SUBMISSION OF

THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

TO

THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

ON THE

AUSTRALIAN CITIZENSHIP BILL 2005

Human Rights and Equal Opportunity Commission
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Introduction

1. The Human Rights and Equal Opportunity Commission ('the Commission') has been invited by the Senate Legal and Constitutional Legislation Committee ('the Committee') to make submissions on the Australian Citizenship Bill ('the Bill'), which is intended to replace the *Australian Citizenship Act 1948* (Cth) (the 'Citizenship Act')

2. The Commission welcomes the opportunity to make this submission and thanks the Committee for its invitation.

Summary of Commission's Submission

3. The Commission has confined its submission to the identification of areas in which the Bill fails to meet Australia's international human rights obligations – notably those under the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Reduction of Statelessness* and the *Convention on the Rights of the Child*. In light of those obligations, the Commission makes the following recommendations for the amendment of the Bill:

Recommendation 1: That proposed sections 24(2) and 30(2) be amended to provide that the Minister must grant citizenship to a person who meets the relevant eligibility criteria.

Recommendation 2: The limitation on review rights in proposed section 52(2) relating to permanent residence be removed from the Bill.

Recommendation 3: The Bill be amended to comply with the *Convention on the Reduction of Statelessness* by:

(a) amending proposed s17 (citizenship by descent) so as to limit the security ground to actual convictions for a security offence in the case of stateless persons;

(b) deleting proposed s21(8)(c) so as to remove reference to reasonable prospects of acquiring another nationality as an exclusionary criterion for citizenship by conferral on the basis of statelessness; and

(c) amending proposed section 24 (citizenship by conferral) so as to limit the security ground to actual convictions for a security offence in the case of stateless persons.

Recommendation 4: Proposed section 36 (discretion to revoke the citizenship of children whose responsible parents cease to be citizens) be removed from the Bill so as to comply with Australia's obligations under article 8 of the *Convention on the Rights of the Child*.

The Bill should also be amended to include a general obligation to take into account the best interests of children as a primary consideration in all decisions which affect them (as required by article 3 of the *Convention on the Rights of the Child*).

Recommendation 5: Proposed Section 21(6) (which sets out eligibility criteria for citizenship by conferral for persons born to a former Australian citizen) be amended to include children of parents who ceased to be citizens under s18 of the Citizenship Act.

Recommendation 6: Proposed section 24(10) be amended to include the same sex partners of Australian citizens, holding an appropriate class of visa.

Recommendation 7: The *National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth) be amended such that it applies to the Security Appeals Division of the Administrative Appeals Tribunal. Consequential amendments be made to the *Australian Security Intelligence Organisation Act 1979* (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth), repealing the existing provisions regarding the treatment of security sensitive information in reviews of security assessments.

In addition, amendments should be made such that the Attorney-General does not have power to prevent review of an adverse or qualified security assessment (through the use of s38(2)(a) of the *Australian Security Intelligence Organisation Act 1979* (Cth)).

General Concerns about the approach taken in the Bill

4. The majority of rights in the ICCPR are not dependent upon citizenship. However, citizenship is a criterion for the rights of political participation conferred by article 25.[1]

5. In light of the contingent nature of the rights conferred by article 25, the Human Rights Committee has indicated that parties to the ICCPR have assumed certain obligations regarding the granting of citizenship. While not setting out to prescribe exhaustive criteria for the granting of citizenship (beyond the principle that citizenship should not be granted or withheld on a discriminatory basis – see paragraphs 28 –46 below), the Committee has stated that:

   - any criteria for citizenship should not be unduly onerous; and
   - that unsuccessful applicants should have rights of review.[2]

6. The Commission has some general concerns about whether the Bill meets those requirements.

Discretion

7. The Bill reserves to the Minister the discretion to refuse a person's application for citizenship by conferral or for resumption of citizenship despite the fact that the person satisfies all of the extensive criteria specified in the Bill.[3] In the Commission's view, this is undesirable in that it allows the Minister to impose arbitrary and unduly onerous criteria upon an applicant – being criteria that will not necessarily be known by the applicant in advance of the decision.

8. The Explanatory Memorandum suggests two reasons for that approach:

   - first, that it has always been a feature of the Citizenship Act, reflecting the fact that citizenship is a 'privilege not a right'. It will be clear from the above that the Human Rights Committee considers that a 'rights based' approach is required in the area of citizenship.
   - Second, that the general discretion will protect against unforeseen situations. The example given is that of a person considered likely to incite hatred or religious intolerance. Despite the suggestion to the contrary, such a case could arguably be dealt with under the character test.[4] If there is doubt about that matter, then it should be avoided through precise language (as has been done in the *Migration Act 1958* (Cth)[5]).

