

## CHAPTER 5

# Refining Australian Citizenship Law and Policy



### The Current and Future Environment

In the early part of this report, the Council has focused on how the broader concept of citizenship could bring Australians closer together. In this and the next chapter, the Council considers what changes might be necessary to the law and policy relating to the legal status of Citizenship to serve Australia and Australians in concert with this broader concept.

As the Council has noted, Australian Citizenship law, as it has evolved from the last half century, has served Australia well, particularly in relation to the provisions for acquiring Citizenship by migrants coming to Australia as part of a planned migration and humanitarian program.

Although the trend to greater global interconnections and the emergence of transnational entities, such as the European Union, raise new dimensions to citizenship issues, the breakdown of a number of larger nation-states and the emergence of many new ones (with crucial Citizenship consequences for the people affected) has reinforced the continuing importance of the legal status of Citizenship and the need for good public policy in this area.

In terms of recent international debate on citizenship issues, the Council is aware that fundamental aspects of Citizenship law have been, and continue to be, the subject of discussion. For example, the European Convention on Nationality, developed by the Council of Europe and opened for signature in November 1997, sets out key principles and rules applying to nationality for participating European countries. It is noteworthy that these principles, which focus on prevention of statelessness, non-discrimination (including on the basis of sex, religion, race, colour, national or ethnic origin), and respect for the rights of persons habitually resident in the territories concerned, are already reflected in Australian Citizenship law.

Although there are some trends in Australia and internationally which give cause for reflection, the Council considers that the fundamentals of Australian Citizenship law are correct and the emphasis should be on continuity rather than change in this area.

In particular, Australian Citizenship law is likely for the foreseeable future to have to continue its central role as the basis of including migrants and humanitarian entrants as full participants in a multicultural Australian society. Although immigration intakes may fluctuate, Australia is

likely to be committed to a continuing significant migration and humanitarian program with a continued wide diversity of sources. In this multicultural society, the legal status of Australian Citizenship will continue to be of central importance as a unifying symbol along with the civic values discussed earlier.

This continuing priority was broadly recognised in submissions which, in general, supported a continuation of the approach of facilitating the acquisition of Australian Citizenship by new migrants to Australia.

Accordingly, the Council **recommends** that the overall inclusive and non-discriminatory approach to Australian Citizenship, that is characterised in current Australian Citizenship law, of welcoming, without undue barriers, migrants and humanitarian entrants who come to Australia as part of the planned migration and humanitarian program, continue to be accepted by governments as the basis for future Australian Citizenship policy and law. In this sense Australian Citizenship law is likely to continue to develop in parallel with other migrant receiving countries, such as Canada, the United States and New Zealand.

One area of change which has implications for Australian Citizenship has been the increasing mobility of the Australian population which is taking place in the context of greater movements of people around the world.

The total number of arrivals to Australia (from all sources, including travelling Australians) increased from some 94,000 in 1947/48 to

over 7.8 million in 1998/99 and, over the same period, the total number of departures from Australia grew from 65,000 to over 7.6 million. In 1998/99, some 83,000 Australian residents left Australia on a long term basis (12 months or more) and some 35,000 Australian residents left Australia permanently, of whom nearly half were Australian-born. The permanent emigration figure is the highest in twenty-six years and reflects increasing internationalisation of labour markets and greater overseas opportunities for Australians in fields such as business and education.

Internationally, these kinds of movements of people have led many comparable countries to change their laws, no longer stripping Citizenship from their internationally mobile citizens who move to another country and take up Citizenship there. This issue was the most frequently raised matter in submissions to the Council as a problem in Australian Citizenship law and an area where a vast majority of submissions argued for change.

The Council examines the specific provisions of Australian Citizenship law in detail below, taking into account material presented in submissions, and makes suggestions for refinement where that seems necessary.

## Acquiring Australian Citizenship

Central to the policy of acquisition of Australian Citizenship is that access to Citizenship should flow from close connections to Australia.

This connection can be demonstrated in a number of ways: by birth in Australia to an Australian Citizen or permanent resident

parent; by adoption in Australia by an Australian Citizen parent; by birth outside Australia to an Australian Citizen parent who has a close association with Australia; by living in Australia as a legal permanent resident for a particular period of time; or demonstrating a close connection as a former Australian Citizen.

Acquisition of Australian Citizenship flowing from these different types of connections is discussed below. Where applicable, the Council has set out the policy rationale for the current provisions, outlined pertinent views from public submissions, highlighted any difficulty with a particular provision and included Council views and a recommendation.

### **Acquiring Citizenship – (1) By birth**

Australian Citizenship legislation provides for a child born in Australia to an Australian Citizen or Australian permanent resident parent to become an Australian Citizen automatically at birth.

Before 1986, with some exceptions, all children born in Australia became Australian Citizens at birth. In 1986, the *Australian Citizenship Act 1948* (the Act) was amended so that a child born in Australia only acquires Australian Citizenship if at least one parent is either an Australian Citizen or an Australian permanent resident. From 1 September 1994, the children of New Zealand Citizens born in Australia, except for the children of diplomats or other officials, also become Australian Citizens at birth.

If neither parent is an Australian Citizen or permanent resident, Citizenship legislation enables the child to become an Australian Citizen by birth on his or her tenth birthday if she or he was born on or after 20 August 1986 and has been ordinarily resident in Australia for ten years (section 10(2)(b) of the Act). This provision is outlined in more detail below.

The Council considers that the current policy and law in relation to Citizenship by birth strikes the correct balance. In particular, in an international environment where population movements are increasing exponentially, and where Australia is seen by many as a desirable destination, it would be inappropriate to allow migration laws to be circumvented through the acquisition of Australian Citizenship status by children born in Australia to temporary or illegal entrants. Such an approach would compromise Australia's migration program as well as being inequitable to the many thousands of people who apply to migrate to Australia every year through the proper channels.

The Council notes that this approach is accompanied by a 'safety-net' which prevents children from becoming stateless (section 23D of the Act). This section complies with the International Convention on the Reduction of Statelessness and provides that if a child does not have access to another nationality they may become an Australian Citizen.

A very small number of submissions raised issues relating to Citizenship by birth and these were supportive of maintaining the current provisions.

### Section 10(2)(b)

As noted in preceding paragraphs, this section provides that children, who did not become Citizens when they were born in Australia, but have been ordinarily resident in Australia for ten years since their birth, automatically acquire Australian Citizenship on their tenth birthday.

The intention is to ensure that young children who have only known Australia as their home country in their first ten years are able to become Australian Citizens.

Acquiring Citizenship under this provision occurs by operation of law. As a result the Department of Immigration and Multicultural Affairs is not aware of who has obtained Citizenship in this way, unless an application for a Declaratory Certificate of Australian Citizenship is lodged. Current anecdotal evidence suggests that several hundred children have obtained Citizenship under section 10(2)(b) since 1986.

It is true that the provisions of section 10(2)(b) have some potential to open an avenue of abuse, if, for example, parents seek to have a child born in Australia and then leave the child in Australia for ten years solely to gain Australian Citizenship and sponsorship rights. The Council understands that there is no strong evidence of abuse of this provision occurring at the moment.

The Council **recommends** that the current provisions relating to the acquisition of Australian Citizenship by birth remain unchanged, but that the Government monitor

the use of section 10(2)(b) and take appropriate action to tighten this provision if evidence of abuse emerges.

### Acquiring Citizenship – (2) By adoption

From 22 November 1984 a non-Citizen child adopted in Australia becomes a Citizen automatically under section 10A of the *Australian Citizenship Act 1948* (the Act) if the child:

- is present in Australia as a permanent resident at the time of adoption; and
- is legally adopted in Australia by an Australian Citizen parent or parents. This includes children adopted overseas who are later fully and legally adopted in Australia.

Section 13(9) of the Act provides a broad discretion to grant Australian Citizenship to children and this provision may be used for children adopted by Australian Citizens living overseas. Policy requires that the parents have lived overseas for more than one year and that they have acquired full and permanent parental rights by the child's adoption.

The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (the Convention) was ratified by Australia on 1 December 1998. The Convention has now been ratified by 34 countries.

The processing of adoptions under a bilateral agreement between Australia and The People's Republic of China (PRC) is expected to commence in 2000. The procedures for

Australian Citizenship for children adopted under this agreement will be the same as for those children adopted under the Convention.

Australia's obligation under the Convention is to provide for recognition of an adoption which takes place under the Convention and to accord the same rights to the child as would be accorded to a child adopted in Australia. The *Family Law Act 1975* was amended in 1998 to provide for the automatic recognition of adoptions made in accordance with the requirements of the Convention or the adoption agreement with the PRC.

At the moment, parents of a child adopted overseas under the Convention may apply for Citizenship on the child's behalf under streamlined procedures. In contrast, a child adopted in Australia automatically acquires Citizenship. However, automatic Citizenship for a child adopted overseas may not always be appropriate as the child may lose Citizenship of their country of birth and/or residence.

No submissions raised issues relating to Citizenship by adoption.

The Council notes that the Department of Immigration and Multicultural Affairs is currently considering what changes to Australian Citizenship law, policy and procedures may be required to ensure that Australia meets its obligations under the Convention.

### **Acquiring Citizenship – (3) By descent**

Australian Citizen parents living overseas are able to register their children born overseas so that they become Australian Citizens.

Section 10B of the *Australian Citizenship Act 1948* (the Act) sets out the rules for such registrations. About 8000 to 9000 children are registered by their parents in this way each year.

Section 10B provides that a child not born in Australia can acquire Australian Citizenship by descent if an application for registration is made by their parents before they turn 18 years of age (parents who obtained Australian Citizenship by descent must have spent an aggregate of two years in Australia before being able to register their children for Australian Citizenship by descent under section 10B).

Section 10C was introduced to provide further opportunities for some people who were previously eligible for registration but had not been registered as Australian Citizens by descent before they turned 18 years of age. It allows persons who were over the age of 18 on the day on which the provision was introduced, that is, 15 January 1992, to register as Australian Citizens by descent.

Accordingly, people who were born between 26 January 1949 and 15 January 1974 can be registered if they can demonstrate that they have an acceptable reason for not having been registered before turning 18 years of age. Those born after 15 January 1974 who were not registered for Australian Citizenship by their 18th birthday are not covered by the provision.

The Report of the Joint Standing Committee on Migration titled *'Australians All – Enhancing Australian Citizenship'* (September 1994) recommended that the time limitation in

section 10C(4)(c)(ii) of the Act be removed, allowing registration of Australian Citizenship by descent for people who reached 18 years of age after 15 January 1992.

