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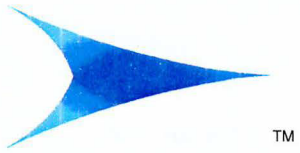

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Primary Submission to the Australian Senate's
Legal and Constitutional Legislation Committee

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

Brussels and Malta
20 January 2006

The Southern Cross Group is an international volunteer-run non-profit advocacy and support organisation for the Australian Diaspora

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Introduction

The Southern Cross Group (SCG) congratulates the Government on the tabling of the *Australian Citizenship Bill 2005* ("the Bill") on 9 November 2005 in the House of Representatives by the Minister for Citizenship and Multicultural Affairs, the Hon John Cobb MP. The SCG also welcomes the fact that, on the initiative of the Australian Democrats, the Bill has been referred to the Senate's Legal and Constitutional Legislation Committee for closer scrutiny, resulting in an important opportunity for all those impacted by this legislation to provide their input into the legislative process.

The Bill embodies an array of citizenship reforms first announced by the Government on 7 July 2004 prior to the last federal election. Many of the reforms will positively impact thousands in the Australian diaspora. Indeed the Bill is welcome evidence that the Government has, after many years, understood a number of the citizenship dilemmas faced by individuals in the Australian expatriate community which have been raised by the SCG and others in Canberra over a significant period.[1]

To that extent, while the SCG submits that various amendments to the Bill would be desirable and appropriate, it nevertheless urges the speedy adoption of this legislation as a whole by the Australian Parliament, so that the specific provisions that will give particular groups in the diaspora access to Australian citizenship may come into force as soon as possible.

The urgency of this legislation is for no group more acute than for thousands of Australian-born women who married US servicemen during or just after the end of World War II ("war brides"), many of whom forfeited their Australian citizenship decades ago on becoming naturalised in the United States.[2] The demographic of this group is such that those who survive are now in their 80s and 90s. Sadly, they are ever diminishing in number. In the eighteen months since the Government's July 2004 reform announcement, the SCG has learned of the passing of a number of these courageous women. Many had expressed a fervent hope that they would be able to become Australian citizens again before they died. Unfortunately this aspiration will not now be realised.

The purpose of this primary submission by the SCG to the present inquiry is to focus on one specific matter that the Government has explicitly chosen not to address in the Bill as tabled on 9 November 2005 – the dilemma of people born overseas to former Australian citizens after they renounced their Australian citizenship under Section 18 of the *Australian Citizenship Act 1948* ("the

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[1] See in particular the SCG's submissions to the Senate's Inquiry into Australian Expats during 2004, available at: *http://www.aph.gov.au/senate/committee/legcon_ctte/expats03/submissions/sublist.htm*
The SCG's website archives also historically documents its citizenship law reform work.

[2] See further *http://www.southern-cross-group.org/brides/overview.html*. Clause 29(3)(a)(i) of the Bill will provide a path to resumption for these women.

current Act"). These people currently have no access to Australian citizenship and the Bill as tabled will continue to exclude them from their Australian heritage. The SCG congratulates the Australian Labor Party (ALP) for giving an undertaking to introduce an amendment to the Bill in both the House of Representatives and the Senate which, if ultimately adopted, would remedy this situation. Details of the Opposition's support for the SCG's position and its proposed amendment are attached as **Annex 1** in a letter from Senator Annette Hurley, Shadow Minister for Citizenship and Multicultural Affairs.

A later SCG submission to this inquiry will catalogue and discuss a number of additional matters of particular concern to those in the Australian diaspora that are also not encompassed in the present Bill.[3]

[3] Since the tabling of the Bill on 9 November 2005, many of those matters have been raised by the SCG directly with Senator Annette Hurley, Shadow Minister for Citizenship and Multicultural Affairs. A copy of the SCG's letter to Senator Hurley dated 1 December 2005 is attached as **Annex 2**. The same questions have been put by the SCG directly to DIMIA, and DIMIA's response by e-mail dated 11 January 2006 is attached as **Annex 3**. Submission Number 34 to this Inquiry, by Mr Jeremy Jenkins, essentially canvasses the same issues.

1. Resumption of Citizenship for Individuals who Renounced in order to Retain Another Citizenship

The current Act provides no resumption mechanism for those aged 25 or over who renounced their Australian citizenship under Section 18 in order to retain another citizenship.[4] The SCG welcomes the fact that under Clause 29(3)(a)(ii) of the Bill resumption will become possible for anyone of good character who has renounced their Australian citizenship since 26 January 1949. In particular, approximately 2,000 Australian-born individuals in Malta will be able to apply to resume their Australian citizenship under this Clause.[5]

This reform is long overdue. The Committee has received several hundred submissions to this inquiry from affected individuals in Malta, Australians living abroad in countries other than Malta, and people within Australia welcoming this planned change. There can be little doubt that this aspect of the Bill has universal support.

1.1 Practicalities of Resumption

On a practical level, candidates aged 18 or over for resumption under this provision will be required to satisfy the Minister that they are of good character. While the precise application/documentation requirements have not yet been made available by DIMIA, it is to be expected that they will partially reflect those set out in the current version of DIMIA Form 132.[6] Applicants for resumption can be expected to have to provide evidence of former possession of Australian citizenship, eg. full birth certificate if born in Australia, as well as police certificates from all the countries they have lived in for the past 10 years (except Australia) to demonstrate good character. Assuming that no unreasonable or unexpected evidentiary requirements are introduced, the SCG considers that the citizenship resumption application process should not be unduly burdensome for applicants. The SCG notes that DIMIA should not need to demand evidence of renunciation of Australian citizenship from resumption applicants, as it should have complete records in its systems as to who has in the past used Section 18 and the date on which those renunciations occurred. A number of Australian-born individuals in Malta have expressed concern to the SCG that they no longer have the original documentation

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[4] Section 23AA of the current Act allows resumption for those who lost their citizenship under the now repealed Section 17, and those who have renounced their Australian citizenship under Section 18 to acquire from scratch a new citizenship rather than retain one of two citizenships. See SCG Submission to the Senate Inquiry into Australian Expatriates (No. 665) dated 27 February 2004, pages 90 - 93. Although DIMIA's Form 132 (Design Date 07/05) is silent on the point, Section 9.2.8 of the Australian Citizenship Instructions states "Those people who renounced their Australian citizenship in order to acquire another citizenship under s 18 may also apply to resume their Australian citizenship under s 23AA." It is submitted that the current version of Form 132 should explicitly stipulate this. A number of Australians continue to renounce their citizenship in countries such as Germany and Denmark in order to acquire the citizenships of those countries. They may later wish to resume and can presently do so, but Form 132 on its face would lead them to believe that they have no current right of resumption.

[5] **Annex 4** sets out data which the SCG has collected over several years on Section 18 cases in Malta and Section 18 offspring cases in Malta as well as estimates, based on that sample, of total affected numbers of Section 18 offspring in Malta.

[6] Declaration of desire to resume Australian citizenship under section 23A, 23AA, 23AB or 23B (Design date 07/05).

surrounding their renunciation. In many cases, the renunciation under Section 18 occurred several decades ago.

Recommendation: *The SCG asks that the Committee seek clarification with DIMIA as to whether it will require applicants for resumption under Clause 29(3)(a)(ii) of the Bill to produce evidence of their renunciation under Section 18.*

While it is not yet clear what the application fee for citizenship applications will be under the forthcoming legislation, the SCG notes that the current fee for citizenship resumption is A$ 65 (or the equivalent in foreign currency).[7] The SCG considers this reasonable for the nature of the application, but would strongly oppose any future increase in this fee which goes beyond normal Consumer Price Index (CPI) increases.

Recommendation: *The SCG asks that the Committee seek clarification with DIMIA as to whether and by how much it intends to increase the application fee for citizenship resumption applications on the entry into force of the proposed legislation.*

The issue as to how the Government intends to make the forthcoming reforms known abroad in the Australian expatriate community is also one which the SCG would ask that the Committee address. Thousands of individuals abroad who will have access to Australian citizenship again, or for the first time under the legislation, presently have no idea that their Australian citizenship entitlements are about to change. While the SCG will do its utmost, within the limitations of its volunteer resources and restricted finances, to publicise the changes globally and assist individuals who have questions as to their impact, it is submitted that it is not the role of a non-governmental organisation such as the SCG to publicise these reforms. It is the role of Government.

