

**Human Rights and  
Equal Opportunity Commission**

**Legal Section**

16 February 2006

Mr Jonathon Curtis  
Secretary  
Legal and Constitutional Committee  
Australian Senate  
Parliament House  
CANBERRA ACT 2600

Dear Sir

**Re: Inquiry into the Australian Citizenship Bill 2005 and Australian Citizenship  
(Transitionals and Consequentials) Bill 2005.**

At the hearing held 30 January 2006, the Commission took three questions on notice. I am advised that the answers to the Honourable Senators' questions are as set out below.

**Question 1**

**CHAIR** - ... I want to ask you some questions about the material the commission has put together in relation to statelessness and, particularly, the Convention on the Reduction of Statelessness. I think it is fair to say that this is sometimes a very complex area of law, but I think the convention is reasonably clear in relation to its application. Was HREOC consulted in the preparation of the bill, particularly on these sorts of issues?

**Mr Lenehan** — Not to my knowledge. For thoroughness, I will take that on notice and check that no-one else within the commission was consulted.

**CHAIR**—That would be helpful. I assume that, if HREOC had been consulted, the concerns that you outlined in your submission in relation to statelessness and the impact of the convention would have been raised in that process.

**Answer:**

The Commission confirms that it was not consulted in the preparation of the Bill.

**Question 2**

At proof Hansard p18, the Commission took the following question on notice:

**Senator BARTLETT**—You may have heard some of the previous evidence regarding parents applying for citizenship on behalf of children, specifically the issue of children who might be part of some of those unfortunate international custody

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disputes and also the potential discrepancy between children adopted overseas who were still overseas when the adoption was formalised and children who were adopted in Australia. I wonder whether you think those areas need tightening up and also whether they present some breaches of our obligations under various conventions. There are a few of them, and I lose track of what they are all called, but I am thinking of the ones dealing with international custodial things and the rights of the child in general.

**Mr Lenehan**—I unfortunately missed that evidence, which I think was from the Centre for Comparative Constitutional Studies, but I have seen their submission. I do not have the commission's view on that issue, but I am happy to seek it and provide it to the committee on notice. Just to be clear, I think that the convention you refer to is the Hague Convention on the protection of children, which is what Dr Evans has sought to address in his submission.

### **Answer:**

The Commission notes that Senator Bartlett's question identifies two distinct issues:

- a. whether the operation of the Bill meets Australia's international obligations in relation to children involved in international custody disputes; and
- b. whether the Bill meets Australia's international obligations in relation to the rights of children who are adopted overseas.

The Commission will address these issues in turn.

#### **A. Whether the operation of the Bill meets Australia's international obligations in relation to children involved in international custody disputes**

Article 1 of the *Hague Convention on the Civil Aspects of International Child Abduction* provides that the objects of the Convention are:

- (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2 of the Convention provides that Contracting States shall take all appropriate measures to implement the objects of the Convention.

Australia has ratified the *Hague Convention on Civil Aspects of International Child Abduction*. The Commonwealth Government has implemented the Convention by introducing the *Family Law (Child Abduction Convention) Regulations 1986*.

Australia's obligations under Article 1(b) and Article 2 of the *Hague Convention on Civil Aspects of International Child Abduction* require the Commonwealth Government to ensure that the rights of custody and access under the laws of other States are respected in Australia.

Proposed section 21(5) provides that persons under 18 may apply for Australian citizenship. At proof Hansard p9 Senator Bartlett asked Dr Evans:

... Have you turned your mind at all to whether this section of the legislation adequately addresses any potential risks in the situation where there is an attempt to prevent a child being returned to another country by making them a citizen here? I imagine it would be fairly rare but, given the few cases I am aware of, it is also not out of the question.

Dr Evans responded:

It is a particularly important area. The whole question of how applications are made by and on behalf of children is left largely to implication in this act. This is too important to leave to implication precisely because of the kind of examples that you give. A contrast with this act is the regime in the passports act, which spells out in quite exhaustive detail who may apply for a passport on behalf of a child. It also picks up the definitions of 'responsible parent' that appear in this bill but uses them to control who is able to make an application, so you do not have the situation of a non-custodial parent—to use the old terminology—making an application on behalf of a child when they ought not have that responsibility. It seems to us that there ought to be a regime spelt out in this act to say, for example—and this is just one possibility—that a child under 18 or 16 may not apply for a passport on their own behalf but a responsible parent or two responsible parents jointly may apply on their behalf, or the child may be included in the application of a responsible parent or an appropriate third party if no parents are available to make an application on their behalf. The act does spell out the consequences when an application by a parent for citizenship is refused. The implications for the child's application follow. However, the act does not say who initiates that application in the first place, who is authorised to initiate that application or who is authorised to take steps in pursuing the application on behalf of the child. It is important to avoid the kind of situation that you mention.

The Commission is of the view that to comply with Australia's obligations under the *Hague Convention on Civil Aspects of International Child Abduction* the Commonwealth Government must take steps ensure that the citizenship application process for children is not open to abuse. In particular, The Bill should ensure that only a 'responsible parent', as defined by proposed section 6, may apply for citizenship on behalf of their child.

