

Submission to Senate Legal and Constitutional Legislation Committee in its Review of the Australian Citizenship Bill 2005 and Transitional and Consequential Bill.

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Outline of proposed oral submission due to be presented on Monday 6 February 2006

Introduction

I am grateful to the Committee for the opportunity to comment on this Bill in person.

I am the author of *Australian Citizenship Law in Context* (2002, Law Book Co).

In addition, as a practitioner on the roll of the High Court of Australia, I have been Counsel in three High Court matters over the past 3 years concerning Australian citizenship.

Finally, since November 2004, I have been a consultant to the Commonwealth of Australia, represented by the Department of Immigration and Multicultural and Indigenous Affairs (the Department) in relation to its review and restructure of the Australian Citizenship Act 1948 and so I have been involved with the development of these Bills.

However, I would like to stress that I am appearing before the Committee in my personal and academic capacity, as an expert in this area, and not as a representative of the Department and I hope my personal observations assist the Parliament in its review of these Bills.

I shall set out the areas I would like to comment upon below as an outline of my oral submission.

Refining the Structure of the *Australian Citizenship Act 1948*

- Success of the Bill in achieving the objective, first proposed by the Australian Citizenship Council in its Report in 2000 calling for the tidying up of the Act, to make it more readily understandable and accessible.
- Improvement in language making the status of citizenship clearer and accessible
- Definition of Australian Citizen through both the 2005 Bill and the Transitional Act improved.
- Distinction between Act and Regulations clearer

Further Areas of Comment

- Definition of *good character*- There is no definition of good character in the Bill (nor was there under the former Act) yet it is mentioned many times as a criterion for eligibility to citizenship (such as 16(3)(c), 21(2)(h), (3)(f), (4)(f), (6)(d), 7(d), 25(2)(ii), 29(3)(b)) .

My book discusses some of the issues with the term, which would also be relevant to the new Act (pages 122-128). As a matter of transparency and consistency, there would be value in including matters relevant to good character in the Act, without limiting the

extent of those matters.

- **Citizenship by Descent**

There is great improvement in these provisions making citizenship by descent more equitable.

I am not convinced, however, that the provisions relating to persons born outside Australia or New Guinea **before** 26 January 1949 are as broad as the intended scope as set out in the Minister's statement back in July 2004.

This is an excerpt from the statement which is available online at <http://www.citizenship.gov.au/info/changes.htm>:

Descent

- The provisions in the Act for the registration of citizenship by descent will be amended. The only requirements that will apply to a person seeking registration as an Australian citizen by descent are that:
 - at least one of the parents was an Australian citizen at the time of the person's birth
 - the person is of good character if 18 years or over, and
 - if a parent of the applicant acquired Australian citizenship by descent that parent must have spent a total of two years in Australia as a lawful resident.
- **The Act will be amended to extend the registration of Australian citizenship by descent for people born overseas before 26 January 1949 to a mother who became an Australian citizen on commencement of the Act on 26 January 1949.**

The current provision 16(3)(b) – that the parent was born in Australia or New Guinea and was naturalised in Australia before the person's birth, precludes children of Australian citizens who became so on 26 January 1949 through the transitional provision 25(1)(d).

This included British subjects who had not been born in Australia nor naturalised, but who were "ordinarily resident" in Australia or New Guinea, or partly in Australia and partly in New Guinea for a period of at least 5 years, on 26 January 1949 who became citizens.

It would be my suggestion that (b) is removed to be consistent with the policy underpinning the new descent provisions; all that is required is that the parent became an Australian citizen on 26 January 1949 and that the Minister is satisfied that the person applying for citizenship by descent is of good character. (For further background see my book, pages 88 and 89.)

- **Citizenship by Conferral**

This section is more accessible and logical in its structure.

Section 21(5) regarding children is a broad provision with little clarity from the Act of its intended operation. (see further comments below regarding children).

Section 21(8) regarding statelessness mirrors the previous Act's provisions, but (8)(c)'s breadth may make it inconsistent with the International Convention for the Reduction of Statelessness to which Australia is a signatory.

The Minister's discretion to refuse an application under s 24 (24(2)) is curious in light of administrative law principles. It is hard to see how the Minister could lawfully use this discretion given the extent of criteria relevant to the making of the decision in the first place. That is, no discretion can be exercised other than lawfully, and lawfulness included questions of relevance, bona fides etc. If an application is rejected for criteria other than those already mentioned in the Act, on what basis could those criteria be relevant? This comment also applies to s 30 (2) and the Minister's discretion regarding s 29 (Resumption of citizenship) applications.

- Place of children under the Act

As mentioned above, the Minister can approve an application for someone under the age of 18 (s21(5)).

If this section is included so children of person's making an application under this subdivision can be included in the application, it could be stated. If not, there needs to be a specific provision allowing the Minister to include a child in a parent's application – without it, and without this subdivision, where would the Minister get the power to grant citizenship to a person under 18?

My book at pages 128-130 highlights some of the issues surrounding children and their applications under the old Act. This new Act provides an opportunity to clean up some of these untidy sections and I don't think the current provisions do so clearly.

Perhaps the guide to the provision can be moulded in contrast to the new s 36. That provision provides for children to lose Australian citizenship in certain circumstances. So too, a provision could be included to say that the child of a responsible parent who applies for citizenship under subdivisions B and C of Part 2 can be included in the application and become a citizen at the time the parent becomes a citizen.

There are various further sections that refer to children under the age of 16 that don't read clearly because of the lack of a corresponding reference regarding the conferral of citizenship to children. See for instance s 28 regarding the Day Citizenship begins.

Conclusion

I commend this Bill to the Committee as a great step in making the *Australian Citizenship Act* more logical and accessible and improving the access of individuals to the formal status of Australian citizenship.