



Senate Legal and Constitutional Legislation Committee  
Department of the Senate  
Parliament House  
Canberra ACT 2600  
Australia

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

Thank you for the opportunity to make a submission to this process. This submission is made in our capacity as academic researchers and not on behalf of the Centre for Comparative Constitutional Studies or the University of Melbourne.

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Australia's citizenship laws are an integral component of Australia's political and cultural landscape and are of vital importance to every member of society. It is essential that these laws are accessible to all who are affected by them.

In 2000, the Australian Citizenship Council recommended that the existing *Australian Citizenship Act 1948* (Cth) (the 'old Act') be 'tidied up' to remove inconsistencies and improve clarity and ease of use. The proposed Australian Citizenship Bill 2005 (the 'new Bill') and Australian Citizenship (Transitionals and Consequentials) Bill 2005 (the 'transitional Bill') are a successful step towards these goals. We welcome the move to make Australia's citizenship laws simpler, more principled and more equitable.

The Bills set out the criteria for Australian citizenship logically and clearly. They pose no significant constitutional problems. However, in light of the overarching philosophy of fairness, accessibility and simplicity behind the proposed legislation, we have several suggestions for how the Bills could be further improved.

In particular, we **recommend** that:

- the unnecessary residual ministerial discretions to refuse citizenship even where all criteria for eligibility are met be eliminated
- in the interests of accessibility, the transitional arrangements, especially those relating to the continuation of existing Australian citizenship, be brought into the new Bill rather than split between the new Bill and the transitionals Bill
- again, in the interests of accessibility, the new Bill include a simplified table or chart to assist members of the public in understanding their legal position regarding Australian citizenship

- the right to review by the Administrative Appeals Tribunal be extended to apply to several new categories of administrative decision that can be made under the new Bill
- the Minister’s essentially unfettered discretion to grant citizenship to persons under 18 be replaced by a structured discretion that provides for a set of relevant criteria for the grant of citizenship
- the new Bill include an additional application provision for people adopted by Australian citizens overseas
- the Bill provide clear and accessible information about the changes to the residency requirements for permanent residents applying to become citizens
- the section providing for citizenship applications by stateless persons be reformulated to comply with Australia’s international obligations
- section 29 of the Bill be amended to allow children of people who renounced their Australian citizenship in order to acquire or retain the nationality or citizenship of a foreign country or to avoid suffering significant hardship or detriment to apply for Australian citizenship

### **1. Ministerial discretion to refuse citizenship despite eligibility**

Sections 24(2) and 30(2) of the new Bill explicitly grant the Minister a residual discretion to refuse an application for citizenship even when the applicant satisfies all the eligibility criteria.<sup>1</sup> Section 24(2) reads: “The Minister may refuse to approve the person becoming an Australian citizen despite the person being eligible to be so approved.” Section 30(2) is similar, making reference to the person “becoming an Australian citizen again”.

The residual discretion is unnecessary because of the wide ranging and comprehensive specific eligibility criteria. Those criteria include good character, knowledge of the English language, understanding of the application, and knowledge of the responsibilities of Australian citizenship. These have been supplemented in the new Bill by stringent assessments of the applicant’s identity and security risk. These specific criteria provide ample grounds on which to refuse an application.

The existence of a ‘catch all’ general discretion to refuse citizenship, therefore, is unnecessary and difficult to justify in policy. It is not limited by any criteria laid down in the Bill, and hence produces uncertainty and the risk of arbitrary decision-making. We **recommend** that the discretion set out in sections 24(2) and 30(2) be eliminated.

### **2. Clarity of definition of Australian citizenship and transitional provisions**

It is of fundamental importance that the Bill makes it absolutely clear that a person who is an Australian citizen or applying to become an Australian citizen under the *Australian Citizenship Act 1948* retains that status under the new Bill.

In the proposed legislation, this is effected through Schedule 3 to the Australian Citizenship (Transitionals and Consequentials) Bill 2005.

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<sup>1</sup> The Minister’s discretion remains the same as under the old Act, but the wording has been clarified. Accordingly, the change should not affect the number of applicants who are refused citizenship despite meeting the eligibility criteria.

The only indication in the new Bill that existing citizenship survives the change in legislative scheme is a note to the definition of ‘Australian Citizen’ in section 4, which makes reference to both the *Australian Citizenship Act 1948* and Australian Citizenship (Transitionals and Consequentials) Bill 2005.

For many Australians, the existence of these other Acts and their relationship to the Australian Citizenship Bill 2005 may be confusing. Citizens may well assume (and they should be entitled to assume) that the Australian Citizenship Bill 2005 is a complete statement of Australian citizenship laws.

