The Senate

Legal and Constitutional Affairs Legislation Committee

Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009

September 2009

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3.35 The committee recommends that the Bill be passed.

CHAPTER 1
INTRODUCTION

1.1 On 25 June 2009, the Senate referred the Australian Citizenship Amendment (Citizenship Test review and Other Measures) Bill 2009 to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 7 September 2009.

1.2 The Bill was introduced in the Senate on 25 June 2009 by Senator the Hon. Penny Wong, Minister for Climate Change and Water, at the request of Senator the Hon. John Faulkner, Minister for Defence, and Senator the Hon. Chris Evans, Minister for Immigration and Citizenship.

1.3 The Bill seeks to amend the *Australian Citizenship Act 2007* to make changes to the Australian Citizenship Program, and in particular, the citizenship test implemented by the former government. $123.6 million was [provided over 5 years in the 2007/08 Budget to establish and implement the test.[1] According to the Explanatory memorandum, the Bill aims to achieve the following, much of which was recommended by the Australian Citizenship Test Review Committee (CTRC). The Bill:

- provides that certain applicants may be eligible for citizenship without sitting the citizenship test if, at the time of application, they have a physical or mental incapacity that is as a result of suffering torture or trauma outside Australia;
- provides that the citizenship test must be successfully completed within a specified period;
- provides that to be eligible for citizenship by conferral, applicants who are under 18 years of age must be permanent residents at both the time of application and the time of decision; and
- streamlines the application process so that citizenship testing and citizenship application would usually take place in one visit to immigration offices.

The committee notes that both hard and electronic copies of the Explanatory Memorandum for the Bill contained misnumbered Item numbers, and understands that this error will be rectified at third reading stage.

Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* newspaper on 1 July 2009, and invited submissions by 31 July 2009. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 100 organisations and individuals inviting submissions.

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1 Answer to Legal and Constitutional Affairs Estimates Committee question on notice, Immigration and Citizenship portfolio, received 17 July 2009.

1.5 The committee received 21 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.6 The committee held a public hearing in Melbourne on 27 August 2009, A list of witnesses who appeared at the hearings is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://aph.gov.au/hansard.

Acknowledgement

1.7 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.8 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2
PROVISIONS

2.1 Item 1, 3 and 4 provide that certain people who have suffered torture or trauma outside Australia and who have a physical or mental incapacity (which need not be permanent) may meet the requirements for citizenship by conferral. The word 'permanent' is removed (by Item 1) from the simplified outline in section 19G to ensure that the explanation is consistent with the amendments made by items 25 and 27 (items 3 and 4).

2.2 Taken together, the amendments provide that a person will satisfy the requirements for application for citizenship under subsection 21(3) if the applicant has a physical or mental incapacity at the time the person makes the application, as a result of the person having suffered torture or trauma outside Australia and the person:

- is not capable of understanding the nature of the application at the time the person made the application; or
- is not capable of demonstrating a basic knowledge of the English language at that time; or
- is not capable of demonstrating an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship at that time.

2.3 The Explanatory Memorandum explains that the new provisions have been inserted in response to a recommendation of the CTRC, which considered that the current exemption criteria do not take into consideration the effect of severe and chronic symptoms resulting from the experience of torture and trauma. The purpose of new subsection 21(3B) is to ensure that certain people who have a physical or mental incapacity as a result of having suffered torture or trauma outside Australia are exempted from the requirement to sit a citizenship test.[1]

2.4 Item 2 replaces existing subsection 21(2A), removing the current requirement that the citizenship test be successfully completed prior to application for citizenship is made. Instead, the new provision will require that an eligible person successfully takes the test and completes it within a prescribed period. The amendment is consistent with the amendment made by item 32, which provides that the Minister may determine the period within which a person must start the test and for the period within which a person must complete the test, and with the recommendations of the CTRC that the process of applying for citizenship and sitting the test be streamlined. By removing the requirement to sit and successfully complete the test before applying for citizenship, the amendments will allow eligible applicants in many circumstances to meet all the requirements for citizenship on the same day, including successfully completing the test. However, to ensure that a person will not be eligible for

1 Explanatory Memorandum, p. 6.

citizenship if they are unable to successfully complete the test within a reasonable period of time, the amendments allow the Minister to specify a period of time within which a person must start the test and complete the test.

