



Australian
Human Rights
Commission

Australian Citizenship and Other Legislation Amendment Bill 2014

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

6 November 2014

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Table of Contents

<i>Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Legislation Committee.....</i>		1
1	Introduction	3
2	Summary	3
2.1	<i>Background and timing</i>	3
2.2	<i>Key issues</i>	4
3	Recommendations.....	5
4	Revoking citizenship if Minister ‘satisfied’ of fraud or misrepresentation	5
4.1	<i>Removal of safeguard of court findings.....</i>	5
4.2	<i>Potential for children to become stateless</i>	7
5	Minister to have power to overrule the Administrative Appeals Tribunal	8
6	Personal decisions of Minister no longer reviewable by Administrative Appeals Tribunal.....	10
7	Ten year old children born in Australia	11
7.1	<i>Children of refugees</i>	12
7.2	<i>Children of parents who overstayed their visa.....</i>	13
8	People with intellectual disability or cognitive impairment	16
9	‘Good character’ requirement.....	18
9.1	<i>Extension to children.....</i>	18
9.2	<i>Revocation by Minister of citizenship by descent.....</i>	19

1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth) introduced by the Australian Government.
2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.

2 Summary

2.1 Background and timing

3. The Commission welcomes the opportunity to make a submission to this inquiry.
4. At the outset, the Commission notes that the Committee has been given an extremely short period of time to review this legislation. This compressed timeframe necessarily has an impact on the ability of the public to make submissions about the Bill.
5. The Commission received an invitation from the Committee on 31 October 2014 to make a submission; the day after the Bill was referred to the Committee for reporting. The Committee has sought written submissions by 6 November 2014, with a view to conducting a public hearing on 10 November 2014. The short period for submissions is a result of the limited period given to the Committee for reporting. A report is due by 1 December 2014.
6. Given that the Commission has only had four business days to review the Bill and produce a submission, we have limited this submission to a few key issues.
7. The Commission has concerns about the limited period given to this Committee to fully consider of the impact of a Bill which amends a very important piece of legislation in a manner that raises a significant number of human rights issues. In his second reading speech, the Parliamentary Secretary to the Minister for Communications said:

This year, we celebrate the 65th anniversary of Australian citizenship. It is therefore appropriate to review the Australian Citizenship Act 2007 to ensure that it upholds the value of our citizenship.¹
8. The reason given for the review of this legislation does not appear to justify the urgency with which it has been put forward, or the limited period of time allotted for its review. It may well be appropriate to review citizenship legislation on the occasion of its 65th anniversary, but that is not a reason why this Committee should be required to complete its review in a month.
9. The Commission recommends that the Committee seek an extension of time for reporting in relation to this Bill to give a greater opportunity for public submissions about the important issues raised by the proposed amendments.

2.2 Key issues

10. This submission deals with two broad themes in the amendments proposed by the Bill.
11. The first theme involves the centralisation of discretionary power in the hands of the Minister for Immigration and Border Protection to make decisions about who should and who should not be an Australian citizen.
12. This is done in a number of ways. For example, under the amendments the Minister would have the power to:
 - a. revoke a person's citizenship for a period of up to 10 years after it was granted if the Minister becomes satisfied that there was a relevant fraud or misrepresentation, without the safeguard of having to prove that fraud or misrepresentation in court
 - b. revoke a person's citizenship acquired by descent if the Minister later becomes satisfied that the person was not of good character at the time they were registered as a citizen
 - c. set aside certain decisions of the Administrative Appeals Tribunal that deal with whether a person was of good character
 - d. prevent administrative decisions about citizenship from being reviewed on the merits by the Administrative Appeals Tribunal by making the decision personally and stating that the decision was made in the public interest.
13. The amendments would increase individual Ministerial discretion and reduce independent merits review of administrative decision making. This is contrary to a primary focus of administrative law over the last 40 years, which has aimed at making administrative decisions more principled and consistent by allowing independent merits review of decisions that have a significant effect on individual rights.
14. The second theme that emerges from the amendments is a reduction in the ability of particular groups of people to qualify for citizenship. For example, the amendments would make it more difficult for the following groups to become citizens:
 - a. children of refugees who are granted temporary protection visas, even after they have been lawfully in Australia for 10 years
 - b. people with mental illness or cognitive impairment who come into contact with the criminal justice system
 - c. children that the Minister considers are not of good character.

3 Recommendations

15. The Australian Human Rights Commission makes the following recommendations.

Recommendation 1

The Commission recommends that the Bill not be passed in its current form.

Recommendation 2

The Commission recommends that the Committee seek an extension of time for reporting in relation to this Bill to give a greater opportunity for public submissions about the important issues raised by the proposed amendments.

Recommendation 3

The Commission recommends that in any future draft of the Bill, consideration be given to removing the following provisions:

- (a) the discretionary power of the Minister to revoke citizenship if satisfied that there was fraud or misrepresentation (s 34AA)
- (b) the power of the Minister to set aside certain decisions of the Administrative Appeals Tribunal (s 52A)
- (c) the power of the Minister to exempt any personal decisions from review by the Administrative Appeals Tribunal (s 52(4))
- (d) proposed limitations on the 'ten year rule' (at least s 12(4)-(7))
- (e) existing and proposed provisions that discriminate against people with a mental illness or cognitive impairment who come into contact with the criminal justice system
- (f) the extension of the 'good character' requirements to children
- (g) the power of the Minister to revoke citizenship by descent if the Minister later becomes satisfied that the person was not of good character at the time they were registered as a citizen (s 33A).

