CHAPTER 3
ISSUES

3.1 The Bill attracted general support from most submitters, primarily through its recognition of at least some of the difficulties faced by applicants for citizenship who have suffered hardship before their arrival in Australia.[1]

3.2 The main issues that arose during the inquiry went to:

- the scope of the exception to the requirement to take the Citizenship Test (the test) as proposed in the Bill; and
- the impact of the proposed amendments for citizenship applications by minors. This chapter addresses each issue in turn.

Exception for physical or mental incapacity resulting from torture or trauma outside Australia

3.3 Proposed subsections 21(3A) and (3B) would amend existing arrangements which permit a person with permanent physical or mental incapacity resulting in the person's inability to understand the nature of their application to become an Australian citizen without sitting the test. The new provisions would, subject to other conditions, bring those suffering from physical or mental incapacity as a result of having experienced torture or trauma outside Australia within the scope of the exception to the requirement for the test. The incapacity need not be permanent, and need only impair the applicant's understanding of the nature of their application, basic knowledge of English, of their knowledge of the responsibilities and privileges of Australian citizenship in order to qualify under the exception.

3.4 The committee was told by Professor Kim Rubenstein, who sat on the Citizenship Test Review Committee (CTRC) referred to in earlier chapters, and the recommendations of which underpinned the proposed exception, that the content of proposed subsection 21(3B) was different from that recommended by the review committee. The most notable effect of the wording recommended by the review committee would have been to broaden the class of persons who could be excused from sitting the citizenship test beyond those who had suffered torture or trauma to those who were unable to understand the nature of their application, the right and

1 Support for the Bill was very often coupled with criticism of the Citizenship Test. See, for example, Newcomers Network, *submission 5*, p. 1; Chief Minister for the Northern Territory, *submission 17*, p. 1; Refugee Council of Australia, *submission 10*, p. 2; Uniting Justice, *submission 4*, p. 2; Federation of Ethnic Communities' Councils of Australia, *submission 1*, p. 1; Ms Zoe Anderson, *proof committee hansard*, 27 August 2009, p. 2. A notable exception to the general support received for the Bill was Mr Bob Such MP, Member for Fisher, *submission 20.*

responsibilities of citizenship, or to basically grasp English, because of a mental or physical problem.[2] In support of her position, Professor Rubenstein argued that:

> Mental health is the condition, as opposed to how the mental health condition was caused, and mental health problems are experienced by people other than trauma and torture victims. My submission to this committee would be that that, as a matter of principle, people who reside permanently in Australia, who are connected to Australia sufficiently and who in every other respect satisfy citizenship requirements but by virtue of their mental health are unable to take the test should not be precluded from becoming Australian citizens.[3]

3.5 The desire to broaden the exception was a common one. While most submitters who addressed this issue praised the introduction of the exception, its scope was criticised as being too narrow. The Refugee and Immigration Legal Centre called for the complete exemption of refugees and humanitarian entrants from the requirement to sit the test.[4] The Immigration Advice and Resource Centre (IARC), which submitted jointly with the Refugee Advice and Casework Service (RACS) summarised the view of a number of submitters when it argued that:

> 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 [within] the narrow exception provided for…[M]any 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 after-effects may well impact on 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 environment.[5]

3.6 IARC and RACS also listed some of the specific experiences and circumstances that could impinge on a person's ability to perform in an examination. These included:

- Experiences of discrimination and abuse and the related after-effects;
- Experiences of prolonged separation from families;
- Long periods of uncertainty while awaiting resolution of immigration status;
- Physical or mental disabilities;[6]

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2 Professor Kim Rubenstein, *proof committee hansard*, 27 August 2009, p. 25.

