THE LAW SOCIETY OF SOUTH AUSTRALIA

20 January 2006

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Mr Owen Walsh
The Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Walsh

Re: Inquiry into the Australian Citizenship Bill 2005 and related measures

The Law Society of South Australia has been asked to provide comments on the *Australian Citizenship Bill 2005 and the Australian Citizenship (Transitionals and Consequentials) Bill 2005* ('the Bills'). The Bills have been referred for comment to the Society's Human Rights Committee and Justice Access Committee.

The Minister for Citizenship has described the Bills as "very significant, indeed historic, changes to our citizenship law"[1]. The *Australian Citizenship Act 1948* (Cth) is one of the most fundamental statutes in Australian law. It defines formal membership of the Australian community and results in, among other things, the entitlement to vote, to serve on a jury and an inviolable right to live in Australia. Any amendment to such an important statute should be closely scrutinised. In the Society's submission, the Bills have significant human rights implications and due consideration should be given to the rights of the individual before any legislation is passed.

The Committees' responses to the Bills are outlined below.

1. Plain English

1.1. The Society considers that, in very general terms, the *Citizenship Act 1948* was in need of recasting into plain English and the Bills have achieved this goal. The Society supports the plain English drafting of legislation and believes that it increases access to justice. The Bills read much more clearly and follow a more user-friendly structure.

[1] Minister for Citizenship the Hon. John Cobb MP, Second Reading Speech, Australian Citizenship Bill 2005, Wednesday 9 November 2005.

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2. Discretionary powers

2.1. The existing Act contains a number of powers subject to ministerial discretion. Much of the language of the Act is cast in terms of the Minister's discretion to confer citizenship rather than an individual's right to citizenship.

2.2. Of particular concern is the nature of the discretionary power to confer citizenship upon an applicant. (Citizenship by conferral is different in this regard from citizenship by birth and citizenship by descent). An applicant for citizenship by conferral may meet the legislative criteria for citizenship eligibility and still be refused by the Minister. The Society considers that the overuse of discretionary powers in legislation can reduce the transparency and perceived legitimacy of the legislation and increase the appearance of arbitrariness. The presence of such (perceived or actual) arbitrariness diminishes the rule of law and undermines the right of the individual to understand the laws to which he or she is subject. This may disadvantage individual applicants and carries the potential to reduce public confidence in the Minister for Citizenship and the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA).

2.3. The Society is disappointed that the wide discretions in the Citizenship Act have been carried over into the new Bills. The Society would prefer the legislation to express clearly the criteria against which an application for citizenship will be measured. Although the Society acknowledges that a discretion may well be required for use in extraordinary cases, the Society would prefer to see the use of discretions reserved for genuinely exceptional cases.

3. 'Security risk' provisions

3.1. The Bills introduce new provisions with regard to applicants potentially representing a security risk to the Australian community. The new sections 17(4), 24(4) and 30(4) provide that the Minister must not approve an application for citizenship at a time when an adverse security assessment or a qualified security assessment is in force under the *Australian Security Intelligence Organisation Act 1979 ('The ASIO Act')* that the applicant is directly or indirectly a risk to security (within the meaning of section 4 of that Act). The Society acknowledges that requirements for satisfaction of security assessments prior to the grant of citizenship are appropriate, but considers that the measures adopted in the new Bills are unacceptably broad. Section 35 of the *ASIO Act* defines an "adverse security assessment" as a security assessment in respect of a person that contains:

(a) any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person; and
(b) a recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person.

A "qualified security assessment" means a security assessment in respect of a person that:

(a) contains any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person; and
(b) does not contain a recommendation of the kind referred to in paragraph (b) of the definition of ***adverse security assessment***;

whether or not the matters contained in the assessment would, by themselves, justify prescribed administrative action being taken or not being taken in respect of the person to the prejudice of the interests of the person.

"Security assessment" or "assessment" are defined to mean:

> a statement in writing furnished by the Organisation to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person, and includes any qualification or comment expressed in connection with any such recommendation, opinion or advice, being a qualification or comment that relates or that could relate to that question.

