

Conceptualising Australian Citizenship for Children: A Human Rights Perspective

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Abstract

Australia's first National Children's Commissioner was appointed in 2013. One of the Commissioner's key functions is to examine whether Commonwealth legislation recognises and protects the human rights of children in Australia. A fundamental starting point for this examination is Australia's citizenship law. Australian citizenship is governed by the *Australian Citizenship Act 2007* (Cth) ('*Act*'). In this article, we highlight two key issues for the Commissioner in examining the *Act*.

First, citizenship is a concept that extends beyond the *Act*. While the *Act* confers citizenship as a legal status, children's citizenship can also be conceptualised as rights, political engagement and identity. These aspects are reflected by the *United Nations Convention on the Rights of the Child* ('*Convention*'). Second, when examined in light of the *Convention*, the *Act* is deficient in the way it protects the human rights of children. The *Act* lacks flexibility for decisionmakers to consider children's best interests and fails to protect their human rights of non-discrimination, participation and identity. These deficiencies form the basis of an argument for reform.

I Introduction

A significant step toward protecting the human rights of children in Australia was taken with the enactment of legislation to establish a National Children's Commissioner ('Commissioner'). On 28 June 2012, the *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth) received royal assent and on 25 February 2013, Megan Mitchell was appointed the first Commissioner. One of the key functions conferred on the Commissioner is to examine existing and proposed Commonwealth enactments to ascertain whether they recognise and protect the human rights of children in Australia, and to report the findings to the Minister.¹ In performing these functions, the Commissioner must consider a range of international human rights instruments, including the United Nations' *Convention on the Rights of the Child*.²

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¹ *Australian Human Rights Commission Act 1986* (Cth) s 46MB(1)(d), as amended by *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth). The Commissioner's other legislated functions focus on researching and reporting on children's human rights in Australia and promoting discussion and awareness of those rights: *Australian Human Rights Commission Act 1986* (Cth) ss 46MB(1)(a)–(c).

² Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*Convention*').

This article argues that a fundamental starting point for any examination of a state's protection of human rights begins with conceptions of citizenship. The term 'citizenship' is used by scholars in different ways,³ and in this paper we draw upon the insights of Linda Bosniak, who identifies the different frames in which citizenship plays out.⁴ There are four key aspects that underpin contemporary understandings of citizenship and which are useful for our argument: citizenship as identity and membership, citizenship as rights, citizenship as political participation and citizenship as a legal status.⁵ While these aspects were formulated in the context of a discussion of the meaning of adult citizenship, we argue that they have a special significance for children, a significance that is reflected by the *Convention*.

In its legal formulation, citizenship is a fundamental expression of membership and is a basis to claim certain rights in a nation state. In Australia, the *Australian Citizenship Act 2007* (Cth) (*Act*) governs an individual's entitlement to the legal status of citizen. Citizenship is the most secure form of membership of the Australian community when compared to permanent and temporary residence. It is also the most secure form of entitlement to Australia's human rights protections. Individuals in Australia who have the legal status of citizen have a right to remain in Australia and, accordingly, to security of indefinite protection of its laws and policies.⁶

In this context, we highlight two key issues for Mitchell in her role as the Commissioner. First, it is crucial the Commissioner is not tied to legal conceptions of citizenship based in the *Act* alone. The centrality of citizenship to membership of the Australian community and to security of human rights protections highlights that citizenship is more than a legal status. Returning to Bosniak's work,⁷ when reviewing the extent to which the *Act* protects the human rights of children in Australia, it is crucial that the Commissioner is mindful of a broader conception of children's citizenship, encompassing membership, rights, and political participation, as well as the legal status conferred by the *Act* itself.

Second, an examination of the *Act* based on the *Convention* and in the context of this broader conception of citizenship highlights a deficiency in the extent to which Australia's citizenship law protects the human rights of all children in Australia. Too often the *Act* lacks the flexibility in practice to allow a consideration of children's best interests,⁸ protect children's rights without discrimination,⁹ foster their participation,¹⁰ nurture their right to a nationality and an identity¹¹ and acknowledge the vulnerabilities of adopted children.¹² This creates a vulnerable class of children who, despite their connections with Australia by

³ This is the subject of another article, Kim Rubenstein, 'Citizenship in Australia: Unscrambling its Meaning' (1995) 20 *Melbourne University Law Review* 503, and is discussed in great detail in Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook Co, 2002).

⁴ Linda Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Legal Studies* 447.

⁵ *Ibid* 455. These will be further defined below.

⁶ *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 44–6. See Helen Irving, 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30 *Sydney Law Review* 131 for a discussion of the legal basis of citizens' right to remain in Australia.

⁷ Bosniak, above n 4.

⁸ *Convention* art 3.1.

⁹ *Ibid* art 2.1.

¹⁰ *Ibid* art 12.

¹¹ *Ibid* art 8.1.

¹² *Ibid* art 21.

membership or political participation, are unable to attain the security of rights and legal status of an Australian citizen.

