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Australian Citizenship and Other Legislation Amendment Bill 2014

Monday, 10 November 2014

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Monday, 10 November 2014

Members in attendance: Senators Jacinta Collins, Ian Macdonald, O'Sullivan.

Terms of Reference for the Inquiry:
To inquire into and report on:
Australian Citizenship and Other Legislation Amendment Bill 2014.
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LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

REILLY, Associate Professor Alexander, Director, Public Law and Policy Research Unit, University of Adelaide

Evidence was taken via teleconference—

Committee met at 09:58.

CHAIR (Senator Ian Macdonald): Welcome. I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee for its inquiry into the Australian Citizenship and Other Legislation Amendment Bill 2014. The committee's proceedings today will follow the program circulated. These are public proceedings being broadcast live via the web. The committee may agree for any request to be heard in camera. If you want to do that, Professor, let us know. In giving evidence, witnesses should be aware they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and any such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. If you object to answering a question, you should state the ground upon which the objection is taken and the committee will determine what to do with that. If the committee insists on an answer, the witness may request that the answer be given in camera.

Professor Reilly, thank you very much for joining us. We have the written submission from your unit, which we have numbered as submission 6. If you wish to make any amendments or alterations to your submission, now is the time to do it. Otherwise, I invite you to make a brief opening statement and then we will ask you some questions.

Prof. Reilly: I work in the law school at the University of Adelaide and am the director of the Public Law and Policy Research Unit. I represent the research unit in this submission. I am the sole author of the written submission and the remarks I make are my own views; however, other members of the research unit have discussed these issues and have read and endorsed the submission.

I would like to start with a few general observations about citizenship. We submit that citizenship is not just a privilege, as is suggested in the submission of the Department of Immigration and Border Protection. The preamble to the Australian Citizenship Act states:

…

Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity.

So we submit that we should, as a rule, be encouraging Australian residents to become citizens. The 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. It is important that the security of citizenship is equal for all Australians whether they are automatic citizens or citizens by application and conferral. We only want one citizenship in Australia. Finally, there is an important distinction, we submit, to be maintained between migration control and citizenship. Migration is the point at which people with no necessary connection to Australia are granted permission to enter and reside in Australia as visitors, workers or family members, and people are rigorously checked upon entry. But, by the time a person is applying for citizenship, they have a strong connection to Australia and citizenship cements this connection.

With those general points in mind, I will speak very briefly to the points in our written submission. Point 2a in the unit's written submission discusses issues of character. There are many provisions in the bill which relate to character and these are used to either deny citizenship or delay citizenship applications in circumstances that do not currently arise under the act. In our submission, the new character provisions are unnecessarily broad. In the written submission, we discuss concerns about extending them to minors, but, more generally, there are many offences against Australian law which do not reflect on character necessarily or, if they do reflect on character, there are good reasons to encourage permanent residents to take up citizenship despite minor concerns over their character, even if those issues of character would have prevented the same person migrating in the first place.

In point 2b in our written submission, we discuss the exceptions to automatic citizenship. As the committee will be aware, section 12(1) of the Australian Citizenship Act currently states:

A person born in Australia is an Australian citizen if and only if:

(b) the person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born.

The proposed new sections add various exceptions to this general rule. It is important to put in context how important birth has been to citizenship in Australia in the past. Until 1986, birth was sufficient for automatic citizenship. The new changes affect, it seems, two groups of people. It affects children of asylum seekers who are found to be refugees. These would be refugee children born when their parents had not yet secured a substantive...
visa and were designated as unlawful citizens at that point. It also affects children born to persons who are here illegally and have kept out of sight of the authorities. This was the rationale for introducing the exception in proposed section 12(4).

There is no question that lying underground and staying in the country illegally is fraudulent and that that is a practice that should be prevented as much as possible, but we submit that there are ways of dealing with the issue of illegal immigration other than by affecting a core principle of citizenship. For us, the question is: should the immigration status of parents affect the citizenship rights of innocent children? This is a philosophical question. What are the fundamentals of membership in Australia? In our written submission, we submit that a child born in Australia and spending their formative years here is irrevocably Australian.

There is also a constitutional question: when is someone a nonalien under the Constitution? This determines the extent of parliament's law-making power under section 51(xix), regarding naturalisation and aliens. In the Singh v Commonwealth, two High Court judges said that birth was enough for non-alien status. The majority of five judges said it is not enough, but they still stated that there must be some limit to the circumstances in which parliament can exclude someone from citizenship. I will briefly quote from Chief Justice Gleeson:

… Parliament cannot, simply by giving its own definition of "alien", expand the power under s.51(xix) to include persons who could not possibly answer the description of "aliens" in the Constitution.

We would submit that, having been born in Australia and being resident here for 10 years, there is a good chance that constitutionally that is enough for someone to be a nonalien and a status that parliament cannot take away.

Point 2c in our written submission relates to revocation. We submit that, in relation to revocation, the bar should be set high for what fraud is sufficient as it must be weighed against the fundamental value of the security of citizenship. Once you start broadening the net so that it covers not only fraud in the citizenship application and that the fraud need not be serious or personal to the applicant, it begins to have serious implications for the security of citizenship. We submit that there is quite a big change being made here from the current provisions on what constitutes fraud for citizenship purposes.

Point 3 in the written submission relates to ministerial decisions and merits review in the Administrative Appeals Tribunal. In relation to this, the act does two things. First, it makes some decisions relying on the public interest discretion not subject to merits review. We make two points on that. One is that citizenship decisions are the types of decisions that should involve merits review. They do not fit the description of decisions made in a high political context. The kinds of decisions where we exclude merits review are things like when there are threats to Australia's defence and security and decisions need to be made in a hurry—so really it is inappropriate to have a long, drawn-out decision-making process involving merits review. But that does not apply to citizenship decisions. There is no hurry in these decisions. We can take our time to get them right. The second point is that decisions are put into the minister's domain if they relate to public interest. The public interest standard is extraordinarily vague. It is not clear why it is a standard that should be determined purely by the minister. In other circumstances, the Administrative Appeals Tribunal is required to apply that standard. In fact, it is a standard that requires much better articulation to avoid arbitrary decision making.

The second thing that happens in relation to review is that it confers a power on the minister to overturn decisions of the Administrative Appeals Tribunal when decisions on character or identity grounds are made in the public interest. In our submission, this undermines the whole point of merits review. If the AAT makes a decision that can simply be overturned by the minister, you have to start questioning why we have a merits review process at all. The justification is that decisions that the minister has not agreed with and cannot appeal have occurred in the past. We submit that the answer to that is not to take away merits review but to give direction to the minister on the appropriate way to apply the public interest test.

CHAIR: Professor, thank you very much for your submission and for your very lucid and concise précis. I would like to discuss a couple of things with you but before I passed to the deputy chair, I saw in the submission somewhere, perhaps from the department, where a number of AAT decisions are listed which certainly do not pass the pub test. I think what the act is trying to say is that where these decisions are clearly contrary to public expectations something has to be done. Can you elaborate for us: is it possible to give directions and how specific can they be? The second question is: if the bill is passed and the minister makes decisions, is there any way those decisions could be appealed by reference to the courts on some of the prerogative writs or otherwise?

Prof. Reilly: In relation to the first question, it is quite common for the Merits Review Tribunal to make decisions the ministers do not like. One response to that is commonly that ministers will say, 'You have misinterpreted what we mean by certain terms in regulations.' The executive can then make directions saying, 'These are the criteria or these are the things to be taken into account in determining what is the public interest.' Over time, what happens is that merits review decisions are made. If they are contrary to the way the minister
understands the criteria to be applied, there is a conversation effectively between ministers and tribunals where
the minister gives directions. The only limit to the giving of directions is that they must be consistent with the
interpretation of the act which gives power to make those directions. If, for example, the minister were to give an
interpretation of the term ‘public interest’ and directions to the tribunal that were contrary to the meaning of
‘public interest’, that can be challenged going forward to the courts because that would be a misinterpretation of
the act.

If you cut out merits review and so you just have a decision of the minister, there is still the possibility for
judicial review of those decisions. However, judicial review is a very different process and the only grounds for
judicial review are if there is actually an error of law. So it is not whether the decision was the right decision; it is
just that the decision was legally made and the kind of grounds for illegality are things like it was so unreasonable
that no decision maker could have made it, so it is a very high threshold, or there has been some error in the
procedures so procedural fairness was not given, those kinds of grounds.

**Senator JACINTA COLLINS:** Most of my questions will probably ultimately go to the department but
thank you for your very concise submission, Professor. One issue on which I wonder whether you know more
information is the period involved for the children of those designated unlawful non-citizens before they would
normally attract a protection visa. What sort of period are we looking at?

**Prof. Reilly:** Are you talking about when someone arrives in Australia seeking asylum and they make an
application for a protection visa?

**Senator JACINTA COLLINS:** I am looking at the 10-year residence requirement and what period we are
looking out for the children of such people.

**Prof. Reilly:** I did try to trace through a few scenarios in relation to this. I think the most common scenario is
going to be that someone has come to Australia seeking asylum and that, while they are in the process of making
an application for a protection visa, a child is born in Australia. Time frames for how long it takes to get a
protection visa change decade by decade. Certainly over the past three or four years the time period has been
extremely long and in fact nearly no-one is getting a permanent protection visa now. As you will know, there is
legislation before the parliament looking to bring in temporary protection visas. There are a lot of people in the
community who have been waiting for many, many years to get a substantive visa, be it a permanent protection
visa or a temporary protection visa. These children then will be unlawful noncitizens all through that period, and
it is only when a substantive visa is granted that they would then be no longer the children of unlawful
noncitizens. My reading of the provision is that it does not matter whether it is a long time or even just a few
days; as soon as there has been a period where you are the child of a person who is an unlawful non-citizen, that
10-year period does not apply anymore, so you cannot get automatic citizenship. It does not matter if it is nine
years and six months and then you go another six months after that to be 10 years as the child of someone who is
not an unlawful noncitizen; it just cuts you out from the automatic citizenship on the basis of a period of the
parents being unlawful.

**Senator JACINTA COLLINS:** So that I have this clear in my own mind, we are looking at a scenario here
where the protection visa is granted and then the 10-year period would start accruing. It does not completely rule
people out, does it?

**Prof. Reilly:** My reading of the act is that is not that the 10-year period starts when you become lawful; it is
just that there is a 10-year period from the time of birth until you are 10 years old. But if you have been unlawful
at any time in that period, then you are excluded from automatic citizenship. So, in the scenario of someone for
whom a protection visa was granted when the child was four years old, it is not that when they turn 14 they can
then apply for automatic citizenship; they would have to be applying for other types of citizenship—citizenship
through conferral. They just are not eligible for automatic citizenship at all.

**Senator JACINTA COLLINS:** All right. That is clear in my mind now.

**Prof. Reilly:** That is my reading of the bill.

**Senator JACINTA COLLINS:** I will ask the department later in the day. That is the only question I had,
thank you.

**CHAIR:** Going back to the issue of the AAT, the explanatory memorandum indicates three significant
decisions outside community standards where the AAT found that people were of good character despite having
been convicted of child sexual offences, of manslaughter and of people smuggling. Is the minister able to give
directions? Obviously they are the extreme cases, but none of us as Australians would want to accept as fellow
Australians people who had committed those sorts of offences if we did not have to. Is the minister able to give
directions that would cover those sorts of things?
**Prof. Reilly:** Absolutely. The minister could make directions saying that, when interpreting good character, the issue of sexual offences must be taken very seriously and it would be only in exceptional circumstances, or never, that a person who had committed a sexual offence could be considered a good character for the purposes of the act. The minister can make directions like that. A tribunal is required to take those directions into account in making future decisions. But, in the sense of a decision that has been made, it is usually, 'Oh well, a bad decision has been made,' and that does happen. The minister can of course seek judicial review if he considered the decision to be unlawful. But certainly when a decision is one that the minister does not like, in those circumstances, the minister came make directions to remedy that for the future.

**CHAIR:** It is a difficult philosophical problem. We as politicians always get people asking us, 'How come the court let that person off with a slap on the wrist for what seemed to be a major offence?' I used to be a lawyer many years ago, so I understand that it is different when you are in court and hear the full circumstances, but we live in a democracy. I see the explanatory memorandum is saying that as a politician the minister is attuned to what the majority of Australians are saying even if the courts are not. I am not quite sure that is right! But there is a challenge around what are accepted community standards and what courts, including AAT, sometimes do. Do you have any comments on that?