The Council was conscious that the removal of the time limitation would considerably widen the operation of this provision — in fact, make it open-ended. By doing this, it is possible that several generations of Australian Citizens could live overseas without any real or tangible connection or association with Australia, yet in turn claim Australian Citizenship by descent for their children.

At the same time, there are sound social and economic reasons to enable Australians to participate more widely in the international community, often to Australia's national advantage. It is now a fact that many people who are proud to call themselves Australian live overseas, sometimes for considerable periods at a time. In many cases, their children are raised to be proud of their Australian heritage, even though they have not necessarily lived in Australia for extensive periods.

In balancing these two opposing considerations, the Council believes that the core issue is to determine the amount of time that a person living overseas should have within which to register to become an Australian Citizen. Or, in other words, at what point should a person eligible to acquire Australian Citizenship by descent cease to have access to this entitlement?

The Council is conscious that not all Australians living overseas are aware of the

time limitations within which overseas-born children must be registered to obtain Australian Citizenship by descent. As a consequence, those children pay a high price in relation to their parent's lack of knowledge or inaction.

Accordingly, the Council considers that young people should have an adequate period after reaching their majority to be able to decide for themselves whether they wish to apply for Australian Citizenship by descent. Extension of the age limit from 18 to 25 years appears reasonable. The Council believes that this approach further enhances the value of Australian Citizenship without undermining the fundamental approach of having a close association to Australia. In practical terms, it provides greater latitude for both parents and their children, including allowing an adult, who was not registered as a child, to take responsibility for registering as an Australian Citizen by descent. The establishment of an age threshold also serves to maintain the integrity of Australian Citizenship.

Accordingly, the Council **recommends** that the current provision of the *Australian Citizenship Act 1948* which specifies that children born overseas must be registered as Australian Citizens by descent before they turn 18 years of age be extended to enable registration before a child turns 25 years of age.

#### **Acquiring Citizenship (4) By grant**

The requirements for grant of Australian Citizenship are set out in section 13 of the *Australian Citizenship Act 1948*. Generally,

a person is eligible to be granted Australian Citizenship when they have been present in Australia as a permanent resident for a total of two years in the previous five, including at least one year in the two years before lodging their application. While there are some exceptions, people seeking Australian Citizenship in their own right must also:

- be at least 18 years of age;
- be capable of understanding the nature of their Citizenship application;
- be of good character;
- possess a basic knowledge of the English language;
- have an adequate knowledge of the responsibilities and privileges of Australian Citizenship; and,
- be likely to reside permanently in Australia or maintain a close and continuous association with Australia.

The numbers of applications for grant of Australian Citizenship fluctuate from year to year, largely driven by the size of the migration program in preceding years and the size of the broader pool of eligible non-Citizens within the community.

A total of 70,205 applications for grant of Australian Citizenship was lodged in 1998/99 compared with 89,111 in 1997/98 and 109,631 in 1996/97. This represents a 21 per cent decrease compared to 1997/98 and a 36 per cent decrease from the year before. The decline is a result of the reduction in the number of migrants and humanitarian entrants

to Australia under the migration and humanitarian program in recent years and the decrease in the total pool of eligible non-Citizens in Australia since the early 1990s. There were 76,474 conferrals of Australian Citizenship in 1998/99 compared with 112,343 in 1997/98.

It is desirable that non-Citizens be encouraged to make a commitment to Australia and its people by acquiring Australian Citizenship as soon as they are eligible. The Council believes that this decision is significant and should be taken voluntarily and with knowledge of the responsibilities and privileges that go with Citizenship.

### *Residence requirements*

As outlined above, the residence requirements for grant of Australian Citizenship are that a person has been present in Australia as a permanent resident for a total of two years in the previous five, including at least one year in the two years before lodgement of application. This timeframe flows from an underlying Citizenship policy of inclusiveness and a close connection to Australia. It also reflects a desire by successive governments to provide an opportunity for eligible non-Citizens to become Australian Citizens as soon as possible after settling in Australia. It is considered that, in general, two years would allow a person to familiarise themselves with Australia, its language and institutions, and to fully understand the responsibilities and privileges which acquisition of Australian Citizenship bestows.

Residence requirements for Australian Citizenship have progressively eased over the last fifty years. Initially the residence requirement was permanent residence in Australia for five years during the eight years preceding the date of application. However, the Minister had a discretion to approve British subjects and Irish citizens as a matter of course after one year. No such discretion was available, however, to those who were not British subjects or Irish citizens. (At that time non-British subjects were referred to as aliens.)

In 1969 the residence requirement for aliens who could read and write English was reduced from five years to three. In 1973, discrimination in respect of the residence requirement between British subjects and aliens was removed, and the residence requirements became three years for both. Finally, in 1984, the minimum residence qualifying period was reduced from three years to two.

In examining the adequacy of the residence requirements, the Council also considered the residence requirements of a number of countries, including those with high migration such as the United States and Canada. In comparison with international practice, the Australian residence requirements for the acquisition of Australian Citizenship at first sight appear shorter. In practice, the differential is less when requirements relating to actual presence in the country are taken into account. The USA, for example, requires at least five years permanent residence immediately before application. However, the

applicant is only required to be physically present in the USA for half of the five years. Canada has a three-year residence requirement, but with no requirement to be physically present in Canada. (Legislation tabled in the House of Commons in November 1999 requires applicants to be physically present in Canada for three years out of the six years before application.) A table outlining the Citizenship residence requirements of a number of countries is at Appendix 5.

The residence qualifying period was specifically raised in the Council's Issues Paper as a matter for comment.

Some submissions that addressed this issue argue that the residence qualifying period for Australian Citizenship should be increased and that this would make Australian Citizenship more meaningful. It was asserted that residence in Australia for two out of the preceding five years is not sufficient to become properly acquainted with Australian culture, language and people. Some note that most other countries have longer residence requirements than Australia. Suggestions for a more appropriate residence qualifying period range from three years continuous residence in Australia to ten years or longer.

Other submissions noted that the key issue is the length of time it takes for a migrant to come to terms with living in a new country.

A few submissions argued that the residence requirements should be reduced, largely on the basis that it is contrary to the principles of natural justice for permanent residents to pay

taxes without being able to vote. It is also argued that this would have the effect of allowing migrants to participate fully in Australian society by becoming Australian Citizens very soon after they arrive.

Other submissions that addressed this issue argue that the current residence requirements should be retained.

The Council was not attracted to making the current requirements stricter as it believes that a two-year time span is an appropriate period for an eligible permanent resident to consider and prepare for assuming the responsibilities and privileges of Australian Citizenship.

The existing length of residence provisions have now been in operation since 1984 and appear to have worked satisfactorily over the past 15 years. The Council is not aware of any objective evidence that would suggest a need for an increase in the period nor any obvious beneficial effects that would flow from delaying full participation of migrants in Australian society for a longer period.

On the contrary, the Council considers that this would simply work against Australia's commitment to migration and to empowering its residents to become fully participating members of the Australian community. Moreover, lengthening the residence qualifying period after a 50-year trend of shortening it would send a negative message to migrants about the Government's and the Australian community's desire for them to become Australian Citizens.

Equally, the Council was not persuaded by arguments for a shorter residence qualifying period. Australia's period remains short by world standards but is a reasonable period to wait before the step of Australian Citizenship is taken.

The Council **recommends** that the current residence requirements for acquisition of Australian Citizenship be retained.

### *Discretionary provisions relating to residence requirements*

Where a Citizenship applicant does not satisfy the two years in five residence requirements, there is scope in certain circumstances to exercise discretion to count other periods of time towards meeting these requirements. For example, where an applicant for grant of Citizenship:

- can demonstrate that activities engaged in during periods of time spent outside Australia as a permanent resident were beneficial to the interests of Australia — section 13(4)(b)(i);
- was in Australia as a permanent resident before the five years immediately preceding the application for Citizenship — section 13(4)(b)(ii);
- was ordinarily resident for periods of time in Papua or New Guinea between 1975 and 1978 — section 13(4)(b)(iii);
- has periods of temporary residence in Australia and can demonstrate that they would experience significant hardship or disadvantage if not granted Citizenship — section 13(4)(b)(iv);

- was previously a temporary resident but should have been a permanent resident and was not, owing to an administrative error — section 13(4)(b)(v).

The number of people granted Australian Citizenship under these discretionary provisions was 359 in 1996/97 (out of 405 applications) and 347 in 1997/98 (out of 429 applications).

The Council understands that there are no concerns with the operation of sections 13(4)(b)(ii), (iv) and (v). However discussion follows on sections 13(4)(b)(i) and (iii).

The section 13(4)(b)(iii) discretion allows the counting of periods of residence in Papua or New Guinea prior to 16 September 1978 towards the ‘two years in five’ residence requirement. An applicant must have been an Australian permanent resident before 16 September 1975 and have remained one. In addition, as a matter of policy, applicants are normally required to show that they would suffer significant hardship or disadvantage if not granted Australian Citizenship. This was a transitional provision and is no longer used.

The section 13(4)(b)(i) discretion is the residence discretion that is most widely used. Where an applicant does not meet the residence requirement of two years physical presence in Australia, it provides for time, where the applicant is overseas and is engaged in activities which the Minister considers beneficial to the interests of Australia, to be counted towards the meeting of these requirements.

The provision was introduced on 22 November 1984 and was aimed at those applicants who identified primarily with Australia but who for work reasons were required to travel and/or reside overseas.

Ministerial guidelines required that to access the concession the applicant must have travelled overseas and be engaged in activities overseas that are beneficial to Australia. In addition, the applicant was required to have established a connection with Australia: a ‘prior primary identification’ with Australia.

However, the Council understands that the legality of the policy guidelines has been questioned by the Administrative Appeals Tribunal, in particular, the concept of a ‘prior primary identification with Australia’ and consequently, it is now not possible to require the applicant to meet this criterion.

Whilst no submissions raised the issue of these five residence discretions, section 13(4)(b)(i) has been raised in other contexts as an area of potential abuse. It has been claimed that many applicants spend a relatively short period of time in Australia before returning to reside in their homeland to establish commercial enterprises or to continue working in an enterprise in which they were involved before migrating to Australia. This could be seen to be in contravention of the notion of Australian Citizenship flowing from close connections to Australia.

However, it is also recognised that the international mobility of people, including Australians and those who aspire to Australian

Citizenship, is a phenomenon of the latter part of the twentieth century and will no doubt increase as we move into the twenty-first century. It could also be argued that with increasing globalisation, there are deserving cases of people who are engaged in activities beneficial to Australia who are unable to meet the residence requirements and for various reasons cannot demonstrate a prior identification with Australia.

