CHAPTER 3

CONSIDERATION OF THE BILL

3.1 Overall the Bill was welcomed as a significant improvement to the existing 1948 Act. However, a number of key areas of concern and cross-cutting issues emerged in submissions and in oral evidence. This chapter considers the major issues identified by the inquiry.

Accessibility and clarity

3.2 As noted above, the redrafting and restructuring of the Bill has been consistently welcomed by practitioners, advocacy groups, individuals and academics. The Committee recognises that this is a significant achievement and is encouraged by the overall approach to the legislation. Two matters arose during the inquiry that may contribute positively to increasing accessibility.

3.3 First, it was argued that it is important that the legislation makes clear that a person who is a citizen under the 1948 Act retains that status under the new Act.[1] While this matter is dealt with in the proposed Schedule 3 of the Australian Citizenship (Transitionals and Consequentials) Bill 2005 it was argued that members of the public will expect to see it expressed and look to the principal Act. Both the Centre for Comparative Constitutional Studies and Professor Rubenstein argued that a substantive provision clarifying the status of citizens under the 1948 Act should be included in the Bill. The Centre for Comparative Constitutional Studies also recommended that the Bills be integrated into one piece of legislation.[2]

3.4 Second, it was suggested by the Centre for Comparative Constitutional Studies that a table or chart which explains the operation of the Bill could be included in a Schedule to the Bill.

> Alternatively, as recommended by the Australian Citizenship Council … a Readers Guide could be developed to complement the finalised legislation. The Readers Guide should be either appended to the legislation itself as in the Trade Marks Act 1995, or included with every copy of the new legislation.[3]

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1 Centre for Comparative Constitutional Studies, *Submission 33*, p.2; A note to section 4 of the Bill indicates that a person who is an Australian citizen under the 1948 Act immediately before the commencement day is taken to be an Australian citizen under the 2005 Act. Item 2 of Schedule 3 to the *Australian Citizenship (Transitionals and Consequentials) Act 2005* provides that a person who is a citizen under the 1948 Act retains that status under the 2005 Act.

2 Specifically that Schedule 3 of the Australian Citizenship (Transitionals and Consequentials) Bill 2005 be incorporated into section 4 Australian Citizenship Bill 2005 and that Schedules 1 and 2 become schedules to the Australian Citizenship Bill 2005.

3 Centre for Comparative Constitutional Studies, *Submission 33*, p. 3.

Committee view

3.5 The Committee acknowledges that the separation of transitional and consequential provisions from substantive sections of the law is a logical approach to redrafting the citizenship legislation. However, to ensure clarity and avoid the risk of unnecessary public concern, the principal Bill should include a clear substantive provision which clarifies that a person who is a citizen under the 1948 Act is a citizen for the purpose of the 2005 Act. However, the Committee considers that integration of both Bills into one piece of legislation may undermine the goal of improving the accessibility and clarity of the legislation.

3.6 Nevertheless, it is well accepted that citizenship law is inherently complex and, in addition to redrafting, there are some significant policy changes reflected in the Bill. A narrative chart or readers' guide included as part of the legislation itself is an inexpensive and practical measure to enable the public and practitioners to understand the operation of the new legislation. It should be seen as a more detailed addition to the information provided on the citizenship website.

Recommendation 1

3.7 The Committee recommends that the principal Bill include a substantive provision, which provides that a person who is a citizen under the 1948 Bill is a citizen for the purpose of the new Act.

Recommendation 2

3.8 The Committee recommends that a chart or alternatively a readers' guide, which explains the operation of the new law, be developed and incorporated as a Schedule to the principal Bill.

Public information

3.9 The question of the extent of public awareness about the proposed changes to the 1948 Act was raised during hearings. The Committee received inquiries indicating that some migrant groups were not entirely aware of the Bill and that as a result, particularly in relation to the extended residential qualifying period, some permanent residents currently eligible for citizenship would lose that eligibility.[4] The possibility of using television, radio and various ethnic media as part of an information campaign was canvassed.[5] However, the Department indicated that no special public communication strategy had been planned.[6] The Department was satisfied that there

4 Senator Hurley, *Committee Hansard,* 6 February 2006, p. 30.

5 Senator Hurley, *Committee Hansard,* 6 February 2006, p. 32.

6 Ms Ellis, Assistant Secretary, Citizenship and Language Services Branch, *Committee Hansard*, 6 February 2006, p. 32.

was a general awareness in the community evidenced by an increase in inquiries and applications for citizenship and referred inquirers to the Departmental website.[7]

3.10 The Southern Cross Group welcomed the website but remained strong advocates of increased communication with the Australian expatriate community.[8] The need for a public education campaign through Australian mission overseas to advertise the new act was also regarded as essential to reach all those who will be affected by the legislation, particularly the new rights to resume citizenship.[9]

Committee view

3.11 The Committee is concerned that many permanent residents currently eligible to apply for citizenship may not be aware of the proposed changes to the residential qualifying period (discussed below). There are approximately 900,000 permanent residents currently eligible for Australian citizenship.[10] More than half that figure is made up of permanent residents from the United Kingdom and New Zealand, many of whom may be under the misapprehension that they are already citizens.[11] Many permanent residents in other non-English speaking communities who are currently eligible for citizenship are equally likely to be unaware of the proposed changes to the citizenship law.[12]

3.12 Information on a website is an important but passive communication tool. The Government has an obligation to ensure that changes in the citizenship law are widely understood. This is also an opportunity to promote the taking up of citizenship. The Committee reiterates its concern that the Department should make every effort to communicate with the Australian public and the expatriate community, especially where changes in legislation will affect their entitlements and obligations.[13]

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7 Ms Ellis, Assistant Secretary, Citizenship and Language Services Branch, DIMA, *Committee Hansard*, 6 February 2006, p. 32.

8 Ann MacGregor, Co Founder, Southern Cross Group, *Committee Hansard*, 6 February 2006, p. 19.

9 Southern Cross Group, *Submission 52*, p. 5.

10 DIMA, *Population Flows,* Citizenship, Multicultural Affairs and Settlement Services, 2003, p.87; WA Minister of Multicultural Interests, Margaret Quirk MP, in Paul Lampathakis and Tess Heal, Where Do we all come from?, *Sunday Times,* 29 January 2006, p. 43.

11 DIMA, *Population Flows,* Citizenship, Multicultural Affairs and Settlement Services, 2003 p.87; see also Paul Lampathakis and Tess Heal, Where Do we all come from?, *Sunday Times,* 29 January 2006, p. 43.

12 The highest number of non-citizens who were residentially eligible to apply for Australian citizenship at the time of the 2001 census where United Kingdom (346,200), New Zealand (205,900), Italy (44,200), Malaysia (27,900), Germany (23,400) and Peoples Republic of China (20,700); 2001 census figures quoted in Department of Immigration and Multicultural Affairs, *Population Flows,* Citizenship, Multicultural Affairs and Settlement Services, 2004-05 p. 96.