Recommendation 1: That proposed sections 24(2) and 30(2) be amended to provide that the Minister must grant citizenship to a person who meets the eligibility criteria.

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[1] Which provides: 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country'.

[2] See *Concluding Comments on Estonia*, (1995) UN doc. CCPR/C/79/Add. 59, para 12.

[3] See proposed sections 24(2) and 30(2). Note that, in relation to citizenship by conferral the specified criteria include good character, knowledge of English, knowledge of the responsibilities and privileges of citizenship, the absence of an adverse security assessment and satisfaction as to the identity of the applicant. The criteria for resumption of citizenship include good character, the absence of an adverse security assessment and satisfaction as to the identity of the applicant.

[4] Although see, in the context of a differently worded character test provision, *Irving v Minister of State for Immigration, Local Government and Ethnic Affairs* (1993) 44 FCR 540.

[5] See s501(6).

Review rights

9. The Commission has made specific comments regarding review rights in the case of adverse or qualified security rights in paragraphs 51-76 below.

10. More generally, the Commission notes that merits review in the Administrative Appeals Tribunal will be available in relation to many of the decisions made under the Bill. However, in relation to a decision under proposed s24 (citizenship by conferral) such review rights will be restricted to permanent Australian residents, except in the case of non-resident applicants aged under 18 at the time of their citizenship application.[6]

11. A person who satisfies the 'general eligibility criteria'[7] for citizenship by conferral will necessarily be a permanent resident. However, those seeking to rely upon the other eligibility categories (including, as a matter of particular concern, the category of 'statelessness'[8]) may not meet that requirement.

12. The reason for this approach is unclear. It is incompatible with the Human Rights Committee's views on the obligation to provide review rights to unsuccessful applicants for citizenship. It also appears to involve discrimination on the ground of residence, which is arguably prohibited by article 26 of the ICCPR[9] (see further the discussion in paragraphs 28 – 46 below).

Recommendation 2: The limitation on review rights in proposed section 52(2) relating to permanent residence be deleted.

Statelessness

13. Australia has also assumed more specific obligations in relation to the granting of citizenship under the *Convention on the Reduction of Statelessness*,[10] which provides (in article 1, paragraph 1):

> A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted:
>
> (a) At birth, by operation of law, or
>
> (b) Upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. **Subject to the provisions of paragraph 2 of this article, no such application may be rejected**...(emphasis added)

14. The criteria which may be imposed on such grants of citizenship are specified in paragraph 2 as follows:

> (a) That the application is lodged during a period, fixed by the Contracting State, beginning not later than at the age of eighteen years and ending not earlier than at the age of twenty-one years, so, however, that the person concerned shall be allowed at least one year during which he may himself make the application without having to obtain legal authorization to do so;
>
> (b) That the person concerned has habitually resided in the territory of the Contracting State for such period as may be fixed by that State, not exceeding five years immediately preceding the lodging of the application nor ten years in all;

[6] See proposed ss 52(2) and (3).
[7] See proposed s21(2).
[8] See proposed s21(8)
[9] The Human Rights Committee has indicated that discrimination on the basis of residence falls within the 'other status' ground of article 26 (*Lindgren v Sweeden* 298-9/88).
[10] (1975) ATS 46, entry into force 13 December 1975.

(c) That the person concerned has neither been convicted of an offence against national security nor has been sentenced to imprisonment for a term of five years or more on a criminal charge;

(d) That the person concerned has always been stateless.

15. No other criteria are permissible.

16. The Bill partially meets Australia's obligations under article 1, paragraph 1 by providing a specific statelessness eligibility class for citizenship by conferral.[11] That class applies to stateless persons born in Australia. However, the Bill imposes the following criteria which appear to be outside the scope of permissible exceptions in paragraph 2:

- that the person does not, at the time of making the application have reasonable prospects of acquiring the nationality of a foreign country;[12]
- that the person has never had such reasonable prospects; [13]
- that the person is not the subject of an adverse or qualified security assessment. [14]

17. As regards the first two criteria, the Convention only permits an exception to the obligation to grant nationality where the person has **actually** acquired the nationality of another country (and thus has not 'always been stateless' – see para 2(d)). It does not permit an exception where the person has or had 'reasonable prospects' of acquiring another nationality.

18. As regards the last criterion, the Convention only permits an exception in the case of a '**conviction of an offence** against national security' (see para 2(c)). Adverse or qualified security assessments can be made without such a conviction.[15]

19. Further, the Minister may impose a range of other criteria not permitted by the Convention through the exercise of the broad residual discretion[16] (see above).

