person made the application.

There are no other provisions related to that application. So it is actually quite a broad provision and gives the minister quite a lot of scope in relation to anyone under the age of 18. I will come back to that in my last point.

Section 21(8) refers to statelessness, which of course is a provision that is intended to satisfy Australia's commitments under the convention to reduce statelessness. My concern, which I noticed is also mentioned in the HREOC submission, is subsection (c), which says the person:

> ... does not, at the time the person made the application, have reasonable prospects of acquiring the nationality or citizenship of a foreign country and has never had such reasonable prospects.

Those last few words seemed curious to me. There is a sense that, if you had at one stage in your life had a reasonable prospect of acquiring another nationality and did not take up that opportunity, that might be a basis for the minister to determine that you are not eligible for citizenship on those provisions. On a personal level, I cannot see how that is relevant at all to the question of statelessness. If you do not at that time have the right to citizenship in another country, even if for whatever reasons you had it at an earlier stage, then the convention would still require the committed countries to bestow citizenship on that person. So I do not think those last few words are necessary to the provision.

Lastly, a point that I noticed was made in quite a few of the submissions from various law societies and one that I put in the context of this discretion is a general concern as an administrative lawyer about the very broad discretion given to the minister in relation to citizenship applications that have met all the criteria that are relevant. There is still the catch-all proviso for the minister to deny citizenship, even if a person has fulfilled the criteria set out. One way of looking at it is to say that it is hard to see how the minister could use that discretion lawfully in terms of the administrative law principles that guide courts in reviewing ministerial decisions where there is discretion. That is, any discretion has to be exercised lawfully and, in order for it to be exercised lawfully, the questions that are relevant to lawfulness include questions of relevance and bona fides.

One way of looking at it is to say that the minister has this broad discretion, but it really is still confined by administrative law principles, so the concerns may not be as acute as are being made out. On the other hand, if administrative law principles are about curtailing discretions, why place such a broad discretion in the act when there are clear guidelines as to the matters that are relevant? They are factors for the committee to consider in looking at the submissions in relation to this catch-all discretion. In basic terms there are legal principles that would still contain the minister in exercising that discretion, but they are principles relating to relevance, and the act sets up a framework for relevance as the criteria within that section.

My last point is just a matter of tidiness as a lawyer looking at the framework of the act in relation to the place of children under the act. I mentioned earlier that subsection 21(5) is quite a broad section under the subsection in relation to the provision for children under the age of 18 to be bestowed citizenship as a matter of conferral. If the section is included so that children of a person making an application under this subdivision can be included in the parents' application then I think it would be sensible to have that stated in the provision itself. It may not be the exclusive reason but it could be included and stated as one of the reasons under subsection 21(5). If that is not meant to be part of the philosophy underpinning subsection 21(5) then I think there needs to be a specific provision that would allow the minister to include a child in a parent's application. Without that provision, it is difficult to know where that power would come from under the act.

I would also suggest that, in a way, there is a precedent within the existing act to make the provisions relating to children slightly clearer here, because within the act there are references to children under the age of 16 and persons under the age of 18. Perhaps the guide can be the provisions in section 36, which relate to children of responsible parents who cease to be citizens. There are provisions under that section for those children. A provision could be included to say that a child of a responsible parent who applies for citizenship under subdivisions B and C of part 2, which covers the conferral provisions or citizenship by application, can be included in the application and the child could become a citizen at the time the parent becomes a citizen. Those timing issues appear in the act in relation to the day citizenship begins, and there are references to children in those sections which, again, imply that a child can be included in an application. But there is no direct statement of that in the act, and that, again, is just a question of transparency and logic. For instance, if a solicitor was acting for a child and trying to navigate the act to determine whether they could be included in an application, there is a presumption, really, in section 21(5) that perhaps does not need to be so obtuse.

In conclusion, I think that this bill is a great step forward for Australian citizenship law in providing a much more accessible, logical structure for the acquisition of citizenship and the loss of citizenship. I should make one thing clear. In looking at some of the submissions last night, I saw one in relation to the status of Australian citizenship that said all this act really does is create and remove that status but does not say very much at all—apart from a preamble which has no legal consequence in and of itself—about the consequences of Australian citizenship. It asserted that there are much broader, more fundamental constitutional issues that this country needs to address at some point, given that 'citizenship'

is not a constitutional term. But that was never the purpose of this bill, as far as I understand; this bill is really about remedying existing legislation to make it accessible and give it a good working framework. I think it is commendable in the way it has done that.

CHAIR—I thank you for your submission; it is very helpful to the committee. One issue which I wanted to pursue is your reference to statelessness and particularly the drafting of 21(8)(c), but I did want to have the HREOC submission in front of me and I do not, so I might wait until I have access to that and come back to my question. Senator Bartlett?

Senator BARTLETT—I will forgo my question on statelessness. Regarding the comments you made about the definition of 'good character'—it is not defined in this bill and is not in the existing act, as I understand it—you suggest there would be value in including matters relevant to good character, as a guide, I guess, without being exclusive, otherwise it becomes one of those catch-all terms like 'national interest' and so on. Do you have any suggestion of the sorts of things—once you start talking about putting in place some terms to help define if not confine it—that could go in?

Prof. Rubenstein—Generally, with existing and past policy that has guided decision makers, there are matters relevant to a person's character around whether they have been sentenced to imprisonment, whether they have been involved in war crimes or crimes against humanity or whether they have been acquitted of offences on the basis of unsound mind. On page 123 of my book there is a list of matters that have been taken into account. They are reasonable matters to be taken into account and have been used as policy, and I cannot see what would be problematic about including those sorts of matters. They are extreme, and I think that is also a good guide to decision makers that there has to be something of significant gravity to the nation to preclude someone on the basis of good character. That would also be helpful. If you had things that were quite grave in terms of a person's activity in relation to their commitment to the greater good of the community, those extreme crimes are the sorts of matters that are relevant. Then, if anything lesser is taken into account, there would have to be a lot more questioning on the part of the decision maker as to why that would be relevant.