13 Senator Payne, *Committee Hansard*, 6 February 2006, p. 32.

Recommendation 3

3.13 The Committee recommends that the Department develop and implement a comprehensive public information campaign to promote the new Citizenship Act.

Recommendation 4

3.14 The Committee recommends that sufficient budget be allocated to enable the use of television, newspaper and radio in Australia and overseas in appropriate community languages.

Recommendation 5

3.15 The Committee recommends that the Department work actively with DFAT to ensure that information materials are distributed through Australian overseas posts to facilitate communication with the expatriate community.

Increased residential qualifying period

3.16 Many witnesses acknowledged the importance of a suitable residential qualifying period[14] but argued that the additional twelve month period is unlikely to make a significant contribution to national security protection. However, it would affect over one million existing permanent residents, many of whom it is envisaged have made plans based on the existing rules.[15] Concerns were expressed about the unintended and adverse consequences that will be experienced by this group and the further delay in achieving citizenship that will be experienced by current temporary entrants.[16] The Committee was also told that security checks of temporary entrants and applicants for permanent residency are already in place.[17]

Entitlements

3.17 In relation to entitlements, the Commonwealth Department of Family and Community Services (FACS) advised that the extended residential qualifying period is unlikely to affect a person's eligibility for social security payments and family assistance. Eligibility for these entitlements is generally possible for people who reside in Australia and have permission to remain here permanently.[18]

3.18 However, a number of witnesses indicated the way in which the change in residency requirements will affect them personally. For example, the delay in

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14 Law Institute of Victoria, *Submission 47*, p.2; Dr Crawford, Fragomen Australia, Submission 43, pp 1- 4.

15 Mr Donald, Economics Research Australia, *Submission 27*, p. 2.

16 For example, Law Institute of Victoria, Submission 47, p. 2; Dr Crawford, Fragomen Australia, *Submission 43*, pp 1-4.

17 Mr McDonald, Economics Research Australia, *Submission 27*, p. 2.

18 FACS, *Submission 26*, p. 1.

qualifying for access to HECS assistance for families unable to afford upfront fees was raised as creating a significant financial problem for some.[19]

Globalised economy

3.19 The Committee was also told of more indirect effects that could result from the rule change. Fragomen Australia argued that citizenship law is a factor in whether Australia is a competitive environment and able to attract and retain highly skilled migrants.[20] Approximately 50,000 people enter Australia on the Temporary Business Entrants (Long Stay) Subclass 457 visa and many remain permanently under the Employer Nomination Scheme (ENS).[21] Recent changes to the ENS and the projected changes to citizenship criteria would mean that in most cases it would be necessary for a person to remain in Australia for at least five to six years to qualify.[22] Corporate executives and skilled technical people are often required to move and the longer residency requirement will be a barrier to Australia's ability to retain them or attract them back to the country.[23]

Refugees

3.20 Refugee groups also argued that the longer residency period fails to recognise that obtaining citizenship as quickly as possible is crucial to refugees who need security to rebuild their lives. These permanent residents have already been subject to security checks by other agencies including the United Nations High Commissioner for Refugees (UNHCR) and the Department before entry or grant of an onshore application.[24] In particular, it was argued that Temporary Protection Visa (TPV) holders will be disproportionately affected. TPV holders must wait 30 months before obtaining permanency and may be on a TPV for five years. TPV holders also undergo security checks and must pass a further security check before being granted permanent residency.[25]

Ministerial discretion to waive residency requirements

3.21 The Minister may, under certain conditions, exercise discretion to count periods of temporary residency or a period spent overseas as a permanent resident, toward the residency requirement. The discretion may be exercised where the person

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19 Mr Shine, *Submission 20,* p.1; Mr Akram, *Submission 21*, p. 1.

20 Dr Crawford, Fragomen Australia, *Submission 43*, p. 2; *Committee Hansard,* 6 February 2006, p. 5.

21 Dr Crawford, Fragomen Australia, *Submission 43*, p. 2.

22 Dr Crawford, Fragomen Australia, *Submission 43,* p. 2.

23 Fragomen Australia, *Submission 43*, p. 3.

24 Liberian Community of South Australia, *Submission 37*, p. 2.

25 Refugee Advice and Casework Service (Aust) inc., *Submission 38*, pp 3-4; Refugee and Immigration Legal Service Inc., *Submission 46*, pp 2 - 3.

would otherwise suffer significant hardship or disadvantage or was engaged in activities beneficial to Australia.[26]

3.22 There is currently no indication as to how 'significant hardship or disadvantage' or 'activities beneficial to Australia' will be defined and interpreted. However, in relation to the latter, the Department indicated that currently 'beneficial to Australia' is limited to economic benefit but under the new legislation the definition would be more generous.[27] For example, spouses of Australian citizens who are in Australia with their families are likely to be catered for in Departmental policy guidelines. The Department also indicated that proposed subsection 22(7) would be amended to allow for up to 24 months temporary residence to be taken into account.[28]

Committee view

3.23 The Committee notes that consideration of adverse consequences for many law abiding residents is important. The Committee notes that New Zealand exempted existing permanent residents when it introduced changes to the residential qualifying period in 2005.[29] Applying the new rules to future permanent residents would be a clear and unambiguous way of achieving that objective.

3.24 The Committee recognises that for many migrants, and especially many refugees, the security of citizenship has important psychological and social benefits. In addition to rights of political participation, citizenship signifies Australia's commitment to an inclusive, diverse and tolerant community. In an environment of acute skills shortage with an ageing population it is also important to attract and retain skilled migrants. The Committee therefore encourages the Government to ensure these principles are fully expressed in the Departmental guidelines. In particular, that the interpretation of 'significant hardship or disadvantage' and 'activities beneficial to Australia' should encompass the breadth of social, cultural and economic factors relevant to a wide range of groups within the Australian community.

Recommendation 6

3.25 The Committee recommends that the Government apply the new residential qualifying period to permanent residents who are granted permanent residency on or after the date of commencement of subdivision B.

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26 Subsections 22(6)(7)(8).

27 Ms Ellis, Assistant Secretary, Citizenship and Language Services Branch, DIMA *Committee Hansard,* 6 February 2006, p. 36.

28 Mr Peter Vardos, PSM, First Assistant Secretary, Citizenship, Settlement and Multicultural Affairs Division, DIMA, *Committee Hansard*, 6 February 2006, p. 30.

29 A person who received permanent residence before 21 April 2005 must be ordinarily resident up in New Zealand for the 3 years before obtaining citizenship, whereas a person who received permanent residence after 21 April 2005 must be a permanent residence for five years.