3.2. The definition of an adverse security assessment is notably broad. However, it is difficult to conceive of broader grounds for exclusion from citizenship than the introduction of qualified security assessments as a barrier. The new provisions allow the executive the power to deny an application for citizenship on the most tenuous suggestion of alleged risk to security. The executive may further deny the applicant a copy of the assessment on security grounds (sections 38 and 38A of the *ASIO Act*), reasons for decision are not available on appeal (section 28(1AAA) of the *Administrative Appeals Tribunal Act 1975 ['the AAT Act']*) and applicants may not be entitled to be present at their own appeal hearing (section 39A of the *AAT Act*). This denial of

the most fundamental aspects of procedural fairness is of serious concern to the Society.

4. Personal identifiers

4.1. The new Bills propose the collection of personal identifiers, which are defined by section 10 of the *Citizenship Bill* as:

(a) Fingerprints or handprints;
(b) Measurements of a person's height or weight;
(c) Photograph or other image of a person's face or shoulders;
(d) Iris scan;
(e) Signature;
(f) Any other identifier prescribed by the Regulations, except those obtained by way of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*.

4.2. The new Bill gives the Minister and persons authorised under the Act the power to request that an applicant provide one or more personal identifiers in relation to the application: section 40(1). The Bill does not prescribe compliance with such a request as a criterion for the conferral of citizenship but it is difficult to imagine citizenship being conferred without such compliance.

4.3. The Minister for Citizenship stated in the Second Reading Speech that "personal identifiers collected and stored under the new act will only be able to be used for the purposes of the Citizenship Act." In the Society's submission, this reassurance is not reflected in the drafting of the legislation. The new measures provide for the collection of a very significant amount of personal information and do not, in the Society's submission, provide adequate mechanisms for the access, disclosure and use of that information.

4.4. Section 42 deals with access to identifying information and relevantly provides:

3) The Minister may, in writing, authorise a specified person, or any person included in a specified class of persons, to access identifying information of the kind specified in the authorisation.

4) The Minister must specify in an authorisation under subsection (3), as the purpose or purposes for which the access is authorised, one or more of the following purposes:

a) one or more of the purposes set out in paragraph 10(2)(c);

b) disclosing identifying information in accordance with this Division;
c) administering or managing the storage of identifying information;
d) making identifying information available to the person to whom it relates;
e) modifying identifying information to enable it to be matched with other identifying information;
f) modifying identifying information in order to correct errors or ensure compliance with the appropriate standards;
g) making decisions under the Act or the regulations, or under the *Migration Act 1958* or the regulations made under that Act;
h) complying with Australian laws.

5) However, the Minister must not specify as a purpose for which access is authorised a purpose that will include or involve the purpose of:

a) investigating an offence against an Australian law; or
b) prosecuting a person for such an offence;

if the identifying information in question relates to a personal identifier of a type prescribed by regulations for the purpose of this section.

4.5. Section 10(2)(c) lists the additional purposes incorporated by virtue of section 42(4)(a) as:

(a) assisting in the identification of, and to authenticate the identity of, a person making an application under Part 2;
(b) combating document and identity fraud in citizenship matters;
(c) complementing anti-people smuggling measures.

4.6. Section 43(2) provides that a disclosure of identifying information is a "permitted disclosure" if it:

(a) is for the purpose of data-matching in order to identify, or authenticate the identity of, a person for the purposes of this Act; or
(b) is for the purposes of this Act; or
(c) is for the purpose of administering or managing the storage of identifying information; or
(d) is for the purpose of making the identifying information in question available to the person to whom it relates; or
(e) takes 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; or

(f) is for the purpose of a proceeding, before a court or tribunal, relating to the person to whom the identifying information in question relates;

(g) is for the purpose of an investigation by the Privacy Commissioner or the Ombudsman relating to a request for the provision of a personal identifier; or

(h) takes place with the written consent of the person to whom the identifying information in question relates.

(3) However, a disclosure is not a permitted disclosure if:

(a) It is a disclosure of identifying information relating to a personal identifier of a type prescribed by the regulations for the purposes of this section; and

(b) It is for the purpose of:

(i) Investigating an offence against an Australian law; or

(ii) Prosecuting a person for such an offence.