Senator BARTLETT—In your experience, would specifying things in the act have an impact one way or the other on the chances of people successfully appealing a decision on the basis of good character? If a minister makes a decision under the character provision, I presume they would still be able to appeal that under this bill.

Prof. Rubenstein—As a matter of judicial review and in terms of that point I was making earlier about lawfulness in decision making, there is a point at which, in relation to stating certain matters that are relevant, it provides a range of decision-making relevance that judges may use as a guide. I think the underlying point that you might be suggesting is that it might confine the minister. I think that is probably correct, but confinement is also in the national interest in the sense that the nature of decision making in a democratic system is that it has to be bound by matters that are relevant and which parliament has agreed are relevant. If parliament includes those in the act, it would possibly confine the minister in judicial review, although of course parliament always has the capacity to then go and amend an act if a decision of the court is not consistent with its intents.

Senator BARTLETT—If it is basically the same as the existing law, is there already some body of case law that gives a fair bit of guidance on what would fall in and out of good character?

Prof. Rubenstein—Certainly arguments could be made, but current law, as is this, is only a matter of policy; it is not a matter of law as such. So courts in reviewing those decisions will often defer to ministers in these contexts in relation to policy as long as there is some question of relevance or of being bone fide in the decision-making process.

Senator BARTLETT—You mentioned the minister's discretion—which is sort of related—to refuse an application under section 24(2), which seems pretty black and white. Basically it says that they can refuse to approve a person's becoming a citizen despite them being eligible to be so approved. Firstly, would such a refusal be appealable?

Prof. Rubenstein—Certainly as a matter of judicial review, if you could find grounds of relevance. Say, for instance, the minister decided to refuse that person because that person had blue eyes, and the minister decided on that day that that person was not eligible because of that criterion, there would, under administrative law principles, be very clear values to argue that that is not a lawful decision because it is not relevant and not a matter that is necessarily consistent with the framework of the act.

Senator BARTLETT—Does a minister have to give a reason?

Prof. Rubenstein—That is a fair question. In relation to the Administrative Decisions (Judicial Review) Act, there are certain decisions under federal law that require reasons for decisions. That does not preclude the parliament excluding this as a matter that is required for decision making, so parliament ultimately has the power to determine whether reasons for decisions are given. The current framework would provide for reasons, but that could be changed. As a matter of common law, the High Court decisions at the moment are that there is no common-law right to reasons by decisions, so we are relying on the federal legislative framework to provide those reasons. If the minister decided that it was too tiresome to give reasons, in principle there is the power to amend the ADJR Act to exclude these decisions from reasons.

Senator BARTLETT—But as things stand?

Prof. Rubenstein—As I understand it, that has not been included as a consequential change.

Senator BARTLETT—On the aspect of risk to security, which has been raised in a few submissions—I do not think it has been raised in yours specifically—

Prof. Rubenstein—No, it has not.

Senator BARTLETT—it says that the minister must not approve a person becoming a citizen at a time when an adverse or qualified security assessment is in force. Do you have any comment on that? Some concerns have been raised about—

Prof. Rubenstein—The introduction of that new provision?

Senator BARTLETT—Yes, and the potential consequences of it. I think people would not necessarily be concerned about the principle of it but, as we have seen with a few incidents

lately, a qualified security assessment might be based on all sorts of things that people do not have the opportunity to be aware of. Firstly, would there be a right of appeal or would the appeal have to be to the AAT about the ASIO assessment rather than the minister's decision?

Prof. Rubenstein—My understanding is that in essence it is caught within the security acts in relation to the rights that an individual would have in relation to those assessments. It draws in the other act. I have not spent enough time on it to give you an expert view on that other act, but my understanding, in basic terms, is that there are rights of review. They may not be as fulsome as in non-security situations, but there is a review framework. To the extent that that is available, that would satisfy some of the concerns that would otherwise be associated with those sorts of provisions.

Senator BARTLETT—One issue I have had raised with me—I am not sure if it is in any of the submissions, but I would be interested in your view as a practitioner—is with respect to what is known as child migrants—that is, orphans from other countries who have come here and do not necessarily have the paperwork to verify various things. Are you aware of concerns relating to that issue and whether this bill impacts on those positively or negatively?

Prof. Rubenstein—I am not very familiar with those situations, but as a general matter in relation to evidence, as in the amount of time a person has lived in the country and the timing associated with their connection to Australia, this bill really mirrors the previous bill. It does not make any changes, but the department may have more knowledge about that in the submissions.

Senator HURLEY—A couple of submissions have raised the Privacy Act and whether there is enough coverage for the personal identifiers that people are now meant to provide if they want to become citizens and that there is no specific mention of the privacy of those personal identifiers in this bill. Do you have any concerns with that aspect?

Prof. Rubenstein—Again, I have not spent much time considering the personal identifiers section and those issues to do with privacy. I understand they mirror very much the Migration Act provisions. In relation to those, there are within those sections penalties associated with the inappropriate use of the information, so my general reaction would be that that would go some way to allay any concerns associated with the misuse of that information and that there are rights that flow from that if there is a misuse of the information.

Senator HURLEY—I want to go back to ministerial discretion, where the minister can refuse an application. My knowledge of the law is not that wonderful, but would a person be able to make a fresh application if there were a new minister in the hope that a different minister would approve the application?