Therefore legislative change to amend section 13(4)(b)(i) to include the requirement for a 'prior identification' with Australia may not be warranted at this time.

The Council **recommends** that the residence discretions be retained without change other than section 13(4)(b)(iii) relating to residence in Papua New Guinea which should be repealed as it is no longer used.

The Council also **recommends** that the Government carefully monitor all residence discretions and take appropriate action to tighten the provisions should a trend of abuse emerge.

### *Concessions relating to the residence requirements*

The *Australian Citizenship Act 1948* allows concessions in relation to the residence requirement. They are as follows:

- where a person has served in the permanent Defence Forces of Australia for at least three months, or been medically discharged prior to three months, there are no residence requirements (see discussion below); and

- if a person was born in Australia or was a former Australian Citizen the residence requirement is one year's presence in Australia as a permanent resident in the two-year period immediately prior to lodgement of the application. There are no identified difficulties with this provision.

### *Residence concessions for the Australian Defence Forces*

In recognition of a commitment to Australia, under section 13(3) of the *Australian Citizenship Act 1948*, the usual residence requirements do not apply where an applicant has completed not less than three months relevant defence service in the Australian Defence Force. Relevant service is defined as service in the permanent forces.

The Council notes that the Joint Standing Committee on Migration Report of 1994 reported that the concession under section 13(3) did not recognise the service of these members of the reserve forces sometimes required to be employed on a full-time basis but who are not classed as serving in the permanent forces of Australia. The JSCM Report recommended that this anomaly be rectified and the concession extended to include full-time members of the reserve forces.

For at least the last ten years, a person wishing to enlist in Australia's reserve forces has been required to be an Australian Citizen. However, it is recognised that this has not always been the case. The Council supports the recommendation of the JSCM in the case of previous members of the reserve forces who

are not Australian Citizens and who were employed on a full-time basis and completed not less than six months service.

The Council **recommends** that the existing residence concession for people who have completed not less than three months relevant service in the Australian Defence Force be retained and extended to include persons who previously completed six months service as full-time serving members of Australia's reserve forces.

### *Other discretions*

The *Australian Citizenship Act 1948* (the Act) provides a broad discretion to grant Australian Citizenship to spouses and children (section 13(9)). The discretion extends to:

- a child under 18 years of age, or a child who applied for Australian Citizenship before attaining 18 years of age; and
- a permanent resident who is the spouse, widow or widower of an Australian Citizen.

The provision relating to children is usually used for overseas adoptions, for children who take out Australian Citizenship with their parents but who wish to have their own Citizenship certificate (currently a fee is payable) and for children who are 16 or 17 years of age. (Under section 13(10) of the Act, only children under 16 years of age can be included on their parent's certificate.)

This broad discretion also provides a 'safety net' for children who would not otherwise be able to access Australian Citizenship. There are no identified difficulties with this provision.

The number of applications requesting grant of Australian Citizenship to children under 18 years of age under discretionary provisions was 1163 in 1996/97 and 1092 in 1997/98. Of these 1150 applications were approved in 1996/97 and 1085 in 1997/98.

As a matter of policy, a spouse, widow or widower is normally required to have been continuously present in Australia as a permanent resident for one year and is required to show that they would suffer significant hardship or disadvantage if not granted Citizenship. There are no identified difficulties with this provision.

The number of applications requesting grant of Australian Citizenship to spouses under discretionary provisions totalled 2335 in 1996/97 and 2448 in 1997/98. Of these 2309 applications were approved in 1996/97 and 2408 in 1997/98.

The Council **recommends** that the current provisions of the *Australian Citizenship Act 1948* providing a discretion to grant Australian Citizenship to a child under the age of 18 be retained.

The Council **recommends** that the current provisions in the *Australian Citizenship Act 1948* providing a discretion to grant Australian Citizenship to a permanent resident spouse, widow or widower of an Australian Citizen be retained.

### *Knowledge of English*

At present, applicants for Australian citizenship must have a 'basic' knowledge of the English

language unless the applicant is over 50 years of age.

This requirement is assessed at the Citizenship interview. Under policy guidelines, the requirements may be satisfied if a person is able to respond in simple English to questions about personal particulars and factual questions on the responsibilities and privileges of Australian Citizenship. There is a power to defer consideration of an application for Citizenship for up to one year if it is likely that the applicant will meet the requirements for Citizenship, with the exception of the residence requirements, after a period of time. An average of some 470 applications are deferred each year to allow applicants to improve their proficiency in the English language.

The level of English required for people acquiring Australian Citizenship is an issue which the Council raised in its Issues Paper for public comment and it was addressed in a number of submissions. Many submissions addressing the issue stated that the existing requirements should be retained. However, there were other views.

One view expressed in submissions is that a lower English language requirement is justified on the grounds of inclusiveness. Some believe that Australian Citizenship should not be denied to individuals who have been accepted as permanent residents of Australia, have lived here in some cases for many years, paid taxes, and have in many cases made a real contribution to the Australian community.

An alternative view in some submissions was that if Australian Citizenship is to heavily focus on civic participation, then a 'basic' English language requirement is not sufficient.

The Council noted that, while English proficiency gives a clear advantage, higher levels of English attainment would not necessarily guarantee greater civic and community participation. Participation is often a matter of personal choice. In addition, proficiency in the English language is not always essential in order to have a knowledge of contemporary Australian issues and politics given the vibrant and informed ethnic language media in Australia and information that can be obtained through family and friends.

Whilst there is a stronger focus than in the past on English language proficiency in the Migration Program, this was not always the case and there are still new migrants who, for various reasons, are not proficient in English. They should not be excluded from fully participating in community life.

It is acknowledged that older people may have greater difficulty in learning a new language. Humanitarian entrants may arrive in Australia having experienced torture and trauma, resulting in a diminished capacity to learn a new language. These people will, in all probability, spend the rest of their lives in Australia, often making their contribution by raising families here. They should not be denied the security and peace of mind guaranteed by Australian Citizenship because of difficulties they may have in learning English.

On balance, the Council rejected any increase in the English language requirement on the basis that everyone who has the will to be involved in the community should have the opportunity to do so — even with a basic level of English. Council members considered that 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.

The Council **recommends** that the existing ‘basic’ English language requirement for grant of Australian Citizenship in the *Australian Citizenship Act 1948* be retained as well as the current arrangements for testing this requirement at interview.

As mentioned in chapter 3 under *Citizenship course element for the AMEP*, the Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock MP, referred the matter of whether completion of a certain number of hours of English tuition or meeting a certain standard in the Adult Migrant Education Program (AMEP) by Citizenship applicants would enable them to meet the English language requirement for grant of Australian Citizenship without further testing.

The Council noted that non-English speaking migrants and refugees are entitled to receive up to 510 hours of English language training (in most cases free of charge) provided by the AMEP. It also understands that completion of 300 hours of English tuition or the Certificate in Spoken and Written English II (CSWE II) could be expected to result in English language competency levels that meet the ‘basic’ English

language requirement for grant of Australian Citizenship and that some 50 per cent of AMEP students have completed 300 hours of English tuition, or CSWE II, by the time they leave the program.

Accordingly, the Council **recommends** that completion of either 300 hours of AMEP English language tuition or the Certificate in Spoken and Written English II (CSWE II) be accepted for the purpose of satisfying the English language requirement for the grant of Australian Citizenship.

All prospective applicants for Citizenship would of course still have the option of satisfying the English language requirement orally during the Citizenship interview.

Acknowledging that English language skills are advantageous in relation to civic participation, the Council **recommends** that new migrants without functional English be actively encouraged to avail themselves of their opportunities under the Adult Migrant English Program in order to increase their opportunity to participate fully in the Australian community.

### ***Knowledge of the responsibilities and privileges of Australian Citizenship***

Applicants for Australian Citizenship, under the age of 60 years, are required to demonstrate at interview that they have an ‘adequate’ knowledge of the responsibilities and privileges of Australian Citizenship. This is tested at interview by asking an applicant to explain in basic English their understanding of the responsibilities and privileges of Australian

Citizenship and identify several of them. A list of the responsibilities and privileges is at Appendix 4.

Responsibilities and privileges of Australian Citizenship were raised in a number of submissions. Some believed that Australian Citizens should have more privileges and be able to access more government benefits than permanent residents, while others believed that permanent residents should have the same rights and responsibilities as Australian Citizens. However, none questioned the need for new Citizens to have a knowledge of the responsibilities and privileges attached to Citizenship.

As mentioned in chapter 3 under *Citizenship course element for the AMEP*, the Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock MP, referred the matter of whether meeting a certain standard in the Adult Migrant Education Program (AMEP) by citizenship applicants would enable them to meet the responsibilities and privileges requirement for grant of Australian Citizenship without further testing.

The Council understands that the Citizenship course element for inclusion in the AMEP curriculum will be a self-contained learning resource, with materials sufficient for about ten hours tuition. It will cover such topics as Australian history, Australian institutions and system of government, principles and values of contemporary Australian society, indigenous and reconciliation issues, legal definition and requirements for Australian Citizenship, including the responsibilities and privileges of

Australian Citizenship, and the Citizenship acquisition process.

The Council considers that, based on this depth of tuition, it would be appropriate for Citizenship applicants who have completed the Australian Citizenship course element of the AMEP to be accepted as having satisfied the 'responsibilities and privileges' requirement for grant of Australian Citizenship

Accordingly, the Council **recommends** that completion of the AMEP Citizenship course element be accepted for the purpose of satisfying the responsibilities and privileges requirement for grant of Australian Citizenship.

All prospective applicants for Citizenship can still, of course, satisfy the responsibilities and privileges requirement for grant of Australian Citizenship orally during the Citizenship interview.

The Council **recommends** arrangements for testing the responsibilities and privileges requirement for grant of Australian Citizenship at interview be retained.

### **Character requirements**

Successive Commonwealth Governments have all required through the *Australian Citizenship Act 1948* (the Act) that applicants for grant of Australian Citizenship be of good character. Good character is seen as being an essential requirement to being granted full membership of the Australian community.

The relevant provision in the Act is section 13(1)(f). There are also character-related prohibitions on grant of Australian Citizenship

under section 13(4)(a) and section 13(11) of the Act.

An applicant for grant of Australian Citizenship must satisfy the decision-maker that they are of 'good character' and is asked on the application form for information relating to their character. The Department of Immigration and Multicultural Affairs also undertakes criminal record checks.