20. The Convention also imposes obligations on Australia in respect of stateless persons born outside Australia to one or more parents of Australian nationality. The relevant obligation is set out in article 4, paragraph 1:

A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State... Nationality granted in accordance with the provisions of this paragraph shall be granted:

(a) At birth, by operation of law, or

(b) Upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. **Subject to the provisions of paragraph 2 of this article, no such application may be rejected**. (emphasis added)

21. The criteria which may be applied to a grant of citizenship are as follows:

(a) That the application is lodged before the applicant reaches an age, being not less than twenty-three years, fixed by the Contracting State;

(b) That the person concerned has habitually resided in the territory of the Contracting State for such period immediately preceding the lodging of the application, not exceeding three years, as may be fixed by that State;

(c) That the person concerned has not been convicted of an offence against national security; and

[11] See proposed s21(8).
[12] See proposed s21(8)(c).
[13] See proposed s21(8)(c).
[14] See proposed s24(4).
[15] See paras 51-76 below.
[16] See proposed s24(2).

(d) That the person concerned has always been stateless. [17]

22. Again, no other criteria are permissible.

23. The Bill meets Australia's obligations under those articles in part through the provisions dealing with citizenship by descent.[18] However, an application for citizenship on that ground must be refused if the applicant is the subject of an adverse or qualified security assessment.[19] Again, this is outside the permissible criteria specified in the Convention.

Recommendation 3: The Bill be amended to comply with the *Convention on the Reduction of Statelessness* by:

(a) amending proposed s17 (citizenship by descent) so as to limit the security ground to actual convictions for a security offence in the case of stateless persons;

(b) deleting proposed s21(8)(c) so as to remove reference to reasonable prospects of acquiring another nationality as an exclusionary criterion for citizenship by conferral on the basis of statelessness; and

(c) amending proposed section 24 (citizenship by conferral) so as to limit the security ground to actual convictions for a security offence in the case of stateless persons.

Rights of children

24. Article 8 of the *Convention on the Rights of the Child* provides:

> States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

25. The Committee on the Rights of the Child has made specific reference to Australia's obligations under that article in relation to the Citizenship Act, which currently provides that:

- in some circumstances, a child automatically loses citizenship upon loss of citizenship by a parent;[20] and
- in other circumstances, the Minister has a discretion to strip a child of citizenship upon loss of citizenship by a parent.[21]

26. The Committee has made the following comments on those provisions:

> The Committee is concerned that in some instances, children can be deprived of their citizenship in situations where one of their parents loses his/her citizenship...The Committee also recommends that no child be deprived of his/her citizenship on any ground, regardless of the status of his/her parent(s).[22]

27. The Bill represents a step towards meeting Australia's obligations under article 8, in that there is no longer a provision automatically revoking the citizenship of children upon loss of citizenship by a parent. However, the Minister retains a discretionary power to remove the citizenship of children in such circumstances.[23] Exercise of that power would still appear to contravene article 8.

28. More generally as regards children, it would be desirable if the Bill enacted the overarching principle set out in article 3 of the *Convention on the Rights of the Child*, which provides:

[17] See article 4, para 2
[18] See proposed Part 2, Division 2, Subdivision A.
[19] See proposed s17(4).
[20] See s23(1) Citizenship Act.
[21] See s23(2) Citizenship Act.
[22] *Concluding Comments on Australia*, Add. 79, paras 14 and 30.
[23] See proposed s36.

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

That should apply to all decisions affecting children – including decisions concerning the citizenship of children and decisions which affect the citizenship of their parents.

Recommendation 4: Proposed section 36 (discretion to revoke the citizenship of children whose responsible parents cease to be citizens) be removed from the Bill so as to comply with Australia's obligations under article 8 of the *Convention on the Rights of the Child*.

The Bill should also be amended to include a general obligation to take into account the best interests of children as a primary consideration in all decisions which affect them (as required by article 3 of the *Convention on the Rights of the Child*).

Resumption of citizenship and rights of non-discrimination

29. The Bill enacts a number of changes to the procedure for resuming citizenship. Those changes were announced during the Senate Legal and Constitutional References Committee's Inquiry into the position of expatriates. In particular, the bill alters the existing arrangements for resumption of citizenship by:

- people who lost citizenship under s17 of the Act. Prior to its repeal in 2002, that section provided that citizenship could be lost by 'any act or thing, the sole or dominant purpose of which and the effect of which is to acquire the nationality or Citizenship of a foreign country'; and
- people who renounced Australian citizenship under s18 of the Act.

