COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

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

THURSDAY, 27 AUGUST 2009

MELBOURNE

CONDITIONS OF DISTRIBUTION

This is an uncorrected proof of evidence taken before the committee. It is made available under the condition that it is recognised as such.

BY AUTHORITY OF THE SENATE

[PROOF COPY]

THIS TRANSCRIPT HAS BEEN PREPARED BY AN EXTERNAL PROVIDER
TO EXPEDITE DELIVERY, THIS TRANSCRIPT HAS NOT BEEN SUBEDITED

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

http://www.aph.gov.au/hansard

To search the parliamentary database, go to:
http://parlinfoweb.aph.gov.au

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Thursday, 27 August 2009

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Feeney, Fisher, Ludlam and Marshall

Substitute members: Senator Hanson-Young to replace Senator Ludlam

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Collins, Coonan, Cormann, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Marshall, Feeney, Fieravanti-Wells and Hanson-Young

Terms of reference for the inquiry:

To inquire into and report on:

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

WITNESSES

ANDERSON, Ms Zoe, Solicitor, Refugee Advice and Casework Service **2**

FORSTER, Ms Renelle, Assistant Secretary, Citizenship Branch, Department of Immigration and Citizenship **37**

IRISH, Ms Rowena, Acting Director/Principal Solicitor, Immigration Advice and Rights Centre **2**

KNEEBONE, Dr Susan, Deputy Director, Castan Centre for Human Rights Law, Monash University **15**

LARKINS, Ms Alison, Acting Deputy Secretary, Department of Immigration and Citizenship **37**

MORONEY, Mr Matt, Principal Legal Officer, Legal Framework Branch, Department of Immigration and Citizenship **37**

RUBENSTEIN, Professor Kim, Private capacity **23**

STEWART, Mrs Lauri, Solicitor, Clothier Anderson and Associates **9**

Committee met at 11.49 am

ACTING CHAIR (Senator Barnett)—The committee will now turn to the second bill on today's program. 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. The bill seeks to amend the Australian Citizenship Act 2007 to make changes to the Australian citizenship program and, in particular, the citizenship test.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time. I ask that people in the hearing room ensure that mobile phones are turned off or switched to silent and ask witnesses to stay behind to advise Hansard of details and to clarify any other matters.

[11.50 am]

ANDERSON, Ms Zoe, Solicitor, Refugee Advice and Casework Service

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

Evidence was taken via teleconference—

ACTING CHAIR (Senator Barnett)—Welcome. It is great to have you on line.

Ms Irish—Thank you.

ACTING CHAIR—The Immigration Advice and Rights Centre and the Refugee Advice and Casework Service have lodged a submission with the committee, and we have labelled it submission No. 9. Do you wish to make any amendments or alterations to that submission?

Ms Irish—No.

Ms Anderson—No.

ACTING CHAIR—Thank you. I invite you to make an opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Ms Anderson—I would like to start by thanking the committee for inviting the Refugee Advice and Casework Service to participate. RACS are a community legal centre that specialise in refugee law. RACS were opposed to the introduction of a formal citizenship test for a number of reasons and our position remains that it should be abolished. However, our particular concern in relation to the test and its practical operation lies in its effect on refugees and humanitarian entrants and its impact on the ability of this especially vulnerable and disadvantaged subgroup within the broader migrant community to obtain citizenship. We respectfully submit that refugees and humanitarian visa holders should be exempted from the requirement to sit the test.

At the time the introduction of a citizenship test was first proposed, RACS had serious concerns that significant numbers of refugees would struggle to pass the test and that their path to citizenship would therefore be impeded rather than facilitated—quite possibly in contravention of article 34 of the refugees convention. We were concerned that, due to a variety of factors—including past experiences of persecution, particularly torture and trauma and their debilitating after-effects—such persons would therefore face difficulties learning and processing new material such as the English language, the required standard, and successfully completing an exam in a formal and therefore potentially stressful testing environment.

Statistics revealed by the department of immigration in July this year suggested our concerns were justified. Those statistics revealed that only 54.3 per cent of refugees and humanitarian entrants passed the test on the first attempt. This lies in stark contrast to statistics concerning skilled migrants, which indicate that 91.9 per cent passed on the first attempt. In addition, the statistics concerning refugees and humanitarian entrants likely suggest an artificially high rate of success, as they do not take account of the fact that significant numbers may simply not attempt the test due to fear and anxiety about the process of sitting the test itself or fear of suffering the humiliation associated with failure.

RACS support revision of the means by which people are able to obtain citizenship and the broadening of the exemptions for the need to sit the test. We welcome the proposed exemption from the requirement to sit the test for people who have suffered torture and trauma outside of Australia and who suffer a mental or physical incapacity as a result. However, we believe the proposed exception is too narrow and will not adequately address the disadvantage faced by significant numbers of vulnerable applicants for citizenship. It is our position that the exemption should be extended to include all refugee and humanitarian entrants.

Many refugees and humanitarian entrants, for example, may have suffered forms of persecution in their countries of origin which fall outside the narrow legal definition of torture. Similarly, many may have been exposed to terrifying experiences which fall short of trauma in the clinical sense, that is, in the context of the DSM4, which requires exposure to a life-threatening event or an event threatening physical integrity. Yet such past experiences and the continuing psychological after-effects, which may include depression and anxiety disorders in addition to post traumatic stress disorder, may well adversely affect the relevant individual’s ability to learn new material and successfully complete the citizenship test.

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.

Our concerns that many vulnerable refugees and humanitarian entrants do not fall within the proposed narrow exemption may be resolved in part by a simple rewording of the proposed section 21(3)(3A) to remove the requirement that mental or physical incapacity is as a result of having suffered torture or trauma outside Australia. However, the 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. For these reasons we submit that there should be a simple exemption for all refugee and humanitarian visa holders from the requirement to sit the test.

In conclusion, we believe that there is a particularly profound importance attached to obtaining Australian citizenship for refugees and humanitarian entrants. Refugees are for all intents and purposes in the same situation as stateless persons in that they cannot exercise the rights associated with citizenship in any other country. By definition, they face persecution in their countries of origin or former habitual residence and are therefore unable to return. It is perhaps for this reason that article 34 was incorporated into the refugees convention. It requires that contracting states should as far as possible facilitate the naturalisation of refugees. We agree with the submission of the Refugee and Immigration Legal Centre that the citizenship test impedes rather than facilitates access to citizenship for refugees, and Australia is therefore arguably in breach of article 34. That concludes my opening statement.

Ms Irish—I want to start by thanking the committee for inviting the Immigration Advice and Rights Centre to participate in this inquiry. IARC is a community legal centre specialising in Australian immigration and citizenship law and policy. We advise and represent clients in relation to Australian citizenship, however, due to resourcing and funding difficulties, are generally unable to represent clients at the AAT.

Although IARC remains opposed to the existence of the citizenship test, we welcome its revision and the positive changes which have been foreshadowed by the government in terms of providing alternative pathways to gaining Australian citizenship. IARC also supports the provision of an exemption for sufferers of torture and trauma. However, as with most submissions to the committee, IARC believes that the exemption proposed in the bill is too narrow.

