The Senate

Legal and Constitutional Legislation Committee

Provisions of:

Australian Citizenship Bill 2005

Australian Citizenship (Transitionals and Consequentials) Bill 2005

February 2006

ISBN 0 642 71603 X

This document was printed by the Senate Printing Unit, Department of the Senate,
Parliament House, Canberra

MEMBERS OF THE LEGISLATION COMMITTEE

Members

Senator Marise Payne, **Chair**, LP, NSW
Senator Patricia Crossin, **Deputy Chair**, ALP, NT # ^
Senator Andrew Bartlett, AD, QLD *
Senator Linda Kirk, ALP, SA
Senator Brett Mason, LP, QLD ^
Senator Nigel Scullion, CLP, NT

Substitute Members

* Senator Natasha Stott Despoja, AD, SA to replace Senator Andrew Bartlett for matters relating to the Attorney-General's Portfolio

\# Senator Annette Hurley, ALP, SA to replace Senator Patricia Crossin, ALP, NT for the Inquiry into the provisions of the Australian Citizenship Bill 2005 and a related bill

^ Senators Bishop, ALP,WA and Trood, LP, NSW to replace Senators Crossin, ALP, NT and Mason, LP, QLD for the Inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 respectively

Participating Members

Senator the Hon. Eric Abetz, LP, TAS
Senator Lyn Allison, AD, VIC
Senator G. Barnett, LP, TAS
Senator Mark Bishop, ALP, WA
Senator George Brandis, LP, QLD
Senator Bob Brown, AG, TAS
Senator George Campbell, ALP, NSW
Senator Kim Carr, ALP, VIC
Senator Grant Chapman, LP, SA
Senator the Hon R Colbeck, LP, TAS
Senator Stephen Conroy, ALP, VIC
Senator Alan Eggleston, LP, WA
Senator Christopher Evans, ALP, WA
Senator the Hon. John Faulkner, ALP, NSW
Senator Alan Ferguson, LP, SA
Senator Jeannie Ferris, LP, SA
Senator Steve Fielding, FFP, VIC
Senator Concetta Fierravanti-Wells, LP, NSW
Senator the Hon Bill Heffernan, LP, NSW
Senator John Hogg, ALP, QLD
Senator Gary Humphries, LP, ACT
Senator Annette Hurley, ALP, SA
Senator Barnaby Joyce, NATS, QLD
Senator Ross Lightfoot, LP, WA
Senator Joseph Ludwig, ALP, QLD
Senator Kate Lundy, ALP, ACT
Senator the Hon Ian MacDonald, LP, QLD
Senator Julian McGauran, NPA, VIC
Senator Jan McLucas, ALP, QLD
Senator Christine Milne, AG, TAS
Senator Kerry Nettle, AG, NSW
Senator Stephen Parry, LP, TAS
Senator the Hon Kay Paterson, LP, VIC
Senator Robert Ray, ALP, VIC
Senator the Hon. Nick Sherry, ALP, TAS
Senator Rachel Siewert, AG, WA
Senator Ursula Stephens, ALP, NSW
Senator Russell Trood, LP, QLD
Senator John Watson, LP, TAS

Secretariat

Mr Jonathan Curtis	Secretary	
Ms Jane Hearn	Principal Research Officer	
Ms Marina Seminara	Executive Assistant	
Suite S1.61	T: (02) 6277 3560	E: legcon.sen@aph.gov.au
Parliament House	F: (02) 6277 5794	W: www.aph.gov.au/senate_legal

TABLE OF CONTENTS

ABBREVIATIONS

the 1948 Act	Australian Citizenship Act 1948
AAT	Administrative Appeals Tribunal
AAT Act	Administrative Appeals Tribunal Act 1975
Archive Act	Archives Act 1983
ASIO	Australian Security Intelligence Organisation
ASIO Act	Australian Security Intelligence Organisation Act 1979
the Bill	Australian Citizenship Bill 2005
the Convention	Convention on the Reduction of Statelessness
CRC	Convention on the Rights of the Child
Department	Department of Immigration and Multicultural Affairs
DIMA	Department of Immigration and Multicultural Affairs
ENS	Employment Nomination Scheme
FACS	Department of Family and Community Services
HECS	High Education Contribution Scheme
HREOC	Human Rights and Equal Opportunity Commission
LIV	Law Institute of Victoria
LSSA	Law Society of South Australia
Migration Act	Migration Act 1958
NSWCCL	New South Wales Council for Civil Liberties
the Privacy Commissioner	Commonwealth Office of the Privacy Commissioner
Privacy Act	Privacy Act 1988
Privacy Foundation	Australian Privacy Foundation
SBS	Special Broadcasting Service Corporation

TPV	Temporary Protection Visa
UNHCR	United Nations High Commission for Refugees

RECOMMENDATIONS

Recommendation 1

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

Recommendation 2

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

Recommendation 3

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

Recommendation 4

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

Recommendation 5

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

Recommendation 6

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

Recommendation 7

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

Recommendation 8

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

Recommendation 9

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

Recommendation 10

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

Recommendation 11

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

Recommendation 12

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

Recommendation 13

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

Recommendation 14

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

Recommendation 15

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

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

Recommendation 16

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

Recommendation 17

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

CHAPTER 1

INTRODUCTION

Background

1.1 The Australian Citizenship Bill 2005 and Australian Citizenship (Transitionals and Consequentials) Bill 2005 (the Bill) was referred by the Senate on 30 November for report by 27 February 2006. The proposed Bills are intended to replace the *Australian Citizenship Act 1948* (Cth) (the 1948 Act), which governs the acquisition, cessation and resumption of Australian citizenship.