4 Revoking citizenship if Minister 'satisfied' of fraud or misrepresentation

4.1 Removal of safeguard of court findings

16. The *Australian Citizenship Act 2007* (Cth) (Australian Citizenship Act) currently provides that if a person applied for and was granted Australian citizenship as a result of descent, intercountry adoption or conferral, the Minister for Immigration and Border Protection (Minister)² may revoke the person's citizenship if:

Australian Human Rights Commission
Australian Citizenship amendments, Senate Inquiry – 6 November 2014

- a. the person was convicted of a criminal offence involving fraud or misrepresentation in relation to the citizenship application; or
 - b. the person obtained citizenship as a result of fraud for which a third party was convicted.³
17. As the law presently stands, allegations of fraud or misrepresentation must be proved in court beyond a reasonable doubt.
18. The Australian Citizenship Council explained the rationale for this threshold as follows:

Generally speaking, the policy underlying the power of government to deprive an Australian citizen of his or her Citizenship is based on the idea that there should be certainty of Australian Citizenship status, that the status should not be easily taken away, and should not be taken away simply by an administrative action by government.⁴
19. The Council noted that the requirement for conviction of an offence in relation to fraud or misrepresentation was ‘an important safeguard’ and recommended that it continue.⁵
20. The Bill proposes to change the threshold for revocation in exactly the kind of way that the Council warned against.
21. Proposed s 34AA would allow the Minister to revoke a person’s citizenship if the Minister was ‘satisfied’ that the person obtained approval to become a citizen as a result of fraud or misrepresentation connected with:
 - a. the citizenship approval granted by the Minister;
 - b. the person’s entry into Australia;
 - c. the grant of any visa to the person prior to the approval to become a citizen.⁶
22. This would significantly decrease the degree of proof of fraud or misrepresentation required. There would no longer be any requirement for the allegations to be tested in court. The Minister’s satisfaction would be sufficient. Citizenship could be taken away ‘simply by an administrative action by government’.
23. The person need not have engaged in any fraud or misrepresentation themselves or even have known that there was any fraud or misrepresentation involved. For example, the Explanatory Memorandum suggests that a person’s citizenship could be revoked if the Minister becomes satisfied that a misrepresentation was made by a person’s migration agent.⁷
24. A person’s citizenship could be revoked under this provision for a period of up to 10 years after it was granted.⁸

25. Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR)⁹ contains due process guarantees in relation to legal proceedings. It relevantly provides:

All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

26. The right of access to courts and tribunals and equality before them, is not limited to citizens. The United Nations Human Rights Committee has said that it must also be available to all individuals, regardless of nationality or statelessness who find themselves in the territory of a state.¹⁰
27. Given the grave consequences involved for an individual if citizenship is revoked, the Commission considers that any allegations of fraud or misrepresentation used as the basis for revoking citizenship should be established as a result of a fair and public hearing by a competent, independent and impartial tribunal established by law.
28. The proposal to remove this important safeguard and allow citizenship to be taken away simply by an administrative action by government is contrary to these principles of due process.

4.2 Potential for children to become stateless

29. Significantly, the Government says that the Minister could use this new power to revoke a child's citizenship, 'even if [this] would make that child stateless'. Such action raises a serious risk of conflict with article 15(2) of the *Universal Declaration of Human Rights* which provides that 'no one shall be arbitrarily deprived of his nationality'. As discussed in more detail below, similar principles are contained in the *Convention on the Rights of the Child* (CRC)¹¹ and the *Convention on the Reduction of Statelessness*.¹²
30. The Government says that a child could only be deprived of his or her citizenship and made stateless if the child was responsible for the fraud or misrepresentation him or herself.¹³ If this is what was intended, the Commission welcomes the clarification and an appropriate amendment should be made to the Bill. However, the Government's statement appears to be a misreading of the Bill and the Australian Citizenship Act as they currently stand. The Explanatory Memorandum refers to s 36 of the Act which relevantly provides that if a *parent's* citizenship is revoked, then the Minister may also revoke his or her child's citizenship, unless the child would otherwise be stateless.
31. However, if the child's visa is revoked directly as a result of the proposed s 34AA, there is no saving provision if the child would otherwise be stateless. The mistake in the Explanatory Memorandum is assuming that a child's visa can only be revoked directly if the child was responsible for the fraud or misrepresentation. On the contrary, it is clear from proposed s 34AA(2) that a child could have his or her citizenship revoked, and become stateless, if the Minister was satisfied that there was a misrepresentation by *any* person in

connection with the child's citizenship application, entry into Australia or grant of a visa. Further, as noted in section 4.1 above, such misrepresentation need not be proved in court proceedings. It is enough that the Minister is personally satisfied that someone engaged in misrepresentation.

