

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

21 July 2017

Dear Committee Secretary,

Inquiry into the Australian Citizenship Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 ('the Bill')

Thank you for the opportunity to make a submission. We do so in our capacity as members of the Andrew & Renata Kaldor Centre for International Refugee Law and the Gilbert + Tobin Centre of Public Law at UNSW Law. We are solely responsible for the views and content in this submission.

While we support the broad objectives that underpin the Bill we have serious concerns regarding its suitability to achieve these objectives, and, indeed, we are concerned that its provisions may undermine these objectives.

In the second reading speech, the Minister for Immigration and Border Protection made reference to Australia's success as a multicultural nation based on 'shared values, rights and responsibilities', and said that the Bill will 'ensure that we continue to welcome new Australians committed to making a positive contribution through the many opportunities our country affords'. We endorse this objective. In our view, the goal of fostering a diverse and harmonious Australia, comprised of people from a broad range of cultures, races, faiths and nation is a laudable one. We also accept the Minister's comments about the need to 'maintain strong public support for migration and the value of Australian citizenship in what is an increasingly challenging national security environment and complex global security situation'.

However, we do not believe that the measures adopted in the Bill address these objectives in a proportionate and evidence-based manner. This is particularly problematic because the proposed changes have significant implications for prospective citizens, their families and society more broadly. Given these implications, it is incumbent on the government to justify why these changes put forward are necessary.

Broadly, the Bill does two things. First, it alters the requirements for acquiring Australian citizenship in a way that makes citizenship more difficult to obtain for some people. Secondly, it significantly expands the discretionary powers of the Minister for Immigration and Border Protection and reduces their accountability.

We have concerns with both aspects of the Bill. The more onerous citizenship requirements proposed have a disproportionately harsh effect on certain prospective citizens, including refugees and humanitarian entrants, who are some of the most vulnerable members of society. No clear case has been made for why the measures proposed are the best way in which to serve the end goal of ensuring that those who acquire Australian citizenship are allegiant to Australia and committed to making a positive contribution to Australian society. The proposed changes to executive power vest significant new personal powers in the Minister for Immigration while eroding independent checks and balances. This creates both a perception and a real risk of arbitrary decision-making and, once again, the precise need that the proposed changes would serve has not been clearly articulated.

Without stronger justification, we fear that the changes proposed will not serve the goal of fostering cohesion and integration amongst the Australian population, and are, in fact, likely to have the opposite effect.

We are also concerned about the fact that key provisions of the Bill purport to operate retrospectively, with effect from 20 April 2017. We cannot see why this is necessary, and it has the consequence of creating considerable uncertainty for large numbers of prospective citizens. This uncertainty is exacerbated by the fact that the Bill has proceeded to Senate inquiry, with no clarity on if, when and in what form it is likely to be passed.

Our detailed recommendations on the Bill are as follows:

- The proposed amendments to s 12 setting out additional citizenship requirements for children born in Australia should be removed.
- The proposed amendments to ss 16(2), 19C(2) and 21 (5)–6, setting out additional citizenship requirements for children born outside Australia, should be removed. If the amendments are retained, the grounds that would exclude a minor from eligibility for citizenship be narrowly defined to address issues relating to ‘serious character concerns’. What constitutes a ‘serious character concern’ should be defined in the legislation, and apply only to minors aged between 16 and 18.
- The proposed amendments to s 22, increasing the residency requirements for citizenship eligibility, should be removed. However, if the government is minded to keep these requirements, the proposed ministerial power to waive the requirements in certain circumstances should be circumscribed in the legislation.
- The proposed amendments in s 21(9)(a), (b) and (c), which empower the Minister to determine by legislative instrument what is required for a person to satisfy the new eligibility criterion of ‘competent English’ (in proposed s 21(2)(e)) should be removed. Any English proficiency requirement necessary for citizenship by conferral should be contained in primary legislation. If the government is minded to increase the English language proficiency requirements, it must ensure that aspiring citizens have access to commensurate levels of government support and education that would enable them to meet such requirements. As

an alternative to any English language test, the *Australian Citizenship Act 2007* (Cth) should set out permissible education-based pathways to obtain English proficiency.

- The factors that go towards determining whether a person has met the requirement in proposed s21(2)(fa) of integration into the Australian community should be included in primary legislation. Moreover, careful consideration should be given to whether factors such as a person's employment status should be a potential bar for citizenship.
- Items 136, 138 and 139 of the Bill should not enable retrospective operation. If the Bill is passed, all its provisions should operate prospectively. If the changes in proposed ss 12(4), (5) and (7) of the Bill with respect to entitlements to citizenship for children born in Australia are retained, these provisions should only apply to children born after the changes commence.
- Proposed s 34AB should not be passed in its current form. Before any increase to the maximum length of delays in conferring citizenship is enacted, the Minister should provide to the Parliament a detailed explanation about how often, and in what circumstances, the current maximum period of 12 months is insufficient. Based on this evidence, the Bill should enumerate and limit the circumstances in which delay of more than 12 months will be permitted under the Act, and require that any delay imposed is proportionate to the circumstances that trigger it.
- The proposed s 33A, expanding the grounds for loss of citizenship should be removed, and the narrower grounds for loss of citizenship in s 19A should be retained. Careful consideration should be given to whether it would be appropriate to amend s 19A to provide the Minister with a discretion to grant a person citizenship who otherwise would not qualify for citizenship by descent.
- The proposed s 34AA should be removed and revocation on grounds of fraud should continue to be available only where a criminal conviction for fraud has been obtained, as is currently the case under s 34. If it is retained, we recommend that the public interest discretion in s 34AA is amended to specify the factors that the Minister must take into account in exercising the discretion. If retained, the proposed s 34AA(1)(c), at a minimum, should state:
 - “(c) after considering the following matters, the Minister is satisfied that it would be contrary to the public interest that the person should remain an Australian citizen:
 - (i) the nature and seriousness of the fraud or misrepresentation; and
 - (ii) that the person was unaware of the fraud or misrepresentation at the time that it took place in deciding whether to revoke their Australian citizenship.”
- Proposed s 22AA, allowing the waiver of the residency requirement, should be retained, but be amended to state in s 22AA(1)(b):
 - “(b) the Minister is satisfied that the determination should be made in relation to the applicant, having taken into account the following matters:

- the reasons why the applicant was unable to meet the general residence requirement; and
- the unfairness to the applicant of imposing the general residence requirement.

If the proposed ss 47(3A) and 54(2) are retained, we recommend that s 22A(3) (the power must be exercised personally by the Minister) and (4) (the power is non compellable) are removed to allow the power to be appropriately reviewed in the AAT and through judicial review.

- The proposed ss 47(3A), 52(4) and 52A should be removed from the Bill: the jurisdiction of the AAT should not be removed in any circumstance, and the power to set aside an AAT decision should be removed. If these provisions are retained, they should be tightly circumscribed, not through the current ‘public interest’ criterion, but, rather, through the enumeration of specific, mandatory criteria that the Minister must take into account.
- Each of the substantive matters relating to eligibility for citizenship delegated in the proposed ss 3(2), 21(9)(a), 21(9)(e), 46(5) and 46(6) should be included in primary legislation.
- The proposed s 46(6) should be amended so that the Values Statement made under the proposed ss 46(5) is subject to disallowance. Further levels of scrutiny may even be appropriate, including:
 - requiring the positive approval of each House of the Parliament before the instrument comes into effect;
 - providing that the instrument does not come into effect until the relevant disallowance period has expired; or
 - a combination of these processes.
- The proposed s 54(2) allowing for the sub-delegation of delegated legislative power in the Act should be removed from the Bill, and if Parliament determines that certain matters are appropriately delegated to the Minister, specify these circumstances in the legislation.
- If the proposed s 52B and the proposed s 22AA(5) requiring the Minister to table a statement following the exercise of particular public interest discretions are retained, they should be significantly tightened so that the statement explaining the public interest decision must be laid before both Houses of Parliament within 5 sitting days, and must set out the reasons for the decision, referring in particular to the Minister’s reasons for thinking that his or her actions are in the public interest.

We outline our concerns and the basis for these recommendations in greater detail below.

Structure of Submission: The remainder of this submission is structured as follows:

Table of Contents

Part 1: Concerns around proposed requirements governing the acquisition of citizenship .	6
(a) Additional citizenship requirements for children born in Australia	6
(b) Additional citizenship requirements for children born outside of Australia	8
(c) Minimum residency period for citizens by conferral	10
(d) English language requirements	13
(e) Values and integration assessment	14
(f) Retrospective application of proposed new requirements for citizenship acquisition	16
Part 2: Concerns around expansion and accountability of executive discretion	18
(a) Capacity to delay a person from making the pledge of allegiance for an extended timeframe	18
(b) Expanded capacity to cancel approval for citizenship by conferral before the pledge of allegiance has been taken	19
(c) Expanded powers to revoke citizenship acquired by descent or conferral.....	20
(i) Power to revoke citizenship acquired by descent under proposed s 33A.....	21
(ii) Power to revoke citizenship acquired by descent, conferral or intercountry adoption on grounds of fraud or misrepresentation under proposed s 34AA.....	22
(d) Expansion of executive discretion through ‘public interest’ criterion.....	25
(i) Waiving general residency requirements in the ‘public interest’ (proposed s 22AA):	26
(ii) Power to revoke citizenship for other cases of fraud or misrepresentation if the Minister is satisfied it would be contrary to the ‘public interest’ for the person to remain a citizen (proposed s 34AA):	27
(iii) Removing AAT jurisdiction in the ‘public interest’ (proposed ss 47(3A) and 52(4)).....	27
(iv) Setting aside AAT decisions in the ‘public interest’ (proposed s 52A).....	28
(e) Expansion of executive discretion through legislative instruments	28
(f) Removal or override of review by the Australian Administrative Tribunal (AAT)	31
(i) Removal of AAT’s jurisdiction to review decision.....	31
(ii) Provision for ministerial override of AAT decisions	33
(iii) Limitations of judicial review of public interest discretion	34
(iv) Limitations of Parliamentary Accountability.....	34
Appendix A: English language requirement analysis.....	37

Part 1: Concerns around proposed requirements governing the acquisition of citizenship

(a) Additional citizenship requirements for children born in Australia

Under proposed ss 12(4), 12(5) and 12(7) of the Bill, some children who are currently entitled to citizenship on the basis of birth in Australia will lose this right.¹ The proposed changes apply to children born in Australia but whose parents did not hold citizenship or permanent residency at the time of their birth. Currently, under s 12(1)(b), children in this category do not gain citizenship at birth, but acquire it on their 10th birthday (the ‘ten year rule’).² The policy rationale for this approach was that children who have lived in Australia for the first 10 years of their life have developed a significant connection to Australia, which should be formally recognised through conferral of citizenship.³

The proposed changes create a number of exceptions to s 12(1)(b). Children will lose the entitlement to citizenship at age 10 if they have ever been present in Australia as an unlawful non-citizen,⁴ if they have ever left Australia without a visa to return,⁵ or if either parent did not hold a substantive visa at the time of their birth.⁶

The effect of this is that children born to people who have overstayed visas, or who have entered Australia without a visa seeking asylum, will lose their automatic entitlement to Australian citizenship. The proposed changes present a particular risk for children of asylum seekers.

The proposed changes in combination with the reintroduction of temporary protection visas (TPVs) in 2014 would make it very difficult for the children of asylum seekers who entered Australia by boat to obtain citizenship. Under the proposed changes, the only pathway to citizenship for such children would be to apply first for a Safe Haven Enterprise Visa (SHEV), then for a permanent visa, and, finally, for citizenship by conferral.⁷ For many refugees, permanent residency – and therefore citizenship – will be unobtainable, as meeting the criteria of both a SHEV and a permanent visa is an onerous task. This was acknowledged by former Immigration Minister Scott Morrison, who introduced the SHEV permanent residency pathway:

it means that if they do go to those places and they do work for three and half years out of the five, then they may make an onshore application for - it could be student visa, it could be a 457 visa - but they would have to meet the eligibility requirements of those visas... Our experience on resettlement for people in this situation would mean that this is a very high bar to clear. Good luck to them if they choose to do that and if they achieve it. But if they do achieve it, then what we are doing here is not providing a pathway to welfare, and generational welfare at that. There is an opportunity here but I think it is a very limited

¹ It is also worth noting proposed s 12(3), which creates an exclusion from s 12(1) for children born in Australia to a parent who had diplomatic privileges and immunities during the 10 year period. As the Explanatory Memorandum notes (at paragraphs [42]-[45]), this codifies the current policy position that that a child of a diplomat is not considered to be “ordinarily resident” in Australia for the purposes of paragraph 12(1)(b). Accordingly, we do not consider proposed s 12(3) as a new exception to s 12(1).