The Commission supports the recommendation of the Centre for Comparative Constitutional Studies that proposed section 21(5) should make clear that an application for citizenship made on behalf of a child must be made by a responsible parent or an appropriate third person.<sup>1</sup>

The Commission notes the Centre for Comparative Constitutional Studies' concern that the Bill provides no indications of the relevant considerations in determining applications for citizenship by, or on behalf of, children. The Commission supports the Centre's recommendation that proposed section 24 be amended to require the Minister to take into account Australia's international obligations in relation to children when considering an application under proposed section 21(5).<sup>2</sup>

More generally, the Commission reiterates its recommendation that the Bill should be amended to include a general obligation to take into account the best interests of children as a primary consideration in all decisions which affect them (as required by article 3 of the *Convention on the Rights of the Child*).

## **B. Whether The Bill meets Australia's international obligations in relation to the rights of children who are adopted overseas.**

Article 21 of the *Convention on the Rights of the Child* provides:

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<sup>1</sup> The Comparative Centre for Constitutional Studies, Submission no. 33, p 4.

<sup>2</sup> Ibid.

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

... (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

Article 1 of the *Hague Convention on the Protection of Children in relation to Inter-country Adoption* states that the objects of the Convention are.

To establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in International Law.

Australia ratified the *Hague Convention on the Protection of Children in relation to Inter-country Adoption* on the 25<sup>th</sup> August 1995. The Commonwealth Government has implemented the Hague Convention via the *Family Law (Hague Convention on Inter-country Adoption) Regulations 1998* and the Commonwealth-State agreement for the implementation of the *Hague Convention for the Protection of Children in Respect of Inter-country Adoption*.

Regulation 18 of the *Family Law (Hague Convention on Inter-country Adoption) Regulations 1998* (Cth) provides that recognition of the adoption of a child includes, for the laws of the Commonwealth and each State, recognition that under those laws the child has the same laws as a child who is adopted under the laws of the State.

Proposed section 13 states:

A person is an Australian citizen if the person is:

- (a) adopted under a law of a State or Territory; and
- (b) adopted by a person who is an Australian citizen at the time of the adoption or by 2 persons jointly at least one of whom is an Australian citizen at that time; and
- (c) present in Australia as a permanent resident at that time.

As noted by the Centre for Comparative Constitutional Studies, under Regulation 16 of the *Family Law (Hague Convention on Inter-country Adoption) Regulations 1998* recognition of adoption occurs automatically upon the issuing of an adoption certificate from the adopted child's country. Consequently, some children adopted overseas will not be present in Australia as permanent residents at the time the adoption is recognised in Australia and, as a result, will not automatically become citizens by operation of proposed section 13.<sup>3</sup> The Centre notes that while they may apply for citizenship under proposed section 21 they must meet the eligibility criteria and, to this extent, will not have the same rights as children adopted within Australia.<sup>4</sup>

The Commission is of the view that, to comply with Australia's international obligations, proposed section 21 of The Bill should be amended to allow a person of any age to apply for citizenship if they were adopted overseas by a person who is an Australian citizen at the time of the adoption and the adoption is recognised in Australia.

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<sup>3</sup> Ibid, p 5.

<sup>4</sup> The Commission notes that granting persons automatic citizenship in circumstances where the persons were adopted overseas and not present in Australia as permanent residents at the time the adoption is recognised in Australia is not an appropriate response as it may result in unwanted interference with the adopted person's citizenship rights in their country of birth or residence. Such action would potentially breach article 8 of the *Convention on the Rights of the Child* which provides: "State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, and family relations as recognised without unlawful interference."

## Question 5

At proof Hansard 19 the Commission took the following question on notice:

**Senator BARTLETT**—Another point that you mention in your conclusion is that citizens possess important rights of political participation. It might seem a little bit of a tangent. I have not noted it mentioned much in other submissions. The current prohibition against dual citizens being able to nominate for parliament is one that strikes me as a bit of an anomaly of the past. I know it is in the Constitution, so there is probably not much we can do about it in the context of the bill, but I wonder whether that issue is one that has at all arisen, as far as you are aware, in the work of the commission. As far as I know there are not terribly clear statistics about exactly how many Australians are dual citizens, but I gather it is a pretty big chunk.

**Mr Lenehan**—I am not aware of any work being conducted within the commission specifically on that area, but again I am happy to take that on notice and check if it will be of assistance.

**Senator BARTLETT**—Thank you for that. It seems discriminatory to me. As much as we have eminently capable people in the current parliament, I am sure that if we can open up the pool by another 20 to 25 per cent of Australians then—you never know—we might get a few more good people in.

### Answer:

The Commission confirms that this issue has not yet arisen in its work.

Please do not hesitate to contact Craig Lenehan (9284 9617) if you require any further information regarding the above.

Yours faithfully

Craig Lenehan  
Deputy Director Legal Services