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25 January 2006

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

**By Post and email** ([legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au))

Dear Committee Secretary

**Australian Citizenship Bill 2005**

The Law Institute of Victoria (*LIV*) welcomes the opportunity to provide a written submission to the Senate Legal and Constitutional Committee on the Australian Citizenship Bill 2005 (*Bill*), which is currently before the Australian Parliament.

The LIV's submission is attached for your review and consideration. We thank you for the opportunity to make an oral submission at a public hearing, however, the issues raised in our written submission should convey any comments or concerns we have in relation to the Bill.

If you would like to discuss any of the matters raised in the submission, please contact me directly on 03 9607 9367 or Jo Kummrow, Solicitor, Administrative Law & Human Rights Section on 03 9607 9385.

Yours sincerely

**Catherine Gale**  
President  
Law Institute of Victoria

Attach.



# Submission

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## Administrative Law & Human Rights Section

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Inquiry into the provisions of the Australian Citizenship Bill 2005 and the Australian Citizenship (Transitionals and Consequentials) Bill 2005

To: Senate Legal and Constitutional Committee

A submission from the Administrative Law & Human Rights Section of the Law Institute of Victoria

Date 25 January 2006 (extension granted)

*Queries regarding this submission should be directed to:*

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## 1 Introduction

The Law Institute of Victoria (*LIV*) welcomes the opportunity to make this submission in response to an invitation from the Senate Legal and Constitutional Committee (Committee) to provide comments to the Inquiry into the provisions of the Australian Citizenship Bill 2005 and the Australian Citizenship (Transitionals and Consequentials) Bill 2005.

On 30 November 2005, the Senate referred the above Bills to the Committee for inquiry and report by 27 February 2006. We understand that these Bills will replace the *Australian Citizenship Act 1948* (Cth) (**Act**), which governs the acquisition, revocation and resumption of Australian citizenship.

The Explanatory Memorandum to the Bills states that the proposed legislation seeks to:

- (a) reorganise existing provisions to ensure consistency under the legislation;
- (b) amend certain citizenship application, residence, approval and Ministerial discretion provisions;
- (c) change provisions relating to resumption of renounced citizenship, citizenship by descent and revocation of citizenship; and
- (d) implement a legislative framework for the collection, use and storage of personal identifiers.

The LIV understands that these amendments follow a number of changes to the Act by the *Australian Citizenship Amendment Act 2002* and relate to restructuring the legislation to ensure that it is accessible, easy to understand and logically numbered and organised.

The LIV would appreciate the opportunity to make an oral submission to the Committee on the Bills or in relation to issues raised in this submission at a public hearing, if required.

## 2 Executive summary

The Australian Citizenship Act was enacted in 1948 in the post World War II period after which Australia experienced a significant wave of migrants from Europe. This was followed by migration from countries in south-east Asia, such as Vietnam, under refugee and humanitarian programs. Most recently, Australia has received a number of asylum seekers and refugees from China, Afghanistan, Iran, Iraq and various Africa nations.

The submission raises the extended residence requirement under section 22 of the Bill and submits that the primary purpose of such an amendment should reflect the important decision taken by migrants to take up citizenship in Australia and not reflect negatively on non-citizens by drawing a link between the amendment to terrorism concerns.

The major concern highlighted in this submission relates to expanded ministerial discretion under the Bill and how this would be applied in practice. The LIV does not support an extension of ministerial discretion in relation to citizenship matters in which an applicant for citizenship should either satisfy or not satisfy the requirements of citizenship (ie period of residence, pledge of commitment and acceptance of rights and responsibilities as a citizen). The LIV submits that nature of citizenship is different to the discretion that may be applied in determining a migration application.

The LIV is concerned that the Bill provides a potential for Australian citizenship law to be influenced by government policy, which may lead to unfair outcomes for persons seeking to become Australian citizens.

Accordingly, the LIV submits that there is a need for such decisions to require written reasons and to be reviewable. We note that sufficient review provisions are included under section 52 of the Bill and recommend that the Committee endorse these review provisions.

### 3 Comments on the proposed Bill

The Explanatory Memorandum to the Bill outlines three major proposed changes to the Act:

- (a) structure and location of provisions to ensure consistency throughout the Act;
- (b) content to reflect changes to government policy; and
- (c) repealing certain provisions which are no longer required.

This submission focuses on changes to the content of the Act to reflect changes to government policy, in particular, the expansion of ministerial discretion under the proposed legislation. It does not provide comment on:

- (a) the structure and location of provisions to ensure consistency throughout the Act; or
- (b) the repeal of certain provisions which are no longer required in the Act.

#### 3.1 Extended residence requirement

The Bill includes a provision to extend the residence period for citizenship eligibility from two to three years.

The Explanatory Memorandum states that in order to meet the residency requirement:

*A person must have been present in Australia as a permanent resident for:*

- (a) *a total period of at least 1 year in the period of 2 years before the day the person made the application; and*
- (b) *a total period of at least 3 years in the period of 5 years before that day.*

The Explanatory Memorandum further states that the increased residence period “strengthens the integrity of the citizenship process by allowing more time for arrivals to become familiar with the Australian way of life: and the identification of people who may represent a security risk to Australia”.