**Prof. Reilly:** Certainly. The whole point of the administrative review we brought in in the 1970s was that it is a principle of democratic accountability that ministers put the decisions they are making through parliament. They usually affect Australians in all sorts of areas of life. The idea was that there needs to be a check on that executive decision making. But, as you say, there is a delicate balance to be held here. The minister is also a parliamentarian and an elected member. I would strongly object to the idea that because the minister is elected and therefore closer to the people the minister can therefore make better decisions. I think the whole point of administrative review is that that is not necessarily the case; sometimes ministers make bad decisions and we need a review process.

But that review process, as you said, can go wrong as well. It is not that administrative review tribunals get it right all the time. However, we have a lot of safeguards in place to make sure that merits review is done in a way that is appropriate. One of those is the minister being able to give directions to tribunals. The other is that tribunals are independent and usually trained in this decision-making process. They are able to make fresh decisions. They follow good decision-making protocols as a rule. That is why we allow merits reviews.

**CHAIR:** You quite rightly say that tribunals are independent. But is the minister giving directions or having a chat to them thought to be interfering with their independence?

**Prof. Reilly:** That is where the delicate balance comes in. The minister can give tribunals assistance through directions and how they should be interpreting the law. But, when it comes to the facts of the decision, tribunals are completely independent. The minister cannot say, 'I thought this person was very unreliable and untrustworthy, so you should find that as well.' No, the tribunal is making a fresh decision based on the applicant. But on issues of how you interpret the concept of 'good character' is where the minister can assist the tribunal by giving directions.

**Senator O'SULLIVAN:** Professor Reilly, if some of my questions seem a little repetitious, please forgive me, as I was out of the room when the Chair canvassed some of this. I just want to make sure I have this right in my head. As I understand it, a decision is taken, then the Administrative Appeals Tribunal can consider that decision and make a decision and then the minister has a right of veto on the Administrative Appeals Tribunal decision, which can then be reviewed. There is jurisdiction for the courts to review the minister's vetoing of the decision. Is that an accurate assessment?

**Prof. Reilly:** Yes. That is pretty accurate. The only thing I would say is that, when it comes to the court reviewing the veto, that is then just on technical legal issues and whether there was an error of law made. What effectively happens is that you have a decision in the first instance and then a fresh decision by the tribunal, looking at the evidence again and maybe even having fresh evidence when making that decision. The minister has decided, 'I don't like that,' so vetoes that decision. There might be limited grounds on which you could apply for judicial review. Going to the courts is on much narrower grounds. It is no longer looking at what was the right decision; it is just looking at whether it was a legal decision.

**Senator O'SULLIVAN:** It more or less looks at process, to a certain extent.

**Prof. Reilly:** Exactly—usually it is issues of process. It is not issues of the merits of the decision. There is one ground where merits and legality blur—that is, if the decision was just so unreasonable and no-one could possibly have made it, then that can go to the legality. But I cannot see how that is going to arise—
Senator O'SULLIVAN: Isn't that a fairly standard scope of the courts to look at process rather than the merits to rehear the case.

Prof. Reilly: That is right.

Senator O'SULLIVAN: Would you agree that we would have to look at the decisions very thoroughly for people who have been convicted of child sex offences, manslaughter, people smuggling and domestic violence before citizenship is extended to an adult individual who has been convicted of such an offence?

Prof. Reilly: Absolutely, we should look at them thoroughly. I could not express an opinion on what was the right decision in those cases. I have not looked at those and obviously have not been privy to the particular cases that have been mentioned in the explanatory memorandum. Yes, of course, they are decisions we would want to look at very closely. If there was a sense that they were not in line with community standards, that is a reason to clarify what criteria the tribunal should be giving emphasis to.

Senator O'SULLIVAN: Would you also agree that it would be almost impossible to provide the tribunal with generic scope in these areas?

Prof. Reilly: You can certainly give directions around sexual offences, for example, to say in this kind of circumstance there would have to be absolutely compelling evidence for why that did not exclude someone. And if that was not the way the tribunal was approaching it, in the future they would have to approach it in that way.

Senator O'SULLIVAN: But would you agree that for somebody to produce an exhaustive guide to any tribunal, judicial or otherwise, to say follow this course in these circumstances—isn't that what we already do with the primary legislation that establishes those offences in the first place?

Prof. Reilly: No. There is scope for clarifying and giving more detailed directions because often the legislation is fairly general in its terms. So we can be more specific. But having said that, I agree that ultimately you have to have faith in the merits review process. You cannot get to the stage where you are virtually, through making directions, taking away the power of the merits review tribunal to make a fresh decision. But there are—

Senator O'SULLIVAN: In the normal course of events, we often have four or five tiers of appeal process with respect to decisions taken by tribunals and quasi-judicial bodies. In this instance, are you advocating that if the Administrative Appeals Tribunal makes a decision then that is the end of the road?

Prof. Reilly: Yes, that is how it works in almost all areas of decision making. We have three tiers of decision making. We have the initial decision, we then have merits review before a tribunal and, in some circumstances, we might be able to seek judicial review of that decision, but that would only be on legal grounds. There are only ever three tiers. What is happening here is we are potentially reducing it to two tiers, in some circumstances, where we are cutting out the AAT. So it is just the minister's decision, and then you could possibly seek judicial review of that. I would argue that in other circumstances we only ever cut out merits review if there is a real time concern—if decisions have to be made in a great hurry—or if they are about defence, national security and those types of really high-level decisions where maybe a tribunal process is not appropriate. I would argue that for a citizenship decision, which is a very important decision for those involved, obviously, we should have the best decision-making process that we have in other areas apply.

Senator O'SULLIVAN: I accept that, but you would accept also that it is a very important decision for the 25 million other Australians who are watching from the sidelines as we endorse someone to become a citizen of this country.

Prof. Reilly: Yes, but that is the reason why you would want to have a merits review process, to make sure that that decision is right. Sometimes that means that a decision might be made that the minister and some of those 25 million people do not like, but it is a question of what we think is the most effective and the fairest decision-making process. Since the 1970s we have sought administrative review of executive decisions as the way to go, and I agree with that.

Senator O'SULLIVAN: What would be your attitude if the process was as recommended with this bill—that is, the minister vetoes the decision of the administrative tribunal—but then allow the parameters of the minister's decision to be examined by judicial review, not just the process but to be able to appeal, and have the minister have to step up and put forward the grounds of his or her decision?

Prof. Reilly: That is putting in another tier of decision making, in a way. Going through the courts is a lot more expensive. There are all these processes that you have to follow. You get lawyers involved. I suppose the point of putting merits review in the tribunal was to avoid doing that in the courts. I agree that if you put that in then it is going to lead to an even stronger overall decision-making process, but you have to look at the costs of that. There is a reason we do not give the courts that responsibility, which is that it is going over the top.
Senator O’SULLIVAN: You and I could probably debate this for a bit longer, but we won't. Let me take you to page 2 of your submission—it is in section 1 ‘General Principles of Citizenship’. You state:
It is also important to acknowledge that most permanent residents applying citizenship have already been through—
this is the bit that is of interest to me—
a rigorous investigation of their identity and character.

Could you elaborate on what you understand to be the due process involved with this rigorous investigation of their identity and character?

Prof. Reilly: It is a very general statement and it does depend on the type of visas that people are applying for, but in every visa you obtain to come to Australia you have to declare that you are a person of good character. The decision making is through an officer in the Department of Immigration and Border Protection who looks at the application and determines whether someone gets a visa or not. For example, for a skilled migration visa a person has to have the skills they say they have, and for a temporary, say a 457, visa they have to be able to make it clear that they do not intend to stay long term. There is a process of application in which they have to fully account for their identity, who they are, and what they are doing in Australia. That is really what I meant.

Senator O’SULLIVAN: Let me raise a point with you. It is a matter, unrelated to these hearings, that I investigated last week. I had someone from the minister's department tell me that, notwithstanding the hundreds of thousands of people who fill out the form where they are asked to declare whether they are person of good character, almost nobody has ever answered, 'No.' So would you still continue to regard that as a rigorous investigation of their identity and character, when there is a self-assessment as to whether they are a person of good character or not?

Prof. Reilly: I am willing to concede that 'rigorous' is possibly putting it too strongly.

Senator O’SULLIVAN: This is where I personally see a flaw with respect to relying upon the due process prior to the citizenship. On the question of commission of offences by minors, we are talking about your definition of a minor as a person of 17 years or younger?

Prof. Reilly: Yes.

Senator O’SULLIVAN: Can you think of any circumstance where a person 17 years or younger might commit any type of offence that you, in your own mind, would then not want that person to be a citizen of our country, if we had an opportunity to make a decision on it?

Prof. Reilly: Do you mean: are there any offences that would not go to their character? Is that what you are asking?

Senator O’SULLIVAN: No. I can give specific examples, but I do not think it is needed. I am saying to you: can you think of no circumstance where an individual 17 years or younger could commit an offence and be convicted of that offence that would not persuade you to not want that person to be a citizen of our country?

Prof. Reilly: No. I think that there are offences that are very serious offences and certainly go to someone's character, but I do not think that is the only question here. We have to look at how long the person has been in the country, the extent to which Australia is responsible for creating a person and their bad character, their relationship with their family and what rights they have to go elsewhere in the world. We have to take that into account as well. But, sure, there are lots of offences that—

Senator O’SULLIVAN: Let me be blunt. Say you have a 16-year-old in our current circumstances who gets caught up in the ISIL arrangement and involves themselves in a kidnapping event where they behead an Australian citizen. You are okay for them to roll out on probation and go and get their citizenship confirmed? That is a really extreme example but it is—

Prof. Reilly: If we are talking about hypotheticals, I think we probably have to spend a lot more time just getting all the facts down. Are you talking about someone who was born here and has lived their whole first 16 years in Australia and then they go and do that? If that is the case, I would say we probably do have to take full responsibility for that person and we might want them in Australia so they are not beheading other Australians—put them in prison here.

Senator O’SULLIVAN: To me it is a moot point to define whether they were born here or whether they have just arrived a week ago. They are not citizens. This provision would prevent them, in certain circumstances, from becoming citizens. I am a retired detective, and nothing ever seemed black or white to me. To say, 'We won't have it,' versus 'We will have it,' I think, is a stark recommendation. But my point is made. Thank you for your contribution. In the first part of your paper, in your first paragraph, on the general principles of citizenship, you
point out the significant importance and the implications of someone becoming a citizen of our country. With your permission, I will use that in a speech in the near future.

Prof. Reilly: That is fine.
Senator O'SULLIVAN: I will quote you.
CHAIR: Professor Reilly, thank you very much for your help today. We do appreciate it.
Prof. Reilly: You are welcome.
EMERY Ms Xanthe Alana, Senior Solicitor, Immigration Advice and Rights Centre
MOJTAHEDI, Mr Ali, Principal Solicitor, Immigration Advice and Rights Centre
WILLIAMSON Ms Jessica, Human Rights Law Program Manager, Asylum Seeker Resource Centre

[10:39]

Evidence from Ms Williamson was taken via teleconference—

CHAIR: Welcome. These are proceedings of parliament. Parliamentary privilege applies. If you want to say anything in camera, you can let us know and we will have a look at it. It is a contempt of parliament if anyone should try to in any way prejudice you by any of the evidence you give to a parliamentary committee. We have received a submission from the Asylum Seeker Resource Centre, which we have numbered submission No. 1. We will go to Mr Mojtahedi first.

Mr Mojtahedi: I thank the committee for the opportunity to appear today and make submissions about the Australian Citizenship and Other Legislation Amendment Bill. The Immigration Advice and Rights Centre, IARC, established in 1986, is a community legal centre that specialises in Australian immigration and citizenship law. We did not have the opportunity to make a written submission to this committee. I apologise for that. Time did not allow for it. However, if the committee is minded, I might take a few short minutes to address some aspects of the bill. Would it be convenient for me to stop at each point for you to ask any questions you might have, or would it be convenient for me to just go through it?

CHAIR: Remember we have limited time. We have started a bit late, because we started the whole proceedings a bit late, so we will go a little bit beyond our scheduled time of 11, but I think you should just go through all of your points and then, Ms Emery, if you have anything to add, you can, and then, Ms Williamson, we will come to you. We will ask the questions after that, if that is okay. Bear in mind that we do need some time to ask you questions, although, as you have not got a submission, perhaps yours might have to be a little bit more fulsome. Fire away.

