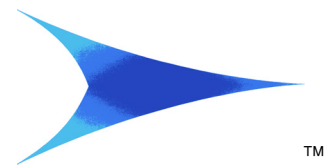


# **The Southern Cross Group**

*Promoting Mobility in the Global Community*  
[www.southern-cross-group.org](http://www.southern-cross-group.org)



## **Second Supplementary Submission to the Australian Senate's Legal and Constitutional Legislation Committee**

### **Inquiry into the Provisions of the *Australian Citizenship Bill 2005* and the *Australian Citizenship (Transitionals and Consequentials) Bill 2005***

Brussels

8 February 2006

***The Southern Cross Group is an international volunteer-run non-profit advocacy and support organisation for the Australian Diaspora***

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## Introduction

In the oral evidence given via videolink at the public hearing conducted in Canberra on 6 February 2006 in the present Inquiry, the Southern Cross Group (SCG) undertook to provide the Committee with a further written submission on the issue of citizenship for those adopted overseas by Australian expatriates where the adopted persons are now adults.

The SCG previously raised this matter in the context of the Committee's Inquiry into Australian Expatriates, in its Supplementary Submission dated 23 July 2004 (pages 22 – 25), and in an e-mail addressed to the then Committee Secretary, Phillip Bailey, sent on 11 August 2004 and copied to the then Minister for Citizenship and Multicultural Affairs, as well as Peter Vardos, Mary-Anne Ellis and Lyn Hearfield of (what was then) DIMIA. We set out the issue again at this time, because our reading of the *Australian Citizenship Bill 2005* ("the Bill"), in the form tabled on 9 November 2005, is that it does not contain a provision which will address this particular anomaly.

Indeed, the SCG's more detailed examination of the current law and the new Bill in this context leads it to conclude that there is no evidence that the Department and the Government have undertaken any recent thorough or comprehensive review of the general issue of Australian citizenship for individuals who are adopted abroad by one or two expatriate Australian citizens, and how the matter should be broadly addressed in policy terms. The SCG asks that the Committee take this matter up with DIMA in the context of the present Inquiry.

### 1. Affected Australian Expatriate Families

The SCG has been contacted over the last several years by two expatriate families where the adopted children were adopted under the laws of a country other than Australia, where those children are now adults and where they have missed out on obtaining Australian citizenship both as minors and now as adults. We set out the facts of both cases below in order to illustrate the scenario of this particular group of persons and then turn to a discussion of the relevant law and policy.

Although the SCG has only learned of two such cases to date, it believes that there must be a number of additional and similar cases in the Australian diaspora. It would be impossible to obtain precise data on the total number of adoptions that Australian expatriates engage in abroad. However, the pattern of overseas adoptions by expatriate Australians can be broadly expected in geographical terms to mirror the concentration of Australians resident abroad in various countries. In other words, probably approximately 33% of all such cases would occur in the United Kingdom, as about one third of all overseas Australians at any one time are in the United Kingdom. Approximately 15% would occur in the other 24 EU countries. Approximately 5% would be in

Canada, 10-15% in the United States and 8% in New Zealand. It is important to note that in the overwhelming majority of cases, when Australian expatriates adopt a child under the laws of their country of residence, that country of residence is a developed country, with fully-fledged adoption laws which Australia should consider to be equivalent to its own adoption laws.

### **1.1 The Salisbury Family**

Mrs Salisbury was born in Australia in 1932 and grew up there, before marrying a Canadian citizen and settling in Canada in the late 1950s. She and her husband adopted a child born in Canada in 1960, and another in 1962, in both cases just a few weeks after the child was born. The adoptions were carried out under the laws of Canada. In the 1970s, the family moved to Australia for several years, and Mrs Salisbury tried to obtain Australian citizenship for the two children, who were still minors at that time, but was told in writing by the Department of Immigration that they could not be Australian citizens because they were adopted under the laws of Canada and not the laws of Australia. Today, Mrs Salisbury is a dual Canadian/Australian citizen and lives with her husband in Canada. She lost her Australian citizenship in 1980 under the now-repealed Section 17 on acquiring Canadian citizenship but recently resumed it. However, her children, now both in their forties, are just Canadian citizens, despite the fact that the only mother they have ever known was an Australian citizen for the entire period of their childhood. This is a matter of continuing disappointment to the whole family. It has also greatly influenced educational, career and other important life decisions, which could well have been very different if the two Salisbury children had been Australian citizens.

