

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 (Transitional and Consequential) 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 Australia 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 five 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).

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- 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).

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- 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 an 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 to 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 Australian 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*.