Mr Mojtahedi: Certainly. I might be able to assist as well with some issues arising from the previous evidence by the professor, certainly in terms of the character provisions.

CHAIR: Sure, and, if there is anything you want to put in writing to the committee afterwards, that is also in order, even though submissions are closed.

Mr Mojtahedi: If there are any issues I can address for the committee, I would be more than happy to.

Like the other submitters, we also have concerns about the introduction of exceptions to what might conveniently be referred to as the 10-year rule, for much the same reasons as the professor mentioned—that the purpose of that provision is to recognise the bond that forms between the state and a child that is born here and has spent their formative years here.

We also express concern about new subsection 12(9), regarding the abandoned child. New subsection 12(9) excludes citizenship for abandoned children in Australia if, at any time before the child was found, they were outside the country. The explanatory memorandum explains that, if a child is known to have been outside Australia, then the child has either arrived lawfully in Australia and its nationality and identity will be known, or it would have arrived as an unlawful noncitizen. The Convention on the Reduction of Statelessness provides:

A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.

We say the exclusion in 12(9) does not amount to anything more than speculation, firstly. There is at least a third possibility. The child may have been born in Australia, taken overseas and returned. We say that it does not amount to the proof which the bill or the explanatory memorandum might have suggested it does. Secondly, if the child's nationality or identity becomes known, the current provisions are adequate to deal with that circumstance.

If I could move onto the new section 13, this is perhaps more of an observation than a concern. New section 13 prevents citizenship by adoption when the adoption process was commenced after the child has turned 18, otherwise known as adult adoption. This new requirement, it is said, seeks to prevent adoption for an improper purpose. I am not familiar with family law, but I imagine the adoption process has sufficient checks to ensure that adoption is not for an improper purpose. I submit that is a matter that should be left to the family courts. What this will do is simply deny citizenship to genuine adult adoptions.

I was going to make a few points also about the character provisions. To avoid any confusion, and I expect there might be some, it is important that the committee understand that the character provisions in this Citizenship Act are different from the character provisions in the Migration Act. What is a good character in the Citizenship...
Act is not defined. I might come back to an issue that Senator O'Sullivan raised before: how could a person who has committed an offence possibly be recognised at a later point as being of good character? I will come to that, but it is important to understand that the term 'good character' is not defined; therefore, the courts have given the term its ordinary meaning. What the courts have said—this is a decision of Irving, where Justice Lee stated:

… the words "good character" should be taken to be used in their ordinary sense, namely, a reference to the enduring moral qualities of a person, and not to the good standing, fame or repute of that person in the community. The former is an objective assessment apt to be proved as a fact whilst the latter is a review of subjective public opinion.

And relevantly.

A person who has been convicted of a serious crime and thereafter held in contempt in the community, nonetheless may show that he or she has reformed and is of good character …. Conversely, a person of good repute may be shown by objective assessment to be a person of bad character.

The bill requires that application for citizenship by a child not only be subject to scrutiny for good character but also mandatorily require its refusal if the child falls under any of the categories under the offences provisions.

We say this is inconsistent with the conventions of the rights of the child. For this very reason it is inconsistent with the rights, the CRC, because it takes away the very important consideration by the minister of what is in the best interests of the child when making a decision relating to a child.

The next point I would make relates to the new section 33A(1)(b), which gives the minister power to revoke a person citizenship where that citizenship was obtained by fraud, if the minister is satisfied it should not have been given. The explanatory memorandum and certainly the text of the new section envisages that the minister may, for example, revisit a person's good character at the time they were registered at a later time. I raised this because the term 'good character' refers to a person's enduring moral qualities. It is not as though the minister missed the fact that a person had been convicted of a serious offence.

I suspect another issue that many appearing before you will raise is the significant lowering of the threshold, under section 34, where citizenship may be taken if the minister is satisfied that there has been fraud or misrepresentation. There are a few fundamental problems with this. The first is that fraud is a criminal matter. It is a serious matter. Currently, in order to have citizenship stripped from you for a matter of fraud, there needs to be a conviction. I have brought a copy of the Commonwealth DPP's prosecution policy which says that, in order for a prosecution to commence, there must be sufficient evidence to prosecute a case. It must be evident from the facts of the case and all surrounding circumstances that the prosecution be in the public interest and in determining whether there is sufficient evidence to prosecute a case, the Commonwealth DPP must be satisfied that there is prime facie evidence of the elements of the offence and the reasonable prospects of obtaining a conviction.

The changes take that quite high standard and reduce it to a state of satisfaction of the minister. Satisfaction really is any decision that would be open to the minister that is not illogical or irrational. We say there are two main problems. Firstly, it allows a person's character to be tarnished but more importantly it allows for a person's citizenship to be stripped. We say if anything this weakens the value of citizenship. I am happy to answer any questions about that or any other issues that arise.

CHAIR: Do you have anything to add?

Ms Emery: No, I do not other than going back very briefly to the 10-year rule for children—the proposed new provisions are mandatory. So there is no discretion, as there is in other parts of the Citizenship Act or in the migration provisions to allow for some unique or exceptional circumstances. For example, where a person has become unlawful for one day in the 10-year period they have resided in Australia the proposed new provisions do not have any discretion for a decision maker which would allow for the best interests of the child to be taken into consideration.

CHAIR: Ms Williamson, we have your submission. If you wish to add to or amend your submission, now is the time to do that. Otherwise, you may wish to give us a brief opening statement.

Ms Williamson: Excellent. I would like to do that, thank you Chair. I would like to thank the committee for inviting ASRC to give evidence to this inquiry today. ASRC is Australia's largest provider of aid, advocacy and health services for asylum seekers. Through our multidisciplinary model, we have a strong understanding of the experiences of asylum seekers under Australia's current migration system. With this knowledge and expertise, we oppose this bill in its entirety. Citizenship is the cornerstone of the Australian community, creating cohesion and providing certainty in the lives of individuals. Our system of citizenship has made Australia the strong and vibrant culture it is today. Cancellation of citizenship can have significant consequences for individuals. It can leave individual stateless, it can separate families and, in the case of refugees, it can result in their return to serious harm. We oppose this bill because it increases the range of situations where an individual citizenship can be
refused or revoked. It increases personal ministerial powers and reduces procedural safeguards such as merits review. Given the importance of citizenship and the potential harsh consequences of such decisions, in our view the proposed changes are not sufficiently justified. We note that the current migration scheme is robust and already contains a suite of visa cancellation powers from reasons of character, security and others which in our view more than adequately protects the security of the Australian community. We would also like to note that these changes are particularly alarming when read with the changes proposed in the resolving the asylum legacy caseload bill, also before a Senate inquiry, which seeks to remove a non-refoulement consideration before removing an individual from Australia. We oppose this bill because the new proposed section 52A undermines the importance of merits review by giving the minister the ability to set aside particular AAT decisions relating to citizenship.

We support the Public Law and Policy Research Unit's suggestion that the minister could make a direction to the AAT to address any issues about decision making. We believe this approach would be durable and resource efficient rather than requiring the minister to review the decisions made by the AAT in relation to citizenship. In light of this simple remedy, the proposed sweeping and significant increase in ministerial power is unnecessary. We note that the tabling of a submission by the minister in parliament is not a procedural safeguard as it does not provide individuals with procedural fairness. Judicial review of this ministerial power is also not a safeguard, because the courts cannot engage in merits review.

Turning to the issue of broader misrepresentation in the proposed provision, we echo the concerns of IARC set out in its oral submission just now relating to the lowering of the threshold to one where the minister need only be satisfied that the fraud or misrepresentation occurred. We are particularly concerned that the proposed changes may disproportionately and unfairly affect refugees in Australia. This is because we are concerned that the proposed amendments may capture situations that regularly occur for asylum seekers when they flee their home countries. For example, if a person obtained a tourist visa to come to Australia for the purpose of seeking asylum, we are concerned that that sort of situation may be captured and may be considered a misrepresentation. We are also concerned that asylum seekers who have fled by whatever means necessary, including providing false information in support of a tourist or other visa application to enter Australia, may also be captured. We are also concerned because we know many asylum seekers who, due to their vulnerability, can have false information submitted by unscrupulous migration agents on their behalf, and these changes will also capture that particular provision. We are concerned that refugees may be unfairly affected and may have their citizenship cancelled purely because of the nature of their having sought asylum in Australia.

Finally, we are also concerned about the ministerial decisions that are to be made non-reviewable. ASRC is concerned because there is an intent or a feeling displayed in the explanatory memorandum that the minister needs to protect particular decisions from the scrutiny of merits review. In our view, merits review is fundamental to the effective administrative decision making in Australia. When consequence involve rendering people stateless, separating families and being returned to danger, it is clear that procedural fairness and a high level of accountability and transparency in decision making is required. In effect, these decisions by the minister will sit beyond the reach of law and place what we say is too large an amount of power in the hands of one individual. We support also the comments made by the Public Law and Policy Research Unit and IARC in relation to the 10-year rule affecting children born in Australia.

We also support the Australian Human Rights Commission's recommendation that the committee seeks an extension of time for reporting in relation to this bill. We believe that, given the significant changes proposed and the absence of urgency laid out in the explanatory memorandum or other supporting materials, proper community engagement and consideration of these changes should be allowed.

**CHAIR:** I will start the questioning. I might have to leave for a little while, and Senator Collins will take over while I am gone. Ms Williamson, do you accept that the government is a bit overwhelmed by the huge number of cases they are dealing with in recent years? Things come to light for the bureaucrats dealing with these things that they were not aware of in the first instance. I expect—I do not know; I have not spoken to the minister or the department; we will do that later—that they are just overwhelmed by the number of cases coming before them. It is impossible, I suspect, to get the DPP to take fraud cases against a lot of people, so there are never going to be convictions because there just are not the resources to do that. That is the broad reason for this tightening, which in some instances does seem harsh, but I guess it has been promoted by experience that makes it very difficult to properly assess these things. That is just a general comment. Ms Williamson, could you perhaps correct me on those broad thoughts?

**Ms Williamson:** Certainly. In the ASRC's view, the current migration scheme has very thorough identity, character, and security provisions and actually already undergoes a very rigorous assessment of people's
characters and other associated issues, including identity and matters relating to fraud and misrepresentation. And we do not believe—in relation to these changes as they relate to citizenship—which needs to be something that is founded on certainty for a person—that the issue you have highlighted would justify those changes. But also, and interestingly, in my reading of the supporting materials, no reference is made to an overwhelming issue of citizenship matters currently before the minister. And that is a great concern of ours: that these proposed amendments, which are quite significant, do not actually seem to have that factual basis or evidentiary basis which we say is very necessary when considering the consequences of these changes. And we know that, at the moment, also before the Senate inquiry is the character and general cancellations bill, which also seeks to increase the range of circumstances where the minister can cancel visas.

So these matters are more than readily and adequately dealt with already. The proposed changes will extend the powers and ability to cancel visas, and we say that citizenship does not need that same level of scrutiny, because it has already occurred.

Mr Mojtahedi: I cannot speak for the Commonwealth DPP but, as I said, the prosecution guidelines suggest that if there is sufficient evidence, and if it is in the public interest, then that is a matter that they will take into account when considering whether to prosecute. If the matter is put to them and they decide not to prosecute, then there is either insufficient evidence or it is not in the public interest to prosecute.

Senator O'SULLIVAN: With respect, that is in conflict with your earlier submission. It also talks about the prospect of a conviction.

Mr Mojtahedi: Correct.

Senator O'SULLIVAN: That could have to do with the mechanics of, for example, bringing witnesses from Pakistan to determine that a document is a fraud; or just on a very practical, mechanical issue. Would you agree?

Mr Mojtahedi: Correct. I am not sure how that is inconsistent with what I said previously, but I agree entirely.

Senator O'SULLIVAN: No; that is what you said previously. It was absent from your response just now, is the point I am making.

Mr Mojtahedi: Yes; be that as it may: I am reading straight from the guidelines, which is what I did previously. But the simple point is, fraud is a very serious allegation to make against somebody. If someone accused you of fraud, you might consider taking legal action against them. You are not calling them an ugly person or a bad person; it is a serious matter. Now to bring that from the criminal standard of proof down to a state of satisfaction is, in our view, quite improper.

Senator O'SULLIVAN: I accept that.