II The Act: Citizenship as a Legal Status

Citizenship in Australia is a statutory concept.¹³ The *Act* governs the ways in which individuals, including children, may attain the legal status of Australian citizen.¹⁴ While membership of the Australian community has existed as a legal concept since the time of Federation, legislation governing Australian citizenship was first enacted in 1948.¹⁵ The enactment of the *Act* in 2007 reframed the structure of how one becomes a citizen. Children are particularly impacted by the *Act* in three key areas: automatic acquisition of citizenship,¹⁶ obtaining citizenship by application¹⁷ and the cessation of citizenship.¹⁸

A child may automatically acquire the legal status of an Australian citizen in one of three ways. If born in Australia, the child will automatically be an Australian citizen if one of the parents is a citizen or permanent resident,¹⁹ or if not, if the child ordinarily resides in Australia for the first 10 years of his or her life.²⁰ A child adopted by an Australian citizen will also be a citizen if the child is a permanent resident and is adopted under a law in force in an Australian state or territory.²¹ Finally, a child found abandoned in Australia is an Australian citizen, unless and until the contrary is proved.²²

The *Act* also identifies ways of applying for citizenship.²³ A child may make an application for a grant of Australian citizenship by descent,²⁴ by conferral,²⁵ in circumstances of statelessness²⁶ or if adopted in accordance with the *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*.²⁷ The Minister must refuse an application for citizenship if the applicant does not satisfy the national security,²⁸

¹³ The High Court has accepted that the Commonwealth's powers under ss 51(xix) and (xxvii) of the *Constitution* are broad enough to support the creation of a statutory status of citizenship: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 212 CLR 162, 173. Further, '[w]ithin the limits of the concept of "alien" in s 51(xix), it is for Parliament to decide who will be treated as having the status of alienage, who will be treated as citizens, and what the status of alienage, or non-citizenship, will entail': see *Koroitamana v The Commonwealth* [2006] 227 CLR 31, 38; *Singh v Commonwealth* (2004) 222 CLR 322, 329.

¹⁴ For a broader discussion of the meaning of citizenship in Australia, see Rubenstein, *Citizenship in Australia*, above n 3; Kim Rubenstein 'Citizenship and the Centenary — Inclusion and Exclusion in 20th-Century Australia' (2000) 24 *Melbourne University Law Review* 576.

¹⁵ *Australian Citizenship Act 1948* (Cth). For a full account of the evolution of Australian citizenship see Rubenstein, *Australian Citizenship Law*, above n 3.

¹⁶ *Act* pt 2 div 1.

¹⁷ *Ibid* pt 2 div 2.

¹⁸ *Ibid* pt 2 div 3.

¹⁹ *Ibid* s 12(1)(a). In *H v Minister for Immigration and Citizenship* (2010) 272 ALR 605, the Federal Court recognised that the meaning of 'parent' is not limited to biological parents and encompasses the ordinary English meaning of the word.

²⁰ *Act* s 12(1)(b).

²¹ *Ibid* s 13(1).

²² *Ibid* s 14.

²³ The terminology was originally that of 'naturalisation'.

²⁴ *Act* s 16.

²⁵ *Ibid* s 21(5).

²⁶ *Ibid* s 21(8).

²⁷ Opened for signature 29 May 1993, Hague Conference on Private International Law Convention 33 (entered into force 1 May 1995) (*Hague Convention*); *Act* s 19C.

²⁸ For citizenship by descent see *Act* ss 17(4)–(4B); by conferral under s 21(5) see *Act* ss 24(4)–(4C); by adoption see *Act* ss 19D(5)–(7A).

identity²⁹ and timing³⁰ requirements imposed by the *Act*. In addition, the Minister has a discretion to refuse an application for citizenship by conferral under s 21(5)³¹ or an application under s 19C by a child adopted overseas,³² despite the applicant satisfying the eligibility criteria and other requirements.

Two of the *Act*'s provisions concerning the cessation of Australian citizenship apply specifically to children. First, under s 25(4), where a child under the age of 16 makes an application for citizenship by conferral under s 21 of the *Act* at the same time as one or more of their parents, the approval of the child's application is conditional on the approval of their parents' application.³³ Second, if the parent of a child under the age of 18 ceases to be an Australian citizen because they have renounced their Australian citizenship,³⁴ had their citizenship revoked by the Minister,³⁵ or are serving in the armed forces of a country at war with Australia,³⁶ the Minister has a discretion also to revoke the child's Australian citizenship.³⁷

This is therefore the legal starting point for thinking about citizenship, but we argue that the enquiry must extend beyond the legislation.

III The Convention: Supporting a Broader Conception of Children's Citizenship

The *Act* governs children's entitlement to citizenship as a legal status through the regulation of the acquisition, conferral and cessation of Australian citizenship. However, the significance of children's citizenship resonates beyond a legal classification based on legislatively prescribed requirements. Citizenship is the most secure form of legal membership of the Australian community and it is also critical for the security and stability of a child's rights in Australia. Further, citizenship is an important reflection of children's political engagement and identification with the Australian community. The *Convention* reflects these aspects, demonstrating their centrality both to the concept of citizenship and to children's rights more generally.

A The Significance of the Convention

The *Convention* is the most comprehensive statement of policy regarding children's interests and has a significant role in Australian law and policy.³⁸ While statements of international law must be specifically incorporated into Australian legislation to have legal status in

²⁹ For citizenship by descent see *Act* s 17(3); by conferral under s 21(5) see *Act* s 24(3); by conferral under s 21(8) see *Act* s 24(3); by adoption see *Act* s 19D(4).

³⁰ Except in circumstances of statelessness, if a person has ceased to be an Australian citizen, the Minister must not approve the person becoming an Australian citizen for 12 months from the day on which the person ceased, or last ceased, to be an Australian citizen. For citizenship by descent see *Act* s 17(5); by conferral under s 21(5) see *Act* ss 24(7)–(8); by adoption see *Act* s 19D(8).

³¹ *Act* s 24(2).

³² *Act* s 19D(3).

³³ *Act* s 25(4).

³⁴ Under *Act* s 33.

³⁵ Under *Act* s 34.

³⁶ Under *Act* s 35.

³⁷ *Act* s 36.

³⁸ Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 94 (1997) [3.14].

