REFUGEE ADVICE + CASEWORK SERVICE (AUST) INC.

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Mr Owen Walsh
Committee Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
CANBERRA ACT 2600

By e-mail

Dear Mr Owen

Inquiry into the Australian Citizenship Bill 2005

Thank you for the opportunity to make a submission to this inquiry.

We welcome the comprehensive updating of citizenship law to reflect contemporary circumstances.

1. The Refugee Advice and Casework Service (Australia) incorporated (RACS)

RACS, the oldest Community Legal Centre specialising in providing advice to asylum seekers, was originally set up in NSW in 1987 to provide a legal service to meet the specific needs of asylum seekers.

A not-for-profit incorporated association, RACS relies primarily on income through the Immigration Advice and Application Assistance Scheme (IAAAS) administered by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), donations from the community, an extensive volunteer network and a Management Committee. RACS' principle aims may be summarised as follows:

- to provide a free, expert legal service for individuals seeking asylum in Australia;
- to provide referral for counselling and assistance on related welfare issues such as accommodation, social security, employment, psychological support, language training and education;
- to provide a high standard of community education about refugee law, policy and procedure;

- to provide training sessions, workshops and seminars on refugee law, policy and procedure to legal and welfare agencies and individuals involved in advising and assisting refugees;
- to establish a resource base of current information and documentation necessary to support claims, for use by RACS, community organisations and lawyers assisting refugee claimants;
- to participate in the development of refugee policy in Australia as it relates to the rights of those seeking asylum in this country; and
- to initiate and promote reform in the area of refugee law, policy and procedures.

At a broader level, RACS aims to promote the issues asylum seekers face by raising public awareness and to advocate for a refugee determination process which both protects and promotes the rights of asylum seekers in the context of Australia's international obligations.

2. Introductory Remarks

We note that the Commonwealth Constitution is silent on the status of, eligibility for, and the rights and duties attaching to, Australian citizenship. Given that citizenship is fundamental to membership of the Australian political community, it is vital that the legislative framework regulating citizenship is non-partisan and prospectively certain.

We welcome the special provisions for registration by descent for Papuans born to an Australian parent before Papua New Guinea's independence in 1975, which rectifies the anomaly resulting from the High Court's decision in the *Walsh* case (2004).

We note, however, that the Bill does not deal with the situation in the *Singh* case (2004), where a child born in Australia to asylum seeker parents was denied citizenship. Since the *Citizenship Act* 1948 (Cth) was amended in 1986, birth in Australia has not been sufficient to establish Australian citizenship.

3. Discretionary refusal of eligible applicants

The Bill expressly allows the Minister to refuse to approve applications for citizenship by conferral (clause 24(2)) or by resumption (clause 30(2)) even where the person is eligible to be so approved. The Explanatory Memorandum justifies these provisions on the basis the existing discretion in the current *Australian Citizenship Act* 1948 (Cth), which reflects the idea that citizenship is a privilege, not a legal right. Further, it asserts that:

> a person could meet the criteria but nevertheless it may not be in the public interest for that person to become an Australian citizen. An example may include a person whom the Australian community would consider as a person who incites hatred or religious intolerance. That person may not necessarily have been convicted of specific offences and may not necessarily fall strictly into the category of refusal on the basis of the good character requirement, but could be within this discretion.

This sole example given by the Explanatory Memorandum does not support allowing the Minister to retain a residual discretion in these circumstances. Section 501(6) of the *Migration Act* 1958 (Cth) already allows the Minister to cancel a visa if a person does not satisfy the very wide grounds of the "character test". In particular, a person who "incites hatred or religious intolerance" could have their visa cancelled and be removed from Australia where there is a "significant risk" that the person would "vilify a segment of the Australian community", "incite discord in the Australian community or a segment of the Australian community", or "represent a danger to the Australian community" by disrupting or threatening violence to it (s 501(6)(d)(iii)-(v).

Moreover, if the government is concerned that such behaviour cannot be prosecuted as criminal offences, yet it is so serious that it should lead to denial of citizenship, then the government should criminalize racial and religious vilification, as suggested by the Human Rights and Equal Opportunity Commission, and as required by Australia's international human rights treaty obligations.[1] Persons convicted of such offences could then by denied citizenship by operation of law, rather than by a non-transparent, residual ministerial discretion.

4. Increase in the qualifying period

It is regrettable that the Bill's extension of the qualifying period for citizenship by 12 months, from two years to three years, was announced by the Prime Minister as a counter-terrorism measure on 8 September 2005, since this casts unwarranted suspicion on all foreigners as somehow linked to terrorism. More importantly, it may make Australia less attractive to skilled economic migrants, and undermine Australia's immigration policy aim of encouraging more migrants to become citizens.

While we acknowledge that many other countries require longer periods of residency before a person is able to apply for citizenship than Australia, we nevertheless oppose the Bill's proposed extension of twelve months before an Australian permanent resident is eligible to apply for citizenship.

We oppose the lengthening of the period before Australian permanent residents can gain access to the full benefits of citizenship. These include the right to vote and elect state and federal parliamentary representatives and the right to obtain an Australian passport and travel as an Australian. The benefits of citizenship are more than symbolic. They are real and tangible. Gaining access to benefits such as these is necessary to fully participate in Australian society and national/political life.

