From: Margaret Donaldson
Sent: Wednesday, 25 July 2007 6:08 PM
To: Legal and Constitutional, Committee (SEN)
Cc: Brook Hely
Subject: Response to Questions on Notice from HREOC

Terry Brown
Principal Research Officer
Senate Legal and Constitutional Affairs Committee
Parliament House Canberra ACT 2600

Dear Terry

As discussed, the email I sent you on 24 July 2007 provided you with HREOC's response to the two questions that were taken on notice at the Committee hearing into the *Australian Citizenship Amendment (Citizenship Testing) Bill 2007* on 6 July. I confirm my advice to you this morning that HREOC would like to substitute the following responses to these two questions:

First question on notice: Ministerial discretion

At paragraphs 24 - 35 of its submission, HREOC proposed amendments to s 21(2A) of the Bill to grant to the Minister a discretion that would enable the Minister to permit an applicant for citizenship to:

- undergo an interview as an alternative procedure for satisfying the eligibility conditions under s 21(2)(d), (e) and (f) (hereinafter, 'the interview discretion'); or
- be exempted from satisfying the eligibility conditions under s 21(2)(d), (e) and (f) (hereinafter, 'the exemption discretion').

In relation to the above proposal, Senator Ludwig asked:

> Are you arguing for a ministerial discretion type power exercised by the minister similar to 417? I want to clarify whether you would consider that that would be too broad a discretion.

Following a brief discussion, HREOC took the question on notice.

Response to first question on notice

As outlined in HREOC's written submission, the refusal of the Minister to exercise the interview discretion may have significant consequences for a prospective citizen. He or she may be at an unfair disadvantage in passing a citizenship test due to past experiences of trauma or persecution, or due to limited or no education. A refusal by the Minister to exercise the interview discretion may have the practical effect of unfairly denying that person a reasonable opportunity of demonstrating that he or she meets the requirements of s 21(d), (e) and (f). This, in turn, would effectively prevent that person from obtaining Australian citizenship.

Similarly, the exemption discretion may represent a 'last hope' for applicants who, due to special circumstances or compassionate grounds, may be unable to:

(i)pass the citizenship test; or

(ii)obtain and 'pass' an interview with a delegate of the Minister.

For such an applicant, the refusal of the Minister to exercise the exemption discretion may also effectively prevent that person from obtaining Australian citizenship.

On matters of such importance, HREOC considers that it is appropriate that a person aggrieved by the Minister's decision should have available an appropriate avenue to seek reconsideration of that decision. HREOC therefore submits that the interview discretion should not be an absolute and non-compellable discretion along the lines of the discretion under s 417 of the Migration Act 1958 (Cth) ('the Migration Act').

Rather, HREOC submits that an applicant should have an opportunity to request internal review of the relevant decision within the Department. This would contribute to consistent decision-making within the Department, as well as providing an applicant with an opportunity to have his or her application reconsidered by the Department.

Secondly, HREOC submits that the relevant decision should be subject to full merits review by way of appeal to the Administrative Appeals Tribunal. This way, the applicant has an opportunity to ventilate the relevant issues before an independent Tribunal which can reconsider afresh the special circumstances advanced by the applicant.

Finally, HREOC submits that an important additional feature of the review process would be a requirement that the Minister (or his delegate) provide reasons for a refusal to exercise either of the above discretions. This would provide transparency to the process, as well as enable an applicant to understand why his or her request has been refused.

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Second Question on Notice

The chair of the Committee invited HREOC to provide a written response to the comments made by Mr Metcalfe on 16 July 2007. Mr Metcalfe's comments were a response to the proposal (made by HREOC in its submission at paragraphs 12 - 15) that the Minister's determination in relation to the citizenship test be made a legislative instrument subject to disallowance by the senate. Mr Metcalfe responded to this proposal by indicating it would cause 'uncertainty… particularly if a person had already sat the test and it was then disallowed.'

Response to the second question on notice

It is clear from section 15 of the *Legislative Instruments Act 2003* that there would be no legal confusion in relation to any rights that might have accrued prior to a disallowance of, or motion to disallow, the Minister's determination. Section 15 provides:

> The repeal of any legislative instrument, or of any provision of a legislative instrument, does not, unless the contrary intention appears in the Act or legislative instrument effecting the repeal:
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect the previous operation of the instrument or provision or anything duly done or suffered under the instrument or provision; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the instrument or provision; or
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the instrument or provision; or
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act or instrument had not been enacted or made.

Section 15, particularly subsections (b) and (c) make it clear that any rights that have accrued prior to a disallowance or motion to disallow would not be affected.

It is therefore assumed that the 'uncertainty' referred to by Mr Metcalfe would be as a result of the fact that, pursuant to subsection 42(1) of the *Legislative Instruments Act 2003,* the senate has 15 days to put a motion to disallow the instrument, and in the

event this occurs, the motion would be debated and could take a further period to resolve.

It is submitted that either administrative or legislative steps could easily be taken to avoid the uncertainty referred to by Mr Metcalfe. At the administrative level, the Minister could ensure that a directive was given through the Department of Immigration and Citizenship (DIAC) that the test would not be implemented pending resolution of the matter within Parliament. Alternatively, the instrument could be drafted in such a way that either it does not come into effect until the 15 sitting days have elapsed or, if a motion for disallowance is put, pending the outcome of the motion.

It is further submitted that the importance of having the matter of a citizenship test subjected to parliamentary scrutiny outweighs the potential temporary inconvenience or uncertainty that this scrutiny might incur. After all, the introduction of the citizenship test does not create new rights or obligations for those categories of people seeking citizenship in Australia. It simply introduces a different and more formal way of obtaining citizenship than that which currently exists. Therefore, the delay that is caused by setting aside time for parliament to properly monitor this very important matter does not prevent people from enjoying the rights or undertaking the obligations that pertain to citizenship. It simply delays replacing the current process with the new citizenship test.

Thank you for this opportunity to provide further information to the Committee

Yours sincerely

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