Mr Mojtahedi: And again, as I said previously, the term 'satisfaction' has received some judicial consideration, and it would be open to the minister to look at the facts and make a decision that is not 'illogical or irrational'.

CHAIR: I agree with what you both have said—that sometimes the explanatory memorandum has not given, perhaps, the full reasons about why these things are being brought forward. We will talk to the department about that, and I hope you will follow it, or read the Hansard about that, and if you have other comments to make after the department talks about these things, please get back to us.

Senator JACINTA COLLINS: I am interested in the concern that we should allow for broader consultation and perhaps an extension of time, given other matters before the committee and before the parliament, and given the interconnection between those matters and this bill.

The government has argued that this piece of legislation is essentially an update of the act. A question from left field, I suppose, would be: do any matters come to mind that should be addressed in an update of the Citizenship Act? I will give you one example that comes to my mind, and that is the issue that the Chief Justice of the Family Court has raised, which is the interconnection between the Citizenship Act and family law here in Australia, most emphasised by the surrogacy matters that have been in the public realm in recent times. But, aside from that, are there other issues that we need to address?

CHAIR: You might have to take that on notice. But keep it under 100 pages, would you!

Senator JACINTA COLLINS: The opposition too has been concerned about the pace with which we have moved with this legislation. When it was dealt with in the House the government did not even allow the traditional time for it to go before the opposition party caucus. So the opposition's opposition has been characterised as, 'Well, we will consider it as it goes through the Senate processes'—this committee consideration. Can I take you to my earlier question. I think you were here when I asked about the application of the 10-year
rule, which I will be asking the department about as well. Is it your understanding that if a child is born in Australia before their parents gain a protection visa then they will be completely excluded from the 10-year rule?

**Mr Mojtahedi:** It depends on the status of their parents. As the law currently stands, visa status is irrelevant because the 10-year rule is really looking—as I tried to articulate before, I am not sure very well—at the relationship between the child and the country when the child has spent such a significant period of time here and considers Australia as their home and has spent their primitive years here. The amendments would have an impact really based on the status of not only the child but the parent. If at some point the child became lawful, obtained a visa, then the child would still no longer be eligible under the changes.

**Senator JACINTA COLLINS:** Then it really does depend on the initial status of the parent and whether they at any stage became non-lawful citizens?

**Mr Mojtahedi:** Yes. The reason for that is that, under migration law, which is perhaps outside the scope of this inquiry, the child really does get the status of the parent, at birth. For example, if the parent is in immigration detention or is an unlawful noncitizen, under the current circumstances, for reasons that are entirely beyond their control, that child, even having reached the age of 10, would no longer be eligible under the changes.

**Senator JACINTA COLLINS:** Do you know how long the 10-year rule has operated under the act?

**Mr Mojtahedi:** I do not. That is something I could take on notice if it would assist.

**Senator JACINTA COLLINS:** No, that is okay. I will ask the department later.

**Ms Williamson:** I think it may be since 1986 and, prior to that, birth in Australia, for citizenship.

**Senator JACINTA COLLINS:** That would make sense. Your understanding would be that, under this proposal, there are no safeguards against statelessness for such people?

**Ms Emery:** That is probably our interpretation of the bill as well. As I said, it is mandatory, so if a person has been unlawful or their parents were unlawful then they are not eligible at the age of 10, even if they have no other country.

**Mr Mojtahedi:** I suspect subject to one provision, and that is section 21(8) of the Citizenship Act, which provides that if a child is born in Australia and is not a national or citizen of any country and has never been a national or citizen of any country and is not entitled to the nationality or citizenship of any country then that child may be eligible for Australian citizenship.

**Senator JACINTA COLLINS:** They can apply—

**Mr Mojtahedi:** They can apply under 21(8). Those are the statelessness provisions in the Citizenship Act.

**Senator JACINTA COLLINS:** Going back to the revocation of citizenship, have you had an opportunity to look at the department's submission?

**Mr Mojtahedi:** I have not.

**Senator JACINTA COLLINS:** I thought I would bring it to your attention to see whether there are any further comments you might want to make subsequently. Again, following the earlier discussion, there is really no case made for a large caseload of matters being dealt with—

**Mr Mojtahedi:** Sorry, to support what proposition?

**Senator JACINTA COLLINS:** This is about the revocation of citizenship.

**Mr Mojtahedi:** Is that under the fraud provisions, or under 33A?

**Senator JACINTA COLLINS:** Under the fraud provisions.

**Mr Mojtahedi:** I cannot speak on behalf of the department.

**Senator JACINTA COLLINS:** It talks about the intent, but not really about the case for why such provisions might be needed.

**Mr Mojtahedi:** The only point I would make is that, even if there was a higher caseload, it does not get around two fundamental issues. The first is, there is an accusation of fraud against a person. That needs to be taken very seriously. It should not be put to the level of satisfaction. And secondly: you are not taking away someone's car, you are not taking someone's sports gear; you are taking away their citizenship. That is an important matter. And as I said in my submissions, this in my view undermines and weakens the whole concept of citizenship—to be able to have it taken away so easily, and that that decision needs to be nothing more than a state of 'satisfaction'; something that is not is not 'illogical or irrational'.

**Senator JACINTA COLLINS:** Okay, thank you.
Senator O'SULLIVAN: Let me just pick up on this point: I accept the thrust of your argument that this should not be included in the act. But to take an example: Gulliver washes up on our beach from Lilliput, he wakes up, and we drop a clipboard in front of him and ask him to fill out some forms. He puts his name down as Ted Smith, he does not say that he comes from Lilliput but that he comes from Saturn, and he says he is of good character; he denies that he was a mass murder in a former life just three tides away from arriving on our beach. The Director of Public Prosecutions is not able to prosecute the case, because it is difficult for them to get someone from Saturn down for the court hearing to prove that Gulliver is Gulliver—

Mr Mojtahedi: That would suggest—

Senator O'SULLIVAN: I like these extreme examples because it gives you a really clear chance to support your argument. So my question to you is, in those circumstances, are you happy for Gulliver to be sworn in as a citizen of the nation as Mr Smith—and life will go on?

Mr Mojtahedi: Sorry; are we still talking about the fraud-type cases, where citizenship can be strict?

Senator O'SULLIVAN: Yes. We are talking about a situation where, within 10 years, we find out that Smith is actually Gulliver—shock, horror—and the minister has to do something about revoking this gift of citizenship. And Gulliver is a mass murderer. Mind you, had I had more time I could have given you hundreds of actual cases post- the Second World War, where this occurred in nations all across the earth and where people were given new identities on complete and absolutely false documentation.

Ms Williamson: I can say that, in my experience, that does not happen now because the identity verification processes for anybody seeking permanent residency in Australia, and particularly for protection visa applicants such as Gulliver—maybe that is the form he filled out—are incredibly rigorous. I have assisted a client that did not have his passport, and we went to six identity interviews. We had biometrics completed, he went through an ASIO assessment, he completed his Australian and foreign police checks, and he actually went through that protection visa process for over three years.

Senator O'SULLIVAN: I am happy to hear that, Ms Williamson, because these provisions will not ever be enacted, will they? They will not be applied.

Ms Williamson: Well, that is part of the point—in the situation, let us say, of my applicant, he did satisfy all of those identity and other requirements already, but he did actually arrive on a false passport. So we are concerned that, once he has already jumped all of those hurdles involved in the protection visa process, he may then be granted citizenship but that citizenship may not be certain, because at some future time the minister may become satisfied again that that misrepresentation warrants a revocation of his citizenship. And how many times does that person—

Senator O'SULLIVAN: But in your case, Ms Williamson, are you be happy for Gulliver to be Smith—and life just goes on?

Ms Williamson: I do not think it is that straightforward. I think that Gulliver would be going through a series of identity and other requirements—fingerprinting, retina photographs, foreign police check requirements, and a whole host of other things. It certainly is not so simple that he would wash up on our shores and be given citizenship. He first needs to be given some status, and that requires a whole host of hurdles for him to already jump. I am very confident in the processes of our government, ASIO and our police. In my experience, if there are some issues around identity, they do detect those—

Senator O'SULLIVAN: They will, but, again without getting argumentative, let us assume that they do not. When they do not, they will not be able to do anything about it.

Ms Williamson: I am concerned that, in the case of my applicant, he may have satisfied all those hurdles, but his citizenship that is later granted will not have that certainty that it needs for him to move on with his life. He may at any time be subject to a minister's decision to revoke his citizenship.

Senator O'SULLIVAN: Or not. If you read the memorandum, it is a discretionary provision using the word 'may' frequently. I, personally, would find it astonishing if a minister of the Crown, presented with circumstances that showed this was a genuine individual who was not involved in the fraud and the fraud was of a nature where it did not bring into account this national interest test, exercised this section.

Ms Williamson: The power would allow for it, and that is concerning.

Senator O'SULLIVAN: And thank the Lord for that, I say.

CHAIR: Ms Williamson, in the case you mention, if the getting of the false passport were excused—and I can think of 100 ways where that would be the case—and it became obvious that the passport was obtained in extreme circumstances, the minister might then say, 'This is not the sort of person we want as an Australian
citizen.' That is what I think this is getting at and I follow Senator O'Sullivan's suggestion that the minister is not just going to sit there and say, 'I don't like the sound of this guy's name, so I'm going to take away his citizenship.' There would have to be some pretty extreme reasons for the minister to make that decision, wouldn't there?

Ms Williamson: When we consider the fact that the minister is also proposing in this bill the power to set aside AAT decisions, I wonder how much this minister or future ministers may accept the final decisions made by, for example, the Refugee Review Tribunal in the circumstances of my applicant, because he is proposing to do just that in the AAT—to set aside a merits review decision. So I am not really satisfied that it would be highly unlikely or used sparingly or in these very extreme circumstances. When you read what the minister is looking to do in other parts of the bill, it looks as though he wants the power to make what he believes is the right decision, regardless of other processes of scrutiny that have taken place.

CHAIR: I accept your argument, technically. I do not think any minister—even, dare I say it, a Labor minister—would capriciously use that power.

Senator O'SULLIVAN: Of course they would.

CHAIR: With the AAT decisions that are mentioned in the explanatory memorandum, of course, again we do not know enough about those instances, but, if the AAT has left in convicted child sex offenders, the minister, I think, would be reflecting community standards in not allowing that. But I guess what has to be looked at and what the AAT may have looked at is: where was the conviction? Was it in some country where they do not quite have our system of law and proof and et cetera such that maybe it was a trumped-up charge?

Senator O'SULLIVAN: I do not want to labour on this much longer either, but, taking the point from Senator Macdonald, are you aware of the case studies where another nation—a state itself—has taken to producing false documentation including passports and entire life histories that are impenetrable to scrutiny as it sends agents around the world? In fact, our own country was embarrassingly involved in an incident like this some years ago.

Do you accept that there may well be occasions when there is a body of documents or materials that simply cannot be penetrated by the level of scrutiny that we apply in these circumstances?

Ms Williamson: I do not profess to be an expert on all issues relating to citizenship, but I understand there are other matters that relate to cancellation or revocation, in criminal issues and so on. That might be a more appropriate use of that power and will involve some proper level or standard or threshold of proving that. As has been mentioned, given the seriousness of revoking citizenship when the threshold is only satisfied, I would say that if it is something that the minister needs the power to do then I do not see the need to simultaneously lower the threshold to do that.

Senator O'SULLIVAN: Thank you for that answer—it was useful—but my question was quite simple: are you aware of public cases where the states of other nations have engaged in the process of producing bodies of documents that would not be penetrated with scrutiny of this type?

Ms Williamson: I am not, unfortunately, no.

Mr Mojtahedi: I was just going to make one additional point, although I suspect it is quite clear. The bill also proposes that the fraud or misrepresentation may have been committed by any person—a third person—and need not have constituted an offence.

Senator O'SULLIVAN: I accept that, but I am assuming that the safeguards there rest in the good faith of the minister, who will consider those issues.

Mr Mojtahedi: Be that as it may, the point I would make—was it Gulliver?

Senator O'SULLIVAN: Yes, Gulliver. Don't tell me you weren't exposed to Gulliver in your childhood!

Mr Mojtahedi: I was not sure what character you used. I thought it was Gulliver but—

Senator O'SULLIVAN: The big guy on the beach with all the little people crawling over him.

Mr Mojtahedi: The big lad, sure.

Senator JACINTA COLLINS: A fairytale.