### **1.2 The Spalding Family**

Mrs Beryl Spalding was born in Australia and went to the UK on a working holiday in 1959. In 1960 she married her British-citizen husband John. Beryl has never taken British citizenship and is still today an Australian citizen, living in London.

Beryl and John adopted two children under the laws of the UK. Catherine was born on 30 June 1963 and came to the couple at the beginning of February 1964, with adoption formalities being completed in October 1964. Ian was born on 1 April 1965 and came to Beryl and John at the age of four months, with adoption formalities being finalised at the end of 1965.

Neither Catherine or Ian have been able to obtain Australian citizenship through their adopted mother although she has always been an Australian citizen.<sup>1</sup>

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<sup>1</sup> Beryl's daughter Catherine is now a permanent resident in Australia and could become an Australian citizen by grant, but only because she has since migrated to Australia.

Beryl has had various correspondence with the Australian authorities over the years on this matter. A letter to the SCG in July 2004 outlining her situation is attached as **Annex 1**. In May 1985, she wrote to the Australian High Commission in London. By that time, both adopted children had attained the age of 18 years. She was told by letter dated 7 June 1985 (attached as **Annex 2**) that it was “not possible to grant citizenship by adoption to a person who has attained the age of 18 years”.

On 9 August 1994, when Beryl and her husband John and son Ian were considering moving to live in Australia, she again wrote to the Australian High Commission in London (letter attached as **Annex 3**). The response dated 24 August 1994 (attached as **Annex 4**) clarified that “children adopted overseas by an Australian citizen cannot apply for registration as Australian citizens [by descent]”, but that an application for the grant of Australian citizenship could be submitted prior to the child’s eighteenth birthday. However, by that time, both Ian and Catherine were well and truly adults. Unfortunately, Beryl had simply not realised while the children were minors that she could have applied for Australian citizenship by grant for them, even though they never qualified at any time for citizenship by descent.

On 20 February 2003, Beryl attended a Citizenship Affirmation Ceremony at the Australian High Commission in London organised by the SCG. On that occasion she met the then Minister for Citizenship and Multicultural Affairs, the Hon Gary Hardgrave MP and personally explained the situation to him. She followed up by writing to Mr Hardgrave on 27 March 2003 (attached as **Annex 5**). She received a response dated 30 April 2003 (attached as **Annex 6**) in which the Minister told her that “your situation is one which I have firmly in my gaze should there be a change to the Act”.

## **2. Australian Citizenship for those Adopted under the Laws of Australia**

Since 22 November 1984, non-citizens adopted in Australia automatically become Australian citizens under Section 10A of the *Australian Citizenship Act 1948* (“the current Act”) if they are in Australia as permanent residents and if they are adopted under a law in force in a State or Territory by an Australian citizen or jointly by two persons, one of whom is an Australian citizen. The Bill will re-enact the current Section 10A in the same terms, in Clause 13. This was confirmed by Mary-Anne Ellis of the Department of Immigration and Multicultural Affairs, Citizenship and Language Services Branch, in response to a question from Senator Bartlett in the public hearing on 6 February 2006.

It is unclear how many, if any, non-citizen children are adopted in Australia who do not have permanent resident status at the time of their adoption, or who do not have one adoptive parent who is an Australian citizen. If a child is adopted under Australian law in Australia but cannot

satisfy the requirements of the current Section 10A or Clause 13 of the Bill, presumably he or she must rely on the citizenship by grant/conferral provisions.

Prior to 22 November 1984, people adopted in Australia had to wait to be naturalised according to the provisions of Section 13 of the current Act.