This citizenship legislation is probably of greater significance to the some one million Australians abroad than any legislation since Section 17 was repealed in April 2002. DIMIA's efforts must go beyond simply amending the *citizenship.gov.au* website once this legislation comes into force. All Australian missions overseas, whether run by DFAT or Austrade should be required to play an active role.

On this point the SCG wishes to put on record the efforts it has made to publicise the current Senate Inquiry to the Australian diaspora. The fact that several hundred submissions have been received by the Committee from Australians abroad is testimony to the fact that those endeavours have met with considerable success despite the shorter than usual time-frame for this inquiry. However the SCG's work in the weeks following the opening of the inquiry on this front have not been without frustration. A number of SCG volunteers around the world who live in cities in which there is an Australian mission

[7] DIMIA Form 990i (Design date 11/05).

took batches of SCG flyers about the inquiry into those missions and asked that they be made available in the foyer or public areas of the missions. In almost all cases, local mission staff were highly supportive and had no problem with the material being displayed. However, the Australian Embassy in Beijing and the Australian Consulate-General in Shanghai refused to accept the material, and directed the SCG volunteer concerned to take up contact with DFAT in Canberra.

The SCG duly took the matter up with DFAT's Passports, Consular and Public Diplomacy Division in Canberra. The e-mails exchanged between DFAT and the SCG in early January 2006 are attached as **Annex 5**. As at the date of lodgement of this submission, the SCG remains to receive clarification from DFAT as to how it wishes to address these issues going forward. Although DFAT in Canberra indicated that in its view the best way that Australian missions could contribute to informing people overseas about the present inquiry would be to "use official material produced by the Senate Committee itself and which is available on its website", the SCG is sceptical as to how and whether this occurred. It also questions whether DFAT has systems in place to make sure that future Parliamentary inquiries of particular relevance to the Australian expatriate community are adequately publicised in its missions.

The SCG notes that the Senate Committee on Legal and Constitutional References made a number of relevant recommendations in this respect in its March 2005 findings in the Inquiry into Australian Expatriates.[8] Those recommendations included the establishment of a web portal devoted to the provision of information and services for expatriate Australians, and the establishment of a policy unit within DFAT to facilitate the coordination of policies relating to Australian expatriates. Especially key for the purposes of the present discussion was Recommendation 4, in which the Committee stated that the consular role of foreign missions should be revised to contain a specific requirement that posts engage with the local expatriate community, in any and all ways possible appropriate to that location.

Ten months after the tabling of the Senate Committee's March 2005 findings in that inquiry, which ran for a duration of almost seventeen months and for which 677 submissions were received, the Government has yet to publish its response. This is despite the fact that we understand that Parliamentary protocols require the Government to respond within three months in all inquiries. The SCG submits that greater numbers of former Australians and others in the Australian diaspora would have access to information concerning the forthcoming citizenship legislation when they otherwise might not were those earlier and wholly sensible recommendations to be acknowledged and duly implemented.

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[8] Legal and Constitutional References Committee, "They still call Australia home: Inquiry into Australian Expatriates", March 2005, Chapter 10, pages 121 to 129.

It is to be expected that hundreds if not thousands of people will apply for Australian citizenship (using various provisions in the new Act) shortly after the relevant provisions come into force. The vast majority of these applications will be lodged with Australian missions abroad. Several hundred, if not as many as just under 2,000 of those applications will be made by people in Malta, and will be lodged at the Australian High Commission in Malta, although their applications will be processed by DIMIA in Canberra.

In the medium term following the coming into force of the new legislation, there will also be increased levels of consular activity arising from additional applications lodged through Australian missions for spouse/*defacto* partner/dependent children family migration visas as families where one partner has recently become an Australian citizen seek to relocate to Australia accompanied by non-Australian citizen family members. For example, a number of families in Malta, where one spouse will qualify to resume their Australian citizenship once the legislation is operative, have already indicated to the SCG that they plan to move to Australia within a one to two-year period of their citizenship resumption.

Recommendation: *The SCG asks the Committee to clarify with DIMIA exactly how the Department envisages it will adequately address the increased demand for citizenship and other visa services brought about by the new legislation at Australian missions overseas, in particular in Malta.*

In addition, the SCG would ask the Committee to raise with DIMIA what its expected processing times will be for citizenship applications under the new legislation. Reference has been made above to the fact that with each day that passes, fewer Australian-born war brides survive.

Recommendation: *The SCG submits that where a considerable number of applications are received simultaneously following the introduction of the new legislation, it would be appropriate for DIMIA to process applications from the most elderly applicants first, and to give such applications expedited treatment.*

It is also to be noted that some elderly applicants may be too infirm or incapacitated to sign the required documentation, even if they have a friend or relative assist them in filling out the substantive part of the citizenship application.

Recommendation: *The SCG asks the Committee to clarify with DIMIA what mechanisms the Department intends to put in place to deal with such situations such that citizenship for especially frail applicants can be made possible promptly and smoothly.*

1.2 The Legacy of Australia's Historical Stance: Destinies Irreversibly Determined by the Inability to Choose Australian Citizenship as Mature Adults - British Law Contrasted

While, as the SCG has stated above, it supports Clause 29(3)(a)(ii) of the Bill without qualification, it is worth pausing, as Australia stands on the brink of major citizenship reforms, to consider the impact that the historical absence of such a provision in Australian law has had on countless lives over the years. The inflexible policy stance Australia maintained until the announcement of the current reforms in July 2004 can be recognised as particularly harsh and inappropriate when contrasted with that of the United Kingdom.

Clause 29(3)(a)(ii) of the Bill will at last bring Australian citizenship law into line with British law. United Kingdom citizenship legislation has allowed the resumption of British citizenship for Commonwealth citizens who ceased to be British citizens as a result of a declaration of renunciation since 1964. This was extended in 1983 to cover those of any nationality who had renounced British citizenship.[9] It is to be noted that in parallel to the situation of the approximately 2,000 Australian-born Maltese who used Section 18, a number of individuals with Maltese parents were born in Britain in the post-war period and therefore found themselves with dual citizenship (British/Maltese) as minors. Those who moved back to Malta whose 19th birthdays occurred before 10 February 2000 when Maltese law changed to allow dual citizenship were also obliged to renounce their non-Maltese, i.e. their British citizenship, by the Maltese authorities, by having recourse to the appropriate renunciation (Section 18 equivalent) provision in British law.

British citizenship statistics over the last decade show that as soon as Maltese law changed to allow dual citizenship in early 2000, a significant number of Maltese citizens were quick to re-acquire their British citizenship and become dual citizens, because British law already contained a resumption mechanism for them to use, unlike Australian law.[10] Even before Maltese law changed to allow dual citizenship on 10 February 2000, British resumption statistics show that a small number of Maltese opted to become British citizens again, presumably to pursue lives in Britain (or other EU countries), despite the fact that before 10 February 2000, resumption of British citizenship meant forfeiting their Maltese citizenship. The fact that British law contained a legal mechanism to allow such people to resume their renounced citizenship provided additional life options, even while Maltese citizenship prohibited dual citizenship.

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[9] Section 10(1) of the *British Nationality Act 1981* (formerly Section 1(1) of the *British Nationality Act 1964*), allows individuals who renounced British citizenship before 1983 to resume their British citizenship if the original renunciation was to acquire or retain the citizenship of a Commonwealth country (i.e. Malta included). Section 13(1) of the *British Nationality Act 1981* allows resumption to those who renounced their British citizenship in 1983 or later, for the purposes of acquiring or retaining any foreign citizenship. Section 13(1) is an entitlement, but can be exercised only once. Subsequent resumption, or if citizenship was renounced for another reason, falls under Section 13(2), which is discretionary.

[10] British Home Office statistics show the following resumption figures for Maltese citizens: 1995 - 8, 1996 - 8, 1997 - 16, 1998 - 23, 1999 - 13, 2000 - 134, 2001 - 110, 2002 - 90. It is to be noted that until 10 February 2000, a Maltese person who had renounced British citizenship but who re-acquired it before that date would in turn have forfeited their Maltese citizenship on becoming British again.