As has been forcefully and eloquently put by many of the submissions, the current exemption provided for in the bill is regrettably narrower than that recommended by the Australian Citizenship Test Review Committee. It will exclude many vulnerable refugees and humanitarian entrants from Australian citizenship, potentially in breach of article 34 of the refugees convention, and will place additional strain on already overstretched mental health professionals specialising in torture and trauma.

We support the concerns raised by RACS in its opening statement in relation to refugees and humanitarian entrants for whom Australian citizenship holds a unique and important meaning. In addition, we believe it is important that other vulnerable members of the Australian community are not forgotten. The government has recognised that the threshold of having to not understand the nature of the application is too high for some sufferers of past torture and trauma and that it is inappropriate for the incapacity to have to be permanent. Yet these requirements remain for disadvantaged and vulnerable persons who are not sufferers of past torture and trauma. Surely the logic should equally apply to all vulnerable and disadvantaged persons to encourage the uptake of Australian citizenship and to make it a truly inclusive process. We recommend that section 21(3A) be deleted in its entirety and the words ‘that is as a result of the person having suffered torture or trauma outside Australia’ be deleted from section 21(3B).

IARC does not support the proposed amendments to section 21(5) requiring minors to be permanent residents in order to be eligible for Australian citizenship. We have set out our concerns in relation to this in our submission but would particularly draw the attention of the committee to the department of immigration’s response to this inquiry where it foreshadows:

… any such people with exceptional circumstances would appropriately be accommodated under the *Migration Act 1958* … 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.

We have serious concerns about reliance on ministerial intervention powers in order to adequately deal with the interests of a minor. The ministerial process is lengthy, uncertain, noncompellable and not subject to review. We also note that is contrary to the minister's stated intention to reduce the number of cases dealt with under ministerial intervention powers.

During the processing of any application for ministerial intervention it is likely that the miner would have difficulties accessing education, Medicare and other services. For example, for one of our eight-year-old clients the major excitement on being granted permanent residence by the minister was that now he could get a Medicare card, which meant he could play soccer with all his friends when he had previously been excluded. This may sound trivial to us, but the social isolation and effect of such things can be profound on young children.

In addition, we are concerned by the focus in the department's response on the family's immigration status rather than on the best interests of the child, in line with our obligations under the Convention on the Rights of the Child. For example, they state:

> 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.

While this may be true in some cases, those children have been given citizenship because it is in their best interests. This is not something that should be taken away lightly. In addition, in other cases the families' immigration status and options are irrelevant to the interests of the children—for example, children who have been abandoned in Australia or have been culturally adopted and raised in Australia.

We also call upon the minister to justify the claims made in the second reading speech that the provision is being exploited and is undermining both the citizenship and migration programs. Children are such a vulnerable group that removal of their rights to citizenship should not be restricted based on such unsubstantiated and generalised accusations. The rights of minors who have formed their identity in Australia were already seriously eroded with the abolition of the close ties visa in 2005 based on the same kind of unsubstantiated, generalised accusation of exploitation. It would weaken the integrity of the citizenship regime to further narrow the ability to deal with exceptional cases dealing with children. These cases should be dealt with in whatever manner is in the best interests of the child, taking into account all of the circumstances. The existing discretion under section 21(5) enables such an approach. That concludes my opening statement. Thank you.

ACTING CHAIR—Thank you, Ms Anderson and Ms Irish, for your opening statements. We will move to questions. I will start with a question regarding your position. I think you said at the outset, and I assume that this applies to both of you, that you do not support the citizenship test at all. Can we just get that on the record for clarification purposes.

Ms Anderson—That is correct. RACS does not support the existence of the citizenship test.

ACTING CHAIR—What about the Immigration Advice and Rights Centre?

Ms Irish—That is also the position of IARC. We do not believe that it adequately addresses the aims that it has.

ACTING CHAIR—Would that correspondingly apply to the English requirements? Do you have a view that there should be any English requirement for a person to become an Australian citizen?

Ms Irish—IARC would have no objection to there being some level of requirement of English language ability. Our concerns would be that the appropriate level is implemented, and currently we do not believe the citizenship adequately addresses the appropriate level of English language ability, and also that there are appropriate pathways in exceptional circumstances where it is not appropriate for particular cases that English language ability at a certain level be required.

ACTING CHAIR—Ms Anderson, do you want to respond to that?

Ms Anderson—RACS, likewise, has no objection in general to there being a basic English language requirement, except in the case of refugees and humanitarian entrants, who we believe should be exempt from this requirement.

ACTING CHAIR—That would be a very large number of people, wouldn't it?

Ms Anderson—It is a small number relative to the population of citizenship applicants.

ACTING CHAIR—Do you know the numbers?

Ms Anderson—I do not have the statistics available right now, but I can take that one on notice.

ACTING CHAIR—You are obviously aware that over 96 per cent of the people who have applied and sat the test have passed it on their first occasion. You are aware of those statistics? You do not think that evidence would go against your argument that there is no need for a citizenship test?

Ms Anderson—The statistics in relation to refugees and humanitarian entrants show quite a different picture. As I stated in my opening speech, only 54.3 per cent of that class are passing on the first attempt. Our concern with the current test is in relation to that particular subgroup.

Ms Irish—I think the other issue also is that the current statistics do not reflect the people who are not applying for citizenship on the basis that the citizenship test is a deterrent.

ACTING CHAIR—Moving to another area: do you have an understanding of how many people are currently receiving their citizenship test based on the fact that they have a permanent incapacity?

Ms Irish—We do not have any figures on that.

Ms Anderson—I do not have any available.

ACTING CHAIR—We can ask the department about that when they get to us. Thanks for that. I will move around the committee and I will see if Senator Feeney would like to ask a question.

Senator FEENEY—No, thank you.

ACTING CHAIR—Senator Marshall? Thank you. Senator Fisher? Senator Fierravanti-Wells?

Senator FIERRAVANTI-WELLS—Thank you. Ms Anderson, you made the comments about the pass rates. If you have accessed those statistics, you will also have seen that the percentage of humanitarian clients who pass the test on their first or subsequent attempt is 84 per cent. Do you dispute that?

Ms Anderson—No. The pass rate is higher on the second attempt. However, 16 per cent is still a very high rate of failure. As Ms Irish commented a moment ago, those statistics may reflect an artificially high pass rate in that they do not take account of the fact that there may be people who are deterred from attempting the test out of fears of the process, the test itself and the humiliation associated with failure.

Senator FIERRAVANTI-WELLS—Ms Anderson, I appreciate you taking the time to give us evidence. But you have made some assertions and I would appreciate it if you would access the snapshot report. You say you have had a look at it. When I look at it, it tells me that under the humanitarian program the average number of tests per client is 1.9. That would tell me that, yes, it is a bit higher than the other streams but that people in that category are sitting fewer than two tests to achieve a pass rate of 84 per cent. I would say that is a very high pass rate rather than view it as the rather pessimistic picture that you are trying to paint.

