SUBMISSION OF

AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

TO

THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

ON THE

AUSTRALIAN CITIZENSHIP AMENDMENT (CITIZENSHIP TESTING) BILL 2007

Introduction

1. Australian Lawyers for Human Rights ("ALHR") thanks the Committee for the opportunity to contribute to this inquiry. ALHR would be very happy to expand on this written submission during the Committee's public hearings.

2. ALHR is a national network of Australian lawyers active in furthering awareness, understanding and recognition of human rights in Australia. It was established in 1993, and incorporated as an association in NSW in 1998.

3. ALHR has approximately 1,200 members nationally, a majority of whom are practicing lawyers. ALHR's membership also includes judicial officers, academics, policy makers and law students. ALHR is composed of a National Committee with State and Territory committees.

4. Citizenship plays a central role in a number of areas relevant to human rights in Australia. In particular, Australian citizenship is a pre-requisite significant civil, political, economic and social rights. Australian citizens are, for example, not able to be the subject of criminal deportation orders under the *Migration Act 1958* (Cth), possess important rights of political participation and have access to financial assistance and employment opportunities which are unavailable to non-citizens.

5. The Australian Citizenship Amendment (Citizenship Testing) Bill 2007 (the "Bill") proposes amendments to eligibility provisions for citizenship by conferral under s21(2) of the *Australian Citizenship Act 2007* (Cth). The effect of those amendments will be to require people seeking citizenship under that provision to pass a test approved by the Minister.

6. ALHR is concerned that those amendments impose obstacles to citizenship (and the derivative rights associated with citizenship) in a manner which is inconsistent with important international human rights standards.

General human rights principles regarding citizenship

7. Australia has a number of international human rights obligations in relation to citizenship law, particularly under the *International Covenant on Civil and Political Rights* ("ICCPR").

8. First, the United Nations Human Rights Committee[1] has stated that states parties to the ICCPR (including Australia) are obliged to ensure that:

   (a) any criteria for citizenship, including any language criteria, should not be unduly onerous; and

   (b) that unsuccessful applicants should have rights of review.[2]

9. Further, Australian citizenship should not be granted or withheld on a discriminatory basis.

[1] Which is the international treaty body for the ICCPR.

[2] See *Concluding Comments on Estonia*, (1995) UN doc. CCPR/C/79/Add. 59, para 12 where the Committee expressed its concern *"that a significantly large segment of the population, particularly members of the Russian-speaking minority, are unable to enjoy Estonian citizenship due to the plethora of criteria established by law, and the stringency of language criterion, and that no remedy is available against an administrative decision rejecting the request for naturalization under the Citizenship Law"*. The Committee's identification of those basic and non-exhaustive obligations regarding the conferral of citizenship appears to follow from the fact that citizenship is a criterion for the rights of political participation conferred by article 25 of the ICCPR, which provides *"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country"*.

10. That follows from the general obligation to avoid discrimination set out in, for example, article 26 of the ICCPR, which states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

11. The United Nations Human Rights Committee has confirmed that that the prohibition on discrimination applies to the granting of citizenship.[3]

12. Similar obligations are imposed by article 2(a) of the *International Convention on the Elimination of all forms of Racial Discrimination* ("ICERD").[4]

13. The prohibition on discrimination in article 26 of the ICCPR and article 2(a) of ICERD extends to so called "indirect discrimination" – for example discrimination which arises where a law has a disparate impact upon different groups of people, even though the law is not on its face discriminatory.

14. ALHR is concerned that the Bill may put Australia in breach of those obligations and explains those concerns in further detail below.

[3] *Borzov v Estonia* CCPR/C/81/D/1136/2002.
[4] Note the construction of article 1(2) of ICERD by the Committee on the Elimination of all forms of Racial Discrimination in *General Recommendation 30*.

Discrimination and the proposed citizenship test

15. The introduction of the citizenship test will, in ALHR's submission, self evidently have a disadvantageous effect upon particular groups of people, including groups defined by reference to language, nationality, social origin and birth (all proscribed grounds of discrimination under ICERD and/or the ICCPR).