30. Under the Bill, both classes of people will be eligible to resume citizenship, subject to the Minister being satisfied that they are of good character if they are over the age of 18 when they make the application. This differs from the scheme under the Act in the following respects:

- in relation to both classes, the Act imposes a number of criteria in addition to the character test; and
- in relation to people who have renounced citizenship, an application for resumption must be made before the applicant is aged 25 years.

31. As was noted in the report of the Senate Legal and Constitutional References Committee's inquiry into the position of expatriates,[24] the current scheme has created particular difficulties for certain groups:

> …many Maltese migrated to Australia in the period following World War II and had children in Australia. Under citizenship laws of the time, these children became Australian citizens by birth, and Maltese citizens by descent. Some of these children subsequently returned to live in Malta with their parents. Until the year 2000, the Maltese Government required persons, when they reached 18, to choose whether to retain or renounce any foreign citizenship they possessed. If they failed to renounce their foreign citizenship by their 19th birthday, they automatically lost Maltese citizenship. This meant they would also lose access to many benefits in Malta including free education; the possibility of employment in the public service; subsidised housing; and access to social security benefits. For financial and practical reasons, many of these people renounced their Australian citizenship. In fact, almost 2000 Maltese people born in Australia are recorded as having renounced their Australian citizenship.[25]

32. In 2000, the Maltese government abandoned the requirement referred to in that passage. However, those who renounced Australian citizenship upon returning to Malta have had considerable difficulty in resuming their Australian citizenship as compared to those who lost

[24] *'They still call Australia home: Inquiry into Australian expatriates', Senate Legal and Constitutional References Committee,* 8 March 2005.
[25] Ibid, para 5.48.

citizenship under section 17. It appears that this difficulty largely arises by reason of the age limit which applies to those seeking to resume citizenship after renouncing it. [26]

33. As noted above, the less stringent test proposed in the Bill applies equally to those who renounced citizenship under s18 and those who lost it under s17. As such it will avoid the disparities identified in the Senate Legal and Constitutional Committee's inquiry into the position of expatriates.

34. However, the Bill will create a further distinction between children of these two groups born **after** their parents lost or renounced citizenship. The nature of that distinction and its rationale was discussed by the Minister in the following terms in the second reading speech:

> Children born after their Australian parent or parents lost their citizenship [under s17] are not eligible for registration of citizenship by descent. They do not meet the essential requirement of an Australian citizen parent at the time of their birth. Provision has been made for these people to apply for citizenship by conferral. In recognition of their particular circumstances, they will not be required to make the pledge…
>
> No provision has been made for children born to a former Australian citizen after that parent renounced their citizenship [under s18]. Unlike those who lost their citizenship under section 17, people who renounced their citizenship were well aware that they had ceased to be Australian citizens. They could have had no reasonable expectation of access to Australian citizenship for any children born after renunciation.

35. This approach is inconsistent with the following views expressed by the Senate Legal and Constitutional References Committee:

> The Committee considers that notions of Australian citizenship should be more inclusive. The Committee welcomes the proposed changes to make it easier to resume citizenship renounced under section 18 of the Citizenship Act. However, the Committee agrees that children of people who renounced their citizenship under section 18 should also be eligible for Australian citizenship.[27]

36. It also raises an issue in terms of Australia's obligations under Article 26 of the ICCPR, which provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

37. The term 'other status' has a broad meaning. It applies whenever a law differentiates amongst 'groups or categories of individuals', as opposed to 'a difference in treatment [which] does not affect a group of people but only separate individuals'. For example, the Human Rights Committee has found that the following distinctions or differences of treatment fall within the other status ground:

- distinctions made between 'foster' and 'natural' children;[28]
- differential treatment of students at private schools as compared to those at public schools;[29] and
- distinctions made between households shared by close relatives and households shared by others.[30]

38. However, the Human Rights Committee has been careful to emphasise that such distinctions do not necessarily constitute discrimination:

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[26] Ibid, para 5.53.
[27] Ibid, para 5.59.
[28] *Kaiss v Netherlands* (426/90)
[29] *Blom v Sweden* (191/85)
[30] *Neefs v Netherlands* (425/90)

> …the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant[31]

39. Note also that the Committee has confirmed that that the prohibition on discrimination applies to the granting of citizenship.[32]

40. Turning to the provisions of the Bill, the Commission is of the view that the distinction drawn between the children of parents who lost citizenship under s17 and the children of parents who renounced citizenship under s18 is a distinction based upon other status. That distinction affects groups or categories of individuals. The two groups or categories are defined by reference to the means by which their parents lost citizenship.