Ms Anderson—We still believe that 16 per cent is an unacceptably high failure rate, particularly when there is no other mechanism available by which those people affected can obtain citizenship.

Senator FIERRAVANTI-WELLS—But they can sit the test as many times as they want.

Ms Anderson—Yes, but for those who will continue to fail—either because they are unable to demonstrate the required standard of English or for other reasons—there is no alternative mechanism available. This is our concern.

Senator FIERRAVANTI-WELLS—Ms Anderson, you have made some assertions. Clearly, given the description of the area you operate in, one would assume that you would have access to this sort of information. I appreciate your assertions, but I would also appreciate it if you could back those up with some figures. There is no point coming to a hearing and making a series of assertions without actually backing them up with some figures.

Ms Irish—We would also appreciate access to some figures. It may be that release of those figures is a more appropriate question for the department. We have access to the same snapshot report that you are referring to, but unfortunately currently we have access to no other specialised information.

Senator FIERRAVANTI-WELLS—I appreciate that, but you have made certain assertions. In fact, if I understand what you are saying, you just do not think that any refugee or humanitarian entrant should even sit a citizenship test. You are making a rather broad request and assertion. I think, to substantiate that, you really have to provide evidence of the sorts of numbers that are not applying. You cannot just make an assertion—and advocate it in your submission—without actually backing that up.

Ms Anderson—It would obviously be helpful to everyone concerned if there were statistics available on the numbers of people eligible for citizenship who were electing not to apply, particularly those within the refugee and humanitarian streams. As far as I am aware, such specific statistics are not available.

Senator FIERRAVANTI-WELLS—Therefore, you are really basing that information on some odd anecdotal evidence. Is that what you are saying?

Ms Anderson—Our position is based on the fact that there remains what we believe an unacceptably high failure rate of 16 per cent. From our own experience with our clients, who find the process of having to go through sitting a citizenship test very stressful and daunting, many have expressed to us that they are so fearful of taking the test that it remains a deterrent to them applying for citizenship.

Senator FIERRAVANTI-WELLS—Can I ask you this other question. If I could encapsulate it: part of the process is also an opportunity for applicants to acquire a knowledge of the English language. If the requirement to sit the test is removed, how will this affect the promotion of English within these groups?

Ms Irish—From IARC's perspective, we had no issue with there being a requirement for an applicant to have a certain level of English language ability in order to apply for citizenship. We just believe that there needs to be provision made for exceptional circumstances where it is not going to be possible for the person to reach the required level of English but that they are still going to play an important or valuable role or forming part of the Australian community. Part of assessing whether they are exceptional cases could involve them partaking in, for example, English language courses. That is some of the role around the current exemptions. We just believe that the current exemption is not sufficiently broad.

Senator FIERRAVANTI-WELLS—Can I just summarise. In effect, you really think that, if they can acquire some English, that is fine, but that refugees or humanitarian entrants really should not need to know any English before they can acquire citizenship. That is, in effect, what you are saying.

Ms Irish—I do not think that is a fair reflection of IARC's view. IARC's view would be that in some exceptional circumstances that may be the case because people can still make a valuable contribution to the Australian community even though they may not be able to pass the specified test of English language ability in the citizenship test. We still believe that they can play a valuable role. But, as I said, that would be in certain cases where there is a prescribed method of exemption. That is why we proposed a broadening of 21(3)(b) to allow that for all people, whether they either do not have the English language ability or do not have the ability to understand the nature of the application. We think it should not be the very narrow exemption that is currently allowed for people who are either vulnerable and cannot understand the nature of the application or have suffered from past torture or trauma outside Australia.

Senator FIERRAVANTI-WELLS—So your solution is: do not even worry about making them sit any test at all. That is really the effect of what you are saying.

Ms Anderson—The government has already acknowledged that there are circumstances where that is appropriate and that there are circumstances where it is not appropriate for individuals to have to sit the test to get Australian citizenship. That is already reflected in section 21(3) of the act. I think it is a very reasonable position to take that there are going to be some applicants for whom it is not appropriate to have to sit the citizenship test and for whom it is not appropriate to have to demonstrate a certain level of English to get Australian citizenship.

Senator FIERRAVANTI-WELLS—That exists under the current legislation. There is a clearly defined category of people with limitations in relation to the permanency of their disability or incapacity. What you are proposing is basically open slather, and that is really the objection that I have to what you are asserting. You are basically saying—and this is what I am trying to encapsulate in a nutshell—that it does not matter whether they have a permanent disability. Quite frankly, they do not have to have any disability. What you are actually saying is that they should not need to sit a citizenship test. That is really the nuts and bolts of what you are saying.

Ms Irish—IARC's submission is that section 21(3B) of the bill should be amended to remove the words 'as a result of the person having suffered torture or trauma outside Australia', which would mean there is still an exemption under section 21(3B) but it is broadened so that there are still prescribed circumstances in which they get the exemption. It is not a generalised exemption. RACS may have a different view on that.

Senator FIERRAVANTI-WELLS—Removing the word 'permanent' opens it up to a much broader category of people. I do not know if either of you have ever practised in personal injuries litigation. If you

have you would know that the removal of the word 'permanent' opens up that category enormously. Have either of you practised in that area?

Ms Irish—No, I have not practised in that area.

Ms Anderson—I have not either.

Ms Irish—That is a fair point to make. But it is not an accurate reflection of our position to say that it is just inviting open slather in applications. There are still prescribed exemption criteria that people would need to satisfy.

Senator FIERRAVANTI-WELLS—But you accept that it broadens the possibilities extensively. By removing important caveats it actually broadens it considerably.

Ms Irish—Absolutely.

Ms Anderson—It does broaden it but in our opinion not unreasonably so.

Senator FIERRAVANTI-WELLS—Going back to language learning, testing is one of the few opportunities women have to learn English, particularly amongst the African and Muslim communities. If you remove the requirement for English language, does that mean that those women will never really have the opportunity to ever learn the language, particularly if they are not engaged in any work environment?

Ms Anderson—We believe it is very important that all migrants, including migrant women, are encouraged to learn English. Certainly making free English language courses readily available would be an important factor in facilitating that. But we do not believe that a test being a requirement to obtain citizenship is the only means by which women are going to have the opportunity to learn English.

Senator FIERRAVANTI-WELLS—But, particularly in some communities where women's opportunities are very limited, surely you would see the test as an opportunity for women to avail themselves of at least a basic knowledge of English. If the requirement is removed, my concern is that women would not be afforded that opportunity, particularly amongst those communities. Where do you see those other opportunities?

Ms Irish—I would see that one of the other very important opportunities is the alternative pathway to citizenship, which is through the courses, where they would have the opportunity to learn English and to learn about Australian culture and values. We do believe that that is an important role but that their citizenship does not then come back to passing or failing a particular test; it is more of an inclusive, value-added role rather than a testing procedure.

Senator FIERRAVANTI-WELLS—But that is not part of what we are considering. It is just your suggestion.

Ms Irish—Yes.