² Australian Citizenship Act 2007, s 12(1)(b)

³ Professor Kim Rubenstein Submission No 2 to Senate Standing Committees on Legal and Constitutional Affairs *Inquiry into Australian Citizenship and Other Legislation Amendment Bill 2014*, 6 November 2014, 2

⁴ Proposed s 12(4)

⁵ Proposed s 12(5)

⁶ Proposed s 12(7)

⁷ See further Part 1(c) below

opportunity and we will see how it works out. But at the end of the day, no-one is getting a permanent protection visa.⁸

We submit that the new proposed exceptions to the ‘ten-year rule’ are inconsistent with the rationale underpinning the rule. Regardless of their immigration status or the immigration status of their parents, any child who has resided in Australia for the first 10 years of their life is immersed in Australian culture, shaped by Australian relationships and education, and likely to have little to no substantive connection with any country besides Australia. As Professor Alexander Reilly has previously noted, to use immigration status as a ground to deny citizenship to children in this category ‘is to put form over substance’.⁹

We recognise that, as stated in the Explanatory Memorandum, the motivation for the proposed changes is to address potential concerns that ‘[t]he ten-year rule has the practical effect of encouraging some temporary residents and unlawful non-citizens to have children in Australia and to keep their child onshore until at least their tenth birthday, whether lawfully or unlawfully.’¹⁰ However, we echo the Australian Citizenship Council’s sentiments that these provisions should not be amended unless there is strong evidence of its abuse,¹¹ and take the view that the government has not established the necessary evidence base to support these amendments.

The Explanatory Memorandum to the 2014 Bill, in relation to equivalent amendments proposed at the time, claimed:

There is a correlation between the foreign citizenships, or eligibility for foreign citizenships, of applicants for evidence of citizenship under the ten-year rule and the citizenships of parents who request ministerial intervention, usually after having been long-term unlawful non-citizens.¹²

However, as the Senate Standing Committees on Legal and Constitutional Affairs Committee in its report on the 2014 Bill noted, it was ‘not provided with evidence of any identified cases of abuse’, and the evidence provided related only to the number of applications made under the ten-year rule annually.¹³

The Explanatory Memorandum to the current Bill does not include even the limited evidence set out in the Explanatory Memorandum to the 2014 Bill, nor the material put before the Committee during its consideration of the 2014 Bill. It simply makes the following assertion (as did the Explanatory Memorandum to the 2014 Bill) without any supporting evidence:

The ten-year rule has the practical effect of encouraging some temporary residents and unlawful non-citizens to have children in Australia and to keep their child onshore until at

⁸ Press conference with Scott Morrison MP (Canberra), 25 September 2014
<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F3414551%22>>

⁹ Associate Professor Alexander Reilly Submission No 6 to Senate Standing Committees on Legal and Constitutional Affairs *Inquiry into Australian Citizenship and Other Legislation Amendment Bill 2014*, 5 November 2014, 3.

¹⁰ Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, p 73 (Statement of Compatibility with Human Rights).

¹¹ Australian Citizenship Council, *Australian Citizenship for a New Century*, (February 2000), 14.

¹² Explanatory Memorandum, Australian Citizenship and Other Legislation Amendment Bill 2014, 10.

¹³ Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Report on Australian Citizenship and Other Legislation Amendment Bill 2014* (December 2014) 34. See also Australian Human Rights Commission Submission No 4 to Senate Standing Committees on Legal and Constitutional Affairs *Inquiry into Australian Citizenship and Other Legislation Amendment Bill 2014*, 5 November 2014, 16.

least their tenth birthday, whether lawfully or unlawfully. These parents would then expect that their children would obtain Australian citizenship and provide an anchor for family migration and/or justification for a ministerial intervention request under the Migration Act.¹⁴

We recommend that the proposed amendments to s 12 be removed.

(b) Additional citizenship requirements for children born outside of Australia

Currently, children born outside of Australia applying for citizenship—whether by descent, following intercountry adoption, or for citizenship by conferral—are not required to satisfy the ‘character’ test to be eligible for citizenship, a criterion applicable to persons aged 18 or above. Proposed amendments to ss 16, 19D, 21, and 29 would extend the good character requirement to minors. The Explanatory Memorandum states:

The amendment recognises the fact that people under the age of 18 sometimes have significant character concerns and/or have committed particularly serious crimes, and that the Minister should therefore have the discretion to refuse to approve such a person becoming an Australian citizen.¹⁵

In our view, the proposed amendments are likely to be ineffective in addressing the purported issue. In any event, they go significantly further than simply addressing the identified concerns, and may have a disproportionate impact, particularly on minors seeking citizenship by descent or as a result of intercountry adoption.

The extension of character requirements to minors creates expectations for standards of behaviour for minors seeking citizenship by descent that are not supported by well-established knowledge and practice relating to the development of children and young adults. As noted by UNICEF Australia in its submission relating to the 2014 Bill, ‘it is well established both internationally and nationally, that the culpability of children before the law is less than adults due to the difference in psychological and physical development as well as their emotional and educational needs’.¹⁶

The phrase ‘good character’ is not defined in the legislation. Nor is there any lower bound defined for the age at which the ‘good character’ requirement may apply. Case law and decisions of the Administrative Appeals Tribunal note that the phrase ‘good character’ takes on its ordinary meaning in the absence of guidance in statute or delegated legislation.¹⁷ This is said to refer to the ‘enduring moral qualities of a person’.¹⁸ Forgie DP in *Zheng v Minister for Immigration and Citizenship* (2011) AATA 304 notes that in light of the preamble to the *Australian Citizenship Act 2007* (Cth), issues that are of significance in assessing a person’s character include ‘loyalty to Australia, a belief in a democratic form of government, a respect for the rights and liberties of all Australians and obedience to and observances of the law’. However, this is not an exhaustive list, and the Minister retains a broad discretion about when and how this requirement may apply.

¹⁴ Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, 75.

¹⁵ Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, [67].

¹⁶ UNICEF Australia, Submission No 8 to Senate Standing Committees on Legal and Constitutional Affairs *Inquiry into Australian Citizenship and Other Legislation Amendment Bill 2014*, 5 November 2014, 2.

¹⁷ Department of Immigration and Border Protection (Cth), *Citizenship Policy*, 145.

¹⁸ Department of Immigration and Border Protection (Cth), *Citizenship Policy*, 145 quoting *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422 at 431–2.

The Citizenship Policy, a non-binding guidance document published by the Department of Immigration and Border Protection notes that the question of whether a person is of 'good character' encompasses:

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

It may be difficult, if not impossible, to accurately judge whether a minor, particularly one who is younger, demonstrates such characteristics. As UNICEF Australia noted:

[c]hildren's psychosocial capacity is not fully developed and evolving throughout childhood heightening the propensity of children to take risks, and increasing general susceptibility to peer influence and to immediate reward ... [T]heir ability to make decisions, control impulses and understand long term consequences isn't completely developed.¹⁹

Further, generally when assessments are made of a person's good character, their criminal conduct is weighed against other factors such as their contribution to society or whether they have taken steps to rehabilitate. It is unlikely that minors will have had the life opportunity to demonstrate such countervailing factors, and thus it is more likely that they would be found to not be of good character.

It has been acknowledged elsewhere that levers such as visa refusal or cancellation will not address what the Explanatory Memorandum refers to as 'serious character concerns'.²⁰ In particular, it has been noted that positive, supportive interventions are more effective in addressing such concerns, and that visa refusal or cancellation has the effect of isolating the young people concerned from access to such services. These comments apply equally in the citizenship context.²¹

Where a minor has their application for citizenship by descent or as a result of intercountry adoption refused on character grounds, there is a significant risk that they may be separated from their families. If a minor is refused citizenship on character grounds, as a permanent resident, they also face the risk of removal to another country, following the cancellation of their visa pursuant to s 501 of the *Migration Act 1958* (Cth). The Australian Human Rights Commission has previously raised concerns that 'visa refusal or cancellation could result in children and young people facing indefinite or permanent separation from family members'.²² This risk may be magnified in the context of a minor applying for citizenship by descent or as a result of intercountry adoption. There is a very real risk that all of the young person's family and community ties would be in Australia. While we acknowledge that the Minister is able to take these matters into account in his or her decision, there is no requirement to do so.

It is our recommendation that the proposed amendments to ss 16(2), 19C(2) and 21 (5)-(6) be removed. If the amendments are retained, we recommend that the grounds that would exclude a

¹⁹ UNICEF Australia, Submission No 8 to Senate Standing Committees on Legal and Constitutional Affairs *Inquiry into Australian Citizenship and Other Legislation Amendment Bill 2014*, 5 November 2014, 2.

²⁰ Australian Human Rights Commission, Submission No 38 to Joint Standing Committee on Migration *Inquiry into Migration Settlement Outcomes*, 31 January 2017, [64].

²¹ Ibid.

²² Australian Human Rights Commission, Submission No 38 to Joint Standing Committee on Migration *Inquiry into Migration Settlement Outcomes*, 31 January 2017, [64].

minor from eligibility for citizenship be narrowly defined in legislation to address issues relating to ‘serious character concerns’. What constitutes a ‘serious character concern’ should be defined in legislation, and apply only to a subset of minors. We agree with submissions made by the Law Council of Australia in relation to the Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth) that any extension of character-based requirements be limited to minors aged between 16 and 18.

(c) Minimum residency period for citizens by conferral

Under existing provisions of the *Australian Citizenship Act 2007* (Cth), a person seeking to apply for citizenship by conferral must meet ‘general residence requirements’. These require that a person:

- be present in Australia for a period of four years immediately before the day of application;²³
- not have been an unlawful non-citizen at any time during the four year period;²⁴ and
- must have been present in Australia as a permanent resident for a period of 12 months immediately before the day in which the application is made.²⁵

The legislation allows for periods of overseas absences: a total of 12 months within the four years²⁶ and a total of 90 days within the 12 months that the person was a permanent resident.²⁷ The legislation also provides for circumstances under which the Minister may exercise discretion to treat overseas absences as if a person was present in Australia for the purposes of the residency period.²⁸

The Bill proposes to repeal the abovementioned provisions and substitute new provisions that would require a person to be a *permanent resident* in Australia for 4 years in order to meet the residency requirements.²⁹ The requirement that a person not be an unlawful non-citizen during the four-year period is retained, and a person would be allowed a total of 365 days of absences during the four-year period as a permanent resident.³⁰

The Explanatory Memorandum argues that the proposed changes are necessary to allow ‘more time assess a person’s character as a permanent resident in Australia’.³¹ In our view, no evidence has been provided to justify such a significant change.

The Explanatory Memorandum does not provide any justification for why ‘more time’ is necessary to assess a person’s good character. In any event, increasing the residency requirement to 4 years of permanent residency does not necessarily increase the time available to assess a person’s good character, *vis-à-vis* existing provisions. Under the current framework, a person is already required to be present in Australia for *at least 4 years* before they are eligible to apply for citizenship by

²³ *Australian Citizenship Act 2007* (Cth) s 22(1)(a).

²⁴ *Ibid* s 22(1)(b).

²⁵ *Ibid* s 22(1)(c).

²⁶ *Ibid* s 22(1A).

²⁷ *Ibid* s 22(1B).

²⁸ See ss 22(4A)-(11). For example, ss 22(9) allows the Minister to treat a period of overseas absence as one in which the person was in Australia if they had an Australian spouse or de-facto partner during that period and they the Minister is satisfied that they had a close and continuing association with Australia during that period.

²⁹ Proposed ss 22(1)(a) and (b) provides that the person must be a permanent resident throughout the person’s ‘residency period’ and cannot be an unlawful non-citizen for any of that period. Proposed subsection 22(1A) defines a ‘residency period’ to be 4 years.

³⁰ Proposed s 22(1B).

³¹ Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Cth), [144].

conferral, during which time their visa—whether temporary or permanent—can be cancelled on ‘character grounds’ under s 501 of the *Migration Act 1958* (Cth).³² Thus, the architecture of the *Migration Act* and the existing requirement of 4 years presence in Australia already provide ample time in which to assess a person’s good character. Extending the permanent residency period to four years simply means that those who are not able to obtain permanent residence quickly will face a longer period during which their visas can be cancelled on character grounds. It is important to note that once a person is an Australian resident, they are no longer subject to the operation of the *Migration Act* and there is no visa to cancel.

We also submit that when it comes to the issue of character, there is no justification to distinguish between time spent in Australia as a permanent or temporary resident. In both instances, a person is required to abide by Australian laws while they are present in Australia, and in both instances, powers already exist to allow the Minister to cancel a person’s visa on character grounds. The extent to which the character assessments enhance the integrity of the citizenship framework should not be based on time spent in Australia or a person’s visa status, but on the nature of conduct and behaviour that raises character issues.