Australia³⁹ and no federal or state legislation has implemented the entire *Convention*, parts of the *Convention* are reflected in state and federal legislation. Significantly, when carrying out her functions under the *Australian Human Rights Commission Act 1986* (Cth), the Commissioner is required to have regard to the *Convention* where appropriate.⁴⁰

More broadly, the *Convention* informs the interpretation and application of all Australian legislation. ‘Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party.’⁴¹ The Australian government’s ratification of the *Convention* gives rise to an international law obligation of the Australian federal government to perform its obligations in good faith.⁴² It is also significant that 193 countries have ratified the *Convention*. Only Somalia and the United States have not yet ratified. Its near universal acceptance makes the *Convention* an important document for ascertaining the substance of children’s rights.⁴³

The *Convention* applies to all children⁴⁴ and contains 40 substantive articles, covering a spectrum of rights. These range from protection against abuse and exploitation to the right to family life, health and education. Certain rights are particularly relevant to the broader conceptualisation of children’s citizenship. These rights will be discussed now in the context of citizenship as rights, citizenship as political activity and citizenship as membership.

B Citizenship as Rights

Bosniak explains that ‘the enjoyment of rights is the defining feature of societal membership: citizenship requires possession of rights, and those who possess the rights are usually presumed thereby to enjoy citizenship’.⁴⁵ The *Convention* reflects the importance of securing possession of rights for all children. The United Nations Committee on the Rights of the Child (‘Committee’) has identified that it is a central principle⁴⁶ of the *Convention* that the rights set out within the *Convention* apply to all children without discrimination.⁴⁷

Australian legislation also ‘attaches considerable weight to the concept of Australian citizenship ... bringing with it special rights and obligations’.⁴⁸ Although most Australian legislation does not discriminate between citizen and non-citizen Australian residents,⁴⁹

³⁹ *Wurridjal v Commonwealth* (2009) 237 CLR 309, 412; *Nulyarimma v Thompson* (1999) 96 FCR 153, 162.

⁴⁰ *Australian Human Rights Commission Act 1986* (Cth) s 46MB(6)(v).

⁴¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

⁴² *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26.

⁴³ John Tobin, ‘*The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction*’ (Legal Studies Research Paper No 541, Melbourne Law School, 2004) 2.

⁴⁴ ‘Child’ is defined as ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’: *Convention* art 1.

⁴⁵ Bosniak, above n 4, 463–4.

⁴⁶ Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (3 October 2003) [12] (‘*General Measures of Implementation of the Convention on the Rights of the Child*’).

⁴⁷ *Convention* art 2.

⁴⁸ *Re Kboi Tri Tang (also known as Chi Tzo Tseng) and Candice Hui Nui Cho and the Honourable Christopher John Hurford, Minister of State for Immigration and Ethnic Affairs* [1986] FCA 214 (4 July 1986) [30]–[31].

⁴⁹ See Rubenstein, *Citizenship in Australia*, above n 3, ch 5, for a discussion of Australian legislation that does and does not discriminate on the basis of citizenship and residence in Australia.

certain statutory rights are limited to citizens. Most significant for children are the distinctions made between citizens and non-citizens in the *Migration Act 1958* (Cth),⁵⁰ including a citizens' right of re-entry to Australia.⁵¹ The right of re-entry is perhaps the central element of the importance of citizenship to children's human rights. A right of re-entry to Australia means a right to remain resident in Australia, thereby securing the protection of the spectrum of legislative rights that come with that residence.

In addition, citizenship may also give rise to certain common law rights for children. In the High Court, Gaudron J has recognised that '[c]itizenship ... involves obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability'.⁵² In the context of reviewing the decision to deport a non-citizen father who had children who were Australian citizens, Gaudron J set out one such obligation, in that:

citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions ... which directly affect that child's individual welfare.⁵³

This right is also central to the *Convention*.⁵⁴ Under the *Convention*, states parties have an obligation to ensure that the 'best interests of the child' is a primary consideration in all actions concerning children.⁵⁵ Every legislative, administrative and judicial body is required systematically to consider how children's rights and interests are affected by their decisions and actions.⁵⁶

Security of rights, and a child's right to have their best interests considered in matters that concern them, are central aspects of the *Convention* and of the meaning of citizenship in Australia. Considering citizenship in the context of possessing rights highlights the importance of citizenship for children, not only for securing children's entitlement to certain statutory rights, but to fundamental common law rights that exist independently of legislation and international law to protect the most vulnerable children in our community.

C Citizenship as Political Activity

The *Convention* recognises that all children have a right to express their views freely in all matters affecting them, with those views being given due weight.⁵⁷ The *Convention* also confers rights to freedom of expression,⁵⁸ thought, conscience and religion,⁵⁹ and

⁵⁰ Other significant statutes discriminating between citizens and non-citizens include the *Commonwealth Electoral Act 1918* (Cth), the *Australian Passports Act 2005* (Cth) and the *Higher Education Support Act 2003* (Cth). The *Commonwealth Electoral Act 1918* (Cth) and *Australian Passports Act 2005* (Cth) respectively restrict the rights to enrol to vote in Australian elections and to hold an Australian passport to citizens. Access to Commonwealth government-supported higher education in Australia is limited to Australian citizens and permanent humanitarian visa holders, with only limited exceptions: see *Higher Education Support Act 2003* (Cth) ss 90–5, 104–5, 118–5, 126–5, sch 1 para 44.

⁵¹ *Migration Act 1958* (Cth) s 42.

⁵² *Teoh* (1995) 183 CLR 273, 304.

⁵³ *Ibid.*

⁵⁴ *General Measures of Implementation of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5 [12].

⁵⁵ *Convention* art 3.1.

⁵⁶ *General Measures of Implementation of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5 [12].

⁵⁷ *Convention* art 12.

⁵⁸ *Ibid* art 13.