4.7. These new provisions do not place sufficient safeguards on the personal information. The Society is particularly concerned about the use of personal information collected under the new Bill in criminal proceedings. It is clear from the text of section 43(2) itself that disclosure of identifying information is not limited to disclosures for the purposes of the Citizenship Act. Section 43(2) permits disclosures "for the purposes of this Act" under subsection 43(2)(b) but also lists a further seven types of disclosure that are also permitted and which, by process of interpretation, are in addition to disclosures "for the purposes of this Act".

4.8. The purported protection from the disclosure of the personal identifiers in criminal investigations and proceedings in sections 42(5) and 43(3) are contingent upon the Minister regulating that such personal identifiers are to be protected from disclosure. No draft regulations have been presented for comment.

4.9. Indeed, section 43(f) specifically provides that it is permitted to disclose identifying information "for the purpose of a proceeding, before a court or tribunal, relating to the person to whom the identifying information in question relates". In the absence of any regulations excluding certain personal identifiers from disclosure (which is in the power of the executive to change), it would appear to be within the power of the Minister to disclose identifying information specifically for the purpose of criminal proceedings.

4.10. Section 43(2)(e) further permits the disclosure of identifying information if it "takes 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." The nature of such exchanges and the identity of such agencies to whom the information is to be disclosed is not specified. In the absence of regulations (which, again, can be changed by the executive), it would seem wholly within the power of the Minister for Citizenship to disclose all of a person's personal information that he or she holds to every police, investigative and prosecutorial body in any government in the country.

4.11. The power of the state to collect personal information from citizens and residents is a very significant power. It should not be dependent upon the making of regulations nor subject to amendment at the discretion of the executive. It should be enshrined in legislation and its scope determined only by parliament. If the personal identifier provisions are to be included, they should be amended to specify exactly which purposes, and which purposes only, are acceptable purposes for accessing and disclosing a person's private information. These purposes should then be debated in parliament.

4.12. It is the Society's strong submission that the provisions should in no way allow the identifiers to be accessed in connection with any criminal proceeding or investigation (and the protection should not be limited to crimes against Australian laws – foreign and international laws should also be covered). The Society recommends that the final paragraph of section 42(5) and subsection (a) of section 43(3) be deleted to achieve this end. The criminal law has been developed over many years to incorporate restrictions on the power of the state to collect and access personal information. This system should not be circumvented by the creation of a readily-accessible database of personal identifiers held by the Minister for Citizenship.

4.13. Australian citizenship is a status that many migrants look forward to achieving. For refugee and humanitarian entrants in particular, citizenship in a free and democratic country represents a security they have never experienced and a guarantee that they will have a safe home for the rest of their lives. It is a status for which they would sacrifice much. The new Division 5 would force these new citizens to give up the right enjoyed by other citizens – the right to non-disclosure of their personal information – in order to achieve this status. The lure of citizenship may be used as a tool to extract from migrants the sort of personal information that other members of the community may understandably refuse to provide. The Society is concerned that these provisions may discriminate against Australians of overseas birth in criminal or other proceedings.

4.14. If the purpose of the new Division 5 is, as stated by the Minister for Citizenship in the Second Reading Speech, to "increase the government's ability to accurately identify people who are seeking to become citizens and those requiring evidence of their citizenship",

there is little justification for the storage of the personal information once citizenship has been conferred. Section 45 provides for the information to stored in the Australian archives under the *Archives Act 1983*. In the Society's submission, it is not appropriate for identifiers such as fingerprints and iris scans to be stored in the archives. Such identifying information should be destroyed once the identity of an applicant for citizenship has been confirmed.

4.15. Division 5 also fails to put express obligations on the Minister for Citizenship to safeguard a person's personal information. Instead, section 43(1), for example, makes it an offence (seemingly of strict liability) if a person's conduct causes disclosure of identifying information and the disclosure is not a permitted disclosure. This provision would appear to make an employee of the Department strictly liable for an inadvertent administrative error and subject to criminal penalties. Instead, the Society suggests that the legislation include express provisions requiring the Minister not to disclose identifying information (that is not a permitted disclosure) and provide a remedy for the person affected. For example, parliament may wish to consider providing that identifying information that has been obtained through a non-permitted disclosure may not be used by other Commonwealth government agencies.