The fact that no resumption mechanism for Australian-born Maltese[11] (or others who renounced their Australian citizenship in order to retain an existing citizenship) has ever existed under Australian citizenship law has meant that after their 19th birthdays (i.e. the moment of their original renunciation which occurred while they were 18), these people have never had the option later in life, even while Malta prevented dual citizenship, of choosing Australian citizenship in preference to Maltese. It cannot be stressed strongly enough that the continuing lack of a resumption mechanism in Australian law for such individuals has limited life options in countless ways for those concerned and set the course of many family destinies in directions which are the source of deep regret for a large number of these people. At the age of 18, living in Malta, faced with renunciation, many were simply not in a position, financially, educationally or emotionally, to reject renunciation and pursue lives as only Australian citizens at that time, i.e. lives in Australia, but without their parents and immediate family. If Australia had had a resumption provision available, some Australian-born Maltese, as they became more mature and independent, would have opted for Australian citizenship and perhaps pursued lives in Australia in their 20s, 30s and even later in life, even if that decision, taken before 10 February 2000, would have meant losing Maltese citizenship. But they did not have that choice. This fact exacerbates the negative impact that the Government's planned denial of Australian citizenship to their overseas-born offspring under the Bill (discussed under point 2 below) will have. It means that with very few exceptions, anyone that used Section 18 in Malta still lives in Malta today.

1.3 Resumption Welcome, But Choices Now Limited for Many Due to Age and Circumstance

Following the Government's July 2004 citizenship reform announcement, Australian-born individuals in Malta have gradually been learning that they will soon be able to resume their Australian citizenship. The news has been greeted with understandable enthusiasm and relief by the vast majority of those affected. A number of Australian-born people, almost invariably people in their mid to late 20s and early 30s, very often single,[12] or married but with no children or very young children, are already making plans to move to Australia to live once they are citizens again.

But others, particularly those in their 40s and 50s, have in many cases told the SCG "it's too late for me".

This is not to say that these older individuals will not apply to resume their Australian citizenship once the law changes. Many are champing at the bit to lodge their resumption applications, and will become proud members of the Australian expatriate community as soon as the law and administrative

[11] That is, apart from Section 23AB introduced from 1 July 2002 which can only be used by those under 25. DIMIA reports that 48 people, 47 of them in Malta, have availed themselves of resumption under Section 23AB since it was introduced: E-mail from Greg Macek, 11 January 2006.

[12] SCG data indicates that 25% of Australian-born individuals in Malta who have used Section 18 have no children yet.

procedures allow, no doubt going on to contribute to Australia in a host of ways from offshore. One of the essential freedoms inherent in Australian citizenship is the freedom to choose to live part or all of one's life outside Australia and to come and go from Australia at any time.

The point is that many older Australian-born Maltese whose lives are typically more settled and established and whose family and financial commitments are more deeply entrenched in Malta, feel that the courses of their lives have already been set, and that it would be very difficult, if not virtually impossible, for them to start new lives in Australia once they become citizens again in the short to medium term.

An illustrative and completely typical example of this phenomenon is that of Norman Bonello, the SCG's volunteer coordinator for Malta. Mr Bonello tells his story in the following words:

> I was born in Sydney on 18 April 1957, the youngest of four children. When I was about fifteen my parents, both Maltese, who had migrated in Australia in 1955, decided that we would move back to Malta. I didn't have any say at the time. My older sisters Carmen and Monica, who were already married and had moved out of home, stayed in Australia.
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> We came back to Malta, and when I was 18, around the time I was finishing high school and starting university in 1975 or 1976, I got a letter from the Maltese authorities. They knew that I was both an Australian citizen and a Maltese citizen. At that time Maltese law prohibited dual citizenship in adulthood. They told me that if I didn't prove to them I had divested myself of my Australian citizenship before I turned 19, then on my 19th birthday I would automatically lose my Maltese citizenship.
>
> I was still living at home with my parents, and was financially dependent on them. I could not have afforded to finish my tertiary education in Malta without Maltese citizenship. Foreign student fees at that time were more than my father's income for an entire year. If I had not renounced my Australian citizenship, I could not have stayed in Malta as a foreigner. Even if I had managed to pay foreign student fees, or had not continued my education, I could not have worked in Malta as a foreigner, and any residency permit would have continually had to have been renewed. I wouldn't have had access to Maltese health care, bank loans or mortgages or government student scholarships.
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> If I had opted to keep Australian citizenship at the age of 18, I would have had no option but to return to Australia almost immediately by myself as a teenager with an unfinished education. Financially this was out of the question, and although my sisters were there, even if I could have come up with the fare to get there, it would have been too much to expect my sisters to take responsibility for me. They both had young families to support and a lives of their own.
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> So with a very heavy heart I renounced my Australian citizenship. I was a just a naive kid. When we're 18 we think we know everything but we have so much to learn. The full ramifications of the step I was being pushed into taking as regards my citizenship weren't clear to me at the time. I suppose

somewhere in the back of my mind I thought or hoped that somehow it would all be able to be sorted out later on, and that once I had finished studying I could go back to Australia then.

After renouncing my Australian citizenship at age 18, I subsequently completed my education in Malta, obtaining a science degree and graduating in electrical engineering. Once my education was behind me, I wanted to return to live in Australia in my 20s, and I made inquiries only to learn that I couldn't get my Australian citizenship back. As I got older, while I was still single, this dream stayed with me and I periodically inquired to see whether anything had changed, but it hadn't. I visited Australia virtually every year once I had a job, usually for a month's holiday, until I got married and financial and other responsibilities prevented such frequent visits.

In 1995 I married my wife Mary, who is a Maltese citizen and a graduate primary school teacher. We have two beautiful daughters, Kim, 8, and Claire, 6, full of life, energy and hope. As children born overseas to an Australian-born person, they would have been Australian citizens by descent if I'd never had to use Section 18.

I am currently employed as a project manager, and I am completing an MBA degree part-time in the evenings. We are buying a house and are paying off a mortgage. We are very active in a number of local community groups, including various church and drama groups. We lead full and happy lives in Malta and we are doing okay.

I'm deeply pleased that I'll shortly be able to apply to resume Australian citizenship. I have always felt Australian inside and it's part of my identity. Having my citizenship back, and being able to carry an Australian passport again is of huge symbolic significance to me. When I read the Minister's announcement on 7 July 2004, I must admit it was a very emotional and proud moment for me. I've been sweating on the Government introducing the legislation to implement the reforms every day since then, hoping and praying that the Bill would give my children access to Australian citizenship too.

When the Bill was finally tabled last November, though, it was a bittersweet moment, as I realised that Kim and Claire had been explicitly excluded. Of course, once I'm a citizen again, I could sponsor my wife and children for migration to Australia, and they could eventually become naturalised Australian citizens that way. But I just don't think it's going to be feasible for us to move as a family to Australia once I'm a citizen again, at least not in the foreseeable future.

My wife Mary lost her father a few years ago, and her mother is very elderly and bedridden, living very close to us. Mary visits her every day and helps care for her. My own mother is also not in the best of health, and my sister Carmen had to come from Australia a few weeks ago to help my parents out during this bad patch, because my father's not getting any younger. I can't imagine us not being in Malta for them. It would break their hearts not to be close to Kim and Claire and watch them grow up. Also, I'm going to be 49 next birthday. Even though I have a good educational background, experience and good skills and English is my first language, unfortunately I'm not confident that employers in Australia would rush to give someone my age a job.

So on a practical level, for myself and my wife, the fact that the Government is going to allow me to get my citizenship back has probably come too late to change the course of our lives. It's far more important to Mary and myself that Kim and Claire be given opportunities that I was denied. We want them to have Australian citizenship so that they'll be able to enjoy their Australian heritage in whatever way they decide is appropriate when they leave the nest. That might involve staying in Malta as dual Maltese/Australian citizens and joining the ranks of Australia's already sizable diaspora, or it might mean studying in Australia or moving to Australia after their studies or at some later point in their lives. It's natural for every parent to want their kids to have the best, and more opportunities than they themselves had. Under the Bill as it stands, though, the only way Kim and Claire could become Australian citizens is if we pack up and move to Australia, and I don't think we'll be able to do that.

That isn't the way things should be. If by accident of birth my parents had not been Maltese migrants to Australia, and I'd lost my citizenship under Section 17 and not Section 18, my children would today already be Australian citizens.[13] The hollow distinction that the Government is making between Section 17 people and Section 18 people is being held up as purported justification for treating their two groups of equally innocent children incongruously. I had hoped to see citizenship reform policies from this Government formulated with a higher degree of intellectual rigour, and quite simply, with greater compassion for families.

Mr Bonello's story encapsulates the dilemma of many Australian-born parents in Malta who have children born to them after they renounced their citizenship under Section 18 of the current Act. The stories of six further families were published by the SCG on 22 November 2005 and are attached hereto for the Committee's reference as **Annex 6**.