1.2 The possible redrafting of the 1948 Act and amendment of some of its key provisions has been in the public domain for some time.[1] In 2000, the Australian Citizenship Council (ACC) presented its report entitled *Australian Citizenship for a New Century*. Most of the ACC's recommended legislative changes were made by the *Australian Citizenship Legislation Amendment Act 2002* (the 2002 Act).[2] The ACC also recommended that the existing 1948 Act be redrafted to remove inconsistencies and improve clarity and ease of use.

1.3 On 7 July 2004, the Hon. Gary Hardgrave MP, the then Minister for Citizenship and Multicultural Affairs, gave a speech to the Sydney Institute in which he outlined the government's proposed changes to the 1948 Act.[3] On 8 September 2005 the Prime Minister, Mr Howard, announced stronger anti terrorism laws.[4] In relation to citizenship the Prime Minister said the government would work on visa and citizenship security and character checking processes and move immediately to extend the residency requirement.

Conduct of the Inquiry

1.4 The Committee advertised the inquiry in The Australian newspaper on 7 December 2005 and also wrote to a number of interested individuals and organisations

---

1 See *Australian Citizenship Bill 2005 and Australian Citizenship (Transitionals and Consequentials) Bill 2005,* Bills Digest No. 72 -73, 7 December 2005, p. 4.

2 Australian Citizenship Bill 2005, *Explanatory Memorandum,* p.1 available at http://parlinfoweb.parl.net/parlinfo/view_document.aspx?ID=2174&TABLE=EMS

3 Hon. G. Hardgrave MP, Minister for Citizenship and Multicultural Affairs, *Australian citizenship: then and now,* speech to Sydney Institute, Sydney, 7 July 2004 as reported in *Australian Citizenship Bill 2005 and Australian Citizenship (Transitionals and Consequentials) Bill 2005,* Bills Digest No. 72 -73, 7 December 2005, p. 3.

4 Hon. J. Howard MP, Prime Minister, Counter Terrorism law strengthened, media release, Canberra, 8 September 2005 as reported in in *Australian Citizenship Bill 2005 and Australian Citizenship (Transitionals and Consequentials) Bill 2005,* Bills Digest No. 72 -73, 7 December 2005, p. 3.

inviting submissions by 16 January 2006. Details of the inquiry, the Bills and the associated documents were placed on the Committee's website.

1.5 On 6 January 2006 the secretariat provided information about the inquiry to the Consular Policy Branch of the Department of Foreign Affairs and Trade (DFAT) for distribution to Australian overseas missions**.** All DFAT posts were advised of the inquiry and encouraged to contribute to informing Australians overseas about the inquiry by using the Committee's official materials.

1.6 The Committee received 67 submissions, two are confidential and the remaining 65 were placed on the Committee's website. Among the 67 submission were numerous letters from individuals, including children, expressing views about the Bills. These letters were grouped into seven broad categories and adopted as standard form letters. The list of submissions is contained in Appendix 1.

1.7 The Committee held a public hearing in Melbourne at the Victoria Parliament House on Monday 30 January 2006. A second public hearing was held on Monday 6 February 2006 at Parliament House, Canberra. Seventeen witnesses appeared in person, by teleconference and video link. A list of witnesses is at Appendix 2. Copies of the Hansard transcript of proceedings are available through the internet at http://aph.gov.au/hansard or at the Committee's website at:

http://www.aph.gov.au/senate/committee/legcon_ctte/citizenship/hearings/index.htm.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the key provisions of the Bill. The provisions of the Australian Citizenship (Transitionals and Consequentials) Bill 2005 are technical in nature and are not discussed in detail in this report.

Key provisions

2.2 The main proposals in the Bill aim to:

- restructure citizenship law to make it more coherent, accessible and easier to use;
- increase access to citizenship by simplifying provisions and changing the rules relating to:
  - citizenship by descent;
  - resumption of renounced citizenship;
- strengthen protection of national security by:
  - extending residence requirements by 12 months to three years;
  - requiring that the Minister be satisfied of an applicant's identity;
  - regulating the collection, use and storage of personal identifiers;
  - prohibiting a grant of citizenship where the person is assessed as a security risk;
  - strengthening Ministerial discretion to revoke citizenship where a serious criminal offence has been committed.

Preamble

2.3 The Preamble to the Bill remains largely the same as that contained in the 1948 Act. The Preamble expresses Parliament's recognition that Australian citizenship represents membership of the community of the Commonwealth; and that Australian citizenship is a common bond that unites all Australians in a reciprocal relationship of rights and obligations, while respecting their diversity. A citizen is entitled to enjoy these rights and undertakes to accept the obligation to pledge loyalty to Australia and its people; share their democratic beliefs; respect their rights and liberties; and uphold and obey the laws of Australia.

