

# **Submission of the**

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

**to the**

**Senate Legal and Constitutional Committee's  
Inquiry into the Provisions of the**

**Australian Citizenship Bill 2005  
and the Australian Citizenship  
(Transitionals and Consequentials)  
Bill 2005**

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**Author:** Michael Walton

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## *Abbreviations*

<b>AAT</b>	Administrative Appeals Tribunal
<b>ACC</b>	Australian Citizenship Council
<b>ACT</b>	Australian Capital Territory
<b>AFP</b>	Australian Federal Police
<b>ASIO</b>	Australian Security Intelligence Organisation
<b>ATS</b>	Australian Treaty Series
<b>Basic Principles</b>	UN <i>Basic Principles for the Treatment of Prisoners</i>
<b>CCL</b>	NSW Council for Civil Liberties
<b>ICCPR</b>	<i>International Covenant on Civil and Political Rights</i>
<b>IVF</b>	in-vitro fertilisation
<b>NSW</b>	New South Wales
<b>SAD</b>	Security Appeals Division of the AAT
<b>Statelessness Convention</b>	<i>Convention on the Reduction of Statelessness</i>
<b>UDHR</b>	<i>Universal Declaration of Human Rights</i>
<b>UN</b>	United Nations
<b>UNHRC</b>	United Nations Human Rights Committee

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## 1. Executive Summary

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**Everyone has the right to a nationality.**

*Universal Declaration of Human Rights, Article 15(1)*

1. CCL rejects the need for the proposal to grant ASIO a veto over who can and can't be an Australian citizen and the proposal to insist that the Minister must be 'satisfied' of every applicant's identity. These proposals are oppressive and violate Australia's international human rights obligations.
2. CCL emphatically opposes the proposal to prohibit the Minister from granting citizenship to someone who has received an adverse ASIO security assessment. This proposal effectively grants ASIO a veto power over every application for Australian citizenship. This is an unwelcome intrusion of faceless secret agents into the process of defining who is a citizen in our free and democratic society.
3. The proposal violates the Statelessness Convention because the Minister will not be able to prevent a person from becoming stateless.
4. CCL is also concerned that, in the current political climate, this proposal will disproportionately impact upon the Muslim community. This could undermine the desirability of Australian citizenship in the eyes of some, rather than fostering a strong multicultural community of citizens – our strongest defence against terrorism.
5. CCL emphatically opposes the proposal to prohibit the Minister from granting citizenship to someone if the Minister is not satisfied of their identity. CCL is concerned that the mandatory nature of this proposal places an unacceptably high onus on an applicant to prove their identity. In an imperfect world, there are many reasons why a person might be unable to prove their identity. For example, people fleeing persecution or their war-torn homes may not necessarily have the time or opportunity to bring with them proof of identification. These people are vulnerable and deserve the support of the community, not its rejection.
6. CCL is also concerned that, because the issue of identity will become so central to the grant of citizenship, that applicants who cannot prove their identity will come under enormous pressure to make fraudulent misrepresentations about their identity.
7. This proposal also violates the Statelessness Convention because the Minister will not be able to prevent a person from becoming stateless. This breaches Australia's international obligations under the Statelessness Convention.
8. CCL is concerned that there are many gaps in the personal identifier framework. For example, there is no mechanism to ensure that the Act will not be changed in the future to allow more and more people access to this extremely sensitive personal information.

9. The proposal to revoke citizenship acquired as a consequence of third party fraud should be removed. It will punish *innocent* victims of fraud. The proposal permits the Minister to revoke an *innocent* child's citizenship, potentially rendering the child stateless or liable for deportation.
10. That proposal violates several international treaties, including the *Convention on the Rights of the Child*.
11. While the new recognition of de facto couples is welcome, the exclusion of same-sex couples is discriminatory and violates Australia's international human rights treaty obligations.
12. The Bill fails to recognise de facto couples in the IVF provisions. This amounts to discrimination on the grounds of marital status.
13. The provisions of the Bill that exclude or restrict prisoners and people convicted of crimes from acquiring citizenship are punitive and fail important human rights tests.
14. CCL is concerned that, in a country without a Bill of Rights, the Minister is given an extremely broad discretion to refuse citizenship – even to refuse a person who meets all the eligibility criteria. This discretion should be made subject to a non-discrimination clause adopted from the *International Covenant on Civil and Political Rights*.
15. In this submission, CCL also looks at other areas of reform which probably fall beyond the scope of this Inquiry. Nevertheless, CCL invites the Committee to consider recommending that the Australian Law Reform Commission investigate them.

## 2. New Citizenship Provisions

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### 2.1 statelessness: international obligations

16. Australia has ratified the *Convention on the Reduction of Statelessness*.<sup>1</sup> By a series of express exemptions, the Bill attempts to ensure that ministerial decisions cannot render a person stateless in contravention of Australia's international obligations under the Statelessness Convention. However, these provisions are inadequate and scattered throughout the Bill. It would make more sense to enshrine this treaty obligation in a single overriding clause, as exists in the current Act.<sup>2</sup> Furthermore, some ministerial decisions which should be subject to statelessness exceptions are not.
17. It should be noted that the Statelessness Convention only places obligations on Australia with respect to people who have some connection with Australia. In other words, the Convention does not impose an obligation on Australia to confer citizenship on a person born outside of Australia to non-Australian parents.
18. The Convention obliges Australia to grant citizenship to a stateless person born in Australia.<sup>3</sup> However, Australia may refuse citizenship to such a person if that person has been *convicted* of an offence against national security or sentenced to imprisonment for a term of five years or more on a criminal charge.<sup>4</sup> The Bill as drafted violates the Convention because it prohibits conferral of citizenship on a person born in Australia on non-Convention grounds: when that person is assessed as a 'security risk'; or when the Minister is not satisfied of that person's identity.<sup>5</sup>
19. The Convention obliges Australia to grant citizenship to a person born overseas of an Australian parent, if that person would otherwise be stateless.<sup>6</sup> However, Australia may refuse citizenship to such a person if that person has been *convicted* of an offence against national security.<sup>7</sup> The Bill as drafted violates the Convention because it prohibits a citizen by descent from claiming citizenship on non-Convention grounds: when that person is assessed as a 'security risk'; or when the Minister is not satisfied of that person's identity.<sup>8</sup>

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<sup>1</sup> [1975] ATS 46 (entry into force in Australia: 13 December 1975). Australia made no declarations or reservations upon accession (on 13 December 1973).

<sup>2</sup> *Australian Citizenship Act 1948* (Cth) s.23D.

<sup>3</sup> *Convention on the Reduction of Statelessness*, n 1, Article 1(1).

<sup>4</sup> *Convention on the Reduction of Statelessness*, n 1, Article 1(2)(c).

<sup>5</sup> Citizenship Bill 2005 (Cth) ss.24(3) & 24(4) are not subject to s.24(8). See also: "ASIO and citizenship" on page 4; and, "identity test" on page 6.

