Refugee & Immigration Legal Centre Inc

Submission to the Senate Legal and Constitutional Affairs Test Review Committee Inquiry into Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009

1. Introduction – Refugee & Immigration Legal Centre Inc.

1.1 The Refugee and Immigration Legal Centre ("RILC") is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia.[1] Since its inception over 20 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration's Immigration Advice and Application Assistance Scheme ("IAAAS") and we visit the Maribyrnong immigration detention centre often. RILC has been assisting clients in detention for over 12 years and has substantial casework experience. We have often been contacted for advice by detainees from remote centres and have visited Port Hedland, Curtin, Perth, Baxter, Christmas Island and Nauru immigration detention centres/'facilities' on numerous occasions. We are also a regular contributor to the public policy debate on refugee and general migration matters.

1.3 In the 2007-2008 financial year, RILC gave assistance to 3,227 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford to pay for legal assistance and are often

[1] RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service ("RACS") and the Victorian Immigration Advice and Rights Centre ("VIARC") which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

disadvantaged in other ways. Much of this work involved advice and/or full legal representation to review applicants at the Migration and Refugee Review Tribunals. Due to funding and resource constraints, in recent years we have generally provided advice and assistance at the administrative level only.

2. Executive summary

2.1 RILC submits that:

2.1.1 the Bill fails to adequately allow alternative paths to Australian citizenship, particularly for refugee and humanitarian entrants;

2.1.2 the expansion of the exemption based on incapacity to having to show understanding of the nature of the application, a basic knowledge of the English language and an adequate knowledge of Australia and the responsibilities and privileges of Australian citizenship remains too narrow; and

2.1.3 the introduction of a legislative requirement that applicants under 18 must be permanent residents to be eligible for citizenship is unwarranted and unnecessary.

2.2 Accordingly, RILC recommends that:

1. **The Act be amended to provide for alternative pathways as recommended by the Test Review Committee.**
2. **The Act be amended to exempt the holders of refugee and humanitarian permanent visas from the requirement that they complete the Citizenship test.**
3. **The amendment proposed at Item4 of the Bill be amended to remove the words "that is as a result of the person having suffered torture or trauma outside Australia and".**
4. **That s 21(5) of the Act not be amended in the way proposed in the Bill.**

3. Introduction

3.1 RILC welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Test Review Committee Inquiry into Australian Citizenship Amendment Citizenship Test Review and Other Measures) Bill 2009 ("the Inquiry").

3.2 The Australian Citizenship Amendment Citizenship Test Review and Other Measures) Bill 2009 ("the Bill") amends the *Australian Citizenship Act 2007* (Cth) ("the Act") by:

- broadening the category of applicants who may be exempted from having to complete the citizenship test in order to be granted citizenship by conferral;
- procedurally linking the requirement that the citizenship test be completed with the application for citizenship by conferral; and
- requiring that applicants who are under the age of 18 be permanent residents to be eligible for citizenship by conferral.

3.3 RILC has previously articulated grave concerns about the introduction of the citizenship test in its current form, requiring the completion of a computer-based multiple choice test answering questions drawn from a resource book written in a way that demands a high level of English language literacy to comprehend. In our submission to the Australian Citizenship Test Review Committee ("the Test Review Committee"), we set out our concerns that the citizenship test in its current form:

- was implemented without any properly demonstrated, evidence-based need for it;
- imposes unreasonable and unequal barriers to citizenship and so barriers to social cohesion and participation;

- fails to provide an adequate range of effective pathways to citizenship;
- imposes language and knowledge requirements that are too high; and
- is arguably inconsistent with Australia's obligations under the Refugees Convention and other international treaties.

3.4 In August 2008, the Test Review Committee published its report *Moving forward … Improving Pathways to Citizenship* ("the Report")[2]. Amongst the key findings of the Report were that:

- the present test is "flawed, intimidating to some and discriminatory", that key legislative requirements require definition before the test is revised to be more appropriate;
- "alternative and improved education pathways to acquire citizenship need to be established"; and
- the "special situations of refugees and humanitarian entrants and other disadvantaged and vulnerable people seeking citizenship must be addressed."