4.16. We have not commented on the interaction of the proposed legislation with the *Privacy Act 1988* (Cth). We note that the Office of the Privacy Commissioner had made some comments in this regard.

5. Expansion of circumstances in which the Minister must not approve a person becoming an Australian citizen

5.1. The new subsection 24(6) of the *Australian Citizenship Bill 2005* provides that the Minister must not approve a person becoming an Australian citizen at a time:

> (g) if, in respect of proceedings for an offence against an Australian law in relation to the person:
>
> > (i) a court does not impose a sentence of imprisonment on the person; and
> >
> > (ii) the court releases the person because the person gives a security, with or without sureties, by recognizance or otherwise, that the person will comply with conditions relating to the person's behaviour;
> >
> > during any period during which action can be taken against the person under an Australian law because of a breach of a condition of that security; ...

5.2. This is an expansion of the existing citizenship law and appears intended to exclude from citizenship those persons who have been found guilty of an offence and released conditional upon their entering

into a bond to be of good behaviour. The exclusion would apply for the duration of the bond.

5.3. The Society considers this amendment to be inconsistent with the sentencing principles of criminal courts, which in South Australia may elect to impose a bond with or without recording a conviction and without imposing a penalty for an offence[2]. One of the purposes of this sentencing discretion is to allow a more moderate penalty to be imposed in relation to minor offences or where a court is satisfied that good reason exists for leniency in sentencing. Under South Australian legislation the bond may be effective for up to three years[3].

5.4. Good behaviour bonds of up to three years may be imposed for such minor offending as disorderly behaviour, offensive language, loitering and petty theft (ie. shoplifting). While in practice it would be unusual for lengthy bonds to be imposed in these circumstances, the Society is aware of situations in which offending on a similarly minor scale has attracted a bond of two years. Courts may be more likely to consider a bond for offenders with mental health problems, impecunious offenders and young offenders, in lieu of other sentencing options which may operate more harshly in the circumstances. The Society considers that excluding such persons from citizenship for the duration of their bond would be potentially discriminatory and vastly disproportionate to the offending behaviour.

5.5. In addition to this, the Society notes that the amendment would create an illogical situation in which a person who is treated with leniency by the criminal courts is treated with greater severity under citizenship legislation. The new subsection 24(6) provides that the Minister must not approve the person becoming an Australian citizen at a time:

> ...
> (b) when the person is confined to a prison in Australia; or
> (c) during the period of 2 years after the end of any period during which the person has been confined to a prison in Australia because of the imposition on the person of a serious prison sentence; or
> (d) if the person is a serious repeat offender in relation to a serious prison sentence – during the period of 10 years after the end of any period during which the person has been confined to a prison in Australia because of the imposition of that sentence; ...

These provisions, which carry over from existing citizenship laws, contemplate that the bar on the conferral of citizenship will only apply for the duration of the prison term, unless the offending is particularly serious.

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[2] *Criminal Law (Sentencing) Act 1988* (SA), section 39.
[3] Section 40 of the Criminal Law (Sentencing) Act 1988 (SA).

5.6. However, the duration of a bond for relatively minor offending will often be longer than a period of imprisonment imposed for similar or more serious offending. The amendment would therefore create a situation in which a person released on a bond would often be excluded from citizenship for a longer period of time than a person who is convicted and sentenced to a period of imprisonment. Similar anomalies may occur under the provision in existing citizenship legislation which applies a bar to citizenship in circumstances where a person has been released from serving a period of imprisonment on condition that they enter into a bond. The Society is disappointed to see this carried over and expanded in the new Bills.

5.7. The Society recommends that the new subsection 24(6)(g) be removed from the Bill.

6. Deferral provisions

6.1. The 'deferral provisions' in sections 14, 14A and 14C in the current Australian Citizenship Act 1948 have been removed in the new Bill.