Mr Mojtahedi: I am familiar. The point I would make is this: if the Crown decides not to prosecute Gulliver because there is insufficient evidence, then all the minister has at that point is an allegation, nothing more.

Senator O'SULLIVAN: I would be happy, if you want to put a submission to us, to take into account that exact provision where the DPP have decided there is insufficient prima facie evidence and, as a result of that, the prospects of a conviction would be remote. You should submit on that but not absolutely to wipe this out. For example, in the point I have made to you, imagine, could you, getting the Russian authorities today—not even 30 years ago—to cooperate with you in terms of you trying to probe the identity of some individual? It would be
impossible. So I say there needs to be some safeguard. I am happy to listen to variations of it, but your submissions have been red lines, strike it, not some alternative that might take into account very genuine circumstances. Or Ms Williamson—she struck the bill.

Mr Mojtahedi: In fairness, all we have said is that the bill—certainly this provision in its current form—is unsatisfactory.

Senator O'SULLIVAN: I have already qualified what I said. I said Ms Williamson said to strike the bill.

Mr Mojtahedi: The other point I would also make is that I obviously cannot speak for the Commonwealth, for the Crown DPP. I do not know the circumstances. All I have in front of me is their prosecution guidelines, which I have read out, and I am happy to hand that up.

Senator O'SULLIVAN: It is the last part of that that is of concern to me. I am talking about the mechanical aspects of the prosecution. I am a retired detective of 16 years. I understand that sometimes guilty people walk free because we cannot get a witness down from Papua New Guinea for the weekend, let alone from Russia or some other point of the earth. And I do not want to make this about Russia, necessarily. Could I ask you this question. You are a lawyer?

Mr Mojtahedi: I am the principal solicitor of IARC.

Senator O'SULLIVAN: This is a pretty simple question, and it is not a trick question. In all of your years, have you had clients not tell you the truth? Have you had clients give you instructions that—forget about what your view was—eventually proved to be not true?

Mr Mojtahedi: I have had instances where I have found out my clients have misled me and I have withdrawn my representation.

Senator O'SULLIVAN: So, when we have the case study put to us of Pa from Myanmar, isn't it fair to say that this case study is what Pa has told someone?

Mr Mojtahedi: Sorry; which case study are you referring to?

Senator JACINTA COLLINS: It is in a different submission.

Ms Williamson: That is in my submission.

Senator O'SULLIVAN: Ms Williamson, do you accept that that is really a reflection of what Pa told someone?

Ms Williamson: Sorry; what is the question? Is it what he has said in terms of his claim?

Senator O'SULLIVAN: Pa makes claims in here. I see that. That to me is probably a very accurate representation of what Pa has said, but has that matter been tested before any sort of court or tribunal or in a thorough investigation?

Ms Williamson: Yes. He went through a primary decision stage at the department, where he was unsuccessful, and then he was considered at the Refugee Review Tribunal, where they made a finding that he was a refugee. But it was sent back to the department for the usual character assessment—so that would include the ASIO assessment, security and other identity requirements—and it satisfied all of those from the department's point of view.

Senator O'SULLIVAN: But at no stage during the journey did Pa know that these documents had been submitted, until it was brought to his attention by the department?

Ms Williamson: He was honest when he came to Australia about what had happened, and it was part of his story for fleeing Myanmar. It was the means of him leaving the country, which is a very common circumstance for asylum seekers.

Senator O'SULLIVAN: So, before Pa left, he was aware that another person had put false information in documents that he knew that he was going to rely upon at the other end for citizenship in Australia?

Ms Williamson: In this particular example, Pa could not read English and so he did not understand what was being submitted, but he did sign the paperwork, because he was very fearful for his life and needed a means of fleeing Myanmar and avoiding arrest and torture.

Senator O'SULLIVAN: Is it your view that in those circumstances—we have established that if he goes back he will be arrested and tortured—a minister of the Crown would invoke this provision and send Pa back home?

Ms Williamson: We are not sure, and that is part of what I have put in my submission—that we are concerned that Pa, having satisfied the protection visa requirements and been granted a protection visa, may later then, once
he does get citizenship, have that citizenship revoked, potentially for reasons of misrepresentation in his visa application to enter Australia.

Senator O'SULLIVAN: This is my final question. If Pa had been a mass murderer from Myanmar and all sorts of other things—you might shake your head, ma'am, but it is a valid question and I am entitled to ask it of Ms Williamson. No, I do not think I will bother pursuing the line. I am pleased you are here to be humoured on these important issues. Thanks, Ms Williamson. Unbelievable!

Mr Mojtahedi: Can I make one point before we close?

Senator O'SULLIVAN: Not to me. If you want to sit there laughing when I am trying to make a valid point on this, there is no point in your coming back to interrogate me on my view.

Mr Mojtahedi: May I make a submission?

ACTING CHAIR (Senator Jacinta Collins): Yes, you may.

Mr Mojtahedi: The only point I would make is I that I would just express some caution. I understand that, before, the chair and, I think, Senator O'Sullivan made this point: how could you possibly say a child molester or a murderer could ever be a person of good character? The point I would make is this. Again, I will revisit the Irving decision, which talks about the concept of good character. It says: 'A person who has been convicted of a serious crime and thereafter held in contempt in the community nonetheless may show that he or she has reformed and is of good character.' So they are looking at the person's standing at the time they are considering the application. A person may have committed some offence in the past. The concept of good character should not hold them to that act. It should consider what their character is today. That is really all I wanted to say.

ACTING CHAIR: I think we need to close on that. I thank witnesses for attending that panel this morning.

Proceedings suspended from 11:29 to 11:39
EDGERTON, Mr Graeme, Senior Lawyer, Australian Human Rights Commission

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

CHAIR (Senator Ian Macdonald): Welcome. We have your submission, submission No. 4. Thank you very much for being here, Professor. I think you have been to enough of these inquiries to know the rules so I will not waste time repeating them. As I mentioned to you privately, we probably should get a special bedroom for you. Where this committee goes, you are a regular before us and we appreciate the contribution that you and your commission make. If you want to make any alterations or amendments to your submission, now is the time. Apart from that, would you make an opening statement as usual and then subject yourselves to some questions from the committee.

Prof. Triggs: Thank you, Senator Macdonald. We appreciate the opportunity to appear before this Senate committee. It is very important for us to put into oral form the broad arguments we have made in a written submission. That submission is relatively detailed, especially given the time available. I would like to make some opening remarks of more than an abstract kind to give you some sense of where we are coming from and to begin with the idea that Australians are bound by shared values and beliefs. When new citizens make the pledge of commitment, they declare that they share the democratic beliefs of Australia and its people and that they will respect Australian laws, rights and liberties and that they will uphold and obey those laws. So it is not a one-way street. It is important that our citizenship laws are consistent with our democratic values and with the rights and liberties that citizens pledge to respect.

Central to that democratic system is the rule of law. At its most basic, the rule of law means that all people are subject to it. Decisions that affect the rights of individuals should be made in accordance with clear, predictable legal rules that apply to everyone. By acting in accordance with the law, decision making becomes consistent. Decisions should not be subject in principle to the arbitrary individual discretion of particular government officials. This is especially true in relation to those deciding to become Australian citizens. What is at stake is participation as a full member of the Australian community with all the rights and obligations that entails. Over the last 40 years, administrative decision making in Australia has been improved through the system of merits review. If this person is dissatisfied with the decision by government official, that person can go to an independent tribunal which stands in the shoes of the original decision maker and considers whether the decision was correct and preferable.

Many aspects of the bill we are considering today represent a significant shift away from that 40-year trend and a shift away from a rule of law approach by increasing the discretionary power in the hands of the minister to make decisions about who should and who should not be an Australian citizen. The increase in individual discretion and a reduction in independent review rights raises the potential for arbitrary and idiosyncratic decisions. That impacts on the rule of law and the human right to have disputes about legal issues determined by competent, independent and impartial tribunals. The amendments would reduce certainty about citizenship decisions by allowing the minister to revoke citizenship long after it has been granted. That element of citizenship we think is a very important one.

May I give you four very brief examples of the centralisation of discretionary power. The first is that the minister has the power to revoke a person's citizenship if he becomes satisfied that there was a relevant fraud or misrepresentation. This can be done for up to 10 years after citizenship is granted. It would no longer be necessary for allegations of fraud or misrepresentation to be proved in a court. Secondly, for people who require citizenship by descent because they were born overseas to an Australian citizen, the minister can revoke that citizenship if he later becomes satisfied that the person was not of good character at the time their citizenship was registered. Thirdly, the minister can set aside decisions of the Administrative Appeals Tribunal that deal with whether a person was of good character. This entirely reverses the process of merits review by allowing the executive to overrule decisions of an independent tribunal. Fourthly, the minister can prevent administrative decisions about citizenship from being reviewed on the merits by the Administrative Appeals Tribunal, by making the decision personally and stating that the decision was in the public interest. These proposed amendments make it particularly difficult for certain classes of persons to become citizens: the children of refugees; people with mental illness who come into contact with the criminal justice system, which is a matter of growing concern to the community in our experience; and, finally, those children that the minister considers are not of good character.

You have been discussing the 10-year rule. There is of course a proposal to wind that back. The bill provides that children who were born in Australia and live here until they turn 10 become citizens on their 10th birthday. The amendments would mean that some 10-year-olds would no longer qualify for citizenship, depending on their visa status. The commission has two concerns about this. First, the government has not put forward any evidence...
that shows an abuse of the 10 year rule, and all good law-making depends on identifying the mischief on the basis of objective evidence. Second, the amendments to fail to take into account that it is highly likely that after people have lived here continuously for 10 years they will be integrated into the Australian community.

The last comment I would like to make in these opening remarks relates to the proposal to conduct criminal record checks in relation to children to assess whether they are of good character. Many Australian jurisdictions have laws that limit the use that can be made of children's criminal records. Some provide that children's criminal records lapse when they turn 18. The Australian Law Reform Commission considered the issue and suggested that children should not be branded in adulthood by youthful mistakes. Very little detail has been provided about how children's criminal records will be obtained and what use will be made of them in determining whether children are of good character. The commission is concerned that these changes may have significant impacts on the ability of some children to become Australian citizens.

**Senator O'SULLIVAN:** Thank you for your submission. It is quite comprehensive, having regard to the time frame. I think we can move across my issues fairly quickly, because you have had the benefit of having been here when I was examining some of the previous submitters. You say that the criminal history of children lapses. Are you sure that that is exactly what happens or is it that they are sealed and cannot be used?

**Prof. Triggs:** I might ask my colleague Graeme Edgerton, who is the senior lawyer from the Human Rights Commission advising on this matter to answer that question, because, frankly, I don't know.

**Senator O'SULLIVAN:** My view is that it is not expunged but sealed and cannot be accessed or used.

**Mr Edgerton:** I think the position would differ from state to state, but even if it is sealed so it cannot be used the reason for that is that children should not have previous mistakes used against them in, say, future criminal proceedings. We would say that there is an analogy here with citizenship. If you are not going to use children's criminal records when later on you are considering the way in which they should be treated in relation to future criminal charges, probably the same issues would arise when you are considering whether they should be entitled to citizenship.

**Senator O'SULLIVAN:** But you would accept, would you not, that are some exceptions to these rules? For example, if a child had—let me again use my exaggerated form, because it helps get to the point very quickly—25 convictions for sexual assault on minors during the course of their 16th year, that would be a different set of circumstances if they wanted to apply to be an assistant at a kindergarten in their 17th year. I understand the principle, but you would agree that there are circumstances where there might be occasions when there is an exception to the rule?

**Mr Edgerton:** I think that is right. There absolutely are, but I don't think that this bill deals with those differences.

**Senator O'SULLIVAN:** We spoke offline, Professor, about the right of the minister to veto the tribunal's decisions. An earlier witness talked about the cost of this to a subject person, for example, who wanted to appeal the minister's vetoing of a tribunal decision. If the state wanted, in what I imagine would be those fairly rare circumstances, financially to support the applicant in their appeal, would that satisfy you that we would then have a sensible level of merit review processes in place?

