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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email to: legcon.sen@aph.gov.au

16th July '07

Dear Ms Morris,

Re: Inquiry into the Australian Citizenship Amendment (Citizenship Testing) Bill 2007

Introduction

National Legal Aid (NLA) thanks you for the invitation to make a submission to the Inquiry into the Australian Citizenship Amendment (Citizenship Testing) Bill 2007.

NLA represents the Directors of each of the 8 State and Territory Legal Aid Commissions. We make this submission because the Bill raises important issues which affect the clients of Commissions.

Legal Aid Commissions have for many years provided advice and representation in migration matters. Currently five Commissions (New South Wales, Victoria, South Australia, Western Australia, and Northern Territory) provide advice and representation to visa applicants under the Immigration Advice and Application Assistance Scheme. There are more than ten Legal Aid Commission solicitors across Australia who regularly assist with immigration applications, and advise on citizenship. Refugees who have been assisted by Legal Aid Commissions also ask their former solicitors for assistance in applying for citizenship. It is as a result of this experience that NLA wishes to comment on the potential impact of this bill particularly on disadvantaged groups of permanent residents.

Executive summary

NLA's main concern is that a citizenship test has the potential to impact negatively on vulnerable groups, such as refugees, humanitarian visa holders, victims of domestic violence, and people with mental health problems. Great care will need to be taken to ensure that the test does not unfairly advantage applicants from English speaking countries, who have computer skills, or who have some experience of modern educational testing methods over those who do not.

In the event that a citizenship test is introduced, NLA supports the following amendments to the current Bill:

- Additional limits on the content of ministerial determination, including:
- Inclusion of general outline of test in Bill
- Inclusion of definition of success in Bill
- Inclusion of right to undertake multiple tests in Bill
- Inclusion of exempt categories of applicants in Bill;
- Removal of cost recovery for undertaking the test.

General Comments on the Bill

1. Acknowledging the importance of citizenship for refugees

NLA suggests that the Bill should acknowledge the importance of citizenship for refugees and their families. Refugees have been forced to flee their country of origin because of recognised threats to their personal security; they may be forced to live for long periods as asylum seekers with uncertain future migration status and the underlying fear of return. Planning for their families' future well-being is inextricably linked to gaining citizenship of the state where they have been granted international protection. Citizenship provides a sense of 'belonging' to a supportive nation. It is an essential part of the healing process for torture and trauma victims who often experience flashbacks linked with fear of return.

"Recognised refugees ... are fully dependent on their host country for both protection (against refoulement), as well as a durable solution to their plight in the form of a secure legal status and rights which will make possible their successful integration – the completion of which is their integration and acquisition of an effective citizenship. This situation sets them apart from other aliens who, failing integration can always return to their country of origin."¹

Because they can not envisage 'returning home', refugee and humanitarian visa holders are motivated to become citizens, generally applying soon after the residence period is completed and taking pride in the citizenship ceremony. Also citizenship has practical benefits for many refugees as an Australian passport enables them to safely visit close family members in countries of first asylum.

¹ Da Costa R, 'Rights of Refugees in the Context of Integration: Legal Standards and Recommendations', UNHCR, POLAS/2006/02, June 2006, at 19.

2. Greater disadvantage for particular groups of refugees

NLA is concerned that specific groups within refugee communities are likely to face much greater obstacles in undertaking the citizenship test. Women and elderly people, especially those from rural areas, are more likely to have limited education and may be illiterate and lacking in computer skills. Similarly refugees or humanitarian visa entrants who have spent years in hiding or in UNHCR camps may have been denied any access to education. Torture and trauma victims may be unable to concentrate on formal studies for some years after the grant of permanent residence. The security linked with a citizenship certificate is likely to encourage recovery.

3. International law

International law recognises the importance of citizenship for refugees and requires expedition and non-discrimination in the naturalisation process. Article 34 Refugees Convention requires states to 'facilitate' naturalization, including reducing charges and costs, while Article 3 binds states to apply the Convention without discrimination. Similarly the Statute of the Office of the High Commissioner for Refugees requires states to facilitate 'naturalization'.² Key human rights instruments provide that children have a right to 'acquire a nationality',³ and women should not face discrimination in changing their nationality.⁴

4. Exemptions under the Act insufficient to cover all those who are vulnerable

The Australian Citizenship Act 2007 recognises that there are certain groups of applicants for whom a formal citizenship test is not appropriate. Exemptions currently cover persons under 18,⁵ over 60,⁶ suffering from hearing, sight, or speech disability,⁷ or a permanent physical or mental incapacity.⁸ This range of exemptions would not be sufficient to cover an illiterate Rohingya from Burma, or a rape victim from Sierra Leone. NLA suggests that the range of exemptions could be expanded to include others for whom a formal citizenship test would not be appropriate.

5. Format and subject matter of the proposed test will disadvantage the vulnerable

Knowledge of Australia can mean different things to different people, especially in terms of which facts about Australia should be emphasised and which excluded (eg Indigenous Australians and the role of European settlers).