2. Citizenship for Individuals Born Outside Australia after their Parents Renounced Australian Citizenship

In the vast majority of circumstances, children born overseas to an Australian-born or naturalised Australian parent qualify to be registered as Australian citizens by descent under Section 10B of the current Act, the key prerequisite being that the child had an Australian-citizen parent at the time of their birth. Australia's basic policy as to how Australian citizenship can be passed on by descent to children born overseas in the future will remain essentially unchanged under Clause 16(2) of the Bill.[14]

While the Bill provides in Clause 29(3)(a)(ii) that former Australian citizens who renounced their Australian citizenship to acquire or retain another citizenship, or renounced to avoid significant hardship or disadvantage, will be given the opportunity to resume their Australian citizenship if they

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[13] This would be possible by virtue of the Government's October 2003 policy change, discussed in further detail below. See *http://www.citizenship.gov.au/media/children.htm*.

[14] Australian citizenship cannot be passed down "in perpetuity" where successive generations make their lives outside Australia and maintain insufficient links with Australia. Where a child is born outside Australia to a parent who themselves gained Australian citizenship by descent, the child only qualifies for registration as an Australian citizen by descent if that overseas-born parent can show that they themselves have spent a total period of not less than two years legally present in Australia, or the child is stateless. See Section 10B(1)(b)(ii)(B) of the current Act, which is in the Bill as Clause 16(2)(b)(i).

are of good character, the Government has explicitly excluded from access to Australian citizenship individuals born overseas to these former Australian citizens, i.e. people born abroad after their parent or parents had to renounce their Australian citizenship under Section 18 ("Section 18 offspring").[15] These people do not qualify for Australian citizenship by descent because technically they have or had no Australian citizen parent at the time of their birth. If their Australian citizen parent or parents had historically never been put in a situation of having to use Section 18, these individuals would generally be Australian citizens today.

As stated in the introduction, the ALP has undertaken to introduce an Opposition amendment in both the House and the Senate which would provide Section 18 offspring with access to citizenship, if the amendment were to be ultimately adopted as part of the final legislation.[16] This in line with the earlier March 2005 recommendation by this Committee that Section 18 offspring be provided with access to Australian citizenship.[17]

2.1 Estimates of Section 18 Offspring: Numbers of Those Directly Affected by the Government's Planned Exclusion will Increase over Time

In discussing any group that is excluded from any benefit, the obvious question is "how many people are affected". The SCG anticipates that the Committee, in considering the issue of Section 18 offspring, will want to gain a thorough understanding as to how many potential Australian citizens are at issue. The best answer that the SCG can provide at the present time is that there are already in excess of 3,000 individuals today around the world who fall into the Section 18 offspring category, both minors and adults. However, this number will grow as time goes on.

The SCG estimates that in Malta alone there are approximately 3,000 Maltese-born individuals born to Australian-born parents who are Section 18 offspring.[18] It might be thought on first analysis that Section 18 offspring in Malta are an historically contained group and that their number, once Australian law changes, will be static. But that is not the case.

It is true that, once Australian law changes, everyone who renounced their citizenship in Malta using Section 18 will have access to Australian citizenship again. And indeed, since 10 February 2000, when Maltese law changed to allow dual citizenship, no additional Australian-born individuals in Malta

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[15] The term "offspring" rather than "children" is used because the legal definition of "children" encompasses only those under the age of 18. The great majority of Section 18 offspring documented by the SCG are in fact minors, with the remainder still in any event qualifying in the broad sense as "young people". The SCG's view is that whether or not a particular impacted person is technically a child or an adult, arguments for their inclusion in the Bill remain the same. If anything, the Government might be accused of favouring older age groups with this legislation, when one considers the number of elderly Section 17 victims who will be able to resume their Australian citizenship, and the fact that many of their offspring, who cannot today be termed "young" will soon have an opportunity to apply for Australian citizenship.

[16] See **Annex 1**.

[17] Legal and Constitutional References Committee, "They still call Australia home: Inquiry into Australian Expatriates", March 2005, Chapter 10, page 125.

[18] See **Annex 4** for an overview of the data on Section 18 offspring in Malta that the SCG has compiled.

have had to avail themselves of Section 18, so the number of Australian-born parents/potential parents in Malta is now historically limited to somewhere in the region of just under 2,000 individuals. If/when these people resume their citizenship, any children born overseas to them will be able to be registered as Australian citizens by descent under Clause 16 of the Bill.

However, it is unrealistic to assume that every single Australian-born person in Malta who used Section 18 in the past will actually avail themselves of the forthcoming resumption option. Logic dictates that some will not, perhaps because they are oblivious that Australian law has changed, or because they see no immediate need to become an Australian citizen again, or perhaps because they simply "haven't got around to it". Even after Australian law changes and the reforms have been in place for some time, children will continue to be born in Malta to Australian-born Maltese citizens who are not Australian citizens and those as-yet-unborn children will not have access to Australian citizenship unless the Government can be persuaded to amend the Bill. The SCG's statistics on affected families in Malta show that approximately 8% of Australian-born Section 18 victims in Malta are presently in their 20s, with 57% being in their 30s, and almost 32% in their 40s. Many are in the process of having families now, or will do so in the short to medium term. So the number of Section 18 offspring potentially excluded from access to Australian citizenship will increase over time.

While the largest group of Section 18 offspring is in Malta, and the SCG has collected significant data on this national group enabling an in depth discussion of their dilemma, it should be stressed that in any instance where a person has used Section 18 over the years, children can potentially have been born to them overseas or could in future be born to them overseas after their renunciation.

Declarations of renunciation under Section 18 could have been made or could in future be made by Australians resident in any country of the world.[19] Clearly more Section 18 renunciations, and consequently Section 18 offspring, will occur in countries which did not allow, or still do not allow dual citizenship. While a number of countries have modernised and liberalised their citizenship laws in recent years to embrace dual citizenship, there is still a significant number of such countries that do not.[20]

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[19] DIMIA has recently revealed to the SCG that there have been approximately 250 renunciations under Section 18 in just the last three calendar years alone, and that about 20 of these were by Australians in Germany, a country which still demands that those being naturalised formally divest themselves of their original citizenship: e-mail from Greg Macek dated 13 January 2006. In February 2000, the Australian Citizenship Council noted that on average, 112 people were renouncing their citizenship annually at that time: Australian Citizenship Council, *Australian Citizenship for a New Century*, February 2000, page 70. That figure, however, would have included renunciations in Malta, which stopped in February 2000.

[20] See **Annex 7** for an indicative (although probably not exhaustive) list of countries around the world which appear to require Section 18 renunciations from Australian citizens in order for them to acquire the citizenship of that country or to retain the citizenship of that country in adulthood (if Australian citizenship was acquired at birth or during childhood). The Committee is advised that DIMIA's Section 18 renunciation statistics should be able to pinpoint the countries in which Section 18 renunciations are most frequently occurring.
The SCG has previously questioned whether it is entirely appropriate to retain Section 18, or a Section 18-equivalent provision in Australia's citizenship laws at all. In its March 2005 report in the Inquiry into Australian Expatriates, this Committee recommended (Recommendation 8) that DIMIA conduct a review of Section 18. Since the Bill was tabled in November 2005, the SCG has also raised with DIMIA whether it is appropriate to allow minors to renounce their Australian citizenship in any circumstances.

Zimbabwe is perhaps worthy of special mention for having recently changed its laws to newly prevent dual citizenship whereas previously dual citizenship was possible. On 6 July 2001 the Zimbabwe government passed legislation requiring all Zimbabwe citizens holding a foreign citizenship to prove that they had renounced that citizenship by 6 January 2002, or lose Zimbabwe citizenship.
A number of Australians in Zimbabwe are understood to have had recourse to Section 18 as a result. In fact, DIMIA still has a special page on its citizenship website for this particular scenario.[21] The resumption provisions in the Bill will benefit any Australian citizens who renounced Australian citizenship to retain Zimbabwe citizenship. They will shortly be able to resume Australian citizenship. However, children born in Zimbabwe in the "window" between their parent's renunciation and resumption will not be eligible for Australian citizenship by descent and will only acquire Australian citizenship if they are brought to Australia as children to live. This is a very similar situation to that of the children of former Australian citizens in Malta.

