Refugee Council of Australia

Response to Question on Notice from the Senate Legal and Constitutional Committee Inquiry into the Australian Citizenship Amendment (Citizenship testing) Bill

Q. I have one point to make and then a final question. In terms of Senator Hurley's interpretation of the minister's actions regarding the resource book and the questions, I draw your attention to the transcript in the *Hansard* for clarity, because there may be a different approach that you might glean from reading the *Hansard*. I have a question with regard to the UN convention. You indicated the possibility of Australia being in breach of a range of UN conventions; you mentioned several of them. In terms of the other countries that have a test—for example, the US, the UK, Canada and the Netherlands—are you aware of any action that has been brought against them for breach of the UN conventions?

As far as the Refugee Council is aware, there has not been litigation undertaken in any of the aforementioned countries in relation to the operation of *citizenship* testing as giving rise to alleged breaches of UN Conventions. However, there have been numerous cases, particularly in the US and the UK, contesting the discriminatory operation of *language* testing in general. Most of these cases identify the racially discriminatory operation of English language testing as the grounds for granting relief. See, for instance, *Griggs* v. *Duke Power Company*[1] and *Hampson v Department of Education and Science*.[2]

Some decisions in the US identifying racial bias in language testing have resulted in the requirement that test results are reported and analysed by race as a means of evidencing that bias does not in fact exist in test results.[3] While it is acknowledged that most of these cases relate to employment issues, it is arguable that language testing for admission to citizenship may also be subject to the challenges on similar grounds.[4]

That said, it is difficult to compare the situations confronting legislators in countries such as the UK, US, Canada or The Netherlands with Australia in relation to discrimination matters, primarily because of the historical and contemporary importance placed by these overseas jurisdictions on domestic bills of rights and the explicit incorporation of UN human rights principles within such legislation.[5] This has consequently established relatively stronger domestic protections against potential breaches of UN human rights convention principles. While Australia has codified a range of human rights treaties within domestic law, it is notable that in the absence of an overarching bill of rights framework, the Australian Parliament is able to exempt whole enactments from the purview of those anti-discrimination laws. For example, the *Migration Act 1958* (Cth) is not subject to the provisions of the *Disability Discrimination Act 1992* (Cth).[6]

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[1] 401 U.S. 424 (1971).
[2] (1989) ICR 179.
[3] *Golden Rule Insurance Company v. Washburn 419-76 Illinois Circuit. Court, 7th Ind. Cir. Ct. (1984)*
[4] See, for instance, Glenn Fulcher and Ron Bamford (1996) "I Didn't Get the Grade I Need. Where's My Solicitor?" *System* 24(4) pp 437-448.
[5] See, for instance, the Fourteenth Amendment to the US Bill of Rights, and the European Convention on Human Rights, which supplement and complement other domestic civil rights legislation.
[6] s 52 provides a blanket exemption for all actions and procedures undertaken in relation to the *Migration Act 1958* (Cth) from the *Disability Discrimination Act 1992* (Cth).

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