32. Article 8 of the CRC provides that children have the right to preserve their identity, including their nationality, without unlawful interference.
33. Article 8(1) of the *Convention on the Reduction of Statelessness* provides that a state shall not deprive a person of its nationality if such deprivation would render the person stateless. There is an exception in article 8(2)(b) if the nationality has been obtained by misrepresentation or fraud. However, there are limitations to this exception.
34. First, based on the *travaux préparatoires*, there is a reasonable basis to conclude that 'misrepresentation' in the context of this exception means 'dishonest misrepresentation'.¹⁴
35. Secondly, deprivation would not be justified if the person whose citizenship may be revoked was not aware and could not have been aware that the information provided during the application for citizenship was untrue.¹⁵
36. On these bases, it appears that the current drafting of the Minister's powers of revocation are broader than permitted under the *Convention on the Reduction of Statelessness* as they could result in the revocation of a person's citizenship as a result of a misrepresentation of which they were unaware.

5 Minister to have power to overrule the Administrative Appeals Tribunal

37. The Australian Citizenship Act contains a system for independent merits review of decisions made by either the Minister or a delegate of the Minister.
38. Merits review is conducted by the Administrative Appeals Tribunal (AAT). Among other things, the AAT may review decisions to refuse to approve a person becoming an Australian citizen.¹⁶
39. Proposed s 52A would allow the Minister to set aside certain decisions by AAT.¹⁷ If a delegate of the Minister refuses to approve a person becoming an Australian citizen because the delegate is not satisfied that the person was of good character or is not satisfied of the identity of the person, and the AAT sets that decision aside, then the Minister would be able to set aside the AAT's decision and make a decision in accordance with the original decision by the Minister's delegate.
40. The only criteria required to be met is that the Minister is satisfied that it is in the public interest to set aside the AAT's decision. If the Minister sets aside a decision of the AAT, the Minister would be required to table in Parliament a statement that includes the reasons for setting aside the AAT's decision.¹⁸
41. The proposed amendment significantly reduces the scope of independent merits review. The aim of an independent merits review tribunal is to provide

for a check on executive decision making. These amendments provide the opposite: an executive check on independent tribunal decisions.

42. As noted above, article 14 of the ICCPR provides:

All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

43. The concept of 'suit at law' encompasses judicial procedures aimed at determining civil rights and obligations as well as equivalent notions in the area of administrative law.¹⁹ It includes procedures for determining applications for citizenship.

44. The current process of review by the AAT satisfies the criteria of review of administrative decisions by a competent, independent and impartial tribunal. The Commission does not suggest that by allowing the Minister to set aside decisions of the AAT, this would cause the AAT to act any differently in its decision making. That is, there is no suggestion that the AAT would not continue to act independently.²⁰ However, allowing the Minister to set aside decisions of the AAT would significantly interfere with the independence of the system of review viewed as a whole.

45. The Government suggests that this change will have no impact on due process rights under article 14 of the ICCPR because if a Minister sets aside a decision of the AAT and refuses to approve citizenship, the person 'will still be entitled to seek judicial review of the Minister's decisions under s 75(v) of the Constitution and s 39B of the *Judiciary Act 1903*'.²¹ This suggestion ignores two points:

- a. in any judicial review, a court will not be able to consider the merits of the application – that is, there will be no reassessment of the substantive question of whether the applicant was of 'good character';
- b. in any judicial review, a court will be limited to considering only whether the Minister made a jurisdictional error in overruling the AAT.

46. The judicial review identified by the Government is the minimum level of judicial review required by the Constitution. It is the only type of judicial review that cannot be removed by statute.

47. It is incorrect to suggest that a limitation of review rights to the minimum level of review possible will have no impact on a person's rights under article 14 of the ICCPR. Because the Government assumes that there will be no impact, there is no attempt to justify the limitation of rights as being reasonable, necessary and proportionate to a legitimate object.

48. The only reason given anywhere in the Bill for the proposed amendment is that 'in the last few years' the AAT has made six decisions that the Government does not agree with.²² In the time available to prepare this submission, the Commission has not had the opportunity to identify and examine those decisions. However, as a matter of principle, this is not a

sufficient basis to allow the Minister to set aside decisions of the AAT. Under the current system, if the Minister disagrees with a decision by the AAT the Minister can seek judicial review of that decision.

6 Personal decisions of Minister no longer reviewable by Administrative Appeals Tribunal

49. As noted above, the current position is that decisions by the Minister or the Minister's delegate can be reviewed by the AAT.
50. Proposed s 52(4) would exempt from review any decision that the Minister makes personally, provided that the Minister's notice of reasons includes a statement that the Minister is satisfied that the decision was made in the public interest.²³ The Minister would be required to table in Parliament a statement that sets out the decision and the reasons for making the decision.²⁴
51. Personal decisions of the Minister that could be exempted from independent merits review by the AAT include:
- a. a decision to approve or refuse to approve a person becoming a citizen by descent (s 17)
 - b. a decision to approve or refuse to approve a person becoming a citizen as a result of intercountry adoption (s 19D)
 - c. a decision to approve or refuse to approve a person becoming a citizen by conferral (s 24)
 - d. a decision to cancel an approval of citizenship by conferral (s 25)
 - e. a decision to approve or refuse to approve a person resuming citizenship if they have ceased to be an Australian citizen (s 30)
 - f. a decision to approve or refuse to approve a person renouncing their citizenship (s 33(2))
 - g. a decision to revoke a person's citizenship (ss 34, 34A and 36, and proposed ss 33A and 34AA)
 - h. a decision to set aside a decision of the AAT dealing with character or identity (proposed s 52A).
52. The justification given by the Government for removing independent merits review for such decisions is that the Minister has 'gained a particular insight into community standards and values' and that the Minister's personal decisions should be protected from 'an unelected administrative tribunal'.²⁵
53. The Administrative Review Council advises the Attorney-General on the classes of administrative actions that should be subject to merits review. The Council says that, as a matter of principle, an administrative decision that will or is likely to affect the interests of a person should be subject to merits review.²⁶