Even in countries where dual citizenship is as a matter of policy allowed, there are instances of Section 18 renunciations in particular cases where a person finds that dual citizenship is untenable for their individual circumstances. For example, an Australian-born person living for some years in the United States, may well have, since 4 April 2002, acquired US citizenship and have become a dual Australian/US citizen, but later, on seeking to join the US Secret Service, may be forced to renounce their Australian citizenship in order to obtain the appropriate US security clearance required for the position. Children could well be born to them outside Australia after the date of renunciation of their Australian citizenship. Another example is that of Hong Kong. Since Hong Kong was given back to the People's Republic of China, anyone who wishes to stand for Parliament in Hong Kong may only be a Chinese citizen and cannot hold the citizenship of any other country. An Australian/Chinese dual citizen in Hong Kong in these circumstances would be forced to use Section 18 of the current Act to divest themselves of Australian citizenship.[22] After their renunciation, while living in Hong Kong, i.e. outside Australia, they might well parent children.[23]

DIMIA's statistics on the number of renunciations under Section 18 since 26 January 1949, coupled with average birth rate figures adjusted over the decades, and basic knowledge on the dual citizenship policies of other nations, should allow the Department to estimate for the Committee approximately how many Section 18 offspring exist globally at the present time, and to project how many future Section 18 offspring are likely to arise per year in the decades to come. In that context, the SCG takes this opportunity to put on record with the Committee that it has concerns as to the integrity and

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[21] *http://www.citizenship.gov.au/info/zimbabwe.htm.*

[22] It is to be noted that Australia's own Constitution (Section 44(i)) contains a similar prohibition and that a number of dual citizens who have sought election to Australia's federal parliament have had to renounce their non-Australian citizenship under the laws of the other country concerned.

[23] The parent, i.e. the person who renounced, would have the option later in life to resume their renounced citizenship if their circumstances changed and they could again hold dual citizenship, under Clause 29 of the Bill. However, children born in the window of time when the parent was not an Australian citizen would still, even at that later stage be excluded from Australian citizenship under the Bill as tabled on 9 November 2005.

quality of DIMIA's Australian citizenship records as a whole. The SCG urges the Committee to look into that issue as part of the current Inquiry.

While the SCG submits that the largest group of Section 18 offspring by far is in Malta, the Government's intention to exclude Section 18 offspring from access to Australian citizenship has implications far beyond that national group and is not historically contained. The exclusion will apply to children born in the future to those who have in the past used Section 18 and have not resumed at the time of the birth of their children, and to children born to people who are future Section 18 users, after that use. Far in excess of 3,000 youngsters, many of whom as yet are unborn, will be shut out of the Australian family in the years ahead by the Government's policy on this issue today.

2.2 Section 17 Offspring *Are* Provided with Access to Australian Citizenship

The Government's exclusion of Section 18 offspring has to be considered against the fact that individuals born overseas to former Australian citizens who lost Australian citizenship under Section 17 have already been, or will shortly be provided with access to Australian citizenship under the Bill. Since 14 October 2003, following lobbying over a significant period by the SCG, the Government's policy has been to allow such people who did not qualify for Australian citizenship by descent because they had no Australian-citizen parent at the time of their birth, but who are still minors, access to Australian citizenship by grant under Section 13 of the current Act, as long as their parent had lost Australian citizenship under Section 17. No legislative amendment was necessary to bring about this change.[24] A number of overseas-born children have already been able to benefit from this policy change to become Australian citizens.[25] Individuals in the same circumstances who cannot benefit from the October 2003 policy change because they are no longer minors, but whose parents had lost their Australian citizenship under Section 17 before they were born, will have access to Australian citizenship by conferral under Clause 21(6) of the Bill. For the purposes of the discussion which follows, all individuals, whether minors or not, in this category, are referred to as "Section 17 offspring".

The Government's explicit denial of access to Australian citizenship for Section 18 offspring was made clear by the Minister when the Bill was tabled,[26] and has been elaborated upon in a communication from the Minister which has recently been received by a number of individuals who have raised the issue since the Bill was tabled (attached as **Annex 8**). The Government's purported justifications for this decision are examined below.

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[24] See *http://www.citizenship.gov.au/media/children.htm.* Note that children can apply regardless of whether or not their Section 17 parent has resumed their Australian citizenship. The Government has in this sense decoupled the fate of Section 17 offspring from the past and future fate of their responsible parent, whereas the exclusion of Section 18 offspring from citizenship depends upon Section 18 victims being liable for their previous citizenship actions vis-à-vis their children.

[25] See submission No. 29 by Janet Lyn Magnin to this inquiry. Mrs Magnin's daughter Zoe recently became an Australian citizen following a successful application for citizenship by grant since the October 2003 policy change.

[26] Hansard, House of Representatives, 9 November 2005, page 13.

2.3 Loss under Section 17 Contrasted with Renunciation under Section 18

The Government's justification for the exclusion of Section 18 offspring from Australian citizenship appears to be primarily based upon perceived distinctions between the (now-repealed) Section 17 and (still in force) Section 18 of the current Act. The Minister asserts that these distinctions provide relevant and appropriate reasons to deny several thousand individuals their Australian heritage and access to Australian citizenship by descent.

The SCG does not deny that Section 17 and Section 18 are different in law.

- Section 17, until its repeal with effect from 4 April 2002, provided that adult Australians who did any act or thing, the sole or dominant purpose of which and the effect of which was to acquire the nationality or citizenship of a foreign country, would cease upon that acquisition to be Australian citizens.

- Section 18, still part of the current Act, provides a route in law for Australian citizens to formally divest themselves of their Australian citizenship.

The two provisions were indisputably conceived to apply to different situations. However, whether an individual found themselves subject to one provision or the other is purely a matter of historical accident. An individual starting from a base of only Australian citizenship, to whom Section 17 applied, would have had no need to ever resort to Section 18 when acquiring another citizenship. And a person born in Australia to migrant parents (from Malta or elsewhere) who by accident of birth enjoyed dual citizenship as a minor, had virtually no option but to use Section 18 to cease to be an Australian citizen in circumstances in which the law of the other country prohibited dual citizenship in adulthood.

2.4 Section 17 Operated Automatically in Law

Section 17 operated to strip individuals who naturalised in other countries of their Australian citizenship. In the law (in various forms) from 26 January 1949 until 4 April 2002, its purpose was to prevent dual citizenship. At the time when Australian citizenship was first created in law in the middle of the 20th century, almost without exception, most nations had legislation in place which was designed to prohibit dual or multiple citizenship.[27] At that time, the international community was overwhelmingly of the view that dual citizenship was undesirable as a matter of policy, and indeed

[27] The United Kingdom and New Zealand were notable exceptions. Their laws as introduced from 1 January 1949 both permitted dual citizenship.

Australia, like many other countries, was party to various international agreements and arrangements with this aim.[28]

Section 17 typically impacted Australian citizens (Australian-born Australians, naturalised Australians, and Australians by descent) who moved abroad to live and then qualified after a certain period of time for citizenship of their country of residence under the naturalisation laws of that other country. Section 17 applied by operation of law. The person ceased to be an Australian citizen on the date of acquisition of the other citizenship. There was no requirement that the person notify the Australian authorities of their acquisition of another citizenship. Section 17 applied whether or not the Australian authorities had knowledge of the person's acquisition of the other citizenship. It also applied whether or not the person themselves was aware of the existence of Section 17, i.e. regardless of whether the individual knew that their acquisition of the other citizenship would result in automatic loss of their Australian citizenship.

2.5 A Conscious Decision was Made in *All* Cases of Loss Under Section 17

In seeking to justify the exclusion of Section 18 offspring from the Bill, the Minister has recently advised in writing that, regarding loss of Australian citizenship under Section 17, "no application was necessary and no decision was involved". This is misleading and untrue. No application under Australian law was necessary by the Section 17 victim to bring about loss of their Australian citizenship. However, the person had to make a conscious decision to apply for and obtain the other citizenship under the laws of the other country concerned. That decision, while as a matter of unavoidable logic thereafter involved recourse to naturalisation procedures under the laws of another country rather than under Australian law, was nevertheless a decision by the individual concerned as to the citizenship status they wished to enjoy.

Indeed, the aspect of voluntary acquisition of the other citizenship and the fact that loss of citizenship could only occur as an adult were important nuances in Section 17 in its final form.[29] They evidence the fact that the Australian legislature only intended the provision to apply to voluntary acts made by individuals of legal age.

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[28] Australia had international reciprocal arrangements with 27 countries which involved exchanging information in regard to acquisition of citizenship, some dating back to the 1940s. These arrangements were designed to facilitate loss of citizenship upon acquisition of another citizenship.