41. The question then is: are the criteria for the differential treatment reasonable and objective?

42. In the extract from the second reading speech above, the Minister appears to advance two bases for the differences in treatment:

- those who renounced citizenship were aware that their actions would result in the loss of Australian citizenship, whereas those who lost citizenship under s17 were not; and
- as a consequence of that knowledge, those who renounced citizenship could have had 'no reasonable expectation of access to Australian citizenship for any children born after renunciation'.

43. As regards the Minister's first point, it has been reported that many Australians 'unknowingly' lost their citizenship by reason of the operation of s17.[33] However, it has never been suggested that this was universally the case. From the commencement of the Act until 2002, s17 operated to remove Australian citizenship from those acquiring the citizenship of another nation state.[34] In addition, the Australian government's policy of refusing to recognise dual citizenship attracted public discussion from time to time. It therefore seems reasonable to assume that many people who acquired foreign citizenship **were** aware that they would lose their citizenship as a consequence of their actions.

44. As regards the Minister's second point, the Commonwealth only began addressing the position of children whose parents lost citizenship by operation of s17 in October 2003.[35] As such, those people who lost citizenship under s17 who turned their mind to the issue would similarly have had 'no reasonable expectation' that their after-born children would be eligible for Australian citizenship.

45. In other words, the Bill proposes a measure which penalises some, but not all, of those who were aware of the consequences of acting in a way which would result in the loss of Australian citizenship. The current circumstances are, in that respect, somewhat similar to those considered by the House of Lords in *A v Secretary of State for the Home Department*.[36]

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[31] *General Comment 18*, para 13.
[32] *Borzov v Estonia* CCPR/C/81/D/1136/2002.
[33] *'They still call Australia home: Inquiry into Australian expatriates'*, Senate Legal and Constitutional References Committee, 8 March 2005, para 5.19.
[34] Until 1984, Section 17 provided: An Australian citizen of full capacity, who whilst outside Australia and New Guinea, by some voluntary and formal act, other than marriage, acquires the nationality or citizenship of a country other than Australia, shall thereupon cease to be an Australian citizen. From 1984 until its repeal in 2002, section 17 provided: (1) A person, being an Australian citizen who has attained the age of 18 years, who does any act or thing: (a) the sole or dominant purpose of which; and (b) the effect of which, is to acquire the nationality or citizenship of a foreign country, shall, upon that acquisition, cease to be an Australian citizen. (2) Subsection (1) does not apply in relation to an act of marriage.
[35] *'They still call Australia home: Inquiry into Australian expatriates'*, Senate Legal and Constitutional References Committee, 8 March 2005, para 5.38
[36] [2004] UKHL 56.

In that matter, their Lordships considered security legislation enacted in response to the terrorist attacks in New York on September 11 2001. Amongst other things, the legislation empowered the Secretary of State to certify and indefinitely detain a **non-UK national** as 'suspected international terrorist' if the Secretary 'reasonably' believed that the person's presence in the UK was a risk to national security and 'reasonably' suspected that the person was a terrorist. There were no equivalent provisions for **UK nationals** suspected of such activities. The majority found that this amounted to discrimination based upon the ground of nationality. Their Lordships held that such differential treatment was not reasonable and placed particular emphasis upon the fact that the legislation did nothing to address the threat of UK nationals suspected of terrorist activities. For example, Lord Bingham of Cornwall stated:

> What has to be justified is … the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another [being those with UK nationality].[37]

46. Similarly here, the Minister suggests that the differential treatment resulting from the Bill is justified on the basis that those who renounced citizenship were aware of the consequences of their actions. However, the Bill fails to address the fact that many of those losing citizenship under s17 were equally aware of the consequences of their actions. As such, the Commission is of the view that the differential treatment resulting from the Bill cannot be said to be reasonable.

Recommendation 5: Proposed section 21(6) (which sets out eligibility criteria for citizenship by conferral for persons born to a former Australian citizen) be amended to include children of parents who ceased to be citizens under s18 of the Citizenship Act.

Residency exception for spouses and discrimination against same sex couples

47. Proposed section 22(9) gives the Minister the discretion to waive (in part or whole) the residence requirement for the spouse of an Australian citizen who makes an application for citizenship by conferral. 'Spouse' is not defined in the Bill. Australian courts have given a restricted meaning to the word 'spouse', holding that it does not apply to the partners of same-sex couples.[38] Section 22(10) makes clear that the term does include the partners of certain de facto couples (those granted a permanent visa as de facto spouses). However, this will not assist same sex couples, because the definition of 'spouse' in the Migration Regulations requires that the partners be of opposite sexes.[39]

48. As such, the Bill differentiates in favour of the partners of Australian citizens who are in heterosexual relationships.