54. There are a limited range of factors that may justify excluding merits review for particular decisions. However, factors that do not justify excluding merits review include:

- a. the fact that the decision maker is an expert; and
- b. the fact that a decision maker is of a high status.²⁷

55. In relation to the second of these categories, the Council said:

The status of the primary decision-maker is not a factor that, alone, will make decisions of that person inappropriate for merits review.

For example, the fact that the decision maker is a Minister or the Governor-General, is not, of itself, relevant to the question of review. Rather, it is the character of the decision-making power, in particular its capacity to affect the interests of individuals, that is relevant.²⁸

56. As the Explanatory Memorandum notes, policy decisions of a high political content may be excluded from merits review.²⁹ The Council has said that this exception 'relates to decisions that involve the consideration of issues of the highest consequence to the Government'.³⁰ Further:

Even where the high political content exception applies, in some areas it will only apply to a few of the total number of decisions made under a particular decision-making power. If a review of all decisions under the power is excluded on this basis, then many decisions not exhibiting a high political content would be inappropriately made ineligible for merits review.³¹

57. The issue that is not addressed sufficiently in the Explanatory Memorandum is whether the proposed exemption from merits review is adequately targeted to exclude only those decisions of a 'high political content'. That is, is it necessary to exempt every personal exercise by the Minister of a power under the Australian Citizenship Act from merits review, where the Minister states that the power is being exercised in the public interest?

7 Ten year old children born in Australia

58. The Australian Citizenship Act currently provides that if a child is born in Australia and lives in Australia for 10 years then the child becomes an Australian citizen on his or her tenth birthday.³² This provision is referred to below as the 'ten year rule'.

59. The Australian Citizenship Council explained that the intention behind the ten year rule is:

to ensure that young children who have only known Australia as their home country in the first ten years are able to become Australian Citizens.³³

60. If passed, the Bill will mean that the ten year rule does not apply to several classes of people. Broadly speaking, these classes are:³⁴

- a. children of foreign diplomats

- b. children who were ‘unlawful non-citizens’ at any time before their tenth birthday
 - c. children who left Australia at any time before their tenth birthday and did not hold a visa entitling them to return to Australia
 - d. children who have a parent that was an ‘unlawful non-citizen’ and who did not hold a substantive visa when the child was born.
61. Given the limited period of time available to make submissions about this Bill, the Commission will focus on two categories of children born in Australia: children of refugees and children of people who lawfully entered Australia but overstayed their visa.

7.1 Children of refugees

62. Under this Bill, children born in Australia to parents who are refugees may be denied citizenship when they turn ten years old.
63. It appears that this will be the case if:
- a. the child’s parents arrived in Australia without a visa and sought asylum;
 - b. the child is born either while the parents are in immigration detention, in community detention or in the community on a bridging visa; and
 - c. the parents are subsequently granted temporary protection visas (TPVs) and live in Australia for the next ten years while their child grows up.³⁵
64. In those circumstances, proposed s 12(7) will apply to prevent the child acquiring citizenship under s 12(1)(b). This will be because the child’s parents did not hold a ‘substantive visa’ when the child was born, the parents entered Australia before the child was born, and when they first entered Australia the parents were unlawful non-citizens.
65. Proposed s 12(7) would deny citizenship by birth to certain children born in Australia solely based on the immigration status of the child’s parents. The child may have held a visa and been lawfully present in Australia for his or her entire life, but will be denied citizenship under s 12(1)(b) primarily because his or her parents at some stage did not hold a valid visa.
66. If the family were granted permanent protection visas (rather than TPVs, as proposed in another Bill currently before this Committee)³⁶ then they would be able to apply for citizenship after being lawfully present in Australia for four years and after being permanent residents for a year.³⁷ The introduction of TPVs would remove the opportunity of applying for citizenship in this way for asylum seeker parents. The amendments proposed in the present Bill would also remove that opportunity for their children born in Australia.

67. In its report to the Australian Government in 2000, the Australian Citizenship Council noted that a central role of Australian citizenship laws in the foreseeable future would be to include migrants and humanitarian entrants as full participants in a multicultural Australian society.³⁸ The Council recommended that:

the overall inclusive and non-discriminatory approach to Australian Citizenship, that is characterised in current Australian Citizenship law, of welcoming, without undue barriers, migrants and humanitarian entrants who come to Australia as part of the planned migration and humanitarian program, continue to be accepted by governments as the basis for future Australian Citizenship policy and law.³⁹

68. The Commission agrees with the ‘inclusive and non-discriminatory approach’ articulated by the Council and considers that this should apply to refugees in Australia to whom Australia has acknowledged it has protection obligations.
69. Article 7(1) of the CRC provides that children shall have ‘the right to acquire a nationality’. The same provision appears in article 24(3) of the ICCPR. The UN Human Rights Committee has said that:⁴⁰

While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory.