### **3. Australian Citizenship for those Adopted under the Laws of Another Country**

With so many Australian citizens living abroad today, it is logical that some will adopt children while they live abroad, under the laws of their country of residence or some other country, rather than under the laws of Australia. It is also clear that a number of adoptions have been made by expatriate Australians under the laws of other countries in the past.

As can be seen from the Salisbury and Spalding cases, and as will be explained in greater detail below, there is presently no route to Australian citizenship by grant or by descent for overseas-born individuals adopted by Australian citizens overseas under the laws of a foreign country where those adopted individuals are now 18 years old or over. A legal route to Australian citizenship should be provided for this group in the Bill, so that these individuals are accorded equivalent treatment to the adult natural overseas-born offspring of Australian expatriates.

Further, the SCG submits that it is time to engage in a fundamental re-think as to how Australian citizenship law generally addresses cases of overseas adoption, and whether the provisions in the Bill fully reflect Australia's commitments under Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption ("the Hague Convention").

#### **3.1 No Legal Mechanism for Australian Citizenship by Descent for Those Adopted Overseas**

##### **a) Minors**

Children who are born overseas and then adopted overseas by one or two Australian citizens under the law of a foreign country cannot normally be registered as Australian citizens by descent under Section 10B of the current Act. That provision requires that the person born overseas, for whom registration as a citizen by descent is sought, have an Australian-citizen parent at the time of birth. Adopted parents are not legally parents of the child at the time of their birth, even though adoption can occur within a few days or weeks of the child's birth. Unless one of the overseas-born adopted child's birth parents fortuitously happens to be an Australian citizen and this is documented, Australian-citizen adoptive parents resident abroad have, since the current Act came into force on 26 January 1949, been prevented from registering their overseas-born and

overseas-adopted minor children as Australian citizens by descent. It appears that this situation will continue under Clause 16 of the Bill (although the SCG queries the meaning of the word “parent” as used in Clause 16, see further below).

## **b) Adults**

As in the case of minors described above, individuals who are the adopted children of Australian citizens, adopted under the laws of a foreign country, who have now reached adulthood, also do not qualify at present for registration as citizens by descent under Section 10C of the current Act, which provides for citizenship by descent for persons aged 18 or over on 15 January 1992.<sup>2</sup> The case of *Heald and Minister for Immigration and Multicultural Affairs* [2001] AATA 455 (28 May 2001) makes this clear. There, the applicant for Section 10C registration was born in 1961 in the UK and adopted a few months later by an Australian-citizen woman and a British-citizen man. Section 10C requires a “natural parent” of the applicant to have been Australian at the time of the birth of the applicant, and there was no evidence of the nationality of Ms Heald’s birth parents. She was therefore deemed not to satisfy the eligibility criterion of Section 10C and her application failed.

It should also be noted that if an Australian citizen has a child overseas that they later put up for adoption overseas, that child could in theory be registered as an Australian citizen by descent by the natural Australian-citizen parent before the adoption takes place under Section 10B of the current Act. If the natural Australian citizen parent failed to do this before the date of the adoption, Section 10C could feasibly be used by the adoptee once he or she reached the age of 18 to achieve citizenship by descent, as long as the adoptee could prove that the natural parent was an Australian citizen at the time of his or her birth. Clause 16 of the Bill will presumably mean that adoptees with a natural Australian parent can apply for Australian citizenship by descent either as minors or as adults as long as they can show that they had a parent at the time of their birth who was an Australian citizen. However this interpretation should be clarified because it is unclear how the term “parent” is to be understood.

If an Australian-citizen child is subsequently adopted by non-Australian parents, the child does not lose Australian citizenship, even if the child then acquires a foreign nationality through its adoptive parents.

### **3.2 The Present Limited Solution: Australian Citizenship by Discretionary Grant/Conferral for Minors**

Children who have been adopted by Australian citizens overseas can obtain Australian citizenship by grant under Section 13(9)(a) of the current Act, by way of Ministerial discretion, unless they are

legally adopted again in Australia (in which case Section 10A applies).<sup>3</sup> Policy requires that the parents have lived overseas for more than one year at the time of the adoption and that they have acquired full and permanent parental rights by the child's adoption. It appears that this discretion will continue to exist under Clause 21(5) of the Bill.