<sup>6</sup> *Convention on the Reduction of Statelessness*, n 1, Article 4(1).

<sup>7</sup> *Convention on the Reduction of Statelessness*, n 1, Article 4(2)(c).

<sup>8</sup> Citizenship Bill 2005 (Cth) ss.17(3) & 17(4) are not subject to any exceptions for statelessness. See also: "ASIO and citizenship" on page 4; and, "identity test" on page 6.

20. The Convention obliges Australia to continue the citizenship of a child whose parents renounce their Australian citizenship or who have their Australian citizenship revoked, if that child would otherwise become stateless.<sup>9</sup> The Bill as drafted complies with the Convention.<sup>10</sup>
21. The Convention obliges Australia to continue the citizenship of any person who renounces their Australian citizenship and would be thereby rendered stateless.<sup>11</sup> The Bill as drafted complies with the Convention.<sup>12</sup>
22. The Convention also obliges Australia not to revoke a citizen's citizenship if that revocation would render the citizen stateless.<sup>13</sup> However, Australia can revoke a citizen's citizenship if it was obtained by misrepresentation or fraud.<sup>14</sup> The Bill as drafted probably violates the Convention because it permits the Minister to revoke the citizenship of the innocent victim of third-party fraud.<sup>15</sup>

**The Bill should include an overriding clause that prohibits any decision made under the Act which would render a person stateless contrary to Australia's obligations under the *Convention on the Reduction of Statelessness*.**

**If an overriding clause is not inserted, then the following provisions need to be made subject to an express statelessness exception: subsection 17(3), 17(4), 17(5), 22(3),<sup>16</sup> 24(3), 24(4), 24(5), 34(1)(b)(ii) and 34(2)(b)(iv).**

## 2.2 ASIO and citizenship

23. The Bill *prohibits* the Minister from approving a citizenship application while an adverse or qualified ASIO security assessment is in force.<sup>17</sup> This is a new statutory requirement for all applications to acquire citizenship: by descent, by conferral and by resumption.
24. CCL is emphatically opposed to this proposal. CCL is concerned that, in the current political climate, these measures will disproportionately impact upon the Muslim community. This could undermine the desirability of Australian citizenship in the eyes of some, rather than fostering a strong multicultural community of citizens – our strongest defence against terrorism.

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<sup>9</sup> *Convention on the Reduction of Statelessness*, n 1, Article 6.

<sup>10</sup> Citizenship Bill 2005 (Cth) s.36(3). See "deprivation of a child's citizenship" on page 11.

<sup>11</sup> *Convention on the Reduction of Statelessness*, n 1, Article 7(1).

<sup>12</sup> Citizenship Bill 2005 (Cth) s.33(7).

<sup>13</sup> *Convention on the Reduction of Statelessness*, n 1, Article 8(1).

<sup>14</sup> *Convention on the Reduction of Statelessness*, n 1, Article 8(2)(b).

<sup>15</sup> Citizenship Bill 2005 (Cth) s.34(1)(b)(ii) is not subject to any exceptions for statelessness. See also "deprivation of citizenship for fraud" on page 9.

<sup>16</sup> see [67].

<sup>17</sup> Citizenship Bill 2005 (Cth) ss.17(4), 24(4) & 30(4).

25. Because the Minister is prohibited from granting citizenship under this proposal, an adverse ASIO security assessment could render a person stateless – in violation of Australia's international obligations under the Statelessness Convention. Under that Convention, a State can only deny citizenship (by birth or by descent) to a stateless person under certain circumstances.<sup>18</sup> Being a national security risk is **not** one of these permitted circumstances.

**The prohibition on a ministerial grant of citizenship when there is an adverse ASIO security assessment in force should be removed from the Bill, because it violates Australia's international obligations under the Statelessness Convention.**

**Alternatively, this prohibition should be made subject to an overriding clause prohibiting statelessness.<sup>19</sup>**

26. CCL has considerable experience defending people who have received adverse ASIO security assessments. The process by which an adverse assessment is made is concerning. For example, CCL is aware of at least one case (in the last six years) in which a person was asked his sexual orientation during a security risk assessment interview with ASIO officers. In contemporary Australia, such a question can have absolutely no bearing on an individual's risk to the security of the nation.
27. The appeal process is a mockery of justice. The subject of a qualified or adverse security assessment may appeal the assessment.<sup>20</sup> Appeals are heard *in private* in the Security Appeals Division ('SAD') of the Administrative Appeals Tribunal ('AAT').<sup>21</sup> The Attorney-General may issue a certificate stating that the disclosure of certain evidence in proceedings would prejudice the security of defence of Australia.<sup>22</sup> The effect of this certificate is that the evidence is heard *in secret* and the applicant and her or his legal team must leave the hearing room whilst Commonwealth lawyers adduce that secret evidence.<sup>23</sup> The applicant and her or his lawyers are then invited back into the hearing room and are expected to respond, in an adversarial hearing, to that secret evidence – evidence that they have not heard.

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<sup>18</sup> see "statelessness" on page 3.

<sup>19</sup> see "statelessness" on page 3.

<sup>20</sup> *Australian Security & Intelligence Organisation Act 1979* (Cth) s.54(1).

<sup>21</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s.39A(5).

<sup>22</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s.39A(8).

<sup>23</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s.39A(9). The applicant's lawyers can only be present in the Tribunal when this secret evidence is adduced *if the Attorney-General consents*.

28. The appeal process is a denial of natural justice. Decisions of the SAD are not reviewable by the Federal Court.<sup>24</sup> Presumably an appeal could be taken to the High Court, but only on the grounds of legal error and not for a merits review. Because Australia has no Bill of Rights, a person who receives an adverse ASIO security assessment cannot have the process reviewed by a court to ensure that her or his human rights have not been violated in the process.

**The Committee should ask the Attorney-General how many adverse and qualified security assessments have been issued since 1979, how many have been appealed to the SAD, and how many appeals have been successful.**

29. This flawed and unfair appeal process means that ASIO will have an effective veto over any application for Australian citizenship, under the new Bill. This is an unwelcome intrusion of faceless secret agents into the process of defining who is a citizen in our free and democratic society.

**The prohibition on a ministerial grant of citizenship when there is an adverse security assessment in force should be removed from the Bill, because it grants to ASIO the power to block a ministerial decision and grants ASIO an effectively unaccountable veto power over every application for Australian citizenship.**

## 2.3 identity test

30. The Bill *prohibits* the Minister from approving a citizenship application 'unless the Minister is satisfied of the identity' of the applicant.<sup>25</sup> This is a new statutory requirement for all applications to acquire citizenship by descent, by conferral and by resumption.
31. CCL is emphatically opposed to the mandatory nature of this proposal. CCL is concerned that it places an unacceptably high onus on an applicant to prove their identity. In an imperfect world, this is not always possible. There are many reasons why a person might be unable to prove their identity. For example, people fleeing persecution or their war-torn homes may not necessarily have the time or opportunity to bring with them proof of identification. These people are vulnerable and deserve the support of the community, not its rejection.
32. CCL is concerned that because the issue of identity will become so central to the grant of citizenship, that applicants who cannot prove their identity will come under enormous pressure to make fraudulent misrepresentations about their identity.
33. CCL is also concerned because the Bill offers the Minister no guidance on what constitutes satisfactory identification.