Each applicant is assessed against 'good character' policy requirements. The fact that a person has a criminal record does not itself automatically preclude grant of Citizenship. Length of time since the offence, seriousness of the offence and the chance of recidivism are all matters that are taken into consideration. Although Citizenship can be refused on character grounds, it can be granted at a later date if a person can demonstrate that they have reformed and are now of good character.

The Council considered whether there is a need to strengthen the good character provisions to maintain the integrity of the Citizenship acquisition process.

Recently, the Administrative Appeals Tribunal (AAT) has placed considerable weight on the policy with regard to character — specifically the length of time since an offence. The current policy requires that a 'reasonable amount of time will need to have passed since the last crime was committed to establish a pattern of good behaviour'.

This means, for example, that if a person committed a crime in 1989, was sentenced in 1992 and released from their sentence in

1995, by 1999, ten years would have passed since they committed the crime but they would have been free of obligation to the Court for only four years.

It can be argued that little weight should be given to good behaviour whilst on parole or under any other obligation to the Court. It is an applicant's behaviour after such obligations cease which indicate their true character. The Council considered, therefore, that a 'reasonable time' should elapse since a person was free of obligation to the Court, not since they committed the crime.

The Council **recommends** that the policy in relation to 'good character' be amended to remove the requirement that a 'reasonable amount of time will need to have passed since the last crime was committed to establish a pattern of good behaviour'. Instead the policy should require the passage of a reasonable amount of time since a person is free of obligation to the Court in order to establish a pattern of good behaviour.

Section 13(11) of the Act, which precludes the Minister from granting Australian Citizenship on certain character grounds, was also considered by the Council which identified some areas as being worthy of consideration and perhaps strengthening.

Section 13(11)(c) provides that a person may not be granted Australian Citizenship during the two years following the expiration of a prison confinement where either the confinement was for a sentence of death commuted to a prison sentence or for life

imprisonment or for a period of not less than one year. At the same time the Council gave consideration to situations where a person was obliged to serve more than one prison sentence, indicating recidivism on the part of that person.

Given the gravity of an offence that would warrant such sentences, consideration was given to increasing the period within which to prohibit grant of Citizenship. On balance, the Council formed the view that the two-year period in which Citizenship cannot be granted following a single sentence of twelve months should not be extended. However, where a person has reoffended and been sentenced to two or more periods of imprisonment of more than twelve months each, the Council considers that the mandatory provisions of section 13(11) should be extended to provide that Citizenship cannot be granted within ten years of being free of obligation to the Court. The rationale being that 'one off' offenders be treated more leniently than those who continue to offend.

The Council **recommends** that section 13(11) of the *Australian Citizenship Act 1948* which prescribes prohibitions on grant of Australian Citizenship be extended to provide that where any person who has been sentenced to two or more periods of imprisonment, of twelve months or more, that person cannot be granted Citizenship within ten years of being free of obligation to the Court.

### **Fees**

The fee payable on application for grant of a certificate of Australian Citizenship is \$120.

The amount of the fee is determined on a fee for service basis. Children included on a parent's application are not required to pay a fee. There is also a concessional fee of \$20 and two classes of exemptions from fee payment exist.

The current fee represents a move to near-full cost recovery and reflects the Government's view that beneficiaries of services provided by government should, as far as possible, bear the cost of those services.

Several submissions addressed the issue of fees. One submission recommended the abolition of all Citizenship fees, arguing that 'the imposition of this fee diminishes the true spirit of Australia as an inclusive multicultural society'. Others sought exemptions or concessions for certain groups.

The Council considered whether fees should be abolished and was advised that the loss of revenue would be about \$9m per year. If the Council were to recommend that fees be abolished, there is no reason to believe that it would impact greatly on community perceptions about Australian Citizenship. As well, the Council was not convinced that imposition of a fee based on cost recovery is necessarily related to the spirit of Australia as a multicultural society.

The Council notes that fees for processing applications for the grant of Australian Citizenship are charged in comparable countries and are higher than those charged in Australia. Citizenship processing fees in New Zealand are \$NZ260 per person (around \$A200), in the USA they are US\$225 per person (around

\$A350) and in the UK they total £150 per person (around \$A380). On balance, the Council **recommends** that fees for applications for grant of Australian Citizenship (and other appropriate Citizenship applications) continue to be charged on a cost recovery basis with appropriate concessions and exemptions.

### *Concessional fee*

Applicants are eligible for a fee concession if they are recipients of, or partners of recipients of, certain pensions from Centrelink or the Department of Veterans' Affairs — an age pension, a mature age allowance, a disability pension, an age service pension or an invalidity service pension.

The Council believes that the current list of concessions may exclude persons who receive pensions and who should also receive a concession.

The Carers' Foundation of Australia lodged a submission with the Council on this matter requesting that carers also qualify for a concession on the basis that the majority of carers experience substantial financial pressures due to their inability to undertake paid work.

The Council **recommends** that the existing list of pensions which give rise to Citizenship fee concessions be kept under review to ensure that it reflects pensions and benefits for people suffering permanent financial disadvantage.

### *Fee exemptions*

Two categories of applicants are exempt from paying the fee:

- former British child migrants who arrived in Australia under the British Child Migrant Scheme between 22 September 1947 and 31 December 1967; and
- persons who have previously applied for Australian Citizenship and accordingly have paid their fee but were unsuccessful solely on the basis of not meeting the residence requirements and who reapply within three months after becoming eligible.

The Council supports the existing fee exemptions for former British child migrants and previous applicants for Australian Citizenship who did not meet the residence requirements and reapply within three months of becoming eligible and **recommends** that they continue.

### *War Veterans*

As previously mentioned, under section 13(3) of the *Australian Citizenship Act 1948*, the usual residence requirements do not apply to those who have completed not less than three months' relevant defence service in the Australian Defence Force.

Since 1981, Australian Defence Force policy has required persons enlisting in Australia's Regular Defence Force to be Australian Citizens unless there is a clear intention that they will take out Australian Citizenship shortly.

However prior to 1981, a number of people served in the Australian Defence Force, including during the Vietnam War, without being Australian Citizens.

Over the last year there have been several cases and some public discussion about whether the fact of having served in the Australian Defence Force, including having served overseas in a war zone, amounted to having applied for and received Australian Citizenship. It has been argued that the act of swearing allegiance to Her Majesty the Queen on entering the Australian Defence Force was in fact a Pledge of allegiance to Australia, and as such negates a need to undertake a separate Citizenship process.

The Council recognises the commitment of people who have served under the Australian flag in the Australian Defence Force. However, the Council believes that providing for automatic conferral of Citizenship on those who have served in the Australian Defence Force would not be appropriate because they may not all wish to become Australian Citizens. In particular, acquisition of Australian Citizenship in this manner could affect the person's existing Citizenship — in some cases, it would even lead to loss of that other Citizenship.

The Council also believes that all applicants for Australian Citizenship should undertake a deliberate act of making an application and taking the Pledge and that these requirements should apply equally to all, including those who have served in the Australian Defence Force. The Council considers that an appropriate concession, in addition to the existing residence concession, would be an exemption from the application fee.

The Council **recommends** that, in addition to the residence concession referred to previously,

no fee be payable in regard to an application for grant of Australian Citizenship if a person has served for a period of not less than three months in the Australian Defence Force.

### *Time limit between grant and conferral of Australian Citizenship*

Current legislation does not impose a time limit within which a person who has been approved for Australian Citizenship must take the Pledge of Commitment to become an Australian Citizen.

At the present time, there can be a considerable gap between the time a person is approved for the grant of Australian Citizenship and the time of the actual conferral (the time they become an Australian Citizen) which is usually conducted by a local council at a Citizenship ceremony. The JSCM Report (September 1994) recommended that a time limit of six months be imposed.

The Council is conscious that the longer the gap between when a person is approved for Australian Citizenship and when it is actually conferred, the greater the risk of problems emerging from what is in effect an open-ended offer of Citizenship. Sometimes people do not attend a ceremony and do not subsequently contact the Department of Immigration and Multicultural Affairs, leaving doubt as to whether they will take up Australian Citizenship. Occasionally, too, an applicant may commit and be convicted of a serious crime during that gap period, and it may not be desirable that the person be permitted to acquire Australian Citizenship.

One solution would be to prescribe a time limit within which conferral must occur. However, there are problems with setting an arbitrary time limit. For example, in some rural and remote areas Citizenship ceremonies may be conducted relatively infrequently. People who have been granted Australian Citizenship may, before the conferral ceremony, be unexpectedly required to go overseas for a substantial period of time. Again, there could be cases where, for other reasons beyond the applicant's control, they are unable within the specified period to have their Citizenship conferred, with the consequence that in due course they would need to reapply for Australian Citizenship and again pay the prescribed fee.

In balancing these arguments, the Council has concluded that it is reasonable to encourage people who have been approved for Australian Citizenship to have it conferred within twelve months. The Council also considers it desirable for the *Australian Citizenship Act 1948* to have a power to revoke the grant of Australian Citizenship between approval and conferral of Citizenship where it comes to the Department's attention after approval that requirements for grant of Citizenship are no longer met or were never met.

The Council **recommends** that the *Australian Citizenship Act 1948* be amended to provide a power to revoke the grant of a certificate of Australian Citizenship between approval and conferral in the following circumstances: where a person does not take the Australian Citizenship Pledge within twelve months of

being approved for Citizenship without an acceptable reason; where a person comes to the attention of the Department of Immigration and Multicultural Affairs, prior to conferral, as no longer satisfying the requirements of section 13 of the Act; and where it is subsequently discovered that a person did not meet the provisions for grant.

The Council also **recommends** that the *Australian Citizenship Act 1948* be amended to provide that if a person granted a Certificate of Australian Citizenship has been charged with, or, is under investigation for a crime or for cancellation of a visa, the Minister has a power to defer for up to 12 months the conferral of Australian Citizenship, to enable it to be established whether the requirements for grant of Australian Citizenship continue to be met.

### *Citizenship ceremonies*

Section 15 of the *Australian Citizenship Act 1948* requires, with limited exceptions, that applicants who have been approved for the grant of Australian Citizenship must make the Australian Citizenship Pledge in order to acquire Australian Citizenship. The grant of Australian Citizenship can be conferred by the Minister for Immigration and Multicultural Affairs, a judge of a Federal or State Court or a magistrate holding office under State law providing they are Australian Citizens, or certain Australian Citizens approved by the Minister as authorised to confer Australian Citizenship. Appropriate Local Government officials are approved by the Minister to confer Australian Citizenship.