49. In 2003 the Human Rights Committee found in *Young v Australia*[40] that the *Veteran's Entitlement Act 1986* (Cth) breached article 26 of the ICCPR by denying unmarried persons who were the same sex as their deceased partner access to a veteran's pension. The pension was available to people who had been married to their deceased partner and those who had been living with their deceased partner in a heterosexual relationship. The Committee upheld the complaint, observing that discrimination on the basis of sexual orientation is prohibited by article 26 unless it is reasonable and objective:

> The Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provides no arguments on how this distinction between same-sex partners, who are excluded from

[37] Ibid at [68].
[38] *Commonwealth of Australia v HREOC and Muller* (17/7/97) FedCt(NSW) 0634/97.
[39] See r1.15A of the *Migration Regulations 1994* (Cth).
[40] 941/00

> pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.[41]

50. The Commission is unaware of any reasonable and objective justification for the differential treatment favouring unmarried heterosexual couples produced by the Bill (and none is put forward in the Explanatory Memorandum). In the absence of such justification, article 26 will be infringed.

Recommendation 6: Proposed section 24(10) be amended to include the same sex partners of Australian citizens, holding an appropriate class of visa.

Security assessments and the right to a fair hearing

Background

51. As noted above, the Minister's powers to grant citizenship by conferral, to grant citizenship by descent and to allow a person to resume citizenship are circumscribed by provisions in the following form:

> The Minister must not approve the person becoming an Australian citizen at a time when an adverse security assessment or a qualified security assessment in respect of the person is in force under the *Australian Security Intelligence Organisation Act 1979* that the person is directly or indirectly a risk to security (within the meaning of section 4 of that Act).[42]

52. The function of making security assessments is conferred on ASIO by s17(1) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), which provides in part:

> The functions of the Organisation are… (c) to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities.

53. The current form of the Citizenship Act does not contain a reference to security assessments. However, the ASIO Act envisages that such assessments will be relevant to decisions on citizenship.[43] Such assessments could be relevant, for example, in the exercise of the Minister's relatively broad discretions in conferring citizenship or allowing a person to resume citizenship. However, the existence of a qualified or adverse security assessment does not currently prevent the Minister from granting or allowing the resumption of citizenship.

54. The Bill will alter that position by removing the Minister's discretion to confer or allow the resumption of citizenship where an applicant is the subject of an adverse or qualified security assessment. As such, the Minister will not be able to have regard to public interest considerations which might outweigh an adverse/qualified security assessment.

55. Further, the Minister will not be able to make his or her own assessment of the security risks posed by the applicant. In the context of similar provisions in the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth) the Federal Court has held:

> the [decision maker] is required to consider … whether an applicant has been assessed to be a risk to Australian national security. It is plain that the question for the [decision maker] is whether someone else has made an adverse security assessment. The legislation does not contemplate that the [decision maker] will make his or her own security assessment.

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[41] Para 10.4.

[42] See ss 17(1), 24(4), and 30(4) – note that the wording of s30(4) differs in that it states: 'The Minister must not approve the person becoming an Australian citizen again…'

[43] See s35 of the ASIO Act.

56. There are, however, some relevant review rights. These are discussed in very short terms in the Explanatory Memorandum:

> A 'security assessment is reviewable under Part IV of the ASIO Act. The review would be undertaken by the Security Appeals Division of the Administrative Appeals Tribunal.

57. The Commission would like to draw the Committee's attention to a number of features of that review process.

Review of security assessments

58. Part IV of the ASIO Act contains provisions regarding the procedure by which security assessments are made and review rights in the Administrative Appeals Tribunal. The *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) also contains a number of relevant provisions regarding review rights.

59. Some elements of that procedural framework are referred to in the Bills Digest:

> Under section 54 of the ASIO Act, a person can apply to the Administrative Appeals Tribunal for a review of an adverse security assessment. As noted above, however, there are claims that such assessments are 'virtually impossible to challenge because of the lack of information made available to the subject and their legal team'. Under subsection 38(2) of the ASIO Act, for example, the Attorney-General for security reasons can certify that a person is either not to be notified of an adverse security assessment or not to be informed of the grounds for such an assessment.

60. Section 38(2) of the ASIO Act provides:

> The Attorney-General may, by writing signed by the Attorney-General delivered to the Director-General, certify that the Attorney-General is satisfied that:
> (a) the withholding of notice to a person of the making of a security assessment in respect of the person is essential to the security of the nation; or
> (b) the disclosure to a person of the statement of grounds contained in a security assessment in respect of the person, or of a particular part of that statement, would be prejudicial to the interests of security.