While this use of Ministerial discretion to grant adopted minors Australian citizenship gets around the fact that adopted children are not covered by the citizenship by descent provisions of the current Act and the Bill, the limiting factor with this discretion is that it can only be exercised in favour of individuals who have not yet attained the age of 18 years. No equivalent discretion exists to grant Australian citizenship to those who were adopted as children abroad by Australian expatriate parents, but who are now adults.

Some adoptive parents overseas, such as Mrs Spalding and Mrs Salisbury, simply never realised this mechanism for citizenship by grant under Ministerial discretion existed, until it was too late for their children. The situation can be likened to the position of children born overseas to natural Australian-citizen parents where those parents never registered their children under Section 10B of the current Act before the age deadline that existed at the relevant time. Section 10C of the current Act provides some relief for such natural-born children, and indeed Clause 16 of the Bill will make registration as a citizen by descent possible for both minors and adults who satisfy the criteria set out therein. The Bill should contain a mechanism allowing adopted individuals who missed out as minors a route to Australian citizenship as adults.

#### **4. May 2005 Policy Change Requiring Adoption/Permanent Visas – A Burdensome Prerequisite for the Exercise of Ministerial Discretion**

Even though a legal route to citizenship by grant does exist for minors adopted overseas, the SCG submits that even the operation of that Ministerial discretion is not without difficulties.

In May 2005 the then Minister for Citizenship and Multicultural Affairs announced that children adopted privately overseas applying for grant of Australian citizenship under Section 13(9)(a) would need to hold an adoption visa or other permanent visa.<sup>4</sup> This change was purportedly made to “make sure that privately adopted children applying for citizenship were genuinely available for adoption”, and so that “Australian citizens adopting children privately now have to meet the same visa requirements as those adopting through State and Territory programs.” This change was deemed necessary to make sure that checks were in place to guard against the trafficking, abduction and the sale of children.

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<sup>2</sup> Only persons born between 26 January 1949 and 15 January 1974 can use Section 10C of the current Act, but this limitation will disappear under Clause 16 of the Bill.

<sup>3</sup> Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co., 2002, page 94.

<sup>4</sup> Media Release by Peter McGauran MP, “Extra Protection for Adopted Children”, 8 May 2005.



For the uninformed reader it is not initially clear what precisely is meant by “private adoptions” in the May 2005 policy change announcement. One could be forgiven for thinking that a “private adoption” is only one that is not organised or supported by the state adoption authorities in any country, for example, a private agreement between individuals. However, DIMA’s Fact Sheet 36 “Adopting Children Overseas” would appear to indicate that a “private adoption” is any adoption which is not supported by an Australian State or Territory welfare authority, i.e. one that is “privately arranged”.<sup>5</sup> The Fact Sheet states, under the heading “Where a full adoption occurs overseas” that “where a full adoption occurs and is completed overseas, an application may be made for the grant of Australian citizenship. To be eligible for the grant of citizenship at least one adoptive parent must be an Australian citizen and the adopted child must hold an adoption visa or any other permanent visa.” In other words, where an expatriate Australian citizen has duly completed state adoption processes in for example the United Kingdom and the adoption has occurred under the law of England and Wales, this would be, in DIMA’s terms, a “private adoption”, and if the expatriate Australian adoptive parent wants Australian citizenship for their child, the application for grant of citizenship necessarily now entails obtaining an adoption or other permanent visa for the child.

The SCG questions whether this extra hurdle is justified, and whether the justifications for requiring an adoption visa given in May 2005 are really necessary in order to protect the best interests of the child, or whether this is simply a revenue raising measure. It has to be asked whether requiring an adoption visa or other permanent visa is an appropriate prerequisite to the grant of Australian citizenship by Ministerial discretion for the child where the family resides abroad and the adoption has fully complied with the laws of countries such as the UK, Canada, and similar jurisdictions. The SCG submits that this requirement in most cases will provide no added protection for the children concerned, and is simply an additional barrier and expense to obtaining Australian citizenship for the child.