In November 2008, the Government responded to the Report,[3] and agreed with a number of its recommendations. It undertook to implement those recommendations with which it agreed. The amendments proposed in the Bill are proposed in this context.

3.5 While RILC continues to hold the position that a Citizenship test in its current, computer-based multiple choice from should be replaced by seminar-based Citizenship courses, we understand that the Government remains committed to maintaining a citizenship test. Accordingly, we frame our concerns about the Bill in the context of a Citizenship test remaining a requirement of citizenship.

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[2] "*Moving forward … Improving Pathways to Citizenship"*, A Report by the Australian Citizenship Test Review Test Review Committee, August 2008.
[3] "*Moving forward … Improving Pathways to Citizenship"*, Government response to the Report by the Australian Citizenship Test Review Test Review Committee, November 2008.

3.6 RILC ‘s core concerns about the amendments in the Bill are thus:

- the Bill fails to adequately allow alternative paths to Australian citizenship, particularly for refugee and humanitarian entrants;
- the expansion of the exemption, based on incapacity, to having to show understanding of the nature of the application, a basic knowledge of the English language and an adequate knowledge of Australia and the responsibilities and privileges of Australian citizenship remains too narrow; and
- the introduction of a legislative requirement that applicants under 18 must be permanent residents to be eligible for citizenship is unwarranted and unnecessary.

3.7 We address these concerns further below.

4. Alternative pathways to citizenship

4.1 While RILC welcomes the announced changes to policy that the citizenship test materials will be amended to ensure that the assessment of a person’s knowledge of the English language is whether they have “a sufficient knowledge of English to be able to exist independently in the wider Australian community”[4] and that the testable section of the Citizenship test will be limited to cover concepts associated with the Pledge of Commitment,[5] we remain seriously concerned at the lack of legislative implementation of alternative pathways to obtaining Australian citizenship, in particular for refugees and humanitarian entrants.

[4] Ibid at page 2.
[5] Ibid at page 3.

4.2 From our experience in assisting clients, for many refugees who are granted permanent protection visas or other vulnerable migrants granted permanent visas in Australia, achieving the status of permanent resident is only one step in the process of recovering from the trauma or disadvantage they have suffered in the past. Becoming an Australian citizen is often a crucial further step for them in the recovery and rebuilding process. Citizenship offers them a form of protection that is both practical and symbolic. It affords them a level of security they have often never been afforded before in their lives. Clients commonly talk of finally feeling embraced and welcomed into the Australian community. For many, it is the sense of finally being granted an equal opportunity to participate in a society that is significant. The cornerstone of refugee protection is providing a durable solution for refugees and a fundamental component of a durable solution for a refugee is to be able to live of full human dignity as a free and equal participant in civil society.

4.3 Further, given that many refugees are effectively stateless, or by their very refugee status denied the full protection to which a citizen of a country is entitled, the sense of security, protection and full participation gained by citizenship is crucial to their full recovery from the harm they or their families suffered or feared suffering which led to their being found to be refugees and, further, their ability to live with full respect and dignity in their country of refuge. As stated by leading international refugee law scholar, Professor James Hathaway, "[b]ecoming a citizen bespeaks a qualitatively distinct level of acceptance by the refugee of the host state … By granting the refugee the right to participate in the public life of the state, naturalization eliminates the most profound gap in the rights otherwise available to refugees …"[6] Most refugees are strongly aware of this "gap" and only feel fully secure in Australia once it is closed.

[6] Hathaway J, *"The Rights of Refugees under International Law"*, Cambridge Press 2005, at p 980.

4.4 Yet it is those who are most likely to be disadvantaged and vulnerable, such as refugee or humanitarian entrants, who have experienced most difficulties with the passing the test.[7] We note that almost 2,000 such people have failed the test. In addition, we note there has been a sharp decline in applications for citizenship, since the new testing regime was introduced.[8] This is clearly inconsistent with policy goals of encouraging inclusion and participation. While it is difficult to precisely identify the causes, it would appear that a significant factor may be confusion or fear about the test. Certainly RILC has been directly aware of such a pattern through discussion with clients. For example, we are aware that a number of Afghan refugees who have been living in Australia for over seven years, who have been gainfully employed for many years, have functional English and participate in wide range of activities within their local communities, have felt too frightened to sit the test for fear of failing. Humiliation was cited as one of the factors in this fear.