3 Professor Kim Rubenstein, *proof committee hansard*, 27 August 2009, p. 25.

4 Refugee and Immigration Legal Centre, *submission 21*, p. 3.

5 IARC/RACS, *submission 9*, p. 3.

6 Which, unless they are permanent, will not fall within the exception provided for in the Bill.

- Limited education and/or illiteracy in the native language; and
- Socio-economic and/or cultural factors impacting on a person's ability to attend English and citizenship education sessions.[7]

3.7 The Castan Centre for Human Rights Law had similar concerns about the breadth of the exception, and noted that:

> It is well recognized that individuals respond to trauma in very personal ways. It is misleading to associate refugees with trauma or traumatic responses as many refugees are very resilient people who cannot be characterized in that way. We are concerned at the inappropriate association of refugees with 'torture or trauma' through this proposal and at its potential to exclude refugees who do not exhibit symptoms of trauma. This is contrary to the Australian government's international obligations to facilitate the assimilation and naturalisation of all refugees as explained above, and potentially discriminates between refugees according to their individual vulnerability.[8]

3.8 The fact that the exception would apply only to torture or trauma experienced offshore was a matter of concern for a number of witnesses. Dr Susan Kneebone argued that in many cases trauma will largely take place in Australia, and provided the compelling example of trafficked people, for whom the majority of their abuse will take place at the hands of their traffickers, once they reach Australia.[9]

3.9 On a similar note, Ms Zoe Anderson, appearing for the Refugee Advice and casework Service (RACS) said at the hearing that:

> There are also many other factors beyond experiences of the past persecution in the country of origin which may cause psychological injuries adversely affecting the ability of refugees and humanitarian entrants to learn new material and pass an exam. These include, for example, experiences of prolonged separation from close family members and experiences of long periods of uncertainty about their ultimate fate while awaiting resolution of status and/or visa grants, in some cases in detention. These are experiences which will often have occurred in Australia rather than outside. The exemption in its current form therefore does not adequately address the special needs of individuals in such circumstances.[10]

3.10 Upon examination of the Government's response to the CTRC's report, the committee notes the government's recognition that:

> The Government agrees that there is a small group of individuals who suffer from psychological disorders as a direct result of having experienced torture and trauma. To assist these most vulnerable clients - many of whom need citizenship the most - the Government will amend Section 21(3)(d) of

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7 IARC/RACS, *submission 9*, p. 3.

8 Castan Centre for Human Rights Law, *submission 14*, p. 7.

9 Dr Susan Kneebone, *proof committee hansard*, 27 August 2009, p. 19.

10 Ms Zoe Anderson, *proof committee hansard*, 27 August 2009, pp 2–3.

> the *Australian Citizenship Act 2007* as recommended by the Review Committee.[11]

3.11 The policy document would impose no condition on where torture and trauma is required to have occurred to be applicable, which is at variance with the position taken in the Bill.

3.12 The committee is convinced by the arguments in favour of removing the proposed requirement that torture or trauma occur offshore before it can fall under proposed subsection 21(3B), and strongly urges the Government to reconsider whether the requirement should remain in the Bill.

Other issues regarding the exception to the citizenship test

3.13 The Castan Centre, and others, expressed disquiet about the terminology used in the Bill:

> 'Trauma' (which may mean simply 'injury') is…undefined but in this context appears to refer to the psychological effect of traumatizing incidents. It is submitted that 'trauma' in this proposal does not have an independent meaning, legal or otherwise, except as an assessment of the effect of events upon an individual.
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> …
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> In our view, the effect of this amendment will be to introduce new criteria which are themselves unclear and open to interpretation/challenge.[12]

3.14 The Department responded that the terminology reflected the feedback that had been received by the Citizenship Test Review Committee, which stated in its report that:

> The Committee considers the current exemption criteria do not take into consideration the effect of severe and chronic symptoms resulting from the experience of torture and trauma. These may include strong anxiety associated with learning difficulties, and while some symptoms are permanent, others, though severe, are not necessarily permanent.[13]

3.15 Concerns were also expressed about possible inconsistency between the Bill and the Explanatory Memorandum. In particular, the Castan Centre noted that the Bill referred to the effect of 'torture *or* trauma', whereas the Explanatory Memorandum refers to the combined effects of 'torture *and* trauma'.[14]

3.16 However, the committee notes that the EM, when referring to those suffering from 'torture and trauma', is referring to the collective group of persons for whom exemption from the citizenship is suggested by the CTRC, and that the subsequent use

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11 *Moving forward…Improving Pathways to Citizenship – Government Response,* Australian Government, November 2008, p. 4.