The current fee for an application for grant of Australian citizenship is AUD 120. The current fee for an adoption or child visa is AUD 1,305. A medical examination may be required as part of the visa application which must also be paid for by the applicant. Adoption and other child visas are generally processed within a matter of weeks once lodged, but considerable paperwork is required to get an application together.

In addition, the SCG notes that adoption and other child permanent visas are always issued with a “date of first entry into Australia” condition. The visa as such is valid from the date it is issued overseas, but the holder of the visa will be given a date by which he or she has to enter Australia. This is usually 12 months from the date of the medical examination report that was submitted with the visa application. If the visa holder has not entered Australia by that date, the visa can be cancelled.

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<sup>5</sup> <http://www.immi.gov.au/facts/36adopting.htm>.

The SCG has no information as to whether an application for grant of citizenship to the adopted child may be made before the first entry into Australia condition on the child/adoption visa has been fulfilled. It submits that the Committee should seek clarification on this point, and DIMA should improve its information on both the *www.immi.gov.au* and the *www.citizenship.gov.au* websites. If the Minister will not grant citizenship under Section 13(9)(a) of the current Act, or Clause 21(5) of the Bill in the future, until the first entry condition has been fulfilled, then the cost of citizenship for such children not only entails the fees for the citizenship and visa applications (AUD 1,425) but also the cost of return airfares to Australia for the child and at least one parent, and related travel expenses such as travel insurance, domestic travel within Australia, accommodation and meals. This would be excessively burdensome. The first entry condition should be irrelevant to the grant of citizenship for the child by Ministerial discretion. If the visa was obtained, and the application for grant of citizenship by discretion was made from overseas and the application granted in the period between the issue date and the date of first entry, then on becoming an Australian citizen the visa would fall away, and there would be no need to return to Australia.

It is also submitted that many expatriate Australians will think that the adoption visa prerequisite to the discretionary grant of citizenship for minor adopted children necessarily means that the family is required to move back to Australia in order for the child to be granted citizenship. The point as to whether the first entry into Australia condition has to be satisfied before applying for citizenship should be clarified and properly explained. Further, Government websites and booklets should clearly state, even if the first entry condition has to be satisfied before the application for citizenship is made, that families may simply visit for a short period and then leave the country again but that a move back to Australia is not necessary.

## **5. Citizenship by Descent is the Appropriate Kind of Citizenship**

That citizenship by descent is not possible for either minors or adults in such cases is illogical in itself. In general terms, the purpose of adoption laws in most Western countries is to allow the adoptive parents to acquire full and permanent parental rights. The adoption order generally severs the legal relationship between the child and its natural parents. Once that legal relationship has been created, it is submitted that Australia's citizenship laws should treat the adopted child of Australian-citizen parents living overseas as it would treat the natural overseas-born child of Australian citizens. They should in principle qualify to be registered as Australian citizens by descent. The fact that the adoption occurred after the child's date of birth does not have to preclude this.

Clause 16(2)(a) of the Bill reads:

A person born outside Australia on or after 26 January 1949 is eligible to become an Australian citizen if:

(a) a parent of the person was an Australian citizen at the time of the birth;

During the 6 February 2006 hearing the SCG queried whether Clause 16(2)(a) of the *Australian Citizenship Bill 2005* could possibly cover such cases. The use of the term “natural parent” in the current Section 10C is no longer present. Could this mean that having a present (adoptive) parent who was Australian at the time of the child’s birth, even if the adoption occurred after birth, be enough? The SCG assumes that that is not the intention of the Parliamentary draftsman. Where the term “parent” (as opposed to “responsible parent”) is used in the Bill (e.g. in Clauses 12(1), 16(2), 16(3), 21(6) and 21(7)), does it mean a natural parent, an adoptive parent, or both?