2.5 Item 5 repeals the current subsection 21(5) and substitutes a new subsection. The current subsection provides that a person is eligible to become an Australian citizen if the Minister is satisfied that the person is under 18 years of age at the time the person made the application, whereas the new provision provides that a person is eligible to become an Australian citizen if the Minister is satisfied that the person is under 18 years of age at the time of application and is a permanent resident at the time of application and at the time of the Minister's decision. The implication of this amendment would be to require an applicant for Australian citizenship who is under 18 to hold a permanent resident visa before their application can be proceeded with.

2.6 Item 6 would allow the Minister to specify a time period within which an applicant for citizenship by conferral must start and complete the test, with a view to streamlining the application process in line with the CTRC's recommendations.

2.7 Item 7 amends provisions relating to the requirement to pledge commitment to Australia, and reflects the amendments made in Items 1, 3 and 4. Under the amendment, an applicant will not be required to pledge commitment to Australia if they have suffered physical or mental trauma outside Australia, and meet one or more of the conditions set out under paragraph 2.2 of this chapter.

2.8 Item 8 relates to the charging of consistent application fees, in the context of the amendments to section 21. Item 9 relates to application, and makes provision for persons who successfully sat a citizenship test prior to the commencement of the amendments to be excused from sitting another test should their application for citizenship be made after the commencement of the amendments.

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.
>
> …
>
> 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.
>
> …
>
> 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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> …
>
> 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

COALITION SENATORS' DISSENTING REPORT

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

- The scope of the exception to the requirement to take the citizenship test and in particular, the exception for physical or mental incapacity resulting from torture or trauma outside Australia – s.21(3A) and (3B) amendments; and
- Citizenship applications for minors – s.21(5) amendment

1.2 Other issues regarding streamlining the administration of the test were non controversial, noting the concerns expressed by the Department about seeking to overcome people sitting the test well in advance of being eligible to apply for citizenship.

Opposition to the provisions seeking to remove the requirement for a 'permanent physical or mental incapacity'

1.3 Coalition Senators oppose the provisions seeking to remove the requirement for a 'permanent physical or mental incapacity' and maintain that the requirement in the exception for 'permanent physical or mental incapacity' be retained.

1.4 The amendments proposed in the Bill extend the exemption to people who have a physical or mental incapacity at the time of making the application that is as a result of the person having suffered torture or trauma outside Australia. Such persons would still need to satisfy the other criteria, e.g. 4 years residence in Australia.

1.5 Concerns were raised at the hearing about the introduction of extending the exemption to one category of people, namely those who had suffered torture or trauma outside Australia, to the exclusion of others, for example, women who had suffered torture and trauma in Australia as a consequence of trafficking. It must be noted that the current provisions refer to 'permanent physical or mental incapacity' without qualification of where or how that incapacity resulted.

1.6 Coalition Senators are concerned that in expressly referring to torture or trauma, the Bill inappropriately and unsuccessfully attempts to frame exclusion from citizenship testing around one (and only one) possible cause (torture and trauma) giving rise to the effect (a mental state) when the latter (the effect) is the appropriate trigger for exclusion, irrespective of its cause.

1.7 This approach is unnecessarily emotive, inflammatory, and unconstructive. Most importantly, it takes the Bill way 'off the mark'.

1.8 The Government has not adequately made the case in favour of their Bill for a range of reasons but in particular as the definition of 'trauma' is so vague and ambiguous; it is almost meaningless and could potentially open the floodgates. This also is unacceptable.

Australian Citizenship Test Review Committee suggested amendment

1.9 The Australian Citizenship Test Review Committee (the Review Committee) suggested the following simpler amendment That s.21(d) be amended to read:

'has a physical or mental incapacity at that time means the person is not capable due to the physical or mental incapacity of:

Understanding the nature of the application at that time; or

Demonstrating a basic knowledge of the English language at that time; or

Demonstrating an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship at that time.'

1.10 According to the Committee, s.23A sets out the process for a citizenship test and it states in the note that the test must be related to the eligibility criteria referred to in paragraphs 21(2)(d) understanding of the nature of the application, (e) a basic knowledge of the English language and (f) an adequate knowledge of Australia and the responsibilities and privileges of Australian citizenship. It argued that 'mental incapacity' ought not to be confined to just understanding the nature of the application at that time, but ought to refer to all three criteria, all of which are relevant to citizenship testing.