Recommendation 7

3.26 The Committee recommends that the policy guidelines ensure the concepts of 'significant hardship or disadvantage' and 'beneficial to Australia' are interpreted broadly to include social and cultural factors as well as economic considerations.

Definition of spouse excludes same sex couples

3.27 As noted above, in certain circumstances the Minister may count a period towards the residential qualifying period.[30] Special provision has also been made for a permanent resident spouse, widow or widower of an Australian citizen not present in Australia during the required period but who has a close and continuing association with Australia.[31] The Bill updates the definition of 'spouse' so as to remove the previous limitation, which required the couple to be legally married, to now include a person granted a permanent visa who is a de facto spouse of the citizen.[32] Witnesses welcomed the inclusion of de facto couples but expressed concern that same sex couples would not be dealt with equally under the discretion[33] During the hearing the issue was raised with the Department who indicated that this matter had not yet been given detailed consideration.[34]

Committee view

3.28 The Committee welcomes the inclusion of de facto couples in the definition of spouse and believes that this approach more accurately reflects the diversity in the Australian community than the 1948 Act. The Committee also believes that it would be timely to consider extending the benefit of the discretion under the Bill to same sex partners.

Ministerial Discretion

3.29 The Minister's discretion not to approve an application for citizenship (conferral or resumption) was the subject of some criticism.[35] It was said that the Bill clearly sets out the eligibility criteria for acquiring citizenship, which have been supplemented with stringent identity and security assessments, providing ample grounds on which to refuse citizenship without the need for an undefined discretion.[36]

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30 Subsection 22(6)(8).

31 Subsection 22(9).

32 Subsection 22(10).

33 NSWCCL, *Submission 25*, p. 12.

34 Ms Ellis, Assistant Secretary, Citizenship and Language Services Branch, DIMA, *Committee Hansard*, 6 February 2006, p. 32.

35 Subsection 24(2); subsection 30(2).

36 Centre for Comparative Constitutional Studies, *Submission 33*, p. 1.

3.30 HREOC argued that the residual discretion increases the risk that a Minister may impose arbitrary and unduly onerous criteria upon an applicant.[37] These views were shared by the NSWCCL, who also were concerned that an unstructured discretion leaves open the possibility of discriminatory decisions.[38] The Centre for Comparative Constitutional Studies recommended that the residual discretion be eliminated or structured.[39] The Law Institute of Victoria (LIV) also opposed retention of the discretion on the grounds that it permits broad policy considerations to influence a Minister's decision.[40]

3.31 The Explanatory Memorandum states that:

> This discretion has been in existence since the inception of the Act in 1948.
>
> It has been a uniform feature of naturalisation legislation (i.e. citizenship by conferral) throughout the Commonwealth for over a century to give the Executive a wide discretion regarding the approval or refusal of citizenship applications.[41]

3.32 The reason for retaining a Ministerial discretion reflects that citizenship by application is a 'privilege not a right' and that a person may satisfy the eligibility criteria but there may be good reasons for rejecting their application.[42] A person who incites hatred or religious intolerance but may not necessarily be rejected on 'good character' is cited as a reason for retaining the discretion.[43]

Committee view

3.33 The Committee agrees that acquisition of citizenship by application is a privilege and entails an undertaking to respect the rights and liberties of other Australians and a commitment to democratic values. It is appropriate that where there is a demonstrable likelihood a person will not discharge that responsibility s/he should not be granted citizenship. Transparency and accountability are also two of the most fundamental democratic values which underpin the rule of law in Australia. Where an application for citizenship is refused merits review is available in the AAT providing the applicant with an opportunity to challenge the reasons for that refusal.

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37 HREOC, *Submission 50*, p. 3.

38 NSWCCL, *Submission 25*, p. 16.

39 Dr Simon Evans, *Committee Hansard,* 30 January 2006, p. 6.

40 LIV, *Submission 51A,* p. 3; *Skase and Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 308 (8 April 2005).

41 *Explanatory Memorandum,* p. 30.

42 *Explanatory Memorandum*, p. 30.

43 HREOC, *Submission 50*, p.3; *Explanatory Memorandum*, p. 30.

Good character test

3.34 Professor Rubenstein pointed out that there is no definition of good character in the Bill (nor was there under the former Act) yet it is mentioned many times as a criterion for eligibility to citizenship.[44]

3.35 The Committee notes that while important issues that go to the general question of character are elaborated upon in the Bill, the lack of a single defined test indicates that 'good character' is intended to encompass additional considerations. HREOC cast doubt on whether the term 'good character' would exclude a person who was believed to promote intolerance in the Australian community as suggested by the Explanatory Memorandum.[45] It was suggested that, the power to refuse citizenship on 'character' grounds should be spelt out in the legislation in a similar fashion to the character test under the *Migration Act 1958* (the Migration Act).[46]

Committee view

3.36 The Committee notes that the existing good character requirement under the 1948 Act remains unchanged in the Bill. In light of the detailed eligibility criteria and the new requirement to exclude a person on national security grounds, it would be appropriate to reconsider how the character test in the citizenship context is intended to operate. If the good character test is intended to deal with a specific mischief it should be elaborated to the maximum extent possible in the Bill. This could be achieved by the adopting the existing definition in the Migration Act.

Recommendation 8

3.37 The Committee recommends that the 'good character' test be defined in the Bill.

National security exclusion – no ministerial discretion

3.38 A number of witnesses opposed subsections 17(4), 24(4) and 30(4), which have been described as giving Australian Security Intelligence Organisation (ASIO) 'a veto' over who becomes an Australian citizen.[47] During hearings, the Department confirmed that ASIO performs security checks for persons seeking permanent residency,[48] and that a police check is carried out as part of the 'good character'

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44 Professor Rubenstein, *Submission* 65, p. 3: such as 16(3)(c), 21(2)(h), (3)(f), (4)(f), (6)(d), (7)(d), 25(2)(ii), 29(3)(b).

45 HREOC, *Submission 50*, p. 3; See also *Irving v Minister of State for Immigration, Local Government and Ethnic Affairs* (1993) 44 FCR 540.

46 Subsection 501(6) of the Migration Act.

47 *Australian Citizenship Bill 2005 and Australian Citizenship (Transitionals and Consequentials) Bill 2005,* Nos. 72-73, Law and Bills Digest Section, 7 December 2005, p. 20.