Prof. Rubenstein—Definitely. I suppose any individual is subject to financial issues in making fresh applications, but in essence once you have had an application denied it does not stop an individual from reapplying when new situations occur. As a matter of general principle though, the act would look much nicer without that provision in the sense of its consistency with administrative law principles. It is quite normal for the public to be concerned about a provision like that, which gives the sense that the minister has this extra power. The whole basis of administrative law and the democratic system is that individuals do not have excessive power, that it is constrained by basic principles. Having a section like that

does sit uneasily in a system that otherwise commends transparency, consistency and knowledge by the public as to what are relevant matters for decision making.

Senator HURLEY—Can I get your view about the conferral of citizenship being made available to the children of those people who lost their citizenship by acquiring another citizenship and those who actually had to renounce their Australian citizenship in order to acquire one—that is, the section 17 and 18 argument. Do you think there is any basis for that distinction?

Prof. Rubenstein—This is really a question of policy as opposed to law. My own personal view is that, as a matter of policy, it is better to be inclusive rather than exclusive. So I would always err on the side of providing a greater group the rights if there is a reasonable basis. But there is a clear sense of distinction in terms of the process of renouncing it as opposed to losing it by virtue of some other action. I think there were very strong arguments that we heard earlier about the reasons that someone would have to renounce that may not be that dissimilar from having acquired dual citizenship and so forth. So I think there are very strong policy arguments to say that they should be treated in the same way. But ultimately it is up to the executive to decide which policy it prefers.

CHAIR—Professor, having had a look at the HREOC submission, in fact I do not think they advert specifically to the point that you make.

Prof. Rubenstein—Don't they?

CHAIR—Not specifically. They raised some concerns about clause 21(8)(c), but I think they are different from the ones, broadly speaking, that you raise or from the very specific point that you make. Have you looked at their three recommendations or their three-part recommendation in terms of compliance with the Convention on the Reduction of Statelessness?

Prof. Rubenstein—I do not have it in front of me. I read it last night and was in agreement with its submissions in the sense that those are persuasive arguments in relation to international law.

CHAIR—Just broadly speaking, we were having a look at that with them last week and were trying to decide what works there. Thank you very much for assisting the committee this morning. I suspect in your new role we may see you more often.

Prof. Rubenstein—That is right.

CHAIR—We look forward to that. Thank you.

[11.46 am]

CLODE, Ms Nadine, Acting Director, Citizenship Policy Section, Department of Immigration and Multicultural Affairs

ELLIS, Ms Mary-Anne, Assistant Secretary, Citizenship and Language Services Branch, Department of Immigration and Multicultural Affairs

VARDOS, Mr Peter, PSM, First Assistant Secretary, Citizenship, Settlement and Multicultural Affairs Division, Department of Immigration and Multicultural Affairs

CHAIR—Welcome. The department has lodged a submission with the committee which we have numbered 35. Do you wish to make any amendments or alterations to that?

Mr Vardos—No changes, Senator.

CHAIR—I remind senators that officers of the department are not required to answer questions relating to policy matters and will be given the opportunity to refer such questions to either the minister or superior officers. Mr Vardos, I assume you will make an opening statement. At the conclusion of that we will go to questions.

Mr Vardos—I have a very brief, 1½-page opening statement. Firstly, I thank the committee for the opportunity to lodge a formal submission and make this statement. There are two issues I would like to raise before we discuss the bill further: first, the ministerial discretion relating to periods of temporary residence and, second, the rights to review of decisions made under the proposed act.

Section 22(7) of the bill as it currently stands allows the minister to consider treating up to 12 months of temporary residence in Australia as permanent residence, provided that the person was engaged during that period in activities beneficial to Australia. As outlined in our submission to the inquiry, the government is proposing to amend this section to allow for a period of up to 24 months of temporary residence to be treated as permanent residence. Policy guidelines for 'activities beneficial to Australia' are yet to be developed but will cover social as well as economic benefit. This would enable some former temporary residents to become citizens after three years residence in Australia: two years as a temporary resident and one year as a permanent resident.

It is also worth noting the continuation of the existing discretion to count periods of temporary residence in Australia as periods of permanent residence if the applicant would suffer significant hardship or disadvantage if they were not approved to become Australian citizens. The committee would be aware that a number of submissions to the inquiry raise the extent to which periods of temporary residence in Australia may be treated as permanent residence for the purpose of meeting residence requirements. Submissions have noted that temporary visa holders have already spent a significant time in Australia—most, at least two years—prior to acquiring permanent residence and, as such, will now be required to have spent a total of five years in Australia before they will be eligible to become citizens.

The second issue I wish to raise is that of review rights. It was the intention of the bill that all reviewable decisions under the Australian Citizenship Act 1948 be reviewable under the proposed new act—that is, that there would be no change to the review rights. However, the

bill does not fully reflect the existing review provisions for those applying for citizenship for reasons of statelessness under clause 21(8) to seek review if their application is refused. This was an unintended drafting oversight. A government sponsored amendment will be introduced to address this.

With your indulgence, Chair, I wish to make a personal statement. I suffer from a medical condition called atrial fibrillation, and I am currently experiencing an episode which started about quarter to 11. I can assure you that it was not the prospect of appearing before the committee that triggered it. The reason I raise it is that I may have to excuse myself to have a Bex and a lie down outside on the couches, if I feel a bit faint.

CHAIR—I understand completely. Would you like to do that now?

Mr Vardos—No, I am fine, thank you. I have techniques for managing it.

CHAIR—I am glad the committee appearance did not bring it on, and thank you for clarifying a number of those points that you raise. One issue which I have pursued through both of the hearings is the question of statelessness and the bill's provisions in that regard. Subclause 21(8)(c), to which Professor Rubenstein referred and which is part of HREOC's submission, particularly the last subclause, has never had such reasonable prospects. What is the rationale of that particular provision?