16. To take an obvious example, a citizenship test is likely to pose a more significant obstacle to potential citizens from non-English speaking backgrounds as compared to those from English speaking backgrounds.

17. Others making submissions to this inquiry have drawn the Committee's attention to the difficulties in passing a citizenship test faced by potential citizens who have fled persecution, including torture.[5] ALHR endorses those submissions and notes that distinctions which disparately affect those persons potentially constitute discrimination on the ground of "other status" in article 26 of the ICCPR.[6]

18. However, the Human Rights Committee has been careful to emphasise that such distinctions do not necessarily constitute discrimination:

> …the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and

[5] See particularly the submission prepared by the Forum of Australian Services for Survivors of Torture and Trauma.

[6] The term 'other status' has a broad meaning. It applies whenever a law differentiates amongst 'groups or categories of individuals', as opposed to 'a difference in treatment [which] does not affect a group of people but only separate individuals'. For example, the Human Rights Committee has found that the following distinctions or differences of treatment fall within the other status ground: distinctions made between 'foster' and 'natural' children; differential treatment of students at private schools as compared to those at public schools; distinctions made between households shared by close relatives and households shared by others (*Kaiss v Netherlands* (426/90); *Blom v Sweden* (191/85) and *Neefs v Netherlands* (425/90))

objective and if the aim is to achieve a purpose which is legitimate under the Covenant[7]

19. Similarly, the Committee on the Elimination of Racial Discrimination has stated:

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.[8]

20. That requires consideration of the aims or purposes underlying the Bill.

21. Although varying rationales for a citizenship test have been advanced,[9] the Bill appears to be put forward solely on the basis that the test will encourage or ensure that those eligible for citizenship under s21(2) of the *Australian Citizenship Act 2007* (Cth) obtain:

> …the knowledge they need to support successful integration into Australian society.[10]

22. As others making submissions to the *Citizenship Taskforce* on the discussion paper entitled *"Australian Citizenship more than just a ceremony"* have observed, it seems

[7] *General Comment 18*, para 13.
[8] *General Recommendation 30*, para 4.
[9] See eg the discussion paper published by the Australian Government entitled *"Australian Citizenship more than just a ceremony"* September 2006, paras 24, 27 and 33.
[10] Second reading speech, House Hansard (30 May 2007) p4, the Hon Kevin Andrews MP. See also para

to be strongly arguable that there are other less discriminatory (and more effective) means of achieving that end.

23. In particular, one possibility would be to require citizenship applicants to complete a course modeled upon the Adult Migrant English Program (AMEP) course entitled "*Let's participate: A course in Australian citizenship*".[11] In ALHR's view, that mode of imparting knowledge about Australian society should be preferred over a citizenship test as one which places comparatively less emphasis on rote learning and offers more opportunities for participation and discussion about Australian society and what it means to be an Australian citizen. Provided appropriate allowance is made for particular needs, it is also an approach which will avoid the potential for discrimination identified above.

24. The existence of such alternatives strongly points to the likelihood that the proposal in the Bill contravenes article 26 of the ICCPR. In ALHR's submission, the means of achieving the identified purpose of the bill cannot be said to be reasonable and proportionate when there are less discriminatory and more effective means of pursuing that end.

25. In light of the above, ALHR's primary position is that the Bill should not proceed by reason of the fact that it appears to be discriminatory in contravention of Australia's obligations under the ICCPR and ICERD.

[11] See the submission of the Human Rights and Equal Opportunity Commission and the submission of the Equal Opportunity Commission of Victoria available at: http://www.minister.immi.gov.au/media/responses/citizenship-test

Unduly onerous criteria and reviewability

26. Alternatively, ALHR says that the requirements under the ICCPR that:

    (a) any criteria for citizenship not be unduly onerous; and

    (b) be subject to appropriate rights of review

    should lead the Committee to recommend the amendments to the Bill described below.