**Prof. Triggs:** Firstly, I am really encouraged by the fact that you are looking for ways that acknowledge the importance of scrutiny and independent processes and judicial review. I think that is important, because that is really what we would hope this committee would start to think about. These provisions at the moment are too stringent and it is absolutely vital that a minister—who of course has a right to make decisions in matters that concern him as an elected representative, but at the same time the democratic process requires checks and balances. You appreciate that in terms of the opportunity for judicial review. That obviously would be better if it were easier to make that appeal. However, I understand the right of judicial review would only apply in relation to certain jurisdictional matters of jurisdictional error. So it would be very limited circumstances, and I believe there would not be a right to reassess the question as to whether a character decision had been made appropriately. So I am not sure that you are really getting to the core problem.

**Senator O'SULLIVAN:** No, I understand it, but we are law-makers, and if there is a law that prevents proper merit based reviews occurring, we can surely amend the relevant laws to make that possible in this instance. Might I say that there seems to have been, through all the submitters so far, some recurring issues—four or five, in fact. In most instances the submissions have been to red-line or strike them out. Ms Williamson, a previous witness, just does not want the bill to proceed. Would you be more content if there were more rigor, more guidance, parameters set, measures that allow the minister of the day to refer what the intent of this was? For example, if Fred cannot speak English and his mate in Somalia wrote the paper up for him for some reward,
because Fred's wife was staying behind and he was in love with Fred's wife, are you saying that the minister could not in those circumstances apply this quite serious revocation of citizenship?

**Prof. Triggs:** With regard to matters that are really serious, the current law would allow that to be dealt with. The DPP would have to consider that and would presumably bring a prosecution. We think that serious, egregious cases of the Gulliver kind or others that you have been referring to, all of which are important, are matters that could be currently considered under the law as it exists.

**Senator O'SULLIVAN:** Except I made the point—and I treasure your comment—that the burden of my question to previous witnesses in the Gulliver case was in relation to the Director of Public Prosecutions not launching a court action simply because he or she knows that it could not be mechanically discharged—they cannot bring the witnesses, they cannot gather the physical evidence, the Russian government refuses to cooperate or the Lilliputian government refuses to come. I have seen not once, twice or dozens of times but hundreds of occasions where prosecutions have not advanced—someone has died, a witness has had a stroke and therefore they cannot give the evidence required to underpin it. So I do not accept that the DPP not proceeding on a fraud case, for example, is a reflection that there was not a fraud.

**Prof. Triggs:** Obviously your professional experience demonstrates that there are real problems with the ability of the DPP to bring prosecutions, and I think we do accept that. It is not difficult to respond to that legislatively by looking at, for example, reconsidering the nature of evidence, reconsidering what is admissible and what is not. There are ways of dealing with it. But, to come back to your core question, 'Are there other ways of managing the exercise of discretion by the minister?' I think certainly if it were possible to have guidelines that would regulate it, that would be a step in the right direction. In other words, it could not be a discretion that could apparently be exercised in a capricious manner—not that I am accusing any minister of doing that; I think it would be done in good faith.

**Senator O'SULLIVAN:** That would be beyond question.

**Prof. Triggs:** But the difficulty is that, as a matter of democracy and as a matter of proper process, there should be some way of challenging that decision if it has been made for reasons that are not appropriate.

**Senator O'SULLIVAN:** All right. So then—and this was my lead-in to the exchange that we have just had—as a principle, if there were judicial safeguards—for want of a better term; there may be other types of safeguards—which are capable of being exercised on the basis of merit, on the decisions of the minister in these areas, and which would mean that the crown might support financially the efforts of the appellant, would that satisfy the concerns in your submission? Would that take you some way towards being more comfortable? And I assume that we are not dealing with dozens of cases each day where the minister is going to revoke someone's citizenship because the AAT found that, for example, child paedophilia was not serious enough.

**Prof. Triggs:** Yes. In fact, if there is any form of merit examination or review of that decision, we would see that as a big step forward. It would meet one of our most serious concerns. I think, underlying our concerns, is the fact that this is being so rushed. The kind of thinking that you are developing is the kind of thinking we would like to see develop over the next few weeks, if it were possible to do so—so that we would have an ability to address the problems that the government quite correctly perceives in upgrading the capacity to deal with these issues, but so that it is done in a way that preserves the balances and the proper checks. And anything that would improve access to merits review in a way that makes sense, in allowing the minister to exercise a discretion, would be valuable.

Can I make one other point though, and I think it is a practical point—that is, that the minister does have a huge number of personal decisions to make. One of our concerns is that—and I think the Chair has referred to the sheer volume of work that not only is existing at the moment but which is coming down the track, with 31,000 asylum seekers waiting to be assessed—the reality is going to be that the minister is probably not going to be able to put his mind to very many of these cases; maybe some, but where he or she does, then obviously the guidelines and the opportunity for some form of merits review on those kinds of issues will be extremely valuable and we would be very happy to see it.

**Senator O'SULLIVAN:** Without burdening you further—and I am speaking for myself here, but the balance of the committee might indicate what they think—I will say that if you had any thoughts which could progress that line of approach but which are not in your submission, I would be more than happy to receive them from you. And if the committee so indicates, I would be more than happy to make a point to circulate that to other members of the committee.

**CHAIR:** Are you talking about some sort of review of the minister's unfettered decision?

**Senator O'SULLIVAN:** I am.
CHAIR: But that is really where it is at the moment, under the current law, isn't it?

Prof. Triggs: That is what merits review does.

Senator O'SULLIVAN: No, but it is not there now—particularly where the tribunal has reviewed an appeal on a decision by the minister, the minister can then veto that; that is the end of it, except for a review as to whether the minister remained within due process. So they cannot look at the merits of his decision. And this is a slight extension of that: to open it up for the Court of Appeal—and the argument earlier was that these people cannot afford this. I am saying that, in these circumstances, because it is of such significant importance—without pre-empting what we may decide—the minister might consider funding that appellant, or assisting with the funding of that appellant, so that that kind of appeal is able to happen.

Prof. Triggs: We would certainly be pleased to take up the opportunity to think this through a little bit, and to make some suggestions, provide some clarity as to exactly what the current position is, and suggest how we could meet our concerns in a way that also meets yours. So, if you would be happy, we would get that to you as soon as we reasonably can.

Senator O'SULLIVAN: Thank you for that.

Senator JACINTA COLLINS: Professor, thank you for a very thoughtful and detailed submission, given the time constraints. The discussion that you were just having, I assume, is about a less-than-ideal option, but hopefully still a method to redress the approach that has been taken with this bill around a decline in the use of merits review. Can I take you back to your comments about what would have been more ideal—especially in view of my understanding of how the government presented this bill in the House of Representatives, which was essentially as an update of the act. I am not aware of any consultative process the government has gone through, as opposed to what I presume is advice from the department, to update the act. Are you aware?

Prof. Triggs: No, we are not. We are particularly alert all the time because of the work that we do in the issue in relation to asylum seeker children. This bill appears, in a way, to have anticipated the judgement of the Federal Circuit Court in the baby Feroz case. In fact, the result in that case was along the lines that the government would have wanted in any event. We have been keeping a very close eye on this because of our concerns for the numbers of children born in Australia of asylum seeker parents. That is obviously a matter of deep concern to the government, but we have certainly not been consulted at all on that or any other issue in relation to this bill.

Senator JACINTA COLLINS: Or in relation to updating the Citizenship Act?

Prof. Triggs: No, we have not been approached, on the basis that this was a matter of urgent legislative reform.

Senator JACINTA COLLINS: Sorry, I am addressing the issue aside from the urgency issue just at the moment.

Prof. Triggs: Or of the need at all—yes, the word 'urgent' is not really necessary to the argument. The point is that, if the law were no longer appropriate and the Citizenship Act needed reform, we have not been consulted in relation to that.

Senator JACINTA COLLINS: Are there any other areas that you are aware that need addressing in an update of the Citizenship Act?

Prof. Triggs: We did have the benefit of hearing your question earlier, and one thing that has been suggested is possibly looking at the surrogacy issue. That is, of course, an extremely difficult matter that we have not really played any role in particularly at the Australian Human Rights Commission, but we can see it as a matter we will have to deal with next year. It is not going to go away. It may very well be that, if you were going to seriously reform the Citizenship Act, for various reasons—conformity with other legislation, for example, or to bring the standards to approximately the same level—it would probably be useful to at least look at the surrogacy question in relation to citizenship as another matter that should be dealt with through the reform process.

Senator JACINTA COLLINS: Are there other areas?

Prof. Triggs: That is the only one that came to mind immediately, but it might be worthwhile for the committee to look at the Family Law Council's recommendations for reform in relation to the Citizenship Act. Again, these things take a lot of time and, given that this has been done at such speed, it is a pity in the sense that there is a lot of work being done in related areas where you could have a thoughtful process that would take in, for example, the Family Law Council recommendations or consult with bodies like ours, the Law Reform Commission and others in the community to get a more coherent approach to upgrading and updating the citizenship law to the extent that it is identified as necessary.
Senator JACINTA COLLINS: Have you had an opportunity to look at the department's submission to the inquiry?

Prof. Triggs: I have not.

Mr Edgerton: I have, briefly.

Senator JACINTA COLLINS: Are there any points other than the points that we have discussed here this morning about the lack of evidence, so to speak, for various of the changes? Are there any other comments that you would like to make to that submission?

Mr Edgerton: To expand on the question of evidence for particular changes?

Senator JACINTA COLLINS: Yes.

Mr Edgerton: I think one thing that the Australian Citizenship Council had identified in its report in 2000 was that you would need to have strong evidence of abuse of the 10-year rule before you decided to change the 10-year rule. It is one thing that is discussed in the explanatory memorandum and also in the department's submission. There is not a lot of data in either of them. I think maybe the department's submission is a little more detailed. They suggest that around 400 people a year apply for citizenship under that 10-year rule.

Senator JACINTA COLLINS: None of the countries really seem to relate to what you might anticipate as countries of origin for asylum seekers, if I recall.

Mr Edgerton: No. I am not sure whether the issue that the department is identifying is perhaps people overstaying their visas, but I think that the point that the department were trying to make—and I do not want to put words in their mouth—but is that the point that the department were trying to make— and I do not want to put words in their mouth—was between people applying under the 10-year rule and people applying for ministerial intervention in relation to asylum seeker cases. They seem to say there was a correlation in the nationalities of people in each group, but I think that that is a far cry from saying that the same people were applying for both. There is not a lot of detail in the department's submission about the way in which those numbers have been trending over time. In our case study in our submission we refer to a particular example of one family that was in that situation with a family of four. The youngest son was an Australian citizen because he was born in Australia, and he was now 13 years old.

CHAIR: Is this the Pak family?

Mr Edgerton: Yes.

CHAIR: Is that mandatory under the new bill—that the child would have to go? Or is it ministerial discretion?

Mr Edgerton: I think under the new bill the child would not automatically become an Australian citizen. But the family, if they did not have an Australian citizen child, would be at risk of being removed from Australia.

CHAIR: I think this what this is an attempt to try and address: a very small minority have the child in Australia and that then becomes their grounds to stay in Australia themselves. I think that is what this is trying to address.

Mr Edgerton: I think it is. And I think that there are very different questions about whether you address right at the start of the process, when they have only just arrived in Australia and maybe just overstayed their visa, as opposed to 10 years later where there are substantial family links and community links within Australia.

CHAIR: Again I am assuming—and I am assuming a hell of a lot, because we have not heard from the department and, as people have pointed out, some of their background has not been terribly fulsome. I am assuming that in cases it takes 10 years to work out that these people have been here illegally for 10 years. I am only guessing. Is there much of that happening that you are aware of?

Mr Edgerton: I think that might be a question for the department.

CHAIR: Yes, certainly it would be.

Mr Edgerton: But certainly in the Pak family case we were provided with submissions from the department which suggested that the number of ministerial intervention applications for that particular group of people—for that particular ethnic group of people—had been declining over time. Coming back to your question about evidence, I think it would be interesting to know how many applications have been made, are they increasing, and are the same people applying for citizenship for their children under the 10-year rule as are applying for ministerial interventions. Or is there just a correlation between ethnic groups?

CHAIR: Before you get off the Pak case, it is not mandatory that the child would go back. In those circumstances, I cannot imagine why any minister would be interested—or that it would even come to his attention. It is one of those things—
Senator O'SULLIVAN: Could I ask a qualifying question, Chair? This denies the child the default citizenship. It does not prevent the child from going down, taking the appropriate application forms and applying to become a citizen—whereas their path to citizenship is different. Is that correct?

Mr Edgerton: No, I do not think that is right. To come back to the chair's question, in this particular case the only reason that the family had the prospect of potentially staying in Australia was because their child was an Australian citizen.