Minister Andrews has foreshadowed that the test will cover 'common values', history and language skills,⁹ and will include mandatory questions on

² Article 2 (e) Statute of the Office of the United Nations High Commissioner for Refugees.

³ Article 7, Convention on the Rights of the Child.

⁴ Article 9, Convention on the Elimination of All Forms of Discrimination against Women.

⁵ *Australian Citizenship Act 2007*, s 21(5).

⁶ *Australian Citizenship Act 2007*, s21 (40 (a) (i).

⁷ *Australian Citizenship Act 2007*, s21 (40 (a) (ii).

⁸ *Australian Citizenship Act 2007*, s21 (3) (d).

⁹ Mr Kevin Andrews, Second reading Speech, House of Representatives, Hansard, 30 May 2007 at 4.

'responsibilities and privileges of citizenship'.¹⁰ Common values are suggested as covering politico/legal concepts such as 'dignity of the individual', democracy, the 'rule of law' and 'a fair go'. It is understood that a recently indicated example of a mandatory question was the gender composition of juries. NLA submits that these are complex ideas, which originate in Australia's legal and parliamentary history. Even many Australian-born citizens may have a poor understanding of them. The terms are also likely to have little resonance for educated European or Asian born citizens and to be completely alien to refugees who have grown up under repressive regimes, where to discuss such concepts would be considered as a subversive act. It would be extremely difficult to properly test comprehension of such ideas through a multiple choice question format.

It is also suggested that multiple choice format is not a good test of general language ability. Multiple choice questions usually require precise comprehension and vocabulary skills, in order to reject the distracters and select the correct response. If the questions are related to the politico/legal issues mentioned above, this is unlikely to be a valid test of an applicant's ability to communicate in the local community and workplace. Many applicants with limited literacy in their native languages and whose education was based on rote learning methods are likely to find a multiple choice test frightening and may be unable to complete the proposed 20 questions. The result would not be indicative of the desire to become an Australian citizen, ability to successfully integrate, or basic knowledge of the English language.

6. Lack of access to English language classes

NLA is concerned that many permanent residents will be disadvantaged in undertaking the citizenship test because of their inability to access English language classes. Currently there are three groups of vulnerable residents who have no entitlement to free English language classes on arrival or grant of residence:

- Members of refugee families who enter or remain in Australia on family visas, such as spouses, parents, older children, and remaining relatives. Refugees regularly choose to reunite their families through the family migration stream as it has perceived advantages of being quicker and more transparent than the offshore refugee and humanitarian visa applications. In addition, some refugee groups will not send documents relating to refugee visas into their home countries for fear that correspondence will be monitored by the authorities, so resulting in the persecution of family members. For example, ethnic minority groups from Burma and religious and ethnic minorities from China prefer family migration to avoid close monitoring by the security forces.
- Recognised refugees who are holders of subclass 785 and 449 temporary visas.

¹⁰ *Australian Citizenship Amendment (Citizenship Testing) Bill 2007*, Explanatory Memorandum, para 19.

While holders of permanent humanitarian visas are entitled to 500 hours of English classes, holders of temporary refugee visas can only access English language education through support groups and volunteer teachers. Their employment opportunities are limited by lack of English and employers' reluctance to engage persons on temporary visas; accordingly temporary refugee visa holders can be restricted to employment within their communities. Opportunities to learn English in the workplace are restricted and working hours hamper attendance at volunteer based classes. When these refugees become permanent residents, they will be entitled to English classes, but by that time, they are likely to have been resident for approximately four years and to have absorbed poor English skills from work colleagues and associates.

- Victims of domestic violence, who obtain permanent residence through the operation of *Migration Regulations* 100.221(4), and 801.221 (6). Spouses who arrive or remain in Australia on two-year provisional visas, have no entitlement to English classes. They can be isolated and abused by the sponsor who restricts contact with the community and threatens the migrant with deportation. Isolation and intimidation have been accepted as indicators of domestic violence.¹¹ Even after gaining permanent residence, the victims have no automatic entitlement to English classes, and often are unable to undertake study because of childcare or employment commitments.

7. The current system is appropriate

NLA believes that the current requirements, including demonstrating basic conversational English and adequate knowledge of the responsibilities of citizenship at interview, and pledging loyalty to Australia, are appropriate. Currently, English language skills are tested in an informal face to face situation. Such oral conversation facilitates assessment of vocational language without the use of intimidating testing systems. NLA suggests that this is a preferable method for estimating English communication skills.

Comments on the provisions of the Bill - limits on Ministerial discretion

NLA is concerned about the breadth of the power to issue Ministerial determinations given the seriousness of the consequences of the test for applicants (ie if they fail the test, they may not achieve citizenship, and the rights and responsibilities which this confers).