Senator FISHER—Ms Anderson and Ms Irish, coming off the back of Senator Fierravanti-Wells's final question about women and where else they would get the opportunity, I ask you the same question, but not just about where else they would get the opportunity. Where else would they necessarily get the opportunity? Opportunity implies 'maybe', 'could be' or choice. Where else would women who would otherwise miss out necessarily get the opportunity to learn the basics of English?

Ms Anderson—As I said before, we think that it is very important that English courses are widely available and free. We think that this provides an opportunity for women who wish to take advantage of it—and I believe that is the majority—to do so.

Senator FISHER—They may so wish. What about those circumstances in which women who so wish are not so able for a range of reasons, including cultural ones, the fact that they may not know about it in the first place because they know not the language and other family or society members who might apply pressure? They may so wish. What if they are not able?

Ms Anderson—Part of the issue there is about dissemination of the information about the availability of such courses. That is an issue more of administration than of anything else. In terms of cultural factors which may make it difficult for women to participate in the English language-learning process, that applies equally whether there is a test requirement to obtain citizenship or not.

Senator FISHER—Thank you. Returning to an earlier theme of questioning by Senator Fierravanti-Wells, your responses on how ideally the citizenship test would be abolished—you understand that this bill is not about that—and the basis upon which you are suggesting that it should be abolished, we have lamented the lack of immediate figures and talked about the department's ability to provide some figures. I understand your

answers to Senator Fierravanti-Wells as saying that you maintain that position notwithstanding lack of access to the figures. If we were to accept that, on what empirical basis do you then make the submission that the citizenship test should be abolished?

Ms Irish—The empirical basis would still go back to the 16 per cent failure rate. The important thing about that 16 per cent is to recognise that that 16 per cent of refugee humanitarian entrants consists of people to whom Australian citizenship really holds a very special, important and unique meaning, unlike for other entrants to the migration program. So our position is based on that 16 per cent and on the anecdotal feedback that centres like ours get about the discouragement that the test provides to people applying for citizenship.

Senator FISHER—You say there is anecdotal evidence about the test being a deterrent. Do you have any empirical evidence on which you base that view or is it only anecdotal?

Ms Irish—Our centre has extremely limited resources and we simply do not have the resources to undertake empirical studies into the effect of these types of changes on clients. We would strongly support any such empirical studies but we are unable to provide figures. We believe that is something that would be more appropriately done by the department.

Senator FISHER—Ms Anderson, did you want to say something?

Ms Anderson—Yes. I was just going to say that RACS is in a similar position in terms of very limited funding and resources, and is not able to undertake such tests. I would concur with Ms Irish's comments in relation to the desirability of such empirical studies being performed by the Department of Immigration and Citizenship.

Senator FISHER—So your organisations say the test is a deterrent because your clients think the test is a deterrent. Is that your evidence?

Ms Irish—Yes. We are not claiming a particular percentage or figure of deterrence, but we know that it is a deterrent in particular cases because of the feedback that we have had from clients.

Senator FISHER—What do your organisations do to disabuse your clients of what many would consider to be a misunderstanding of the citizenship test?

Ms Irish—IARC would see its main role as being to provide information and advice about the process, about the types of questions, about what resources are available to them—for example, in their community language—in order to prepare for the test. Obviously, a lot of the apprehension about the test will come from, as you say, fears that may not be substantiated, through talk within communities and between refugee and humanitarian applicants which may not necessarily be accurate or a reality. So we would see our main role as being to provide them with accurate advice and accurate information about what exactly is involved in the process.

Senator FISHER—Okay. You said you 'would see' your role as that; do you do that at the moment?

Ms Irish—Yes.

Senator FISHER—Okay. Ms Anderson?

Ms Anderson—Similarly, our only role can be to provide advice and referrals. But, for our client base, many of the fears relate to the English language requirement rather than the content of the test itself. It is the necessity to demonstrate the required knowledge of English that presents the significant hurdle.

Senator FISHER—Okay. Thank you both.

ACTING CHAIR—Yes, thank you again, Ms Irish and Ms Anderson, for being with us today via teleconference.

Ms Irish—Thank you.

Ms Anderson—Thank you.

ACTING CHAIR—The committee will now break for lunch.

Proceedings suspended from 12.28 pm to 1.36 pm

STEWART, Mrs Lauri, Solicitor, Clothier Anderson and Associates

ACTING CHAIR—Welcome. Clothier Anderson has lodged submission No. 8 with the committee. Do you wish to make any amendments or alterations to that submission?

Mrs Stewart—No.

ACTING CHAIR—I invite you to make a short opening statement at the conclusion of which I will invite members of the committee to ask questions.

Mrs Stewart—I would like to thank the committee for giving me the opportunity to speak before you all today. I believe that this is a really important bill and that the proposed amendments will have significant and far-reaching consequences not only for my clients and citizenship lawyers but also for the notion of citizenship and our understanding of citizenship in our community. I believe that the proposed amendments have the potential to alter the understanding and the notion of citizenship and I do not believe that this alteration will be positive.

My submission focuses only on the proposed amendments to section 21(5) of the Australian Citizenship Act 2007. This amendment would require applicants for conferral of Australian citizenship to be permanent residents not only at the time of their application but also at the time of their decision. Consequently, that proposed amendment is the only amendment to which my submission before you today will be focused on. If you would like to ask me further questions, I will try my best to answer them; however, I warn you that I may be deferring to Professor Rubenstein who is appearing before you this afternoon.

Professor Rubenstein is also much better placed than I to discuss the history of section 21(5) of the 2007 legislation which is section 13(9) of the previous legislation, so again I warn you that I may be deferring to her judgment for some matters in that regard.

I have a couple of concerns with the proposed amendment, which are set out in my submission. My first concern is that this proposed amendment will be effectively punishing children and young adults for the actions of their parents. Many children are joined to their parents' applications for refugee and other visas and the operation of the Migration Act, with specific reference to section 48, means that if the parents' application fails, the children are also prevented from being able to lodge a further application to remain in Australia.

Some of my clients have even been born here without having the opportunity to put their claims or their desires to become Australian citizens before the Minister for Immigration and Citizenship. They live their lives here but they are born as the holders of bridging visa E or they are even born with the status of an unlawful non-citizen and they never have the opportunity to regularise their status in the community.

My broader concerns are that this amendment will seek to take away the individual nature of citizenship and I also have a legal concern that the law is being changed to bring it in line with policy when our history and tradition tell us that policy should guide the law and not the other way around.

My greatest concern is that the proposed amendments will devalue citizenship. I spent 12 months of my university degree living in Texas in the United States of America. Before I went to Texas I never thought of myself as being particularly patriotic, except when it came to sporting events. But the feeling of being able to belong somewhere is very strong, and that is something that I experienced firsthand. These children and young adults who grow up here and sometimes spend 15-18 years here before they make their application for conferral of Australian citizenship cannot get that; they cannot be recognised as belonging to the place that they feel they belong to.

I understand the department's concerns about the legislation as it currently stands. I guess their primary concern is that they feel people and their migration agents will try and circumvent the migration process. As I have stated in my submission, I do not believe that this is the case at all. The Administrative Appeals Tribunal has decided the cases of Baddage and Paul and they have found that in order to become an Australian citizen under section 21.5 of the 2007 legislation you must prove yourself to be a member of the Australian community. This is a concept that Aristotle referred to as serving in the justice of the city. This concept of substantive citizenship—or small 'c' citizenship, as it is sometimes referred to—has been in citizenship discourse since 1948, since the first citizenship act was enacted.