1.11 The methodology suggested by the Review Committee is simpler and non discriminatory. Coalition senators suggest that the Review Committee's proposed amendment be adopted with the addition of the word 'permanent'. Accordingly, we suggest that s.21(3A) and (3B) of the Bill be removed and substituted with the following amendment to s.21(d):

'has a permanent physical or mental incapacity at that time means the person is not capable due to the permanent physical or mental incapacity of:

Understanding the nature of the application at that time; or

Demonstrating a basic knowledge of the English language at that time; or

Demonstrating an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship at that time.'

1.12 Coalition Senators have concerns that the dropping of word 'permanent' has the potential to extend this exemption to a much wider group of people. There is a big difference between a 'permanent physical or mental incapacity' and a 'physical or mental incapacity'.

1.13 At present the Act also allows exemption from sitting the test for people who suffer from permanent physical and psychological disorders of any origin. Removal of 'permanent' from the definition will lead to confusion about eligibility and definitions about 'permanent' and 'temporary' incapacity. We have no information about how many people may be in this category. Regrettably, this figure was not able to be provided by DIAC at the hearing because the Department did not know and indeed, have been unable to provide an answer in questions on notice. This is disturbing and unacceptable that the Government has no idea of the consequences intended or unintended, if the Bill passes.

1.14 Permanent residents including refugees are required to have lived in Australia for four years before eligibility for citizenship. If those granted protection visas are still suffering from a 'temporary' incapacity after four years, then arguably their

condition could be considered 'permanent', and the current law allows for those people to be exempt from the test.

1.15 There is concern that this new exemption could be used by some to bypass the requirement to have adequate English and knowledge of Australian values, in particular to limit the opportunity for women to learn English, a point that was canvassed by a number of the witnesses at the hearing.

1.16 It is particularly important for humanitarian and refugee entrants who suffer a range of other obstacles if an incentive to learn English language is removed.

Recommendation to bolster 'assistance' to sit the test

1.17 Current provisions in the legislation allow people who have a physical or cognitive impairment (whether permanent or temporary) that prevents them from sitting the Standard Test to sit an 'assisted test'. In the 'assisted test', an administrator may talk the person through the computer-based test. The test administrator may read aloud the questions and multiple choice answers, ask the person which answer they think is correct and select on the computer the answer that the person indicates. An applicant has 90 minutes to complete the test which is double the time allotted for others.

1.18 Coalition senators support extending 'assistance' to people to help them pass the test rather than opening up the category to a wider group of people, and hence, potential exploitation.

Why is there a need to change the citizenship test given the extremely high pass rate?

1.19 Coalition senators also question the need for changes to the citizenship test, given the high pass rates. DIAC officials were unable to explain the inadequacy of the current pass rate such as it needed changes, as is seen from the following exchange:

> **Senator Fierravanti-Wells**—Given the very, very high levels of pass of the citizenship test—it is 97 per cent, from your snapshot—why do we need to change the test? Even in the humanitarian categories, it is 84 per cent. I just do not understand.
>
> **Ms Forster**—I am sure you are aware, from previous discussions—
>
> **Senator Fierravanti-Wells**—I am aware of the report.
>
> **Ms Forster**—of the review of the committee. The government has stated its response to that review and it has indeed moved on with the test.
>
> **Senator Fierravanti-Wells**—Perhaps I can ask the question in another way. What statistics are you relying upon that make a pass rate of 97 per cent inadequate, so that you have to change it completely? In other words, what are you trying to achieve? Are you trying to achieve 100 per cent? What is so materially and statistically wrong with the current system? What are you trying to achieve here?
>
> **Ms Larkins**—I think the government's intent was to respond to the findings of the committee review, which found that, for a small subset of those people, they were disadvantaged in sitting the test.