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<sup>24</sup> *Administrative Decisions (Judicial Review) Act 1997* (Cth) Sch 1(y).

<sup>25</sup> Citizenship Bill 2005 (Cth) ss.17(3), 24(3) & 30(3).

34. The Minister has not satisfactorily made out the case for this proposal. The Minister says that this mandatory identity test is necessary to “protect the integrity of Australia’s citizenship processes”,<sup>26</sup> “to enhance national security” and “to combat identity fraud”.<sup>27</sup> But the Minister provides no figures establishing that there are significant problems in *citizenship applications*. Nor does he explain why he has concluded that a fetter on his decision-making processes is warranted.
35. This identity test is, of course, a relevant consideration in the Minister’s decision to grant or refuse citizenship, but it should not effectively veto all other considerations.

**The prohibition on a ministerial grant of citizenship when the Minister is not satisfied of an applicant’s identity should be removed from the Bill, because it could deny citizenship to the most vulnerable and traumatised applicants – those fleeing persecution, war or torture.**

36. Because the Minister is prohibited from granting citizenship under this proposal, if he is not satisfied about a person’s identity then an applicant could be rendered stateless – in violation of Australia’s international obligations under the Statelessness Convention. Under that Convention, a State can only deny citizenship (by birth or by descent) to a stateless person under certain circumstances.<sup>28</sup> Being unable to satisfy the Minister of your identity is **not** one of these permitted circumstances.

**The prohibition on a ministerial grant of citizenship when the Minister is not satisfied of an applicant’s identity should be removed from the Bill, because it violates Australia’s international obligations under the Statelessness Convention.**

**Alternatively, this prohibition should be made subject to an overriding clause prohibiting statelessness.**<sup>29</sup>

## 2.4 personal identifier framework

37. The new Bill enshrines and regulates the collection, storage and access of personal identifiers. ‘Personal identifiers’ include fingerprints, physical measurements, photographs, signatures and iris scans.<sup>30</sup> The Minister can add to this list by writing regulations.

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<sup>26</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 November 2005, 14 (John Cobb, Minister for Citizenship and Multicultural Affairs).

<sup>27</sup> John Cobb, ‘Australian Citizenship in the Global Age - Reforms to Australian Citizenship Act’ (speech delivered at the National Press Club, Canberra, 14 September 2005), <<http://www.minister.immi.gov.au/cam/media/speeches/speeches05/citizenship-in-the-global-age.htm>>.

<sup>28</sup> see “statelessness” on page 3.

<sup>29</sup> see “statelessness” on page 3.

<sup>30</sup> Citizenship Bill 2005 (Cth) s.10.

38. CCL is concerned about the considerable number of privacy implications of the personal identifier framework. It is important that the collection of this information is controlled by statute, but significant changes need to be made to the Bill as drafted.
39. The Minister can request that an applicant provide one or more personal identifiers.<sup>31</sup> However, the Bill does not say what happens if an applicant refuses. The Bill is also silent on whether such a request is only permitted where there is insufficient material before the Minister to establish a person's identity. These are important issues that should not be left to the Minister to decide for herself or himself, which is what the Bill does now.<sup>32</sup>

**A provision should be inserted into the Bill stating that a request for the provision of personal identifiers should only be made where there is insufficient material before the Minister to establish a person's identity.**

40. CCL is concerned about "information access creep" with respect to the collection of this personal information. While the Bill restricts the use of the information to the purposes of this Bill, there is nothing to stop the Act being amended at a later stage to permit, for example, ASIO or the AFP accessing the information to look for terrorist suspects.

**A provision should be inserted into the Bill stating that "applicants have a legitimate expectation that the personal identifiers collected under this Act, once provided, will only ever be used for the purpose of considering or reviewing their application under this Act".**

41. The Bill permits the disclosure of these personal identifiers with the Australian States and Territories.<sup>33</sup> There can be no legitimate purpose for the sharing of this information, which is collected solely for the purpose of establishing a person's identity before granting an application for citizenship, with any other jurisdiction. If the Minister is satisfied of the identity of a person and grants an application, then the States and Territories should be satisfied with a certificate of citizenship as proof of identity and do not need to access the information upon which the Minister based her or his decision.

**Subsection 43(2)(e) should be removed from the Bill, because there is no legitimate reason why the States and Territories should be able to access this information.**

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<sup>31</sup> Citizenship Bill 2005 (Cth) s.40.

<sup>32</sup> Citizenship Bill 2005 (Cth) s.41.

<sup>33</sup> Citizenship Bill 2005 (Cth) s.43(2)(e).

42. CCL is also concerned that the Bill is silent on how the personal identifiers will be stored once an application has been dealt with to finality. Given that the information is only collected for the purpose of confirming an applicant's identity, there is no reason for this information to be stored "on line" in an accessible way once an application has been dealt with to finality. The information should be archived and retrieved only if needed for a legitimate purpose related to the Act, for example to investigate an allegation of fraud.

**The Bill should expressly state that, once an application has been dealt with to finality, all personal identifiers should be archived and removed from all "on line" databases.**

43. After a reasonable time, this personal information should be destroyed because government can no longer have a legitimate interest in the retention of the information. These considerations are too important to be left to the discretion of the Minister by regulation.<sup>34</sup>

**The Bill should expressly state that, after five years, all original personal identifiers should be returned to the applicant and all copies should be destroyed.**

44. The Bill leaves it to the discretion of the Minister, by regulation, to decide which types of personal identifiers may not be accessed by or disclosed to law enforcement officials.<sup>35</sup> Given that the information is only collected for the purpose of confirming an applicant's identity, the only legitimate purpose for which investigating and prosecuting authorities should be able to access any personal identifier collected under the Act is for the purpose of investigating or prosecuting an offence against the Act, for example an allegation of fraud. This sensitive personal information should be protected in all other circumstances.

**Subsections 42(5) and 43(3) should be replaced with an express statutory prohibition on the accessing by or disclosure to investigating and prosecuting authorities of personal identifiers collected under the Act, except for the purpose of investigating or prosecuting an offence against this Act.**

## 2.5 deprivation of citizenship for fraud

45. The Bill grants the Minister the discretion, under certain circumstances, to revoke the citizenship of citizens who were born overseas.<sup>36</sup>

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<sup>34</sup> Citizenship Bill 2005 (Cth) s.41.

<sup>35</sup> Citizenship Bill 2005 (Cth) ss.42(5) & 43(3).

<sup>36</sup> Citizenship Bill 2005 (Cth) s.34.