Ms Ellis—The provision is not changed from the current legislation. The obligations under the convention on the reduction of statelessness have been considered, and the government is satisfied that clause 21(8)(c) is not inconsistent with the obligations in article 1 of the convention regarding the grant of nationality to persons born in Australia.

CHAIR—Lots of our witnesses are not satisfied though, so I am interested in the issues that they raise, and we do receive particularly valuable submissions from HREOC in their pursuit of these matters.

Ms Ellis—We have taken advice from the Attorney-General's Department on this matter.

CHAIR—I am sure they would not be keen to give it to us because they would like to be consistent in the way they go about these matters. Has all the analysis done by HREOC on these points been rejected by the department?

Ms Ellis—Yes.

CHAIR—Okay, we will consider those further. Are there other questions?

Senator HURLEY—In terms of the ministerial discretion to refuse citizenship, I think the example quoted where the minister may refuse citizenship is when there has been no specific adverse security assessment but the minister might consider that, for example, the person has been inciting violence, hatred or something of that nature. There has been one suggestion in our submissions that this might be covered under the good character test; that such a person might be considered of bad character. Can you comment on that.

Ms Ellis—The reason for the discretion in the draft bill is that there is currently that discretion in the legislation. It is worded differently. The restructuring of the legislation and the use of more modern drafting language is making it much more explicit. For example, section 13(1) states:

Subject to this section, the Minister may, in the Minister's discretion ...

The language is much more explicit in the new legislation, but it is continuing a discretion that has been there since the legislation came into effect in 1949. There has been no consideration and no decision to change that discretion that currently exists.

Senator HURLEY—How many times has the minister exercised that discretion?

Ms Ellis—I have only been involved in this area for just under 2½ years. I am not aware of an occasion on which that discretion has been used. To my knowledge, the decisions that have been taken generally by the minister's delegates to refuse an application have been where there has been a specific criterion that has not been satisfied. Clearly, the vast majority of decisions to refuse applications are subject to merits review by the Administrative Appeals Tribunal.

Senator HURLEY—I now move on to the change in the time period, from two years to three years, to qualify for permanent residency in Australia. Again, the rationale for this was that people would get to know Australia better. I can understand some rationale for that. We have had quite a bit of evidence that some people think that the requirements for becoming citizens should include a test, as Senator Bartlett has said, and should become more onerous. I am concerned primarily about the people who are caught in the transitional period, those who are in Australia at the moment. Their understanding has been that two years is the requirement. As soon as this bill passes into law, as I understand it, they will be caught and will not be able to apply for up to another year, up to the three-year limit. Why has there been no provision for the people who came to Australia and got permanent residency under the understanding of the two-year time period?

Ms Ellis—The legislation as currently drafted is in accordance with the policy decision that has been taken. I would just note that the bill does include a number of discretions in relation to the residence requirements, so not all those people would necessarily be caught in that. There is not a great deal more that I can add. It is really a policy decision that is reflected in the current legislation such that, when the legislation comes into effect, applications on and after that date would be subject to the new requirement.

Senator HURLEY—Is there any education process planned in the lead-up to the passage of this bill through parliament? A number of groups in migrant communities that I have spoken to are not aware of the bill going through the House and are not aware of this provision. So people who now qualify under the two-year rule may not be aware of the change until it actually goes through and then they will find that they will have a longer period to wait.

Ms Ellis—I was interested to hear evidence given earlier suggesting that a lot of people are not aware of it. Certainly the application rates to the department indicate that there are significant numbers of people who are aware of the proposed change. There has been considerable correspondence with people thinking that, because it had been announced, the change was currently in force. We are assuring people that the change will not come into effect until the legislation comes into effect. We are pointing people to the citizenship web site and suggesting that they keep an eye on that because progress on the legislation will be

included on the web site. In terms of a specific campaign to inform people, there is no campaign planned at this stage.

Senator HURLEY—There is no suggestion that the government may, for example, advertise on SBS television and radio or in the various ethnic media?

Ms Ellis—There are no plans at this stage. However, I would note in that in relation to people who make an application and miss out on satisfying the residence requirement, there are provisions in regulations to enable them to make another application and not pay a fee in such further period of time as would enable them to meet the requirements. If the concern is that people would make an application, pay their money and then have to apply again and pay another fee, that particular aspect is covered.

CHAIR—On the point that Senator Hurley is pursuing, one of the substantive aspects of the references committee's inquiry into expatriate Australians, broadly speaking, was about communication with the expatriate communities on matters such as this. As I recall, recommendations made in relation to both your department and DFAT about better communication both within and outside Australia on changes in relation to legislation in this area were at least taken up favourably by the departments concerned. So the point that Senator Hurley makes about the importance of communicating with relevant constituencies, which is a point made in the submission of the Southern Cross Group, is one the committee would be keen to reinforce and then see the department take up perhaps slightly more positively than you did in your response to Senator Hurley's question.

Ms Ellis—My apologies. There are two matters quite apart from the legislation.

CHAIR—I understand that.

Ms Ellis—There is the general campaign to promote citizenship and, to the extent that there are opportunities within that advertising to ensure that people understand what some of the basic requirements are, I am sure consideration will be given to including that in the advertising. In respect of the recommendations made by the other committee, it is my understanding that those recommendations are still under consideration, and a response—

CHAIR—The Department of Foreign Affairs responded faster than DIMIA did, then?

Ms Ellis—I am not aware of that response.