The extension of the minimum period of permanent residency before a person can apply for citizenship will have a particularly detrimental effect on much of RACS' client base. We represent asylum seekers and refugees, many of whom have already endured long periods of fear and uncertainty before the grant of permanent residency. These long delays result from a number of factors including the following:

[1] See Ben Saul, "Speaking of Terror: Criminalizing Incitement to Violence" (2005) 28 *UNSW Law Journal* 868

- the often long and treacherous journeys to escape persecution in their home countries and find protection and security in Australia;
- the long periods spent awaiting a determination of refugee status (often endured while in immigration detention); and
- the Temporary Protection Visa (TPV) system, which forces large numbers of refugees who are only eligible for three year TPVs to reapply for protection after the expiry of their TPV and again submit themselves to a potentially long drawn out process before being granted permanent residency.

Our client base represents a particularly vulnerable group in society. Many of our clients are victims of torture and trauma and have endured much suffering before reaching Australia. The periods of uncertainty therefore have a particularly detrimental effect on these individuals and serve to both increase their sufferings and to act as a barrier to recovery from past experiences.

The proposed amendment will serve to further prolong this period of fear and uncertainty, affecting one of the most vulnerable groups in society.

The extension of the period will do little to protect Australia against terrorists and others who pose a risk to our national security. The stringent character tests which an applicant must satisfy before the grant of permanent residency already serve to protect Australia from those who potentially pose a threat to national security. The extension of the minimum period of permanent residency will serve only to penalise the vast majority of potential citizens who have only positive contributions to make to this country.

5. Renunciation of citizenship in wartime

Clause 33(5) allows the Minister to refuse a dual national's renunciation of Australian citizenship in wartime, even where the person's country of other nationality is not the country at war with Australia. This provision clearly aims to prevent a person from, for example, fulfilling an obligation such as conscription. This provision would, however, be improved by limiting its application only to "defensive" wars in which Australia is engaged. Otherwise, the provision could compel dual nationals to retain their Australian citizenship, and thus to potentially fight for Australia, in a war of aggression, such as where Australia invades another country. Dual nationals should be free to divest themselves of their Australian citizenship in these circumstances. This problem is aggravated because under clause 52(1)(e), the Minister's decision to refuse a renunciation of Australian citizenship is not reviewable in the AAT.

6. Cessation for third-party fraud

Clause 34(2)(iv) introduces a new provision allowing the Minister to revoke a person's Australian citizenship if approval was obtained as a result of third-party fraud. This is defined in clause 34(8), which also requires that the act or omission which constituted the relevant offences was "connected with" the Minister's approval.

These provisions may result in considerable unfairness to citizens. There is no requirement that the citizen him or herself was involved or complicit in the fraud by a third party, nor even that the citizen was aware or had knowledge of the fraud. Moreover, the requirement that fraud was merely "connected to" the Minister's approval need not mean that the fraud actually *contributed to* the approval. The provisions should be amended to require that the citizen had *knowledge* of the fraud by the third party, and that the fraud *substantially contributed* to the approval.

7. Delegation of powers

Clause 53 of the Bill gives the Minister a discretion to 'delegate to any person all or any of the Minister's functions or powers under this Act or the regulations'. The Explanatory Memorandum states that all delegations under the old Act will operate in the same way under the new Act, including non-delegation of the power to revoke citizenship.

While it may have been past practice under the existing Act for the Minister not to delegate his or her power to revoke citizenship, neither the existing Act or the Bill prevent the Minister from delegating this power. No exception to this effect is found anywhere in the text of the Bill. If it is intended that that the Minister not be permitted to delegate his or her power to revoke citizenship, this should be made explicit in the Bill.

Indeed, there are persuasive policy reasons for requiring the Minister to personally exercise the power of revocation. Revoking citizenship is a very serious legal sanction which may cause considerable hardship to affected individuals. If such a power is to remain with the executive branch (instead of, for example, the courts), then the exercise of this power should be subject to the highest political control – and accountability – rather than being exercised by departmental officials.

In the same way, the Minister's powers to substitute a more favourable visa decision under s 417 of the Migration Act 1958 (Cth), and to refuse or cancel a visa where a person is not of good character under s 501(3) of the same Act, are both powers which must be exercised personally by the Minister and cannot be delegated.

8. Use of regulations to change provisions

Given the potentially intrusive nature of new forms of personal identifiers, which may interfere unjustifiably in personal privacy, it is not appropriate that regulations may prescribe 'any other identifier' (cl 10(1)(f)) and the procedures applicable (cl 41). While advances in technology may supply new types of identifiers, these should only be adopted by the Parliament and not by subsidiary legislation.

9. Concluding Remarks

A submission such as this cannot possibly canvas all the issues which may be of interest to the Legal and Constitutional Legislation Committee.

Accordingly, please do not hesitate to contact Ben Saul or Mark Green on (02) 9211 4001 if you require any further information or assistance with any aspect of this submission.

Yours sincerely,

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

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