> **Senator Fierravanti-Wells**—In other words, make it easier for everybody.[1]

1.20 The focus on extending the exception resulted in questioning of the high pass rates of the citizenship test and the number of conferrals of citizenship. Given the high pass rates, it is clear that the Government's changes are politically motivated. Reference was made during the hearing to the statistics contained in the Australian Citizenship Test Snapshot Report, July 2009. During the hearing, much was made that the humanitarian program had an 84% pass rate – roughly about 10,500 of 12,727 for period 1 October 2007 to 30 June 2009. The following points were made clear during the hearing:

- It was pointed out that humanitarian applicants sit the test on average 1.9 times;
- The 16% non-pass rate reflects people who come back (roughly 2,000) and sit the test at a subsequent time (can sit as many times as you need to); and
- DIAC agreed it was wrong to say that there were hundreds of people who are never going to sit the test for fear of failure to pass (contrary to other evidence given)

1.21 Citizenship can be acquired through application or conferral – in 7 situations:

- General eligibility criteria and successfully completing a citizenship test – ss.21(2) and (2A);
- Permanent physical or mental incapacity – s.21(3) - exempt from citizenship test;
- Person aged 60 or over or has hearing, speech or sight impairment – s.21(4) - exempt from citizenship test;
- Person aged under 18 – s.21(5) - exempt from citizenship test;
- Person born to a former Australian citizen – s.21(6) - exempt from citizenship test;
- Person born in Papua – s.21(7) - exempt from citizenship test; and
- Statelessness – s.21(8) - exempt from citizenship test

1.22 DIAC have advised that in the period 1 October 2007 to 30 June 2009, **168,293** people were conferred citizenship under s.21 either through application or conferral. DIAC was asked for a breakdown of the figures for each of the 7 situations, but has advised that:

> We are not readily able to provide a breakdown of numbers against each subsection of the Act.[2]

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1 Proof Committee Hansard, 27 August 2009, p. 40.

2 Email correspondence from Ms Renelle Forster to the Committee Secretariat, in response to questions from Senator Fierravanti-Wells, received 2 September 2009.

1.23 Coalition Senators find this remarkable. How can the Government seek to change provisions such as these and not have the statistical analysis to base its assertions of the need for change?

1.24 However, DIAC were able to count the number of people whose citizenship was conferred under the permanent physical or mental incapacity provisions of s.21(3) for the period 1 October 2007 to 30 June 2009 – **366** people applied and of these, **189** were conferred citizenship. It is amazing that DIAC cannot provide a breakdown and hence, Coalition Senators have sought to work this out from other information:

- For the period 1 October 2007 to 30 June 2009, **138,155** people sat the Citizenship test and **133,925** passed on the first or subsequent attempt (these are people in the general eligibility criteria ss.21(2) and (2A) referred to above (namely 1 of the 7 situations above)
- Hence, one would assume that the difference between 168,293 and 133,925 i.e. **34,368** represents people who had citizenship conferred on them (presumably the other 6 situations referred to above)
- This would then mean that roughly **20% or 1 in 5 people** acquire citizenship by conferral rather than applying and sitting the test.

1.25 Accordingly, Coalition Senators are concerned that s.21 conferrals other than for general eligibility criteria applicants who sit the citizenship test is already considerable and ought not be extended further.

Amendments to waive residency requirements for athletes and some other categories

1.26 Coalition Senators also note that on 31 August 2009 in a letter to our Committee Senator The Hon Chris Evans, Minister for Immigration and Citizenship, advised his intent to amend the Government's Bill with a not insignificant amendment (relating to a residence requirement for certain persons) of four (4) pages and notes of seven (7) pages which will now have to be considered on its merits.

1.27 The onus is on the Government to outline the urgency of waiving residency requirements for athletes and other categories of people. In the ordinary course, the proposed amendments ought to have been open to proper examination and scrutiny by the Committee and groups and organisations wishing to make submissions on the amendments. A separate inquiry on the amendments would also have afforded interested groups, organisations and members of the public the opportunity to comment on the changes.

Senator Guy Barnett
Deputy Chair

Senator Mary Jo Fisher

Senator Concetta Fierravanti-Wells

ADDITIONAL COMMENTS BY THE AUSTRALIAN GREENS

Introduction

1.2 The Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009 essentially seeks to amend the Citizenship Act to exempt applicants who cannot complete the test because of mental or physical incapacity occasioned by torture or trauma; and tighten the eligibility criteria for persons under 18 by requiring they be permanent residents before granting citizenship.