Senator O'SULLIVAN: That is not in conflict with the burden in my question. If a child does not qualify for the default provision—that is, 'I've been here for 10 years to the day. I am now automatically a citizen without further ado.' Let me ask the question this way: does that child have the capacity to take another pathway through to citizenship?

Mr Edgerton: For this particular family, that child would not have, because the requirement for citizenship by conferral would be that you have been in Australia for four years and you have been a permanent resident for a year. For this particular family, they did not have permanent residency status, so that family would not have been able to apply for citizenship for that child.

CHAIR: The child could not apply itself?

Mr Edgerton: No.

Prof. Triggs: Can I also pick up on what I think might have been a little bit behind your question, Senator Macdonald, about the risk of separating the families—that you could have the parents being effectively deported and child staying, in the circumstances of the Pak case, did not comply with the four-year rule and getting a permanent visa. That was not going to work, but let us assume it was going to work. You would have the spectre of the child applying and maybe getting it—for reasons we do not need to worry about at the moment—and the family having to be forcibly deported. Of course, in a way that raises the High Court decision in Teoh's case, which you might remember created such a storm when it was decided by the High Court that government officials must take into account the Convention on the Rights of the Child when making these decisions and that they should respect the right of the child to be with their family.

CHAIR: But isn't that what this is about—that the child can stay with the family but back in Korea?

Prof. Triggs: That is another way of doing it, but that was not an issue in the Teoh case. I do think that there is a very strong legal principle, on the basis that Australian law is presumed to comply with international law, that you would not deliberately try to separate the family. I know that is the opposite of the Pak case that Teoh applies, but I still think it is something that the department is aware of. Teoh still exists and it is something that government officials increasingly are conscious of—and they are very unfortunate cases.

I might make the observation that when you are in government, as you are, you are very aware that you are actually going to make decisions on fair grounds, or you are going to try to—that is a given. What we are concerned about is that the effect of the way these laws work can be ones that are at risk of breaching very profound rights of the child or rights of the family—and maybe these are not at the forefront of thinking.

CHAIR: But, if that happened, wouldn't there be some legal redress?

Prof. Triggs: If there were no consideration of the rights of the child, there would be a redress to the extent that you could go to the court and you could say to the court that there is an obligation under Teoh to look at the Convention on the Rights of the Child. That convention, as you may know, is not directly part of Australian law but is part of our mandate at the Australian Human Rights Commission, which is why we have a mandate to talk about it. The court would say, 'That’s very interesting but the legislation here is clear, as it was in the baby Ferouz case, that the minister has got two options—deport or consider an application for a visa.' So long as the legislation is clear, the courts have no right to look at the international treaties—and that is the difficulty.

CHAIR: Sorry, Senator Collins, for interrupting you.

Senator JACINTA COLLINS: I have a final question, which is on timing and the discussion you had earlier with Senator O'Sullivan. How much time do you think you need to properly consider that issue and provide further advice to the committee?

Prof. Triggs: Could we possibly have five days?

CHAIR: Again, we might ask the department. I am not quite sure what the urgency with this bill is. It has been through the House of Representatives—

Senator JACINTA COLLINS: We are still confused about that too. We have sought for it to be delayed in the House of Representatives at least to allow for an opposition caucus discussion.
CHAIR: What was the response?
Senator JACINTA COLLINS: No; we are going ahead.
CHAIR: There was no reason given?
Senator JACINTA COLLINS: My suspicion is that the government is lacking in legislation for the House.
CHAIR: Expunge that from the record! I am sure that is not right.
Prof. Triggs: Can I add another one? This is purely a supposition on my part too—I do not know—but I do think that the government was concerned that, had the Federal Court made a different decision on the baby Ferouz case, you would have had more than 200 children applying for visa, citizenship et cetera on the basis of their birth in Australia. As it happened, the Federal Court took a different view, but that is now on appeal. I think the government is concerned to get this legislation in place before that factual circumstance starts to lead to a different legal result than the one they might prefer. I think at least is an indication of the urgency.
CHAIR: That sounds more like it.
Senator JACINTA COLLINS: But five days should still allow sufficient time.
Prof. Triggs: I think it would be worth exploring how we can balance the need for checks and balances with the minister’s concern in those greyish areas. The clear ones—clear fraud or misrepresentation and any evidence to support it—will be catered for under current legislation, but the ones that are further down the track are more difficult.
CHAIR: Are you normally consulted on these sorts of issues?
Prof. Triggs: Historically—and certainly over the last few years—we are very readily consulted by the relevant department that wants to make change. On this issue we were not. I believe that that is the case. To my knowledge we have not been consulted at all on this. It literally landed on our desk.
CHAIR: Again, I think Senator Collins has already flagged the question of what consultation there was. I am one of those that think government may take absolutely no notice of what you say, but at least you have the opportunity to alert the draftsman and the department to a few issues that perhaps they have not considered.
Prof. Triggs: That is how we normally work. We spend a great deal of our time, behind the scenes in a way, working with the department—or any department, for that matter—in any area of legislation that affects us. That occurs increasingly through the scrutiny of the Joint Committee on Human Rights—the scrutiny committee. If I may say so, that is proving to be a very productive relationship, because it means that we can get human rights concerns earlier to the attention of parliament and they can be taken into account.
Senator JACINTA COLLINS: Just as long as they can table their report before we deal with a piece of legislation.
Prof. Triggs: Exactly. The speed is a problem. You cannot have careful thinking on these drafting problems. We end up with a very confused legislative body of work in the Migration Act, which we are all having trouble understanding—as well as the Australian Citizenship Act. They have now become so complex that ordinary people certainly cannot read them. It is very difficult, even for people like us who are working with these things all the time. That is the difficulty. Every time you add another amendment or you make a change you have twisted or diverted the existing legislation and it becomes even more confusing. That is why we would argue for more time to look at this as a serious exercise in something that is fundamental to Australia’s future, which is our citizenship arrangements.
CHAIR: We might have to hurry along. Are there any other particularly urgent questions?
Senator O’SULLIVAN: I have a quick observation and one question. For clarification, on these issues with the automatic child citizenship, this is not confined to refugees; this could very well be a couple of very well to do Lilliputians who have decided to come to Australia and have a better go at life. They could come in on a tourist visa and hide out immediately like a dedicated arrangement. So I just want to make the point that this is not all about people who are here as refugees from—
Prof. Triggs: Not at all. I do not mean to divert the discussion too much in that area.
Senator O’SULLIVAN: I may have been wrong on this, Professor Triggs. You did not make mention of the issue to do with the adult adoption. Is it fair comment that you did not submit on that in your opening statement? You covered points that were important to you.
Mr Edgerton: I do not think that was part of our submission.
Senator O’SULLIVAN: And the reason? You submission is your submission, but do you not have concerns with the provisions relating to adult adoption?
Mr Edgerton: I just do not think we have had a chance to consider that in a lot of detail.

Senator O'SULLIVAN: Okay.

Prof. Triggs: We decided to go for the particular provisions that were of the greatest concern to us, knowing full well that there is a lot in that bill. There are many, many more provisions, as a matter of fact, that need to be looked at.

CHAIR: Thank you very much Professor Triggs and Mr Edgerton for your help. If you want, you can respond to some issues. I lost track of what the five days were that you were seeking.

Senator O'SULLIVAN: I asked whether they want to give us an alternative thought about how there might be judicial reviews that are merit based. They said, 'We'll try and get something to you in five or six days.'

CHAIR: If you could do that, we have to report by—

Senator O'SULLIVAN: Will that be for general circulation? Everybody would like to see that, obviously.

CHAIR: It will come to the secretariat.

Prof. Triggs: We will work to get back to you.
FINNEY, Ms Frances, Assistant Secretary, Citizenship Branch, Migration and Citizenship Division, Department of Immigration and Border Protection

FLEMING, Mr Gary, First Assistant Secretary, Migration and Citizenship Policy Group, Department of Immigration and Border Protection

SEKHON, Ms Shireen, Principal Legal Officer, Legislation and Framework Branch, Legal Division, Department of Immigration and Border Protection

[12:19]

CHAIR: I welcome the final witnesses from the Department of Immigration and Border Protection led by Ms Fairleigh, the assistant secretary. Ms Finney, can I start by asking if there is any reason why we are doing this by teleconference? I am one of these old-fashioned people that find teleconferences not terribly satisfactory. Is there a problem getting departmental people to give us evidence face-to-face?

Ms Finney: Our apologies for not being able to be there in person in Sydney today. It certainly was not something intentional. It was more to do with just the timing of the hearing and also the availability of some of our people to be able to be in Sydney at the time.

CHAIR: Do you discuss these issues with committee staff? I accept teleconferencing and videoconferencing is useful where citizens are involved and they do not really have the resources to travel long distances or they have other work commitments, and I realise how busy you people are, but it is a bit difficult. Anyhow, I guess we can only make the most of it. But I would just hope that this is not going to be the rule rather than the exception.

Mr Fleming: I just want to add that we received notice of the hearing on Thursday, which was a contributing factor to other commitments and personal commitments. It is our normal practice to appear in person before committees.

CHAIR: That is the principal issue, I guess, that it is the normal practice.

Mr Fleming: I can give you an assurance that I have had the pleasure of appearing before the Senate legislation and other committees for many years and I think this is the first teleconference I have done. I can just assure you that it is our usual practice to appear in person.

CHAIR: That is fine. Thank you for coming along and thank you for your submission. I will not go through the rules—I think you are all probably experienced at these sorts of hearings and do not need me to go through them. You are aware that we do not ask for opinions from officers and, if there are things that you want to consult with the minister or others about, you should indicate that. Will ask you to make an opening statement before we ask questions, if you would like. Before I do that, can you tell us the timing of this bill? Has the government indicated the urgency for this piece of legislation? It doesn't seem to be terribly urgent from what I have read of it. Was there any reason or, as one of my colleagues unfairly and capriciously said, 'The government had run out of legislation in the House of Representatives.' But I am sure that is not the reason.

Mr Fleming: I had not heard of that as a reason. From our perspective there are whole-of-government processes that set the relative categorisation, urgency and order in which bills are presented. We have no special insight on this one.

CHAIR: Okay, there was a suggestion from the Human Rights Commission—which, if you were watching this, and hopefully someone in your office has been watching the proceedings—that it might have been a guard against perhaps a rogue court decision. How can any court decision be rogue? But anticipating an outcome of a court action and making sure things were in place. If that is the reason, whether you agree with it or not, I would accept that. Can anyone comment on that?

Mr Fleming: Firstly, to assure you, we have had the hearing on in the background. I would say that the process for this legislation was in train well before the case raised by the commission.

Senator JACINTA COLLINS: I have had people attempting to monitor the hearing today and they have been telling me that the live streaming is not working, so I am not sure the department necessarily has heard the evidence we heard earlier today.

Mr Fleming: It has been playing on a television in my office throughout.

Unidentified speaker: Visually or audio?

Mr Fleming: Audio. We have not had visuals.

CHAIR: We will send Senator Collins' staff around to get some—
Senator JACINTA COLLINS: It may be that they are in a parliamentary network rather than in an office in another city.

CHAIR: Did you want to make an opening statement or any amendment to your written submission?

Ms Finney: Yes, I will make an opening statement. The department appreciates the opportunity to provide further information or clarification on aspects of this bill. We also welcome and acknowledge the insights of the other contributors to this consideration. We note that the department has already provided a submission to provide some further explanation of the bill, but we just wanted to make a couple of opening points.

The first is that, as I think we all agree from the hearing this morning, citizenship is the most valuable status that this department administers and that the Australian community can give. One of the things we wanted to do was clarify some of the questions or concerns that have emerged in some of the submissions and discussions so far. These are obviously not all of them; they are just some of the ones we wanted to cover initially. We will keep our statement brief so that we can allow time for questions from the committee.

We just wanted to remind everyone that the Citizenship Act and the Migration Act assessments and decisions are two different processes. For example, a decision to refuse or cancel an approval does not necessarily mean a person would be detained or removed from Australia. In cancelling or refusing citizenship, it does not necessarily follow that someone would automatically be removed from Australia or detained. Those decisions are taken under the Migration Act, not the Citizenship Act. If a person is refused their application for citizenship, they would usually continue to remain in Australia as a permanent resident on the visa that they already hold. If a person's Australian citizenship, on the other hand, is revoked while they are in Australia, they would automatically revert to an ex-citizen visa, which allows them to remain in Australia indefinitely, just not as an Australian citizen. Under the Migration Act, any visa may be considered for visa cancellation. So, if an individual's visa is not cancelled and should they wish to travel on an ex-citizen visa they would need to apply for a visa with a travel facility, such as a resident return visa. Importantly, people can always reapply for citizenship at a later date.