CHAIR—I thought there had been a favourable response. The committee would reiterate its point about the valuable opportunities for communication available to the departments and the very simple ways available at our fingertips in relation to technology—that these can be done simply and inexpensively and avoid a lot of problems.

Senator HURLEY—I want to go on to the security risk issue—assessing security issues for people who want to become citizens. The ASIO assessment is now included in the process. Was that because of identified shortcomings in the existing process?

Ms Ellis—There is currently no requirement under the citizenship legislation for a person to have been assessed as not being a security risk. Government decided and announced in September last year that there would be a requirement for a security check on citizenship applications, and the legislation reflects that decision.

Senator HURLEY—Were police checks done previously?

Ms Ellis—Certainly police checks are undertaken as part of the good character requirement.

Senator HURLEY—So it was purely a policy decision that the police checks were not adequate to cover any issues with security?

Ms Ellis—Yes, Senator.

Senator HURLEY—I also want to deal with the matter of children of people who have renounced their citizenship, and it appears that the Maltese community is the biggest group. Have you heard of any other communities that may be affected by this provision?

Ms Ellis—It is not all that easy to interrogate our databases, because a lot of the information is pre databases and does not readily lend itself to getting the sorts of reports that we would like to get from them at times. But, as an indication, we have pulled some data on renunciations in 2002-03. Citizenships of people who renounced their Australian citizenship included Malaysia, Singapore, Germany, the US, the UK, Fiji, Indonesia, China, Japan, Denmark, Austria, New Zealand and Korea. Others included Canada, France, South Africa and Ireland. So there is a significant range of countries. It is clear that the majority were Maltese nationals—approximately 60 per cent. On the indicative data we have been able to cobble together from going through old bound registers of renunciations, it seems that there are about 3,600 people who have renounced their citizenship since 1949. Around 60 per cent of those were Maltese nationals, but there are a lot of other countries.

Senator HURLEY—With regard to a number of those countries that you have mentioned, my understanding is that the renunciation would have been because you have to renounce your Australian citizenship to become a citizen of those other countries. Is that so in all cases?

Ms Ellis—No, it is not so for all cases. Certainly a number of those countries do not allow dual citizenship and the circumstances under which the individual renounced their Australian citizenship could vary. It could be because they wanted to acquire the citizenship of the other country. It might be because they were dual citizens and had reached the age of 18 or 19 and the laws of the other country may have required them to renounce Australian citizenship. But not all of those countries do not allow dual citizenship. Take, for example, Canada, the UK, the USA and New Zealand; there are a number of countries which do allow dual or multiple citizenship.

Senator HURLEY—So there would be a clear distinction then between those people who chose to renounce their Australian citizenship and those that did it because they had to because the country that they were living in did not allow dual citizenship and they had to renounce their citizenship?

Ms Ellis—Yes. There is a range of circumstances that can lead to someone renouncing their Australian citizenship. For some it is a choice that is not linked to another country's legislation but for others it is a life choice that they are wanting to make and it is linked to the legislation of the other country.

Senator HURLEY—In choosing in this bill to exclude the children of those citizens who had actually renounced their citizenship, the explanation given in the second reading speech

was that those people would have known what they were doing and therefore their children did not deserve citizenship; their parents should have known that they would be excluding their children from citizenship. In light of the evidence that has come forward, in particular that from Maltese people, about the circumstances of their renunciation, do you think there is a clear delineation between those who have lost their citizenship by becoming citizens of another country and those who have actually made the decision that they had to renounce in order to become citizens of another country?

Ms Ellis—I am just not sure how close we are getting to the areas in which my ability to comment as a public servant is limited.

Senator HURLEY—I understand; that is fine. So if the law were altered and those section 18 people who renounced their citizenship were included, would that have a significant effect on the number of people or the types of people who would become eligible for citizenship?

Ms Ellis—In terms of numbers, we know that around 3,600 people have renounced their citizenship since 1949. We do not know how many of those people are still living. We do not know how many of those people might want to take advantage of the provision to resume their Australian citizenship. There is then the matter of how many children they may have and what ages the children are. There is a range of possibilities. If, for example, the 3,600 each had between two and three children, the total number of first generation children would be between 7,000 and 11,000, so the numbers are not insignificant but is very difficult to get into the ballpark in terms of an estimate of the numbers that we would actually be talking about.

Mr Vardos—Senator, if I could venture a comment in relation to an earlier question about renunciation, I think we could go so far as to say that renunciation is a formal and final act in severing your relationship with the country. In doing it, there can be no expectation that subsequent generations of your family will have any formal claim to the citizenship of that country.

Senator HURLEY—Yes, but I think the evidence though, Mr Vardos, is that many people, before Australia opened up the possibilities of dual citizenship, did acquire the citizenship of another country and, unfortunately, some had to renounce their Australian citizenship in the process. It is a question of what distinction is made there.

A number of people who moved back to their original country or another country and took up citizenship lost their citizenship of Australia by default. It seems that the legislation welcomes back those people, even though you could argue that they knew at that stage that, by acquiring citizenship of another country, they would lose their Australian citizenship and should have known that their descendants would be affected. It is a matter of fine balance, I guess.

Mr Vardos—It is.

Ms Ellis—The other thing is that the legislation has, over the years, clearly discriminated between section 17 and section 18. Section 17 was an operation of law provision. There have been resumption provisions since 1984 for people who lost their Australian citizenship under section 17. There have been resumption provisions for quite some years for children who lost their citizenship under section 23 as a result of a parent having renounced their citizenship or lost their citizenship under section 17. Section 17 has been repealed and the focus of, if you

like, trying to tidy up the consequences of section 17 and providing for the adult children of those who lost under section 17 is linked to the repeal of section 17. The provisions extending the provisions for people who have renounced their citizenship to resume their citizenship are regarded as a very significant extension of a resumption provision that was introduced only in 2002.