46. The Minister can revoke citizenship acquired by decent or conferral if a citizen has been convicted of fraud in relation to their application for citizenship.<sup>37</sup> This is consistent with the Statelessness Convention, which permits the revocation of citizenship obtained by misrepresentation or fraud.<sup>38</sup>
47. The Bill proposes to go beyond these provisions to allow the Minister to revoke citizenship that was acquired as a consequence of proven *third party* fraud.<sup>39</sup> There is no requirement in the Bill that the citizen *knew* about the fraud. This means that *innocent victims* of the fraud will suffer twice over. First, they will lose the benefit of any money paid to the third party criminal; and second they will lose the benefit of their citizenship.

**Subsections 34(1)(b)(ii) and 34(2)(b)(iv) should be removed from the Bill because they punish the innocent victims of third party fraud. If a citizen had knowledge of the fraud, then they should be prosecuted *and convicted* for complicity in the fraud before the Minister can legitimately exercise his or her power to revoke something as important as citizenship.<sup>40</sup>**

48. Under this proposal, the innocent victims of third party fraud might even end up stateless. Given that the purpose of the Statelessness Convention is to reduce and eliminate statelessness,<sup>41</sup> it is highly unlikely that the Convention permits the deprivation of citizenship in cases of non-complicit third party fraud.

**Subsections 34(1)(b)(ii) and 34(2)(b)(iv) should be removed from the Bill because they probably violate the Statelessness Convention.**

49. Under this proposal, it is within the power of the Minister to revoke the citizenship of a child who has been the innocent victim of third party fraud. Significantly, nothing in the Bill prohibits the Minister's decision from rendering the child stateless.<sup>42</sup> The Statelessness Convention does not even envisage this scenario – adding weight to the argument that the Convention does not permit deprivation of citizenship for third party fraud.

**Subsections 34(1)(b)(ii) and 34(2)(b)(iv) should be removed from the Bill because they permit the Minister to render a child stateless by depriving that child of his or her citizenship for third party fraud. This violates the child's right to a nationality in contravention of Article 24(3) of the *International Covenant on Civil and Political Rights* and Article 7 of the *Convention on the Rights of the Child*.**

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<sup>37</sup> Citizenship Bill 2005 (Cth) ss.34(1)(b)(i), 34(2)(b)(i) & 34(2)(b)(iii).

<sup>38</sup> *Convention on the Reduction of Statelessness*, n 1, Article 8(2)(b).

<sup>39</sup> Citizenship Bill 2005 (Cth) ss.34(1)(b)(ii) & 34(2)(b)(iv).

<sup>40</sup> *Criminal Code 1995* (Cth) s.11.2 (complicity and common purpose).

<sup>41</sup> see [67].

<sup>42</sup> section 36 of the Bill only deals with what happens to a child when a *parent* loses citizenship under Division 3, not when a child loses citizenship under Division 3. See "English proficiency test should be removed" on page 22.

## 2.6 deprivation of a child's citizenship

50. Under existing law, when a parent ceases to be an Australian citizen, their Australian child automatically loses her or his citizenship, unless that would render the child stateless.<sup>43</sup> The Bill provides that this loss of a child's citizenship will no longer be automatic.<sup>44</sup> The Minister will have a discretion to revoke the child's citizenship, subject to two exceptions: where the child would be rendered stateless; or where the child's other parent is still an Australian citizen.
51. The Minister should not have the power to revoke citizenship of children. In 1997 the Committee on the Rights of the Child recommended to Australia that:<sup>45</sup>
- ...no child be deprived of his/her citizenship on any ground, regardless of the status of his/her parent(s).
- This statement is crystal clear: a child cannot be deprived of her or his citizenship *on any ground*.
52. The Minister is simply wrong when he says that the new Bill complies with Australia's international obligations.<sup>46</sup>
53. As a matter of good policy, in a case in which the Minister has revoked a parent's citizenship or where the parent's citizenship is automatically revoked because she or he is fighting with enemy armed forces, the 'sins of the parent' should not be visited on her or his children.

**To ensure that the Bill complies with Australia's international obligations under the *Convention on the Rights of the Child*, sections 34 & 36 should be redrafted to ensure that a child's citizenship cannot be revoked on any ground, including the unlawful behaviour of her or his parent or parents.**

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<sup>43</sup> *Australian Citizenship Act 1948* (Cth) s.23.

<sup>44</sup> Citizenship Bill 2005 (Cth) s.36.

<sup>45</sup> Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Australia* (21 October 1997) UN Doc CRC/C/15/Add.79.

<sup>46</sup> John Cobb (9 November 2005), n 26, 11.

## 2.7 definition of 'spouse' violates the ICCPR

54. The Bill updates the definition of 'spouse' for the purpose of residency requirements to include de facto couples.<sup>47</sup> This is a welcome amendment. However, this amendment excludes same-sex de facto couples because a same-sex partner cannot apply for 'a permanent visa as a de facto spouse'. Same-sex partners can only apply for an 'interdependency visa'.<sup>48</sup>
55. As drafted, the Bill denies same-sex couples the benefit of residential requirement exceptions under subsection 22(9). The Bill also denies same-sex couples the exemption afforded opposite-sex couples under subsection 24(5). This means that a heterosexual partner need not be present in Australia to be conferred citizenship but a homosexual partner must be present in Australia to be conferred Australian citizenship. There is no reasonable or objective reason for this differentiation.
56. In *Young v Australia*, the UN Human Rights Committee found that federal legislation excluding same-sex partners from the definition of 'member of a couple' in the *Veterans' Entitlements Act* is a violation of the fundamental human right of equality under the law, because such discrimination is not reasonable or objective.<sup>49</sup> In the same way, the Citizenship Bill's definition of 'spouse' violates this guarantee of equality.

**To ensure that the Bill does not violate Article 26 of the *International Covenant on Civil and Political Rights*, subsection 22(10) should be redrafted to expressly include de facto partners granted an interdependency visa.**

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<sup>47</sup> Citizenship Bill 2005 (Cth) s.22(10).

<sup>48</sup> Department of Immigration and Multicultural and Indigenous Affairs, 'Interdependency Visa', <[http://www.immi.gov.au/migration/family/partners/part1\\_interdependency.htm](http://www.immi.gov.au/migration/family/partners/part1_interdependency.htm)>.

See also: *Migration Regulations 1994* (Cth) r 1.15A (a spouse must be 'of the opposite sex').

<sup>49</sup> *Young v Australia* (2003) UN Doc CCPR/C/78/D/941/2000, [10.4] (violation, ICCPR art. 26).