1.3 While the Greens do not support the premise of the Citizenship Test, and continue to hold concerns over aspects of this legislation, we recognise that the Minister has sought to improve the way in which the test is applied in response to some of the recommendations made in the report of the Australian Citizenship Test Review Committee.

Subsection 21(3) exceptions from the citizenship test

1.4 The majority of submissions and evidence received by the Committee argue that while an exemption from the requirements to sit the citizenship test is provided for sufferers of past torture and trauma experienced, the exemption identified in Subsection 21(3) of the Bill is too narrow.

1.5 Many refugee and humanitarian entrants, for example, that may have suffered persecution within their countries of origin, would fall short of the legal definition of torture. Similarly, the requirement that mental or physical incapacity is as a result of suffering torture or trauma outside of Australia, is too prescriptive, particularly when discussing trafficked persons, or those held in detention whilst their visa application is being determined.

1.6 It is not appropriate to limit the definition of torture or trauma to those that have suffered psychological damage outside of Australia. In their submission, Castan Centre for Human Rights Law argues that:

> Many refugees have been re-traumatised by their treatment in Australia, and have suffered trauma from prolonged detention…whilst under Australia's care and jurisdiction.[1]

1.7 At a minimum, consideration must be given to expanding the definition to include persons traumatised by their experience in an Australian detention facility, and trafficked persons who have suffered trauma and persecution in Australia at the hands of persons here.

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1 Castan Centre for Human Rights Law, Monash University, *Submission15*, p. 8.

1.8 There was also confusion around how a person's level of incapacity will be measured, and by whom. The Refugee Advice and Casework Service argued in their evidence to the committee that:

> individuals falling within the exception would still be forced to submit to the potentially humiliating process of having themselves declared mentally incapable. In addition, a significant strain may well be placed upon the already overburdened mental health services.[2]

Recommendation 1

1.9 The Greens submit that the exemption within 21(3) is too narrow, and must be expanded to include all refugee and humanitarian visa holders from the requirement to sit the test.

Recommendation 2

1.10 If the exemption proposal is not broadened, we recommend that the amendment be broadened to include people who have suffered significant trauma while in Australia.

1.11 Proposed subsection 21(3B) and paragraph 26(1)(ba) be amended by omitting the words "outside Australia"

Subsection 21(5) removal of exemption for minors

1.12 The Committee heard evidence throughout the Inquiry regarding concerns over the removal of the Ministerial discretion clause, effectively allowing the Minister to grant citizenship to a child or young person who is not a resident. Of particular concern was that by requiring a person under 18 years of age to be a permanent resident at time of the application and decision for citizenship, the best interests of the child are not being taken into account.

1.13 Children are a particularly vulnerable group of, and their visa status if often as a result of factors beyond their control. According to the Refugee and Immigration Legal Centre's submission into the Inquiry

> Australia's obligations under the Convention on the Rights of the Child to act in the best interests of the child must be the guiding and determining factor in deciding whether a child can be conferred Australia citizenship. Of particular relevance is the degree of the child's connection to Australia, to the extent that it may amount to a form of citizenship, rather than their formal visa status.[3]

2 Refugee Advice and Casework Service, *Proof Committee Hansard,* p. 2.

3 Refugee and Immigration Legal Centre, *Submission 21*, p. 13.

Recommendation 3

1.14 Given Australia's commitment to the Convention on the Rights of the Child, the Greens recommend that Subsection 21(5) be omitted, and replaced with a clause that requires the Minister to take into account, when deciding whether an applicant under the age of 18 years of age is eligible for conferral of citizenship, the best interest principle from Article 3 of the Convention of the Rights of the Child.

Alternative pathways to citizenship

1.15 While a number of the proposed amendments contained in this legislation will make it easier to obtain citizenship, the Greens remain concerned at the lack of legislative implementation for alternative pathways to citizenship.

1.16 It is largely the most vulnerable applicants, such as refugee or humanitarian entrants, who have experienced most difficulties with the passing the test. Given the Australian Citizenship Test Review Committee recommended a range of other alternative pathways, including Citizenship Education Programs in English and in languages other than English, the Government must develop its alternative pathway to citizenship plan as a priority.