The Explanatory Memorandum to the Bill provides the following justification for introducing a 4-year minimum *permanent residency* requirement:

A residence requirement is an objective measure of an aspiring citizen’s association with Australia. This period allows a person the opportunity to gain an understanding of shared Australian values, and the commitment they must make to become an Australian citizen. It also allows them time to integrate into the Australian community and acquire English language skills required for life in Australia as a successful citizen. Extending the general residency period strengthens the integrity of the citizenship programme by providing more time to examine a person’s character as a permanent resident in Australia. For these reasons the National Consultation Report on citizenship recommended increasing the permanent residency period to 4 years for the general residence requirement.³³

In our view, these proposed changes to the residency requirements are unnecessary for at least two reasons. First, they may have the unintended consequence of creating and exacerbating isolation and disenfranchisement within society by excluding people from being able to obtain citizenship within a reasonable timeframe. Secondly, the proposed changes, in effect, privilege access to citizenship to those whose immigration circumstances are such that they can quickly obtain permanent residence.

We see no principled reason why citizenship legislation should privilege periods of permanent residency or temporary residency if the purpose of the residency period requirement is to allow time for one to demonstrate one’s commitment to Australia. To take a simple example, a non-citizen could apply offshore (i.e. from another country) to enter and reside in Australia on a permanent skilled independent visa (Subclass 189). This is a permanent visa, which would see the person meet the general residence requirement after 4 years of living in Australia. Another person could apply onshore for the same Subclass 189 visa after many years living in Australia on a series of temporary

³² *Migration Act 1958* (Cth) s 501. We note that powers afforded to the Minister to cancel a visa on character grounds are significant in breadth and level of discretion.

³³ Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Cth), [144].

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

The proposed amendments are unfair and unjust. We foresee that they may result in a class of persons who—despite wanting to become Australians and having built a strong association to Australia—are made to feel like they are on ‘eternal probation’ compared to others. This may exacerbate problems of social cohesion if such persons are not able to obtain full membership to the Australian community which acts as a marker of personal belonging and identity.

We also have concerns that the proposed changes are contrary to the spirit of Article 34 of the UN Convention Relating to the Status of Refugees, which requires state parties to facilitate assimilation and expedite naturalisation proceedings for refugees as far as possible. Access to citizenship is an important ‘durable solution’ for refugees and humanitarian entrants who, by definition, cannot simply return to their country of origin. As the Refugee Council of Australia has previously noted, Australian citizenship is ‘often the first effective and durable form of protection’ that refugees and humanitarian entrants receive. Consequently, it tends to be especially valued by these groups.³⁴

To illustrate how the proposed residency requirements might operate for refugees, it is helpful to consider the example of a person who arrived by boat as part of the Legacy Caseload, and who is granted a Safe Haven Enterprise Visa (SHEV). The SHEV allows the holder to work and study in designated regional areas of Australia for 5 years, after which they can apply for a further SHEV or temporary protection visa. Holders of a SHEV may also apply a range of permanent visas after they meet certain ‘pathway requirements’. These require a person on a SHEV to reside in designated regional area for a period, or periods totalling 42 months (3.5 years) during which time they are engaged in full-time study or employment, without receiving social security benefits.

If the Bill is passed, the minimum time required for a refugee to be eligible for Australian citizenship would be 7.5 years (3.5 on a SHEV and 4 years as a permanent resident). In practice, we suggest that the period is likely to be longer than this when one takes into account visa processing times. Further, many refugees may need to be on multiple SHEVs in order to meet the 42-month requirement of living or studying full-time in a regional area without any social security benefits, and to build English or work experience skills necessary for a range of skilled permanent visas. The best case scenario of a 7.5 year wait for citizenship is well beyond what would be considered best practice when it comes to facilitating naturalisation of refugees and humanitarian entrants. Again, this is an example of how the changes will disproportionately impact on those who are unable to obtain permanent residency quickly.

We recommend that the proposed changes to section 22 of the Australian Citizenship Act 2007 (Cth), be removed. However, if the government is minded to keep these requirements, the proposed Ministerial power to waive the requirements in certain circumstances should be circumscribed in the legislation. See part 2(d) below for a discussion of our views on the proposed waiver provisions in the Bill.

³⁴ Refugee Council of Australia, ‘Delays in citizenship applications for permanent refugee visa holders’ (October 2015), 3 <<http://www.refugeecouncil.org.au>>

(d) English language requirements

The Bill tightens the eligibility criteria for citizenship by conferral by requiring that a valid application for citizenship be accompanied by evidence that a person has ‘competent English’. Under proposed ss 21(9)(a), (b) and (c), the Minister is empowered to determine by legislative instrument what information or document is required to satisfy the test for ‘competent English’. The Explanatory Memorandum notes that the powers would enable the Minister to determine, for example:

That a person has competent English where the person has sat an examination administered by a particular entity and that a person has achieved at least a particular score. The Minister could determine that person must have completed this examination within, for example, three years ending on the day the person made an application for citizenship.³⁵

Under existing provisions, an applicant for citizenship must possess a ‘basic knowledge of the English language’.³⁶ The term ‘basic knowledge of English’ is not defined in the *Australian Citizenship Act 2007* (Cth),³⁷ but is understood under policy to mean ‘having a sufficient knowledge of English to be able to live independently in the wider Australian community’.³⁸ Further, policy states that where a person has successfully passed the Australian Citizenship Test, they are also taken to have satisfied the English language requirement.³⁹

The Explanatory Memorandum (at paragraph [141]) suggests that this amendment reflects the government’s ‘position that English language proficiency is essential for economic participation and promotes integration into the Australian community’ and is ‘an important creator of social cohesion and is essential to experiencing economic and social success in Australia’.⁴⁰

As a starting point, we agree that English language proficiency is something that an aspiring citizen should strive for, but there is a balance that must be struck in promoting the importance of English language proficiency without unduly hindering access to citizenship. Research suggests that English language proficiency is one of the factors that hinders migrants—especially humanitarian entrants and refugees—from achieving the best possible outcomes in employment.⁴¹ We also acknowledge that English proficiency is an important and necessary skill in order to become part of the wider community. It is our view however that the current test is adequate to achieve these objectives and requiring a more stringent test than is current will only result in excluding refugees, humanitarian entrants and the most vulnerable members of society from accessing citizenship.

³⁵ Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Cth), [138].

³⁶ Citizenship Act 2007 (Cth), s 21(2)(e). An English requirement was included in the Nationality and Citizenship Act 1949 (Cth) and required an applicant to possess ‘an adequate knowledge of English’. The provision was introduced to enable those with limited English ‘who have lived in Australia for some time and who would take pride in becoming citizens’ to do so: see, Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 1983 (Stuart John West, Minister for Immigration and Ethnic Affairs).

³⁷ *Australian Citizenship Act 2007* (Cth) s 21(2)(e) requires an applicant for citizenship by conferral to, among other things, ‘possess a basic knowledge of the English language’.

³⁸ Australian Citizenship Policy Instructions, Ch 7 (Citizenship by Conferral). This is also consistent with the definition preferred by the Administrative Appeals Tribunal. See *Liu and Minister for Immigration and Multicultural Affairs* [1999] AATA 251 per Senior Member Allen.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ See eg, Centre for Development Studies, *Settling Better: Reforming Refugee and Settlement Services* (2017), 15 noting that currently, ‘humanitarian migrants with good English are 70% more likely to have a job than those with poor English after 18 months in Australia’ and that ‘85% of humanitarian entrants who speak English very well participate in the labour market compared to just 15% who cannot speak English’.

We submit that in order for citizenship policy to be inclusive and non-discriminatory, it is important that the level of English language proficiency required be commensurate with opportunities and support given to aspiring applicants to obtain such. We believe that any English requirements should be reasonable and not used as a tool to exclude citizenship aspirants. This is not currently the case for certain cohorts of aspiring citizens, in particular humanitarian entrants and refugees. For example, the Adult Migrant English Program (AMEP) available to humanitarian and refugee entrants provides up to 510 hours of English language tuition. Successful completion of this program gives applicants a level of ‘functional English’ that allows them to ‘participate socially and economically in Australian society’.⁴² For this cohort, requiring anything beyond a ‘functional level’ of English is not only unfair and unreasonable, but it effectively undermines the rationale of citizenship policy to foster social cohesion to the extent that it precludes those who can participate in society from accessing formal membership.

For the reasons set out in part 2(e) below, we argue that it is inappropriate for an important criterion such as English proficiency to be determined by Ministerial discretion through the use of delegated legislation. Rather, the requirements for English competency should be contained in the legislation itself. We also note that in the lead-up to the Bill, there was speculation that the government considers that ‘competent English’ would require a band score of 6 in an International English Language Testing (IELTS) examination. In Appendix A, we provide an analysis of why an IELTS exam result may not be suitable for citizenship purposes, and why educational based pathways to English proficiency should be preferred.

We recommend that any English proficiency requirement necessary for citizenship by conferral be contained in the Australian Citizenship Act 2007 (Cth). If the government is minded to increase the English language proficiency requirements, it must ensure that aspiring citizens have access to commensurate levels of government support and education that would enable them to meet such requirements. As an alternative to any English language test, the Australian Citizenship Act 2007 (Cth) should set out permissible education-based pathways to obtain English proficiency.

(e) Values and integration assessment

Proposed changes to the Preamble and the citizenship pledge (renamed ‘pledge of allegiance’) in sch 1, and proposed ss 21(2)(f), 46(1B)(b) and 46(5), introduce a number of requirements that seek to ensure and test whether an applicant for citizenship understands and will comply with ‘Australian values’. The Minister is empowered to determine an Australian Values Statement, and any related requirements.⁴³ Proposed s 46(1B)(b) provides that, if an Australian Values Statement is determined, an application for citizenship will be invalid if it is not accompanied by the Statement. The Explanatory Memorandum (at paragraph [305]) suggests that this will require applicants to sign the Statement. Under proposed s 32AB, applicants for citizenship (whether by conferral, descent or other avenue) aged 16 or above, must—subject to exemptions relating to physical or mental incapacity—make a pledge of allegiance. Under proposed amendments to sch 1, the pledge of allegiance includes a declaration of shared values. Applicants for citizenship by conferral must also pass a revised citizenship test which will assess an applicant’s knowledge of Australian values.⁴⁴

⁴² See Department of Education and Training (Cth), ‘Adult Migrant English Program’ <<https://www.education.gov.au/adult-migrant-english-program-0>>.

⁴³ Proposed s 46(5).

⁴⁴ Proposed s 21(2)(f).

The Explanatory Memorandum states that ‘the policy intention of the Australian Values Statement is to underscore the significance of Australian citizenship and require applicants to acknowledge their understanding of the rights and privileges of Australian citizenship and of Australian values’.⁴⁵

While we agree that aspiring citizens should have an understanding of, and commitment to shared Australian values as discussed in part 2, we have concerns about the broad discretion given to the Minister to determine what constitutes Australian values, and the lack of parliamentary involvement in and oversight of such core and fundamental components of what it means to become an Australian citizen. Further, as discussed in part 2(c)(ii), we are concerned that the requirement to sign an Australian Values Statement combined with the proposed expanded power to revoke citizenship for fraud and misrepresentation may create a significantly expanded power for the Minister to monitor the conduct of a person granted citizenship by conferral and potentially revoke their citizenship.

The Bill also introduces an eligibility requirement for citizenship by conferral centred around a person demonstrating that they have ‘integrated into the Australian community’.⁴⁶ There is no legislative guidance on how the Minister is to determine whether a person ‘has integrated into the Australian community’. Instead, the Minister is vested with a broad discretion to determine these matters by legislative instrument (see part 2(d) for a discussion of our concerns about overly broad Ministerial discretion). The Minister, may (but is not required to) set out, in a legislative instrument, matters to be considered in determining whether a person ‘has integrated into the Australian community’. The Explanatory Memorandum flags that this could include quite a wide variety of factors. It states it could cover matters such as:

... a person’s employment status, study being undertaken by the person, the person’s involvement with community groups, the school participation of the person’s children, or adversely, the person’s criminality or conduct that is inconsistent with the Australian values to which they committed throughout their application process.⁴⁷

This criterion applies only to those seeking to become a citizen under the general eligibility requirements. Thus, a subset of Australian residents—who undergo a thorough and stringent process in order to be granted residency status—are subject to additional requirements of a character different to those imposed on other classes of residents.

We agree with Professor Alexander Reilly’s view that ‘we should, as a rule, be encouraging Australian residents to become citizens’,⁴⁸ and recommend that careful consideration be given to whether factors such as a person’s employment status should be a potential bar for citizenship. As discussed in part 2(e) below, we further recommend that the factors which go to whether a person ‘has integrated into the Australian community’ be included in primary legislation.

⁴⁵ Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Cth), [313].

⁴⁶ Proposed s 21(2)(fa).

⁴⁷ Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Cth), [142].

⁴⁸ Evidence to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, Sydney, 19 November 2014, 1 (Associate Professor Alexander Reilly).