## 2.8 English proficiency test: maximum age will be 60

57. Currently, the maximum age at which applicants are required to satisfy the language test is 50.<sup>50</sup> The Bill proposes to increase this to 60.<sup>51</sup> While this is apparently a recommendation of the 1994 report of the Joint Standing Committee on Migration,<sup>52</sup> the more recent report (in 2002) of the Australian Citizenship Council ('ACC') rejected this proposal.<sup>53</sup> The ACC acknowledged that older people find it more difficult to learn a new language.<sup>54</sup>

**Subsection 21(4)(a)(i) should be amended to cover people 'aged 50 or over'.**

**Alternatively, if the maximum age of 60 is to be adopted, then this significant change to citizenship rules should be advertised widely by the government in the media, including all non-English speaking media. Otherwise people might be robbed of an expectation that they would qualify for citizenship, without proficient English, upon turning 50 years of age.**

## 2.9 victims of section 17 who are born in Australia

58. The Bill's provisions to allow children of people who were forced to renounce their Australian citizenship under the now-repealed section 17 of the Act is a welcome improvement in citizenship law.
59. However, it is unclear why the Bill requires that such children be born *outside* of Australia. It is conceivable that a child could be born in Australia, leave Australia before their tenth birthday, and then both parents renounce their citizenship. This child will not be able to apply for citizenship. The distinction between children born in and children born outside of Australia seems discriminatory.

**Unless there is a valid reason, subsection 21(6)(a) should be deleted from the Bill.**

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<sup>50</sup> *Australian Citizenship Act 1948* (Cth) s.13(7).

<sup>51</sup> Citizenship Bill 2005 (Cth) s.21(4)(a)(i).

<sup>52</sup> Explanatory Memorandum, Citizenship Bill 2005 (Cth) 23.

<sup>53</sup> Australian Citizenship Council, *Australian Citizenship for a New Century* (18 February 2002) 51, <<http://www.citizenship.gov.au/info/report.htm>>.

<sup>54</sup> Australian Citizenship Council (2002), n 53, 50. See also "English proficiency test should be removed" on page 22.

### 3. Existing Problems Requiring Action

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60. There are a few significant problems with the existing Bill that should be fixed, given this opportunity of re-drafting the entire Act. These problems require fixing because they violate, or permit violations of, Australia's international obligations.

#### 3.1 IVF provisions

61. The Bill replicates the existing provision that a man married to the mother of a child conceived by IVF and who is not the biological father of that child is considered the father of the child for the purposes of determining citizenship by descent.<sup>55</sup>
62. This provision was introduced in 1984.<sup>56</sup> The provision does not apply to de facto couples who find themselves in this situation. Given that other provisions of the Bill introduce the concept of de facto relationships,<sup>57</sup> it is appropriate that this provision also be available to Australians who choose not to marry.
63. This provision also does not apply to lesbian couples who find themselves in this situation. Given that international law requires that federal law not discriminate against same-sex couples,<sup>58</sup> it is appropriate that this provision be redrafted to include lesbian couples. This conclusion is further reinforced by the fact that lesbians are prohibited by law from marrying,<sup>59</sup> which means that, unlike heterosexual de facto couples, they do not have the option of marrying each other in order to bring themselves within the operation of this provision.<sup>60</sup>
64. In short, the discrimination on the grounds of marital status, with respect to IVF and citizenship by descent, is archaic and should be removed. Furthermore, the ICCPR prohibits discrimination 'on any ground such as...birth or other status'. Marital status falls within the scope of 'other status', particularly when there is no option of marrying.<sup>61</sup>

**To ensure the Bill does not violate Article 26 of the *International Covenant on Civil and Political Rights*, section 8 of the Bill, which discriminates on the grounds of marital status, should be redrafted to remove this discrimination.**

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<sup>55</sup> Citizenship Bill 2005 (Cth) s.8; replicating *Australian Citizenship Act 1948* (Cth) sub-ss.5(6), 5(7) & 5(8).

<sup>56</sup> *Australian Citizenship Amendment Act 1984* (Cth).

<sup>57</sup> Citizenship Bill 2005 (Cth) s.22(10).

<sup>58</sup> *Young v Australia* (2003) UN Doc CCPR/C/78/D/941/2000. See also "definition of 'spouse' violates the ICCPR" on page 12.

<sup>59</sup> *Marriage Act 1961* (Cth) s.5(1)('marriage').

<sup>60</sup> see *Young v Australia* (2003) UN Doc CCPR/C/78/D/941/2000, [10.4].

<sup>61</sup> see n 60.

### 3.2 treatment of prisoners & criminal psychiatric patients

65. The Bill reproduces the existing law excluding or restricting people convicted of crimes from citizenship.
66. The Minister has a discretion to revoke conferred citizenship if the citizen committed an offence before becoming a citizen and was convicted of the offence after becoming a citizen.<sup>62</sup> The Bill complies with the Statelessness Convention because if the act of revoking citizenship would render the citizen stateless, then the Minister cannot revoke the citizenship.<sup>63</sup>
67. For the purposes of assessing the time a person has resided in Australia, the Bill prohibits the Minister from including any period of time a person spends in prison.<sup>64</sup> This provision violates the Statelessness Convention. The Convention permits States to impose waiting periods of 'habitual residence'.<sup>65</sup> The term 'habitual residence' is not defined in the Convention, however it should be given its 'ordinary meaning' in context, in good faith and in light of the object and purpose of the Convention.<sup>66</sup> A prisoner 'resides' in prison. The purpose of the Convention is to reduce and eliminate statelessness.<sup>67</sup> Article 15 of the *Universal Declaration of Human Rights* states that 'Everyone has the right to a nationality'. Prisoners should only be deprived of those rights which are 'demonstrably necessitated by the fact of their incarceration'.<sup>68</sup> Given these factors, Australia is not permitted under the Convention to confine the definition of residential requirements to 'non-custodial residence'.

**Subsection 22(3) should be removed from the Bill because it violates the Statelessness Convention.**

**Alternatively, section 22 should be subject to an overriding clause prohibiting statelessness.<sup>69</sup>**

68. The Minister is also prohibited from conferring citizenship on a person:<sup>70</sup>

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<sup>62</sup> Citizenship Bill 2005 (Cth) s.34(2)(b)(ii); *Australian Citizenship Act 1948* (Cth) s.21(1)(a)(ii).

<sup>63</sup> Citizenship Bill 2005 (Cth) s.34(3); *Australian Citizenship Act 1948* (Cth) s.23D(3A).

<sup>64</sup> Citizenship Bill 2005 (Cth) s.22(3); *Australian Citizenship Act 1948* (Cth) s.13(4).

<sup>65</sup> *Convention on the Reduction of Statelessness*, n 1, Articles 1(2)(b), 4(2)(b).

<sup>66</sup> *Vienna Convention on the Law of Treaties* [1974] ATS 2 (entry into force 27 January 1980), Article 31(1). Strictly speaking the Stateless Convention is not bound by the Vienna Convention because the latter came after the former and the latter is not retrospective: Vienna Convention, Article 4.

<sup>67</sup> *Convention on the Reduction of Statelessness*, n 1, Preamble. Preamble also mentions UN General Assembly Resolution 896 (IX), 4 December 1954 (UN Doc A/RES/896(IX)), which recognises 'the importance of reducing and, if possible, eliminating future statelessness by international agreement'.

<sup>68</sup> see [69].

<sup>69</sup> see "statelessness: international obligations" on page 3.

<sup>70</sup> Citizenship Bill 2005 (Cth) s.24(6); *Australian Citizenship Act 1948* (Cth) s.13(11).