The other aspect we wanted to clarify up-front is that there is a difference in the act between 'character' and 'offences'. Some of the information put to the committee may bring both of those together, whereas they are quite different. Offences are obligations to an Australian court where prohibitions on approval currently apply in the act, whereas character considerations are broader and take in a number of factors.

The third area to clarify is just that there are no changes in the existing statelessness provisions in the act. The bill proposes no changes. So a child born in Australia who is assessed as being stateless remains eligible for Australian citizenship under the eligibility requirements of the existing act, and that is unchanged in the bill. Finally, if a person's citizenship application or status has been refused, cancelled or revoked, there are no bars preventing applicants from seeking to reapply for Australian citizenship at a later date when their circumstances may have changed. We thought that some of these overarching comments may assist the discussion. Thank you.

CHAIR: They certainly do. Thank you for those clarifications. As a matter of course, do you consult widely on these amendments to citizenship and migration issues? In particular, the Human Rights Commission have indicated that they often are consulted but were not in this case. I accept that not everyone always agrees with everything the Human Rights Commission say, but it would seem a saving of time if bodies like that were consulted up-front then they may not need to be called as witnesses to our inquiries. What is the consultation process with this bill?

Ms Finney: The department undertook the standard legislation consultation process. That involves consultation widely within government and with other government agencies also identifying if other non-government agencies need to be included in the consultation process. They would assist us in identifying whether that was considered necessary. In this case, it was not indicated to us that that was necessary.

CHAIR: You have seen the Human Rights Commission's submission, which they concede is not as fulsome as they would have liked because of the time constraints of this committee. I repeat and acknowledge that not everyone always agrees with the Human Rights Commission, and I am not suggesting that the department should agree with them, but it would be sometimes useful if they were consulted in matters where human rights are likely to be an issue. That is gratuitous comment on the side.

Mr Fleming: If I could add one thing to that. As part of the standard process of developing and consulting on policy and associated legislative changes, compatibility with human rights instruments is an explicit role undertaken via the Attorney-General's portfolio. Even though it is not the Australian Human Rights Commission, compatibility with human right instruments is considered as part of developing legislation, even if it is not part of a broader consultation. As you have pointed out, sometimes legislation is developed in that way, particularly if,
for example, it is rewriting an entire act and you might do an actual public exposure draft of the legislation. That is usually for far more fundamental and far-reaching changes than we are dealing with in this amending bill.

**Senator JACINTA COLLINS:** The government has presented this to the House of Representatives as an update to the Citizenship Act rather than simply an amending bill. So I would like a little more detail from the department about what consultation has occurred. You mentioned the standard process. What did that involve?

**Ms Finney:** It involved the identification, firstly, within the department through our legislative change process and change management process of the various areas impacted or affected by the bill. And then, beyond that, as I mentioned before, there is the broader consultation across government, where, if we need to go further and seek specific input from other agencies or non-government organisations, that would be identified. So, in the case of this bill, it was those two processes, and there were no further agencies or organisations identified in that consultation.

**Senator JACINTA COLLINS:** What is not clear to me, for the second time around, is: within that standard process, where was the need for further consultation with, for example, the Human Rights Commission, not identified?

**Ms Finney:** In the broader government consultation process, as Mr Fleming has explained.

**Mr Fleming:** Yes. The standard process for developing legislation engages departments of state. Whether there is going to be broader consultation with other agencies or broader public consultation is a matter for government process and/or cabinet decision.

**Senator JACINTA COLLINS:** Then, Mr Fleming, what policy measure was it proposed required only limited consultation?

**Mr Fleming:** We went through the standard process, and if in that standard process—

**Senator JACINTA COLLINS:** Which departments were involved in the standard process? Perhaps you can help me with that much information.

**Mr Fleming:** For example, drafts of cabinet submissions go to all departments of state.

**Senator JACINTA COLLINS:** Okay. So, with your earlier comment about Attorney-General's, for instance, perhaps Attorney-General's should have highlighted that it would be useful to have input from the Human Rights Commission. Is that your suggestion?

**Mr Fleming:** No. No, I am not suggesting that at all. I was merely commenting on the fact that the standard process does include looking at proposed policy and legislative changes for compatibility with human rights instruments.

**CHAIR:** You are saying the Attorney-General's Department looks at whether legislation accounts for Australia's human rights obligations?

**Mr Fleming:** That is correct.

**CHAIR:** Okay. That is helpful.

**Senator O'SULLIVAN:** Can I just ask a clarifying question, Senator Collins?

**Senator JACINTA COLLINS:** Sure.

**Senator O'SULLIVAN:** On that point, if you take yourself to page 7 of the Australian Human Rights Commission's submission, it says, it seems to me—from my reading of it, at least—that the potential for leaving a child stateless would be in contravention of article 8 of the CRC. Are you saying that the Attorney's office has looked at that and disagrees with that opinion as expressed by the Human Rights Commission in their submission?

**Mr Fleming:** I would not be able to go to the content of the advice given to government, but I would refer to Ms Finney's comments in the opening statement that this bill does not amend the statelessness provisions in the Citizenship Act. So our position would be that the specific provision with respect to acquiring citizenship, if a child born in Australia would otherwise be stateless—I cannot remember the section number of the act at the moment; it is section 21(8)—

**Senator O'SULLIVAN:** While you are doing that, I direct your attention to the submission—and their words are quite explicit. Let me quote them: On the contrary, it is clear from proposed s 34AA(2) that a child could have his or her citizenship revoked, and become stateless …

Now, that is in no way ambiguous. If it were not in a submission from the Australian Human Rights Commission, I might accept it could be otherwise. Does that mean, prima facie—the fact that it remains in the bill—that the
Attorney's office has looked at it and would disagree absolutely with that unambiguous statement of the commission? I do not need a long answer. That is a bit of a yes or no question.

Mr Fleming: Except that I cannot go to the content of the policy or legal advice given to government.

Senator O'SULLIVAN: But you would never accept the proposition, would you, that the Attorney's office would allow draft legislation to go through that would give effect to a child being stateless? In other words, does that default to the alternative proposition? They have looked at it. They do not have a problem. Human rights have looked at it. They have a problem, so we have this sort of Mexican stand-off on the issue.

Ms Sekhon: I understand the question relates to the new revocation of citizenship powers in the bill. Essentially the position is that the provisions are consistent with the reduction of statelessness convention, so essentially if there is a situation where there is fraud or misrepresentation presented in relation to a child citizenship application, then the minister would have the discretion—and could I emphasise it is a discretion—that could only be exercised in the public interest to revoke that citizenship.

Senator O'SULLIVAN: Sorry to interrupt you, but my question is quite specific: do you agree, first of all, that the Australian Human Rights Commission disagrees with that element of the bill or with the statement that a child cannot become stateless under this bill's amendments? They have stated so. Let me read it to you again. This is their words:

On the contrary, it is clear from proposed s 34AA(2) that a child could have his or her citizenship revoked, and become stateless …

I am not here to debate whether you agree with that statement or not, but would you agree with this: that statement is very clear that at least the Human Rights Commission believes it is possible?

Ms Sekhon: Yes.

Mr Fleming: We would agree with that.

Senator O'SULLIVAN: If the bill has been scrutinised by the Attorney-General's office and allowed to go forward, with the provision in it that the Human Rights Commission are concerned about, it would follow that we can assume, prima facie, that the Attorney-General's office does not agree with that reading of the legislation. Is that fair?

Mr Fleming: I cannot go to the reading of the Attorney-General's Department. What I would say is that not even the Human Rights Commission is saying that there is anything in the bill that would require a child to be rendered stateless. There is nothing in the bill that requires it. It could only follow the exercise of a discretion and a determination in the public interest.

Senator O'SULLIVAN: So if the minister exercised his or her discretion, you are agreeing with the Human Rights Commission that—if they decided—they could make a child stateless.

Mr Fleming: That would seem possible, yes.

Senator O'SULLIVAN: What happens to a stateless child?—sorry, Senator Collins, do you mind if I follow?

Senator JACINTA COLLINS: Yes. I think the committee needs to discuss, given the limited time we have, where we go from here because I do still have a number of questions in more specific areas. I am happy for you to continue, just on this point.

Senator O'SULLIVAN: What happens to a child, in this unlikely event? Let us not debate the likelihood or not.

Ms Sekhon: If this particular event occurred, the child would default to an ex-citizen visa. Then again, as Frances explained in her overarching comment, there would be subsequent processes that could be followed, which could result—there would be further options that would be explored at that time.

Senator O'SULLIVAN: I invite you to finish your question, where you used the word 'result'. Could it result in a stateless child being put on the Queen Mary, for example, never to come back or—

Ms Sekhon: They would default to the position of holding an ex-citizen visa—

Senator O'SULLIVAN: I understand that.

Ms Sekhon: lawfully in the community and then, whatever the issues were that went to the consideration of the revocation decision in the first place—the fraud and misrepresentation issues—they would be considered in the context of trying to find—

Senator O'SULLIVAN: I am only going to have one more attempt at this and then yield, as I should, to Senator Collins. This seems to be a very untidy provision. Is it possible for a citizen who has a non-citizen visa to be lawfully and forcefully removed from the country to some other place on earth other than Australia?
**Ms Sekhon:** Not while they are the holder of a visa.

**Senator O'SULLIVAN:** That is not my question, ma'am. That is not my question, in fairness. Just go to the nub of my question. Is it possible for someone who holds a non-citizenship visa to eventually become an alien to Australia?

**Ms Sekhon:** Yes, it is possible that the circumstances relevant to the fraud and misrepresentation, which resulted in the citizenship-revocation status, could be considered in the visa-cancellation space.

**Senator O'SULLIVAN:** Just on that point, and I will close, we have a stateless citizen now who is here up until 8 am tomorrow morning on a non-citizen visa. It is revoked, because we know this is all possible. What happens to that child at nine o'clock tomorrow morning?

**Mr Fleming:** If their citizen visa is cancelled—

**Senator O'SULLIVAN:** Yes, and they are stateless.

**Mr Fleming:** Again, that would depend on factors such as if they were eligible for a bridging visa or any other visa.

**Ms Sekhon:** Also, the best interests of the child would be considered in any cancellation of a visa.

**Senator O'SULLIVAN:** Guys, listen; please. We could go on forever here.

**CHAIR:** No, you could not.

**Senator O'SULLIVAN:** The question is clear, Chair.

**CHAIR:** It is, Senator Sullivan. I have just been having a conversation with the deputy chair, who reminds me that we have other committee hearing, on a different bill, starting in 20 minutes time. We might have to stop there, but Senator O'Sullivan do not be dismayed. Senator Collins and I both have some substantive questions and we really have not got onto those. We might have to try to have a hearing next week some time, during the sitting of the Senate, which would probably have to be Wednesday.

I do appreciate the department's help. There are a number of questions we really did want to put to you. I accept that if you only got advice last Thursday it would have been difficult for you to get here on Monday, because you had other things, and I accept that. Part of the problem is this committee has so many inquiries going that we have trouble getting a date. Having said that, I think we will adjourn the proceedings now. Members of the department, the secretariat will be in touch with you after the committee identifies a time when you could meet with us in Parliament House so that we can put to you some of the issues that have been raised with us and other questions. Would that be okay?

**Mr Fleming:** That would be fine, Chair. You are talking about not this Wednesday but the following Wednesday?

**CHAIR:** That is correct.

**Mr Fleming:** That would be fine. It probably also gives us enough time to respond, if you want the secretariat to pass particular questions to us. We could, I am sure, in quick order give a full or partial response, depending on the questions, which might free up some of your time when it comes to the hearing.

**CHAIR:** That is a good suggestion. Could I suggest that you have a look at Hansard, if the Hansard is out in the next couple of days, and review the evidence given by some of the previous witnesses today and some of the questions that members of the committee raised. If there are comments that you want to make in either answer to the committee's questions or perhaps in contradiction of some of the evidence given to us, it might be a useful start. That is a good suggestion. Thank you very much.

Committee adjourned at 12:51