The government's obligation to the people who would like to make application under section 21.5, and also to the rest of us who are already formal members of the Australian community, is to recognise those people who are here who make a contribution who bring something substantial and of great importance to our

community but fail to have that formal status. It is my fear, and I hope this will not happen, that the proposed amendments will prevent this from being possible and that a very large and very special class of young adults will never get to be formally recognised as belonging to the place they live in. I am happy to take questions.

ACTING CHAIR—Thank you, we appreciate your input.

Senator FIERRAVANTI-WELLS—How long have you been practising? Have you just practised in the immigration area?

Mrs Stewart—I have only practised in immigration. I was admitted in February 2008, so I have been admitted for 18 months.

Senator FIERRAVANTI-WELLS—I appreciate your comments about migration agents. I practised for 20 years as a lawyer with the Australian Government Solicitor's office and I have seen my fair share of, suffice to say, if I can put it this way, rather than exemplary behaviour in the immigration legal area. So why can't the minister use his discretion to deal with those exceptional circumstances? Why should there not be uniformity in the immigration legislation so that, just like other people, you get your citizenship when you are 18 years of age and, if there are circumstances such as perhaps are now dealt with by this provision, why can't they be dealt with by the exceptional circumstances discretion that the minister has?

Mrs Stewart—At the moment section 21.5 provides broad discretion and then should the minister decide that, notwithstanding the fact that those applicants are under the age of 18 years, there is a discretion in section 24.2, I believe, though I could be wrong on that, to refuse to confer Australian citizenship. That discretion was not present in the 1948 act; it is an amendment as of 1 July 2007. The decisions that we have been receiving from the department at the moment all state, 'Yes, the applicant is under 18 and therefore the applicant satisfies the section 21.5 requirement. However, my decision is made under section 24.2,' which is that discretion. It is not my concern that there should not be a discretion available for exceptional circumstances. I agree with you that there should be a discretion available for exceptional circumstances. My concern is that in the matter of SM and X, which was an Administrative Appeals Tribunal matter handed down in July this year, the tribunal found that the policy which requires a residency requirement and requires applicants to be permanent residents is actually ultra vires, it places an unlawful fetter on the discretion of the minister. My concern is that the law is being changed to reflect the policy rather than an overview of the system and understanding why that discretion is there in the first place.

Senator FIERRAVANTI-WELLS—My concern comes from my own observations over many years. I have watched people unscrupulously circumvent the circumstances and use their children simply to achieve a legal objective. In that respect, why should this provision remain in the legislation to afford that sort of loophole, if I can put it that way?

Mrs Stewart—Whilst I have only been practising for 18 months as a solicitor of the Supreme Court and the High Court of Australia, I have actually handled approximately 10 such cases under section 39 or section 21(5). In some of those cases, the child applicant was 17 or 17½ and her parents had actually abandoned her. They had returned to their country of origin and they had left their child with a friend or, in another instance, a family member who was an Australian permanent resident. That child was not a permanent resident. That child was not able to obtain permanent residence because of section 48 of the Migration Act, which states that, if you have made a previous application onshore, you cannot make another application onshore. One of these children had been living with her family's friend for more than 10 years. She considered herself to be no different to her 'adoptive' brothers and sisters, who were Australian citizens by birth. I think that that is where the discretion is needed.

It is not always the case that parents try and use their children in order to obtain a more favourable migration outcome for themselves. I certainly agree that that has occurred in previous applications. I note that the AAT's decision in the matter of Paul stated that specifically—that the purpose of citizenship is not to try and circumvent the Migration Act. Indeed the purpose of any application is not to try and circumvent any other area of law. It is also noted that the distinction between immigration and citizenship lawyers is that you do not need to be a lawyer to practise migration law; you only need to be migration agent; in order to practise citizenship law, you must be a lawyer, otherwise you face the penalties of practising law without a certificate. Lawyers do have a higher duty to the court than their duty to their clients. I hope and I trust that that duty exists enough that people will say, 'This is your situation, these are your chances and I don't think that this is the best option for you,' or 'I don't think that we can do this just so that you can come in on a contributory parent visa,' or another sort of visa.

Senator FIERRAVANTI-WELLS—I wish you well, Mrs Stewart. I will talk to you in 10 years time after you have practised in this area, and perhaps your view might be a little more cynical than it is today.

Mrs Stewart—I had a feeling you might say that!

Senator FIERRAVANTI-WELLS—My concern is this: citizenship being conferred upon a child and then that being used. It is a catch 22 situation. If you can manage to get your child citizenship, then it may help you ultimately strengthen your own case. Do you see where I am coming from?

Mrs Stewart—I do understand where you are coming from.

Senator FIERRAVANTI-WELLS—I am really concerned. If it is a genuine situation, why can't it be dealt with under the provisions of the minister's discretion rather than leaving a loophole in the legislation that can potentially be used and abused in circumstances that are perhaps not along the lines of the ethical ways in which we would like this area to be dealt with.

Mrs Stewart—I certainly do understand where you are coming from. All I can say in response to that is that there will always be people who are trying to find ways around systems and there will always be people who will try and find ways to achieve their own ends through the use or abuse of somebody else. From my perspective, and from what I have seen, I am of the opinion that the risk is worth it. These children make a contribution to our society. They are not kids. Some of them are 17 or 18 by the time it takes for their application to be lodged, then decided by the deputy and then decided by the tribunal if the department refuses it at first instance. It can take two years. I have four clients who are now at university who would not be able to go to university but for the fact that they are Australian citizens. The course being done by one of them does not take international students. The other three simply could not have afforded to go without the government's assistance.

I certainly understand that the department and the government say quite rightly that citizenship is about needs and not wants. But in this instance consider the courses that these young adults are doing and the contribution they are making to our society. We need them as much as they need us.

Senator FIERRAVANTI-WELLS—I do not think it is a question of needing or otherwise. I come back to the point that there is a provision there and it is being used as a loophole. If there is a discretion available to these people, or there is a course of action available to these children through a ministerial discretion, why shouldn't the loophole be shut down and the discretion utilised. That is really my answer, and with all due respect, Mrs Stewart, I do not think that you have quite answered my question. If they can get to the same route and if they are legitimate cases, then one can argue that they can go the legitimate route. There is another route available to them—shut down the loophole—but there are other alternatives available to them.

Mrs Stewart—Could you explain to me what those other avenues are?

Senator FIERRAVANTI-WELLS—You probably read the department's submission—

Mrs Stewart—Yes

Senator FIERRAVANTI-WELLS—The department makes the point on page 146 that by removing this provision:

It is 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.