- when criminal proceedings are pending against that person;
- who is in prison or was in prison within the last 2 years;
- who is a 'serious repeat offender' and who has been in prison within the last 10 years; or
- who is currently on parole or a criminal bond.

This prohibition is subject to an exception for statelessness,<sup>71</sup> which only applies to people born in Australia.<sup>72</sup> This complies with the Statelessness Convention because the Bill does not subject citizens by descent to residential restrictions and because the Convention imposes no obligation to grant citizenship to a person born overseas to non-Australian parents.

69. Nevertheless, these special rules for prisoners and convicted persons are punitive. They impose an additional non-judicial 'sentence' on a prisoner. They punish the individual above and beyond the punishment imposed by a court. They contravene the UN *Basic Principles for the Treatment of Prisoners*.<sup>73</sup> Principle 5 states that prisoners retain all their human rights and the only limitations that may be placed upon them are those limitations 'demonstrably necessitated by the fact of incarceration'. Unlike depriving a prisoner of, for example, freedom of movement, depriving a prisoner of the opportunity to acquire Australian citizenship is not necessary to ensure her or his incarceration. While the Basic Principles are not binding, they do constitute international 'soft law'.

**Subsections 22(3), 24(6) and 34(2)(b)(ii) should be removed from the Bill because they are punitive and are not demonstrably necessitated by the fact of incarceration. They also discriminate against people on the grounds of their criminal record.**

### 3.3 ministerial discretion

70. The Bill affords the Minister a great deal of discretion.
71. One discretion authorises the Minister to refuse an application for the conferral or resumption of citizenship even though an applicant has met all the criteria for citizenship.<sup>74</sup> This is an extremely broad discretion. Because Australia does not have a Bill of Rights, it is open to the Minister to discriminate against an applicant on any ground that is not prohibited by law. For example, the Bill effectively authorises the Minister to refuse an application because the Minister does not like the applicant's religion or sexual orientation.

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<sup>71</sup> Citizenship Bill 2005 (Cth) s.24(8).

<sup>72</sup> Citizenship Bill 2005 (Cth) s.21(8)(a).

<sup>73</sup> *Basic Principles for the Treatment of Prisoners*, UNGA resolution 45/111 (14 December 1990), UN Doc A/RES/45/111.

<sup>74</sup> Citizenship Bill 2005 (Cth) ss.24(2) & 30(2). Only in the case of an application for citizenship by descent *must* the Minister accept the application if the applicant has met all the criteria: s.17(2).

72. The Minister also has the discretion to appoint people who can receive a pledge of commitment.<sup>75</sup> In March 2004 the Minister informed ACT Chief Minister Jon Stanhope that his appointment under the Act to receive pledges of commitment was being withdrawn because of a speech Mr Stanhope delivered at a citizenship ceremony a few months earlier in which he voiced his 'opposition to the war on Iraq, his disappointment at the Federal Government's treatment of asylum-seekers and refugees and its failure to reconcile with indigenous Australians'.<sup>76</sup> CCL believes that this is an inappropriate exercise of discretion because it denies Mr Stanhope his right to freedom of expression and discriminates against him on the grounds of his political opinions.

**The Bill should include an overriding clause that adopts Article 26 of the *International Covenant on Civil and Political Rights*, prohibiting any decision made under the Act to discriminate against anyone on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**

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<sup>75</sup> Citizenship Bill 2005 (Cth) s.27(4).

<sup>76</sup> Scott Hannaford, 'Stanhope banned from ceremonies', *Canberra Times* (Canberra), 2 March 2004, 1.

## 4. Other Suggestions for Reform

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### 4.1 good character test for citizenship by descent

73. The Bill replicates the good character test used in existing law.
74. CCL notes that the Minister has stated that is a “fact that Australian citizenship is a privilege and not a right”.<sup>77</sup> CCL assumes that he means the *conferral* and *resumption* of citizenship is a privilege, because all Australians by birth and descent have a moral *right* to citizenship.
75. The good character test was added as a requirement for Australians by descent (born outside of Australia to an Australian citizen) in 1991.<sup>78</sup> This amendment was made to permit adult citizens by descent who were not registered at an Australian embassy before their 25<sup>th</sup> birthday to apply to the Minister to be registered as a citizen once they had reached the age of 18. This provision was called “section 10C”.
76. In 2002 the pre-1991 provision for citizens by descent registered at embassies (“section 10B”) was amended to include the good character test.<sup>79</sup> In a circular (and meaningless) line of reasoning, the then Minister explained that the good character test was being inserted because ‘it is important that these people of adult age be of good character to access Australian citizenship’.<sup>80</sup> The Explanatory Memorandum states that the good character test was added to bring the section into line with the 1991 section (which included a good character test).<sup>81</sup>
77. CCL is concerned about this creep of the good character test into citizenship by descent. A person born overseas to an Australian citizen should not be discriminated against simply because of the location of their birth. A citizen by birth (born in Australia) is not subject to the good character test, but a citizen by descent (born outside of Australia) is subject to the test.
78. Citizenship by birth and by descent is a right, not a privilege. This view is reinforced by the fact that the Minister *must* grant citizenship to applicants for citizenship by descent if they meet the criteria.<sup>82</sup>

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<sup>77</sup> John Cobb (9 November 2005), n 26, 10.

<sup>78</sup> *Australian Citizenship Amendment Act 1991* (Cth) inserting *Australian Citizenship Act 1948* (Cth) s.10C.

<sup>79</sup> *Australian Citizenship Legislation Amendment Act 2002* (Cth) inserting *Australian Citizenship Act 1948* (Cth) s.10B(1A).

<sup>80</sup> Commonwealth, *Parliamentary Debates*, House of Representatives (13 February 2002) 52 (Gary Hardgrave, Minister for Citizenship and Multicultural Affairs).

<sup>81</sup> Explanatory Memorandum, *Australian Citizenship Legislation Amendment Bill 2002* (Cth), 8.

<sup>82</sup> *Citizenship Bill 2005* (Cth) s.17(2).

**Citizenship by birth and by descent is a right, not a privilege. The good character test should be removed from subsection 16(2)(c) of the Bill because it grants the Minister a discretion to deny an Australian citizen her or his birthright.**

## 4.2 citizenship by birth: the 10-year rule & moral panic

79. The Bill preserves the existing 10 year waiting period imposed upon children born in Australia of non-citizen parents, before they automatically become citizens by birth.<sup>83</sup> This is the absolute maximum waiting period Australia can legislate under its international obligations.<sup>84</sup> If a child would be stateless because of the waiting period, the Minister can confer citizenship upon the child.<sup>85</sup>
80. In 1986, in response to a moral panic over unlawful non-citizens being sponsored by their Australian-born children (a practice described as 'contemptible queue jumping' by the then leader of the Australian Democrats), Parliament introduced a waiting period of 10 years for all children born in Australia of unlawful *and lawful* non-citizen parents.<sup>86</sup>
81. It is worth noting that in the recent High Court case of *Singh*, a case involving a six year old born in Australia to unlawful non-citizen parents and an automatic Indian citizen by descent, both of the dissenting Justices expressed the view that Parliament does not have the power to deprive Australian-born children of their claim to being Australians.<sup>87</sup> Significantly, Justice McHugh found that this waiting period (section 10) is unconstitutional:<sup>88</sup>

...in so far as section 10 applies to a person like Ms Singh who is not an alien, it seeks to deprive her of her membership of the Australian community and her constitutional citizenship. It is beyond the power of the Parliament to do so.