### *Role of Local Government*

Since 1954 Local Government has been making a significant contribution to Australian Citizenship through the conferral of Citizenship at Citizenship ceremonies. Public Citizenship ceremonies have fulfilled an important symbolic role in the grant of Australian Citizenship by formally welcoming new Citizens from many cultures into the Australian community, with representation from the three spheres of government.

The acquisition of Australian Citizenship is a very important milestone in a person's life and has traditionally been regarded as an occasion for celebration. The Council acknowledges and appreciates the tremendous contribution that Local Government makes in conducting Citizenship ceremonies and marking this important milestone in the lives of new Citizens. The Council recognises that, with few exceptions, Local Government councils, both large and small, conduct ceremonies that are extremely meaningful for all concerned.

Current guidelines on conducting Citizenship ceremonies are contained in the handbook *Australian Citizenship Ceremonies – A Guide for Local Government*. The guidelines are produced by the Department of Immigration and Multicultural Affairs and have been developed with a view to promoting the conferral process as a ceremonial occasion and as a public affair. The Guide was revised and enhanced in consultation with the Australian Local Government Association and re-released in January 1998. It has been well received by Local Government.

In submissions to the Council, two Local Government councils raised the issue of direct funding of Local Government councils for the conduct of Citizenship ceremonies. One argued that increased funding would enable Local Government councils to 'further enhance the occasion for candidates by including other information and activities'. The other argued that councils need an adequate level of funding to allow them to promote and acknowledge the importance of Citizenship ceremonies. They point out that areas with higher migrant populations incur greater costs than those with lower migrant populations as there is more frequent demand for ceremonies.

At present, the Commonwealth Government provides funding to local governing bodies through States and Territories, in the form of general purpose grants. The objective of this assistance is to strengthen Local Government to enable it to provide a wider range of services and to promote equity between councils and certainty of funding.

The Council acknowledges that Local Government councils place high importance on their conduct of Citizenship ceremonies and that they wish to provide the best and most memorable occasion possible for new Australian Citizens. The Council recognises that, with few exceptions, there is a high level of achievement by Local Government councils within the existing arrangements, making ceremonies a special occasion and an event to be remembered. However, the Council is not convinced that direct funding for Citizenship ceremonies would necessarily enhance

ceremonies and make them more meaningful.

Recognising the positive effects of introducing new Citizens to their local community through Citizenship ceremonies conducted by Local Government councils, and the generally high level of achievement by Local Government councils in this area, the Council **recommends** that the conduct of public ceremonies by Local Government councils be the principal means of conferral of Australian Citizenship, but that no special arrangements for direct funding be introduced.

#### *Private conferral of Australian Citizenship*

At present all applicants are encouraged to participate in public ceremonies wherever possible. Whilst private ceremonies are available, they are not promoted and are provided in limited circumstances. Australian Citizenship is conferred on only a very small proportion of candidates in this way.

Local Government councils and the Department of Immigration and Multicultural Affairs also conduct private ceremonies where a candidate is seeking Citizenship urgently or when a private ceremony is specifically requested by the candidate who provides a valid reason why a public ceremony is not appropriate, such as where the candidate is aged or bedridden.

There is already anecdotal evidence that some migrants who have lived in Australia for many years and feel part of the Australian community do not wish to participate in Citizenship ceremonies. Some have suggested that this is particularly so for those of British

and New Zealand background. It is thought that some see the ceremony as not appropriate or relevant to them and that some people feel this so strongly that it prevents them from applying for Australian Citizenship.

Only three submissions to the Council addressed this issue, all suggesting that candidates be given the choice of attending a private or public function. One author, who has been in Australia for nearly 30 years and who has not taken out Australian Citizenship due to 'neglect and procrastination', now shies 'away from the thought of attending a public ceremony which fairly or otherwise has the image of inducting those who have recently arrived in the country'.

The Council considered whether to support the option of an informal, private conferral for applicants who have been resident in Australia for a lengthy period. The Council noted that while public ceremonies are the preferred option, private conferral is currently available in certain circumstances. The Council did not therefore see the need to change current practice.

The Council **recommends** that all applicants for Australian Citizenship be encouraged to participate in public ceremonies and that private ceremonies continue to be held only on a limited basis where appropriate.

#### *State/Territory Government involvement*

The Council also considered whether State/Territory Governments should be able to hold Citizenship ceremonies as this issue was

raised in one submission. It was recognised that there may be concern expressed by Local Governments on duplication of roles and confusion for Citizenship candidates as to who conducts ceremonies.

The Council **recommends** that current arrangements, which provide for State/Territory Government involvement in the conduct of Australian Citizenship ceremonies for special events, from time to time, are appropriate and sufficient at this time.

## Losing Australian Citizenship

### Losing Citizenship – (1) By acquiring another Citizenship

Section 17 of the *Australian Citizenship Act 1948* (the Act) provides that an Australian Citizen aged 18 or over who does ‘any act or thing, the sole or dominant purpose of which and the effect of which is to acquire the nationality or Citizenship of a foreign country shall... cease to be an Australian Citizen’.

A child who acquires another Citizenship in their own right will not lose Australian Citizenship under section 17 of the Act. However, under section 23 of the Act, if a child has a parent who loses Australian Citizenship under section 17 of the Act, the child will also lose her or his Australian Citizenship unless their other parent is an Australian Citizen or the loss would render them stateless.

This provision works by operation of law and therefore takes effect when the Australian Citizen acquires the new Citizenship, whether

or not she or he is aware of it. Around 600 cases of loss of Australian Citizenship come to the notice of the Department of Immigration and Multicultural Affairs (the Department) each year, often in the context of the individual applying for an Australian passport. In some cases, the Department may have to advise a person that she or he has ceased to be an Australian Citizen some years previously. Many of these notifications cause significant distress to the individuals concerned. Many cases of persons losing their Australian Citizenship do not come to official notice at all.

However, a great number of Australian Citizens do possess another Citizenship in addition to their Australian Citizenship including:

- Australian Citizens by grant who are able, under the law of their country of origin, to keep their previous Citizenship on obtaining Australian Citizenship;
- Australian Citizens born in Australia who automatically acquire, through a parent, another Citizenship by descent;
- Australian Citizens born overseas to an Australian Citizen parent who by the law of that country acquire that Citizenship by birth;
- Australian Citizens who acquire the Citizenship of another country automatically by legislation of that country, for example, through marriage.

This situation is a major anomaly in that some Australian Citizens, estimated to be around 4.4 million, are able to lawfully possess more than one Citizenship, while those who start

from the base of having Australian Citizenship and acquire another Citizenship lose their Australian Citizenship.

At issue is not whether Australia should allow plural Citizenship but whether an Australian Citizen who applies for and receives the Citizenship of another country should lose Australian Citizenship, as is currently the case under section 17 of the Act.

The Council specifically raised this issue for comment in its Issues Paper.

Nearly three-quarters of the submissions to the Council addressed this issue of loss of Australian Citizenship upon acquisition of another. Only a small proportion of these submissions argued in favour of such loss. Overwhelmingly, the submissions called for the repeal of section 17.

Those in favour of such loss believe the acquisition of another Citizenship represents disloyalty to Australia. They argue that seeking and acquiring the Citizenship of another country indicates a deliberate choice to place allegiance to another country over and above their commitment to Australia. They argue that to allow people who take up a foreign Citizenship to retain their Australian Citizenship is essentially to depreciate the value of Australian Citizenship.

Many of the submissions in favour of repeal of section 17 came from Australians living and working overseas, including a former Nobel Prize winner and Australian of the Year.

Many of these people are Australians who have gone abroad and helped to advance the reputation of Australia. Many wrote about their own personal circumstances where, by working and living overseas for some period of time, they have the opportunity to acquire the Citizenship of their country of residence, without which their prospects are severely prejudiced.

These people argued that seeking the Citizenship of another country in no way diminishes their commitment to Australia. Many quite literally call Australia home, return to Australia regularly and wish to return to Australia permanently in the future. Others, whose job prospects have required them to go overseas, are keen that their children do not lose their Australian Citizenship and heritage because of their own need to take up an overseas work opportunity which requires acquisition of another Citizenship.

In addition, were it not for the existence of section 17, following recent changes in many countries, for example the collapse of the former Soviet Bloc in Eastern Europe, as well as liberalisation of laws in some Western countries, such as Italy, many Australian Citizens who were former migrants would have the opportunity to access the Citizenship of their birth. Many former migrants have a deep-felt longing to reacquire the Citizenship of their birth, often for nostalgic reasons but also as a result of more practical considerations, including the existence of property rights.

## **SOME PERSONAL COMMENTS REGARDING SECTION 17**

Although the Council received far more submissions in favour of repealing section 17 of the *Australian Citizenship Act 1948* than retaining it, in the interests of facilitating informed debate the Council has chosen to use an equal number of vignettes to illustrate each case. (For the record, 75 per cent of submissions to the Council addressed loss of Australian Citizenship on acquisition of another; 86 per cent of these expressed support for repealing section 17, while 14 per cent opposed repeal.)

### **PERSONAL COMMENTS...IN FAVOUR OF REPEAL**

'An increasing proportion of Australia's most vigorous and effective progeny will inevitably spend much of their lives working outside the country. Australia's current citizenship laws fail to take account of this reality. It is not in Australia's long-term interest that people with extensive international experience, contacts and (in some cases) financial resources should sense any need to diminish their links with home... An increasing number of us function, by necessity, as world citizens. This does not reduce our loyalty or affection for our countries of origin, but it can create some very real personal difficulties. It would be to everyone's benefit if Australia's citizenship laws could be modified to reflect contemporary realities. It makes no sense

to have barriers, whether psychological or financial, that make it less likely that Australia will gain from the contributions and resources of people who have extensive international experience.'

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'Under US law, as a non-citizen, I would lose a substantial amount of my husband's hard-earned estate to estate tax should he die... I have a young child to raise and a husband with cancer... Putting the welfare of my child first, I feel compelled to become a US citizen to protect our estate. This means I would lose my Australian citizenship which I value very highly... I feel my Australian citizenship is my birth right and I resent the fact that I may be forced to relinquish it under these circumstances... I feel betrayed by my country.'