Mrs Stewart—I have read that and with all due respect to the department and their solicitors, who drafted that submission, I think that there are still cases that fall outside of that ambit. Some of my clients have been living in Australia on bridging E visas. They were not born here. They were not joined to their parents' applications and they now have no avenue to go to the minister under section 417 or under section 351, which is the ministerial intervention power that enables the minister to substitute a more favourable decision of either the Migration Review Tribunal or the Refugee Review Tribunal. As I said before, by getting rid of this broad discretion and saying, 'Okay, you can use another instrument in order to get permanent residence and then when you have been lawfully resident here for four years and a permanent resident for at least 12 months of that time then you can make your application like everybody else under section 21,' there are still people who will miss out. Their only option then is to make application for a protection visa onshore. The question arises as to what would we rather: people clogging up the refugee process or people making an application and relying on discretion and relying on their own acts and circumstances to pull them through. So I certainly

understand where the department is coming from, but I think that their answer will still leave a lot of young adults out in the cold.

Senator FIERRAVANTI-WELLS—Mrs Stewart, I think you mentioned in your opening statement that your submission—and clearly it is just confined to this particular section, so your preference is not to take questions in relation—

Mrs Stewart—I can, if you would like me to comment on something.

Senator FIERRAVANTI-WELLS—Perhaps if we have other questions specifically related to this area.

Senator FEENEY—I have what may be characterised as a dumb question. You cited a case, SNMX v Minister for Immigration and Citizenship.

Mrs Stewart—That is correct.

Senator FEENEY—Heard in the Administrative Appeals Tribunal earlier this year. I am not familiar with the case and I wonder if you could give us a quick precis of what transpired.

Mrs Stewart—I was fortunate enough to have carriage of that case. Professor Rubenstein, who is appearing before you this afternoon, was the counsel for the applicant. At the time of application the applicant had just turned four years old. He was born in Australia and his parents were looking to return to their home country. Unfortunately—

Senator FEENEY—Which was where?

Mrs Stewart—Sri Lanka. Unfortunately, I cannot tell you the applicant's name or any other details. There is a tribunal prohibition order for his safety.

Senator FEENEY—Those are not necessary for our purposes.

Mrs Stewart—The applicant had just turned four years old. He was born in Australia under application of the Citizenship Act. If he reaches the age of 10 years and has been ordinarily resident in Australia throughout that time he will be able to make an application for automatic conferral of Australian citizenship. His problem, and this is something that I touched on before, is that he was erroneously joined to his father's section 417 application. Both of his parents had made applications for refugee status, and the Refugee Review Tribunal in both matters had found that they did not meet the strict definition of a refugee but that, nevertheless, if they were returned to Sri Lanka they would suffer significant harm. They had made many requests—

Senator FEENEY—Can I just stop you there for a moment. When you say they had 'erroneously' made an application on behalf of their child, do you mean they made an application in their capacity as parents for refugee status on behalf of their child?

Mrs Stewart—The child was born after the mother's application for refugee status had been lodged and after the tribunal's decision had been handed down. The way that the 351 process works is that only the people who are actually on that tribunal decision, who are joined to that application, can go to the minister. This child was not attached to his mother's or his father's refugee application so he should not have been able to have been considered by the minister. If the minister had decided to intervene in the parents' case then he would have been able to grant a visa to the mum or dad but not the child, just because the child was not attached. In that instance, the child would have just made an application for a child visa, because one or both of his parents would have been a permanent resident. He was born on a bridging E visa—that is the other thing to take into account. They say once you are on a bridging E visa you never get off. It is one of those things. You cannot make a substantive application from a bridging E visa. Your options are basically to leave the country or wait until the minister intervenes in your case.

Senator FEENEY—Can you explain to me why 21(8) is not a remedy for a child in that circumstance?

Mrs Stewart—Section 21(8) involves a ward of a state—is that correct?

Mr Fraser—A child born in Australia who is considered stateless.

Mrs Stewart—That is correct. He was not considered stateless, and this is where international citizenship laws come into play. Because his parents were Sri Lankan citizens at the time of his birth, this child was deemed to be a Sri Lankan citizen at the time of his birth, even though he was born in another country.

Senator FEENEY—I see. Sounds marvellously simple!

Mrs Stewart—It is! So this application was made. It was brought upon two grounds, the first being that the policy which requires applicants under 21(5) to be permanent residents is ultra vires—it goes beyond the law's

intention. We were successful on that point. The second ground was that, in the alternative, even if that policy was found to be lawful, the application fulfilled the requirements of that policy in that he would suffer significant hardship or disadvantage should he be not conferred Australian citizenship and be forced, with his parents, to depart to Sri Lanka. The child's grandmother is an Australian citizen and she had said: 'It's not safe for him to go back to Sri Lanka. If my son and his wife have to go back to Sri Lanka I will take care of the child and he can live with me.' We had numerous psychological reports. We had experts speaking on the best interests of the child. All of those sorts of things came into play.

Senator FEENEY—Did the parents make a submission about what their will was?

Mrs Stewart—Yes, they did. They provided many and substantial statements. They were of the opinion that their son had a future in Australia and did not have a future in Sri Lanka. This was an extraordinary case in that the consequences for the child, as found by the tribunal, if he had been forced to go back to Sri Lanka, would have been so strong and so harmful. Most situations where my firm or my clients have been successful under section 21(5) have been due more to the time the person has spent in the community, their integration into the Australian community and the things they have done for Australian society than the harm or the disadvantage that they would face if they were returned to the country of their parents' origin.

Senator FEENEY—So the decision was that the child would remain in Australia?

Mrs Stewart—Yes, it was.

Senator FEENEY—Thank you very much.

ACTING CHAIR—I will conclude with a question, and I just wanted to read to you from the department's submission. At the bottom of the second last page, page 6, it says:

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 options have been exhausted, including requests for ministerial intervention, and removal from Australia is imminent.

It goes on to say:

Subsection 21(5), and a similar provision in the *Australian Citizenship Act 1948*, were not intended to be used in this way.

How would you respond to the department?

Ms Stewart—I would agree with the latter part of that statement in that the purpose of section 21(5) and section 13(9) of the 1948 act is not to circumvent the migration process. However, as I have stated before, I do not believe that it is an effective measure of trying to circumvent the Migration Act. The tribunal has to my knowledge—and I could be wrong—made only five decisions on citizenship applications under section 21(5). Choi and Raisani were run in Sydney. They were successful and they were on the facts of the case. I believe the 17-year-old and 15-year-old children in that instance were members of the Australian community. The matter of S and M X, which was handed down in July 2009, was the first case which has dealt with the law. The matter of Baddage, which was handed down in May 2009, I believe, affirmed the decision of the department. That child, who I believe had only been in Australia for two years at the time of application, was not conferred Australian citizenship. There is also the matter of Paul. That applicant was a three-year-old boy from India. I think that that array of cases, even though they are very small in number, shows that the tribunal is still applying the test whether the person is actually a substantive Australian citizen: what have they done; how long have they been here—all of those things that we think of when we think of an Australian citizen. In those instances any attempts by the parents or the family members of Ms Baddage or Mr Paul certainly would not be successful.

ACTING CHAIR—You answered my second question about how many of these cases in the last few years, so thank you for that. The second last paragraph says:

There will be a very small group of people under the age of 18 who will no longer have direct access to Australian citizenship should this amendment proceed. It is 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.