[29] Note that Section 17 was amended with effect from 22 November 1984 and that from that date there was a stronger element of intention in the provision. Minor children whose responsible parent lost citizenship under Section 17 automatically forfeited their citizenship under Section 23 in almost all cases.

2.6 Many Section 17 Victims Made Fully Informed Decisions

In seeking to distinguish individuals who used Section 18 from those to whom Section 17 applied, and thereby their offspring, the Minister has stressed that many victims of Section 17 were unaware that they had automatically lost their Australian citizenship by actively acquiring another. This is a true statement. However, it does not change the fact that those Section 17 individuals, even if they may have been ignorant of Section 17, made a conscious and voluntary decision, i.e. to acquire another citizenship.

More importantly, and conveniently ignored by the Minister in his recent communications, many victims of Section 17 did know of its existence, and made the decision to acquire another citizenship in full consciousness that they would forfeit their Australian citizenship. In fact, DIMIA has evidence of numerous such cases at its disposal. Every Section 17 victim who has sought resumption since the mid 1980s has been required to indicate on DIMIA Form 132 whether or not they knew at the time that they would cease to be an Australian citizen. In February 2000 the Australian Citizenship Council reported that approximately 360 were resuming their citizenship annually.[30] The Department's own records should enable it to precisely quantify for the Committee the number or percentage of Section 17 applicants for resumption who had knowledge as opposed to those who did not. The SCG submits that the figure of those who had knowledge will be significant.

For people with knowledge of Section 17, the decision to acquire the other citizenship was never an easy one, and was often taken in difficult circumstances and with the utmost regret. The decision was taken because the person felt they had no choice in the circumstances, and because they felt that they were "forced" or "compelled" to do so. Their situation was in that sense completely parallel to that of individuals who held two citizenships as minors and who had to use Section 18 to formally divest themselves of Australian citizenship because the law of their other country of citizenship did not allow the retention of two citizenships in adulthood.

2.7 Section 17 Victims Were Usually Older and Wiser than Maltese Section 18 Victims When They Made Their Conscious Decision to Acquire Another Citizenship

Many Section 17 victims were in fact much older and wiser than a large number of Section 18 victims when they took their decision to acquire the citizenship of another country. It was very often the case that the opportunity or necessity to acquire the other citizenship arose only after a number of years of residence overseas, when people were in their twenties, thirties and forties or even older. The move overseas may have occurred due to marriage to a non-Australian spouse, or for career reasons.

[30] Australian Citizenship Council, Australian Citizenship for a New Century, February 2000, page 71.

In contrast, the 2,000-odd individuals who were forced to use Section 18 in Malta all did so before their 19th birthdays, at an age when, although no longer technically minors, they lacked any significant life experience. This fact was explicitly acknowledged by the Australian Citizenship Council in 2000 when it recommended that resumption be made possible for those under the age of 25 years, a recommendation which was accepted by the Government and enacted with effect from 1 July 2002. The Australian Citizenship Council was concerned that such young people had renounced their Australian citizenship "before they were able to make an adult and informed decision. Some ...are still living with their parents and may still be at school when they have to make a decision on which citizenship to retain. The consequences of such a decision could have a significant impact on their future."[31]

It is also worth noting that in decades past the pressure on Australian-born Maltese to make their Section 18 renunciations was immediate and "draconian" in a way in which Section 17 victims would rarely if ever have encountered. In once instance, for example, an Australian-born Maltese woman happened to be outside Malta on holidays in Spain just before her 19th birthday. On re-entering Malta, she was told by the Maltese immigration authorities that she had to renounce her Australian citizenship within a few weeks, i.e. by her 19th birthday, or she would only be able to remain in Malta for three months as an Australian tourist. This incident "scared" her to the extent that she went to the Australian High Commission in Malta and completed her Section 18 paperwork the next day.

In another instance in Malta, an Australian-born young man was in the middle of an apprenticeship with a Government-owned utility company at the time just before his 19th birthday. He was informed in writing that if he did not renounce his Australian citizenship in order to retain his Maltese citizenship his apprenticeship would be terminated as he would no longer qualify for employment as a civil service at the facility.

In such circumstances, any element of "choice" for Section 18 victims, although they were technically of age and "knew what they were doing", was entirely absent, in contrast to the majority of Section 17 victims who were older, wiser and who very often had chosen the life course some years previously that lead to them having the opportunity later in life to acquire another citizenship.

2.8 Knowledge of Consequences or Lack Thereof an Irrelevant Criterion

Historical fact concerning the circumstances in which Section 17 operated, acknowledged as a matter of policy by Australia's citizenship law as it stands today, does not support the logic of the "knowledge" distinction the Government is now seeking to make in the context of the exclusion of Section 18 offspring.

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[31] Australian Citizenship Council, Australian Citizenship for a New Century, February 2000, page 72.

Under current resumption provisions, the law admits that there are two groups of Section 17 victims, but does not distinguish whether one group is more worthy of resumption than the other on the basis of whether the individual had knowledge that they would lose their citizenship at the time. It is submitted that the "knowledge distinction" is similarly irrelevant when considering citizenship by descent for the offspring of Section 18 victims as against the offspring of Section 17 victims. Indeed, Section 23AA of the current Act provides a route to resumption of Australian citizenship for all Section 17 victims, whether or not they knew of its existence at the time of the acquisition of the other citizenship. Resumption is currently possible either when a person did not know they would lose Australian citizenship as a result of their actions, or when they took the other citizenship in order to avoid significant hardship or detriment, provided all the requirements of Section 23AA can be met.[32]

The Government explicitly acknowledges that for Section 17 victims often the decision to acquire the other citizenship was necessary to avoid "significant hardship or detriment". In already allowing the resumption of citizenship for people who had full knowledge that they would forfeit their citizenship under Section 17 but who made a conscious decision to move ahead with the acquisition of the other citizenship nonetheless and to sign legal documentation to bring that about (albeit under the laws of another country), the Government undermines any distinction it is seeking to bring forward now to justify the different treatment of Section 17 and Section 18 offspring.

DIMIA's current Form 132 lists examples of significant hardship or detriment of both an economic and non-economic nature which are deemed acceptable to fulfil the requirements of the current resumption provisions. These include:

- the loss of cultural or family heritage;
- the inability to allow their children to participate fully in the social, political and cultural life of their other country of residence;
- difficulties in obtaining visas, inability of families to be treated as a unit when family members hold different passports;
- the facilitation of travel, the inability to realise vocational aspirations;
- a requirement to pay higher taxes; the denial of the usual marital rights in relation to tax and inheritance laws on the death of a spouse, or others;
- the denial of, or significant difficulty in obtaining permanent employment;
- ineligibility to obtain a driver's licence which may have affected a person's employment prospects; denial of, or significant restrictions on access to social security benefits;
- ineligibility to undertake formal courses of study or obtain certain educational qualifications;

[32] Two requirements which currently cause present barriers to resumption for Section 17 victims residing outside Australia are those in Section 23AA(1)(b)(iii) - two year's residence, and Section 23AA(1)(b)(iv)(B) - intention to reside in Australia again within three years. The SCG has previously made the case that these hurdles are inappropriate and indeed they will disappear once the Bill is enacted. See the SCG's 27 February 2004 submission to the Senate's Inquiry into Australian Expatriates, pages 78 - 89.

- ineligibility to access loans from financial institutions; a requirement to apply regularly for residency and work permits; and
- the ineligibility to purchase or retain property.

This list of circumstances acceptable to justify a resumption application is noteworthy in the present context because many, if not all of the situations DIMIA specifies exactly describe circumstances in which individuals have also been forced to have recourse to Section 18. A number of specific cases in which individuals in Malta have felt themselves forced to use Section 18 are enumerated below.

Whether or not a person had knowledge that their action would lead to loss of citizenship under either Section 17 or 18 is a wholly irrelevant criterion. Although the Government is seeking to make much of the fact now that many Section 17 victims had no knowledge of Section 17 when they became citizens of other nations, many did have full knowledge. In any event, all Section 17 victims made a conscious decision to acquire the other citizenship that led to their loss, just as Section 18 victims all consciously filled in a declaration of renunciation.

As the old saying goes, "ignorance of the law is no excuse". Lack of knowledge as a criterion of distinction by the Government in the present scenario is ill-conceived to the extent that any informed observer should recognise this tactic for what it is - rhetoric without foundation that has been manufactured in the absence of adequate research or reflection to disguise a poor policy decision. That unsound policy decision unjustly discriminates between two groups of equally-innocent offspring of former Australian citizens. Those former Australian citizens, whether Section 17 or Section 18 victims in their time, were all the unlucky scapegoats of outdated laws (in whatever jurisdiction) that sought to prevent dual citizenship.