48 Ms Ellis, Assistant Secretary, Citizenship and Language Services Branch, DIMA *Committee Hansard,* 6 February 2006, p. 38.

requirement under the 1948 Act.[49] The Department confirmed that there was a view that police checks are not adequate to deal with security issues.[50]

3.39 Currently a national security assessment may be made available to the Minister of Immigration as part of ASIO's broad function of providing such assessments to Commonwealth agencies.[51] The Committee was told that adverse assessments of non-citizens are rare.[52] The provisions therefore represent a significant upgrading of the role of national security assessments in the citizenship decision making process.[53]

3.40 The Law Society of South Australia (LSSA) opposed the new provisions arguing that the provisions of the Bill are unacceptably broad.[54] The Bill relies on the definition of 'security' and 'adverse' and 'qualified security assessment' contained in the ASIO Act. LSSA argued that: 'The new provisions allow the executive the power to deny an application citizenship on the most tenuous suggestion of alleged risk to security.'[55]

3.41 The mandatory nature of the provisions and the breadth of the assessment under the ASIO Act raises important issues of transparency and accountability. HREOC opposed the mandatory nature of the provision. There is no scope to take account of competing considerations, and a refusal to grant citizenship is not subject to effective merits review.[56]

3.42 The Explanatory Memorandum simply states that a 'security assessment' is reviewable under Part IV of the ASIO Act.[57] However, LSSA, HREOC and NSWCCL were critical of the review process, specifically that:

- proceedings must be held in private;[58]

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49 Ms Ellis, Assistant Secretary, Citizenship and Language Services Branch, DIMA, *Committee Hansard*, 6 February 2006, p. 32.

50 Ms Ellis, Assistant Secretary, Citizenship and Language Services Branch, DIMA, *Committee Hansard*, 6 February 2006, p. 32.

51 Section 17 Australian Security Intelligence Organisation Act 1979 (the ASIO Act). Section 35 includes the exercise of any power, or the performance of any function in relation to a person under the *Citizenship Act 1948* or the *Passport Act 1938* the regulations under either of those Acts.

52 Response to Question on Notice, 7 February 2006.

53 Ms Ellis, Assistant Secretary, Citizenship and Language Services Branch, DIMA *Committee Hansard*, 6 February 2006, p. 37; see also Explanatory Memorandum, p. 19.

54 LSSA, *Submission 49,* p .2.

55 LSSA, *Submission* 49, p.2.

56 See HREOC *Submission 50,* p.11; see also *Director General Security v Nasmy Obed Sultan & Anor* [1998] 1548 FCA (1 December 1998).

57 *Explanatory Memorandum*, p. 9.

58 Subsection 39A(5).

- the Attorney General may certify that the applicant not be notified of the adverse security assessment and/or not be informed of the grounds for the assessment;[59]
- the statutory right to reasons under the *Administrative Appeal Tribunal Act 1975* (AAT Act) does not apply where the review jurisdiction is exercised by the Security Appeals Division of the Administrative Appeals Tribunal (AAT);[60] and
- the applicant and his or her representative may be excluded from that part of the hearing, which involves the disclosure of security sensitive information.[61]

3.43 HREOC also argued that the jurisdiction of the AAT may only be invoked when the applicant has been given notice of the security assessment.[62] Thus, in cases where the Attorney General exercises his power to certify that the applicant not be informed of the assessment, review rights are effectively vitiated.

3.44 To ameliorate the barriers to procedural fairness HREOC recommended that the *National Security Information (Criminal and Civil Proceedings) Act 2004* be amended to apply to the Security Appeals Division of the AAT. This would enable the AAT to make an assessment as to whether sensitive information should be disclosed to the applicant for citizenship.

3.45 The Committee also notes the parallel to subsection 116(3) of the Migration Act and Regulation 2.43, which require the Minister to cancel a visa once ASIO has made an adverse security assessment against a visa holder, and provides no discretion.[63] These provisions apply to temporary visa holders in Australia, and permanent residents who are overseas and who have not yet entered Australia.[64] By contrast provisions that apply to permanent residents in Australia provide the Minister with a discretion:

> If the person is in Australia as a permanent visa holder, they may be considered for visa cancellation under the character provisions of section 501 of the Migration Act or, in some circumstances, deportation under section 202 of the Migration Act.
>
> Exercise of either of these powers requires the decision maker to consider the reasons behind the adverse security assessment. Therefore, the decision maker needs to have sufficient reasons, provided by ASIO or other sources,

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59 Sections 38 and 38A of the ASIO Act; see also subsection 39A(8) of the AAT Act.

60 Section 28 (1AAA) of the AAT Act.

61 Section 39A (9) of the AAT Act; see also NSWCCL, *Submission 25*, p. 4.

62 Subsection 27AA(1) of the AAT Act; Section 54(1) of the ASIO Act; HREOC *Submission 50*, p. 12.

63 The mandatory nature of subsection 116(3) and regulation 2.43(2) (a) was confirmed in *Tian v MIMIA* [2004] FCAFC 238 (30 August 2004).

64 Response to question on notice, 7 February 2006.

> before consideration can be given to cancellation or deportation as appropriate.[65]

Committee view

3.46 The Committee acknowledges that it is the responsibility of Government to respond to demonstrable risks to national security. In this respect, the proposed provisions represent a more explicit and consistent approach to national security in the field of migration and citizenship law. However, the mandatory rejection of a citizenship application on the basis of either an adverse or qualified security assessment makes no allowance for competing considerations and may result in a disproportionately harsh outcome in some cases.

3.47 While subsection 116(3) and Regulation 2.43 are mandatory, other provisions of the Migration Act allow for ministerial discretion. The Committee also notes that the power to make a decision to deport a non-citizen under section 202 of the Migration Act arises where the security assessment is adverse but not where the assessment is a qualified security assessment.[66] Against this background the provisions appear more onerous than is necessary to stop a person who is threat to national security risk from obtaining citizenship. The removal of discretion where national security grounds are implicated also sits at odds with the conferral of wide discretions elsewhere in the Bill.

3.48 In addition, the lack of transparency may undermine confidence in the decision making process and act as a disincentive to apply for citizenship. The Committee suggests that to ameliorate the risk of an unfair outcome, the Minister should retain some discretion to take account of individual circumstances, including, for example, the nature of the risk and, where applicable, the impact on the spouse and children.

Recommendation 9

3.49 The Committee recommends that proposed sections 17(4), 24(4) and 30(4) be amended to give the Minister a discretion to reject an application where s/he is satisfied that the person poses a threat to national security.

Stateless Persons

3.50 A number of witnesses have raised concerns about the consistency of provisions of the Bill with Australia's international legal obligations under the Convention on the Reduction of Statelessness (the Convention).[67] The Committee notes that provisions relating to statelessness appear throughout the Bill and are intended to replicate existing section 23D of the 1948 Act.

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65 Response to question on notice, 7 February 2006.

66 Paragraph 202 (1)(b) of the Migration Act.

67 (1975) ATS 46, entry into force on 13 December 1975.