This amendment was announced by the Prime Minister on 8 September 2005 in the context of counter-terrorism measures that he was proposing to implement.

The LIV recognises that some overseas jurisdictions have residence requirements of five and even ten years (ie United Kingdom and the United States). However, the LIV submits that the primary purpose of such an amendment should reflect the important decision taken by migrants to take up citizenship in Australia. For some this means renouncing the citizenship of their home country. Such an amendment should not be introduced to focus negative attention on non-citizens who the government may seek to delay or prevent from obtaining citizenship.

Australian citizenship confers a number of rights to members of the Australian community, including the right to vote and running for election to parliament and the right to obtain an Australian passport for the purpose of overseas travel and consular assistance overseas.

We also query how an increase of one year would provide for better identification of person who may be a security risk. However, by this, we do not suggest that the period should be further extended.

Accordingly, the LIV submits that the existing two year residence period is sufficient to achieve the objectives of Australian citizenship law.

### 3.2 Expansion of Ministerial discretion

The LIV is concerned with the expansion of Ministerial discretion under the Bill in that it provides a potential for Australian citizenship law to be influenced by government policy. The Bill provides for the Minister to refuse to approve applications for citizenship by conferral (Section 24(2)) or by resumption (Section 30(2)) despite *prime facie* entitlement for citizenship.

The Explanatory Memorandum to the Bill states that these provisions are justified on the grounds that Ministerial discretion provided for under the current Citizenship Act reflects the nature of citizenship as a privilege rather than a legal right. The centre of such discretion is whether it is deemed by the Minister to be in the public interest for a person to become an Australian citizen regardless of whether they meet the legal requirements.

The LIV suggests that the broad discretion available to the Minister under the Bill may result in uncertainty in the citizenship process and lead to unfair outcomes for persons seeking to become Australian citizens or resume citizenship. The LIV submits it is not necessary to expand Ministerial discretion as provided for in the Bill.

For example, such discretion may be relied upon in difficult or controversial cases. Two such recent citizenship cases concern Pixie Skase, who sought to resume Australian citizenship, and David Hicks, who sought British citizenship by descent. In both cases, the Australian and UK Governments exercised its discretion to refuse each application. These cases are examples of how citizenship law should be applied without interference from government in that once eligibility criteria is satisfied, citizenship should be granted as a legal right.

#### (a) Pixie Skase

In the case of *Skase and Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 308 (8 April 2005), Mrs Skase sought review of a decision by the Minister for Citizenship and Multicultural Affairs to refuse her application to resume Australian citizenship under section 23AA of the *Australian Citizenship Act 1948* on policy grounds. Section 23AA(1) of the Citizenship Act provides that any registration of a declaration of resumption of citizenship is a matter of discretion even when all the requirements of that section are met.

In considering the exercise of discretion under section 23AA(1), Deputy President Forgie of the Administrative Appeals Tribunal, stated that:

*Section 23AA does not specify the limits of the discretion but, as with any discretion conferred by statute, it is not unlimited. Its limits are determined by reference to "... the subject matter, scope and purpose of*

*the statute ..."*[\[73\]](#)*. That may mean that the latitude of the discretion is considerable*[\[74\]](#) *but it depends on the latitude of the subject matter, scope and purpose of the Act. The Minister is free to adopt a policy to guide him in the exercise of his discretion provided his policy is consistent with s. 23AA in the context of the Act*[\[75\]](#) *and does not require him to take irrelevant circumstances into account*[\[76\]](#)*.*

In considering all of the factors in the case, Deputy President Forgie concluded that:

*What is important in this case is that feelings of rancour or distaste for the activities of her husband or views about the benefits she has gained do not cloud the issues in this case. It is important that she not be punished for the sins of her husband, perceived or otherwise but that her application be judged on its own merit.*

Accordingly, the Tribunal held that discretion should be exercised in Mrs Skase's favour and the Minister's decision to exercise discretion to prevent her from resuming citizenship, for reasons suggested to be linked to her husband's previous business dealings in Australia, was set aside.

(b) David Hicks

The second case concerns Australian citizen, David Hicks, who application for British citizenship based on his mother being born in the United Kingdom. Mr Hicks is being detained at Guantanamo Bay, Cuba by the United States Government while he awaits a US military commission trial. Mr Hicks had hoped that British citizenship would entitle him to the same diplomatic protection and assistance as other British citizens held in Guantanamo Bay.

The UK Home Secretary has powers under the *Nationality, Immigration and Asylum Act 2002* (UK) and the *British Nationality Act* (UK) 1981 to deprive a person of citizenship if they have been "disloyal or disaffected" towards the Queen or assisted an enemy. Mr Hicks' citizenship application was refused by the British Government on policy grounds due to his alleged terrorist activities for which he is yet to be convicted.

The British High Court later ruled that Mr Hicks met the eligibility criteria for British citizenship and should be granted citizenship and issued with a British passport as soon as possible. However, the judge in the case ruled that Mr Hick's behaviour could only be taken into account if it occurred after the person had acquired citizenship.