Recommendation 4

1.17 The Greens support the recommendation put forward by the Refugee and Immigration Legal Centre that "any alternative pathway proposed by the Government for refugee and humanitarian entrants, must not involve the completion of any form of computer-based, multiple choice test and the training element of this pathway must be available in languages other than English."[4]

Recommendation 5

1.18 The Greens further recommend that if refugee and humanitarian applicants are not exempt from the test, a review mechanism be implemented, under the current powers of the Commonwealth Ombudsman, for refugee and humanitarian applicants to challenge their ability to access support, in order to undertake the test.

Public scrutiny

1.19 Given Recommendation No.18 of the Australian Citizenship Test Review Committee recommended that:

4 ibid

> all citizenship test questions, regardless of the pathway, be made publicly available and education experts be consulted on the number of questions to be in the bank.[5]

1.20 It is disappointing that the Government does not see the merit in ensuring there is appropriate public scrutiny of the citizenship test.

1.21 Appropriate levels of public scrutiny would ensure and promote public discussion around what are appropriate questions to include in the test.

Recommendation 6

1.22 Considering the Department for Immigration and Citizenship recently published the "Australian Citizenship Test Snapshot Report", the Greens recommend that this information, and the questions included within the test, be released, on an annual basis, to encourage public engagement and scrutiny in the process.

Conclusion

1.23 The Greens continue to hold concerns around the narrow exemption clauses for minors and past sufferers of trauma and torture, as well as the failure to include alternative pathways for citizenship, or appropriate levels of public scrutiny of the citizenship test.

1.24 Although we have been strong advocates for the abolition of the citizenship test, we recognise that the amendments posed within this Bill seek to improve the current testing regime, and we will seek to address the recommendations outlined above, when the Bill is debated in the Senate.

1.25 As such, the Greens reserve our final position on the Bill.

Sarah Hanson-Young
Australian Greens' Spokesperson for Immigration

5 Australian Citizenship Review Committee, *Moving Forward…Improving Pathways to Citizenship* (The Woolcott Report) Commonwealth of Australia, August 2008, p. 5.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Federation of Ethnic Communities' Councils of Australia (FECCA)
2	Coalition for Asylum Seekers, Refugees and Detainees (CARAD)
3	Australian Lawyers for Human Rights
4	UnitingJustice Australia
5	Newcomers Network
6	Victoria Legal Aid
7	Kim Rubenstein
8	Clothier Anderson Associates
9	Immigration Advice and Rights Centre
10	Refugee Council of Australia
11	Department of Immigration and Citizenship (DIAC)
12	Multicultural Council of the Northern Territory
13	Forum of Australian Services for Survivors of Torture and Trauma
14	New South Wales Council for Civil Liberties
15	Castan Centre for Human Rights Law
16	Community Relations Commission NSW
17	Canberra Multicultural Community Forum (CMCF)
18	Northern Territory Chief Minister, Minister for Multicultural Affairs
19	Refugee and Immigration Legal Service
20	Bob Such MP
21	Refugee and Immigration Legal Centre

ADDITIONAL INFORMATION RECEIVED

1. Answers to Questions on Notice - Provided by the Department of Immigration and Citizenship, received Tuesday 1 September 2009

2. Attachment for Answers to Questions on Notice – Provided by the Department of Immigration and Citizenship, received Tuesday 1 September 2009

3. Answers to Questions on Notice - Provided by the Department of Immigration and Citizenship, received Wednesday 2 September 2009

4. Answers to Questions on Notice – Provided by the Refugee Advise and Casework Service, received Wednesday 3 September 2009

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Melbourne, Thursday 27 August 2009

ANDERSON, Ms Zoe, Solicitor
Refugee Advice and Casework Service

FORSTER, Ms Renelle, Assistant Secretary, Citizenship Branch
Department of Immigration and Citizenship

IRISH, Ms Rowena, Acting Director/Principal Solicitor
Immigration Advice and Rights Centre

KNEEBONE, Dr Susan, Deputy Director
Castan Centre for Human Rights Law, Monash University

LARKINS, Ms Alison, Acting Deputy Secretary
Department of Immigration and Citizenship

MORONEY, Mr Matt, Principal Legal Officer, Legal Framework Branch
Department of Immigration and Citizenship

RUBENSTEIN, Professor Kim
Privaty Capacity

STEWART, Mrs Lauri, Solicitor
Clothier Anderson and Associates