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'How is it that the Queen of England (also known as the Queen of Australia), a non-Australian, without possession of true citizenship nor a significant period of time of residence in Australia, can be Australia's Head of State, yet I, an Australian-born in Sydney, raised in Perth, a one time member of the Australian Army Reserve,... must renounce my citizenship upon seeking citizenship of Canada?... My Australian nationalism will not be jeopardised by my seeking citizenship of Canada. As an immigrant [to Canada], I feel I can continue to bridge the gaps and work towards stronger bonds between the nations.'

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'Australians living overseas are still Australians and are worthy of due consideration by its government. They promote Australia. They create opportunities at home and abroad. They often bring back entrepreneurship and technical skills. This will be increasingly important in the new millennium.'

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Denying Australian-born citizens access to dual citizenship 'is inconsistent with the notion of fair go. . . It is ironic that a country so proud of its commitment to equal opportunity discriminates on such a fundamental issue against its own citizens.'

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'I feel and see absolutely no conflict between being a loyal and committed Australian, which I always will be, and taking out Canadian citizenship.'

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'The automatic loss of Australian citizenship is a highly symbolic act for an Australian — severing an intangible birthright and imposing the deprivation of unfettered access to his or her homeland. Although there are mechanisms to regain the lost citizenship, this loss is very likely to foster rejection and resentment and may have the unintended outcome of depriving the Australian community of the talents acquired by the former Australian citizen.'

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'In truth, I feel somewhat abandoned by my country. I feel like I am being forced to choose between my mother and my wife. With all my heart, I hope that you will see the wisdom in allowing dual nationality. The present situation is harsh for all of us who love Australia but for any number of reasons, cannot live our entire lives there.'

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'Multiple citizenship is a positive force for world peace. Globalisation means that to maintain a single citizenship concept will see discrimination against Australians, economically and socially, in the years ahead.'

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Mr F arrived in Australia with his parents in 1938 when he was 3 years old. The F family fled Germany in fear because of their Jewish faith and they were stripped of their German citizenship. They became naturalised Australians in 1944.

In 1996, the German Government sent a letter to Mr F acknowledging the injustices of the past and offering restoration of his German citizenship. Mr F would like to accept the offer in order to reclaim his German heritage, but would not do it if it jeopardises his 'proudly held Australian citizenship'.

'I am in every way fiercely proud of being an Australian and intend to remain Australian. . . I want my children and my

children's children to be Australians but I personally have an indescribably strong need to rejoin that broken link with my origins and past... I currently have absolutely no desire to move my residence to Germany nor even currently a particular wish to visit there... I feel terribly cheated at losing this continuity with my past. I feel a real anger towards the German regime that disrupted my life.'

**PERSONAL COMMENTS...  
AGAINST REPEAL**

'Dual nationality... One wonders what will be the fate of people possessing dual citizenship similar to our Italian, German and Japanese settlers of the two World Wars...'

'Every applicant for Australian citizenship must make an oath to Australia only and no dual citizenships are acceptable.'

'Nobody can serve two masters... Remember, in Australia freedom wears a crown!'

'Dual citizenship should be allowed except in the case of judges, diplomats, employees of the APS and members of the Australian Armed Forces in time of war.'

We oppose 'any relaxation of Australian laws in relation to dual citizenship'.

'The question of dual loyalties cannot be assessed unless there is a crisis situation in which individuals are forced to make a choice between their different citizenships.'

'Australian citizenship is further devalued when the Act permits dual citizenship. The value will be greatly enhanced when the applicant is required to revoke prior citizenship.'

'The matter of loyalty will always be a contentious point; a person cannot be loyal to two different countries. Old allies can be tomorrow's enemies. Japan and Italy were our allies during World War I... those countries were our enemies in WW II.'

'Australia should not offer its citizenship for economic reasons.'

'I believe no vote should be allowed to dual citizens. You cannot be confident of a person's loyalty when it is split between countries. In some countries a man may have more than one wife but he always has a favourite.'

Of all the issues the Council has addressed, there is no doubt that this matter of the loss of Australian Citizenship is of the most critical importance to Australians. The Council believes that as we move into the twenty-first century, the prevalence of dual Citizenship internationally will rapidly increase. The law and practice of most countries with which Australia likes to compare itself permits Citizens of those countries to obtain another Citizenship without losing their original Citizenship – New Zealand and the United Kingdom have allowed this for over 50 years; Ireland, for over 40 years; Canada and France, for over 20 years; and the United States of America and Italy, among others, have changed their practices within the last decade to allow this. These countries simply recognise that they have an internationally mobile population and that they can retain connection with this population even if another Citizenship is acquired. The Council is not aware of any detriment suffered by these countries as a result of their, in some cases, very longstanding practices in this area.

The Council also believes that to hold and enforce the threat of loss of Australian Citizenship over Australians who wish to live and work overseas in countries where acquisition of another Citizenship is important to their situation is to place a completely unnecessary obstacle in the way of expansion of Australian presence in other societies. The Council does not believe this to be a desirable position for Australia to place its Citizens. And equally important, it does not believe that to do so is in Australia's national interest.

Given the above, the Council is of the view that the way ahead must be to repeal section 17 governing the loss of Australian Citizenship upon acquisition of another Citizenship.

The most recent external review of this issue by the 1994 Joint Standing Committee on Migration (JSCM) recommended to the Government that section 17 of the Act be repealed to allow Australian Citizens to acquire dual Citizenship. It further recommended that former Australian Citizens who had lost Australian Citizenship under section 17 have the unqualified right to apply for the resumption of their Australian Citizenship.

The Council finds itself in complete agreement with the JSCM in relation to the repeal of section 17. However, it considers existing resumption provisions are adequate for those who have already lost Australian Citizenship under section 17.

For the above reasons, the Council strongly **recommends** that section 17 of the *Australian Citizenship Act 1948* be repealed so that Australian Citizens over the age of 18 do not lose their Australian Citizenship on acquisition of another Citizenship.

### *Reciprocal notification arrangements with other countries*

Australia has, in the past, had international reciprocal arrangements with 27 countries which involved exchanging information in relation to acquisition of Citizenship. Some of these date back to the 1940s.

The arrangements were designed to facilitate loss of Citizenship upon acquisition of another

Citizenship. Under these arrangements, if a Citizen of one country acquired the Citizenship of another, then the latter country was to provide the former country with details of the person, and, under some arrangements, collect the person's passport and return it to the former country.

In recent years, these reciprocal arrangements have largely lapsed, mainly due to privacy and resource considerations and to changes to the laws of some countries, which allow people to retain their former Citizenship upon acquisition of Australian Citizenship.

In today's environment, as opposed to when the arrangements were reached in the 1940s and 1950s, routine exchange of Citizenship information may be considered an inappropriate infringement of individual privacy. The Council is also concerned that in relation to some countries, there is potential for problematic use of information which is supplied by Australia in good faith.

For Australia to seek to reactivate routine Citizenship exchange arrangements would impact significantly on resource issues with little reciprocal benefit. None of the 27 countries now routinely provides Australia with details in accordance with the arrangements and there are many more people from the 27 countries acquiring Australian Citizenship than there are Australian Citizens taking out Citizenship of the 27 countries.

Accordingly, the Council **recommends** that existing reciprocal arrangements between Australia and other countries for the exchange

of Citizenship acquisition information remain lapsed or, where necessary, be formally terminated.

### **Losing Citizenship – (2) By serving in the armed forces of a country at war with Australia**

Under section 19 of the *Australian Citizenship Act 1948* (the Act), an Australian Citizen who serves in the armed forces of a country at war with Australia and who is a Citizen of another country automatically ceases to be an Australian Citizen upon so serving.

The Council is aware that there is a view in the community that this provision should be tightened and that, specifically, if an Australian Citizen fights for another country, for example their country of birth, then, irrespective of whether that country is at war with Australia, they should be deprived of their Australian Citizenship.

The Council notes that it is possible for Australian Citizens to be recruited for overseas military purposes and believes that this may be an issue for concern in some circumstances but not one that would be best addressed under Citizenship law.

The Council sees a distinction between Citizens who serve in the armed forces of a country that is at war with Australia and those who serve in the armed forces of a country that is not at war with Australia. While the Council strongly supports loss of Australian Citizenship in the former case, the Council considers that loss of Citizenship may be unduly harsh in the latter case.

The Council **recommends** that section 19 of the *Australian Citizenship Act 1948* remain unchanged.

### **Losing Citizenship – (3) By deprivation**

Under what circumstances should an Australian be actively deprived of her or his Citizenship by a decision of the Government?

Generally speaking, the policy underlying the power of government to deprive an Australian Citizen of her or his Citizenship is based on the idea that there should be certainty of Australian Citizenship status, that the status should not be easily taken away, and should not be taken away simply by an administrative action by government.

The power to deprive a person of Australian Citizenship relates only to those who became Citizens by grant.

The circumstances in which the Government can intervene to deprive a person of her or his Australian Citizenship are contained in section 21 of the *Australian Citizenship Act 1948*. The grounds are quite limited and relate to circumstances where, in effect, the person would not have been granted Citizenship had she or he completed the migration and Citizenship application truthfully or where the person is convicted of a serious crime which was committed before grant of Citizenship.

Specifically the threshold grounds for deprivation are:

- Where a person has been convicted of making false or misleading statements or concealing a material circumstance in

relation to the application for Australian Citizenship (there is a ten-year time limit for prosecution in relation to Citizenship applications made before 1997); or

- When grant of Australian Citizenship was based on migration fraud related to the person becoming a permanent resident and the Citizen is convicted of such fraud (this applies to Citizenship applications made after 1997); or
- Where a person has committed a serious offence before grant of Citizenship and is convicted of that offence after becoming an Australian Citizen and is sentenced to a minimum of 12 months. (This applies to applications made after 1984.)

Deprivation of Australian Citizenship is not automatic, even if one of the threshold requirements is met. In addition, the Minister must also be satisfied that it would be contrary to the public interest for the person to continue to be an Australian Citizen.

Furthermore, the Act and the International Conventions on the Reduction of Statelessness prevent deprivation of Australian Citizenship where a person, if deprived of their Australian Citizenship, would become stateless, except where the Citizenship has been obtained as a result of fraud.

A person who is deprived of Australian Citizenship (under any of the grounds set out in the Act), while outside Australia, has no right of re-entry and must apply for a visa to return to Australia.

If a person loses Australian Citizenship while in Australia, the *Migration Act 1958* permits the person to remain in Australia as a permanent resident.

If a person is deprived of Australian Citizenship and permitted to remain in Australia as a permanent resident, it should be noted that the Minister has discretionary powers to deport a permanent resident with criminal convictions in certain circumstances or to cancel the visa of a permanent resident and remove her or him from Australia on the grounds of not being of good character. Removal action is dependent on another country being prepared to receive the person being removed.