(f) Retrospective application of proposed new requirements for citizenship acquisition

Items 136, 137 and 139 of the Bill provide that a number of the proposed amendments to the citizenship application process will apply retrospectively, to applications for citizenship lodged on or after 20 April 2017, when the policy change that led to the Bill's introduction to Parliament was first announced. The provisions that will apply retrospectively include those relating to the pledge of allegiance and the new eligibility criteria for citizenship by conferral, relating to the minimum residency period, Australian Values Statement, required level of English and integration requirement.

While Parliament has the power to pass retrospective laws, it is often said that such laws undermine the rule of law.⁴⁹ This is because an element of the rule of law is that the law should be accessible and, as far as possible, certain, intelligible, clear and predictable.⁵⁰ We acknowledge that retrospective civil laws may be justified when laws are only dated back to when the proposed changes were announced. The Australian Law Reform Commission (ALRC), for instance, noted that such laws may be justified because they fulfil 'Blackstone's calls for laws to be "notified to the public"'.⁵¹ However, in our view, retrospective changes to laws that affect core matters, such as a person's citizenship and membership of the community, require additional justification.

Further, as identified by the ALRC, the justification for backdating to the date of announcement becomes more tenuous as the time between announcement and enactment increases.⁵² In this instance the Bill has not yet been passed, and there is no indication of if, when, or in what form it might become law. This means that people who have already lodged citizenship applications (after 20 April 2017) have no certainty about when their applications will be processed, what criteria they will need to meet, and whether they will still be eligible for citizenship.

Moreover, the fact that the Bill provides that the new eligibility requirements for citizens by conferral will operate retrospectively means that applications lodged after 20 April 2017 but before the Bill is passed cannot be processed by the Department. This adds to existing workload pressures. It has been reported that there are currently 81,000 citizenship applications awaiting processing by the Department.⁵³

The detrimental effects of retrospective operation here are exacerbated by the fact that no compelling justification has been made for the need for the proposed changes to operate retrospectively. The Explanatory Memorandum merely states that the retrospective operation

⁴⁹ See eg, Rule of Law Institute of Australia, 'Retrospective Legislation and the Rule of Law', 30 September 2015, <<http://www.ruleoflaw.org.au/retrospective-legislation-and-the-rule-of-law/>>; Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129 (2 March 2016), [13.15] <<http://www.alrc.gov.au/publications/common-law-principle-10>>.

⁵⁰ See eg The Rt. Hon Lord Bingham of Cornhill KG, 'The Rule of Law' (Speech delivered at the 6th Sir David Williams Lecture, University of Cambridge Centre for Public Law, 16 November 2006) <<https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures2006-rule-law/rule-law-text-transcript>>.

⁵¹ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129, [13.56].

⁵² Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129, [13.57]

⁵³ See eg Shamsher Kainth, 'Over 81,000 citizenship applications awaiting processing', *SBS News* (28 June 2017) <<http://www.sbs.com.au/yourlanguage/punjabi/en/article/2017/06/27/over-81000-citizenship-applications-awaiting-processing>>

‘reflects the changes to citizenship requirements that were announced by the Prime Minister and the Minister on 20 April 2017’.⁵⁴

The provisions in the Bill that restrict access to citizenship by birth under the ten-year rule (ss 12(4), 12(5) and 12(7) – see further part 1(a) above) are not technically retrospective. However, as the Scrutiny of Bills Committee identifies,⁵⁵ they raise similar concerns to the retrospective provisions in the Bill. Children who have lived in Australia for long periods of time and who know no other home may have relied on the expectation that any changes to the law entitling them to citizenship on their tenth birthday would only apply to those born after the change in law.

It is our recommendation that, if the Bill is passed, all its provisions should operate prospectively only. We also recommend that, if the changes with respect to entitlements to citizenship for children born in Australia are passed, these provisions should only apply to children born after the changes commence.

⁵⁴ See Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, [412]

⁵⁵ See Standing Committee for the Scrutiny of Bills, Scrutiny Digest 7/17 at [1.66]-[1.73]

Part 2: Concerns around expansion and accountability of executive discretion

(a) Capacity to delay a person from making the pledge of allegiance for an extended timeframe

The proposed s 32AB gives the Minister the power to issue a written determination preventing a person from making the pledge of allegiance for a specified period of up to two years. This power may be exercised in three circumstances, where the Minister is:

- satisfied that a visa held by the person may be cancelled under the *Migration Act 1958* (Cth) (whether or not the person has been given any notice to that effect);
- satisfied that the person has been or may be charged with an offence under Australian law; and
- considering cancelling the person's approval for citizenship, under:
 - the mandatory cancellation grounds in proposed ss 17A(1), 19DA(1), 25(1A) or 30A(1), or
 - the discretionary cancellation grounds in proposed ss 17A(2), 19DA(2), 30A(2) or 25(1) by virtue of s 25(2).

Exercising this power has the effect of delaying the person concerned from becoming an Australian citizen, for the specified period.

If enacted, proposed s 32AB would replace the current s 26(3), which sets out a narrower ministerial power to delay a person from making the pledge. The maximum delay period under s 26(3) is 12 months.

The Explanatory Memorandum does not provide a rationale for extending the period that the Minister can delay a person from making the pledge. Some justification can be found in the Explanatory Memorandum for the 2014 Bill, which included an equivalent provision to proposed s 32AB. The 2014 Explanatory Memorandum stated:

The purpose of this amendment is to lengthen the period of time for which the Minister may determine that a person is to be delayed in making their pledge of commitment to become an Australian citizen from a maximum period of 12 months to a maximum period of 2 years (or to periods that in total are no more than 2 years). This amendment recognises the fact that investigation into some matters that may lead to the cancellation of approval, including criminal offences such as fraud, can take longer than 12 months, and that a period of 12 months' delay in making the pledge of commitment is not sufficient to allow the Minister to determine whether or not approval should be cancelled.⁵⁶

We recognise the utility of a ministerial power to delay a person's acquisition of citizenship where there are significant concerns about whether citizenship should be granted. We also accept that it is plausible that there may be circumstances in which a delay of 12 months is insufficient to allow investigations to be completed.

However, there is a need to afford sufficient flexibility to the Minister while also affording certainty and timely processing to citizenship applicants. In our view, proposed s 32AB does not appear to strike this balance in a fair manner. No compelling case has been made for why it is necessary to

⁵⁶ Explanatory Memorandum, Australian Citizenship and Other Legislation Amendment Bill 2014, [332]

double the permissible delay period for all instances in which the power to delay citizenship is exercised. This is unsatisfactory, because citizenship delays leave applicants—who are not required to be informed of the reasons for delay—in a state of limbo, and can produce feelings of uncertainty and anxiety.⁵⁷ In 2015, the Refugee Council of Australia conducted research which found that such feelings can be particularly pronounced for applicants who are refugees or humanitarian entrants, who often have family living overseas in unsafe conditions, and for whom reunification is contingent upon obtaining citizenship.⁵⁸ The Refugee Council’s report on this research includes extracts of interviews from refugees subject to citizenship delays and from mental health professionals, all of whom emphasised the high levels of stress and anxiety that delays produce. One psychologist interviewed said that refugees:

... suffer extreme helplessness and despair and there is little doubt that the long delays in processing their citizenship applications is a strong contributing factor in their severe emotional distress. In summary, the prolonged delays in processing of applications for citizenship, particularly in the case of 866 visa holders is causing acute and severe mental distress.⁵⁹

In light of these impacts, stronger justification for the need to increase the maximum length of delays is required, as well as some mechanism via which to ensure that the ministerial power to impose delays is exercised in a manner that is proportionate to the circumstances that trigger it.

It is our recommendation that before any increase to the maximum length of delays is enacted, the Minister should provide to the Parliament a detailed explanation about how often, and in what circumstances, the current maximum period of 12 months is insufficient. Based on this evidence, the Bill should enumerate and limit the circumstances in which delay of more than 12 months will be permitted under the Act, and require that any delay imposed is proportionate to the circumstances that trigger it.

(b) Expanded capacity to cancel approval for citizenship by conferral before the pledge of allegiance has been taken

The Bill expands the Minister’s capacity to cancel a person’s approval for citizenship by conferral via two mechanisms:

- Proposed s 25(1A) creates a ministerial *duty* to cancel a person’s approval for citizenship by conferral if, before the person acquires citizenship, the Minister becomes satisfied that approval should not be granted on account of identity or national security grounds (available to the Minister under s 24).
- Proposed s 25(1) read with s 25(2) creates a ministerial *discretion* to cancel a person’s approval for citizenship by conferral where the person otherwise fails to meet eligibility criteria for citizenship. Proposed s 25(2)(b) provides that this discretion will be enlivened where, prior to the person acquiring citizenship, the Minister become satisfied that approval

⁵⁷ See eg Abdul Karim Hekmat, ‘Secret freeze on refugee citizenship processes’, *The Saturday Paper* (5 September 2017), <<https://www.thesaturdaypaper.com.au/news/immigration/2015/09/05/secret-freeze-refugee-citizenship-processes/14413752002323>>; Refugee Council of Australia, ‘Delays in Citizenship Applications for Permanent Refugee Visa Holders’ (October 2015), 9 <<http://www.refugeecouncil.org.au/wp-content/uploads/2015/10/1510-Citizenship-Delays-for-Permanent-Refugees.pdf>>.

⁵⁸ Ibid.

⁵⁹ Ibid.

should not be granted on account of any of the grounds available under s 24 except those relating to identity, national security and presence in Australia.

These cancellation provisions only operate where the applicant in question has not yet become an Australian citizen under proposed s 32AD. In effect, this means that cancellation of a citizenship approval is only possible for applicants who are required to take the pledge of allegiance, as those who are exempted from the pledge gain citizenship at the time that they are granted approval.⁶⁰

While we accept that there is justification for a provision that enables cancellation of a person's approval for citizenship where they do not satisfy the eligibility criteria, we have concerns about the way in which this is implemented under the Bill.

In particular, we are concerned about the breadth of the discretionary cancellation power under proposed ss 25(1) and 25(2), in light of the Bill's proposed expansion of increased ministerial discretion with respect to the eligibility criteria for those who apply for citizenship by conferral (see above, at parts 1(d) and 1(e)).

As an example of how these discretions interact, the Minister, under proposed s 21(2)(fa), may look holistically at the question of whether an applicant has 'integrated' into the Australian community. The Bill provides no guidance about how this ministerial power will be exercised,⁶¹ and, indeed, the Minister is not required to develop guidelines that clarify this. Where the Minister determines that the applicant has integrated into the community, and that all other eligibility requirements have also been met, there still remains a ministerial discretion to refuse to approve the person for citizenship.⁶² The effect of the proposed ss 25(1) and 25(2) is that, even after the Minister decides to approve a person's application for citizenship, they may continue to monitor the person up until the day of their citizenship ceremony, and may retract approval for citizenship if they form the view that integration is no longer present.

In this fashion, the Bill makes applicants for citizenship by conferral subject to ongoing scrutiny. This is particularly concerning when we consider the interaction between the proposed cancellation provisions and proposed s 32AB, which enables the Minister to delay a person from making the pledge of allegiance for up to two years (see above, part 2(a)).

(c) Expanded powers to revoke citizenship acquired by descent or conferral

The Bill introduces two new ministerial powers to revoke citizenship acquired by descent or conferral:

- Proposed s 33A creates a ministerial discretion to revoke the citizenship of a person who had been registered as an Australian citizen by descent, where the Minister is satisfied that, at the time of application, the person should not have been approved for citizenship.
- Proposed section 34AA creates a ministerial discretion to revoke the citizenship of a person who obtained citizenship by descent, conferral or intercountry adoption, where the Minister is satisfied that the person became an Australian citizen as a result of fraud or misrepresentation, and that it would be contrary to the public interest for the person to remain an Australian citizen. This power would exist in addition to s 34, which (*inter alia*)

⁶⁰ See proposed s 32AD(2).

⁶¹ See proposed s 21(9)(e).

⁶² See s 24(2).

allows the Minister to revoke citizenship where the person or a third party has been convicted of fraud in connection with the person's citizenship acquisition.

For the reasons outlined below, we submit that these proposed revocation powers are overbroad, and are not subject to sufficient safeguards.

(i) Power to revoke citizenship acquired by descent under proposed s 33A

The Minister may revoke a person's citizenship if the Minister is satisfied that approval for citizenship should not have been given. That is, if the Minister is subsequently satisfied that, at the time approval was granted, a person should not have been granted citizenship, the Minister may revoke that person's citizenship. For example, the Minister may revoke a person's citizenship if subsequently satisfied that the person was not of good character at the time approval was granted.