61. If neither certificate is issued, then the Commonwealth agency to which the security assessment is provided (in this case the Minister administering the Citizenship Act) must provide written notice of the assessment and a copy of the assessment to the person who is the subject of the assessment.[44]

62. If a certificate is issued under s38(2)(a) then the person may nevertheless ascertain that an adverse security assessment has been given to the Minister administering the Citizenship Act (by seeking reasons under s13 of the *Administrative Decisions(Judicial Review) Act 1977* (Cth) (ADJR Act)). However, they will not be able to seek a review of the adverse security assessment in the AAT. This is because the Tribunal's jurisdiction to review security assessments is only enlivened when the applicant has been given notice of the security assessment under the relevant provisions of the ASIO Act.[45] If notice is not given, the tribunal lacks jurisdiction.

63. If a certificate is issued under s38(2)(b), the copy of the assessment attached to the notice given to the person is not to contain any matter to which the certificate applies. This could mean that the statement of grounds is not provided at all or provided with deletions of the identified material. If review is sought under the AAT Act, the Director General is required to lodge the certificate and the whole of the assessment with the AAT.[46] The certificate and the material in the assessment are then unable to be disclosed to anyone other than the tribunal members.[47] The AAT has no discretion to release that material.[48]

[44] See s38(1) of the ASIO Act.
[45] See s27AA(1) of the AAT Act.
[46] See s38A of the AAT Act.
[47] See ss38A(2) and 39B(2)(3) and (10).

64. The Attorney can also issue conclusive certificates to protect the disclosure of other material. Section 39A(8) provides that the Attorney may:

> …by signed writing, certify that evidence proposed to be adduced or submissions proposed to be made by or on behalf of the Director-General of Security or the Commonwealth agency to which the assessment was given are of such a nature that the disclosure of the evidence or submissions would be contrary to the public interest because it would prejudice security or the defence of Australia.

65. If such a certificate is issued, the applicant must not be present when the evidence is adduced or submissions made. Nor is the applicant's legal representative to be present unless the Attorney consents.[49] If the applicant's legal representative is allowed to be present, they must not disclose any relevant information to the applicant or to any other person.[50]

66. Again, the AAT has no discretion to allow disclosure contrary to such a certificate.

67. A similar conclusive certificate procedure applies to other information which might be disclosed or produced to the AAT in proceedings for review of a security assessment.[51]

68. It is also relevant to note that the ASIO Act contains an ouster clause in the following terms:

> No proceedings, other than an application to the Tribunal under section 54, shall be brought in any court or tribunal in respect of the making of an assessment or anything done in respect of an assessment in accordance with this Act.[52]

69. In chapter 10 of its report, *Keeping Secrets: the protection of classified and security sensitive information* the ALRC discussed the provisions outlined above.[53] It noted the concern expressed by the President of the AAT about:

> the problems which arise when parties and legal advisers are required to be excluded from a hearing and never see the evidence before the Tribunal. This is not a matter over which the Tribunal has any real control where the Attorney-General gives appropriate certificates under the Act. Having heard cases in the Security Appeals Division of the Tribunal, I am also aware of the fact that it can be necessary for material to be withheld from applicants before the Tribunal. ... it can be difficult to balance the interests of an applicant who has a right to have a decision reviewed and a prima facie right to know what was the basis for the decision with the requirements of protecting national security. ...
>
> It is certainly true to say that there are a greater number of matters in the Security Appeals Division of the Tribunal which raise these issues than there have been in the past. In previous years the matters in the Security Appeals [Division] of the Tribunal have largely been confined to appeals from adverse security assessments of Commonwealth public servants. The Minister for Foreign Affairs and Trade has recently cancelled a number of passports as a result of adverse security assessments and these have given rise to appeals in the Tribunal in which issues much wider than the security assessments of Commonwealth Public Servants are raised.[54]

70. The ALRC also gave an example of difficulties which had arisen in proceedings before the Security Appeals Division:

> [T]he use of secret evidence in the AAT has repercussions in cases involving passport cancellations. Secret evidence was led by the Australian Government and ASIO in the case of Zak Mallah, who was refused an Australian passport based on an adverse ASIO security assessment. Mallah appealed the

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[48] Compare with s39B(5) of the AAT Act which permits disclosure of material covered by s39B(2)(c).
[49] See s38A(9) of the AAT Act.
[50] See s38A(10) of the AAT Act.
[51] See s39B of the AAT Act.
[52] See s37(5) of the ASIO Act.
[53] The full text of the report is available at http://www.austlii.edu.au/au/other/alrc/publications/reports/98/.
[54] See paragraph 10.43.