Part 1 – Preliminary Matters

2.4 Part 1 of the Bill deals with definitions and a number other preliminary matters, including important concepts used in Part 2 of the Bill. Section 4 defines 'Australian citizen' to mean a person who is an Australian citizen under Division 1 or 2

of Part 2. A note to section 4 indicates that a person who is an Australian citizen under the 1948 Act immediately before the commencement day is taken to be an Australian citizen under the 2005 Act.[1]

2.5 Subsection 10(1) provides that a personal identifier is any of the following:

- fingerprints or handprints of a person (including those taken using paper and ink or digital live-scanning technologies):
- a measurement of a person's height and weight;
- a photograph or other image of a person's face and shoulders;
- an iris scan;
- a person's signature;
- any other identifier prescribed by the regulations (except an intimate forensic procedure within the meaning of s.23WA of the *Crimes Act 1914*).

2.6 Subsection 10(2) establishes the regulation making power in respect of personal identifiers and qualifies that power by requiring that the Minister must be satisfied that:

- obtaining the identifier would not involve carrying out an intimate forensic procedure;
- the identifier is an image of, or a measurement or recording of, an external part of the body; and
- obtaining the identifier will promote one or more of the following purposes:
  - assist in the identification of, and to authenticate the identity of, a person making an application under Part 2;
  - combating document and identity fraud in citizenship matters;
  - complementing anti-people smuggling measures.

Part 2 - Australian Citizenship

Division 1 – Automatic acquisition of Australian citizenship

2.7 Part 2 of the Bill contains the substantive provisions which regulate the acquisition, resumption and cessation of Australian citizenship.

2.8 Division 1 outlines those circumstances where a person will automatically acquire Australian citizenship by operation of law. Clause 12 clarifies that Australian citizenship is not automatic by reason of a person being born in Australia. Paragraph 1

1 The note cross refers the reader to item 2 of Schedule 3 to the *Australian Citizenship (Transitionals and Consequentials) Act 2005*.

(a) provides that a person born in Australia is an Australian citizen if and only if they have a parent who is either an Australian citizen, or a permanent resident, at the time of their birth. Paragraph 1 (b) provides that a person born in Australia is an Australian citizen if and only if the person is ordinarily resident in Australian throughout the period of 10 years beginning on the day of the person's birth.[2]

2.9 Proposed sections 13, 14 and 15 deal with automatic acquisition of citizenship of people who are adopted, abandoned or by incorporation of territory.

Division 2 – Subdivision A – Acquisition of Australian citizenship by descent

2.10 Division 2 regulates the acquisition of citizenship by application**.** Subdivision A deals with citizenship by descent. The previous requirement that children born overseas must be registered for citizenship by descent within 25 years has been removed.

2.11 Proposed subsection 16(1) provides that a person may make an application to the Minister to become an Australian citizen. Subsection 16(2) provides that a person born overseas on or after 26 January 1949 may apply for citizenship by descent and sets out the criteria, which include a requirement that the person:

- must have had a parent who was an Australian citizen at the time of their birth; and
- if the applicant is over 18 he or she must be of good character.

2.12 Additional eligibility requirements need to be met by persons whose parent(s) gained Australian citizenship by descent, namely:

- the parent has been present in Australia for at least 2 years at any time before the person makes the application; or
- the applicant is stateless at the time of the application.

2.13 Proposed section 17 requires that where the person satisfies the eligibility criteria the Minister must approve an application for citizenship by descent subject to the following qualifications:

- the Minister must be satisfied of the identity of the person;[3]
- the Minister must not approve citizenship where an adverse security assessment or a qualified security assessment is in force under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) that the person is directly or indirectly a risk to security within the meaning of section 4 of that Act;[4]

2 *Explanatory Memorandum,* p. 14.

3 Subsection 17(3).

4 Subsection 17(4).

- if the person has previously ceased to be a citizen, that more than 12 months has lapsed since day the person ceased to be a citizen.[5]

Division 2 – Subdivision B – Acquisition of Australian citizenship by conferral

2.14 Subdivision B provides for citizenship by conferral.

2.15 Proposed section 21 sets out the eligibility criteria. Proposed section 22 increases the residential qualifying period from the existing requirement (that a person must be present in Australia as a permanent resident for not less than two years in the previous give year period) to not less than three years in the previous five years period. The requirement that an applicant must be resident in Australia for twelve months in the two years immediately preceding the application remains unchanged from former section 13 of the 1948 Act.

2.16 The Minister has a discretion to waive the permanent residency requirements in certain circumstances where:

- a temporary entrant resident in Australia would suffer significant hardship or disadvantage if a period of that residency was not counted as a period of permanent residency;[6]
- a temporary entrant resident in Australia who has been engaged in activities beneficial to Australia may have twelve months of that residency counted as permanent residency;[7] or
- a person who has resided as a permanent resident for at least one year in Australia and has been engaged in activity 'beneficial to Australia' while outside the country, and would suffer hardship if the period of absence from Australia (as a permanent resident) is not taken into account.[8]

2.17 The spouse of an Australian citizen must meet the same eligibility criteria as other adult applicants. However, the Minister has the discretion to waive residency requirements for a spouse, widow or widower.[9] Spouse includes de-facto spouse but does not include same sex partners.[10]

2.18 Proposed section 24 is equivalent to existing section 17, in that it:

---

5 Subsection 17(5).

6 Paragraph 22(6)(b).

7 Subsection 22(7). Note that the Department indicated that subsection 22(7) is to be amended to allow for a period of up to 24 months of temporary residence to be counted as permanent residency.