The Minister has a discretion also to deprive a child of Australian Citizenship if a parent has been deprived of Australian Citizenship under section 21 of the Act, unless the other parent is an Australian Citizen or if the loss would render them stateless.

In practice, the deprivation power has been used extremely rarely with only five people being deprived of their Australian Citizenship by the Minister since 1958. These were all cases where the individuals were convicted of making false statements in their applications for Australian Citizenship.

The Council received a number of submissions in relation to deprivation, most of which were in favour of increasing the power of the Government to deprive Australian Citizens who acquired their Australian Citizenship by grant — generally if a serious crime has been committed. Some argue that new Citizens

should be on probation for periods of 5 to 20 years after grant of Australian Citizenship. If they committed a serious crime in this period it was argued that they should be deprived of their Australian Citizenship.

The Council believes that at the heart of the issue is whether or not there should be two classes of Australian Citizenship, with one class of Citizen (overseas-born) subject to extensive possibilities for deprivation of Citizenship which do not apply to another class of Australian Citizen (Australian-born).

The Council does not endorse any form of probationary Citizenship for Australian Citizens by grant, which would leave them open to deprivation of their Australian Citizenship for actions which occurred after they became Australian Citizens. For example, it does not favour a regime under which an Australian-born Citizen and an Australian Citizen by grant both committed an offence, serve the same sentence, but only the latter could also be deprived of Australian Citizenship. This would add an additional unfair penalty on overseas-born Australian Citizens.

The Council **supports** the existing Australian Citizenship policy and law on deprivation of Australian Citizenship which limits deprivation of Australian Citizenship to specific circumstances involving fraud in relation to migration or Citizenship applications and to where a serious crime was committed before grant of Australian Citizenship. The Council also considers that the current requirement for conviction of an offence in relation to fraud or an offence committed before grant of

Australian Citizenship, before the Minister's deprivation power arises, is an important safeguard which should continue.

### *Deprivation of Citizenship of suspected war criminals*

As set out in preceding paragraphs, the *Australian Citizenship Act 1948* provides that if a person is convicted of making a material false representation or of concealing a material circumstance in relation to an Australian Citizenship application, and the Minister is satisfied that it would be contrary to the public interest for that person to continue to be an Australian Citizen, the person may be deprived of Citizenship.

For many years prosecution for such an offence had to be commenced within ten years of the offence. In 1997 this time limit was removed for Citizenship applications made from 1997 onwards. In addition, for Citizenship applications made from 1997 onwards, the Citizenship deprivation power was extended to cover situations where a person obtained Citizenship as a result of migration-related fraud and is convicted of such fraud.

The consequence is that no prosecution for Citizenship fraud leading to possible deprivation of Citizenship can be commenced in respect of an offence committed before 1989 and a prosecution for migration fraud is relevant only to Citizenship applications made after 1997.

Two submissions were received which raised in detail the issue of alleged Second World War

war criminals who became Australian Citizens before 1989. (A further two submissions note the matter.) Both submissions which discuss this issue substantively express opposition to the existence of the old ten-year time limit as frustrating any attempt to deprive of their Citizenship individuals who for decades had successfully concealed their criminality. It is said that failure to reveal activities in the nature of war crimes or crimes against humanity amounts to the concealing of a material circumstance which, but for the ten-year time limit, would justify prosecution and conviction which would then entitle the Minister to deprive that person of Citizenship.

War crimes and crimes against humanity are grave criminal matters to be punished under the criminal law. The Council has serious reservations about seeking to use Australian Citizenship law as a substitute for prosecution for war crimes under the criminal law.

In particular the Council is not attracted by the prospect of retrospective legislation, such as would be involved in now removing the effect of the old ten year time limit, especially as it would have unintended consequences. It would potentially place in jeopardy the Citizenship of any of the millions of Australian Citizens granted Citizenship in the past fifty years whenever it could be shown that in some respect a person had failed when seeking Citizenship (or in relation to migration) to disclose whatever could be said to be a material circumstance or had made a statement that could be regarded as misleading in a material way.

Given the time elapsed and the limitations of then current migration and Citizenship forms and processes in the 1940s and 1950s, it cannot be assumed that questions were asked which led to false statements being made in cases where war criminality is alleged. There would appear to be considerable doubt whether in any prosecution proof of failure to volunteer such information could be established, and whether records exist which could constitute proof of such a negative fact. Moreover it would, no doubt, also be necessary to prove that such information was indeed the fact; in other words, that the applicant had engaged in such activities and accordingly should have supplied information about them. Yet it is the very difficulty of securing such proof that is said in these submissions to be the reason why successful prosecution under the criminal law has in the past proved impractical and why recourse to deprivation of Citizenship is suggested as an alternative.

The situation since the removal of the ten-year time limit in 1997, for Citizenship applications from that year onward, and the addition of migration fraud as a ground for deprivation, together with the inclusion of specific questions in current migration and Citizenship documentation concerning involvement by applicants in war crimes or crimes against humanity, appears, for the future, to satisfactorily meet the need to safeguard against the retention of wrongfully acquired Citizenship.

For the reasons stated above, the Council **recommends** that the current provisions for the deprivation of Australian Citizenship in the

*Australian Citizenship Act 1948* be retained unchanged.

#### **Losing Citizenship – (4) By renunciation**

With some exceptions, a person may renounce Australian Citizenship under section 18 of the *Australian Citizenship Act 1948* if she or he is 18 years or older and the holder of another Citizenship. A person may also renounce Australian Citizenship under section 18 if she or he was born in, or ordinarily resident in, another country and is not entitled to acquire that other Citizenship because she or he is an Australian Citizen.

A child who renounces Australian Citizenship will not lose Australian Citizenship under section 18 of the Act. However, under section 23 of the Act, if a child has a parent who renounces their Australian Citizenship under section 18 of the Act, the child will also lose her or his Australian Citizenship unless their other parent is an Australian Citizen or the loss would render them stateless.

Renunciation can be refused if Australia is engaged in a war and the person is a Citizen of a foreign country or if the Minister considers that it would not be in the interests of Australia to register the declaration of renunciation. In addition, renunciation can be refused if the person would become stateless.

On average, around 112 people each year renounce Australian Citizenship. The majority of people who renounce do so in order to retain another Citizenship. For instance, people with Maltese Citizenship must renounce any

other Citizenships within a year after turning 18 years of age in order to retain their Maltese Citizenship.

The Council considers the existing provision appropriate and **recommends** that the provisions for the renunciation of Australian Citizenship contained in section 18 of the *Australian Citizenship Act 1948* be retained.

However, as there is currently no recovery of costs involved in processing an application for renunciation of Australian Citizenship, the Council **recommends** that a fee be charged for people wishing to renounce their Australian Citizenship. The fee should be set to recover processing and administrative costs, in line with other Citizenship fees.

## Reacquiring Australian Citizenship

A person who has lost Australian Citizenship may be eligible to reacquire Australian Citizenship in some circumstances. The ways of reacquiring Australian Citizenship vary, depending on how Citizenship was lost and whether the person was an adult or a child at the time.

An adult who has lost Australian Citizenship by taking action to acquire another Citizenship can apply to resume Australian Citizenship in certain circumstances. The resumption provisions apply to persons who have lost Australian Citizenship by taking out another Citizenship and to those who were required to renounce their Australian Citizenship in order to acquire another Citizenship.

To be eligible to resume, the person must meet the following criteria.

The first requirement is that the person:

- did not know that they would lose Australian Citizenship; or
- would have suffered significant hardship or detriment had they not acquired the other Citizenship or, if the significant hardship or detriment were of an economic nature, the circumstances that caused them to take out another Citizenship must be compelling.

The other requirements are that the person:

- has been lawfully resident in Australia for a total of at least two years in their life; and
- states that they intend to continue to reside in Australia or intend to commence residing in Australia within three years; and
- has maintained a close and continuing association with Australia.

A child under 18 years of age may be able to resume Australian Citizenship by being included in a parent's application for resumption.

On average, around 360 people each year resume their Australian Citizenship.

Few submissions raised resumption as an issue. Of those that did, one suggested that an applicant for resumption be required to 'serve a period' as a permanent resident before being eligible for resumption. Another, supported ceremonies for persons resuming Citizenship. The predominant view was that resumption is not an appropriate avenue by which to address the issue of loss of Citizenship through acquisition of another Citizenship.

Other than the circumstances mentioned above, adults who have renounced Australian Citizenship can reacquire Australian Citizenship by grant. They must wait at least twelve months from the time they lost their Citizenship before applying to reacquire it, but, unlike other applicants for grant of Australian Citizenship, need only be present in Australia as a permanent resident for twelve months in the two years immediately before lodging their application.

Adults who are deprived of Australian Citizenship can apply to reacquire it by grant and must meet all the usual requirements.

One submission raised the case of a person who had renounced Australian Citizenship at the age of 18 in order to be able to retain another Citizenship but had later regretted this action. The person renounced Australian Citizenship while overseas, thereby losing permanent resident status and eligibility to reacquire Australian Citizenship by grant without first going through the migration process.

This case raised the issue of young people renouncing before they are able to make an adult and informed decision. Some, including the person referred to above, 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.

As discussed previously in relation to registration of Citizenship by descent, the Council is of the view that where parents fail to register their children, those children should

have an adequate period after reaching their majority to be able to decide for themselves whether they wish to apply for Citizenship by descent. The Council recommended that they have until the age of 25 to make their application and considers that there should be a similar provision to enable those who renounce at a young age in order to retain another Citizenship to reacquire Australian Citizenship.

The Council **recommends** that the *Australian Citizenship Act 1948* be amended to allow persons who renounce their Australian Citizenship before the age of 25 in order to retain another Citizenship to reacquire Australian Citizenship up to the age of 25 if they meet the usual requirements for resumption of Australian Citizenship.

One of the key concerns with the current resumption provisions is that applicants are not required by legislation to satisfy good character requirements, even if they lost their Citizenship many years ago.

The application form for resumption in accordance with Australian Citizenship Regulations does include a question relating to good character but there is no specific legislative basis for refusing an application for resumption on these grounds.

The Council considers that the fact that a person has been an Australian Citizen in the past is not sufficient reason to exclude the need to satisfy the good character requirement that any other applicant for Australian Citizenship has to satisfy.

To maintain the integrity of the Citizenship acquisition process, the Council **recommends** that the resumption provisions in the *Australian Citizenship Act 1948* be amended to require that an applicant for resumption of Australian Citizenship satisfy a good character requirement.