3.51 Article 1 of the Convention imposes a duty to grant nationality[68] to a person born in the State party's territory who would otherwise be stateless. Citizenship may be granted either by operation of law or application. Where the State party requires an application, paragraph 2 prescribes the criteria that may be applied:

- the person has neither been convicted of a national security offence or been sentenced to imprisonment for a term of five years or more on a criminal charge;[69]
- the person has always been stateless.[70]

3.52 NSWCCL argued that the Bill imposes criteria, which fall outside the scope of article 1.2, in particular, the requirement that the person:

- must not be the subject of an adverse or qualified security assessment;[71] and
- must satisfy proof of identity.[72]

3.53 It was noted that an adverse or qualified security assessment can be made without a conviction and this criterion is therefore inconsistent with article 1.2(c).[73] Similarly, the NSWCCL argued that failure to prove identity is not a sufficient ground alone to deny citizenship where the person would remain stateless.[74]

3.54 HREOC made the additional submission that the State party's discretion to require that a person 'has always been stateless' does not extend to include the criteria set out in the Bill, namely, that:[75]

- the person does not have reasonable prospects of acquiring the nationality of a foreign country;[76]
- that the person has never had such reasonable prospects.[77]

3.55 On this point, HREOC argued that the treaty permits an exception only where the person 'has actually acquired the nationality of another country'.[78] Professor Rubenstein endorsed this view:

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68 The Committee understand that the term 'nationality' in this context is a synonym for 'citizenship'. That is, denoting the legal relationship between the state and the individual.

69 Article 1.2(c) and Article 4.2(c).

70 Article 1.2(d).

71 Subsection 24(4).

72 Subsection 24(3); NSWCCL, *Submission 25*, p. 3.

73 Article 1.2(c) refers to a person who has been convicted of an offence against national security; HREOC, *Submission 50*, p. 5; NSWCCL, *Submission* p. 3.

74 NSWCCL, *Submission 50,* p. 3.

75 HREOC, *Submission 50*, p.5.

76 Paragraph 21(8)(c).

77 Paragraph 21(8)(c).

> 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.

3.56 The same concerns were raised in relation to the acquisition of citizenship by descent. Article 4.1 of the Convention on the Reduction of Statelessness requires that Australia grant citizenship to a person born outside Australia where one parent is of Australian nationality, who would otherwise be stateless. It was argued that, while the provisions of the Bill dealing with citizenship by descent meet the obligation in part, the refusal of citizenship by descent under subsection 17(3) (identity) and 17(4) (adverse or qualified ASIO assessment) raise the same issue of compatibility.[79]

3.57 The Department initially informed the Committee that the provision has not changed from the current legislation and the Government is satisfied that clause 21(8)(c) is 'not inconsistent' with article 1.[80] However, the Committee notes that in further correspondence, the Department explained that disqualification on the grounds of lack of proof of identity or an adverse or qualified security assessment had not been considered during the drafting of the Bill.[81] HREOC also confirmed, in response to a question on notice, that it had not been consulted in the preparation of the Bill.[82]

Committee view

3.58 The Committee notes that the proposed Bill does change the law in two important ways. Further, while the Committee appreciates that legal opinion may differ, there is a legitimate question as to whether proposed paragraph 21(8)(c) is sufficient to meet the objectives of the Convention. Australia may have adopted an unduly restrictive interpretation of its obligations in this regard.

3.59 The Committee considers that legal and policy issues pertaining to the status of stateless persons (including children) and the reduction of statelessness should be the subject of consultation between the Government, HREOC and the UNHCR. Further advice from Attorney-General's Department should also be sought in relation to all the matters raised during the inquiry.

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78 HREOC, *Submission 50*, p. 5.

79 HREOC, *Submission 50,* p. 6; See also Centre for Comparative Constitutional Studies, *Submission* 25, p. 4.

80 Ms Ellis, Assistant Secretary, Citizenship and Language Services Branch, DIMA, *Committee Hansard*, 6 February 2006, p. 31

81 Correspondence, DIMA, 7 February 2006.

82 Response to question on notice, 7 February 2006.

Recommendation 10

3.60 The Committee recommends that sections 17, 24 and 30 be amended so as to limit the exclusion from citizenship on national security grounds in the case of a stateless person to applicants who have been the subject of an actual conviction for a security related offence in accordance with the provisions of the Convention on the Reduction on Statelessness.

Recommendation 11

3.61 The Committee recommends that the Bill be thoroughly reviewed to ensure that Australia fully discharges it responsibility towards stateless persons and that the UNHCR and HREOC be consulted as part of this process.

Identity and privacy issues

3.62 As noted above, the Bill prohibits the approval or renunciation of a person's citizenship 'unless the minister is satisfied of a person's identity'.[83] NSWCCL argued that, although proof of identity will be central to a grant of citizenship, there is no evidence that identity fraud is a significant problem in citizenship applications and there is no explanation as to why a fetter should be placed on the Minister.[84]

3.63 The new Bill proposes the collection of the following personal identifiers, including biometric information:[85]

- fingerprints and handprints
- measurements of a persons height or weight
- photograph or other image of a person's face or shoulders;
- iris scan;
- signature;
- any other identifier prescribed by regulations, except those obtained by way of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914.*[86]

3.64 Section 40 enables the Minister to request one or more personal identifiers but the procedures and requirements for individuals to provide personal identifiers will be specified in the regulations.[87] The Committee was assured that the Department will

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83 Subsections 17(3), 24(3), 30(3), 33(3).

84 NSWCCL, *Submission 25*, pp 6-7.

85 A biometric is a unique identifying physical characteristic such as facial recognition, iris pattern or fingerprint.

86 Section 10(a)–(f).

87 Section 41.

consult with the Commonwealth Office of the Privacy Commissioner (the Privacy Commissioner) in the development of these regulations.[88]

3.65 The use of biometric information in the proposed law was criticised. In particular, the Australian Privacy Foundation believed that the Government should be taking more time to consider the implications of the use of biometric technology,[89] and raised three principal objections:

- biometrics and the recording of biometrics in a database form are not infallible technologies, data can be corrupted and consequences for victims of identity fraud are serious;
- a biometrics database in the citizenship context will be a vast undertaking. Management of existing databases has already been criticised by the Auditor General, who reported a 30% error rate. Inadequate training of Departmental staff who have access to the information was also criticised in the Palmer report;
- the use of biometrics is a 'stalking horse' for a national identity card, which is being presented as a *fait accompli* because of its use already in relation to passports.