70. Nevertheless, where rights to citizenship are implemented by states ‘in accordance with their national law’,⁴¹ these rights are to be ensured without discrimination of any kind including the status of the children’s parents.⁴² The Human Rights Committee has emphasised that there should be no discrimination in accessing citizenship, for example, based on whether children are legitimate or based on the nationality status of one or both of the parents.
71. This Bill would discriminate between children who were born in Australia and have been lawfully present in Australia for 10 years, based solely on the initial immigration status of their parents. The Explanatory Memorandum to the Bill does not deal with this issue at all.⁴³ No legitimate object has been put forward in order to justify the discriminatory treatment. In the absence of a legitimate object, the provisions will be in breach of articles 2 and 7 of the CRC and articles 2 and 24(3) of the ICCPR.

7.2 Children of parents who overstayed their visa

72. A second category of children born in Australia who will be denied citizenship when they turn ten years old comprises children who themselves were unlawful non-citizens at any time prior to their tenth birthday.⁴⁴
73. Proposed s 12(4) provides that a child who is born in Australia and lives in Australia until he or she turns ten does not become a citizen if at any time he or she was an unlawful non-citizen. This provision applies to anyone born in

Australia during the last ten years who turns ten after the amendments commence.⁴⁵

74. The Government says that the aim of this amendment is to discourage ‘abuse of the ten year rule by unlawful non-citizens’.⁴⁶ It notes that the Australian Citizenship Council recommended that the provisions relating to acquisition of Australian citizenship by birth not be changed.⁴⁷ When the Council reported in February 2000 it understood that ‘there is no strong evidence of abuse of this provision occurring’.⁴⁸ It recommended that the Government monitor the use of the ten year rule and take appropriate action to tighten the provision if evidence of abuse emerged.⁴⁹
75. There is an assertion in the Explanatory Memorandum that ‘concerns have since been raised’ that children may acquire citizenship at age ten and ‘provide an anchor for family migration’. The use by the Government of the terminology ‘anchor’ echoes debates in the United States about ‘anchor babies’.⁵⁰
76. However, there are very significant differences between citizenship law in the United States and in Australia. The major difference is that the fourteenth amendment to the US Constitution provides that all persons born in the United States are citizens of the United States. This is often referred to as *jus soli* or birthright citizenship. The fourteenth amendment overruled the *Dred Scott* decision of the US Supreme Court in 1857 which had denied citizenship status to people of African descent born in the United States.⁵¹
77. Birthright citizenship was the legal position in Australia prior to 1986 but is no longer the position. Now, the ten year rule provides that a person who lives in Australia for 10 years after birth qualifies for citizenship.
78. There may be good policy reasons not to provide citizenship to anyone born in Australia at the time of their birth. However, very different questions arise when assessing whether someone who was born in Australia and has lived continuously in Australia for 10 years should be accorded citizenship. After ten years, a person will have become integrated into the Australian community. As the Australian Citizenship Council noted above, the intention of the ten year rule is to ensure that young children who have known only Australia as their home country in the first ten years are able to become Australian Citizens.
79. The Government says that the aim of the amendment denying citizenship to ten year olds if they have been an unlawful non-citizen at any point is to ‘encourage lawful residence’. In assessing the balance between the desirability of ‘a provision that encourages lawful residence’⁵² and the obligation to take into account the best interests of children born in Australia as a primary consideration (article 3, CRC), the fact that the child has lived in Australia for 10 years and that Australia may be the only country the child knows will weigh much more heavily in favour of retaining the present provision.
80. The difficulties that can arise are illustrated by the following case study:

Case study: the Pak family

In 2012, the Commission published a report about a complaint by a family of four who were at risk of being removed from Australia.⁵³

Mr Pak and Ms Mun were originally from South Korea. They first came to Australia when they were 33 and 31 years old respectively and had resided in Australia for more than 20 years.

For the first 10 years that they were in Australia, Mr Pak and Ms Mun were employed as cleaners. In 2001, they established a small business called the Morning Glory Cleaning Company. For the next 10 years they successfully operated this business and employed two Australian citizens. Each year since their arrival in Australia they declared their income and paid income tax. With the proceeds from their business, they purchased a family home and were paying off a mortgage.

Their daughter came to Australia with them when she was 14 months old. She grew up in Australia and completed primary school and high school here. She was studying education at university and intended to become a primary school teacher.

Their son was born in Australia in 1998. In 2003 he was enrolled in kindergarten and has since completed primary school. When he turned 10 years old, he acquired Australian citizenship. The Assistant Principal at his school described him as self-motivated, well behaved and a somewhat shy and sensitive child. At the time of the Commission's report was 13 years old and had started high school.

Mr Pak and Ms Mun originally entered Australia as the holders of tourist visas. Following the expiration of those visas, they remained in Australia. Mr Pak claims that he did not approach the Department of Immigration and Citizenship as he was frightened of the consequences of not holding a valid visa.

The issue before the Commission was the potential separation of Mr Pak and Ms Mun from their son if they were now required to leave Australia. A significant question was the community's expectations about whether a family that had been present in Australia for more than 20 years should be permitted to remain here.