What do you say to that?

Ms Stewart—As I said before, I just do not see how, by requiring people to make a possibly false refugee application, that is possible. I do not think that that is at all what the government wants to have happen for people who have no other option but to make an application for a visa that they know they are not eligible for and they know they are not going to get simply so that they can get to the minister. I think that is wrong. I am

sure that that is not what the department or the minister wants to see happen. By all means, define 'Australian citizenship' and tighten the policy requirements as to what constitutes an Australian citizen but do not put a residency requirement in there if the purpose of the legislation is to make it encompassing. That is where we have greatly fallen down in that we are trying to make citizenship exclusionary when Australia has always prided itself on inviting people and welcoming people.

ACTING CHAIR—Thank you. Ms Stewart, thank you very much for being with us today. You have done very well under the circumstances, with a whole lot of series of questions from a whole lot of different senators. Well done on your efforts and we thank you for being here.

Ms Stewart—Thank you very much.

[2.04 pm]

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

ACTING CHAIR—The committee thanks the representative from the Castan Centre for Human Rights Law. The centre has submission No. 14 with the committee. Do you wish to make any amendments or alterations to that submission?

Dr. Kneebone—No.

ACTING CHAIR—I invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Dr Kneebone—Thank you. First of all I would like to say that the previous witness was taught by me in 2004—the first year that I taught citizenship and migration law—and I am extremely proud of her and the way she has developed in practice. I teach citizenship and migration law; that is one of my areas.

I am here representing the Castan Centre for Human Rights Law, whose objectives are to promote, educate and support human rights approaches. I would like to point out that there are probably two main foci of my submission. The first is the use of legislative power, as such—how legislative power should be used, the extent to which there should be discretionary powers, and the extent to which there should be clarity in the legislation. The second is that I think that citizenship is a concept that is intended to be inclusive. We should not confuse citizenship with migration law and border control.

I have particularly focused, in the Castan Centre submission, on the eligibility requirement. I am not particularly knowledgeable about the issue that the previous witness spoke about but I can make some general comments about approaches to children and use of discretion and so forth if you wish. In terms of the eligibility requirement and my comment on the torture and trauma proposed exception, I am pleased to note that the arguments that I have made on a more legal or abstract level are supported by the empirical evidence from the Immigration Advice and Rights Centre and the Refugee Advice and Casework Service.

So, bringing the two together, I guess that one of the issues that concern me with this legislation is that both sections are intended to affect only small groups of persons. So I wonder about the use of legislation for such a purpose, which, as I say in my conclusion, does seem to have the potential to be eventually discriminatory against persons rather than inclusive. I will stop there because I am sure you have lots of questions for me.

CHAIR—Thank you very much, I appreciate that. We will go to questions now.

Senator FIERRAVANTI-WELLS—I read your submission just before. Can you expand on the point about the discrimination for me in a simplified—

Dr Kneebone—In terms of the eligibility requirements, the torture and trauma issue or—

Senator FIERRAVANTI-WELLS—Yes. Perhaps I might as my question in this way. As I read it—this is what I understand you are now saying—the legislation as it currently stands talks about the permanent physical or mental incapacity and conferral for permanent physical or mental incapacity. There is a provision that if a person has a permanent physical or mental incapacity at the time the person made the application it means the person is not capable of understanding the nature of the application at that time. It is a general provision. It basically defines mental or physical incapacity.

Dr Kneebone—That is currently section 21(3) is it?

Senator FIERRAVANTI-WELLS—Yes, section 21(3). I leave aside the other provisions because the amendments deal specifically with that component of it. The new provisions which are being inserted state:

(3A) A person satisfies this subsection if the person has a permanent physical or mental incapacity, at the time the person made the application, that means the person is not capable of understanding the nature of the application at that time.

That seems to be a repetition of the previous position. Then it states:

(3B) A person satisfies this subsection if the person has a physical or mental incapacity, at the time the person made the application, that is as a result of the person having suffered torture or trauma outside Australia and that means ...

one of three things. Is the point that you are making that the discriminating component of that is now coming down to if you have suffered torture or trauma? Is that the point that you are making—in other words, that the new (3B) is qualifying the previous position?

Dr Kneebone—Not, it is not that.

Senator FIERRAVANTI-WELLS—Could you just explain to me what you—

Prof. Kneebone—I saw that argument made by someone else in one of the submissions. That is not my argument. I am simply saying that the torture and trauma exception is a great idea but it needs to be broader. If it comes as it is, without any alteration, it is actually going to include just a small group of people. I suggest that there are also uncertainties and anomalies about it.

Senator FIERRAVANTI-WELLS—Is that because of the definition component, because you say that nowhere is torture or trauma actually defined?

Prof. Kneebone—Exactly. 'Torture or trauma' is a colloquial expression. Let us put it that way. It is not actually a legal test. In my submission, I said it was the way that the committee used to describe a problem but it is not really what the problem is.

Senator FIERRAVANTI-WELLS—Do you think that it should be defined?

Prof. Kneebone—I think it probably should be left undefined. It probably wants to be a broader exception, to take account of people who have disabilities—I find it difficult to find the right language to use. I was hoping that I would not be asked to suggest language, because I think it is going to be quite difficult to define. I think what you have to capture is the fact that there are so many people who come in under the humanitarian program who have not necessarily suffered torture or trauma in any legal sense, or any sense, but who nevertheless suffer from some disability or incapacity. There was a wonderful photograph in the *Age* this week of three women from Afghanistan who are all illiterate. How are those women ever going to be able to pass the exam? I think we have to recognise that we allow in under the humanitarian program people who do not have the same advantages that we have, people, particularly women, who have not been educated and do not have the opportunity to be educated. So we have to allow for those people. I have also heard doctors speak about their patients who are overly traumatised by not being able to pass the citizenship test because they are disadvantaged by their whole background. Do you understand what I am saying?

Senator FIERRAVANTI-WELLS—In other words, if I can simplify what you are saying, refugees and humanitarian entrants should not have to sit a citizenship test?

Prof. Kneebone—No. I am not saying that at all.

Senator FIERRAVANTI-WELLS—I am just trying to understand what it is that you are saying.

Prof. Kneebone—After I wrote my submission, I read the government's submission and I see that they talk about an alternative test conducted as part of the Adult Migrant English Program. I think that is terrific and I think that is what has to happen. But I think it also needs to be legislated in some way so that these people have got a right to this. As I said, I do not like the association of refugees with torture and trauma, because that is perpetuating a very popular concept of a refugee which does not actually fit with what a refugee is.

Senator FIERRAVANTI-WELLS—Previously there was the criterion of permanent physical or mental incapacity, which is a very broad term, the parameter being permanency. Taking away the permanency, potentially that is going to open up and make it a lot—

Prof. Kneebone—I guess it is the incapacity bit. I do not know that these people are incapable; they are, in our terms, disadvantaged—they have come from totally different cultural backgrounds with totally different life expectations. They have been uprooted in the middle of their life and transplanted into another community. We have given them a status. We have a responsibility to them. We have to deal with that situation. Does that make sense?