We therefore **recommend** that section 4 of the new Bill be amended to incorporate Schedule 3 of the Australian Citizenship (Transitionals and Consequentials) Bill 2005, making clear that those persons who are Australian citizens under the old Bill retain their citizenship under the new Bill. Schedules 1 and 2 of the transitional Bill could then be attached as schedules to the new Bill to eliminate the need for two citizenship Bills.

Section 4(2) of the new Bill refers to the necessity of establishing whether someone is a citizen under the old *Australian Citizenship Act 1948*. We **recommend** that a table or chart be included as a Schedule to the new Bill, outlining the ways in which citizenship was determined under the old Act. This should be referred to in section 4, which would then clearly illustrate how citizenship originating in the *Australian Citizenship Act 1948* is ‘picked up’ under the proposed Bill through the transitional provisions. Such a table or flow chart, taking a step by step approach to eligibility for citizenship under all relevant legislation, would be a useful and effective way of improving community access to this important area of the law.

We acknowledge that this would represent an unusual legislative device. But it would hardly be unprecedented. There are flow charts describing graphically the operation of legislation in several other Commonwealth Acts, including, for example, section 4 of the *Patents Act 1990*, and in the ‘Readers’ Guide’ to the *Trade Marks Act 1995*. Part 1.5 of the *Corporations Act 2001* includes a plain language, user friendly ‘Small Business Guide’ to assist in the setting up and operation of small businesses.

Alternately, as recommended by the Australian Citizenship Council (*Australian Citizenship for a New Century* (2000), 79-80), a Reader’s Guide could be developed to complement the finalised legislation. The Reader’s 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. Administrative law principles**

An appeal to the Administrative Appeals Tribunal is available under section 52 for the majority of decisions made under the new Bill. However, section 52(2) states that an appeal to the AAT for applicants who are refused citizenship under section 24 is available only to permanent residents. This effectively denies an opportunity for merits review to applicants under sections 21(6) (children of former citizens), 21(7) (persons born in Papua) and 21(8) (stateless persons).

An essential aim of the new Bill is to enable persons to access their Australian heritage and to apply an ‘overall non-discriminatory approach’ to Australian citizenship (Australian Citizenship Bill 2005, Second Reading Speech [Mr John Cobb, Minister for Citizenship and

Multicultural Affairs], 9 November 2005). Accordingly, it is difficult to see why in principle or policy, applicants who are not permanent residents should be denied the right to merits review in the AAT. Therefore, we **recommend** that subsections 52(2) and 52(3) be removed to allow all decisions under s 24 to be reviewed in the AAT .

#### **4. Citizenship by application for children**

The new Bill is unclear about the citizenship status of children, especially where they apply at the same time as their parents.

Section 21(5) provides that persons under 18 may apply for Australian citizenship. However, the Bill provides no indications of what factors will be relevant to the granting of citizenship under these sections.

We therefore **recommend** that section 24 be amended to require the Minister, when considering an application under section 21(5), to take into account:

- the best interests of the child;
- the extent to which a grant of Australian citizenship will prejudice or disentitle the child's claims to citizenship of a foreign state; and
- Australia's international obligations in relation to children under treaties and conventions.

We **recommend** that section 21 should make clear that a responsible parent may apply for citizenship on behalf of their child. (This emerges only by implication from section 25.) Section 21(5) will require consequential amendment.

Section 25, dealing with cancellation of approval, refers only to children under 16. Therefore, we **further recommend** that section 25 be amended to allow the Minister to cancel the approval of children aged between 16 and 18, where the approval of their responsible parents has been cancelled. The amendment should require the Minister to consider the same factors recommended above in relation to section 24.

Section 36 provides that a child under 18 of a responsible parent who has had his or her citizenship revoked *may* also have their citizenship revoked. We **recommend** that section 36 be amended in the same way as section 24 to require the Minister to take the above factors into account when considering a revocation.

#### **5. Adopted persons**

The new Bill allows for the automatic citizenship of adopted persons who were present in Australia as a permanent resident at the time of adoption, one or both of whose parents were Australian citizens at that time: section 13.

However, the new Bill does not specifically provide for persons adopted by Australian citizens overseas. Presumably, adopted persons who do not automatically become citizens may apply for citizenship under section 21(5), but they must do so before they are 18.

Australia's obligations under the Hague Convention on Protection of Children in relation to Inter-country Adoption (ratified by Australia on 1 December 1998) are to provide the same rights to children adopted overseas under the Convention as to children adopted in Australia.