4.5 In light of the above, we submit that, even with the policy changes proposed by the Government, the test in its current form - an impersonal computerized multiple choice exam – continues to operate as a further intimidating barrier to full and equal membership of civil society for refugees and disadvantaged migrants in Australia.

4.6 Another issue of concern is whether the test in its current form may operate in a way that runs counter to Australia's obligations to refugees under Article 34 of the Refugees Convention. Article 34 requires that a state party to the Convention

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[7] 1,986 refugee/humanitarian entrants, representing 16%, have failed between October 2007 and June 2009. See Australian Citizenship Test Snapshot Report July 2009, accessible via http://www.citizenship.gov.au/_pdf/citz-test-snapshot-report-jun09.pdf.

[8] The DIAC Annual Reports for 2006-2007 and 2007-2008 show that 169,123 people were granted Australian citizenship by grant, descent and resumption in 2007 – 2007 but that only 107,662 people were approved fro citizenship by conferral, descent and resumption in 2007 – 2008. Figures for the period 2008 – 2009 are not yet available.

"shall as far as possible *facilitate* the … naturalisation of refugees .. [and] … in particular *make every effort to expedite* naturalisation proceedings" [italics added]. While it is acknowledged Article 34 does not require that a government simply waive or reduce substantive requirements for the acquisition of citizenship by refugees, the Article is positive in nature and so does require that a government actively assist refugees in obtaining citizenship.[9] The test in its current form – even with the proposed policy changes - does not facilitate or assist with the naturalization of refugees in Australia. As stated above, we argue it does the reverse: it impedes that process.

4.7 We note the Government has announced it intends to develop a citizenship course to provide an alternative pathway to citizenship for refugees and disadvantaged or vulnerable migrants. We welcome the Government's statement in the Response that this will *include* people who understand English but whose level of literacy does not allow them to undertake a formal computer-based test. Yet in the Second Reading Speech for the Bill, it is stated the proposed alternative pathway will *only* be for "a small group of disadvantaged people whose literacy skills will never be sufficient to sit and pass a formal computer test event though they understand English." We also note that the Test Review Committee has recommended a range of other alternative pathways, including Citizenship Education Programs in English and in languages other than English.[10]

4.8 We submit it is crucial to ensure that refugees and humanitarian entrants, and disadvantaged or vulnerable other migrants are given sufficient support and access to Australian Citizenship and so clear, certain alternative pathways to Australian citizenship must be established. We submit that the alternative pathway proposed by the Government should be available to all refugee and

[9] See fn 6 at page 990.
[10] See fn 2 at paragraph 7.7.

humanitarian entrants, must not involve the completion of any form of computer-based, multiple choice test and the training element of this pathway must be available in languages other than English.

4.10 Further, we submit that, in light of the significant barriers to social inclusion for many refugees and humanitarian entrants and the central role access to Australian citizenship can play in overcoming those barriers, in particular by addressing the actual and psychological need of many for a new country of citizenship, refugee and humanitarian entrants should be exempted from the requirement that they complete the Citizenship test.

Recommendation 1

We recommend that the Government provide for alternative pathways as recommended by the Test Review Committee.

Recommendation 2

We recommend that the Act be amended to exempt the holders of refugee and humanitarian permanent visas from the requirement that they complete the Citizenship test.

5. Incapacity exemption

5.1 We note that the amendment to s 21 of the Act proposed at Item4 to Schedule 1 of the Bill allows for persons not to have to complete the citizenship test if they have a physical or mental incapacity "as a result of the person having suffered torture or trauma outside Australia". While RILC welcomes the removal of the requirement that in certain circumstances an incapacity need not be permanent, we submit the restriction of this exemption only to those who have suffered

torture or trauma outside Australia is not in accordance with the Test Review Committee's recommendation on this issue and is unduly restrictive.

5.2 The Test Review Committee's recommended amendment did not restrict the exemption to those whose incapacity is the result of torture or trauma suffered outside Australia.[11] It is therefore not correct to state this amendment is an implementation of the Test Review Committee's recommendation on this issue.