12 Castan Centre for Human Rights Law, *submission 14*, pp 67.

13 *Moving forward…Improving Pathways to Citizenship,* Australian Citizenship Test review Committee, Commonwealth of Australia, August 2008, p. 35.

14 Castan Centre for Human Rights Law, *submission 14*, pp 67, emphasis added.

of the term 'torture or trauma' in the Bill is not inherently contradictory, as the Bill intends to pick up those who have suffered either torture or trauma.

3.17 In its supplementary submission, the Department provided further information on the number of applicants with permanent incapacity, and addressed concerns relating to the method of assessment of claims of incapacity[15] in the following way:

> During [the period 1 October 2007 and 30 June 2009] 366 people applied for citizenship under the permanent physical or mental incapacity provisions provided in subsection 21(3) of the Australian Citizenship Act 2007. Of these, 189 people who applied under the permanent incapacity provision acquired citizenship when they were found to have a permanent incapacity which meant they were not capable of understanding the nature of the application. This number represents 0.1% of the total number of people who acquired citizenship by conferral during this period. In each case clients were required to provide evidence of their incapacity in the form of a letter from a specialist in the field related to their incapacity. Each assessment is made on the basis of the information provided by the specialist. Citizenship officers do not make assessments of a person's incapacity. It is anticipated that the number of people who will be able to acquire citizenship under the proposed s21(3)(d) will remain a very small percentage of the overall caseload.[16]

3.18 The committee notes disagreement from a number of submitters with the scope of the exemption to take the test. However, members note that most dissenters would prefer to see the removal of the citizenship test altogether, a factor which must inform their position on the exemption contained in the Bill. The committee is also mindful of the fact that the citizenship test enjoys bipartisan support, and that the test brings with it some notable benefits. For example, the committee was reminded of the role of the test in empowering some permanent visa holders who, but for the need to pass the test, might be precluded from taking classes in English. As Dr Susan Kneebone said at the committee's hearing:

> I absolutely agree with you on that point. The citizenship test can be used in a way which is inclusive and does incorporate, as you say, particularly women who may not have a lot of contact outside their family circle or outside their home. It is well known that migrant women are often the ones left out of the reckoning and this is a way of including them. I think we are in agreement on that.[17]

3.19 While the committee can see arguments in favour of broadening the proposed exemption, it is mindful of the desirability of requiring the test be successfully completed in as many cases as is fair and possible. The proposed exemption will cater to those for whom sitting and passing the test would be an unfair and unreasonable

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15 See, for example, Australian Lawyers for Human Rights, *submission 3*, p. 4; Castan Centre for Human Rights Law, *submission 14*, p. 6.

16 Department of Immigration and Citizenship, answer to question on notice, received 1 September 2009.

17 Dr Susan Kneebone, *proof committee hansard*, 27 August 2009, p. 17.

requirement. The Department has arrangements in place to assist those in less extreme situations who are having difficulty preparing for the examination, and taken together with the proposed exemption, the committee takes the view that an appropriate balance has been struck.

Citizenship applications from minors: subsection 21(5) amendments

3.20 The Bill would also amend arrangements for applicants for citizenship by conferral who are under the age of 18. Currently subsection 21(5) of the Act provides that a person is eligible to become an Australian citizen if the Minister is satisfied that the person is aged under 18 at the time the person made the application.

3.21 Subsection 24(2) confers a discretion to the Minister to refuse to approve a person becoming an Australian citizen despite the person being eligible to become an Australian citizen under subsection 21(2), (3), (4), (5), (6) or (7) of the Act, and policy instructions from the Minister in relation to this provision require that *most people* under the age of 18 be a permanent resident at time of application.[18] While the Act does not specify any criteria for the exercise of this discretion, the discretion is limited to the subject matter, scope and purpose of the statute.[19] The Bill aims to implement government policy that, in general, people must be residents before they can become citizens.