⁵⁹ *Ibid* art 14.

association.⁶⁰ Arguably, articles of the *Convention* setting out children's rights of participation are crucial in the pursuit of children's citizenship.⁶¹ These rights 'carry the promise of legitimately engaging children in the civic and political functions of their communities and governments.'⁶²

However, assumptions regarding children's reasoning capacity have historically meant that childhood and citizenship in a political sense have been considered incompatible.⁶³ It has been argued that children cannot be regarded as complete members of the community because, though they have some social and civil rights, they have no political rights facilitating their participation as citizens of society.⁶⁴ In Australia, children's 'active engagement in the life of the political community'⁶⁵ is limited by statutory restrictions, for example that an Australian citizen must be 18 years old to vote.⁶⁶ However, children in Australia are gradually being permitted to participate in society, and act as citizens by exercising the rights that it confers.⁶⁷ Significantly, these opportunities for children's political engagement are not limited to children who hold the legal status of citizen. Opportunities for children's participation exist, and evidence a certain degree of political engagement by children in Australia, and not just those who are legally citizens. Importantly, in the context of performing her functions, the Commissioner may consult children.⁶⁸

D Citizenship as Identity

Beyond rights and political participation, citizenship can be essential to securing identity. '[M]embership of the community in the full sense includes social citizenship and this is not confined to legal citizens.'⁶⁹ Citizenship and identity may be independent, both conceptually and in individuals' experiences, but they are also often 'intertwined in complex ways, in ways that may be painful for the individual and problematic from the perspectives of social justice, human dignity and human rights'.⁷⁰ While identity may not be a clearly definable legal concept, it is a concept grounded in an individual's significant relationships and social and geographic connections.⁷¹ These connections can be meaningful to children. Consequently, it may be these connections, not 'an adult

⁶⁰ Ibid art 15.

⁶¹ Felton Earls, 'Children: From Rights to Citizenship' (2011) 633 *The Annals of the American Academy of Political and Social Science* 6, 9.

⁶² Ibid.

⁶³ Sharon Bessell, 'Betrayal and Broken Ties: British Child Migrants to Australia, Citizenship and Identity' in Kim Rubenstein, Fiona Jenkins and Mark Nolan (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, forthcoming).

⁶⁴ Ibid

⁶⁵ Bosniak, above n 4, 470.

⁶⁶ *Commonwealth Electoral Act 1918* (Cth) s 93.

⁶⁷ For example, under s 60CC(3)(a) of the *Family Law Act 1975* (Cth), in determining what is in a child's best interests, the court must consider 'any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views'.

⁶⁸ As well as state, territory and federal departments and authorities, non-governmental organisations, international organisations and agencies and such other parties as the Commissioner considers appropriate: *Australian Human Rights Commission Act 1986* (Cth) s 46MB(5).

⁶⁹ Kim Rubenstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalized World,' (2000) 7 *Indiana Journal of Global Legal Studies* 519, 527.

⁷⁰ Bessell, above n 63.

⁷¹ Ibid.

imposition or a general approximation of children's experiences, wishes and feelings⁷² (or a label of legal citizenship) that constitute the child's identity and are central to their human dignity.⁷³

The *Convention* requires states parties to ensure their national law implements children's right to acquire a nationality⁷⁴ and to preserve their identity without unlawful interference.⁷⁵ In Australia, citizenship is the legal prerequisite for belonging to the national group. However, a child may identify as Australian without being a citizen. Indeed, in a number of cases, the Administrative Appeals Tribunal has drawn on analysis of a child's sense of identification with the Australian community as the basis of a decision to grant the child Australian citizenship.⁷⁶ This evidences a recognition, both internationally and by domestic decisionmakers, of the importance of Australian citizenship, not only in securing children's rights, freedoms and political identity, but in recognising and formalising their identity. The issue in Australia is the extent to which our citizenship law and policy adequately achieves these outcomes, as will be discussed further below.

E Conceptualising Australian citizenship beyond the Act

Australian citizenship is more than a legal status for children. It is vital for securing statutory and common law rights and protections. It is evidenced by children's increasing acknowledgment and inclusion in administrative decisionmaking and policy. Citizenship is also a social concept, encompassing a child's identity and sense of belonging to the Australian community. The rights in the *Convention* reflect the importance of the aspects of citizenship that exist beyond a legal status. A child's Australian citizenship is a multifaceted interaction of rights, engagement and identity, as well as a legal status.

When considering children's citizenship, and more generally their rights under other Commonwealth laws, the Commissioner is not tied to the legal definition of citizenship. To the contrary, the Commissioner's role is to examine the extent to which Commonwealth law recognises and protects children *in Australia*, not only Australian children. In doing so, she is obliged to have regard to the *Convention*. To realise this role fully, it is crucial that the Commissioner is mindful of aspects of citizenship that sit outside the legal status bestowed by the *Act*.

IV Reflecting a Broader Concept of Citizenship in Australian Citizenship Law

A related but distinct issue for the Commissioner is the extent to which the statutory concept of citizenship in Australia protects the human rights of all children in Australia. The *Convention* is an appropriate and useful lens under which to analyse the *Act*, as the Commissioner is required to have regard to the *Convention* when performing his or her functions. Further, the rights in the *Convention* reflect the broader concept of Australian

⁷² Ya'ir Ronen, 'Redefining the Child's Right to Identity', (2004) 18 *International Journal of Law Policy and the Family* 147, 173.

⁷³ *Ibid* 172.

⁷⁴ *Convention* art 7.

⁷⁵ *Ibid* art 8.

⁷⁶ See, eg, *Re SNMX and Minister for Immigration and Citizenship* [2009] AATA 539; *Ashik Antar Paul v Minister for Immigration and Citizenship* [2009] AATA 97; *Re Raisini and Minister for Immigration and Citizenship* [2008] AATA 640; *Re Choi and Minister for Immigration and Citizenship* [2008] AATA 726.

citizenship. Though we do not consider an expanded statutory definition of citizenship to be a practical possibility, we argue that this broader concept of citizenship is appropriate and useful, both for the Commissioner in the context of considering children's human rights and citizenship and for decisionmakers under the *Act*.