As acknowledged in the Explanatory Memorandum, this represents a significant expansion:

The discretionary nature of the decision under new section 33A means that issues such as the length of time that a person has been a citizen, and the seriousness of any character concerns, can be taken into account. These are considerations that cannot be afforded under the [proposed to be] repealed s 19A ... which provides an operation-of-law loss of citizenship [where it is revealed that neither parent was an Australian citizen at the time of the person's birth].⁶³

Proposed s 33A confers a broad discretion on the Minister with no legislative guidance on the circumstances in which the Minister may decide that approval should not have been given. For example, the Minister may exercise his or her power based on new information that comes to light that the person was not of good character at the time that approval was granted. Proposed s 33A may also, for example, empower the Minister to determine retrospectively that certain conduct engaged in at or before the time of approval is not consistent with conduct engaged in by a person who is of good character. The lack of legislative guidance on what constitutes good character and the kinds of conduct which may empower the Minister to revoke citizenship by descent under proposed s 33A creates uncertainty. The possibility that the provision may be read in a way that empowers the Minister to change what constitutes a person of good character retrospectively also raises the prospect that persons who gain citizenship by descent may be subject to changing standards. Further, while the Minister may exercise his or her discretion not to exercise this power if a long time has passed since the person attained citizenship, there are no time limits imposed on the Minister's power to exercise his power under proposed s 33A. This exacerbates the potential uncertainty faced by persons who gain citizenship by descent.

As previously expressed by Professor Alexander Reilly, '[t]he primary right of citizenship is that a citizen can reside in Australia as a member of the Australian community until their death and have complete security of residence'.⁶⁴ As a matter of policy, in the absence of fundamental concerns about the granting of citizenship to a person (such as, that they do not fulfil the key criteria for citizenship by descent—that is, at least one of the parents was an Australian citizen at the time of the person's birth), a person's citizenship should not be disturbed. We do not believe that a person's right to citizenship by descent should be disturbed because the Minister subsequently believes they

⁶³ Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Cth), [287].

⁶⁴ Evidence to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, Sydney, 19 November 2014, 1 (Associate Professor Alexander Reilly).

'got it wrong'. Grounds for revocation on such broad terms may potentially give rise to a situation where a citizen or class of citizens is under ongoing scrutiny.

It is our recommendation that proposed s 33A be removed, and the narrower grounds for loss of citizenship in s 19A be retained.

As identified in the Explanatory Memorandum, however, under existing arrangements, the Minister cannot exercise a discretion to grant a person with citizenship by descent if neither parent was an Australian citizen at the time of the person's birth. An example where it would be appropriate for such a discretion to be available and exercised might be where, due to administrative error, a person erroneously believes one or more of their parents was a citizen at the time of their birth, a long time has elapsed since the person was granted citizenship, and the person has strong ties to the community.

In light of this, we also recommend that careful consideration be given to whether it would be appropriate to amend s 19A to provide the Minister with a discretion to grant a person citizenship who otherwise would not qualify for citizenship by descent.

(ii) Power to revoke citizenship acquired by descent, conferral or intercountry adoption on grounds of fraud or misrepresentation under proposed s 34AA

Proposed s 34AA gives the Minister the discretion to revoke a person's citizenship where the Minister is satisfied that the person became an Australian citizen as a result of fraud or misrepresentation. This provision, which was first proposed in the 2014 Bill, expands significantly upon the existing fraud-based revocation provision in s 34.

Under s 34, the Minister may revoke a person's citizenship where it was acquired as a result of fraud, but only if the person or a third party has been convicted of migration or third party fraud. The Minister must also determine that revocation is in the public interest.

Proposed s 34AA removes the need for a conviction to be secured before a person can have their citizenship revoked on fraud grounds, requiring only that the Minister feel satisfied that the person's citizenship must have acquired as a result of fraud or misrepresentation, and that revocation must be in the public interest.⁶⁵ The fraud or misrepresentation may have been carried out by the applicant themselves or by a third party,⁶⁶ such as a migration agent.⁶⁷ Proposed s 34AA can only be used to revoke a person's citizenship within ten years of the fraud or misrepresentation taking place.

The Explanatory Memorandum does not provide a detailed rationale for why proposed s 34AA is necessary. The only justification for the removal of a conviction requirement comes from the Minister's second reading speech:

While law enforcement agencies, for a range of reasons, may not be in a position to prosecute all forms of fraud and misrepresentation in the citizenship process, the government is committed to providing the highest levels of integrity where possible.

In our view, the possibility that law enforcement agencies may not elect to prosecute every potential fraud case is a grossly insufficient justification for the proposed change.

⁶⁵ See proposed s 32(1)(c)

⁶⁶ See proposed s 34AA(2)

⁶⁷ See eg Explanatory Memorandum, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, [413]

Citizenship is often regarded as the most fundamental of human rights. It signifies formal membership of a national community, and is often a gateway to a host of basic entitlements, including political rights, mobility rights and rights to consular assistance. It is a concept with a strong rhetorical dimension in forging understandings of what it is to belong to a community, and in shaping a country's sense of its own identity. It is for such reasons that nations have historically exercised caution in respect of laws that enable people to have their citizenship revoked.⁶⁸

While we accept that there are circumstances in which revocation may be appropriate, and that these circumstances may change over time, it is imperative that the circumstances in which citizenship revocation is necessary be carefully worked out by Parliament, with a view to minimise revocation wherever possible and to avoid consequences such as statelessness, and with strong safeguards built into any revocation process.

Proposed s 34AA fails on each of these counts. It creates the possibility of citizenship revocation subject only to ministerial 'satisfaction' that fraud or misrepresentation took place, and that revocation would be in the public interest. The Minister's discretion is broad: the bill does not prescribe criteria that govern the exercise of the proposed power. The bill does not even define what 'misrepresentation' means for the purposes of s 34AA, noting only that it 'includes the concealment of material circumstances'.⁶⁹

Our concerns regarding the creation of broad public interest discretions are discussed in detail below at part 2(d). With respect to the standard required for ministerial satisfaction that fraud or misrepresentation took place, the Explanatory Memorandum states, at paragraph [290], that for the power in s 34AA to become enlivened,

... the Minister must be actually persuaded of that fraud or misrepresentation. In addition, the Minister's satisfaction must be based on findings or inferences of fact that are supported by probative material or logical grounds.

This is not, however, clarified in the Bill, which creates the ministerial discretion under s 34AA in a broad and substantially unfettered fashion. This is exacerbated by the fact that s 34AA interacts with other broad discretions created under the Bill. For instance, when determining whether a person is eligible for citizenship by conferral, proposed ss 21(2)(fa) and 21(9)(e), discussed in greater detail above at part 1(e) and below at part 2(e), give the Minister a broad and potentially unconditioned power to assess whether the applicant has 'integrated' into the Australian community. The Explanatory Memorandum (at paragraph [142] suggests that a broad range of factors, including employment, education, community involvement, school attendance and 'conduct inconsistent with Australian values' may be drawn on when assessing integration. The government's discussion paper, 'Strengthening the Test for Australian Citizenship', released in advance of the Bill, suggests that applicants will be required to demonstrate their integration into the Australian community, for example by providing documentation relating to the factors flagged in the Explanatory Memorandum.⁷⁰ There is a risk that when exercising the power under s 34AA, the Minister may look at any conduct considered to demonstrate a lack of 'integration' that a person has engaged in *after* acquiring citizenship, and draw on this to conclude that representations made to demonstrate

⁶⁸ See further Sangeetha Pillai and George Williams, 'Twenty-first century banishment: Citizenship stripping in common law nations (2017)', 66(3) *International & Comparative Law Quarterly*, 521.

⁶⁹ See proposed s 34AA(4).

⁷⁰ Australian Government, *Strengthening the Test for Australian Citizenship* (April 2017), 15

integration at the time of application were misrepresentations. In a similar vein, it is not clear whether s 34AA would allow the Minister to look at conduct considered to be 'inconsistent with Australian values' that a person has engaged in after acquiring citizenship, and use this to draw a conclusion that when that person signed the Australian Values Statement they were acting fraudulently.

Proposed s 34AA also does not operate in a way that minimises the risk of revocation in circumstances where it is likely to be inappropriate or unreasonably harsh. For example, where the fraud or misrepresentation is committed by a third party, the affected citizen remains vulnerable to citizenship loss even where they had no involvement in and no knowledge of any wrongdoing. While this is also the case under current s 34, the vulnerability of citizens is exacerbated under the proposed change by the removal of the requirement that the existence of fraud be proved before a court. The Explanatory Memorandum notes, at paragraph [293], that '[a]s the power to revoke a person's Australian citizenship under new section 34AA is discretionary, it will be open to the Minister to consider arguments that the person was unaware of the fraud or misrepresentation in deciding whether to revoke their Australian citizenship'. However, as the Scrutiny of Bills Committee identifies, 'there are no express constraints in the legislation which would prevent the revocation of citizenship in these circumstances'.⁷¹

Additionally, proposed s 34AA appears to enable the revocation of a person's Australian citizenship even where the person holds no other citizenship, and would become stateless as a result. For this consequence to flow from an unconditioned ministerial discretion is wholly inadequate. It is worth noting that even the citizenship loss provisions introduced via the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*, which were designed to hinge citizenship loss upon serious conduct that presents a risk to national security, are designed to avoid the consequence of statelessness.

Finally, the broad power in proposed s 34AA is not adequately safeguarded. We agree with the observations made by the Scrutiny of Bills Committee on this point. Where the power under s 34AA is exercised by the Minister personally, merits review is excluded, by virtue of proposed s 52(4). The Minister's second reading speech introducing the Bill noted that judicial review would remain available for decisions made under s 34AA. However, as the Scrutiny of Bills Committee noted, there are limits to the effectiveness of judicial review in this context. For instance, judicial review does not allow review of errors of fact, even where serious, and 'does not allow the courts to consider whether a persuasive case has been made for the making of the decision under review'.⁷² Finally, as the Scrutiny of Bills Committee noted, the fact that revocation decisions under proposed s 34AA must be made within 10 years of the relevant fraud or misrepresentation is not a safeguard, as 10 years is an extremely long period which, particularly in light of the possibility for citizens who have engaged in no wrongdoing to lose their citizenship under s 34AA, creates a more pressing need for other safeguards.⁷³

It is our recommendation that proposed s 34AA be removed. Revocation on grounds of fraud should continue to be available only where a criminal conviction for fraud has been obtained, as is currently the case under s 34.

⁷¹ Standing Committee for the Scrutiny of Bills, Scrutiny Digest 7/17, [1.27].

⁷² Ibid, [1.26]; [1.32].

⁷³ Ibid, [1.27]

(d) Expansion of executive discretion through ‘public interest’ criterion

The Bill introduces four new discretions that are to be made ‘in the public interest’. They have significantly different consequences for individuals affected by the decisions:

- **Waiving general residency requirements in the ‘public interest’:** The first is the proposed s 22AA. This gives the Minister the power to determine that the general residence requirement, as required in ss 21(2)(c), 21(3)(c) or 21(4)(d) to be eligible for citizenship, does not apply because there has been an administrative error or because it is in the ‘public interest’. This power must be exercised by the Minister personally and the Minister does not have a duty to consider whether to exercise the power.
- **Power to revoke citizenship for other cases of fraud or misrepresentation if the Minister is satisfied it would be contrary to the ‘public interest’ for the person to remain a citizen.** The proposed s 34AA significantly expands the existing power to revoke on these grounds under s 34, as the proposed s 34AA confers power where there is no conviction for an offence and where the fraud or misrepresentation did not constitute an offence. The Minister only needs to be satisfied there has been fraud or misrepresentation in gaining citizenship. Further, the fraud or misrepresentation may have been committed by any person, not the person in danger of losing their citizenship.
- **Removing AAT jurisdiction in the ‘public interest’:** The second discretion is the proposed ss 47(3A) and 52(4), which gives the Minister the power to determine that a decision made by the Minister personally is not subject to review by the AAT, if the Minister issues a statement to the effect that he or she is satisfied that the decision is made in the public interest. This is the result of the combined operation of the power to make a statement under the proposed s 47(3A) and the removal of jurisdiction in the proposed s 52(4) when such a statement has been issued. This discretion will operate to remove an important avenue of review, as discussed in greater detail below, at part 2(f)(i).
- **Setting aside AAT decisions in the ‘public interest’:** The third is the proposed s 52A, which gives the Minister the power to determine that certain AAT decisions should be set aside when the Minister determines this is in the public interest (proposed s 52A). This decision is to be made personally by the Minister. This discretion will operate to remove the effect of an important avenue of review, as discussed in greater detail below, at part 2(f)(ii).

These proposed discretions join other public interest discretions already contained in the *Australian Citizenship Act 2007* (Cth).⁷⁴ The proposed expansion of public interest discretions in the Bill is of great concern. The fact that there are pre-existing public interest discretions, in both the *Australian Citizenship Act* and elsewhere is an insufficient justification for their expansion.