3.66 The Privacy Commissioner and the Australian Privacy Foundation also argued that the scope of provisions governing collection, access, use and storage of biometric data are not proportionate to the purpose of confirming the identity of a person seeking citizenship.[90] Several witnesses also submitted that there was no demonstrable necessity to retain biometric data with an individual's citizenship record once identity has been confirmed or beyond a conferral of citizenship.[91]

3.67 Of particular note is proposed subparagraph 10(2)(c)(ii), which permits regulations under the Act provided the Minister is satisfied that obtaining the identifier will *promote* the purpose of 'complementing anti-people smuggling strategies'.[92] Access to personal identifiers for purposes other than confirming the identity of the applicant or establishing proof of citizenship are also envisaged by the Bill. Subsection 42(4) allows for personal identifiers to be accessed for purposes such as 'combating document and identity fraud in citizenship matters' and 'complementing anti-people smuggling measures'.

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88 Office of the Privacy Commissioner, *Submission* 39, p. 2.

89 Privacy Foundation, *Submission 40*, p. 2.

90 Privacy Foundation, *Submission* 40, p. 2; Office of the Privacy Commissioner, *Submission* 39, pp 1-3.

91 Office of the Privacy Commissioner, *Submission 39*, pp 1-3; Privacy Foundation, Submission 40, pp 1-4; Law Society of South Australia, *Supplementary Submission 49A*, p. 1.

92 Office of the Privacy Commissioner, *Submission* 39, p. 3

3.68 The Australian Privacy Foundation submitted that identifying information about citizenship applicants, including fingerprints, photographs and iris scans, could be accessed or disclosed for any reason, so long as there is either:

- a law allowing the recipient to access such information (cl.42(4)(h));
- a purpose of data-matching to identify a person for citizenship purposes (cl.43(2)(a));
- an agreement with any government agency (federal, state or territory) to exchange such information (cl.43(2)(e)).

3.69 It was argued that disclosures allowed under this Bill would include:

- a State or Territory police force, or any other body with investigative powers to collect information – under the law governing that other body;
- Centrelink or the Tax Office – under an agreement, or under the social security or taxation legislation which allows widespread collections from other agencies;
- a State driver licensing authority – under an agreement; or
- a person's employer, bank, video rental store or fitness club (each holds signatures, and potentially photographs) – for the purpose of data-matching to identify a person.[93]

3.70 During the hearings, the question of whether the Bill should make express reference to the Privacy Act was raised.[94] The Department argued that, in its view, nothing would be gained by including such a reference because, where there is an inconsistency, the provisions of the Bill would prevail.[95]

3.71 However, the Department reiterated that it is the intention that identifying information will only be collected under the Bill for citizenship purposes. And that such information will only be accessed and disclosed for purposes of the citizenship and migration legislation 'and in some very limited other circumstances'.[96]

3.72 The Department conceded that provisions which deal with personal identifiers have the potential to allow use and disclosure in a wider range of circumstance than is intended. Further, access and disclosure provisions were modelled on similar provisions in the Migration Act. The Department has subsequently undertaken to examine how these provisions 'might be amended to more closely reflect the policy intention'.[97] In particular, the Department stressed that it is not intended that personal

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93 Australian Privacy Foundation, *Submission 40*, p. 2.

94 Senator Payne, *Committee Hansard*, 6 February 2006, p. 34.

95 Response to question on notice, 7 February 2006.

96 Response to question on notice, 7 February 2006.

97 Response to question on notice, 7 February 2006.

information be used, access or disclosed for any breach of the law, except for the investigation of offences against citizenship and migration laws.[98]

3.73 On the question of retention of biometric information, the Department advised that retention is necessary in case a request for evidence of citizenship is made. The rules in relation to destruction of personal identifying information are governed by the *Archives Act 1983* (the Archive Act). Arrangements under the Archives Act currently provide that documents relating to approved citizenship applications (which would include identifying information) must be retained for eighty years.[99]

Committee view

3.74 The Committee has previously expressed its concern about the use of regulation making powers to extend the scope of legislation in ways that *prima facie* infringe basic civic liberties.[100] In particular, the Committee is concerned about the breadth of the regulation making power under section 10.

3.75 The requirement to establish proof of identity is not *per se* an unreasonable requirement. How proof of identity is administered will be crucial.

3.76 The Committee welcomes the Department's undertaking to review the access, use and disclosure provisions. However, the Committee does not agree that an entitlement to obtain proof of citizenship is sufficient justification for the retention for eighty years of the personal identifying information of Australian citizens. Instead it should be recognised that the retention of such personal information increases the risk of unnecessary incursions into personal privacy and encourages the use of this material.

3.77 The Committee is also concerned that this Bill also represents another extension of Government activity involving the use of biometrics without comprehensive public consultation; a pilot scheme or public discussion of the costs and efficacy of new technologies.

Recommendation 12

3.78 The Committee recommends that the Department continue to work with the Privacy Commissioner to restrict to the maximum extent possible the collection, access, use and disclosure of personal identifying information in the Bill.

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98 Response to question on notice, 6 February 2006.

99 Response to question on notice, 6 February 2006.

100 Legal and Constitutional Legislation Committee, *Provisions of the Migration Legislation Amendment (Identification and Authentication) Bill 2003*, September 2003, p. 8.

The status of children under the Bill

3.79 A number of witnesses have argued that the status of children under the Bill is unclear and that there are some inconsistencies with Australia's international obligations toward children.[101]

Application for citizenship

3.80 The Bill appears to allow for an application for citizenship by a child to be made independently of a responsible parent. However, it is not clear whether this applies in all circumstances.[102] There is no age barrier to when a person, including a child, may apply for citizenship by descent. Similarly, there is no age limit on the resumption of citizenship, including resumption where a child was deprived of citizenship as a consequence of their parent's actions. Subsection 21(5) allows the Minister the discretion to approve an application for citizenship by conferral from someone under the age of 18.[103] It is unclear whether this is intended to imply that an application for citizenship can be made on behalf of a child.[104]

3.81 A question was also raised as to whether the provisions of the Bill meet Australia's international obligations in respect of children who are the subject of an international custody dispute.[105] It was suggested that the lack of clarity about the application process may create the potential for a person, who is not a 'responsible parent', to apply on behalf of the child.

3.82 Accordingly, witnesses proposed that section 21 should make clear that a responsible parent may apply for citizenship on behalf of their child.[106] It was also advocated that, where the decision making power of the Minister under section 24 is exercised in respect of a child (a person under 18 years), the Minister should be required to take into account:

- the best interests of the child as a paramount consideration;[107]
- the extent to which the grant of citizenship might prejudice or disentitle the child's claim to citizenship of a foreign state; and

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101 See for example, Centre for Comparative Constitutional Studies, *Submission 33,* p. 4; Professor Rubenstein, *Submission 65*, p. 3.

102 The on-line information merely indicates that a child under 16 can be included in a parent's application at no extra cost. However, this will not be relevant in all circumstances.

103 Professor Rubenstein, *Submission 65*, p. 3.

104 Centre for Comparative Studies, *Submission 33*, p. 4.

105 Senator Bartlett, *Committee Hansard*, 30 January 2006, p. 18; Australia is a signatory to the Hague Convention on Civil Aspects of International Child Abduction and implements its obligations under the treaty through the *Family Law (Child Abduction Convention) Regulations 1986*.