A The Best Interests of the Child

Article 3.1 of the *Convention* provides for a child's best interests to be a primary (though not *the* primary) consideration in all actions concerning children. We recognise that, while children are human beings who have their own rights, adults will often ultimately make decisions on their behalf.⁷⁷ The Committee emphasises that the concept of a child's best interests is threefold.⁷⁸ It is a substantive right, creating intrinsic obligations for states parties, and is a fundamental principle of legal interpretation. It is also a rule of procedure.

Whenever a decision is to be made that will affect a [child or children] ... the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.⁷⁹

To assess properly the way that the *Act* facilitates the consideration of children's best interests in actions taken under it, it is necessary to set the *Act's* provisions in the context of a recent legislative amendment to s 21(5) of the *Act*. The broader implications of the change with respect to the best interests consideration in the context of children's citizenship can then be considered.

I The 2009 amendment to s 21(5)

Section 21(5) of the *Act* was amended on 9 November 2009. Previously, *any person* under 18 was eligible to apply for a conferral of Australian citizenship. Now, the applicant must be a permanent resident to be eligible to apply.⁸⁰ The amendment was intended to 'prevent children who are in Australia unlawfully, or who along with their families have exhausted all migration options, from applying for citizenship in an attempt to prevent their removal from Australia'.⁸¹ However, this change has jeopardised the protection of children's best interests in Australia.

Section 24(2) of the *Act* confers a discretion on the Minister to refuse to approve the person becoming an Australian citizen, despite the person being eligible under s 21(5). Prior to the amendment, the Minister had the power to refuse an application where a child eligible under s 21(5) was not a permanent resident, but the exercise of this discretion was guided by the best interests of the child⁸² and the application of policy. Central to the policy requirements was a requirement that the Minister consider a child's circumstances

⁷⁷ Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 432.

⁷⁸ See Committee on the Rights of the Child, *General Comment No 14: On the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) 4.

⁷⁹ *Ibid.*

⁸⁰ *Act* s 21(5) as amended by *Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Act 2009* (Cth) sch 1.

⁸¹ Commonwealth, *Parliamentary Debates*, Senate, 25 June 2009, 4264 (Penny Wong).

⁸² *Australian Citizenship Instructions 21 September 2009 – 8 November 2009* (Cth) ch 5.

and best interests when assessing an application under s 21(5).⁸³ In practice, this often included a consideration of the child's citizenship in the broader sense. Indeed, a number of applications brought under the former s 21(5) turned on a consideration of the child's best interests having regard to their identification with Australia and membership of the Australian community.⁸⁴

2 Broader practical implications

The amendment to s 21(5) has removed the Minister's discretion to inquire into the unusual circumstances of a child who is not a permanent resident, including their identification and Australian citizenship in the broader sense. There is also no opportunity for an assessment of these children's best interests or prospects of suffering hardship or disadvantage if they are denied the legal status of Australian citizenship.⁸⁵

The amendment narrowed the scope for consideration of children's citizenship in the broader sense, rendering a child's citizenship dependent on their residency status under the *Migration Act 1958* (Cth). This is evidence of a focus on immigration policy and the circumstances of family members and other people who accompany a child in Australia, rather than on the interests of the child themselves.⁸⁶

B Rights without Discrimination

This focus on immigration policy is particularly marked when examining the *Act* in light of art 2 of the *Convention*, under which states must ensure that no child is discriminated against, including on the basis of their parents' status.⁸⁷ The Committee has repeatedly highlighted Australia's failure to ensure that no child is deprived of 'citizenship on any ground, regardless of the status of his/her parents'.⁸⁸ The fact that children do not become citizens automatically unless their parents are permanent residents or citizens is the first expression of a child's citizenship being linked to their parents'. This is discussed below,⁸⁹ however, the *Act's* provisions concerning the cessation of citizenship also illustrate its failure to account for children as individual citizens in their own right, removed and separate from the potential immigration status of their parents.

⁸³ Ibid.

⁸⁴ See, eg, *Re SNMX and Minister for Immigration and Citizenship* [2009] AATA 539; *Ashik Antar Paul v Minister for Immigration and Citizenship* [2009] AATA 97; *Re Raisini and Minister for Immigration and Citizenship* [2008] AATA 640; *Re Choi and Minister for Immigration and Citizenship* [2008] AATA 726.

⁸⁵ Note that the *Australian Citizenship Instructions* issued on 1 July 2013 include, for the first time, a chapter addressing the requirement to consider a child's 'best interests' in citizenship decisionmaking. However, it is made clear (at 18.2) that a 'best interests' enquiry is only relevant when exercising discretion under the *Act*. If no discretion exists, such as in situations where a child does not meet the legislative eligibility requirements, the policy does not mandate a consideration of the child's best interests. See *Australian Citizenship Instructions 1 July 2013* (Cth) ch 18.

⁸⁶ Mary Crock, Mary Anne Kenny and Fiona Allison, 'Children and Immigration and Citizenship Law' in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2008) 238, 240.

⁸⁷ *Convention* arts 2.2, 8.

⁸⁸ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [38]; Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Australia*, 16th sess, UN Doc CRC/C/15/Add.79 (10 October 1997) [30]. In 2012, the Committee made specific mention in this context of the child's right to preserve his or her national identity in art 8 of the *Convention*, illustrating the interconnectedness of the *Convention's* articles.

⁸⁹ See IV D regarding the child's right to nationality and identity.