8 Subsection 22(8).

9 Subsection 22(9).

10 Subsection 22(10).

- precludes the Minister from approving an application for citizenship unless satisfied of the person's identity;[11] and
- provides that the Minister must not approve citizenship where an adverse security assessment or a qualified security assessment is in force under the ASIO Act that the person is directly or indirectly a risk to security within the meaning of section 4 of that Act.[12]

2.19 In addition, proposed section 24 provides that the Minister must not approve citizenship if, at the time of the application:

- proceedings for an offence against Australian law are pending (including appeal or review);
- the person is confined to a prison in Australia;
- for a period of two years after the expiration of a 'serious prison sentence';[13] or
- if the person is a 'serious repeat offender' – for a period of ten years after the expiration of a serious prison sentence;[14]
- during a period of parole or licence;
- during a period when the person has been released from imprisonment by a court on conditions relating to the person's behaviour;
- during a period that a court does not impose a sentence of imprisonment but releases the person subject to conditions;
- during a period that a person is confined in a psychiatric institution under a court order arising from proceedings for an offence against an Australian law.

2.20 The Minister also has a residual discretion to refuse to approve a person's application for citizenship despite fulfilling the eligibility criteria.[15] There are no statutory criteria for the exercise of that discretion.

2.21 Proposed section 26 requires a person to make a pledge of commitment unless the person is under 16 years or has a permanent physical or mental incapacity at the time of making the application. Section 27 provides for how the pledge is to be made.

---

11 Subsection 24(3).

12 Subsection 24(4).

13 'Serious prison sentence' is defined in section 3 as a sentence of imprisonment for a period of at least 12 months.

14 'Serious repeat offender' is defined in section 3 as a person who has had more than one serious prison sentence imposed on them.

15 Subsection 24(2).

Division 2 – Subdivision C – Resuming citizenship

2.22 Proposed section 29 simplifies the resumption provisions of the 1948 Act and expands those provisions to make resumption of citizenship dependent principally on the requirement that the person be of good character.

2.23 Subsection 29(2) provides that a person may be eligible to apply for resumption of citizenship who previously renounced citizenship in order to:

- acquire or retain the nationality or citizenship of a foreign country to avoid suffering significant hardship or detriment; or
- where the person is a child of a responsible parent who renounced citizenship.

2.24 Subsection 29(3) enables people who lost citizenship under certain provisions of the 1948 Act to apply for citizenship provided the Minister is satisfied they are of good character. This provision removes the pre-existing barrier to resumption that a child who lost citizenship must apply for resumption of citizenship before the age of 25 (section 23AB (1)(b) of the 1948 Act).

2.25 Proposed section 30 provides that the Minister:

- has a residual discretion to refuse an application to resume Australian citizenship despite the person being eligible to do so;[16]
- must be satisfied of the person's identity;[17]

2.26 However, the Minister must not approve citizenship where an adverse security assessment or a qualified security assessment is in force under the ASIO Act that the person is directly or indirectly a risk to security within the meaning of section 4 of that Act.[18]

Division 3 – Cessation of Australian citizenship

2.27 Proposed section 33 provides for the renunciation of citizenship. Renunciation must be done by application to the Minister. The Minister must approve the person renouncing their citizenship if the Minister is satisfied that the person is 18 years of age and is a national of another country at the time; or the person was born or is ordinarily resident in a foreign country and, because of the laws of that country, is prevented from acquiring citizenship because of their Australian citizenship.[19]

16 Subsection 30(2).

17 Subsection 30(3).

18 Subsection 30(4).

19 Subsection 33(3)

2.28 There are a number of additional limitations on the Minister's power to approve renunciation. The Minister must not approve renunciation:

- unless the Minister is satisfied of the identity of the person;[20]
- where it would not be in the interests of Australia to do so;[21]
- where the person would become stateless.[22]

2.29 Proposed section 34 empowers the Minister to deprive a person of Australian citizenship acquired by descent or conferral where the person obtained their citizenship by migration fraud or third party migration fraud.[23] The Minister must also be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.[24]

2.30 A person who acquires citizenship by conferral may be deprived of citizenship if, after making their application, he or she is convicted of a 'serious criminal offence' committed any time before becoming a citizen.[25] The provision applies to offences committed against an Australian or a foreign law before the person became an Australian citizen and for which the person has been sentenced to death or to 'a serious prison sentence'.[26] Subsection 34(3) qualifies the Minister's discretion and is intended to prevent revocation of Australian citizenship where such a person would become stateless.[27]

2.31 A decision to revoke citizenship under section 34 is subject to merit review.[28]

2.32 Under proposed section 35, a person ceases to be an Australian citizen if he or she is a citizen of another country and serves in the armed forces of a foreign country at war with Australia. Citizenship ceases at the time the person commenced their service.