106 Centre for Comparative Studies, *Submission 33,* p. 4.

107 Article 3 CRC.

- Australia's international obligations in relation to children.

The status of children adopted outside Australia

3.83 Section 13 confers automatic citizenship on an adopted child if the adoption is under a law of a State or Territory; at least one adoptive parent is an Australian citizen and the person is present in Australia as a permanent resident. The Department confirmed that proposed section 13 is identical to the equivalent provision of the 1948 Act.[108]

3.84 The Committee was informed that under international treaties, Australia is required to ensure the same rights and protections that are accorded to a child adopted overseas that apply to a child adopted in Australia.[109] Under Regulation 16 of the *Family Law (Hague Convention on Intercountry Adoption) Regulation 1998,* recognition of adoption occurs automatically upon the issuing of an adoption certificate by the adopted child's country.[110] Consequently, some children adopted overseas will not be present in Australia as permanent residents at the time the adoption is recognised in Australia and will not automatically become citizens by operation of proposed section 13.[111] Witnesses agreed that automatic conferral of citizenship may lead to loss of citizenship of the country of origin contrary to the interests of the child.[112]

3.85 It was suggested Australia's obligation could be fulfilled by permitting an adopted person of any age, who was adopted overseas and whose adoption is recognised in Australia, to apply for citizenship. A grant of citizenship should require consideration of:

- the age of the applicant;
- the best interests of the child if the person is under 18 years old;
- whether a grant of Australian citizenship will affect their citizenship of another country.[113]

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108 Ms Ellis, Assistant Secretary, Citizenship and Language Services Branch,DIMA*, Committee Hansard*, 6 February 2006, p. 38.

109 Rubenstein K., *Australian Citizenship Law in Context,* Lawbook Co., Australia, 2002, p. 94; Hague Convention on Intercountry Adoption; Convention on the Rights of the Child (CRC).

110 Centre for Comparative Constitutional Studies, *Submission 33,* p. 5.

111 Centre for Comparative Constitutional Studies, *Submission 33,* p. 5; see also HREOC, *Supplementary Submission 50A*, p. 4.

112 HREOC, Supplementary Submission 50A, p. 4; Centre for Comparative Constitutional Studies, *Submission 33,* p. 5

113 Centre for Comparative Constitutional Studies, *Submission 33,* p. 5; see also HREOC, *Supplementary Submission 50A*, p. 4.

Loss of citizenship

3.86 Subsection 36(1) confers discretion on the Minister to revoke the citizenship of a child where the citizenship of their responsible parent is ceased because of citizenship fraud (including third party fraud); conviction for a serious criminal offence (committed before conferral) or where the parent has renounced citizenship.[114]

3.87 The UN Committee on the Rights of the Child has recommended that no child be deprived of his/her citizenship on any ground, regardless of the state of his/her parent(s).[115] HREOC therefore welcomed the removal of the automatic loss of citizenship under the new Bill.[116] However, several witnesses queried why a ministerial discretion to deprive a child of citizenship had been retained.[117] To strengthen the protection of the child, the Centre for Comparative Constitutional Studies argued that the Minister should be required to take into account the best interests of the child. By contrast, HREOC recommended that the discretion under proposed subsection 36(1) be removed entirely from the Bill.[118]

Committee view

3.88 Having considered the evidence, the Committee agrees that the recognition of rights and interests of the child under Australian citizenship law requires closer attention. Clarification of the circumstances in which an application for citizenship of a child may be considered separately or with that of their responsible parent would improve the visibility of the child in the Bill. This would also contribute to their recognition as full members of the Australian community. The situation of persons adopted overseas also requires attention.

3.89 The Committee also believes that, in most instances, it would not be acceptable to the Australian community to strip a child of citizenship because of the actions of their parent(s). In its current form, subsection 36(1) is unfettered and leaves open the potential for considerations contrary to the interests of the child. Subsection 36(1) would be improved by including:

- a presumption against revocation of citizenship of a child;[119]
- a requirement that the Minister must have regard to the best interests of the child as a paramount consideration;[120]

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114 Section 34 and 35.

115 Committee on the Rights of the Child, *Concluding Comments on Australia,* Add. 79, paras 14 and 30 as reported by HREOC, *Submission 50*, p. 6.

116 HREOC, *Submission 50*, p. 6

117 HREOC, *Submission 50*, p. 6; CCS, *Submission 33*, p. 4.

118 HREOC, *Submission 50*, p. 6; CCCS, *Submission 33*, p. 4.

119 Article 8, CRC.

120 Article 3, CRC.

- the right of the child to nationality and to preserve identity, including nationality;[121] and
- that the views of the child should be taken into account.[122]

3.90 Similarly, where a Minister makes a decision for the resumption of citizenship under section 29 the same criteria should apply.

Recommendation 13

3.91 The Committee recommends that the Bill should expressly adopt the principle that, in all decisions affecting the rights and interest of a child, the best interests of the child shall be a paramount consideration in Part 1 of the Bill.

Recommendation 14

3.92 The Committee recommends that the Bill should clarify when a child may make an application in their own right and when an application may be considered as part of an application of a responsible parent.

Recommendation 15

3.93 The Committee recommends that the discretion to revoke the citizenship of a child where the citizenship of the parent has ceased should be amended to reflect Australia's international obligations and include a:

- **presumption against revocation of citizenship of a child;**
- **requirement that the Minister must have regard to the best interests of the child as a paramount consideration;**
- **requirement that the views of the child should be taken into account.**

Resumption of citizenship

3.94 The provisions relating to the resumption of citizenship have generally been well received. In particular, the Bill provides that resumption of citizenship may be granted to a person

- who lost citizenship under the dual citizenship rule in section 17 of the 1948 Act (prior to its repeal in 2002) may apply for resumption of citizenship;[123]
- who lost citizenship because of renunciation under section 18 of the 1948 Act to avoid suffering signigicant hardship or detriment.[124]

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121 Article 8 CRC.

122 Article 12 CRC.

123 Subparagraph 29 (3)(a)(i)

124 Subparagraph 29 (3)(a)(ii)

In addition, subject to the good character test, a child, born outside Australia to a former Australian citizen who lost citizenship under the section 17, may apply for citizenship by conferral (but is not required to make a pledge).