3.22 The Department explained the practical operation of the existing provisions as follows:

> The policy instructions provide an aid to decision-makers exercising the discretion under subsection 24(2) and a decision-maker must consider the circumstances of a particular case in deciding whether it is appropriate to apply the policy in exercising the discretion.
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> …
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> In the case of an applicant who does not meet the policy requirements, the full circumstances of the case, including the best interests of the child, are taken into consideration to determine whether the application nevertheless warrants approval outside of policy because of the exceptional nature of those circumstances. The legislation in the past had been left deliberately broad in order to accommodate very exceptional cases that came to the attention of the department.[20]

3.23 The Department explained the rationale behind the proposed amendments this way:

> In recent years the provision to confer citizenship on children under the age of 18 has been increasingly utilised by clients and their agents in an attempt to circumvent migration requirements or as a last resort when all migration

18 Department of Immigration and Citizenship, *submission 11*, p. 6, emphasis added.

19 Department of Immigration and Citizenship, *submission 11*, p. 5, citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J.

20 Department of Immigration and Citizenship, *submission 11*, p. 5

> options have been exhausted, including requests for ministerial intervention, and removal from Australia is imminent. This can result in children being conferred citizenship but there being no or little prospect of their family remaining lawfully in Australia or returning to Australia in the foreseeable future because there is no migration option available to those family members…Subsection 21(5), and a similar provision in the *Australian Citizenship Act 1948*, were not intended to be used in this way. It was not the intention, for example, that an unauthorised arrival in Australia who was under 18 years of age at time of their arrival would have the right to Australian citizenship on their arrival.[21]

3.24 In its supplementary submission to the committee, the Department reported that 415 children applied in their own right for citizenship between 1 October 2007 and 30 June 2009. Of these 14 were not permanent residents at the time of the application. This is the cohort that would be impacted by the proposed amendment. Of this cohort, 4 had their citizenship conferred following a favourable decision of the AAT.[22]

3.25 Much of the criticism levelled at the proposed amendments went to this point: that the current legislation allows for exceptional cases, but that the proposed amendments would remove the discretion to confer citizenship when circumstances warranted it. Professor Kim Rubenstein recommended the retention of the broad discretion, through the scrapping of the proposed amendment to subsection 21(5):

> My recommendation is to not include the amendment, to leave section 21(5) exactly as it is and to review policy, which I think is possible in a way that would maintain a lawful decision-making process under the section as it currently stands but also deal with the issues that the minister is concerned about in terms of the links between the migration program and the citizenship program.[23]

3.26 Victoria Legal Aid summarised the view of many submitters in its submission:

> This broad discretion…recognises that children are a particularly vulnerable group. There can be extraordinary and compelling reasons for the grant of citizenship to children. The presence of this discretion in Australian citizenship law recognises that the unique vulnerabilities of children sometimes raise unusual circumstances, where a grant of citizenship is warranted. The Minister should have the power to deal with those unusual and compelling circumstances appropriately.
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> …
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> There is, as far as VLA is aware, no evidence that there has been a large increase in the number of applications for the grant of citizenship [under

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21 Department of Immigration and Citizenship, *submission 11*, p. 6

22 Department of Immigration and Citizenship, Answer to Question on Notice, received 1 September 2009.

23 Professor Kim Rubenstein, *proof committee hansard*, 27 August 2009, p. 36.

> 21(5)]. VLA does not accept that the continues presence of a broad discretion in s21(5) will adversely impact on Australia's capacity to control migration, or citizenship. As demonstrated in the case of *SMNX v Minister for Immigration and Citizenship* [2009] AATA 539 discretion in s21(5) will be exercised only in the exceptional case. The exercise of the discretion, further, can be guided by appropriately drafted policy.[24]

3.27 Submitters such as Ms Rowena Irish, representing IARC, were not convinced of the wisdom of relying on ministerial intervention powers to adequately deal with the interests of a minor. They submitted that the process was 'lengthy, uncertain, non-compellable and not subject to review'.[25]