Provisions of the *Act* concerning cessation of citizenship arbitrarily discriminate against children on the basis of their parents' status. The effect of ss 25(4) and 36 of the *Act* is that in some circumstances, children can be deprived of their citizenship only because their parents are. Under s 25(4), in situations where one of their parents loses citizenship, cancellation of a child's approval is mandatory. Under s 36, the Minister's decision to revoke a child's Australian citizenship is discretionary, but this discretion is exercisable upon cessation of the citizenship of the child's parent. These provisions breach Australia's obligations under the *Convention*.⁹⁰ They also fail to acknowledge children as citizens in their own right, especially in the broader sense, where children will clearly have rights, political engagement and experiences of membership of the Australian community that are independent of their parents'.

C The Right to Participate

The *Convention* recognises the importance of considering the child as an individual, conferring rights of participation, freedom of thought and of expression.⁹¹ The Committee has recognised that 'the views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws', as well as their evaluation.⁹² The Committee considers that children's participation should be a continuing and intense dialogue between children and adults on the policies and measures implemented by those adults that affect children's lives.⁹³

The enduring focus in Australian citizenship policy on preventing parents from using their children to obtain citizenship themselves has undermined the consideration of children's citizenship claims in their own right, and denied children their right to participate in decisions that affect them — a central aspect of citizenship itself.⁹⁴ In addition, the scope for decisionmakers to consider the circumstances of all children in exercising their discretion under the *Act* has been progressively narrowed, for example by the amendment to s 21(5) discussed above. This has resulted in a systematic failure to facilitate children's active participation in citizenship decisions that affect them.

D The Right to Nationality and Identity

Article 7 of the *Convention* relates to the protection of the child's legal identity, which includes the right to be registered at birth, to have a name, a nationality and family relations. The child's right to preserve his or her identity, including nationality, is set out in art 8. The right to nationality has been described as the 'most critical and controversial aspect of Article 7 in the context of the persistent and increasing phenomenon of stateless

⁹⁰ Human Rights and Equal Opportunity Commission, Submission No 50 to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the provisions of the Australian Citizenship Bill 2005 and the Australian Citizenship (Transitional and Consequential) Bill 2005* (20 January 2006) [27]. See also Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [38], noting the Committee's specific mention of the child's right to preserve his or her national identity in art 8.

⁹¹ *Convention* arts 12.1, 13.1, 14.1.

⁹² Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard*, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009) [12].

⁹³ *Ibid* [13].

⁹⁴ Bosniak, above n 4, 470.

amongst adults and children alike'.⁹⁵ However, the importance of this right is recognised outside the *Convention*. For example, the *Universal Declaration of Human Rights* states that 'everyone has the right to a nationality'.⁹⁶ Nationality has been defined as 'the essential condition for securing to the individual the protection of his rights [under international law]'.⁹⁷ Further, a sense of membership is a core aspect of citizenship.⁹⁸

Two aspects of the *Act*, namely citizenship by birth and citizenship in situations of statelessness, address nationality in a way that is inconsistent with a broader conceptualisation of citizenship and with the international human rights approach.

I Citizenship at birth

The *Act* was amended in 1986 to require that a child's parent must be a citizen or a permanent resident for the child to acquire citizenship at the time of their birth. Prior to the amendment, every child born in Australia⁹⁹ automatically acquired Australian citizenship.¹⁰⁰ Now, children born in Australia to unlawful non-citizen parents are taken to be unlawful non-citizens from birth.¹⁰¹ These children will only become citizens by virtue of their birth in Australia if they remain living in the country until they are 10 years old.¹⁰² This has led to a growing number of long-term or 'permanently temporary'¹⁰³ migrants in Australia. These are children who, despite being born in Australia and growing up in the country and forming a meaningful membership of the Australian community, remain excluded from the legal status of citizen and thus risk deportation prior to their 10th birthdays.

The amendment signified a departure from the principle of *jus soli*: the acquisition of nationality based on the place of birth. While *jus soli* cannot always reflect meaningful membership of the community, an international norm of *jus soli* has developed, especially in the case of children who would otherwise be stateless.¹⁰⁴ The High Commissioner for Human Rights has stated that:

[i]n view of the nearly universal ratification of the *Convention*, the principle of *jus soli* (citizenship based on place of birth) has emerged as the overriding international law

⁹⁵ Douglas Hodgson, 'The Child's Right to a Legal Identity' (1993) 2 *Australian Journal of Family Law* 121, 124.

⁹⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 15.

⁹⁷ Lassa Oppenheim, *International Law: A Treatise – Volume 1* (H Lauterpacht, 8th ed, 1955) 669 quoted in Hodgson, above n 95, 124.

⁹⁸ Bosniak, above n 4, 455.

⁹⁹ Unlike certain provisions in the *Migration Act 1958* (Cth), for the purpose of the *Act*, the definition of 'Australia' includes the external territories.

¹⁰⁰ With the limited exceptions of children born to diplomats, or to enemy aliens in occupied territories: *Australian Citizenship Act 1948* (Cth), later amended by *Australian Citizenship Amendment Act 1986* (Cth) s 4.

¹⁰¹ Kathryn Cronin 'Primary Consideration: Children in Australian Immigration Law' in Melinda Jones and Lee Ann Basser Marks (eds), *Children on the Agenda* (Prospect Media, 2001) 147, 161.

¹⁰² *Act* s 12(1). In *Singh v Commonwealth* (2004) 222 CLR 322 and *Koroitamana v Commonwealth of Australia* (2006) 227 CLR 31, the High Court held that children born in Australia to non-citizens may be aliens for the purposes of s 51(xix) of the *Constitution*. That is, birth in Australia does not entitle children to any special form of membership outside the *Act*.

¹⁰³ This terminology is used by Peter Mares, 'Temporary Migration and its Implications for Australia' (Speech delivered at the Senate Occasional Lecture Series, Parliament House, Canberra, 23 September 2011) <http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/pop57/c03>.