3.95 However, a number of witnesses have criticised the Bill for not providing an opportunity to 'resume' or acquire citizenship by descent for the later born offspring of former Australian citizens who renounced citizenship.[125] It was argued that the distinction between these groups of later born children cannot be justified.[126]

3.96 In the case of Maltese born children of former Australian citizens, the Committee was reminded that between 1969 and 2000, Australian born Maltese were required to renounce their Australian citizenship by their 19th birthday in order to keep their Maltese citizenship in adulthood.[127] The historic inequity of loss of citizenship is cited as one reason for allowing the overseas born offspring of those Australian born Maltese to have access to Australian citizenship by descent or conferral.[128] It was also noted that people who fall within this category are not confined to a relatively small number in Malta but include the offspring of any former Australian citizen who renounces their citizenship in order to acquire or retain the citizenship of any other country.[129]

3.97 The Department explained the distinction on the basis that renunciation is regarded as a final act of severing the relationship with the country.[130] The current provision for later offspring of former citizens who lost citizenship as a result of section 17 (dual nationality), is regarded as a final 'tidying up' of the consequences of the dual nationality rule:

> … 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

125 Maltese Welfare Association, *Submission 7*, p. 1; Centre for Comparative Constitutional Studies, *Submission 33*, p. 6; Southern Cross Group, *Submission 52,* pp 13-30.

126 Southern Cross Group, *Submission 52*, p. 19.

127 Maltese Welfare Association, *Submission 7*, p. 1.

128 Southern Cross Group, *Submission 52*, p. 31; Para 16(2) (a) makes it clear that a person is not eligible to apply for citizenship by descent unless one of their parents was an Australian citizen at the time of birth or become an Australian citizen on 26 January 1949, DIMA, *Submission 35*, p. 2.; Legal and Constitutional References Committee, *They still call Australia home: Inquiry into Australian Expatriates*, March 2005, Chapter 10, p. 125.

129 Southern Cross Group, *Submission 52*, p. 15.

130 Mr Peter Vardos, PSM, First Assistant Secretary, Citizenship, Settlement and Multicultural Affairs Division, DIMA, *Committee Hansard*, 6 February 2006, p. 33.

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.[131]

3.98 During hearings, the Committee canvassed the question of resumption and where the boundary should be drawn. In providing the background to the issue, the Department told the Committee 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.[132]

Committee view

3.99 The Committee considers that this matter has been fully considered by the Government over a number of years and that renunciation is properly regarded as a more significant and conscious relinquishing of the bonds of allegiance to Australia. As such, the Committee accepts the proposed provisions.

Review rights

3.100 Merits review in the Administrative Appeals Tribunal will be available in relation to many of the decisions made under the Bill. However, in relation to a decision under clause 24 (citizenship by conferral), review rights are restricted to permanent residents (except for non-residents under 18 years of age). A number of witnesses argued that this effectively denies an opportunity for merits review to children of former citizens;[133] persons born in PNG;[134] and stateless persons.[135] During hearings the Department informed the Committee that:

> 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

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131 Ms Ellis, Assistant Secretary, Citizenship and Language Services Branch, DIMA *Committee Hansard*, 6 February 2006, p. 34.

132 Mr Peter Vardos, PSM, First Assistant Secretary, Citizenship, Settlement and Multicultural Affairs Division, DIMA, *Committee Hansard*, 6 February 2006, p. 33.

133 Subsection 21(6).

134 Subsection 21(7).

135 Subsection 21(5); see for example, Centre for Comparative Constitutional Studies, *Submission 33*, p. 3.

> refused. This was an unintended drafting oversight. A government sponsored amendment will be introduced to address this.[136]

3.101 The Department stated that an exercise of Ministerial discretion under subsections 22(6), (7) and (8) will be reviewable by the AAT.[137] The Committee notes that the review of a decision under section 24 (citizenship by conferral) is expressly provided for by section 52. However, whether the AAT has jurisdiction to examine decisions under subsection 22(6) and (7) may be open to argument.

3.102 Section 52A of the 1948 explicitly provides that a decision of the Minister under section 13 is a reviewable decision. Ministerial discretion to count certain periods of temporary residency as permanent residency were contained in paragraph 13 (b). The drafting of the new Bill separates these provisions.

Committee view

3.103 The Committee understand that the Department's intention is that Bill maintain the status quo on review rights and welcomes its clarification of this matter. This area requires careful attention so as to not remove rights to procedural fairness and merit review from applicants for citizenship.

Recommendation 16

3.104 The Committee recommends that all existing review rights be maintained.

Dual nationals

3.105 The NSWCCL pointed out that the Bill fails to address some important issues arising out of recent High Court cases concerning the 'aliens' power.[138] In summary, the result of the Singh case is that a person may be regarded as both a statutory citizen and a constitutional alien.[139] NSWCCL agued that:

> In the case of Singh, the lead judgment stated that an alien is simply a person who owes allegiance to a foreign power.[140] This has serious implications for citizens who have dual citizenship. In essence, it means that any dual citizen is liable to deportation under the Migration Act. This

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136 Mr Peter Vardos, PSM, First Assistant Secretary, Citizenship, Settlement and Multicultural Affairs Division, DIMA, *Committee Hansard*, 6 February 2006, p. 30.

137 *Committee Hansard,* 6 February 2006, p. 36.

138 NSWCCL, *Submission 25*, p. 25.

139 Peter Prince, *Mate! Citizens, aliens and 'real Australians' – the High Court and the case of Amos Ame,* Parliamentary Library Research Brief, No.4 2005-06, 27 October, 2005, p. 2; See also *Singh v Commonwealth* (2004) ALR 355.

140 *Singh v Commonwealth* (2004) ALR 355 [305] (Gummow, Hayne & Haydon JJ), as cited in NSWCCL, *Submission* 25, p. 25.

> would also, presumably apply to citizens by birth and descent, as well as by conferral.[141]

3.106 The Department advised the Committee that:

> Data on the number of Australians who hold dual citizenship is not available. The Department has unsuccessfully suggested in the past that the Australian Bureau of Statistics include in the census form, a question or questions on dual citizenship. The Australian Citizenship Council in its February 2000 report *Australian Citizenship for a New Century* estimated the number of dual citizens at 4.4 million.[142]

Committee view

3.107 The Committee is concerned that the potential for treating a person who is a citizen also as an alien has wide ranging consequence for the value of Australian citizenship. While there are limited circumstances in which citizenship may be ceased under the current law, the provision for depriving a person of citizenship is tightly circumscribed. This recognises that once a person has made an allegiance to Australia, the responsibility to reciprocate that mutually legally binding relationship should only be broken by the State in extreme circumstances. Without constitutional protection Australian citizenship is a statutory creature subject to change by the Parliament. While this is desirable, in that citizenship can be updated to reflect changing social attitudes, the fundamental worth of citizenship should not be in doubt.

Recommendation 17

3.108 The Committee recommends that the Preamble recognise that Australian citizenship represents full and formal membership of the community of the Commonwealth.

Senator Marise Payne

Committee Chair

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141 *Submission* 25, p. 25.

142 Response to question on notice, 7 February 2006.