The Commission referred to decisions of the United Nations Human Rights Committee which had found that separation of families in similar cases would amount to an unlawful interference with family contrary to article 17 of the ICCPR where 'substantial changes to long settled family life would follow'.

81. This is an extreme example. The Pak family was in Australia without a visa for the vast majority of the time that they were in Australia. However, the proposed Bill would deny a right to citizenship under s 12(1)(b) to a person born in Australia if he or she did not have a valid visa for *any* period prior to his or her tenth birthday.

82. There is little discussion in the Explanatory Memorandum of any evidence supporting the claim of abuse of the ten year rule. The only reference to something said to support the amendment is a ‘correlation’ between:
- a. the nationalities of people applying under the ten year rule; and
 - b. the nationalities of people seeking a ministerial intervention under the *Migration Act 1958* (Cth).
83. No data is provided about how often either of these kinds of applications are made or the trend in applications over time. When the Commission was considering the Pak family’s case, the available evidence was that requests for ministerial intervention from the relevant cohort had been steadily declining.⁵⁴
84. As the Australian Citizenship Council noted, ‘strong evidence of abuse’ of the ten year rule would be required in order to justify any amendment.⁵⁵ This would then need to be balanced against the requirement that the best interests of the child be taken into account as a primary consideration.

8 People with intellectual disability or cognitive impairment

85. Some people acquire Australian citizenship automatically, for example if they are born in Australia and have a parent who is an Australian citizen or permanent resident, or if they were born in Australia and live in Australia for 10 years.⁵⁶
86. Some people can apply to become Australian citizens. Broadly speaking, there are three categories of people who can apply for citizenship. These are:
- a. people born outside Australia to an Australian citizen (‘citizenship by descent’)⁵⁷
 - b. people adopted outside Australia to an Australian citizen (‘citizenship by intercountry adoption’)⁵⁸
 - c. other people entitled to apply for citizenship, for example people who have been lawfully in Australia for four years and have been permanent residents for a year and have passed a citizenship test (‘citizenship by conferral’).⁵⁹
87. The Australian Citizenship Act currently provides in s 24(6) that a Minister must not approve an application by a person for citizenship by conferral if criminal proceedings are on foot in relation to the person or, if the person was convicted of a criminal offence, until a certain period of time has passed after the person is released from prison or the person’s parole period expires.⁶⁰
88. The Bill proposes to extend this prohibition on citizenship based on criminal proceedings or criminal conduct in two ways:
- a. it will apply not just to applications for citizenship by conferral, but also to:

Australian Human Rights Commission
Australian Citizenship amendments, Senate Inquiry – 6 November 2014

- i. applications for citizenship by descent;⁶¹
 - ii. applications for citizenship by intercountry adoption;⁶² and
 - iii. applications for resumption of citizenship that had ceased.⁶³
 - b. in relation to all of these types of applications, the scope of the prohibition will be extended beyond the matters currently in s 24(6).⁶⁴
89. Given the limited period of time in which to make submissions about this Bill, the Commission will focus only on the impact of these changes on people with an intellectual disability or cognitive impairment who come into contact with the criminal justice system.
90. The Bill proposes that the Minister must not approve an application for citizenship of any kind when the applicant is subject to an order of a court requiring him or her to participate in 'a residential program for the mentally ill', where the order was made 'in connection with' proceedings for an offence.⁶⁵
91. The Commission also has concerns about the existing s 24(6)(h) and the proposal to extend this provision to all categories of applicants for citizenship. Under this provision, the Minister must not approve an application for citizenship during any period during which the person is confined in a psychiatric institution by order of a court made 'in connection with' proceedings for an offence.
92. There are two factors that distinguish these prohibitions from the other prohibitions currently in s 24(6):
 - a. they apply only to people with a mental disability;
 - b. they apply to situations where a person was charged but was not convicted of any criminal offence.
93. Article 5 of the Convention on the Rights of Persons with Disabilities relevantly provides:
 - (1) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
 - (2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.⁶⁶
94. The Government recognises that on their face, 'these amendments discriminate against persons with a mental illness'.⁶⁷ However, it submits that the discrimination is necessary and proportionate to the legitimate end that those approved to be citizens are of good character. The Government explains that 'being of good character is a fundamental tenet of the citizenship program' and that the amendments are proportionate to this end because the bar on citizenship reflects the consequences imposed by the criminal law 'for committing a criminal offence'.⁶⁸

95. There are two responses to the question of proportionality. First, there is a need to separate the question of good character from a person's criminal record. As the Australian Citizenship Council noted:

Each applicant is assessed against 'good character' policy requirements [including the ones now in s 24(6)]. The fact that a person has a criminal record does not itself automatically preclude a grant of Citizenship. Length of time since the offence, seriousness of the offence and the chance of recidivism are all matters that are taken into consideration.⁶⁹

96. Secondly, a key difference in the provisions identified by the Commission above is that a person who meets the criteria may not have been convicted of an offence at all. For example, the court may have determined that the person was unable to plead to any criminal charges, or the person may have been found not guilty of any offence by reason of mental impairment. Neither of those circumstances leads to the conclusion that the person is not of good character.
97. In this sense, the provisions discriminate against people with a mental disability or a cognitive impairment who have not been convicted of a crime but have been made the subject of orders either requiring them to participate in 'a residential program for the mentally ill' or requiring them to be confined in a psychiatric institution. This discrimination is not proportionate to the end of identifying whether the people are of good character because there is no necessary relationship with this end.