The use of public interest discretions represents a threat to the rule of law because such discretions confer powers with little guidance to the individual affected by the power as to how it is likely to be

⁷⁴ Including the power to revoke a person’s citizenship in certain circumstances relating to conviction for offences or fraud, if the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen (ss 34(1)(c), 34(2)(c)); as one factor that the Minister must have regard to in determining whether to exempt a person from the operation of ss 33AA or 35, effecting an automatic renouncement or cessation of citizenship (ss 33AA(17)(h); 35(12)(h)); as one of the criterion against which the Minister may cease the citizenship of a person who has been convicted for terrorism offences and other certain offences (s 35A(e), and see also s 35A(e)(vii)); discretions about publication of certain sensitive information (ss 33AA(19); 35(14); s 35A(3)(d); s 51B(2)(d)).

exercised, and the Australian courts have historically been reluctant to review the exercise of public interest discretions, with the Court offering great deference to the executive decision-maker's assessment. Indeed, former Chief Justice Mason explained in *South Australia v O'Shea* (1987) 163 CLR 378 that when the Parliament adopts a public interest test, it is reflecting their intention that 'political assessment of the public interest is to be preferred to judicial assessment.' While the High Court has evinced an intention to review public interest discretions by reference to the broader legislative context in which they are found, this also raises concerns. In *O'Sullivan v Farrer* (1989) 168 CLR 210, Chief Justice Mason and Justices Brennan, Dawson and Gaudron explained that the discretionary value judgement imported by a public interest test will usually be made by reference to undefined factual matters, confined only by the statutory context. This can be problematic, as to understand the possible limits of the discretion, the affected individual will have to undertake a complex exercise of statutory interpretation. This places the affected individual in a very different position to that which he or she would be in had the legislature taken the responsibility of enumerating the factors that must be considered by the executive decision-maker in exercising the discretion.

The addition of further undefined public interest discretions amounts to the vesting of arbitrary power and should be avoided as far as possible, particularly where those discretions have the capacity to affect the rights of individuals, such as the right to citizenship or the right to seek review. The rule of law dictates that Parliament should take responsibility for enunciating the factors that an executive decision-maker should take into account when exercising these discretions.

Drawing on these more general concerns about the expansion and use of the public interest discretions, we also raise the following specific issues and recommendations in relation to each of the proposed public interest discretions:

(i) Waiving general residency requirements in the 'public interest' (proposed s 22AA):

While the exercise of this discretion would potentially *benefit* the individual seeking citizenship, there is no duty for the Minister to even consider whether to exercise it, thus removing the ability of an applicant to seek judicial review of the Minister's decision to even consider exercising the discretion. Entirely unreviewable discretions are anathema to the rule of law and the principle that government should be accountable to its legal obligations. Further, if the exercise of the discretion is considered, the individual affected has little power to review the decision because of the nature of the public interest test. This is exacerbated because it is a decision that must be made by the Minister personally (22AA(3)), and therefore may be removed from the jurisdiction of the AAT under the proposed ss 47(3A) and 54(2), and the power is non compellable (s 22AA(4)).

It is our recommendation that the proposed s 22AA should be retained, but be amended to state in s 22AA(1)(b):

“(b) the Minister is satisfied that the determination should be made in relation to the applicant, having taken into account the following matters:

- (i) the reasons why the applicant was unable to meet the general residence requirement; and
- (ii) the unfairness to the applicant of imposing the general residence requirement.

Further, if the proposed ss 47(3A) and 54(2) are retained (we recommend their removal from the Bill, below at part 2(f)), we recommend that s 22A(3) and (4) are removed to allow the power to be appropriately reviewed in the AAT and through judicial review.

(ii) Power to revoke citizenship for other cases of fraud or misrepresentation if the Minister is satisfied it would be contrary to the ‘public interest’ for the person to remain a citizen (proposed s 34AA):

We have already set out serious concerns with the expansion of the power of the Minister to cancel citizenship on the basis of fraud or misrepresentation where there has been no conviction, and recommended its removal from the Bill (see above at part 2(c)(ii)). As such, our primary submission is that s 34AA be removed from the Bill.

Here, we highlight our concerns, should the provision be maintained, with the public interest discretion contained therein. If retained, this proposed provision has the potential to have a significant impact on the affected individual, highlighting the need for certainty and reviewability of the power. The inclusion of a public interest discretion, and the possibility of the removal of AAT review, undermines both of these principles. For instance, the Explanatory Memorandum (at [293]) states:

As the power to revoke a person’s Australian citizenship under new section 34AA is discretionary, it will be open to the Minister to consider arguments that the person was unaware of the fraud or misrepresentation in deciding whether to revoke their Australian citizenship.

While it may be true that it would be *open* for the Minister to consider these arguments, the nature of the public interest discretion, described above, is such that the Minister is not compelled to do so.

Our primary recommendation is that the proposed s 34AA is removed from the Bill. If it is retained, we recommend that the public interest discretion in s 34AA is amended to specify the factors that the Minister must take into account in exercising the discretion, rather than relying on the “public interest”. It is our recommendation that, if retained, the proposed s 34AA(1)(c), at a minimum, should state:

“(c) after considering the following matters, the Minister is satisfied that it would be contrary to the public interest that the person should remain an Australian citizen:

- (iii) the nature and seriousness of the fraud or misrepresentation; and
- (iv) that the person was unaware of the fraud or misrepresentation at the time that it took place in deciding whether to revoke their Australian citizenship.”

(iii) Removing AAT jurisdiction in the ‘public interest’ (proposed ss 47(3A) and 52(4)).

Our primary submission is that these proposed provisions are anathema to the rule of law and accountability of government power and should be removed from the Bill (see below at part 2(f)(i)). We can see no reason why the jurisdiction of the AAT should be removed, but, if the power to remove it is retained, it should be tightly circumscribed, not through the

current 'public interest' criterion, but, rather, through the enumeration of specific, mandatory criteria that the Minister must take into account in determining when to remove AAT jurisdiction. This would force the government and Parliament to prescribe limited circumstances in which AAT review would be unavailable to an individual.

(iv) Setting aside AAT decisions in the 'public interest' (proposed s 52A).

Our primary submission is that this proposed provision is anathema to the rule of law and accountability of government power and should be removed from the Bill (see below at part 2(f)(ii)). We can see no reason why power to set aside an AAT decision should be retained. But, if it is retained, it should be tightly circumscribed, not through the current 'public interest' criterion, but, rather, through the enumeration of specific, mandatory criteria that the Minister must take into account in determining when to remove AAT jurisdiction. This would force the government and Parliament to prescribe limited circumstances in which the AAT's decisions could be overturned by the government.

Further, if the proposed ss 47(3A) and 52(4) are retained (we recommend their removal from the Bill, below at part 2(f)), we recommend that the proposed s 52A(2) is removed to allow the exercise of the power to be appropriately reviewed in the AAT and through judicial review.

(e) Expansion of executive discretion through legislative instruments

The significant expansion of the public interest discretions in the Bill join another concerning trend in the Bill, which is to expand the executive's discretion to make legislative instruments that set out the eligibility for citizenship. This occurs in:

- **the proposed s 3(2)**, which gives the Minister the power to determine, by legislative instrument, the kind of permanent visa required for eligibility under s 21(5)(b)(ii) (determining the eligibility of persons under the age of 18), which is also relevant to 52(2A)(b) (determining who may review that decision);
- **the proposed s 21(9)(a)**, which gives the Minister the power to determine, by legislative instrument, the circumstances in which a person has 'competent English';
- **the proposed s 21(9)(e)**, which gives the Minister the power to determine, by legislative instrument, the matters to which the Minister must have regard to when determining whether a person has integrated into the Australian community;
- **the proposed ss 46(5) and 46(6)**, which gives the Minister the power to determine an Australian Values Statement via a legislative instrument, but makes this determination not subject to disallowance under the *Legislation Act 2003* (Cth), thus removing an important accountability requirement for delegated legislative power.

It is our recommendation that each of these matters should be included in the primary legislation. While we accept that there is an appropriate place for the delegation of legislative power to the Executive, each of these matters involves a determination of substantive policy and it is our submission that it is inappropriate for delegation. We do not accept that the proposed delegations are matters that require particular technical expertise or frequent change. Rather, these are matters of substantive policy, which would be more appropriate for the full deliberation of and determination by Parliament.

The Government itself, in *The Department of Prime Minister and Cabinet's Legislation Handbook* (February 2017), sets out when legislation ought to be primary and the circumstances where it is appropriate to delegate legislative power. Relevantly, it states (at 1.10) that primary legislation should deal with:

- (b) significant questions of policy including significant new policy or fundamental changes to existing policy;
- (c) rules which have a significant impact on individual rights and liberties;
- ...
- (e) provisions conferring enforceable rights on citizens or organisations...

Each of the proposed delegations falls within these types of laws.

The proposed delegations that relate to eligibility for citizenship differ significantly from the types of matters that are currently relegated to legislative instrument under the Act. Existing legislative instruments deal with a variety of machinery or process related matters, such as persons who are authorised to receive a pledge of commitment,⁷⁵ activities which satisfy the special residence requirements in s 22A of the *Australian Citizenship Act 2007* (Cth),⁷⁶ registration of citizenship,⁷⁷ translation requirements for documents,⁷⁸ processes for applications to replace evidence of citizenship, fees and charges,⁷⁹ and the words to be used in citizenship certificates.⁸⁰

While the power to declare an organisation a declared terrorist organisation for the purposes of s 35AA of the *Australian Citizenship Act 2007* (Cth) deals with matters of substance in a legislative instrument, we note that the making of such a declaration is subject to review by the Parliamentary Joint Committee on Intelligence and Security. Further, in the context of the declaration of terrorist organisations, the executive may be in a better position than parliament to make the determination, by reason of access to intelligence relating to matters of national security. By contrast, issues of who should be a part of Australian society and the terms on which they may join are a matter particularly suited for parliament, as the representative of the people, to determine.

The proposal to include these more substantive matters in the legislative instruments reduces their certainty and accountability. First, certainty for those affected by the determinations is reduced because, unlike matters set in primary legislation, they can be changed by executive determination alone. Further, any change may be subject to disallowance by the Parliament, further increasing uncertainty because a change may come into effect only to be later disallowed by the Parliament.

Second, accountability is reduced because, while the *Legislation Act 2003* sets out a framework for the legislative review of delegated legislation (including the tabling of delegated instruments and parliamentary disallowance motions) and this is supplemented by the work of the Senate's Regulations and Ordinances Committee, this remains less than the scrutiny given to primary legislation. Parliament has greater democratic credentials than the executive, and is the best placed branch of government to determine open-ended policy matters such as those covered in these

⁷⁵ *Australian Citizenship Act 2007 Instrument of Authorisation 2015*

⁷⁶ *Australian Citizenship Act 2007 Special Residence Requirement 2013*

⁷⁷ *Australian Citizenship Regulations 2016* cl 6–7, 11.

⁷⁸ *Australian Citizenship Regulations 2016* cl 14.

⁷⁹ *Australian Citizenship Regulations 2016* cl 16–17, sch 3.

⁸⁰ *Australian Citizenship Regulations 2016* sch 2.

delegations.⁸¹ Parliament's law-making processes are also superior to the executive's in their transparency and publicity, including through the additional scrutiny provided by parliamentary committees.⁸²

Concerns about relegating matters such as these to legislative instruments is magnified in light of the heavy scrutiny workload of the Senate Standing Committee on Regulations and Ordinances. In its 2014–15 Annual report—the most recent available—the Senate Standing Committee on Regulations and Ordinances reported that it had considered 1656 instruments, and further, that this figure was comparable to the number of instruments considered in 2013–14 (1614) and 2012–15 (2084).⁸³

These accountability concerns are exacerbated in the case of the proposed ss 46(5) and 46(6), where even the limited scrutiny and accountability mechanisms available over delegated legislation are reduced, by making the determination not subject to disallowance. The Values Statement explicitly performs one task: an applicant must sign the Statement to make a valid application for citizenship. The government claims that given the function of the Statement, it is an appropriate matter to be determined by the Executive. However, as the Scrutiny of Bills Committee sets out (Scrutiny Digest 7/17 at [1.37]), the Bill also sets out, in the proposed s 21, that to be eligible for citizenship, an applicant 'has adequate knowledge of Australia's values'. It is not clear whether the Values Statement is intended to inform this criterion of citizenship. It is our view that the Australian Values Statement, even if used only at the point of application for citizenship, represents a significant statement of policy that should be either determined by the Parliament itself in primary legislation, or at the least, if delegated to the Executive, must be subject to full parliamentary oversight under the *Legislation Act 2003* (Cth), including being subject to disallowance. We agree with the recommendations of the Scrutiny of Bills Committee that further levels of scrutiny may even be appropriate, including:

- requiring the positive approval of each House of the Parliament before the instrument comes into effect;
- providing that the instrument does not come into effect until the relevant disallowance period has expired; or
- a combination of these processes.