2.33 Proposed subsection 36(1) confers on the Minister a discretion to revoke the citizenship of a child where the citizenship of the child's 'responsible parent' ceases under sections 33, 34 or 35 and the child is under 18 years of age at that time.[29] The

---

20 Subsection 33(4).

21 Subsection 30(6).

22 Paragraphs 30(7)(a)(b).

23 Paragraph 34(1)(a) and subparagraph 34(1) (b)(ii); subparagraphs 34(2) (i), (iii)and (iv). See also section 50 of the Bill and sections 137.1 or 137.2 of the *Criminal Code*.

24 Paragraph 34(2)(c).

25 Subparagraph 34 (2) (ii) and subsection 34(5).

26 Subparagraph 34(5); a serious prison sentence is defined as a sentence of imprisonment for a period of at least 12 months.

27 DIMA, *Submission 35*, p. 4.

28 Section 52.

29 'Responsible parent' is defined in section 6.

discretion does not apply where there is another responsible parent who is an Australian citizen or the Minister is satisfied the child would become stateless.[30]

Division 5 – Personal Identifiers

2.34 As noted above, the Bill introduces a new requirement that the Minister must not approve the person becoming an Australian citizen unless satisfied of the person's identity.[31] Proposed section 10 sets out the type of 'personal identifiers' for the purposes of the Bill (see paragraph 2.5 above). Proposed paragraph 10(1)(f) provides that regulations may prescribe other identifiers, provided that the collection of further identifiers will *promote* additional purposes outlined in subparagraphs 10 (2)(c)(i), (ii) and (iii) (see paragraph 2.6 above).

2.35 Division 5 sets out the legislative scheme for collection, disclosure and storage of personal identifiers. Proposed section 40 provides for Ministerial delegation of the authority to request one or more personal identifiers. Proposed section 41 enables the procedures and requirements that apply to the provision of personal identifiers to be prescribed by regulation.

2.36 Under proposed subsection 42(3) and (4) the Minister may authorise access to identifying information to identify the person for the purposes of the Bill and other purposes, including:

- the making of a decision under the *Migration Act 1958* or its regulations; and
- complying with Australian laws.[32]

2.37 Proposed section 43 regulates the scope of 'permitted disclosures'. Permitted disclosures include disclosure:

- for the purpose of data matching in order to identify, or authenticate the identity of, a person for the purposes of this Act;[33] and
- for the purpose of making identifying information available to the person to whom it relates.[34]

2.38 Permitted disclosures also include disclosures that:

- take place under an arrangement entered into with an agency of the Commonwealth, or with a State or Territory or an agency of a State or Territory, for the exchange of identifying information;[35]

30 Subsections 36(2) and (3).

31 Subsections 17(3), and 24(3).

32 Paragraphs 34(4) (g) and (h).

33 Paragraph 43(2)(a).

34 Paragraph 43(2)(d).

- is for the purpose of a proceeding, before a court or tribunal, relating to the person to whom the identifying information in question relates.[36]

2.39 Paragraphs 43(3)(a) and (b) purport to prevent the disclosure of personal identifying information for the purpose of the investigation or prosecution of a offence against Australian law.

2.40 Proposed subsection 42 (1) makes it an offence to have unauthorised access to personal identifying information, unless the access was through a permitted disclosure. The defendant bears an evidential burden in respect of this offence.[37] Proposed subsection 43(1) makes it an offence to cause disclosure of identifying information that is not a permitted disclosure under the Bill. Both offences carry a penalty of up 2 years imprisonment or 120 penalty units or both.

Review rights

2.41 Proposed section 52 provides for the right of merits review in the Administrative Appeals Tribunal (AAT) for review of decisions of the Minister to refuse to approve a person becoming an Australia citizen; refusing approval to resume Australian citizenship; and refusing approval for a person to renounce Australian citizenship and a decision to revoke a person's citizenship. Subsection 52(2) restricts the right to have reviewed a decision not to confer citizenship under section 24 to permanent residents, except where the decision relates to an applicant who is under the age of 18 years.

35 Paragraph 43(2)(e).

36 Paragraph 43(2)(f).

37 See subsection 13.3(3) of the *Criminal Code*.

CHAPTER 3

CONSIDERATION OF THE BILL

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

Accessibility and clarity

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

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

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

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

---

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

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

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

Committee view

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

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

Recommendation 1

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

Recommendation 2

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

Public information

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

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

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

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

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

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

Committee view

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

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

---

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

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

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

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

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

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

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

Recommendation 3

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

Recommendation 4

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

Recommendation 5

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

Increased residential qualifying period

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

Entitlements

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

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

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

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

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

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

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

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

Globalised economy

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

Refugees

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

Ministerial discretion to waive residency requirements

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

---

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

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

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

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

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

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

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

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

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

Committee view

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

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

Recommendation 6

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

---

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

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

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

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

Recommendation 7

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

Definition of spouse excludes same sex couples

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

Committee view

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

Ministerial Discretion

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

---

30 Subsection 22(6)(8).

31 Subsection 22(9).

32 Subsection 22(10).

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

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

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

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

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

3.31 The Explanatory Memorandum states that:

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

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

Committee view

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

---

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

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

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

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

41 *Explanatory Memorandum,* p. 30.

42 *Explanatory Memorandum*, p. 30.

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

Good character test

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

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

Committee view

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

Recommendation 8

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

National security exclusion – no ministerial discretion

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

---

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

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

46 Subsection 501(6) of the Migration Act.

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

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

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

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

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

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

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

- proceedings must be held in private;[58]

---

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

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

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

52 Response to Question on Notice, 7 February 2006.

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

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

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

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

57 *Explanatory Memorandum*, p. 9.