9 'Good character' requirement

9.1 Extension to children

98. The Australian Citizenship Act currently requires that adults applying for citizenship satisfy the Minister that they are of 'good character' in order to have their application approved.⁷⁰
99. The proposed amendments will remove the age limits in relevant sections so that all applicants, including children, will need to satisfy the Minister that they are of good character.⁷¹
100. The Government says that in practice an assessment of whether someone is of good character would be conducted by examining their police record.⁷² Police records would typically be sought for applicants aged 16 and over and that this would be done with the person's consent. However, the Government says that if it became aware of serious concerns it could seek criminal history records for children as young as 10.
101. The Government says that the instructions given to decision makers will be amended, so that decision makers consider the best interests of the children in making a character assessment for applicants under 18 years old.⁷³
102. The Commission is concerned that the protection of the rights of children in relation to this new process will be limited to administrative guidelines which it

appears are yet to be drafted. In the circumstances, the Commission is unable to conclude that the rights of children will be adequately protected.

9.2 Revocation by Minister of citizenship by descent

103. People applying for citizenship by descent currently need to satisfy the Minister that they are of good character.⁷⁴ As noted above, a person qualifies for citizenship by descent, in broad terms, if they are born outside Australia and one of their parents is an Australian citizen.
104. Currently, s 19A provides that a person does not become an Australian citizen by descent, even if approved, unless a parent of the person was in fact an Australian citizen.
105. The Bill proposes to remove s 19A and replace it with a broader discretionary power. Proposed s 33A will give the Minister discretion to revoke a person's citizenship obtained by descent 'if the Minister is satisfied that the approval should not have been given'.⁷⁵
106. Significantly, it appears that s 33A will allow the Minister to revoke citizenship by descent if the Minister later becomes satisfied that the person was not of good character at the time they were registered as a citizen.⁷⁶
107. This amendment raises similar problems as those set out in section 4.1 above of uncertainty of citizenship status and the prospect of citizenship being revoked 'simply by an administrative action by government'.

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 October 2014, p 1 (Paul Fletcher MP).

² Under the current Administrative Arrangements Order (12 December 2013), the Department for Immigration and Border Protection is responsible for citizenship and the Minister for Immigration and Border Protection administers the *Australian Citizenship Act 2007* (Cth).

³ *Australian Citizenship Act*, s 34.

⁴ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 67.

⁵ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), pp 68-69.

⁶ Proposed s 34AA, *Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth) (Bill)*, Sch 1, Pt 1, item 66, p 21.

⁷ *Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth) Explanatory Memorandum (EM)*, Statement of Compatibility with Human Rights, p 2.

⁸ Proposed s 34AA(3), *Bill*, Sch 1, Pt 1, item 66, p 21.

⁹ ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally on 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia on 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).

¹⁰ Human Rights Committee, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) para 9. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fG%2f32&Lang=en (viewed 17 October 2014).

¹¹ CRC, opened for signature 20 November 1989, [1991] ATS 4 (entered into force generally on 2 September 1990; entered into force for Australia on 16 January 1991).

¹² Convention on the Reduction of Statelessness, opened for signature 30 August 1961, [1975] ATS 46 (entered into force generally and for Australia on 13 December 1975).

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- ¹³ EM, Statement of Compatibility with Human Rights, p 2.
- ¹⁴ See discussion in UNHCR, Expert Meeting, *Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality, Summary Conclusions* (November 2013), para 56. At <http://www.refworld.org/pdfid/533a754b4.pdf> (viewed 4 November 2014).
- ¹⁵ See discussion in UNHCR, Expert Meeting, *Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality, Summary Conclusions* (November 2013), para 59. At <http://www.refworld.org/pdfid/533a754b4.pdf> (viewed 4 November 2014).
- ¹⁶ Australian Citizenship Act, s 52.
- ¹⁷ Proposed s 52A, Bill, Sch 1, Pt 1, item 73, p 23.
- ¹⁸ Proposed s 52B(3), Bill, Sch 1, Pt 1, item 73, p 24.
- ¹⁹ Human Rights Committee, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) para 16. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fG%2f32&Lang=en (viewed 17 October 2014).
- ²⁰ In this respect, the Statement of Compatibility with Human Rights for the Bill at page 16 seems to miss the point.
- ²¹ EM, Statement of Compatibility with Human Rights, p 15.
- ²² EM at [451].
- ²³ Proposed s 52(4), Bill, Sch 1, Pt 1, item 72, pp 22-23.
- ²⁴ Proposed s 52B(1), Bill, Sch 1, Pt 1, item 73, p 24.
- ²⁵ EM, Statement of Compatibility with Human Rights, p 14.
- ²⁶ Administrative Review Council, *What decisions should be subject to merits review?* (1999). At <http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjectto%20meritreview1999.aspx> (viewed 5 November 2014).
- ²⁷ *What decisions should be subject to merits review?* at [5.17]-[5.23].
- ²⁸ *What decisions should be subject to merits review?* at [5.20]-[5.21].
- ²⁹ EM, Statement of Compatibility with Human Rights, p 14.
- ³⁰ *What decisions should be subject to merits review?* at [4.22].
- ³¹ *What decisions should be subject to merits review?* at [4.27].
- ³² Australian Citizenship Act, s 12(1)(b).
- ³³ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 41.
- ³⁴ Proposed s 12(3)-(7), Bill, Sch 1, Pt 1, item 12, pp 4-5.
- ³⁵ The introduction of TPVs is proposed in another Bill currently before this Committee, the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth). The Commission has made a submission in relation to that Bill.
- ³⁶ The Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).
- ³⁷ Australian Citizenship Act, ss 21 and 22.
- ³⁸ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 38.
- ³⁹ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 39.
- ⁴⁰ Human Rights Committee, *General Comment 17, Article 24 (Rights of the child)*, UN Doc HRI/GEN/1/Rev.8, para 8, p 185. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6623&Lang=en (viewed 4 November 2014).
- ⁴¹ CRC article 7(2).
- ⁴² CRC article 2.
- ⁴³ See Explanatory Memorandum, Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth), Statement of Compatibility with Human Rights, pp 9-11.
- ⁴⁴ Proposed s 12(4), Bill, Sch 1, Pt 1, item 12, p 5.
- ⁴⁵ Bill, Sch 1, Pt 2, item 78(3).
- ⁴⁶ EM, Statement of Compatibility with Human Rights, p 10.
- ⁴⁷ EM, Statement of Compatibility with Human Rights, p 9.
- ⁴⁸ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 41.
- ⁴⁹ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 41.
- ⁵⁰ There is a large body of academic literature dealing with this issue. See for example, E Kendall 'Amending the Constitution to Save a Sinking Ship? The Issues Surrounding the Proposed