Clause 17 of the Bill indicates, with regard to applications for registration by descent made under Clause 16, that no Ministerial discretion exists.

However, it is submitted that citizenship by descent could be made possible for adopted persons of any age in the Bill by introducing a separate descent provision especially for adopted people, and making this subject to Ministerial discretion. The element of Ministerial discretion would allow the Government to make an assessment in each case as to whether the overseas adoption could be deemed equivalent and proper, in particular whether the adoptive parents had lawfully acquired full and permanent parental rights by the child’s adoption at the time. In the Salisbury case discussed above, the adoptions occurred under the laws of Canada. In the Spalding case, the adoptions occurred under the laws of England and Wales. Both of these countries have common law legal systems close to the Australian legal system in many respects, and it is submitted that adoptions under the laws of these countries in previous decades could not conceivably ever have reasonably been considered in Australia to be improper or not equivalent to an adoption under Australian law.

Providing access to citizenship by descent rather than by grant for children adopted by Australian expatriate citizens under the laws of other countries would in fact result in a more consistent policy approach. Citizenship by grant is a different or higher quality of citizenship in terms of citizenship by descent for the next generation and natural overseas-born children of Australian citizens do not get citizenship by grant. Citizenship by descent only enables to passing on of citizenship by descent to the next generation if certain requirements are met, most notably the parent must have been present in Australia for a total period of at least two years.

Further, by including overseas adopted people with Australian-citizen expatriate adoptive parents within the descent provisions, the decision to register for Australian citizenship by descent could

be taken by the individual concerned (if they are adults) or their parents (if they are still minors) if it does not have detrimental consequences under the citizenship laws of another country.

## **6. Differentiation Between Adopted and Natural Children of Overseas Australians is Discriminatory – the Canadian Experience**

Under Clause 16 of the Bill, individuals born abroad to a natural Australian-citizen parent will have access to registration as an Australian citizen by descent at any age. People born abroad and then adopted by Australian-citizen parents overseas will have no access to the descent provisions, and their access to citizenship by grant will expire on the day they turn 18. The different treatment for these two groups is discriminatory.

It is submitted that the Government has no *bone fide* justifications for not granting access to citizenship by descent via registration for the adopted group. It might be claimed that the different treatment is justified in order to prevent the potential abuse that could occur when people improperly attempt to bypass the immigration system by using adoption as a means of gaining admission of persons to Australia without their qualifying as immigrants. However, the need to keep the Australian immigration system honest can be accomplished without discriminating against adopted children. Once it has been established that the adoption has been performed according to local law and has created a true parent-child relationship, no more should be necessary.

In this respect developments in recent years in Canada are illustrative. Under Canadian law, children born abroad to Canadian citizens automatically acquire citizenship.<sup>6</sup> However, children adopted overseas by Canadian citizens resident outside Canada had to gain admission to Canada as permanent residents in order to then be granted Canadian citizenship. This requirement is not dissimilar to the adoptive/permanent resident visa requirement which the Australian Government announced in May 2005. The fact that Canadian citizenship law incorporated by reference the requirements pertaining to permanent residency imposed under the *Immigration Act* was held by the Canadian Federal Court of Appeal to be discriminatory in the 1998 McKenna case.

In that case, the appellant, Mrs McKenna, a Canadian citizen, had three sons born in Canada who received Canadian citizenship as of right. Then she had her husband, permanent residents of Ireland, adopted two daughters in accordance with the laws of Ireland. The daughters were both born in Ireland and were Irish citizens. When Canadian consular authorities in Ireland refused to issue Canadian passports to her daughters, Mrs McKenna lodged a complaint with the Canadian Human Rights Commission, alleging discrimination on the basis of family status contrary to the

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<sup>6</sup> *Citizenship Act*, Section 3.