We also draw the Committee's attention to the proposed s 54(2), which confers on the Governor-General the power to make regulations that further delegate to the Minister the power to make a legislative instrument. The courts are reluctant to accept that a delegate of legislative power can sub-delegate that power (this is known as '*delegatus non potest delegare*').⁸⁴ However, a statute may, as in the case of the proposed s 54(2), permit such a sub-delegation.⁸⁵ But, we submit, it should do so only in the most limited of circumstances. The common law position exists because the sub-delegation of power further undermines the direct accountability of that power between the

⁸¹ Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 53.

⁸² Judith Bannister, Gabrielle Appleby and Anna Olijnyk, *Government Accountability* (Cambridge University Press, 2014), 112-113 .

⁸³ Senate Standing Committee on Regulations and Ordinances, *Report on the Work of the Committee in 2012–13* (Report No 118, 2013) [3.2].

⁸⁴ Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, (LexisNexis Butterworths, 3rd ed, 2005) ch 3.

⁸⁵ See *Esmonds Motors Pty Ltd v Commonwealth* (1970) 120 CLR 463, 477 (Menzies J, with whom Walsh J agreed) although note Kitto J at 472.

Parliament and the delegate. The Explanatory Memorandum provides no good reason for the sub-delegation in s 54(2). Indeed, the Explanatory Memorandum indicates that the power of sub-delegation may be very broad indeed, stating at [359] it is not limited to more routine matters of delegation such as setting of fees:

This will enable the Minister to make legislative instruments under the Regulation that include **(but will not be limited to)** the payment of citizenship application fees in foreign currencies and foreign countries. (Emphasis added)

We consider that there is no good reason provided why the delegation to the Minister should not be done, in those circumstances that Parliament determines it to be appropriate, in the primary legislation. We recommend that the proposed s 54(2) be removed from the Bill, and if Parliament determines that certain matters are appropriately delegated to the Minister, specify these circumstances in the Bill.

(f) Removal or override of review by the Australian Administrative Tribunal (AAT)

The proposed s 52(4) makes decisions made by the Minister in the public interest not reviewable in the AAT. This relates to the proposed s 47(3A), which gives the Minister the power, where he or she makes a decision personally in accordance with a provision of the Act, to make a statement that the decision has been made in the ‘public interest’. Thus, in effect, the statement operates to remove an individual’s right to seek review of any such decision in the AAT.

By the insertion of a new s 52A into the *Australian Citizenship Act*, the Bill further makes provision for the Minister to set aside certain decisions of the AAT. This provision applies to decisions made by delegates of the Minister under ss 17, 17A, 19D, 19DA, 24, 25, 30 or 30A where the delegate was ‘not satisfied that the person was of good character or was not satisfied of the identity of person’. If, upon application to the AAT for merits review, the AAT sets aside the delegate’s decision, s 52A(1)(e) provides that the Minister can make a further decision setting aside the AAT’s decision where the Minister considers it is ‘in the public interest to do so’. In accordance with s 52A(2), this power can only be exercised by the Minister personally.

The combined effect of these provisions is to remove key accountability measures for decisions made under the *Australian Citizenship Act 2007* that have profound consequences for individuals affected. The remaining accountability mechanisms are insufficient. These are judicial review in the courts, which is limited to legal review and severely hampered in relation to the review of a decision made in the ‘public interest’, and democratic accountability in the Parliament. In relation to the latter, the proposed s 52B purports to increase the accountability of unreviewable decisions and decisions to set aside AAT decisions by requiring that the decision, and the reasons for the Minister’s decision, must be tabled in each House of Parliament within 15 sitting days (and see also proposed s 22AA(5) in relation to decisions to waive the general residency requirement). This, we submit, increases transparency, but still fails to adequately address the accountability concerns raised by the removal of the Tribunal’s jurisdiction.

(i) Removal of AAT’s jurisdiction to review decision

We are concerned generally about the removal of the AAT’s jurisdiction to review decisions. The fact that there are pre-existing provisions removing the AAT’s jurisdiction such as in the *Australian Citizenship Act*, as referred to at [327] of the Explanatory Memorandum, is insufficient justification

for their expansion. In fact, it is representative of a wider, concerning trend in which governments over a period of several decades have sought to limit review of executive decisions.

The AAT was established in 1975 following the 1971 recommendations of the Commonwealth Administrative Review Committee (Kerr Committee). It was recognised by the Kerr Committee that, under the traditional forms of parliamentary review and judicial review, there was a lack of effective oversight mechanisms for individuals to access in relation to Commonwealth government decisions that affected them. It was established partly in response to the fact that, due to the constitutional separation of powers, courts in Australia can only review for legality. However, as recognised by the Kerr Committee, most people who are affected by a Commonwealth administrative decision will wish to challenge on the basis of a factual or merits based error.⁸⁶ While tribunals existed before the AAT, what made the AAT unique at the time was the breadth of its jurisdiction to review executive decisions, as well as its visibility and accessibility. In providing such a generalist merits review tribunal, Australia was seen as a nation at the forefront of accountable government.

The AAT has a key role. It fills an accountability gap that lies between the limits of judicial review and the capacity of Parliament to hold Ministers responsible for their decisions. As the Tribunal is not subject to the same separation of powers considerations as the courts, it is able to re-consider issues of discretion, that is, to review the merits of the initial decision. It is sometimes said that the tribunal member stands in the shoes of the original decision maker, providing an independent second opinion on the whole of the decision. In contrast, judicial review, which is concerned only with legality, is not concerned with the merits of the decision.

We are particularly concerned about the justifications provided in paragraphs [325] of the Explanatory Memorandum. The Explanatory Memorandum asserts that the Minister, as an elected official 'has a particular insight into Australian community standards and values and what is in Australia's public interest.' This is the justification provided by the government for removing the jurisdiction of the AAT – an 'unelected administrative tribunal' – where the Minister has given the matter his or her personal attention.

We respectfully disagree that the AAT is in a less appropriate position than the Minister to make this assessment. First, the fact that the Minister, as an elected official, makes a decision in the public interest is not alone enough to place that decision beyond the scope of merits review by the AAT. Many pieces of legislation covering a wide range of substantive policy areas provide for the AAT to review decisions made personally by the Minister.

Second, the purpose of the AAT is for an *independent* tribunal member to review such decisions and check that it is correct or preferable in all of the circumstances.⁸⁷ The AAT, being created with legislative safeguards of independence, separated from the political branches, is better placed to make independent decisions about community standards. The role of Tribunal members is to assess all the relevant facts, alongside the legislation and any relevant policy, in an independent and apolitical manner. The reasons provided in paragraph [325] are insufficient to justify the Minister not being subject to AAT review in this particular circumstance.

⁸⁶ Commonwealth Administrative Review Committee Report 1971 (Kerr Committee Report) (Parliamentary Paper No 144 of 1971), p. 9.

⁸⁷ *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 (*Drake* (No 1)). (1979) 24 ALR 577 (*Drake* (No 1)), 589 (Bowen CJ and Deane J).

We note that judicial review remains available to applicants in relation to decisions where the AAT's jurisdiction to review has been removed. However, there are numerous barriers to accessibility of judicial review. These include costs, time delays and complexity of judicial review challenges. Whereas, the objective of the AAT is to provide review that is '... economical, informal and quick'.⁸⁸ Further, as noted, the AAT performs a different review task to that of courts. Courts can only ensure that decisions have been made according to law. The AAT, on the other hand, is able to check that a decision was correct or preferable in all of the circumstances. This restriction on the nature of review by courts are particularly heightened where there is a 'public interest' discretion in the legislation as discussed above at part 2(d).

For these reasons it is our submission that removal of the AAT's oversight jurisdiction is highly undesirable.

(ii) Provision for ministerial override of AAT decisions

The Bill's proposed introduction of the override power in s 52A raises similar concerns to those outlined above in relation to proposed s 52(4) in so far as it, in effect, removes the oversight function of the AAT. But the provision also raises its own unique concerns: first around real or perceived executive influence over the AAT, and second in that it creates ongoing uncertainty for an applicant who might be successful in their challenge of a decision made by a delegate in the AAT, only to have the Minister later overturn it by the use of this provision.

Although the AAT is not a court, it is nevertheless important that it is able to exercise its review function in an independent manner – both as a matter of reality and perception. Conferring a power on a Minister to override the decision of the AAT in this manner raises issues of possible bias. The Minister may use the power in such a way as to change the behaviour of the AAT members, thus undermining their independence from the executive branch. Short of actual bias, even if the AAT members retain their decisional independence in these circumstances, there may be the perception that given the Minister's override powers, they are likely to change their behaviour to avoid their decisions being the subject of that power. The proposed provision, in undermining of the independence of the AAT, undermines it as an effective accountability mechanism. Potential applicants and the public at large will lose their confidence in its ability to provide an independent review of government decisions, both in relation to the particular decisions that may be subject to override, but potentially more broadly.

We do not consider that sufficient justification has been provided to establish the need for this amendment. With respect to [330], we are concerned about the tone of the criticism of the AAT, particularly because no specific evidence to substantiate that criticism is provided. The paragraph, for instance, refers to 'three significant decisions' and 'three other recent decisions'. The Explanatory Memorandum notes that these cases related, broadly, to findings of 'good character' despite various convictions, but does not provide further detail. There is not enough information for us to provide further commentary on these decisions. However, it appears, that the major underlying concern is how the AAT is applying government policy (for example, in paragraph [332] of the Explanatory Memorandum).

The way the Tribunal approaches policy has been settled since the early days of the AAT, such that the AAT generally applies government policy unless the policy is unlawful or there is a cogent reason

⁸⁸ *Administrative Appeals Tribunal Act 1975 (Cth)*, s 2A.

for it not to do so.⁸⁹ Given this legal position, there are other ways in which to address the government's concern that the AAT is misapplying policy, such as provision of further policy guidance to the AAT as detailed in [332] of the Explanatory Memorandum. We further note that it is possible to get judicial review of AAT decisions, or appeal to the Federal Court, and that these function as oversight mechanisms of the AAT from the government's perspective. On the other hand, if the proposed s 52A was inserted, it would be difficult, for the reasons we have outlined above in relation to public interest discretions, for an applicant to seek judicial review of the Minister's decision to override. Therefore, this proposed amendment is taking away an important review mechanism for applicants, without sufficient justification.

We note that a mechanism of parliamentary oversight has been included in proposed s 52B such that the Minister will need to table any decision that is deemed not reviewable before both Houses of Parliament within 15 sitting days. There are numerous potential deficiencies with relying upon this form of parliamentary oversight as an accountability measure. This is addressed further below at part 2(f)(iv).

(iii) Limitations of judicial review of public interest discretion

We again draw attention to the limitations of judicial review over an undefined public interest discretion that we have elucidated above at part 2(d).

(iv) Limitations of Parliamentary Accountability

The parliamentary accountability that is achieved through the requirement to table a statement in the proposed s 52B (and see also the proposed s 22AA(5) in relation to decisions to waive the general residency requirement), is insufficient to address the accountability concerns raised by the removal of AAT's jurisdiction and the limitations on judicial review caused by the invocation of a public interest discretion.

First, while the tabling of a statement may improve the transparency of the Minister's decision under s 52(4), it provides a form of *explanatory* accountability only. That is, the consequences of tabling a statement may be that the Minister has to answer questions in Parliament about the decision and the reasons for it, but it does not provide any mechanism of review of that decision for the individual affected. At best, and we submit this would be highly unlikely to occur, the Parliament's response to the statement may result in the Minister changing his or her decision. Further, the likely explanatory accountability is, in today's political climate, largely undermined for reasons of the partisan politicking that often characterises debate in the Parliament and the volume of work before the Parliament.

Second, the statement must only be tabled within 15 sitting days. If a decision is made before, or during, a parliamentary vacation, this may mean that the tabling occurs after a significant period of time – weeks and even months. Once decisions have been in place for such significant periods, explanatory accountability largely loses its force. The decision has taken effect for this period and thus the immediacy of the consequence of the decision has been lost.

Third, in comparison to other similar provisions contained in the *Migration Act 1968* (Cth), ss 351 and 417, the obligation in the proposed s 52B lacks sufficient specificity as to the nature of the matters the Minister must set out in the statement. For instance, s 351(4) provides:

⁸⁹ *Drake and Minister for Immigration and Ethnic Affairs* [1979] AATA 179; (1979) 2 ALD 634 (*Drake* (No 2), 644-645 (Brennan J)).

(4) If the Minister substitutes a decision under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

- (a) sets out the decision of the Tribunal; and
- (b) sets out the decision substituted by the Minister; and
- (c) sets out the reasons for the Minister's decision, ***referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.*** (Emphasis added).

To be clear, it is not our submission that s 351(4) provides an example of adequate accountability for the exercise of a public interest discretion. But we refer to it because it demonstrates that the proposed s 52B provides even weaker accountability than that proposed in the *Migration Act*.