The *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* allow for the automatic recognition under Australian law of overseas adoptions made in compliance with the Convention. Under regulation 16, recognition occurs automatically upon the issuing of an adoption certificate from the adopted child's country. As a result of this automatic recognition of the adoption as a matter of family law, many 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 section 13. They may apply for citizenship under section 21 but must meet the eligibility criteria. To this extent their rights will differ from those of children adopted within Australia. On the other hand, granting such adopted persons automatic Australian citizenship may result in the unwanted loss of citizenship of the person's country of birth or residence.

We **recommend** that the new Bill include an extra provision within section 21 allowing people 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 (or by two persons jointly at least one of whom is an Australian citizen), and their adoption is recognised in Australia. As a matter of policy, whether such applicants will be granted citizenship should involve consideration of:

- the age of the applicant; and
- whether a grant of Australian citizenship will affect their citizenship of another country.

The inclusion of such a provision would go towards fulfilling Australia's obligations under the Hague Convention.

## **6. Changes to residential requirements for permanent residents seeking citizenship**

Under section 22 of the new Bill, the existing residential qualifying period for permanent residents seeking citizenship (not less than two years in Australia in the previous five years) is extended to not less than one year in the previous two years *and* not less than three years in the previous five years. The Minister has a discretion to relax this requirement in situations of significant hardship; for the spouses of Australian citizens; and in situations where applicants have been engaged in activities beneficial to Australia.

The discretionary regime under the new Bill clearly has the potential for a more flexible and fair operation than the old Act with its more rigid two year requirement. However, the extension of the residential qualifying period could significantly reduce the number of people eligible for Australian citizenship. We consider it vital that information about these requirements is freely and easily accessible to potential applicants. We **recommend**:

- the implementation of a public education campaign about the extension of the qualifying period
- that the Minister publish the guidelines for the exercise of the discretions before the Act comes into operation.

## **7. Section 21(8)(c): Citizenship by application for stateless persons**

Section 21(8)(c) provides that a person making an application for citizenship on the grounds of statelessness is only eligible if the person

- currently is not a national or citizen of any country and
- *has never been such a national or citizen* and
- currently has no reasonable prospects of acquiring the nationality or citizenship of a foreign country and
- *has never had such reasonable prospects* (emphasis added).

The requirement that the Minister refuse an application under section 24 in certain circumstances does not apply to stateless persons applying under section 21(8) (except on identity and security risk grounds: sections 24(2) and (4)). Equally, the provisions relating to revocation of citizenship (under section 34(4)) also contain exceptions for otherwise stateless persons. Each of these provisions evidences an intention that applicants should not be rendered or kept stateless through the harsh operation of Australian citizenship laws.

In this context, the twin restrictions on eligibility in section 21(8) that we emphasised above are anomalous. They plainly operate to deny eligibility for Australian citizenship to a currently stateless person who *no longer* has any reasonable prospects of acquiring the nationality or citizenship of another country. Such a situation could arise where a person is born in Australia to non-citizen parents, has or is eligible to acquire the same foreign citizenship as his or her parents, but loses that ability through no fault of their own (as a result for example of legal changes to the foreign country's citizenship laws). Under the current proposal, they would then become ineligible for Australian citizenship, despite being effectively stateless.

In relation to persons born in Australia, such an operation is also inconsistent with Australia's obligations under the International Convention on the Reduction of Statelessness, acceded to by Australia in 1973. Article 1 of the Convention states:

A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.

Section 21(8) of the new Bill falls outside of the permissible exceptions to Article 1 of the Convention. We **recommend** that the words 'and has never been such a national or citizen' and, more especially, 'and has never had such reasonable prospects' be deleted from the section.

## **8. Children of people forced to renounce citizenship**

Many people leaving Australia have been essentially forced to renounce their Australian citizenship in order to be eligible for work and other civic benefits in other countries. In particular, many Maltese Australians were put in this position upon their return to Malta. The Bill as currently drafted creates an unprincipled anomaly within families affected in this way.

Under section 29, people who were forced to renounce citizenship in order to acquire or retain the nationality or citizenship of a foreign country or to avoid suffering significant hardship or detriment are able to apply for resumption of their Australian citizenship. Children born before their parents renounced citizenship and who lost their own citizenship at that time are also able to apply under section 29. However, any children born after their

parents renounced Australian citizenship will have no access to their Australian heritage unless they are under 18 or otherwise meet the requirements of section 21.

We **recommend** that section 21 be amended to allow all children of people who renounced their Australian citizenship in order to acquire or retain the nationality or citizenship of a foreign country or to avoid suffering significant hardship or detriment to be eligible to apply for Australian citizenship.

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We would be very happy to discuss any of these issues or other related issues with the Committee if that would be of assistance. Thank you again for the opportunity of making this submission.

Yours sincerely

Mr Daniel McCluskey  
Law Reform and Public Policy Intern

Dr Simon Evans  
Director