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<sup>83</sup> Citizenship Bill 2005 (Cth) s.12(1)(b); *Australian Citizenship Act 1948* (Cth) s.10(2)(b).

<sup>84</sup> *Convention on the Reduction of Statelessness* [1975] ATS 46 (entry into force in Australia: 13 December 1975), Article 1(2)(b).

<sup>85</sup> Citizenship Bill 2005 (Cth) s.21(8); *Australian Citizenship Act 1948* (Cth) s.23D(1).

<sup>86</sup> Peter Prince, *We are Australian – the Constitution and deportation of Australian-born children* (24 November 2003) Parliamentary Library Research Paper No. 3 2003-04, 10-12.

<sup>87</sup> *Singh v Cth* (2004) 209 ALR 355, [139] (McHugh, dissenting) & [322] (Callinan, dissenting). The majority did not agree: see "constitutional reform" on page 25.

<sup>88</sup> *Singh v Cth* (2004) 209 ALR 355, [139] (McHugh, dissenting).

82. While international law does not prescribe the rules for defining citizenship, the principle of *jus soli* has long been the tradition in many common law countries.<sup>89</sup> For example, it is enshrined in the US Bill of Rights.<sup>90</sup> There are three exceptions to the *jus soli* principle.<sup>91</sup> Most Australians would be genuinely surprised to learn that, since 1986, a child born in Australia is not automatically an Australian citizen.
83. Much of the moral panic of the mid-1980s was inspired by unlawful non-citizens being sponsored for permanent residency by their Australian-born citizen children or claiming that any attempt to deport them would violate the rights of their Australian-born citizen children.<sup>92</sup> Since the moral panic of 1986 there have been some important determinations of the UN Human Rights Committee that have significant implications for the 10-year waiting period rule.
84. In the case of *Winata v Australia*, an immigration case involving the deportation of two unlawful non-citizens who had a 13 year old Australian son, the observations of the UN Human Rights Committee suggest that the legal status of a child changes when she or he begins to attend school in the country of her or his birth:<sup>93</sup>
- The [Winata's] son has grown in Australia from his birth 13 years ago, attending Australian schools as an ordinary child would and developing the social relationships inherent in that. In view of this duration of time, it is incumbent on the State party to demonstrate additional factors justifying the removal of both [unlawful non-citizen] parents that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness.
85. In the case of *Rajan v New Zealand*, the UN Human Rights Committee found that the simple fact that the (non-citizen) complainants' two-year old daughter was a New Zealand citizen by birth did not preclude New Zealand from deporting the family for immigration fraud.<sup>94</sup>

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<sup>89</sup> The *jus soli* (right of soil) principle states that nationality is determined by *where* a person is born. By contrast, the *jus sanguinis* (right of blood) principle states that nationality is determined by the nationality of their parents, i.e. by descent.

<sup>90</sup> *US Constitution* Amendment 14(1): 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside'.

<sup>91</sup> born of enemy alien parents during enemy occupation (reproduced in s.12(2) of the Citizenship Bill 2005); born of alien diplomats; and, born of a foreign Sovereign: *Singh v Cth* (2004) 209 ALR 355, [99] (McHugh, dissenting).

<sup>92</sup> Peter Prince (2003), n 86, 10.

<sup>93</sup> *Winata v Australia* (2002) UN Doc CCPR/C/72/D/930/2000, [7.3].

<sup>94</sup> *Rajan v New Zealand* (2003) UN Doc CCPR/C/78/DR/820/1998.

86. In *Madafferi v Australia*, the Minister refused the application for permanent residency by an unlawful non-citizen, who had been in Australia for six years and who had married an Australian citizen with whom he had four children (all citizens by birth through their mother), on the grounds that Mr Madafferi was not a person of 'good character'. Mr Madafferi claimed that any attempt to deport him would constitute arbitrary interference with his family contrary to article 17 of the ICCPR. The UN Human Rights Committee agreed, noting 'the considerable hardship that would be imposed on a family that has been in existence for 14 years. If Mrs Madafferi and the children were to decide to emigrate to Italy in order to avoid separation of the family, they would...have to live in a country they do not know and whose language the children (two of whom are already 13 and 11 years old) do not speak'.<sup>95</sup>
87. The human rights principle the UN Human Rights Committee applied in *Madafferi* was that:<sup>96</sup>
- in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.
88. These cases support the view of John Dowd that 'having a child born [in Australia] is not a basis for staying here as a matter of law'.<sup>97</sup> In fact, it has **never** been the law in Australia that a non-citizen parent of an Australian citizen cannot be departed.<sup>98</sup>
89. It appears then that a family member of a young Australian citizen can be deported from Australia, provided that that child has not yet become so integrated into the Australian community that it would cause distress and hardship to the child if she or he were forced by circumstances to leave Australia.<sup>99</sup>

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<sup>95</sup> *Madafferi v Australia* (2004) UN Doc CCPR/C/81/D/1011/2001 [9.8].

<sup>96</sup> *Madafferi v Australia* (2004) UN Doc CCPR/C/81/D/1011/2001 [9.8].

<sup>97</sup> Peter Prince (2003), n 86, 13.

<sup>98</sup> in the case that inspired the introduction of the 10-year rule, Brennan J said that it is not the law that 'the mere fact that prohibited immigrants have a child born to them in Australia entitles them to permanent residence in Australia': *Kioa v West* (1985) 159 CLR 550, 604 (Brennan J), quoted in Peter Prince (2003), n 86, 11.

<sup>99</sup> see also Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: cases, materials & commentary* (2004, 2<sup>nd</sup> ed) [20.24]-[20.25].

90. This analysis undermines the justification for the ten-year rule, which was the legislative solution to the moral panic of 1986. Premised on a flawed view of human rights and immigration law, the only thing that the 10 year rule achieves is removing the right to automatic citizenship from Australian-born subjects of the Queen of Australia. It is best to leave it to the Minister (at first instance) and the courts (for review), on a case by case basis, to determine if the non-citizen parent of an Australian-born child can be deported according to the *Madafferri* principle. In other words, there is no reason to maintain the 10 year rule to the citizenship law. Australia should return to the long-standing common law tradition of *jus soli*.