NLA notes the comments of the Senate Scrutiny of Bills Committee which questioned the reasons behind new sub-section 23A(7), which provides that a Ministerial determination is not a legislative instrument, and draws attention to the Scrutiny of Bills Committee's advice that the provisions may be considered to insufficiently subject the exercise of power to parliamentary scrutiny.

NLA therefore believes there are four specific areas which should be covered in more detail in proposed new section 23A. These are:

¹¹ *Sok and Minister for Immigration and Multicultural Affairs*, FCAFC 56 (11 April 2005)

1. Outline of test
2. Definition of success
3. Right to take multiple tests; and
4. Exempt categories

1. Outline of test in Bill

Proposed new subsection 23A(1) provides that the Minister may, by written determination, approve the citizenship test. There are no proposed provisions covering the outline of the test, for example, whether the test would be written or oral, whether it would be composed of multiple choice questions etc.

The Minister for Immigration and Citizenship's Second Reading Speech indicates that the Government expects that the citizenship test would consist of 20 multiple choice questions drawn randomly from a large pool of confidential questions. However, as it is currently drafted, the Bill places no limit on the Minister's discretion – in practice, the test could ultimately look significantly different from this model.

Given the seriousness of establishing a citizenship test, NLA suggests that the general outline of the test should be included in the Bill.

2. Inclusion of definition of success in Bill

Proposed new sub-section 23A(2) provides that the Minister will determine what constitutes successful completion of the citizenship test. The Minister for Immigration and Citizenship's Second Reading Speech provides some illumination on the matter, indicating that he expects the pass mark would be 60%, including answering three mandatory questions correctly. However, the Minister of the time will ultimately be able to set a pass mark far higher than 60% if he or she so chooses.

NLA suggests that the definition of successful completion of the citizenship test is sufficiently important to include in the Bill.

3. Inclusion of right to take multiple tests

During public debate surrounding the proposed introduction of a citizenship test, much importance has been placed on the fact that, irrespective of how difficult or easy the test will be, applicants will be able to undertake the test multiple times. This approach is confirmed in the Minister for Immigration and Citizenship's Second Reading Speech. NLA is concerned that there is no legislative guarantee that this will be the case. It appears that the operation of either new subsection 23A(3)¹² or 23A(6)¹³, or both, means that a Minister may be able to limit the number of times an applicant can undertake the test, possibly to just once.

As a result, if a citizenship test is to be introduced, NLA suggests that proposed section 23A should confirm an applicant's right to undertake the test an unlimited number of times.

¹² A determination... may set out the eligibility criteria a person must satisfy to be able to sit the test.

¹³ A determination... may cover any other matter related to the test the Minister thinks appropriate.

4. Inclusion of exempt categories in Bill

The Bill does not affect the different processes for applicants who are aged over 60, or have a mental or physical incapacity (or apparently for applicants who are under 18 years of age).

The Minister for Immigration and Citizenship's Second Reading Speech indicates that there may also be some lesser requirements for people who experience difficulties with literacy (for example, by having the test conducted orally) or to have lesser requirements for other groups in future, depending on need. Once again, this ability relies on the broad grant of Ministerial discretion under proposed section 23A.

If Citizenship testing is to proceed, NLA supports the ability to have lesser requirements for certain categories of applicants. Where possible, these protections should be included in the Bill itself, and consideration should be given to include other groups.

One particular group which NLA believes should be protected in the Bill is refugees. This is based on the special nature of being a refugee – unlike voluntary migrants who choose to come here, refugees and humanitarian entrants are forced to leave their home due to persecution. They face particular barriers which distinguish them from other migrants.

Proposed section 23A should be amended to set out the availability of different processes for people with poor literacy skills, and to exclude refugees and humanitarian entrants (and their families) from having to undertake the citizenship test.

5. Removal of cost recovery for test

Proposed new subsection 46(1A) would allow the fee which is charged to applicants for citizenship to be increased depending on whether, and how many times, they had undertaken the test.

NLA does not support this provision, because it will lead to increased barriers to citizenship for refugees and humanitarian entrants, people from low socio-economic status backgrounds, women, and other disadvantaged groups. This effect may be compounded as these groups may be more likely to need to undertake the test multiple times, thereby potentially attracting an even higher fee.

Conclusion

The citizenship test has been justified as a measure to 'support successful integration' and to identify migrants who are unable to engage with the mainstream community. NLA is concerned that if great care is not taken that a test could have the contrary effect and isolate disadvantaged residents who are unable to pass the test because of past trauma, lack of literacy skills or family hardship. NLA believes an investment in identifying and ameliorating

detachment and isolation by increasing accessible and culturally appropriate support services for permanent residents would be appropriate and would complement the introduction of any test. If a test is introduced our view is that the legislation must contain appropriate safeguards for vulnerable people.

Thankyou for the opportunity to make this submission.

Should you require any further information please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'W Grant', written in a cursive style.

Bill Grant, OAM
Chairperson
National Legal Aid