¹⁰⁴ Asbjørn Eide, *Citizenship and the Minority Rights of Non-Citizens*, UN Doc E/CN.4/Sub.2/AC.5/1999/WP.3 (15 April 1999) [24].

governing the nationality of children born to non-citizen parents, particularly if they would otherwise be stateless.¹⁰⁵

The *Act's* failure to align with the principle of *jus soli* has created a gap between the Australian system and that of other states. The children who fall into this gap are without both a nationality and the protections that that nationality would afford them. We argue that in order to protect children's right to nationality,¹⁰⁶ and to recognise the connection that children of non-citizens who are born in Australia (or who arrive soon after their birth and grow up in Australia) may have with the country, the concept of citizenship by descent in the *Act* needs to be expanded. One possibility is to complement the existing legal concepts of Australian citizenship by birth and descent with a category of citizenship based on meaningful membership of the community, which is consistent with the provision enabling a child born in Australia who resides here continuously for 10 years to become a citizen on their 10th birthday.¹⁰⁷

The amendment to s 21(5), which removed the scope for decisionmakers to consider the circumstances of children who are not permanent residents, including their identification with the Australian community, makes this need even more pressing.

2 Stateless persons

The *Act's* treatment of stateless children also contains problematic gaps that undermine Australia's fulfilment of its obligation to protect 'every individual's right to a nationality, including every child's right to acquire a nationality'.¹⁰⁸ The *Statelessness Convention* requires a state party to grant its nationality to individuals born in that state who would 'otherwise be stateless'.¹⁰⁹

However, the *Act* focuses on *entitlement to*, rather than an actual grant of, foreign citizenship. A person born in Australia is eligible to apply for citizenship under s 21(8) only if that person is not entitled to acquire the nationality or citizenship of a foreign country. The ambiguity inherent in this focus raises questions in practice. If a child, or any person, was subject to any element of discretion by a foreign country to accept or reject an application for citizenship, this may negate their claim to Australian citizenship under s 21(8), even if their claim in that country was rejected.¹¹⁰ These individuals may not be able to become Australian citizens under the *Act*, despite satisfying the corresponding

¹⁰⁵ Office of the United Nations High Commissioner for Human Rights, *The Rights of Non-Citizens*, UN Doc HR/PUB/06/11 (2006) 33.

¹⁰⁶ *Convention* art 7.

¹⁰⁷ For example, in her book *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009) 165, Ayelet Shachar develops the concept of *jus nexi* citizenship, based on a genuine connection to the country, to establish 'a tie between citizenship and the social fact of membership rather than blind reliance upon the accident of birth'.

¹⁰⁸ Office of the United Nations High Commissioner for Refugees, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, UN Doc HCE/GS/12/04 (21 December 2012) [1].

¹⁰⁹ *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) art 1 ('*Statelessness Convention*'). For a discussion of the interpretation of the *Statelessness Convention*, see Office of the United Nations High Commissioner for Refugees, above n 108.

¹¹⁰ Department of Parliamentary Services (Cth), *Bills Digest*, No 8 of 2008–09 (25 August 2008) 26.

precondition in the *Statelessness Convention*. That is, they would otherwise be stateless and are therefore deserving of protection.¹¹¹

Further questions arise when considering s 21(8) in light of a child's right to nationality under the *Convention* and in the context of specific circumstances that arise for children. Where a child's parents are fleeing their own country at the time of the child's birth because of a genuine fear of persecution, the child may technically be entitled to acquire citizenship of that country by virtue of their parents' citizenship. However, because their parents' return to that country is impossible, in practical terms, the child is left stateless.¹¹² Section s 21(8) would not operate to protect children in these circumstances. As a consequence, these children are denied both their right to acquire a nationality¹¹³ and to have their best interests considered.¹¹⁴ To protect the rights of such children properly, further amendment to s 21(8) is required to reflect adequately the practical reality, for refugee children who are not Australian permanent residents, that statelessness results from the lack of a grant of meaningful foreign citizenship, rather than a lack of eligibility to acquire that citizenship.

E The Rights of Adopted Children

States parties to the *Convention* that recognise and/or permit the system of adoption must ensure that the best interests of the child are the paramount consideration.¹¹⁵ The historic experience of abuse of intercountry adoption practices has led to the development of child-centered protections to prevent abuses such as child trafficking, adoption of children against the consent of their birth parents and by Australians who have committed offences against children. These protections are not found in the *Act* itself, but are largely incorporated through reference to the relevant visa provisions in *Migration Act 1858* (Cth) and the *Hague Convention* (which is implemented in Australia by legislation).¹¹⁶ However, in light of art 21 of the *Convention*, there are shortfalls in the way these protections have been implemented in Australian citizenship law.

The *Act* addresses adoption in three principal areas. First, children who are the subject of adoptions recognised in Australia will automatically acquire Australian citizenship under s 13 of the *Act*. Section 19C allows children whose adoptions are recognised overseas in a *Hague Convention* country, where a compliance certificate has been issued, to apply for citizenship. All other adopted children, that is, those adopted overseas in a non-*Hague Convention* country (or where a compliance certificate has not been issued), have no other option but to apply for citizenship by conferral under s 21(5). The issue here is that s 21(5) now requires the child to be a permanent resident, so the child must be eligible for a permanent visa under the *Migration Act 1958* (Cth). Not all adopted children will be eligible for permanent visas.

¹¹¹ Ibid.

¹¹² Anais d'Arville, Submission to the Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (9 January 2003) 3.

¹¹³ *Convention* art 8.

¹¹⁴ Ibid art 3.1.

¹¹⁵ Ibid art 21.

¹¹⁶ See *Family Law Act 1975* (Cth); *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* (Cth).