*Canadian Human Rights Act*. Successful before the Human Rights Tribunal, Mrs McKenna lost upon judicial review, but ultimately succeeded in the Federal Court of Appeal.<sup>7</sup>

Following the McKenna case, the Canadian Government tabled a bill designed to allow citizenship to be granted to adopted persons without requiring them to meet the criterion of permanent residence. To fill the vacuum until the legislation was adopted, the Canadian citizenship authorities introduced interim measures specific to adopted applicants for citizenship whose permanent residence is outside Canada, allowing them access to Canadian citizenship at any age, provided that they were adopted while under 18 years of age.<sup>8</sup> The alternative offered to persons legally adopted by Canadians residing outside Canada is the discretionary power of the Governor in Council to grant citizenship to person who do not meet the criteria of the Act. Applicants are required to provide evidence to satisfy the following criteria:

- The person must have been adopted by a Canadian after 31 December 1946;
- The person must have been less than 18 years of age at the time of the adoption;
- The adoption must have been done in the best interests of the adopted person;
- The adoption must have created a genuine parent-child relationship between the adopted child and the adopting parent;
- The adoption must have been done in accordance with the law of the place of adoption and of the place of residence of the adopting parent;
- The adoption must not have been done solely for the purpose of evading legal obligations relating to immigration or citizenship.

Treating natural and adopted children of overseas Australians differently under Australian citizenship law is discriminatory in itself. Imposing the requirement for an adoption or other permanent visa on adopted children seeking grant of Australian discretion under Ministerial discretion on top of that is unnecessarily burdensome. It may suit DIMA in that it means that public servants in the Citizenship and Language Services Branch of the Department in Canberra are not required to make decisions on the efficacy of overseas adoptions or handle additional documentation. All they have to do is tick a box as to whether an adoption or other permanent visa has been issued, their colleagues in a separate Division having done the visa processing work for them in advance. But this convenience is achieved at the considerable financial expense and inconvenience imposed on expatriate families who have adopted children overseas.

## **7. Clause 13 of the Bill and the Hague Convention**

Australia's ratification of the Hague Convention entered into force on 1 December 1998. Under the Convention Australia must provide for the recognition of an adoption which takes place under

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<sup>7</sup> <http://reports.fja.gc.ca/fc/1999/pub/v1/1999fc23364.html>.

the Convention and is obliged to accord the same rights to the child as would be accorded to a child adopted in Australia.<sup>9</sup> As Rubenstein notes, theoretically, if this Convention is applied to the current Act, then children adopted overseas should be given the same rights as children adopted in Australia, as set out in Section 10A of the current Act, which will be re-enacted as Clause 13 in the new Bill.<sup>10</sup>

We note that at the time of the Australian Citizenship Council's February 2000 Report, the Department was reportedly "currently considering what changes to Australian Citizenship law, policy and procedures may be required to ensure that Australia meets its obligations under the Convention."<sup>11</sup> The SCG would ask the Committee to seek details from the Department as to the results of that review and any subsequent changes which have occurred to citizenship law and policy. In particular, the SCG asks that the Department clarify whether all adoptions which are carried out under the Convention result in an adoption order being made under Australian law. If they are not, then Section 10A of the current Act and Clause 13 in the Bill would seem not to apply to automatically give the child Australian citizenship, and Australia may not be according the same rights to the child as should be accorded to children adopted in Australia.<sup>12</sup>

The Australian Citizenship Council noted in 2000 that automatic citizenship for such children (as occurs under the current Section 10A) might not always be appropriate, because the child may lose citizenship of their country of birth and/or residence. The SCG believes that an amendment to the Bill's provisions concerning citizenship by descent would for that reason be more appropriate. Australian citizenship by descent only ever comes about via registration, i.e. an application has to be made. If the Australian-citizen adoptive parents resident abroad do not want Australian citizenship for their adopted child because of the consequences this might have for the child's existing citizenship/s, the application does not have to be made.

## **8. Children Adopted Overseas After their Parent Lost Australian Citizenship**

In order to ensure consistency, it is submitted that Clause 21(6)(c) of the Bill should also be amended to allow persons adopted overseas under the laws of other countries after their parent lost Australian citizenship under not only Section 17 but the other loss provisions access to Australian citizenship.