58 Subsection 39A(5).

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

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

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

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

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

---

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

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

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

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

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

64 Response to question on notice, 7 February 2006.

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

Committee view

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

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

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

Recommendation 9

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

Stateless Persons

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

---

65 Response to question on notice, 7 February 2006.

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

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

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

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

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

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

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

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

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

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

---

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

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

70 Article 1.2(d).

71 Subsection 24(4).

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

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

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

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

76 Paragraph 21(8)(c).

77 Paragraph 21(8)(c).

> If you do not at that time have the right to citizenship in another country, even if for whatever reasons you had it at an earlier stage, then the convention would still require the committed countries to bestow citizenship on that person. So I do not think those last few words are necessary to the provision.

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

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

Committee view

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

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

---

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

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

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

81 Correspondence, DIMA, 7 February 2006.

82 Response to question on notice, 7 February 2006.

Recommendation 10

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

Recommendation 11

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

Identity and privacy issues

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

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

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

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

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

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

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

86 Section 10(a)–(f).

87 Section 41.

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

95 Response to question on notice, 7 February 2006.

96 Response to question on notice, 7 February 2006.

97 Response to question on notice, 7 February 2006.

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

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

Committee view

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

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

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

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

Recommendation 12

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

98 Response to question on notice, 6 February 2006.

99 Response to question on notice, 6 February 2006.

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

The status of children under the Bill

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

Application for citizenship

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

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

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

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

---

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

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

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

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

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

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

107 Article 3 CRC.

- Australia's international obligations in relation to children.

The status of children adopted outside Australia

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

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

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

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

---

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

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

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

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

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

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

Loss of citizenship

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

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

Committee view

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

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

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

---

114 Section 34 and 35.

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

116 HREOC, *Submission 50*, p. 6

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

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

119 Article 8, CRC.

120 Article 3, CRC.

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

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

Recommendation 13

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

Recommendation 14

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

Recommendation 15

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

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

Resumption of citizenship

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

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

121 Article 8 CRC.

122 Article 12 CRC.

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

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

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

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

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

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

> … the legislation has, over the years, clearly discriminated between section 17 and section 18. Section 17 was an operation of law provision. There have been resumption provisions since 1984 for people who lost their Australian citizenship under section 17. There have been resumption provisions for quite some years for children who lost their citizenship under section 23 as a result of a parent having renounced their citizenship or lost their citizenship under section 17. Section 17 has been repealed and the focus of, if you like, trying to tidy up the consequences of section 17 and providing for the adult

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

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

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

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

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

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

> children of those who lost under section 17 is linked to the repeal of section 17. The provisions extending the provisions for people who have renounced their citizenship to resume their citizenship are regarded as a very significant extension of a resumption provision that was introduced only in 2002.[131]

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

> … three ministers have now considered this issue. Minister Hardgrave cast the die in the first place. Mr McGauran then affirmed that position and Mr Cobb subsequently affirmed that position again. So it has been given significant consideration since 2003.[132]

Committee view

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

Review rights

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

> The second issue I wish to raise is that of review rights. It was the intention of the bill that all reviewable decisions under the Australian Citizenship Act 1948 be reviewable under the proposed new act – that is, that there would be no change to the review rights. However, the bill does not fully reflect the existing review provisions for those applying for citizenship for reasons of statelessness under clause 21(8) to seek review if their application is

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

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

133 Subsection 21(6).

134 Subsection 21(7).

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

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

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

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

Committee view

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

Recommendation 16

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

Dual nationals

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

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

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

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

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

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

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

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

3.106 The Department advised the Committee that:

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

Committee view

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

Recommendation 17

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

Senator Marise Payne

Committee Chair

141 *Submission* 25, p. 25.

142 Response to question on notice, 7 February 2006.

MINORITY REPORT FROM THE AUSTRALIAN LABOR PARTY

1.1 In chapter 2 of the draft report of the committee responsible for the inquiry into the provisions of the Australian Citizenship Bill, it is stated that one of the main aims of the new Bill is to increase access to citizenship by simplifying provisions and changing the rules relating to citizenship by descent and resumption of renounced citizenship. This point has been emphasised through out the deliberation process of making changes to the old citizenship Act 1948.

1.2 Labor supports the inclusion of Maltese children in resumption of Australian citizenship by conferral and being of good character. Labor believes that excluding children of former Australian citizens who renounced citizenship under section 18 contradicts the purpose of the Bill which according to the draft report in page 8 states that, subsection 29(2) of the new Citizenship Bill provides that a person may be eligible to apply for resumption of citizenship if he or she previously renounced citizenship in order to

- acquire or retain the nationality or citizenship of a foreign country to avoid suffering significant hardship or detriment; or
- where the person is a child of a responsible parents who renounced citizenship.

1.3 Thus disregard for the inclusion of Maltese children in the New Citizenship Act defeats the purpose of the new bill which is intended to encourage taking up of Australian citizenship.

1.4 Submissions from the Southern Cross Group also demonstrate an interest in wanting to belong to Australia. Statement made by the last three former minsters of citizenship has supported inclusion of Maltese who lost their Australian citizenship at a time when they have not much choice.