5.3 Further, the concerns raised by the Test Review Committee in relation to survivors of torture and trauma as justification for their recommendation[12] apply equally to persons who may suffer serious psychological symptoms and problems as a result of a wide range of forms of actual or potential serious harm or substantial discrimination as part of the circumstances giving rise them being granted a refugee or humanitarian visa. In some cases, the very process of being forced to flee one's home country can cause great psychological suffering, without a person having actually been a victim of torture or trauma. Further, there are many instances where torture and trauma experienced in Australia, for example as a result of prolonged immigration detention or separation from immediate family, have resulted in mental health problems causing incapacity. For people suffering these forms of harm, both the current and proposed exemptions based on incapacity largely fail to prevent the Citizenship Test from operating as a substantive, significant barrier to them obtaining Australian citizenship.

5.4 Thirdly, the lack of legislative definition of the terms "torture" and "trauma", and the practical difficulty of determining whether the identified incapacity is actually *as a result of* torture and trauma will hinder its effective implementation. We submit that it is crucial to the dignity and well-being of

[11] See fn 2 at paragraph 8.8.
[12] See fn 2 at paragraphs 8.2 – 8.3.

refugees and humanitarian entrants and, indeed, other disadvantaged migrants that they feel welcomed into the Australian community and not humiliated or intimidated by the process by which they become citizens. Requiring such applicants to have to undergo mental health assessments based on vague and uncertain terms and methodology runs a serious risk of establishing a further barrier to their social inclusion.

5.5 We submit that the provision of clear, alternative pathways to citizenship as recommended by the Citizenship Test Review Committee may reduce the difficulties in obtaining citizenship for many people who suffer the various forms of psychological harm referred to above. In light of the above, however, we recommend that, in addition to the clear provision of alternative pathways to citizenship and the creation of an exemption for refugee and humanitarian entrants, the amendment proposed at Item4 of the Bill should be amended to remove the words "that is as a result of the person having suffered torture or trauma outside Australia and".

Recommendation 3

The amendment proposed at Item4 of the Bill should be amended to remove the words "that is as a result of the person having suffered torture or trauma outside Australia and".

6. Children and citizenship by conferral

6.1 Item 3 of the Bill amends s 21(5) of the Act to require that for a person who is under 18 years of age to be eligible to become an Australian citizen by conferral they must be a permanent resident at time of application and decision. The justification for this given in the Explanatory Memorandum to the Bill is "to

ensure the integrity of the citizenship and migration programs".[13] The Second Reading Speech for the Bill states that s 21(5) is "being exploited".[14] In its submission to the Inquiry, the Department states their justification for the amendment being that "the provision to confer citizenship on children under the age of 18 has been increasingly utilised by clients and their agents in an attempt to circumvent migration requirements or as a last resort when all migration options have been exhausted, including requests for ministerial intervention, and removal from Australia is imminent."[15]

6.2 We submit that, contrary to the Government's position, central to the question of whether a person under the age of 18 should be conferred citizenship must be an assessment of Australia's obligations to that person under the Convention on the Rights of the Child ("the CRC"). Children are a particularly vulnerable group and their visa status is often as a result of circumstances beyond their control. Accordingly, Australia's obligations under the CRC to act in the best interests of the child must be the guiding and determining factor in deciding whether a child can be conferred Australia citizenship. Of particular relevance is the degree of the child's connection to Australia, to the extent that it may amount to a form of citizenship, rather than their formal visa status. In almost all cases a child's visa status is governed by the visa status of their parents – it is something over which they have no control. It cannot be in a child's best interests that they be arbitrarily excluded from consideration for Australian citizenship as a result of factors beyond their control.

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[13] Explanatory Memorandum, *Australian Citizenship Amendment (Citizenship Test Review and other measures) Bill 2009*, at page 6.

[14] *Senate Hansard*, 25 June 2009, page 4264.

[15] Submission made by the Department of Immigration and Citizenship, Senate Standing Test Review Committee on Legal and Constitutional Affairs Inquiry into the Australian Citizenship Amendment (Citizenship Test Review and other measures) Bill 2009, July 2009 at 6.