2.9 There But for the Grace of God: A Small Number of Australian-born Individuals in Malta Escaped Section 18 and Consequently Lost Citizenship under Section 17

By random twist of fate, a handful of Australian-born individuals in Malta, for one reason or another, and it appears wholly without design, managed to escape Section 18 renunciation despite the fact that their 19th birthdays occurred before Maltese law changed on 10 February 2000. This resulted in them forfeiting their Maltese citizenship automatically under Maltese law the day they turned nineteen. The SCG has at least two cases on its files where the individual later decided that they wanted their Maltese citizenship back. Their registration as Maltese citizens some time later (if it occurred before 4 April 2002) then resulted in their automatic loss of Australian citizenship under Section 17. The fact that these people, by pure chance, were never subject to Section 18, has provided them and their children with significantly greater rights under Australian law than the vast majority of their Australian-born compatriots in Malta. The two cases known to the SCG are illustrative:

was born in Australia to Maltese parents on 1975. The family moved back to Malta when he was only one. should have renounced his Australian citizenship by his 19th birthday, i.e. 1994, but was unaware that Maltese law required him to do so. As a result, he automatically forfeited his Maltese citizenship on that date. Several months later, this was discovered, and he decided that he wanted to resume his Maltese citizenship. This occurred by registration under Maltese law on 22 February 1995. On that date, he automatically forfeited his Australian citizenship under Section 17. Two children were subsequently born to him in Malta after he lost his Australian citizenship, in May 1995, and in May 1997.

does not presently qualify to resume his Australian citizenship because he cannot satisfy the two year presence in Australia requirement in Section 23AA(1)(b)(iii). Once Clause 29(3)(a)(i) of the Bill is law, however, this restriction will be removed and he will only have to demonstrate good character.

two children, however, are in an enviable position as against the some 3,000 children born to other Australian-born individuals in Malta who did end up using Section 18. Since October 2003, due to the Government's policy change on Section 17 minors at that time, and have been eligible to apply for citizenship by grant. Once the Bill is in force, if they have not availed themselves of the October 2003 policy change by that time, they will in any event be covered by Clause 21(6).

This case particularly highlights the indiscriminate application and impact that the Government's exclusion of Section 18 offspring will have in practice. The various reasons as to why a small handful of individuals slipped through the net in Malta and never used Section 18 when Maltese law dictated that they should have are many, but could have haphazardly occurred for any one of the some 2,000 Australian-born individuals concerned. The fact that happened to avoid Section 18 a decade ago is matter of pure chance and, as it turns out, a stroke of enormous good luck from the point of view of his children today. Looked at objectively, however, it should be wholly irrelevant in determining whether his children have a right to Australian citizenship.

At least one person among this small group of Section 17 victims in Malta has a minor child born before her loss under Section 17. That child, a daughter, was registered with the Australian High Commission as Australian by descent and then lost her Australian citizenship under Section 23 of the current Act at the time of her mother's loss under Section 17. This story has a happy ending because both mother and daughter have recently resumed their Australian citizenship. But had the Australian-born woman concerned not been fortunate enough to have lost her citizenship under Section 17 after miraculously avoiding Section 18, she and her daughter would not be Australians citizens again now.[33]

The SCG does not believe that the differences in circumstances between individuals who were subject to or availed themselves of either Section 17 or Section 18 in the past, today provide an adequate or

[33] This is the case of Mrs Alison-Marie Curmi and her daughter Sara Ann Curmi, outlined in a letter dated 19 August 2004 from the SCG to the then Minister for Citizenship and Multicultural Affairs, the Hon Gary Hardgrave, MP, attached as **Annex 9**. If Mrs Curmi had perchance used Section 18 before her 19th birthday and by default become a Section 17 victim, she and Sara Ann would both now have prospects of resumption under Clause 29(3) of the Bill.

equitable foundation for the denial of Australian citizenship to Section 18 offspring when citizenship access is being made available for Section 17 offspring.

2.10 Children Who Will "Just Miss Out"

As has been stated above, approximately 97% of Australian-born people who have used Section 18 in Malta are in their 20s, 30s, or 40s, and a large number are still to complete their families or have yet to start their families. The SCG has on file the details of several families in Malta where one spouse or partner is Australian-born and where children have very recently been born to the couple or a baby is presently "on the way". It has fielded a number of inquiries as to whether these expectant mothers (or their Australian-born male husbands/partners as the case may be) will be able to resume their Australian citizenship quickly enough for their babies to qualify for Australian citizenship by descent at the time of their birth.

The case of the Grima family in Malta poignantly illustrates this situation:

> Marten Grima was born in Footscray, Melbourne in 1968 to Maltese migrant parents. His parents moved back to Malta, taking him with them, when he was seven years old. Like almost 2,000 other Australian-born Maltese he renounced his Australian citizenship at the age of 18 because Maltese law at the time did not allow him to be a dual citizen in adulthood. In April 2003 he married Ruth who holds only Maltese citizenship. The couple have decided to start a family and to their great joy Ruth is now expecting their first child, due in a matter of weeks, in late February or early March 2006.
>
> The Grimas learned in July 2004 that the Australian Government would be changing the law so that Marten could resume his Australian citizenship. They had hoped that the legislation to bring about this change would be tabled sooner than November 2005 and would now be in force. As is nature's way, it was not possible for them to time the starting of their family with any exact precision. Although Marten will apply for resumption of his Australian citizenship as soon as it becomes possible, it is already clear that when the couple's first child is born in Malta in a few weeks time, it will not have an Australian-citizen parent, and will therefore not qualify for Australian citizenship by descent under Section 10B of the current Act. Unless Clause 21(6)(c) of the Bill is amended, this first child will also have no access to Australian citizenship by descent under the forthcoming changes, simply because he/she had the misfortune to be born a matter of only a few months too early.

2.11 Siblings Within a Family Will Have Different Citizenship Status

The Grima case leads to the identification of a further illogical and inequitable anomaly which the Government's planned exclusion will bring about over time. Siblings within the one family will end up having different citizenship entitlements. In the case above, the Grima's first child will enjoy only Maltese citizenship. But it is highly likely that the Grimas will have further children (indeed, that is their present intention), and that those further children will be born after the date that Marten resumes his

Australian citizenship once the law changes. Those subsequent children will qualify to be registered as Australian citizens by descent under Clause 16 of the Bill because they will have an Australian-citizen parent at the time of their birth. They will enjoy dual citizenship (Australian/Maltese). But their eldest sibling will be an anomaly and will be disadvantaged as against his/her later-born siblings, being only entitled to Maltese citizenship.

In the Grima case, all their children remain to be born. But there are a number of families in Malta who already have one or more young children who do not have access to Australian citizenship, and where further children are already on the way or are planned, who are likely to be born after their Australian-born parent resumes Australian citizenship and who will consequently enjoy dual citizenship.

The "divided siblings" problem is already fully understood by the Government in the context of Section 17 offspring. Indeed, the Government's 14 October 2003 citizenship policy change on Section 17 minors was introduced following considerable lobbying by the SCG which highlighted the plight of several families with siblings of different citizenship status. The then Minister for Citizenship and Multicultural Affairs, the Hon Gary Hardgrave MP, verbally indicated to SCG volunteers in person on a visit to London in early 2003 that this situation was a matter of considerable concern to him and that he understood the random inequity of such cases. In an article which appeared in the *Sydney Morning Herald* at that time, after having had occasion to meet one such family, Mr Hardgrave was quoted as stating "I want to make sure common senses prevails".[34]

2.12 Article 26 ICCPR - Prohibition on Discrimination

The various cases outlined above show that the Government's exclusion of Section 18 offspring from the Bill will result in random and inequitable consequences in a number of ways. Section 17 offspring are clearly being viewed by the Government as "more equal" in the Orwellian sense than Section 18 offspring. Although the SCG has pointed out both in this submission and elsewhere that not only people in Malta, but in other countries are impacted by its stance, the majority of discussion and media attention on this issue has undoubtedly focussed on Australian-born Maltese and their Maltese-born children. It has been suggested to the SCG that the Government's policy amounts to deliberate discrimination against a particular group on the grounds of national origin. While the SCG doubts that there is any truth in this allegation, different treatment of two equivalent groups of innocent youngsters is already occurring. This is inconsistent with Australia's international obligations under Article 26 of the International Covenant on Civil and Political Rights:

[34] Peter Fray, "Citizenship mix-up leaves sons divided", Sydney Morning Herald, 1-2 March 2003, page 13, attached in full as **Annex 10**.