## Other Issues

### Citizenship certificates for children

At present, children under the age of 16 years who acquire Australian Citizenship are generally included on their parent's Citizenship application and certificate at no additional cost to the parent/s. Children who wish to have individual evidence of their Australian Citizenship can either apply for grant of Australian Citizenship in their own right and therefore receive their own certificate of Australian Citizenship, or apply for a declaratory certificate of Australian Citizenship. The latter is a legally recognised document which includes details such as name, date of birth and date of grant of Australian Citizenship. A separate application for grant costs \$120 and a declaratory certificate costs \$55.

The Council considered whether, in future, individual certificates should be provided to all children under 16; and if so, whether a fee should be charged.

Where several children are included on a certificate of Australian Citizenship, there can be logistical difficulties in using a single document as evidence of Australian Citizenship once these children reach adulthood.

On balance, the Council considered that there is considerable merit in providing individual certificates of Australian Citizenship to children at the time of conferral of their parent's Australian Citizenship certificate/s. Not only would this alleviate future logistical difficulties, it would also, in the form of the certificate, provide more tangible symbolism and meaning for both the children and their parents and enhance the Citizenship conferral ceremony for all concerned. Furthermore, the Council considered that certificates for children should be provided at no additional cost.

The Council **recommends** that the *Australian Citizenship Act 1948* be amended to provide, at no additional charge, individual certificates of Australian Citizenship to all children under 16 years of age who acquire Australian Citizenship with their parents.

The Council also considered the option of providing certificates of Australian Citizenship to every Australian child. While it was considered that this might be thought to give more symbolism and meaning to Citizenship to those who acquire it by birth, and generally enhance awareness of Australian Citizenship, on balance the Council decided not to proceed with this option. It was recognised that the proposal would present a range of considerable administrative difficulties, including the need for eligibility to be determined, given that not all children born in Australia become Australian Citizens by birth. It might also be thought anomalous for native-born parents to have no such certificates while their children had them. Other anomalies

would arise in the case of some adopted children and those born overseas to Australian Citizens.

### **Amendment/replacement of certificates**

Section 47 of the *Australian Citizenship Act 1948* enables the Minister to amend a certificate of Australian Citizenship if it is considered desirable to do so. As certificates of Australian Citizenship are used as evidence of possession of Australian Citizenship, it is important that amendments be appropriately substantiated and policy requires that two documents providing evidence of a change of name are required.

It is thus important to strike a balance between what is considered a desirable reason to amend a certificate and a need to prevent fraud.

The Council **recommends** that current provisions of the *Australian Citizenship Act 1948* allowing the Minister to amend a certificate of Australian Citizenship if desirable or replace a certificate of Australian Citizenship in limited circumstances be retained and that policy maintain a balance between the desirability of a client's request for amendment and a need to prevent fraud.

### **Citizenship in relation to migration agents**

The Review of the Statutory Self-Regulation of the Migration Advice Industry conducted by the Department of Immigration and Multicultural Affairs (DIMA) in 1999 recommended that steps should be taken to extend the statutory self-regulation framework governing the migration advice industry to

cover Citizenship advice. The Minister for Immigration and Multicultural Affairs has asked the Council to advise on whether this should occur.

Statutory self-regulation was introduced to regulate the migration advice industry in March 1998. The aim of the regulatory framework is to maintain and improve consumer protection, competence and ethical standards in the migration advice industry.

As part of the review, the Migration Agents Registration Authority, the body regulating the industry, noted the relationship between the provision of migration and Citizenship assistance and raised the need to include Citizenship within the scope of the regulatory scheme, on the basis that it would be desirable to protect such consumers. The review noted that consumers of Citizenship advice may be less vulnerable than those seeking migration advice, but nevertheless, may still encounter difficulties.

The key issue is to determine the extent of need for inclusion of Citizenship advice within the coverage of industry regulation in terms of consumer protection and, if a substantial need is identified, the precise way in which it should be done.

The Council gave consideration to the current arrangements for dissemination of Citizenship advice and information. They noted that advice can be obtained, at no cost, from a wide variety of sources, including DIMA, Australia Post, the Citizenship Telephone Enquiry Line, Local Government councils and the Internet.

The Council also noted that Citizenship requirements are different in many aspects to migration requirements, generally being more straightforward, and the client group for the grant of Australian Citizenship would usually already be permanent residents with security of stay in Australia and therefore considerably less vulnerable than applicants for permanent visas. The Council considered that if Citizenship was to be included in this regime, it probably should be limited to grant of Australian Citizenship, as other Citizenship matters generally are only of concern to persons who are already Australian Citizens.

On balance, the Council considered that there is currently insufficient evidence of exploitation to justify bringing Citizenship into the migration advice regulatory regime, especially as regulation could restrict the current wide availability of Citizenship advice. Accordingly, the Council **recommends** that the Department of Immigration and Multicultural Affairs continue to monitor the situation and if more evidence emerges indicating that provision of Citizenship advice needs to be included in the regulatory scheme for the provision of migration advice, the Government should take appropriate action.

### **Sub-section 44(i) of the Australian Constitution**

This issue differs from all others discussed in this chapter as it is not directly concerned with the Australian Citizenship Act 1948. Rather, it concerns the Australian Constitution and relates to the parliamentary process and the basis on which our representatives are elected

to Parliament. The Council's interest in this issue relates to how this provision of the Constitution may restrict the full participation in the political process of Australian Citizens who hold another Citizenship. In considering this issue the Council was also cognisant of the outcome of the High Court case *Sykes v Cleary* in 1992 (outlined below). In that case, the High Court had to interpret sub-section 44(i) of the Constitution. It concluded that sub-section 44(i) required persons wishing to stand for election to the Parliament to 'take all reasonable steps to divest themselves of other citizenships'. The Council also noted that in the recent *Sue v Hill* case decided in 1999, the High Court held that the United Kingdom was a 'foreign power' for the purposes of sub-section 44(i). The ensuing paragraphs provide some background and discussion on this issue.

Sub-section 44(i) of the Constitution states:

' Any person who —

(i) Is under acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power:

... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.'

This sub-section provides for the disqualification of intending members of Parliament who hold foreign Citizenship/s or who have various other attachments to a foreign power. The intent of the provision was

to protect the parliamentary system by disqualifying candidates whose performance could be influenced by a potential conflict of loyalties.

In 1992, the High Court determined that sub-section 44(i) of the Constitution required an intending candidate who held another Citizenship/s in addition to Australian Citizenship 'to take all reasonable steps' to divest themselves of their other Citizenship/s. This has the effect now of requiring persons who hold other Citizenship/s and who wish to stand for Parliament to endeavour to renounce their other Citizenship/s. If they are not successful because the laws of their other country of Citizenship do not allow them to renounce that Citizenship, they may stand for Parliament and take up office holding dual or plural Citizenship.

The Council is aware that the issues surrounding sub-section 44(i) were the subject of a report by the House of Representatives Standing Committee on Legal and Constitutional Affairs titled *Aspects of Section 44 of the Australian Constitution* (July 1997).

The Report expressed the view 'The language in which the principle is expressed is archaic. The provision was drafted before the concept of Australian Citizenship developed and the scope of the subsection is uncertain'. The report also raised the issue of whether Australian Citizens who hold other Citizenships 'should be excluded from the political process' and drew attention to the fact that 'the steps necessary to renounce other Citizenships are those embodied in relevant foreign law'.

Furthermore, 'Those who renounce a foreign Citizenship in order to nominate and then fail to get elected may be considered to have paid a high price for participation in the political process'. In addition, the fact that 'many Australians may be unaware that they are dual citizens' was also highlighted as a difficulty.

The report recommended (Recommendation 2), among other things, that a referendum be held to delete sub-section 44(i) of the Constitution; the insertion of a new provision requiring candidates and members of Parliament to be Australian Citizens; and empower Parliament to enact legislation determining the grounds for disqualification of members of Parliament in relation to foreign allegiance.

The Council noted the Government response to Recommendation 2, which acknowledged a need to limit risks relating to loyalty and conflict of interest to protect the parliamentary system. The Government response supported repeal of sub-section 44(i) but recommended 'a new provision establishing failure on the part of a parliamentarian or candidate to retain Australian Citizenship as a ground for disqualification. The Government notes the Committee's conclusion that the constitutional amendment should also provide for a legislative regime to protect against 'divided loyalty'; either by requiring candidates to give an undertaking that they will not take advantage of any specified form of foreign association, or by requiring dual citizens to take specified steps to renounce foreign citizenship. On either approach, non-compliance would constitute a ground for disqualification.'

The Council endorses the thrust of the Committee's views outlined above. The Council believes this provision discriminates against Australian Citizens who hold, for various reasons including accident of birth, another Citizenship in addition to Australian Citizenship. The fundamental tenet underlying Australian Citizenship is that of inclusivity and full participation in all aspects of Australian life. The Council believes that all Australian Citizens should be able to stand for Parliament irrespective of whether they hold another Citizenship. Those who hold another Citizenship are not required by Australian Citizenship law to renounce their other Citizenship/s when acquiring Australian Citizenship and, as a general principle, the Government encourages migrants/new Citizens to maintain their cultural heritage whilst living in Australia. Sub-section 44(i) of the Constitution is therefore at odds with Citizenship law and government policies of successive governments.

The Council is in accord with the views of both the Committee and the Government that there is a need to protect the parliamentary system. However, it could be argued that the holding of another Citizenship does not of itself mean that a person would necessarily act in a disloyal manner. Any Australian Citizen whether or not they hold another Citizenship potentially could have split loyalties or conflict of interests for various reasons. One circumstance could be where an Australian Citizen who does not possess another Citizenship has commercial interests in another country. Sub-section 44(i) as it currently stands assumes that if a person

holds another Citizenship there will automatically be issues of conflict of interests and divided loyalties. The holding of another Citizenship is perhaps the most obvious way of alerting others to potential divided loyalty. However, it would appear that the issue is not whether a person holds another Citizenship, but rather whether a person might not act in Australia's best interests at all times. Therefore, another measure or identifier relating to loyalty may need to be found.

The Council supports Recommendation 2 in the report of the Standing Committee on Legal and Constitutional Affairs, on *Aspects of Section 44 of the Australian Constitution*, in particular that there be a requirement for intending candidates and members of Parliament to be Australian Citizens, but **recommends** that further consideration be given by government to the issue of how to more appropriately measure 'undivided loyalty to Australia' for intending candidates for Parliament and members of Parliament.