3.28 Professor Kim Rubenstein argued in her supplementary submission that the applicant in the *SNMX* case would not succeed if subsection 21(5) were repealed, because the factors underpinning the Administrative Appeals Tribunal's decision in that case would not have been considered under the Migration Act framework.[26] It was on that basis that Professor Rubenstein argued that an applicant under subsection 21(5) in similar circumstances to those of *SNMX*, would have no path to citizenship.[27]

3.29 The Department concluded that a 'very small group' of people under the age of 18 would no longer have direct access to Australian citizenship should the amendment proceed, but anticipated

> …that any such people with exceptional circumstances would appropriately be accommodated under the Migration Act 1958 (the Migration Act), if necessary, by way of Ministerial Intervention powers available under the Migration Act. Once granted a permanent resident visa under the Migration Act they would have a pathway to citizenship.[28]

3.30 In its supplementary submission to the committee, the Department maintained its position, notwithstanding the claims of Professor Rubenstein

> To say that '(c)hildren are largely dependent upon the parent's claim under the Migration Act' is true if the child is applying for a visa as a secondary applicant, i.e. as a member of their parent's family unit, the parent being the primary applicant. However, that does not mean that a child cannot apply for a visa other than as a member of their parent's family unit.

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24 Victoria Legal Aid, *submission 6*, p. 2.

25 Ms Rowena Irish, *proof committee hansard*, 27 August 2009, p. 4.

26 Professor Rubenstein also argued that the amendment to subsection 21(5) was unnecessary and that an acceptable policy outcome could be achieved simply through amendments to the *Australian Citizenship Instructions*, which prescribe the policy surrounding the legislation. The committee notes evidence from the Department, at page 47 of the transcript, of its belief that the amendment was made necessary by virtue of departmental decisions being overturned by the AAT, as in the case of *SNMX*.

27 Professor Kim Rubenstein, *submission 7 (supplementary)*, pp. 4, 5.

28 Department of Immigration and Citizenship, *submission 11*, p. 7.

…

> … [T]here is nothing to prevent a child making an application relying on their own claims to being a person to whom Australia has protection obligations (paragraph 36(2)(a)), subject only to the issue of the child's capacity to understand the nature of the application. If the child is too young to understand the nature of the application, then he or she could only make a valid application through a parent or legal guardian, albeit that the application (and the claims made in it) would be the child's own application.[29]

3.31 The Department also pointed out that, had *SNMX* not been granted citizenship through their application under subsection 21(5), an application for a Protection visa would have been open to them, and that:

> It is a matter for his legal advisers as to why such an application was never made by *SNMX* in circumstances where he was not subject to a statutory bar. Given that he was eligible to apply for Australian citizenship, there may have been no need to do so, however he was not subject to a statutory bar which prevented him from making an application for a protection visa which would have provided a pathway through to holding a permanent visa to be eligible for Australian citizenship.[30]

3.32 The committee is mindful of the need to ensure that avenues exist to ensure the fair treatment of all claimants to Australian citizenship, diverse though they may be. It has examined carefully the arguments in relation to the proposed amendment to subsection 21(5), and the concern raised that in closing off what the government considers a 'loophole', more legitimate and compelling claims might be denied recourse. As the foregoing discussion discloses, stakeholders' views diverge significantly.

3.33 Nonetheless, the committee must give strong weight to the considered and repeated advice from the Department that other avenues to citizenship do exist for those for whom existing subsection 21(5) might otherwise have been an option.

3.34 The committee is not persuaded to recommend any amendment to the Bill in this regard.

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29 Department of Immigration and Citizenship, *submission 11 (supplementary),* pp 1–2. The Department cited Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 74 ALJ 775; Soondur v Minister for Immigration and Multicultural Affairs [2002] FCAFC 324 at [35] – [36]; Re Woolley; and Ex parte Applicant M276/2003 [2004] HCA 49 at [103], [155] in support in their argument.

30 Department of Immigration and Citizenship, *submission 11 (supplementary),* p. 5.

Recommendation 1

3.35 The committee recommends that the Bill be passed.

Senator Trish Crossin

Chair