27. In that regard, it seems to be recognised in the explanatory memorandum to the Bill that there is a potential for the new test to be unduly onerous (particularly for people with reduced literacy skills). That potential problem is said to be accommodated by the possibility that the Minister may approve more than one test for the purposes of section 21(2A):

    > The Minister may approve more than one test for the purposes of new subsection 21(2A). This allows for the possibility that the Minister may consider that some people, for example those with low levels of literacy, may need to be given the opportunity to demonstrate that they meet the criteria in paragraphs 21(2)(d), (e) and (f) in a different way to the majority of prospective citizenship applicants.[12]

28. However, the Minister is under no statutory duty to make such arrangements.

29. Indeed, while the approval power under s21(2A) is mandatory in the sense that the Minister must approve "a test", the Bill places very few conditions upon the manner

[12] See explanatory memorandum, para 17.

in which that power is exercised. The only express condition upon that power is that it the Minister must specify what amounts to successful completion of the test.[13] Otherwise, it would appear that the Minister's powers are very broad (note for example that a determination may "cover any other matter related to the test the Minister thinks appropriate").

30. The explanatory memorandum suggests that the breadth of those powers will facilitate a beneficial approach to the testing regime:

> New subsection 23A(6) allows the determination to cover any other matter related to the test that the Minister considers appropriate. The determination could include provision for special arrangements for people with special needs, such as those whose literacy skills make it difficult for them to undertake a test without assistance.[14]

31. However, equally, the Minister could decline to adopt such an approach and adopt a test and/or associated conditions which cause real and practical unfairness to particular groups of potential citizens (see above in relation to discrimination).

32. That is, in ALHR's view, of particular concern given that the Bill leaves very little room for scrutiny of the Minister's determinations.

33. As the Senate Scrutiny of Bills Committee observed, s23A(7) has the effect of ensuring that a determination is not subject to the disallowance and sunsetting

[13] See proposed s23A(2).
[14] See explanatory memorandum, para 22.

provisions of the *Legislative Instruments Act 2003* (Cth).[15] That Committee also noted that such a decision was not subject to review by the Administrative Appeals Tribunal.[16]

34. It might be said that it is nevertheless possible that a person with sufficient standing could seek to challenge a decision to approve an "unduly onerous" test through judicial review. However, quite apart from the prohibitive expense associated with that process, such an application would be extremely difficult given the breadth of the discretion conferred upon the Minister.[17] As a result, significant elements of the process proposed by the Bill are not subject to any real or effective forms of review by Parliament, the Courts or relevant tribunals.

35. It should also be noted that there is no residual discretion to avoid situations of particular unfairness which may arise, say, in relation to prospective citizens with limited literacy skills or who face difficulties passing a test by reason of matters associated with having fled persecution. The only way to satisfy the criteria set out in proposed ss21(2)(d),(e) and (f) is the successful completion of an approved test.[18]

36. In light of the above, ALHR makes the following recommendations for amendments to the Bill (should the Committee decide to recommend that the Bill should proceed):

    (a) proposed section 23A(7) should be amended so as to provide that determinations made under s23A(1) are legislative instruments for the purposes of the *Legislative Instruments Act 2003* (Cth);

[15] See ss42 and s50.
[16] Senate Committee for Scrutiny of Bills, *Alert Digest No 6 of 2007* pp 18-19.
[17] See generally *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-8.
[18] See explanatory memorandum, para 14.

(b) express conditions should be placed on the Minister's determination power under s23A(1). At a minimum, the Minister should be obliged to ensure that the test approved is not "unduly onerous" (in the sense that that term has been used by the Human Rights Committee) and to consider whether it is necessary to approve alternative tests or specify particular conditions to ensure that the testing regime does not unfairly disadvantage certain potential citizens (such as those with reduced literacy or victims of torture);

(c) the Minister should retain a residual discretion to waive the requirement to pass a test, where that requirement causes unfairness; and

(d) there should be review rights (preferably merits review in the Administrative Appeals Tribunal) in relation to the discretionary power to waive the requirement to pass a test.

Conclusion

37. ALHR supports the apparent sentiment which underlies the Bill. The conferral of Australian citizenship should be seen as something of value and as a means of inclusion for people who are new to the Australian community. However, those ends will not be furthered by a citizenship test. Such a test is likely to encourage rote learning rather than developing any form of deeper understanding of Australia and Australian citizenship. It also stands to cause real unfairness for some potential Australian citizens and is inconsistent with relevant international standards.

Australian Lawyers for Human Rights

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