> decision to the AAT. He and his lawyers were not permitted in an AAT hearing while counsel for the Australian Government led certain evidence, and his counsel could not be present to cross-examine the ASIO evidence. Mallah's counsel told the AAT:
>
> > 'I am at a disadvantage in this case by not knowing the evidence and it's akin to boxing in the dark'.[55]

Relevant human rights principles.

71. As noted above, Human Rights Committee has indicated that unsuccessful applicants for citizenship should have rights of review. However, the Attorney-General can foreclose any such review by issuing a certificate under s38(2)(a) of the ASIO Act if she/he is satisfied that the 'withholding of notice to a person of the making of a security assessment in respect of the person is essential to the security of the nation'. The Commission acknowledges that this would represent an extreme case. However, in the Commission's view, the better course (consistent with the views of the Human Rights Committee) would be to allow review under a regime that appropriately protects Australia's security interests.

72. The Attorney-General's powers to:

- prevent an applicant and their legal representative being present during the hearing of an application for review of a security assessment; and
- prevent an applicant and their legal representative having access to relevant material

raise a separate human rights issue: the right to a fair and public hearing which is guaranteed by article 14 of the ICCPR.

73. The Commission has made extensive submissions regarding that right to this Committee (see particularly the Commission's submissions on the Provisions of the National Security Information (Criminal Proceedings) Bill 2004, the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill and the National Security Legislation Amendment Bill 2005).[56] Without reiterating those submissions, Article 14 does not explicitly confer a right to be present at a civil hearing as an aspect of a fair trial (as compared with criminal defendants, who do have explicit protection under article 14(3)(d) of the ICCPR). However, the Human Rights Committee has stressed the importance of being able to respond to the legal contentions and evidence of the other parties in a civil matter, stating that it is

> a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party. [57]

74. In the Commission's view, Australia would better meet that obligation if the *National Security Information (Criminal and Civil Proceedings) Act* 2004 (NSI Act) was to operate in this context. The NSI Act does not apply to proceedings in the AAT, because it only applies to proceedings in a court.[58]

75. The Commission has previously criticised the provisions of the NSI Act as potentially infringing upon the right to a fair hearing.[59] However, the NSI Act does at least preserve the discretion of the Court to determine how security sensitive information is to be treated. Under the NSI Act, the relevant Court is required to conduct a hearing and determine whether the material should be disclosed, made the subject of non-disclosure orders or provided in another form (eg with deletions). In considering those orders, the Court is required to weigh any security concerns against various matters, including the right of an accused person to a fair

[55] See paragraph 10.44.
[56] Available at http://www.humanrights.gov.au/legal/submissions/index.html
[57] *Äärelä v Finland* Communication No 779/1997 CCPR/C/73/D/779/1997 at 7.4.
[58] See s15A.
[59] See the Commission's submissions available at http://www.humanrights.gov.au/legal/submissions/index.html

hearing (in a criminal matter) and any adverse effect on the trial (in a civil matter).[60] In contrast, in a review of a security assessment, the issue of disclosure of security sensitive information can be conclusively determined by the executive and the applicant has no opportunity to seek to persuade the AAT that the interests of justice favour disclosure.

76. It is also relevant to observe that the ALRC recommended that legislation governing the use of security sensitive information should apply to both courts and tribunals.[61]

Recommendation 7: The *National Security Information (Criminal and Civil Proceedings) Act* 2004 be amended such that it applies to the Security Appeals Division of the Administrative Appeals Tribunal. Consequential amendments be made to the *Australian Security Intelligence Organisation Act 1979* (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth), repealing the existing provisions regarding the treatment of security sensitive information in reviews of security assessments.

In addition, amendments should be made such that the Attorney-General does not have power to prevent review of an adverse or qualified security assessment (through the use of s38(2)(a) of the *Australian Security Intelligence Organisation Act 1979* (Cth)).

Conclusion

77. Citizenship is an important source of rights in Australia. Australian citizens are, for example, not able to be the subject of criminal deportation orders under the *Migration Act 1958* (Cth) and possess important rights of political participation. The Bill represents a unique opportunity to ensure that the process for granting those rights is consistent with Australia's international obligations. The Commission's recommendations are designed to achieve that end.

Human Rights & Equal Opportunity Commission

20 January 2006

[60] See sections 31(7) and 38L(7) of the NSI Act.

[61] See *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (2004), recommendation 11-1.