

Committee Secretary
Senate Legal and Constitutional Committee
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Australia

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Set out below are our submissions to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Australian Citizenship Amendment (Citizenship Test Review and Other Measures) bill 2009 (Citizenship Bill)*.

1. Overview

1.1 About the Immigration Advice and Rights Centre

The Immigration Advice and Rights Centre (IARC) is the only community legal centre in New South Wales specialising in the provision of advice, assistance, education, training, and law and policy reform in immigration and citizenship law. IARC provides free and independent advice to almost 5,000 people each year and a further 1,000 people attend our education seminars annually. IARC also produces *The Immigration Kit* (a practical guide for immigration advisers) and the *Immigration News* (a quarterly newsletter), and conducts education/information seminars for members of the public. Our clients are low or nil income earners, frequently with other disadvantages including low level English language skills.

IARC was established in 1986 and since that time has developed a high level of specialist expertise in the area. We have also gained considerable experience of the administrative and review processes applicable to Australia's immigration and citizenship law.

1.2 About the Refugee Advice and Casework Service

The Refugee Advice and Casework Service (**RACS**) is a community legal centre that provides free legal advice and assistance to people seeking refugee status in Australia. It is the only specialised refugee legal centre in NSW.

RACS was established in 1988 at the request of Amnesty International with funding from UNHCR in order to meet the increasing demand for legal assistance to people seeking asylum in Australia. Since that time RACS has provided advice and full casework representation to well over 5,000 asylum seekers. In the past 5 years alone, RACS has represented over 800 asylum seekers from more than 50 countries, over 90% of who were found to be owed protection obligations.

RACS aims to promote the issues asylum seekers face by raising public awareness and to advocate for a refugee determination process which both protects and promotes the rights of asylum seekers in the context of Australia's international obligations.

2. Overview

2.1 General overview

IARC and RACS are appreciative of the opportunity to be heard in relation to the proposed citizenship changes. We believe that the current pathways to citizenship create significant obstacles to some permanent residents who are seeking to become Australian citizens. Many of these people have a great desire to be Australian citizens and would contribute in a positive way to Australian society.

While IARC and RACS would respectfully submit that the citizenship test should be abolished, we understand that this is not an issue being considered by the Senate Standing Committee and therefore have not provided detailed submissions in relation to this. Instead we will limit our submissions to specifically address the proposed amendments and in particular their impact upon some of the most vulnerable and disadvantaged sub groups within the broader migrant community in Australia – including in particular refugees and humanitarian entrants.

There is often a particularly profound importance attached to obtaining Australian citizenship for certain groups of vulnerable migrants such as refugees and humanitarian entrants. Refugees, for example, are for all intents and purposes in the same situation as stateless persons in that they cannot exercise the rights associated with citizenship in any other country. By definition, they face persecution in their countries of origin or former habitual residence and are therefore unable to return.

Yet paradoxically obtaining citizenship in the current test based system is often most difficult for those who need it most. Statistics released by the Department of Immigration and Citizenship in April 2008¹ and April 2009² reveal that refugees and humanitarian entrants have faced considerable difficulties in comparison to the broader migrant community in passing the test. The statistics reveal both that their pass rates are lower than for other streams of migrants and that the average number of attempts taken to pass the test is higher.³

¹ Department of Immigration and Citizenship, Australian Citizenship Test Snapshot Report, April 2008, accessed at <http://www.citizenship.gov.au/pdf/citztest-snapshot-report-2008-april.pdf>, on 16 May 2008.

² Department of Immigration and Citizenship, Australian Citizenship Test Snapshot Report, April 2009, accessed at <http://www.citizenship.gov.au/pdf/cit-test-snapshot-apr-09.pdf>, on 28 July 2009.

³ The statistics, for both years, reveal that the pass rate for the test from 1 October 2007 to 31 March 2009 was consistent at 99% on the first or subsequent attempt for skilled stream migrants. However, for humanitarian stream migrants³ the pass rate as of 31 March 2009 was 84% (a marginal increase of 2% from 31 March 2008) on the first or subsequent attempt. The statistics also show that humanitarian entrants sat the test on average 1.9 times, (up from 1.7 times in 2008) compared to 1.1 times for skilled stream migrants and 1.3 times for family stream migrants.