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<sup>8</sup> Interim measure concerning person adopted by a Canadian citizen residing outside of Canada, CP 01-05, 16 July 2001, 3008-1.

<sup>9</sup> Australian Citizenship Council, *Australian Citizenship for a New Century*, February 2000, pages 41 and 42.

<sup>10</sup> Rubenstein, *Op cit*, page 94.

<sup>11</sup> Australian Citizenship Council, *Op cit*, page 42.

<sup>12</sup> See also Submission No. 33 to this Inquiry by the Centre for Comparative Constitutional Studies at the University of Melbourne, 16 January 2006, page 6, and statements by Dr Simon Evans during the Public Hearing of 30 January 2006.

## Conclusion

A child adopted by one or two Australian-citizen parents anywhere outside Australia should in principle have the same access to Australian citizenship as a natural overseas-born child of the same parents. Conversely, a child of an Australian-citizen parent who has been adopted out to a non-Australian family should have the same access to Australian citizenship as if he or she had not been adopted out. This is consistent with the fact that the law does not strip Australian citizenship from those children adopted out who obtain Australian citizenship before their date of adoption.

The Bill as tabled by the Government fails to come to terms with the general issue of how Australian citizenship should best be made available for overseas-born individuals adopted overseas by Australian expatriates. The then Minister's written statement to Mrs Beryl Spalding in April 2003 that her "situation was one which he had firmly in his gaze should there be a change in the Act" appears to have never been followed up or acted upon.

It is submitted that citizenship by descent is the most appropriate form of citizenship for such people, rather than citizenship by grant. The situation of these people is in all respects parallel to those children born overseas to Australian citizens.

Further, it is crucial to make Australian citizenship available for adopted individuals who missed out on citizenship by discretionary grant as minors. Just as Clause 16 of the Bill envisages making citizenship by descent available for people of any age, an equivalent mechanism should be introduced for adopted individuals.

In addition, serious doubts must be raised as to the necessity for an adoption or other permanent visa as a prerequisite to the discretionary Ministerial grant of citizenship for overseas adopted children at the present time and under Clause 21(5) of the Bill going forward.

Finally, the general comment must again be made that there is still very little information on pertinent Australian citizenship issues available in the public domain to guide overseas Australians who are considering adopting overseas-born children while they live abroad, under the laws of a foreign country, or who have done so at any time in the past. The Australian Citizenship Instructions (ACIs) do contain some policy rules, but as noted in the SCG's primary submission to the Inquiry into Australian Expatriates of 27 February 2004, they are not publicly available. The SCG notes the statement by Mary-Anne Ellis at the public hearing in this Inquiry on 6 February 2006 that "the current Australian Citizenship Instructions are publicly available" and asks the Committee to seek clarification from the Department on this issue. The SCG submits that as the ACIs are only available for those able to pay an expensive subscription to Legend, this should not be considered to be "publicly available" within any sensible definition of the term.

Australia fares poorly in this regard as against the UK and Canada where virtually all policy documents on citizenship are accessible on government websites for no subscription fee.

Certainly, the *citizenship.gov.au* website could be greatly improved to include answers to both historical adoption citizenship questions and questions relevant to those planning to adopt while permanently resident overseas. It should also explain to Australian citizens abroad who are planning to give their child up for adoption how they can ensure that their child obtains Australian citizenship before the adoption occurs. The website should also fully explain whether and how Australia is complying with its obligations under the Hague Convention.

### **Table of Annexes**

- 1 Letter from Beryl Spalding to the Southern Cross Group, 27 July 2004
- 2 Letter from the Australian High Commission, London to Beryl Spalding, 7 June 1985
- 3 Letter from Beryl Spalding to the Australian High Commission, London, 9 August 1994
- 4 Letter from the Australian High Commission, London to Beryl Spalding, 24 August 1994
- 5 Letter from Beryl Spalding to the Hon Gary Hardgrave MP, 27 March 2003
- 6 Letter from the Hon Gary Hardgrave MP to Beryl Spalding, 30 April 2003