1.5 In a speech to the Sydney institute Wednesday 7 July 2004 in relation to the Maltese issue the Hon Gary Hardgrave states that “the Australian government has reconsidered this issue and decided that the principles underlying the resumption provisions should apply equally, regardless of wether the purpose of renunciation was to acquire or retain another citizenship and regardless of a persons age. The government will amend the act accordingly and include a requirement that the person be of good character”.

1.6 Prof Rubenstein's contribution in the Canberra hearing also reinforces the point by stating that "I think there were very strong arguments that we heard earlier about the reasons that someone would have to renounce that may not be that dissimilar from having acquired dual citizenship and so forth. So I think there are strong policy arguments to say that they (children under section 18) should be treated the same way'.

Recommendation 1

1.7 The committee recommends that children of former Australian Citizens who lost their citizenship under S.18 should be permitted to apply for citizenship by Conferral.

Senator Annette Hurley

Australian Labor Party

ADDITIONAL COMMENTS FROM THE AUSTRALIAN DEMOCRATS

1.1 I am largely supportive of the Committee's report and recommendations. In most respects, the Bill is a positive step and the committee's recommendations should improve it further. However, I believe there are a few extra areas where further change to the legislation is desirable.

Refugees on Temporary Protection Visas

1.2 I strongly agree with Recommendation 6 which provides that the new residential qualifying period of 3 years only apply after the commencement of subdivision (B) to ensure that current permanent residents are not affected by retrospective law.

1.3 However, while the committee has recognised that certain groups like refugees who are here on Temporary Protection Visas may be vulnerable, it falls short of making specific recommendations to protect this group. As has been noted, most of these people who have or will end up on permanent visas have already spent well over three years in Australia.

1.4 I believe it would be appropriate to specifically ensure that this period is taken into account in determining eligibility for citizenship. This ensures that those refugees who have already resided here for many years and wish to take up citizenship of Australia to be able to do so more quickly. The evidence of history shows this would be beneficial to Australia as well as to the individuals involved.

1.5 I note that Committee recommendation 7 recommends broadening the concept of 'significant hardship or disadvantage' to encompass this group, but I am of the opinion that a stronger proposal should be put forward.

Recommendation 1

1.6 For the purposes of determining eligibility for citizenship, refugees who have been on Temporary Protection Visas should have the time they have resided in Australia treated as if they had been permanent residents during that period.

Same sex partners

1.7 It is pleasing to note the committee's recognition that the definition of spouse (which has now been updated to encompass de facto spouses) does not extend to same sex partners, and also their comment that consideration should be given to including same sex partners within the definition of spouse. However, the Committee fell short of specifically recommendation that this should be so.

Recommendation 2

1.8 A specific amendment should be made to the legislation extending the definition of spouse to include same sex couples.

Ministerial Discretion

1.9 I remain concerned about whether the merits review that will be available in the AAT is an adequate protection against the unreasonable or unfair use of ministerial discretion to deny citizenship to someone who otherwise meets all the elegibility criteria under the law.

1.10 Whilst I accept that this discretion exists under the current Citizenship Act 1948, I believe there is now enough evidence of how the use of such discretion can be overly politicised to warrant restricting such power.

1.11 The proper area for dealing with people who present an unacceptable risk to the community is the Migration Act, not the Citizenship Act. If someone is so unacceptable that they should be denied citizenship, despite meeting all criteria under law, it is hard to see how the question would not also arise as to whether or not that person's residency visa should be cancelled. If a person is of good enough character and acceptable to remain as a long-term permanent resident of Australia, they should be of good enough character to take up citizenship, should they meet all the criteria.

Security assessments

1.12 The same point that I made above applies with people whose applications may be rejected on the grounds of national security. If someone poses a threat to national security, it is hard to see a situation where they should still be able to remain eligible for permanent residency, while being refused eligibility for citizenship.

1.13 The explanatory memorandum to the legislation mentions that there are some review rights available under Part IV of the ASIO Act which would be undertaken by the Security Appeals Division of the AAT. However, review of this kind can be very difficult to challenge due to the lack of information which is made available to the complainant in some circumstances.

1.14 There are already enough impairments to fair and due process for people subjected to security assessment.

1.15 I support the recommendation of HREOC that the ***National Security Information (Criminal and Civil Proceedings) Act 2004*** be amended so that it applies to the Security Appeals Division of the AAT. This at least ensures a right to review and is in line with the right to a fair hearing.

Stateless Persons

1.16 I support the Committee's recommendation 10 and 11, but I believe it should go further. I believe Paragraph 21(8)(c) as it stands can clearly be interpreted in a way which is outside our obligations under the Convention on Statelessness.

Recommendation 3

1.17 That the words "that the person has never had such reasonable prospects" be deleted from Paragraph 21 (8) (c).

Personal identifiers and Privacy issues

1.18 I am concerned that recommendation 12 does not go far enough in ensuring adequate protection of individual privacy. I believe this area needs further examination before the legislation is passed, and I reserve my position on possibly moving amendments to the legislation addressing these issues.