The difficulties faced by refugees and humanitarian migrants in successfully completing the test in our submission are likely closely linked to their particular vulnerability and disadvantage as a sub group within the broader migrant community. Such vulnerability and disadvantage impact upon ability to learn and process new material – such as a new language and concepts associated with the rights and obligations of citizenship – and successfully complete an exam in a formal and potentially stressful testing environment.

We support revision of the means by which people are able to obtain citizenship and the broadening of exceptions from the need to sit the citizenship test. We note that the Citizenship Bill takes some steps towards achieving this outcome. Nevertheless there remain some concerns in relation to the proposed changes set out in the Citizenship Bill as discussed below.

In his second reading speech for the Citizenship Bill the Minister for Immigration referred to the Citizenship Test Review Committee report *Moving Forward ... Improving Pathways to Citizenship* (**Moving Forward Report**). Therefore, where relevant, we have referred to this report to support our comments outlined below.

3. Our concerns regarding the Citizenship Bill

3.1 Subsection 21(3) exceptions from the citizenship test

We welcome the adoption of the recommendation that an exemption from the requirements to sit the citizenship test be provided for sufferers of past torture and trauma as recommended in the Moving Forward Report. However, we believe that the exception provided for is too narrow (see also our comments in 2.2 below).

There are especially vulnerable and disadvantaged sub groups within the broader migrant community in Australia – including in particular refugees and humanitarian entrants – who will not always fall with the narrow exemption provided for.

Many refugees and humanitarian entrants, for example, may have suffered persecution in their countries of origin, which falls short of the legal definition of torture. Similarly many may suffer from psychological injuries resulting from past experiences, which fall short of trauma in the clinical sense. Yet such past experiences and the continuing psychological aftereffects may well impact upon the relevant individual's ability to learn and process new material – such as a new language and concepts associated with the rights and obligations of citizenship – and successfully complete an exam in a formal and potentially stressful testing environment.

There are many other factors, which contribute to the vulnerability and disadvantage suffered by refugees and humanitarian entrants among others may impact upon ability to learn new material and pass an exam. These include:

- Experiences of discrimination and abuse and the related after effects (whether physical or psychological);

- Experiences of prolonged separation from close families members (and related psychological effects);
- Experiences of long periods of uncertainty about ultimate fate while awaiting resolution of status and / or visa grant and resettlement (and related psychological effects);
- Physical or mental disabilities;
- Limited education and / or illiteracy in the native language; and
- Socio-economic and / or cultural factors, which may impact upon ability to attend English and citizenship education.

The Moving Forward Report recommended that a number of alternate means of satisfying the legislative requirements be introduced, namely:

- self directed learning based on the citizenship booklet in English and computer based testing
- self directed learning based on the citizenship booklet in community languages and an oral test in English
- a citizenship education program in English with ongoing assessment during the program, and
- a citizenship education program in community languages with a separate interview to assess English language ability.

It also recommended the introduction of the concept of "earned citizenship" whereby the following persons are able to obtain citizenship after being interviewed by a Citizenship Referee:

- those who have been educated in Australia and have remained long term residents
- those who have been resident within Australia for at least 15 years, have made a contribution to Australian society but have not achieved a basic knowledge of the English language, and
- those who despite repeated attempts are unable to pass the citizenship test.

The recommendation in relation to sufferers of past torture and trauma was made within the framework of a number of other recommendations that would create broader exemptions and alternate pathways. While the Minister refers in his second reading speech to the development of a citizenship course there is no detail provided about this and there is no reference made to the introduction of the concept of "earned citizenship".

The exemption provided in the Citizenship Bill fails to address the other significantly disadvantaged groups acknowledged by the Moving Forward Report for whom there are now substantial obstacles in obtaining citizenship because of the introduction of the citizenship test, including:

- the illiterate or uneducated in any language
- those who are prevented by language, culture and/or family responsibilities from attending English and citizenship education
- those who have a mental or physical disability, and

- those who are simply not capable of passing a citizenship test or learning basic English.

The exemptions provided under the Citizenship Bill are not broad enough to cover these disadvantaged people. For example, Subsection 21(3A) requires that a person with a physical or mental incapacity (other than sufferers of past torture and trauma) have a permanent incapacity that means they are not capable of understanding the nature of the application at that time. The requirement that the incapacity be “permanent” has been removed for sufferers of past torture and trauma but remains for other persons suffering from a relevant incapacity.