In *Lavalu and Minister for Immigration and Citizenship*,¹¹⁷ citizenship was granted to a child who was born, adopted and living in Tonga. The child, Lina, was adopted by an Australian citizen and her Tongan uncle, who was an Australian permanent resident. The adoption was official under Tongan law and Lina was issued with a new birth certificate listing her new parents as her parents. However, Tonga is not a signatory to the *Hague Convention*, so Lina was not eligible to apply for citizenship in Australia under s 19C. Nonetheless, Lina's application under s 21(5) was successful due to the unusual circumstances of the case. These circumstances included that Lina's birth mother did not want any responsibility for her, that Lina and her adopted parents shared a close bond, and that Lina had been separated from her new parents and was living in Tonga in poor, crowded and unsanitary conditions. Deputy President Tamberlin considered Lina's circumstances and concluded that '[t]he best interests of Lina ... are strongly in favour of the grant of citizenship'.¹¹⁸

However, since the amendment to s 21(5), situations arise where adopted children slip through the net cast by the *Act*. Because these children are not eligible for Australian citizenship under the *Act*, their best interests are never considered in the context of an application. For example, the applicant in another matter, *Lavelua and Minister for Immigration and Citizenship*¹¹⁹ was also adopted pursuant to an adoption order made by the Supreme Court of Tonga. The new parents of the child, Sione, were Australian citizens who brought their adopted child with them to Australia, but were unable to gain citizenship for him.¹²⁰

The difference between Sione's case and that of Lina¹²¹ was that Lina's application was made before the amendment to s 21(5), while Sione's application was made four days after it came into effect. Senior Member Handley commented on the gap in Australia's citizenship law in protecting the best interests of children such as Sione:

For my part, I would recommend with respect, that an appropriate visa be issued to Sione to allow him to remain in Australia ... Sione was adopted with the consent of his biological mother. Denying him the right to remain in Australia with his adoptive parents would not be in his best interests. Being forced to return to Tonga would be unconscionable.¹²²

However, Sione had no visa options and could not be granted citizenship. The *Act* was inadequate to allow consideration of his best interests that, according to the *Convention*, should be a primary consideration in such cases.

V Conclusion and Recommendations

The establishment of the National Children's Commissioner presents a significant opportunity for the protection of children's rights in Australia. The Commissioner's function of examining the recognition and protection of the human rights of children under Commonwealth statutes is an important one, not least in the area of citizenship law. Citizenship is fundamental to the concept of a nation state. As a legal status, the concept of

¹¹⁷ [2010] AATA 229 (31 March 2010).

¹¹⁸ *Ibid* [46].

¹¹⁹ [2010] AATA 314.

¹²⁰ It is unclear how this happened, given that there would have been no appropriate visa options for the child.

¹²¹ See *Lavalu and Minister for Immigration and Citizenship* [2010] AATA 229.

¹²² *Lavelua and Minister for Immigration and Citizenship* [2010] AATA 314 [13].

Australian citizenship is governed by the *Act*, which specifically affects children's automatic acquisition of citizenship, eligibility to obtain citizenship by application and cessation of citizenship.

However, both practically and philosophically, citizenship for children, like adults, is more than a legal status. Citizenship is an entitlement to security of rights and protections. It is engagement with a political community. Citizenship is also identity, in the sense of membership of a national group. The importance of these aspects is reflected by the centrality of the rights they intersect with in the *Convention*, an instrument that the Commissioner is bound to consider in performing her functions. We argue that this intersection warrants a conceptualisation of citizenship that is broader than that established by the operation of the *Act* alone. Our first key message to the Commissioner is that in order to reflect the breadth of the concept of citizenship properly (and the *Convention* in the context of citizenship) it is crucial that when examining the *Act*, the Commissioner is mindful that citizenship is a concept based on rights, political engagement, membership *and* legal status.

Our second key message is that the outcome of that examination should be to highlight a number of deficiencies in the way the *Act* protects the human rights of children. When we examine the *Act* through the lens of the *Convention*, it is apparent that it lacks the flexibility to adequately reflect the broader conception of children's citizenship. The *Act's* focus on the legal status of children's parents means that it fails to secure rights for all children without discrimination. This focus also denies children the right to engage actively in the policies and decisions affecting them. Further, the fundamental discrepancy between children's experience of an Australian identity and their avenues to citizenship mean that in practice, a child's legal status does not align with their experience of other aspects of citizenship. Finally, the *Act* falls short of achieving practical protection of the best interests of all adopted children.

Consequently, our general recommendations are twofold. First, it is necessary to reintroduce the scope for discretionary consideration of all children's circumstances (not only permanent residents) that was removed by the 2009 amendment to s 21(5). This reform should not be limited to the concept of citizenship as a legal status established under the *Act*, but should build on a recognition of citizenship as a multifaceted concept, grounded in rights, political engagement and membership. Other deficiencies in the adequacy of the *Act's* protection of children's rights highlighted in this article are exacerbated by the current lack of a child-specific citizenship category that is open to all children. The reintroduction of such a category would give decision-makers flexibility to consider a child's best interests, individual circumstances and meaningful membership of the Australian community when making citizenship decisions.

The second, related, recommendation is that in the exercise of any discretion or decision-making power under the *Act*, decisionmakers need to be mindful of a concept of children's citizenship based on rights, identity and political participation, as well as legal status. This has been demonstrated by decisionmakers in the past, particularly in the context of s 21(5) before its amendment. Such consideration presents a significant opportunity not only to grant citizenship to children in a way that reflects their individuality and membership, but also to define and expand the concept of Australian citizenship, and those we include in it.

Citizenship is a fundamental and crucial area of law for examination by the Commissioner. A comprehensive review of the *Act* in light of the *Convention* highlights a need for reform in order to ensure the protection of the human rights of *all* children in Australia, as well as those who have the security and protection of being recognised as Australian citizens under the *Act*.