Senator HURLEY—I suppose that is again the point: the tendency in allowing citizenship has been to include more people. You have drawn another line in the sand, and the question is where that line should be drawn. As you say, that is a policy decision.

Mr Vardos—I should add that three ministers have now considered this issue. Minister Hardgrave cast the die in the first place. Mr McGauran then affirmed that position and Mr Cobb subsequently affirmed that position again. So it has been given significant consideration since 2003.

Senator BARTLETT—Perhaps touching on that comment: who actually has ministerial responsibility for this now? Has it gone back to Senator Vanstone or is it something that is going to be put in the bailiwick of the parliamentary secretary?

Mr Vardos—I believe those details are still being worked out.

Senator BARTLETT—I just asked in case a fourth person takes a different view and wants to leap into the fray before it is too late. I want to ask about something that I do not think has been raised yet: the concern that has been raised about whether we need to have greater clarification with regard to privacy principles. You are aware of some of those comments. Do you have any response to them? Do you believe the privacy protections are adequate as they stand?

Ms Ellis—Yes. The framework that is in the legislation is that it is essential to establish the identity of people applying for citizenship or applying for evidence of their citizenship. There can be multiple transactions involving the same person. I think some of the submissions perhaps do not have a very good understanding of the processes. Of course, if we have personal identifiers, given that the person may want to have evidence of their citizenship at some time in the future, it is important to hold and have access to those identifiers for the purposes of establishing that person's identity when they next come to the department.

We currently collect signatures and photographs. The framework within the legislation is really so that, as new technology comes into the workplace, and perhaps iris scans or other means of identification are used more commonly, we have that framework so we can collect and store and use those personal identifiers—again, all with the intention of establishing the identity of the person who is interacting with the department in respect of their citizenship. The department is bound by the 11 information privacy principles that are set out in section 14 of the Privacy Act, and that, together with the provisions in the legislation, we regard as covering those aspects.

CHAIR—Where is there a cross-reference in this bill to the Privacy Act and the binding nature of the privacy principles?

Ms Ellis—There is not specific reference in that legislation, but we are nevertheless bound.

CHAIR—Would it be unreasonably onerous to insert it in the legislation, given the serious nature of the material which the bill concerns—particularly if you are going to talk biometrics as well?

Ms Ellis—That I something I would need to take on notice. I would need to consult with the drafters as to whether they regard that as redundant.

CHAIR—I know what the drafters do when they regard things as redundant. They put in clauses like, 'To avoid doubt, this means …' which does not always strike the committee as an ideal approach to drafting. As far as the bill itself is concerned, can you point me to the clauses which indicate, for example, that it would not be permissible for DIMA to release personal identifiers to other agencies, like the tax office or Centrelink? Where are those clauses?

Ms Ellis—Clause 43 talks about permitted disclosures, and there are references there that say, 'for the purposes of this act'. Subclause (3) says that a disclosure is not a permitted disclosure if it is for the purposes of investigating an offence against an Australian law or prosecuting a person for such an offence.

CHAIR—So you do not envisage that it would be possible under, for example, clause 43(2)(e)—which refers to the exchange of identifying information 'under an arrangement entered into with an agency of the Commonwealth, or with a state or territory or an agency of a state or territory'—for that to end up being the case, that personal identifiers might end up being released under that sort of clause to the tax office or to Centrelink, for example?

Ms Ellis—It is my understanding that that provision is, for example, to cover arrangements that we have with the passports office for when they are verifying that a person is a citizen and verifying identity for the purposes of the Passports Act and other similar provisions. I would have to take on notice any further provision that that would be, but we would regard (3) as, if you like, a rider on (2).

CHAIR—Under clause 10(2)(c), it seems to me that material collected under section 42 can be accessed for other purposes which are not about identifying the individual but, under clause 10(2), are about 'combating document and identity fraud in citizenship matters and complementing'—whatever that means—'anti-people-smuggling measures'. What does that mean, and how is that within the privacy principles? The Privacy Commissioner certainly does not seem to think it is.

Ms Ellis—The provisions were largely based on the provisions in the Migration Act, with specific exclusion of the collection of any forensic identifiers.

CHAIR—So you do not regard the collection of biometric data such as an iris scan as falling into that category? There may be a definitional issue that I unaware of.

Ms Ellis—It is my understanding that it is not regarded in the forensic—

CHAIR—I am glad my iris is not regarded as forensic.

Ms Ellis—Intimate forensic is, for example, the taking of blood.

CHAIR—If you are going to get that close to my iris, I think you are going to be intimate! Maybe that is just a personal space problem I have. In its submission, the Privacy Commissioner raised some issues about proportionality in relation to data retention and collection. These are matters which do concern the committee, particularly when section 10(2) allows personal identifiers to be used in relation to matters other than the specific purpose for which they are collected—that is, determining identity. The committee will probably pursue that further with the Privacy Commissioner, although we do have the benefit of their submission already. Sorry to interrupt, Senator Bartlett.

Senator BARTLETT—That is okay. Could you explain for me how the discretions that are being put in place in regard to previous residence in Australia might work with the extension of the requirement to three years of permanent residence and presence in Australia in the preceding five years? There is scope for the minister to give a 12-month discount, if I am using the right terminology, for people who have been in Australia on temporary residence visas—is that right?

Ms Ellis—It will be up to 24 months. In the opening statement, Mr Vardos mentioned that the intention was for up to 24 months of temporary residence to be taken as permanent residence for the purpose of a citizenship application.

Senator BARTLETT—So there would then be a requirement for another one year of permanent residency before they become eligible?

Ms Ellis—Yes.

