Submission to the Senate Standing Committee On Legal And Constitutional Affairs Review of the Australian Citizenship Amendment (Citizenship Test Review and Other measures) Bill 2009

Professor Kim Rubenstein,
Director of the Centre for International and Public Law, ANU College of Law, ANU

Introduction and background

I am grateful to the Committee for the opportunity to make a submission on this Bill and I would appreciate the opportunity to appear before the Committee in person in order to elaborate on my written submission.

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

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

Between November 2004 and 30 June 2007, I was a consultant to the Commonwealth of Australia, represented by the Department of Immigration and Multicultural and Indigenous Affairs, later the Department of Immigration and Citizenship (the Department) in relation to its review and restructure of the Australian Citizenship Act 1948 which resulted in the Australian Citizenship Act 2007 which came into force on 1 July 2007.

I was *not* a consultant to the Department and was not involved in any way with the 2007 Citizenship Test amendment Bill that introduced a citizenship test into the 2007 Act. I made a submission to this Committee on the 5 July 2007 in relation to that Bill.

In 2008 I was appointed by the Minister for Immigration and Citizenship to be a member of the Independent Committee (the Committee) to review the operation and effectiveness of the Australian Citizenship Test which reported to the Minister the same year and which is referred to by the Minister in the second reading speech with this Bill.

In 2007 and 2008 I have acted in my capacity as a solicitor with a current practicing certificate on behalf of a range of children who had matters before the AAT seeking review of decisions declining their application for citizenship under s 21(5) of the Australia Citizenship Act 2007 and its predecessor section 13(9)(a) of the Australian Citizenship Act 1948 who have all since been granted Australian Citizenship. All of the matters except one were settled before being heard before the AAT granting the children citizenship under the respective 1948 and 2007 provisions.

The one matter heard before the AAT resulted in a judgment of 21 July 2009, *SNMX and Minister For Immigration and Citizenship [2009] AATA 539* and is attached for the Committee's consideration.

Proposed changes
There are two specific aspects of this bill that I'd like to address here and in person before the committee:

1. Those exempt from sitting the test

I believe that the current amendment proposed in the new section 21(3A) is too narrow and does not achieve the ends proposed by the Committee and that the amendment should be in the terms as set out in the report of the Committee at page 34 of its report.

It is my view that the policy guidelines could be drafted in a way to take into account the governments main aim of providing an exemption for survivors of torture and trauma as well as including other unforseen mental health situations that would also benefit from the proposed amendment in the Committee report.

The amendment as proposed in the Committee report would correct an anomaly in the existing act which only provides for exemption for physical and mental incapacity in relation to "understanding the nature of the application" and not for "knowledge of the English language" and "knowledge of the responsibilities and privileges of citizenship". I will be happy to elaborate on this point in person.

2. Children

The proposed repeal of s21(5) with the substituted s 21(5) is a very significant proposed amendment and I urge the Parliament to seriously review this suggested amendment which is, as stated in the Second Reading Speech, unrelated to the Citizenship Test.

With the greatest respect to the Minister, I do not believe the characterisation of the section in the current Act regarding conferral for children under the age of 18 is fair when he describes it as "being exploited" or that it is "undermining both the citizenship and migration programs."

In the cases in which I have been involved as counsel, in which each child has been granted citizenship after the original decision maker determined not to grant citizenship, the final decision has been consistent with the principles underpinning the citizenship Act.

"Exploitation" is being used by the Minister in a negative sense here and I would suggest the section is there to be available to children who have a real connection to Australia and who will suffer hardship if not granted citizenship. These concepts are entirely consistent with the principles underpinning the current Australian Citizenship Act framework. That

is, it is an avenue to ensure that the "best interests of the child" are taken into account in making profound decisions about whether they have a sufficient connection to the Australian community and also in promoting an inclusive and tolerant and harmonious society.

If the current amendment is made, then cases like the applicant in *SNMX and Minister For Immigration and Citizenship* would no longer be eligible for Australian citizenship. This would be inequitable and not consistent with the inclusive and fair principles underpinning other sections in the Act.

I encourage the members of the Committee to read the case as just one example of a child, with a strong connection to Australia through a citizen grandparent, through residence throughout his whole life in Australia, and through severe family circumstances that lead to the best decision in his circumstances of being granted Australian citizenship.

Moreover, I would strongly encourage you as a Committee to invite the Department of Immigration and Citizenship to provide the committee with a complete history of the provision regarding children – in particular the history of s 13(9)(a) of the former Act which is the direct predecessor to the current s 21(5) and the policy that has been used over the years in its application.

In my considered view the Minster would be better revising the current policy regarding s 21(5) to enable any concerns about "exploitation" and the "undermining of both the citizenship and migration programs" in order to ensure that the provision continues to provide an avenue for a decision which is in the best interests of the child applicant in any given case and consistent with Australia's inclusive and fair citizenship framework.

Conclusion
I therefore recommend that both sections referred to above be reconsidered and not passed in their current form.

I look forward to and am keen to discuss this submission with the Committee in person.

Kim Rubenstein
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Professor Kim Rubenstein
Director, Centre for International and Public Law
ANU College of Law
Australian National University
Canberra
ACT 0200
Phone: +61 2 6125 0455
Fax: +61 2 6125 0150
Kim.Rubenstein@anu.edu.au
http://law.anu.edu.au/cipl