**Now that the moral panic of 1986 is over, section 12(1) of the Bill should be redrafted to reflect the common law principle of *jus soli*, thereby affording citizenship to everyone born in Australia, subject to the three recognised common law exceptions.**

**Alternatively, if the waiting period is to be maintained, then two changes should be made to the Bill to bring it into line with international human rights law and to protect the rights of all children born in Australia:**

**First, Australian-born children with non-citizen parents should be able to apply to the Minister for conferral of Australian citizenship prior to the expiration of the waiting period. The Minister should be required to grant the application if the child is sufficiently integrated into the Australian community.**

**Second, the waiting period should be reduced to reflect the fact that children will be socially integrated into the community long before they are 10 years of age. Two possibilities are the age of compulsory schooling (6) or the first day of a child's compulsory attendance at Kindergarten.**

### **4.3 English proficiency test should be removed**

91. While international law does not prescribe how a country should define citizenship,<sup>100</sup> discrimination on the grounds of language is prohibited under articles 2, 25 and 26 of the *International Covenant of Civil and Political Rights*. However, differential treatment is permitted where criteria are reasonable and objective and the aim is to achieve a legitimate purpose.<sup>101</sup>

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<sup>100</sup> see *Singh v Cth* (2004) 209 ALR 355, [257] (Kirby J).

<sup>101</sup> UN Human Rights Committee, *General Comment 18 (non-discrimination)*, 10 November 1989, [13], <<http://www.ohchr.org/english/bodies/hrc/comments.htm>>.

92. CCL recommends that the English proficiency test be removed from the Bill because it is not reasonable to expect every Australian to speak English. There are many reasons why a person might not be able to learn English. The ACC acknowledges that older people might find it more difficult to learn a new language and that humanitarian entrants might find it difficult to learn a new language if they are suffering from torture and trauma.<sup>102</sup>
93. Nor is it reasonable to assume that only English-speaking citizens can make a contribution to the community. Non-English speaking residents and citizens can quite effectively, for example, raise families, work, volunteer their time to help others and remain informed through the non-English speaking media.
94. It makes no sense to maintain that a person cannot be Australian if they do not speak English. It makes no sense because there are, for example, Indigenous Australians who do not speak English.
95. In its 2002 report, the ACC concluded that:<sup>103</sup>
- it is the desire to be 'Australian' that underlies Australian Citizenship and that, while English is one indication of how one can be Australian, it is not the only one.
96. Furthermore, like the ACC,<sup>104</sup> CCL believes that non-English speaking citizens and residents should be encouraged to take advantage of the free-of-charge Adult Migrant English Program. But this should never be compulsory or a pre-requisite to citizenship.

**Subsection 21(2)(e) should be removed from the Bill. The language proficiency test discriminates against people who are unable or unwilling to learn English, but who nevertheless wish to be citizens and who can contribute to the Australian community.**

#### **4.4 deprivation of citizenship for criminal convictions**

97. The Bill grants the Minister the discretion, under certain circumstances, to revoke the citizenship of citizens who were born overseas.<sup>105</sup>

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<sup>102</sup> Australian Citizenship Council (2002), n 53, 51.

<sup>103</sup> Australian Citizenship Council (2002), n 53, 51.

<sup>104</sup> Australian Citizenship Council (2002), n 53, 51.

<sup>105</sup> Citizenship Bill 2005 (Cth) s.34.

98. The Bill authorises the Minister to revoke the citizenship conferred on a person who has subsequently been convicted and sentenced to more than 12 months for an offence committed *before* the conferral of their citizenship.<sup>106</sup> The offence and trial may have occurred in a foreign country. This could lead to grave injustices. For example, the Minister could revoke the citizenship of a person convicted under foreign anti-gay or abortion laws. When it comes to a civil rights issue as serious as citizenship, Parliament should not rely on the discretion of the Minister to ensure that such injustices will not occur.

**Subsection 34(2)(b)(ii) should be removed completely because it could lead to grave injustices, for example if a citizen is convicted of an offence that is not even an offence in Australia.**

**Alternatively subsection 34(5) should be redrafted to ensure that it applies to only the most serious sentences of 20 years or more and that the offence is also an offence treated with similar gravity in Australia.**

99. For the purposes of the Bill, a 'conviction' includes a sentence dismissing or discharging the guilty offender.<sup>107</sup> Sentences such as this are only handed down in trivial or exceptional circumstances.<sup>108</sup> The effect is that no conviction is recorded on the offender's criminal record.

**Subsection 34(9) should be removed from the Bill because it is disproportionate in the extreme to permit the Minister to deprive a citizen of citizenship for an offence of fraud considered trivial by a court of law.**

## 4.5 dual citizen enemy combatants

100. Section 35 of the Bill replicates existing law.<sup>109</sup> It should be noted that the exercise of this provision is automatic and could never render a person stateless because it only applies to an Australian who is also a 'citizen of a foreign country'.

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<sup>106</sup> Citizenship Bill 2005 (Cth) s.34(2)(b)(ii); s21(1)(a)(ii). This ground of deprivation was added in 1984: *Australian Citizenship Amendment Act 1984* (Cth).

<sup>107</sup> Citizenship Bill 2005 (Cth) s 34(9); *Australian Citizenship Act 1948* (Cth) s.11(2). This definition was added in 1984: *Australian Citizenship Amendment Act 1984* (Cth).

<sup>108</sup> e.g. *Crimes Act 1914* (Cth) s.19B(1)(b); *Crimes (Sentencing Procedure) Act 1999* (NSW) s.10(3). See also: Australian Law Reform Commission, *Sentencing of Federal Offenders: Issues Paper* (January 2005) IP 29, [7.58]-[7.66].

<sup>109</sup> *Australian Citizenship Act 1948* (Cth) s.19.

## 4.6 constitutional reform: all dual citizens are aliens?

101. This Bill fails to address the important issues arising out of the recent series of 'alien power' cases from the High Court. The central problem being that a person can be both a *statutory* citizen and a *constitutional* alien.<sup>110</sup>
102. In the case of *Singh*, the lead judgment stated that an alien is simply a person who owes allegiance to a foreign power.<sup>111</sup> This has serious implications for citizens who have dual citizenship. In essence, it means that any dual citizen is liable to deportation under the *Migration Act*.<sup>112</sup> This would also, presumably, apply to citizens by birth and descent, as well as by conferral.
103. Ultimately, the solution is a constitutional one and beyond the reference of the present Inquiry. It may be that a constitutional definition of citizen is needed, as exists in the United States.<sup>113</sup>

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<sup>110</sup> Peter Prince, *Mate! Citizens, aliens and 'real Australian' – the High Court and the case of Amos Ame*, Parliamentary Library Research Brief (27 October 2005) no.4 2005-06, 2. See also: *Singh v Cth* (2004) 209 ALR 355, [309] (Callinan J).

<sup>111</sup> *Singh v Cth* (2004) 209 ALR 355, [205] (Gummow, Hayne & Heydon JJ).

<sup>112</sup> see Peter Prince (2005), n 110, 12. See also Bills Digest, Australian Citizenship Bill 2005 (Cth), 7 December 2005, Parliamentary Library nos.72-73 2005-06, 21.

<sup>113</sup> see n 90.