Senator BARTLETT—One group whose circumstances were raised, I think at the Melbourne hearings, were the refugees who have been here on temporary protection visas for at least three years. In that sort of situation, they would now only need to have one year on a permanent resident visa before they could apply for citizenship—is that right?

Ms Ellis—The discretion is to count up to 24 months, if the person was engaged in activities beneficial to Australia during that period. The policy guidelines for what constitutes activities beneficial to Australia have not yet been developed, but we expect that it would address not just economic benefits but also social benefits. It would be expected to be quite generous.

Senator BARTLETT—The terminology of 'beneficial to Australia' is taken from the existing act, isn't it, for people who have been overseas?

Ms Ellis—Yes. Underlying the changes is recognition that under the current legislation people who spend time overseas involved in activities beneficial to the interests of Australia can have that time treated as permanent residence in Australia. There was no matching provision for those who were living in Australia as temporary residents, so the intention was to match that up, if you like, to get the two parts very similar. In respect of people who are living in Australia, while the current provision tends to focus much more on the economic benefit to Australia, it is expected that the policy guidelines for this new provision would be much broader than economic benefit.

Senator BARTLETT—I have two questions that flow on from that. Firstly, does this being at the discretion of the minister mean that it will be up to the minister as to whether or not they exercise it and that there is no scope for appeal?

Ms Ellis—Any of the current residence discretion decisions are reviewable, and it is expected that decisions under the same circumstances would be reviewable under the new legislation. There is the limitation, of course, that people generally need to be a permanent resident to have the review rights, because permanent residence is a threshold requirement for most of the provisions for people to be eligible for citizenship.

Senator BARTLETT—I guess the second would be that it is still to be determined how this notion of benefit to Australia that we are putting into the law here in a new sense for temporary residents will be defined in a meaningful sense.

Ms Ellis—That is correct.

Senator BARTLETT—You say the expectation is that it will be more generous. What is that based on?

Ms Ellis—It is based on thinking in putting forward the current provision that there are circumstances in which people spend many years in Australia as temporary residents. For example, and this is only an example, there are some cases where the reason for a person being able to get a temporary visa is that they will be contributing to Australia. It is important to recognise that. It is also recognised that there are benefits associated with social matters. For example, I would expect that there would be reference to spouses of Australian citizens who are here with their Australian family within the policy guidelines.

Senator BARTLETT—A point was made by a previous witness, Professor Rubenstein, regarding section 16(3)(b) for people born outside Australia or New Guinea before 26 January 1949. Do you know the matter I am referring to?

Ms Ellis—Yes.

Senator BARTLETT—She suggested that that as drafted is a bit narrower than what she reads as the intended scope of the minister's statement back in July 2004. Do you have a response to that?

Ms Ellis—I would not agree with that. As drafted, it is consistent with the policy intention that that provision would cover someone who was born outside Australia to someone who had been born in Australia or born outside Australia to someone who had previously been naturalised in Australia.

Senator BARTLETT—So you think the comments she made in her submission were based on a misreading of that.

Ms Ellis—Yes.

Senator BARTLETT—The ASIO qualified security assessment basically makes it automatic that the minister must not accept or approve an application whilst someone has a negative ASIO assessment outstanding. Is it correct that there is no discretion there?

Ms Ellis—That is correct.

Senator BARTLETT—To appeal against such an assessment people would have the normal existing appeal mechanisms through the AAT and the ASIO act, or whatever that act is.

Ms Ellis—That is correct.

Senator BARTLETT—This might be outside your expertise, but I would have thought that, if people were here on any sort of visa, were not citizens and had a negative ASIO security assessment, there would be some consideration given to cancelling their visa as well. Is that not automatic?

Ms Ellis—I would expect that that would be the case. However, the issue is one of timing. It is entirely possible that someone might have applied for citizenship and then come to notice and there is an assessment by ASIO. We still need to deal with the citizenship application, regardless of what might or might not happen in respect of the person's visa and any consideration as to cancellation of the visa.

Senator BARTLETT—Would you be able—perhaps on notice, because I appreciate it is not in the citizenship area—to clarify whether or not there would be an automatic flow-on to have a cancellation of a visa?

Ms Ellis—Yes.

Senator BARTLETT—A qualified assessment could stay in place for a very long time and I am curious about how it could impact over a long period of time if people were still in the country. It is now clearly established and, I think, widely supported policy and law for Australia to be comfortable with dual or even triple citizenship. The question has come up a few times in other contexts, but do we know the total number of Australian citizens?

Ms Ellis—The total number of dual citizens?

Senator BARTLETT—Firstly, just Australian citizens.

Ms Ellis—I would need to take that on notice. I would need to go to the ABS statistics. It would be the latest data, which was the 2001 census because the department has statistics on those people who have become Australian citizens but of course does not have records on those people who have acquired citizenship automatically by birth in Australia unless they have approached the department and have sought evidence of their citizenship. Then there are those who may have lost their citizenship but have not come to notice for whatever reason. That would be a smaller subset but it is not a figure that we would be able to derive from our databases. We would rely on the ABS data.

Mr Vardos—The national census is the definitive source of identifying the number of Australian citizens.

Senator BARTLETT—Citizens who were in the country on census night.

Mr Vardos—As far as it goes, yes. Our current data is 2001. That is why we are very much looking forward to the 2006 census.

Senator BARTLETT—With regard to how many of those are dual citizens, we do not have anything?

Ms Ellis—That is equally as difficult because there are those who we know are dual citizens but, for example, we do not keep track of the citizenship laws of a whole range of countries. So there are people who acquire Australian citizenship and, on acquisition of Australian citizenship under the laws of another country, would lose that other citizenship. So we would not know that number.