Dual citizenship

1.19 Finally, I believe it is becoming more and more urgent that an effort is made to make the necessary change to our Constitution that prohibits dual citizens from running for Parliament. Dual citizenship is part and parcel of modern society and certainly of Australian society. A significant proportion of Australians hold dual citizenship and that this number is growing, not least because of the recent changes made to the Citizenship Act.

1.20 These people are disenfranchised in the sense that they are not able to run for election to the federal parliament without relinquishing their dual citizenship. There may be valid arguments to require sole citizenship as part of eligibility to be a Minister or Prime Minister, where perhaps dual citizenship may not be appropriate. However, I believe we are short changing ourselves as a nation if we prevent dual citizens from becoming a Member of Parliament.

Recommendation 4

1.21 That all parties in the Parliament support as a matter of urgency, legislation to initiate a referendum to remove the prohibition on dual citizens being able to run for federal Parliament.

Senator Andrew Bartlett

Australian Democrats

APPENDIX 1

SUBMISSIONS RECEIVED

1	Standard Form Letter – received by various individuals
2	Standard Form Letter – received by various individuals
3	Standard Form Letter – received by various individuals
4	Standard Form Letter – received by various individuals
5	Standard Form Letter – received by various individuals
6	Ms Lynn van Riel
7	Maltese Welfare (NSW) Inc
8	Sydney University Graduates Union of North America (SUGUNA)
9	Mr Ian Borg
10	Mr Jim Woulfe
11	Ms Kim Falconer-Brown
12	Mr Michael Young
12A	Mr Michael Young
13	Standard Form Letter – received by various individuals
14	Mr Phil Wong
15	Standard Form Letter – received by various individuals
16	Mr Robert & Mrs Ruth Innes
17	Ms Charlene Falzon
18	Mr Dylan Falzon
19	Mr Roger and Mrs Sue Williams
20	Mr Andrew Shine
21	Akram

22	Dr Trevor Glasbey
23	Ms Maire Claire West
24	Ms Melissa Wood
25	NSW Council for Civil Liberties
26	Department of Family and Community Services
27	Mr Bruce Donald
28	Mr John Griffin
29	Mrs Janet Lyn Magnin
30	Mr Gabriel and Mrs Maria Pana
31	Mrs Shona Salver
32	Maltese Guild of South Australia Inc.
33	Centre for Comparative Constitutional Studies
34	Mr Jeremy Jenkins
35	Department of Immigration and Multicultural Affairs
35A	Department of Immigration and Multicultural Affairs
36	Ms Kathy Okoth
37	Liberian Community of South Australia Inc.
38	Refugee Advice and Casework Service (Aust) Inc.
39	Office of the Privacy Commissioner
40	Australian Privacy Foundation
41	Mr David W. Ash
42	Mr Mark Galley
43	Fragomen Australia
44	Human Rights Act for Australia Campaign
45	Ms Robbie Anna Hare

46	Refugee and Immigration Legal Services Inc
47	Migration Institute of Australia
48	Mr Michael Mok
49	Law Society of South Australia
49A	Law Society of South Australia
50	Human Rights and Equal Opportunity Commission
50A	Human Rights and Equal Opportunity Commission
51	Law Institute of Victoria
51A	Law Institute of Victoria
52	Southern Cross Group
52A	Southern Cross Group
52B	Southern Cross Group
52C	Southern Cross Group
53	Dr Saviour & Dr Salvina Borg
54	Mr Daniel Piscopo
55	Ms Yasmin Schembri
56	Mr Darryl Schembri
57	Kurt & Luke Falzon
58	Ms Jacques Bugeja
59	Ms Alain Bugeja
60	Ms Myra Bugeja
61	Mr Karl Farrugia
62	Mr Malcolm Vella
63	Mr Andrei Zahra
64	Nathaniel, Jurgen-Paul & Jean-Claude Zammit

65 Professor Kim Rubenstein

66 Confidential

67 Confidential

ADDITIONAL DOCUMENTS

Drawings sent into the Committee by various children living in Malta.

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Melbourne, 30 January 2006

Law Institute of Victoria

Mr Erskine Rodan, Councillor and Board Member

Ms Alison Brooks, Paralegal, Administrative Law and Human Rights Section

Centre for Comparative Constitutional Studies

Dr Simon Evans, Director

Law Society of Law South Australia

Ms Deej Eszenyi, President

Ms Sasha Lowes, Member, Human Rights Committee

Ms Paula Stirling, Member, Justice Access Committee

Human Rights and Equal Opportunity Commission

Mr Craig Lenehan, Deputy Director, Legal Services

Canberra, 6 February 2006

Fragomen Australia

Dr David Crawford, Partner

Migration Insitute of Australia

Mr David Mawson, Chief Executive Officer

Mrs Helen Duncan, Vice-President, QLD Branch

Mr Neil Hitchcock, Fellow and Founding Member

Southern Cross Group

Ms Anne MacGregor, Co-Founder

Maltese Welfare Assocation

Mr Lawrence Dimech OAM JP, President

Professor Kim Rubenstein

Department of Immigration and Multicultural Affairs

Mr Peter Vardos PSM, First Assistant Secretary, Citizenship, Settlement and Multicultural Affairs Division

Ms Mary-Anne Ellis, Assistant Secretary, Citizenship and Language Services Branch

Ms Nadine Clode, A/g Director, Citizenship Policy Section