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- Amendment of the Citizenship Clause and “Anchor Babies” (2012) 22 *Berkeley La Raza Law Journal* 349; M Ormonde ‘Debunking the Myth of the “Anchor Baby”: Why Proposed Legislation Limiting Birthright Citizenship is not a Means of Controlling Unauthorized Immigration’ (2012) 17 *Roger Williams University Law Review* 861; D Gayeski ‘Give Me Your Tired, Your Poor, Your Legal: Why Efforts to Repeal Birthright Citizenship are Unconstitutional and Un-American’ (2011) 21(1) *Temple Political and Civil Rights Law Review* 215.
- ⁵¹ *Dred Scott v Sandford* 60 US 393 (1857).
- ⁵² EM, Statement of Compatibility with Human Rights, p 10.
- ⁵³ *Pak family v Commonwealth of Australia* [2012] AusHRC 54. At <http://www.humanrights.gov.au/publications/aushrc-54-pak-family-v-commonwealth-australia-department-immigration-citizenship> (viewed 4 November 2014).
- ⁵⁴ *Pak family v Commonwealth of Australia* [2012] AusHRC 54 at [38]. At <http://www.humanrights.gov.au/publications/aushrc-54-pak-family-v-commonwealth-australia-department-immigration-citizenship> (viewed 4 November 2014).
- ⁵⁵ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 41.
- ⁵⁶ Automatic acquisition of Australian citizenship is dealt with in Part 2, Division 1 of the Australian Citizenship Act.
- ⁵⁷ Citizenship by descent is dealt with in Part 2, Division 2, Subdivision A of the Australian Citizenship Act.
- ⁵⁸ Citizenship by intercountry adoption is dealt with in Part 2, Division 2, Subdivision AA of the Australian Citizenship Act.
- ⁵⁹ Citizenship by conferral is dealt with in Part 2, Division 2, Subdivision B of the Australian Citizenship Act.
- ⁶⁰ Australian Citizenship Act, s 24(6).
- ⁶¹ Proposed s 17(4C), Bill, Sch 1, Pt 1, item 18, p 6.
- ⁶² Proposed s 19D(7B), Bill, Sch 1, Pt 1, item 22, p 8.
- ⁶³ Proposed s 30(8), Bill, Sch 1, Pt 1, item 61, p 18.
- ⁶⁴ The amendments that extend the scope of the prohibition in s 24(6) for applicants for citizenship by conferral are in items 44 and 45 of the Bill, pp 14-15.
- ⁶⁵ Proposed ss 17(4C)(j)(ii), 19D(7B)(j)(ii), 24(6)(j)(ii) and 30(8)(j)(ii).
- ⁶⁶ Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, [2008] ATS 12 (entered into force generally on 3 May 2008; entered into force for Australia on 16 August 2008).
- ⁶⁷ EM, Statement of Compatibility with Human Rights, p 6.
- ⁶⁸ EM at [125] and Statement of Compatibility with Human Rights, p 6.
- ⁶⁹ Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000), p 53.
- ⁷⁰ See, for example, ss 16(2)(c), 16(3)(c), 19C(2)(g), 21(2)(h), 21(3)(f), 21(4)(f), 21(6)(d), 21(7)(d), 29(2)(b), 29(3)(b).
- ⁷¹ EM, Statement of Compatibility with Human Rights, p 3.
- ⁷² EM, Statement of Compatibility with Human Rights, p 3.
- ⁷³ EM, Statement of Compatibility with Human Rights, p 4.
- ⁷⁴ Australian Citizenship Act, s 16(2)(c) and (3)(c).
- ⁷⁵ Proposed s 33A, Bill, Sch 1, Pt 1, item 64, p 20.
- ⁷⁶ EM at [401].