Senator BARTLETT—I do not want to go too far down this track but I guess in the broader debate of what is citizenship and what it means and those sorts of things, if the resident population of Australia at the moment under ABS is roughly 20½ million, which I presume also includes temporary residents as well as permanent residents, we do not necessarily know how many of those 20½ million are Australian citizens except for on census night 2001. Is that right?

Ms Ellis—The number who are citizens in Australia on that night, and then it would be guesstimates about how many Australian citizens are outside Australia at that point.

Senator BARTLETT—The question I raised briefly with the previous witness was about what are known as child migrants but the child migrants that were considered in the Senate committee inquiry into former child migrants who were brought here. I think the *Lost innocents* report had a recommendation that the government confer automatic citizenship on all former child migrants with provisions for those who do not wish to become citizens to decline. My understanding is that the government rejected that recommendation. I am told there are still difficulties with passports and other issues for some such people who do not have birth certificates or who had their names changed by institutions who cannot prove who they are and those sorts of things. Can you give me any comment on any awareness you have of those ongoing issues and how you are attempting to address them? I appreciate that under this act—and I suspect it is under the previous act—the minister has to be certain of someone's identity before they can give citizenship. In what ways are we trying to overcome these problems, and are you are aware of them?

Ms Ellis—We do occasionally have people who have difficulty, for example, in finding someone to complete the declaration that they have known the applicant for a certain period of time. We had one case recently where the person was an itinerant worker who moved through and did not stay in any one place for longer than about three months. What we do is work with those individuals to find some way to find someone who has perhaps not known them for all of the last 12 months but has known them for periods of time or a period of time and sees them regularly. We work with the individual to see just what they have so as to get to the point where we can be satisfied as to their identity. What we do with each individual, of course, varies depending on their circumstances.

Senator BARTLETT—Can I ask you as well about the aspect to do with citizenship by adoption—section 13. Is that just copied over from the existing act?

Ms Ellis—Yes.

Senator BARTLETT—In section 13(c), where it says 'present in Australia as a permanent resident at that time,' does that mean just that the adopted child has to be present when the application for citizenship is made?

Ms Ellis—That is an operation of law provision. It is for children who are adopted through the intercountry adoption arrangements through the state and territory governments. They enter Australia on an adoption visa and their adoption is finalised once they have arrived in Australia. The provision is that, as soon as the adoption is completed in Australia—they have entered Australia on a permanent visa or on the adoption visa—they become Australian citizens and they are entitled to get a certificate of evidence of that citizenship.

Senator BARTLETT—So that is where the automatic bit kicks in?

Ms Ellis—That is correct.

Senator SCULLION—I have a couple of areas for clarification. Most of the issues have been covered by my colleagues. Just going back again to the issue of an assessment for permanent residency and an assessment for citizenship, is there any difference between the jurisdictions that do that assessment? For example, are both of them done by ASIO? I understand the proposal is for the citizenship application to be referred to ASIO. Does permanent residency currently enjoy exactly the same level of scrutiny or not?

Ms Ellis—There have been security checks of applications for permanent visas for some time. That is my understanding.

Senator SCULLION—So, when we talk about ASIO having the veto, they are conducted at the same level? The security checks would be done by ASIO?

Ms Ellis—Yes.

Senator SCULLION—There would be no difference between a permanent resident and somebody who is applying for citizenship, in effect?

Ms Ellis—No. Security checking is done by ASIO.

Senator SCULLION—Will same-sex couples enjoy the discretion to raise the residency requirements under this new bill?

Ms Ellis—The only reference to spouses is in the residence waiver. There is not provision for same-sex partners.

Senator SCULLION—Why would that be?

Ms Ellis—It is not a matter that has been considered, I would have to say. There has been reference for some time to the fact that 'spouse' under the Australian Citizenship Act is 'legally married spouse'. There has been no provision for a de facto spouse. Under the new bill for adults there will be no basis for an application in respect of a relationship with an Australian citizen. All adults will need to apply in their own right. The residence discretion has been extended to the de facto spouse of an Australian citizen where they entered Australia as the de facto spouse of that citizen. There was not an intention to introduce into the citizenship process an assessment of relationships and the nature of a relationship. That is why that extension to de facto spouses has been framed in that way. Consideration had not been given to same-sex partners, but, obviously, if the committee wants to make a recommendation then that will be considered in due course.

Senator SCULLION—I was just getting to the bottom of whether or not it was a specific policy intent rather than something that deals generally with de facto relationships. You have clarified that for me.

CHAIR—There are a couple of issues which we may take up further through questions on notice, and we have already flagged some of those. There is just one question I want to ask Mr Vardos before we close. I think in your opening remarks you referred to the development of policy guidelines specifically relating to what is beneficial to Australia—if I have the terminology generally correct. What will be the status of those policy guidelines? Will they be internal guidelines to the department? Are they publicly available? What is the plan for those?

Ms Ellis—They would be publicly available. The current Australian citizenship instructions are publicly available. With this legislation we will be developing regulations and policy to support the regulations and the act, in the same way that currently there are policy guidelines. I noted an earlier remark from someone giving evidence that the current policy guidelines are very complex and lengthy, and we are hoping with the simplified structure of the legislation that the policy guidelines will be more straightforward and much more accessible.

CHAIR—Thank you. I think most of our witnesses—to make a generalisation—have agreed that the bill is welcome and long overdue, but there are issues around some important areas that they still wanted to pursue with the committee. We will consider those, perhaps take some up with you further in questions on notice and go from there. There being no further questions, may I thank you all for your appearance here today, for your assistance to the committee and also for your submission and opening statement. Not all departments are that helpful all the time.

Committee adjourned at 12.41 pm