6.3 The policy guidance under the current Act allows for these issues to be considered by decision makers in setting out the circumstances where a child who is not a permanent resident may be conferred citizenship as follows. Where the child is

- under 16 years of age when applying, and living with a responsible parent, who is not an Australian citizen and consents to the application, and the child would otherwise suffer significant hardship or disadvantage; or
- under 16 years of age when applying, and in the care of another person, such as relative who consents to the application, and the child would otherwise suffer significant hardship or disadvantage; or
- an unaccompanied humanitarian minor who is a ward of the Minister and the Minister's delegate has consented to the application.

6.4 Outside those circumstances, the current policy guidance requires that "decision makers must consider the full circumstances of the case, including the best interests of the child, to determine whether the application nevertheless warrants approval because of the exceptional nature of those circumstances."

6.5 This policy has been applied in a number of recent decisions of the Administrative Appeals Tribunal ("the AAT"), reviewing decisions to refuse applications for citizenship for children without permanent residence. In some cases, the applications have been successful and decisions have been made conferring Australian citizenship.[16] In other cases, applications have been refused.[17] In the cases where the application have been successful, the AAT has generally found that exceptional circumstances apply such that the child or children involved face serious hardship and disadvantage if denied citizenship in

[16] See for example *Raisani v MIAC* [2008] AATA 640, *Choi v MIAC* [2008] AATA 725 & *SNMX v MIAC* [2009] AATA 539.
[17] See for example, *Baddage v MIAC* [2009] AATA 392 & *Paul v MIAC* [2009] AATA 97.

circumstances where they have been able to establish a strong, close "citizenship-like" connection to Australia.

6.6 While we acknowledge the Government's role in preserving the integrity of the migration system, mere assertions that the system is being "circumvented" are not a basis for the proposed amendment. The Department has provided no evidence supporting its claim that there has been sufficient circumvention of "migration requirements" to justify the denial of this discretionary assessment of a child's best interests in these circumstances. We submit that if any evidence were to be provided it would need to show an extremely high proportion of unsuccessful applications made for children under 18 years, together with evidence showing the length of time individuals may have "prolonged" their stay in Australia as a result of unsuccessful applications, to justify such a denial. Without substantial evidence of this sort, we submit there is no justification for the proposed amendment.

6.7 Further, we note that in its submission to the Inquiry, the Department proposes that such exceptional cases may be dealt with using the Ministerial intervention powers under the Migration Act 1958 (Cth). These Ministerial intervention powers are non-compellable and non-delegable. In contrast, the discretion currently allowed under s 21(5) in its current form is delegated to Departmental decision maker and so is subject to independent merits review by the AAT. As noted above, the AAT has in several cases exercised this discretion in favour of child applicants without permanent visas. We note that the Department has not sought judicial review of these decisions. If the Department objects to the substance of these decisions, and seeks to characterize them as some form of circumvention of "migration requirements", then we submit it is necessary for the Department to explain why. The proposed amendment can not be justified

otherwise. We submit that the Department should be asked to explain why it considers such decisions to be circumvention of the “migration requirements”

6.8 Finally, we note that s 21(5) of the Act in its current form mirrors the equivalent section 13(9) of the Australian Citizenship Act 1948 (Cth) (“the previous Act”). When the previous Act was re-drafted in 2007 and replaced by the Act in its current form, the Government and Parliament could have chosen to limit the discretion in relation to the conferral of citizenship on children in the way proposed in the Bill. The fact the Government did not propose such an amendment at the time and the Parliament did not make one is an indication of the importance of this discretion to ensuring the Government acts in the best interests of children in Australia.

6.9 In light of the above, we recommend that s 21(5) of the Act not be amended in the way proposed in the Bill.

Recommendation 4

That s 21(5) of the Act not be amended in the way proposed in the Bill.

7. Other matters

7.1 Finally, we note the proposed amendments to s 21(2A) of the Act which procedurally tie the application for citizenship to the sitting of the test. We understand the procedural logic of this amendment but we remain concerned that an applicant will then be required to complete the test within a relevant period after the application is lodged. We submit that this period should not be so limited that it would exclude people from applying for citizenship because of doubts as to whether they can complete the test within the period. While this concern would be ameliorated by the proper provision of alternative pathways to citizenship that

would give greater certainty to applicants about their ability to pass the test, we submit the period by which the person must complete the test after applying should be a generous one, such as 6 – 9 months.

Refugee and Immigration Legal Centre

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