6.2. Section 14 previously allowed the Minister to defer consideration of an application for citizenship if the Minister was likely to refuse the application (for certain specified reasons) and, having regard to the "effluxion of time, or to the likelihood of a change in circumstances", the Minister would be likely to grant the application after the expiration of a period of time, not exceeding an aggregate of 12 months. This provision is often used to allow an applicant some further time to improve their English or their knowledge of the privileges and responsibilities of citizenship, instead of having their application refused.

6.3. The effect of the removal of the deferral provisions is that applications would simply be accepted or refused on the state of the application at the time of decision, rather than giving the applicant extra time to comply. The Society does not object in principle to this amendment, as the Minister may well consider it to be inefficient for the Department to be carrying a number of "inactive" applications on its books. The Society also notes that there is nothing to stop an applicant who has been refused from re-applying. However, the Society notes that an applicant who is refused and forced to re-apply would need to pay the application fee again. The fee currently stands at $120 or a $20 concessional fee for certain recipients of social security or Veterans' affairs pensions. The additional fee represents a further barrier to citizenship that is not present under the current legislation.

7. Increase in residential qualifying period

7.1. The new section 22 of the *Australian Citizenship Bill 2005* increases the residential qualifying period for citizenship by conferral from two years in the last five (the current position) to three years in the last five. In general terms, the Society is of the opinion that amendments which increase the barriers to citizenship impact upon the human rights of applicants and should only be made if there is adequate justification for the change.

7.2. In the Bill's second reading speech, the Minister for Citizenship and Multicultural Affairs asserted that:

> The increase in the residential qualifying period will allow more time for new arrivals to become familiar with the Australian way of life and the values to which they will need to commit as citizens. It will also strengthen the integrity of the citizenship process by giving more time for the identification of people who may represent a risk to Australia's security.

7.3. General eligibility criteria for citizenship by conferral already require applicants to satisfy the Minister that they have an adequate knowledge of the responsibilities and privileges of Australian citizenship. This requirement must be satisfied under existing legislation and applicants who fail to do so may have their application for citizenship refused, regardless of whether they have applied after two or three years' residency in Australia. It is therefore difficult to see how the opportunity to "become more familiar with the Australian way of life" provides adequate justification for an increase in the residential qualifying period.

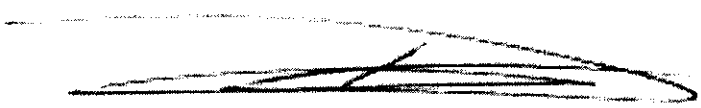
7.4. Similarly, satisfaction of 'good character' requirements prior to the grant of citizenship is necessary under existing citizenship legislation. Thorough security checks are already undertaken as part of the visa application process and citizenship application process. While the detail of the security checking process is not released to the public, it seems logical that most checks would be carried out when an application is under consideration rather than through a continual security checking process throughout the person's residence in Australia. Again, it is difficult to see how adding a year to the residence requirements for citizenship is justified by reference to "more time for the identification of people who represent a risk to Australian security", since the change would seem to be unlikely to affect the stage at which security checking is initiated.

7.5. The Society again expresses its strong concerns about the use of the ambiguous references to "people who may represent a risk to Australia's security" as justification for amendments which impact upon the human rights of applicants. The Society repeats its concerns that

these proposed amendments are linked to a raft of recent legislative changes, most notably the State and Federal anti-terrorism laws[4], which increase the power of the executive while seriously impacting upon the human rights of members of the Australian community. There is little evidence to show that the changes which purport to be based on the need to improve security measures are necessary or appropriate for achieving that goal. The Society opposes the introduction of changes which increase the barriers to full membership of the Australian community through citizenship without adequate justification.

Thank you for the opportunity to comment on the proposed legislation.

Yours sincerely



D J Eszenyi
PRESIDENT

[4] Anti-Terrorism Act 2005 (Cth), Anti-Terrorism Act (No. 2) 2005 (Cth), Terrorism (Police Powers) Act 2005 (SA) and Terrorism (Preventative Detention) Act 2005 (SA). The Society affirms the points made in its submission to the State Attorney-General in relation to the *Terrorism (Police Powers) Act 2005* (SA) and notes that the Society was not given the opportunity to comment on the federal legislation.