> 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.

2.13 The "No Reasonable Expectation" Argument

The Government has said that Section 18 victims "could not have had any *expectation* that they would be able to resume their Australian citizenship" and that it is "making a further, very significant concession" in removing the under 25 age-limit for resumption. The SCG will not repeat the arguments that it has made in earlier submissions to this Committee and to other forums as to why it believes a resumption mechanism is appropriate for all Section 18 victims. As has been stated above, the Government's decision to allow resumption for these people is welcomed at this time.

However, the SCG wishes to take issue with the premise that "expectation" or "reasonable expectation" is in any way a relevant criteria for determining citizenship policy for any group. The Government has also said that Section 18 victims "could have had no *reasonable expectation* of access to Australian citizenship <u>for children born after their renunciation</u>" (emphasis added).

While it is true that the concept of "reasonable expectation" finds use in some fields of the law, the SCG believes that any attempt by the legally-minded to define the term as used by the Government in its recent citizenship statements by reference to legal precedent or legislation would attribute meaning to it far beyond the thought processes of those who framed the statements. Logic and common sense by themselves reveal the "reasonable expectation" argument to be mere smokescreen.

The point is that "reasonable expectation" is simply irrelevant. A fact is only relevant if it is connected, directly or indirectly, with another fact in issue such that it tends to prove or disprove the fact in issue.

It is extremely difficult to believe that an eighteen-year-old Section 18 victim in Malta ten, twenty or thirty years ago would have had any expectations, reasonable or unreasonable, pertaining to the citizenship of their future unborn children.

The SCG notes that a number of Section 18 victims have stated that they were told at the time of their renunciation by the Australian High Commission in Malta that "they'd be able to get their Australian citizenship back later" and "not to worry" or words to that effect. These statements are merely anecdotal evidence but the SCG does not rule out that inaccurate or misleading advice may well have been given out by the Australian authorities on a least a few occasions. In recent years the SCG has encountered less-than-perfect citizenship advice at more than one Australian mission. It would be reasonable for a young person in those circumstances to rely on such statements. They may well

have had perfectly reasonable expectations that they would get their Australian citizenship back based on these encounters.

Even in the highly unlikely event that any (subjective or objective) expectations existed at the time (reasonable or otherwise) it is submitted that expectations as to what is reasonable would in any event change over time. In 1980 it would have been unreasonable to assume that Malta would ever change its law to allow dual citizenship. But this occurred in February 2000. In 1990 it was difficult to imagine that Australia would ever repeal Section 17, but this occurred in 2002, along with the introduction of Section 23AB of the current Act. In October 2003 the Government began to allow Section 17 minors access to Australian citizenship and in July 2004 it announced a host of further citizenship law reforms. If "reasonable expectation" is to be advanced as in any way relevant for the case of Section 18 offspring (which the SCG submits that it is not), then there is ample evidence to support the view that expectations change over time. Indeed, in light of what must be seen as fairly radical citizenship reforms in both Australia and Malta in recent years, it would be wholly unreasonable for a person who made any assessment of their future citizenship prospects on a regular basis not to adapt their expectations in the light of recent developments.

2.14 "Australia Only Has a Duty to Fix Problems that it was Originally Responsible For"

In seeking to rebut arguments that Section 18 offspring should have access to Australian citizenship, the Government has been at pains to stress that "Australian law has never required people to renounce their other nationality when they became Australian citizens" and that Section 18 renunciations were made because other countries demanded them. These are true statements. But they do not justify the exclusion of Section 18 offspring. This is the "it's not our fault so why should we fix it" argument. Like other reasons advanced by the Government for excluding Section 18 offspring from citizenship, it is ill-founded.

Australia is the only country that can put this situation right. Whether or not a person can hold Australian citizenship is a matter for Australian law. A former Australian citizen only has access to Australian citizenship again if Australian law allows it. Whether a particular child has access to Australian citizenship by descent or otherwise is wholly a matter for Australian law.

In a broad sense, the Bill currently before Parliament is about putting the past right, but above all it is about equipping Australia with a citizenship law that will adequately serve its people into the 21st century. The world is now globally mobile to an unprecedented extent. Allowing dual and multiple citizenship recognises the fact that people can and do belong in more than one country, and allows Australia's citizens to compete more effectively on the world stage. Excluding Section 18 offspring from the Bill closes the door on dual citizenship for young people who belong in both Malta and Australia.

2.15 Access to Australian Citizenship Following Migration Not Enough

The Government has stated that:

> Former Australian citizens who resume their citizenship can sponsor family members for migration to Australia and a permanent chid visa may be issued to any dependent child up to 24 years of age. Once permanently resident in Australia, the child would ordinarily become eligible for Australian citizenship. Children under 18 could be accommodated immediately through policy in respect of existing broad discretions under citizenship legislation.

While this route to Australian citizenship for Section 18 offspring is not in dispute, the SCG submits that it should not be the only available route to citizenship for them. Norman Bonello's story, outlined above, encapsulates why it will not be possible or appropriate for many families in Malta to move with their minor children to Australia and to achieve citizenship for their offspring on that basis. A key factor is that many have aging parents in Malta.

Inherent in making this the only route to citizenship available for Section 18 offspring is a further but more troubling policy by the Government. That is that Section 18 parents have to "earn" Australian citizenship for their youngsters by committing to move their families to Australia. The price they have to pay for citizenship for their offspring is higher, because as Section 18 users they were "more to blame" than those who lost their citizenship under Section 17. This is despite the fact that Australia's citizenship-by-descent law principles would in any other circumstance provide their offspring with Australian citizenship. The SCG has argued for a number of years, and the argument has now been accepted by the Government, that it is inappropriate to make citizenship resumption for former Australians still resident abroad conditional upon an intention to return to reside in Australia within three years. But in effect, by denying Section 18 offspring access to Australian citizenship by any means other than outright migration, it is reinstating the same inappropriate and outdated notion.

By making Australian citizenship solely conditional upon residence in Australia for these people, the Government is simultaneously devaluing and trivialising the Australian diaspora. It is placing less worth on its overseas citizens, and failing to recognise that significant contributions are made to the country by Australians who live their entire lives outside Australia. Regardless of whether Section 18 offspring chose to live part or all of their lives in Australia, they are worthy of Australian citizenship and above all it is their due.

2.16 Excluding Section 18 Offspring is Inconsistent with the Government's Emphasis on "Family" and Unhelpful for Australia's Aging Demographic

The SCG's statistics for Section 18 offspring in Malta show that the majority of these people are presently still minors.[35] Their average age is 10½. Despite perceptions in some quarters that most Section 18 offspring are adults, the SCG's data shows that only approximately 2% are over the age of 25, with 86% being aged 17 or under. In allowing Section 18 offspring access to Australian citizenship the Government would be welcoming a significant number of young people to the Australian family, future parents, members of the work force and taxpayers. Treasurer Peter Costello is on record as urging Australians to have more children, one for their husband, one for their wife, and "one for the country".[36] The Government's taxation policies provide incentives to procreate. Those who have used Section 18 in Malta demonstrate an average of 1.91 children per adult, whereas the birth rate in the Australian population in 2004 was lower, at only 1.75.[37] Demographically, Australia could only benefit by allowing Section 18 offspring to become Australian citizens. The young people concerned are far more likely to spend some or all of their futures in Australia if they are Australian citizens.

Conclusion

Many hundreds of people over a significant period have advanced the case for the provision of Australian citizenship to Section 18 offspring. There is more than sufficient public support for their inclusion.

This submission has sought to critically examine the reasons the Government has advanced since 9 November 2005 for their exclusion. It is submitted that those reasons do not survive analysis. They should under no circumstances be accepted by the Senate Committee as adequate justification for the exclusion of this group from Australian citizenship.

The SCG accordingly submits that the Committee recommend in its report resulting from this Inquiry that the Bill be amended by the inclusion of just two additional words: Clause 21(6)(c) of the Bill should have the words "or 18" inserted after the word "17".

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[35] See **Annex 4**.
[36] Transcript of the Hon Peter Costello MP, Treasurer, Budget Lock-up Press Conference, Parliament House, Canberra, 11 May 2004.
[37] Australian Bureau of Statistics, Media Release, 25 November 2004.

Table of Annexes