In addition, applicants under s21(3A) are required to show that the incapacity means they are not capable of understanding the nature of the application. This is a very high threshold and there are a group of persons who are capable of understanding the nature of the application but will never (or at least for an extended period of time will not) be capable of demonstrating a basic knowledge of the English language or responsibilities and privileges of Australian citizenship. Nevertheless such people may be valuable and/or long standing members of the Australian community. The provisions set out in s21(3A) and s21(3B) are inconsistent and we recommend that the provisions be made consistent to also broaden the exemption for persons who are not sufferers of torture and trauma but nevertheless are disadvantaged (eg by their mental abilities, cultural background or disabilities).

We submit that, even with the amendments referred to above, these exemptions will only be adequate if there is “safety net” for those cases which not fit within the prescriptive legislative exemption. In our extensive experience there are always cases in practice that are not, and cannot be, envisaged by the legislative drafters. Therefore, it is critical to build in a system of discretion whereby a citizenship referee can make an assessment as to whether a person should be entitled to citizenship even if they cannot satisfy the citizenship test and does not suffer from a mental or physical incapacity within the meaning of s21(3A) or (3B).

3.2 Availability of guidelines and policy

While we welcome any broadening of the legislative provisions to allow for exemptions from the citizenship test, meaningful assessment of those provisions requires availability of the guidelines and policy that will be used when implementing them. For example, details about how and by whom the assessment will be done of whether a person has a “mental or physical incapacity” will determine how appropriate the provisions are in providing assistance to the vulnerable group that they are aimed at.

Therefore we recommend the development of detailed, clear, publicly available guidelines on the following:

- the criteria used in determining whether a person has a mental or physical incapacity
- the criteria used in determining whether that incapacity is “permanent”

- the criteria used in determining whether a person has “suffered torture or trauma outside Australia”, and
- the criteria used in determining when a person is “not capable” of understanding or demonstrating the criteria set out in s21(3A) or (3B).

Such guidelines and policy should be available for public comment prior to being implemented as it will impact on the appropriateness of the provisions and will ultimately determine whether the vulnerable group at whom these amendments are aimed, are in reality being provided with sufficient pathways to citizenship.

3.3 Subsection 21(5) removal of exception for minors

The Minister in his second reading speech states that (our emphasis):

Current legislation allows any person under the age of 18 to be eligible for Australian citizenship by conferral. This is a provision that was carried over from the 1948 Citizenship Act, however, **the provision is being exploited and is undermining both the citizenship and migration programs.**

However, no evidence has been provided of this exploitation nor any explanation of how it is undermining the citizenship and migration programs. In light of the current policy that the discretion would only be exercised in specified, narrow circumstances and generally only where the applicant is a permanent resident it is difficult to see how there could be widespread exploitation of the provision. In the absence of any detail about such exploitation and undermining of the program, it is difficult to see any justification for removal of a provisions that provides flexibility in protecting the interests of a child. Given Australia’s international obligations under the *Convention on the Rights of the Child* it is important to provide for discretion to resolve cases of vulnerable children in the most appropriate way possible.

This has been a long standing exemption carried over from the *Citizenship Act 1948* and the fact that it was retained in the re-drafting of the citizenship legislation in 2007 shows the importance of the discretion it provides. The current Departmental policy acknowledges that there may be applications that warrant approval even if they do not hold permanent residence because of the “exceptional nature” of their circumstances. The current legislation provides flexibility for the decision maker to then consider the full circumstances of the case, including the best interests of the child.

3.4 Streamlining of test and application

IARC supports the streamlining of the citizenship test and application procedures, subject to evaluation of the relevant determination to be made by the Minister under 23A(5A) in relation to the period for sitting and completing the test and the relevant policy surrounding this. In that determination we recommend that there should be a discretion provided for exceptional circumstances where test is not completed within the prescribed period.

4. Conclusion

We appreciate the opportunity being afforded to stakeholders to make appropriate submissions in relation to the Citizenship Bill and hope that the same opportunity will be afforded to us in relation to the alternatives being developed for the citizenship test and the policy and guidelines used to implement the provisions of the Citizenship Bill. Thank you for your consideration of our comments.

Regards



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