It is our recommendation that ss 47(3A), 52(4) and 52A should be removed from the Bill. But, if these provisions are retained, they should be tightly circumscribed, not through the current 'public interest' criterion, but, rather, through the enumeration of specific, mandatory criteria that the Minister must take into account. This would force the government and Parliament to prescribe limited circumstances in which AAT review is not available or the AAT's decisions could be overturned by the government.

We recommend that, if the proposed s 52B and the proposed s 22AA(5) are retained, that they be significantly tightened so that the statement explaining the public interest decision must be laid before both Houses of Parliament within 5 sitting days, and must set out the reasons for the decision, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

Yours sincerely,

Associate Professor Gabrielle Appleby
Associate Dean (International & External Engagement), UNSW Law
Co-Director, The Judiciary Project, Gilbert + Tobin Centre of Public Law
g.appleby@unsw.edu.au

Lynsey Blayden
Doctoral Candidate & Teaching Fellow, UNSW Law
Member, Gilbert + Tobin Centre of Public Law
l.blayden@unsw.edu.au

Lauren Butterly
Lecturer, UNSW Law
Member, Gilbert + Tobin Centre of Public Law
l.butterly@unsw.edu.au

Khanh Hoang

Doctoral Candidate, & Teaching Fellow, UNSW Law

Member, Andrew & Renata Kaldor Centre for International Refugee Law, UNSW

khanh.hoang@unsw.edu.au

Dr Sangeetha Pillai

Senior Research Associate, Andrew & Renata Kaldor Centre for International Refugee Law, UNSW

Member, Gilbert + Tobin Centre of Public Law

sangeetha.pillai@unsw.edu.au

Shreeya Smith

Doctoral Candidate & Teaching Fellow, UNSW Law

Member, Gilbert + Tobin Centre of Public Law

shreeya.smith@unsw.edu.au

Appendix A: English language requirement analysis

As stated above in our submission, the current framework requires that an applicant for citizenship by conferral to have ‘basic knowledge of the English language’.⁹⁰ As a report of Richard Woolcott AC who undertook a review of the Citizenship Test in 2008 (Woolcott Report) noted, this threshold was introduced to enable those with limited English “who have lived in Australia for some time and who would take pride in becoming citizens” to do so.⁹¹ In our view, this threshold is appropriate, as it allows for an understanding that while possessing a basic knowledge of English is important, it should only be relevant insofar as it affects a person’s ability to integrate as a member of society. While the Woolcott Report also suggested that an English language test could be ‘separated from other testing for citizenship’ it also suggested that ‘different testing pathways be made available for those with different levels of English’.⁹² This is explored further below.

In the lead up to the Bill, it was widely reported that the Government intends to specify competent English to mean and IELTS band score of 6 across the four components of reading, writing, listening and speaking). We suggest that an IELTS band score of 6 is inappropriate in the context of citizenship applications and that the government should instead consider education based pathways to English proficiency. If an IELTS score of 6 is specified as evidence of ‘competent English’, this would disproportionately affect asylum seekers and refugees.

IELTS score is too high and is not an appropriate tool

In our view, the proposed requirement to obtain a score of 6 in the IELTS test is too high for most refugee and humanitarian entrants.

It is worth pointing out that the requirement of IELTS 6 is the equivalent or higher than what Australia expects for high level students and highly skilled migrants, many of whom migrate permanently to Australia (see table below). Whereas these migrants have been able to obtain English skills through their previous work or education, refugee and humanitarian entrants may not have similar opportunities. Moreover, refugees and humanitarian entrants are more likely to come from countries where English is not a spoken language.

⁹⁰ *Australian Citizenship Act 2007* (Cth) s 21(2)(f).

⁹¹ Australian Citizenship Test Review Committee, *Moving Forward ... Improving Pathways to Citizenship* (2008), 17 citing Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 1983 (Stuart John West, Minister for Immigration and Ethnic Affairs).

⁹² *Ibid*, 20.

Visa subclass	English language requirement (IELTS)	Notes
457 (Temporary Skilled)	Overall band score 5 ⁹³	The subclass 457 will be abolished in March 2018 and replaced by a new visa that will require applicants to have obtained IELTS score of 5, with a minimum of 4.5 in each test component. ⁹⁴
476 (Recognised Graduate)	Overall band score 6 ⁹⁵	
186 (Employer Nomination Scheme)	Overall band score 6 (Competent English) ⁹⁶	
189 (Skilled Independent)	Overall band score 6 (Competent English) ⁹⁷	Points can be awarded under the points test if the applicant has proficient English (IELTS 7) or superior English (IELTS 8).
190 (Skilled Nominated)	Overall Band 6 (Competent English) ⁹⁸	
500 (Student)	Overall band score 5.5 ; or Overall band score 5 if packaged with at least 10 weeks' ELICOS; or Overall band score of 4.5 if packaged with at least 20 weeks' ELICOS. ⁹⁹	Universities may require higher IELTS scores depending on the course the student enrolls in.

⁹³ Commonwealth of Australia, *Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirements for Subclass 457 (Temporary Work (Skilled)) Visas 2015*, IMMI 15/058.

⁹⁴ Department of Immigration and Border Protection (2017), *Fact sheet one: Reforms to Australia's temporary employer sponsored skilled migration programme—abolition and replacement of the 457 visa*.

⁹⁵ Commonwealth of Australia, *Specifications of English Language Tests, Scores and Passports 2015*, IMMI 15/062.

⁹⁶ *Migration Regulations 1994* (Cth) sch 2, cls 186.222 and 186.232.

⁹⁷ *Ibid* sch 2, cl 189.213.

⁹⁸ *Ibid* sch 2, cl 190.213.

⁹⁹ *Ibid* sch 2, cl 500.213. See also Commonwealth of Australia, *Specification of English Tests and Evidence Exemptions for Subclass 500 (Student) Visas 2016 – IMMI 16/019* (29 April 2016).

This is part of the reason why settlement services exist for humanitarian and refugee entrants and not for other migrants. It is also well recognised that the Adult Migrant English Program (AMEP), which provides humanitarian entrants with up to 510 hours of English language tuition in the first 5 years of arrival in Australia, is only intended to provide applicants with a ‘functional level’ of English.¹⁰⁰ The term ‘functional English’ is used in the *Migration Regulations* as a requirement that needs to be met by secondary (family members) for certain visas.¹⁰¹ Under a legislative instrument, ‘functional English’ is prescribed as only requiring a band score of 4.5 in the IELTS.¹⁰²

We note that the current requirements are on par with other Commonwealth countries where English proficiency would also be an important and necessary skill for social integration. For example, in New Zealand, an applicant for citizenship is only required to demonstrate ‘a sufficient knowledge of English’.¹⁰³ To meet this requirement, a person only needs to include in their application something that proves that they can speak English and then be able to hold a conversation during an interview with a Departmental Officer.¹⁰⁴ In Canada, an applicant is required to demonstrate ‘an adequate knowledge of the one of the official languages of Canada’.¹⁰⁵ This is defined to mean a level 4 score on the Canadian Language Benchmarks, which appears significantly lower than what is required to obtain an IELTS 6.¹⁰⁶ Similarly in the UK, an applicant is required to achieve a band score of B1 on the Cambridge English Language Scale – equivalent to an IELTS 4-5.¹⁰⁷

Therefore, while the arguments for a high IELTS test may appear legitimate at first glance, we would argue that it subjects humanitarian entrants to a higher hurdle vis-à-vis other migrants, when their circumstances are taken into account. It is important for policy to also recognise that refugees and humanitarian entrants face significant challenges in the first few years of integration into Australia. Many are recovering from trauma which may make learning difficult. Many will not be able to afford extra tuition and/or time to improve their language to the level required. Policy also needs to recognise that it is more difficult to learn English as an adult. Taken together, these factors exacerbate and hinder a refugee and humanitarian entrant’s ability to pass the IELTS test or any other test where the requirement to pass is above a basic level of English. It is concerning to us that the Government has not canvassed whether additional measures will be put in place to support humanitarian entrants to improve their English.

Our concern is that a standalone English test result to demonstrate ‘competent English’ will act as a significant barrier to refugees and humanitarian entrants who wish to become Australian citizens. Statistics from the Department show that entrants under the Humanitarian Programme are twice as

¹⁰⁰ See Department of Education and Training, *Adult Migrant English Program* <<https://www.education.gov.au/adult-migrant-english-program>>.

¹⁰¹ See eg *Migration Regulations 1994* (Cth) sch 1 item 1114B which requires a secondary applicant for the Subclass 186 visa who is not assessed as having functional English to pay a visa application charge of \$4890. Section 5(2) of the Act provides that the Minister can prescribe in a legislative instrument the evidence required to demonstrate English language proficiency. See also *Migration Regulations 1994* (Cth) reg 5.17.

¹⁰² Commonwealth of Australia, *Evidence of Functional English Proficiency 2015*, IMMI 15/004.

¹⁰³ *Citizenship Act 1977* (NZ) s 8(2)(e).

¹⁰⁴ New Zealand Government, *Apply for NZ citizenship* <<https://www.govt.nz/browse/nz-passports-and-citizenship/getting-nz-citizenship/apply-for-nz-citizenship/#language-requirements>>

¹⁰⁵ *Citizenship Act R.S.C.*, 1985, c. C-29 s 5(1)(d).

¹⁰⁶ Government of Canada, <[http://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=567&top=What does “adequate knowledge” of English or French mean when applying for citizenship?](http://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=567&top=What%20does%20adequate%20knowledge%20of%20English%20or%20French%20mean%20when%20applying%20for%20citizenship?)> This level only requires a person to be able to understand simple questions and instructions, use basic grammar and to show knowledge of enough common words to be able to take part in short, everyday conversations about common topics.

¹⁰⁷ UK Government, *Prove your knowledge of English for citizenship and settling* <<https://www.gov.uk/english-language>>

likely to re-sit the citizenship test compared to skilled or family entrants, but that they are also more likely to apply for the test.¹⁰⁸ This suggests that humanitarian entrants greatly value Australian citizenship, which is viewed as a marker to belonging. If the requirement to for ‘competent English’ is set too high, many refugees will simply not be able to obtain citizenship or will defer the application for citizenship. The exclusionary effect of not being able to obtain citizenship (and therefore becoming a full member of the Australian community) will have significant impacts on individual refugees and on multiculturalism in Australia.

Lastly, it is also important to recognise that the IELTS test *was never designed* to be used a tool to test integration or, as the discussion paper provides, to set a standard that allows for ‘economic participation and social cohesion’. As Dr David Ingram — a member of the team that develop the IELTS — pointed out in a submission to the Productivity Commission’s Inquiry into Migrant intake in Australia:

*The principal test used for visa purposes at all levels is IELTS. While IELTS is a highly regarded test, it was developed specifically to test the English of international students wishing to enter English-speaking universities or other training programmes. Its content and design do not meet the needs of tests to assess proficiency for vocational purposes or for general survival purposes.*¹⁰⁹

We argue that the proposed use of an IELTS test is therefore not consistent with the stated objective of testing English proficiency as “essential for economic participation and social cohesion”.

Education-based pathways to English proficiency

If the government is serious about investing in the language proficiency of prospective citizens and wants to test English as a prerequisite for obtaining citizenship, we suggest that this could be achieved via education-based pathways rather than through a standalone English test.

Such a model was proposed in the Woolcott report which suggested that different methods could be used for those who are literate in English and those with little or low literacy skills. For example, those with who are considered ‘literate’ would be encouraged through self-directed learning undertake a computer based English test.¹¹⁰ Those with no or low literacy could demonstrate English ability through successful completion of approved courses with in-built assessments or have their English assessed through an oral based test. The Committee noted from its consultations and submissions that:

*The Committee received overwhelming feedback calling for a range of pathways to citizenship which do not discriminate against migrants and refugee and humanitarian entrants with poor literacy or education levels, or who may have no knowledge or experience of computers and computer based testing.*¹¹¹

¹⁰⁸ Department of Immigration and Border Protection, *Australian Citizenship Test Snapshot Report* (2015). Statistics for the 2014-15 financial year demonstrate that Humanitarian Entrants on average take the test 2.4 times compared to 1.1 for skilled entrants and 1.4 for family entrants.

¹⁰⁹ David Ingram, Submission to the Inquiry by the Productivity Commission into Migrant Intake in Australia (June 2015), 2.

¹¹⁰ See Australian Citizenship Test Review Committee, *Moving Forward ... Improving Pathways to Citizenship* (2008), 29.

¹¹¹ *Ibid*, 27.

Education pathways were perceived by many to offer a just, fair, and flexible approach in preparing for a test. It was felt that participation in courses and discussions relating to shared values and attributes would help prospective citizens gain the knowledge required to pass a test in a safe learning environment.¹¹²

We therefore urge the government to revisit this recommendation and consider mechanisms for testing English proficiency other than through an IELTS test.

¹¹² Ibid.