Senator FIERRAVANTI-WELLS—To some extent. I am just trying to understand in the end what you are actually suggesting. We are dealing with a specific bill here. I am really asking: is your bottom line that people who are in this category should not sit a citizenship test?

Prof. Kneebone—No. I have already said that that is not my view. One should sit a citizenship test. My role here is not really to suggest an alternative but to help you think of alternatives. I see that as my role, rather than suggesting alternatives. I think that some recognition needs to be made of the fact that we do have disadvantaged people who are here in Australia and our responsibility, and we have to help them pass this test. This should be in the legislation, not part of some discretionary arrangement.

Senator FIERRAVANTI-WELLS—When we look at the statistics about the citizenship test and look at the high pass rates, even among the humanitarian cases—they sit the test as many times as to wish—there is a pass rate of 84 per cent, which is quite high. The overall pass rate is at 96 or 97 per cent. One asks oneself why there is a need to change this. That is not a question I am putting to you. The question I am putting to you is

that many humanitarian entrants view the citizenship test as an opportunity to improve their knowledge of the English language. My concern is that, if this requirement is removed, how will it affect the promotion of English among these groups? I am so most particularly concerned about the women. For example, in certain communities, if they know they have to to sit the test that is their one opportunity to learn English; whereas, if there is domination in their community by their husbands, unless they need to do it they may not be allowed to do it. That is the question I would like you to explore, Professor.

Dr Kneebone—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. I would prefer not to see an exception for torture and trauma victims. If you are looking for a suggestion from me, I would want to see something to do with persons who are disadvantaged, entrants under the humanitarian program, if you want to put it in those terms.

Senator FIERRAVANTI-WELLS—It is a question of definition. As it stands it refers to 'has a permanent physical and mental incapacity at the time the person made the application', that means the person is not capable of understanding the nature of the application at that time. That is quite broad. Do we need some qualifiers? In other words, are we better off leaving it in its broad terms with some degree of permanency rather than qualifiers which, as you say, brings some people in and leaves some people out?

Dr Kneebone—You could have it temporary or permanent because for a lot of people this is a transitory phase which is going to help them to become a full member of the community. It is a hurdle they have to get over. It is a great psychological barrier for many of them. Maybe the word 'permanent' should come out of that section. I still have a problem with the word 'incapacity'. These people are not incapable; they are probably highly intelligent, very skilled and resourceful within their own cultures. It is just that they are in another culture.

Senator HANSON-YOUNG—They are capable, given the opportunity.

Dr Kneebone—Yes.

Senator HANSON-YOUNG—I can see where you are coming from. I think there is general concern around the idea that trying to be inclusive, particularly in the way the draft is written, is ultimately going to be exclusive, which seems to be what you are saying.

Dr Kneebone—Yes.

Senator HANSON-YOUNG—Do you have a better way of trying to overcome the issues of the way it is currently drafted, which is the permanency of being incapable, of being able to undertake the test? You mentioned that you were happy to see that the department has an alternative pathway and you would like to see that legislated. Can you tease that out? Is that the alternative you would like to see?

Dr Kneebone—Yes—if not legislated, at least set out very clearly in the Australian Citizenship Instructions or in some other clear form of policy. There is a provision in the act which talks about the minister having the discretion to make a determination in relation to a test. It is section 23A. It requires some link between the legislation and the Australian Citizenship Instructions, to do with the minister having the ability to approve tests which are tailored to people who have suffered disadvantage. I am not in any way suggesting a watering down of the test or that we not have a test, because I think that a test, used properly, is an extremely good idea.

Senator HANSON-YOUNG—So it is about how we link the idea that something can be tailored to different groups of people without being exclusive—the assistance component?

Dr Kneebone—That is right.

Senator HANSON-YOUNG—But what you are saying is that it needs to be very clear that that discretion is available, accessible—

Dr Kneebone—Yes.

Senator HANSON-YOUNG—and that there is some ability to advocate that it is a right.

Dr Kneebone—Yes. If we go back to basic principles, I think we all understand that legislation should be transparent. We also know—although we have just said we are not talking about the migration regime—that the Migration Act, for example, underwent a big revision in 1999 and there was an attempt to codify everything. We know that the current minister for immigration does not like the idea of discretion. So we want

to make sure that any discretion that is built into the legislation actually describes a parameter for such discretion—what it is intended for.

My other proselytising mission—after all, I am an academic—is to make sure that people understand what refugees are. I think we do have a problem with that. It is partly a generational issue in that people, particularly of a certain age, do not really understand what the refugee issue is and that refugees are in fact, by the very nature of their status in international law, exceptions to migration programs and need special attention. We have also, as I have mentioned, taken others under our humanitarian program who have suffered great human rights abuses. So I think we have to be realistic about what we can expect from those people.

Senator HANSON-YOUNG—So what you are suggesting there is that we need to perhaps redefine the purpose of the citizenship test—what it can do and can offer those people, as opposed to just providing a visa status.

Dr Kneebone—One feature of this current legislation is that it has clarified that the purpose of the test is to ensure that people understand the pledge, and I think that is a perfectly legitimate and desirable spelling-out of what it should be. Citizenship is about civic responsibility and about people becoming part of a community, and I think that is all very sensible. So I am not suggesting that there should be any different test; it is just that I think the way that those people get to sit the test should be in conjunction with support and assistance.

Senator HANSON-YOUNG—Yes. Senator Fierravanti-Wells, did you want to jump in?

Senator FIERRAVANTI-WELLS—Just to follow up that point, if I may, Senator Hanson-Young. At the moment, the provisions allow people with a physical or mental incapacity to have assistance with the test. The administrator can talk the person through the test if they cannot do it on the computer. Am I correct in reading into some of the answers and comments that you gave to Senator Hanson-Young that you believe that the circumstances in which that ‘assistance’, ‘assisted test’, or components of it are provided should be expanded to cover a broader range of people?

Dr Kneebone—Yes.

Senator FIERRAVANTI-WELLS—Leaving aside your comments in relation to the permanent physical or mental incapacity—in other words, that the assistance level goes more to that ‘incapacity’ to assist the person to go through, rather than having a qualification or pigeon-holing them into a particular trauma or torture component—

Dr Kneebone—Yes; that is right.

Senator FIERRAVANTI-WELLS—to achieve the end objective.

Dr Kneebone—Yes.

Senator FIERRAVANTI-WELLS—Sorry, Senator Hanson-Young; I just wanted to ask that.

Senator HANSON-YOUNG—That is fine. I was thinking that the comments that you were making around the difficulty of understanding what is, officially, refugee status, and defining the idea of torture and trauma, brings us to the same problems that the department and the minister have had in relation to classifying people under the protection visa categories and the need for the complementary protection approach, which we know the minister is looking to introduce soon. I guess in the same vein, we would need to ensure that we are not again just creating a new category that is not covering people who fall either side of that.

Dr Kneebone—You could take out the word ‘permanent’ and add the words, I suppose, ‘incapacity’ or ‘disadvantage’. The words ‘torture’ and ‘trauma’ worried me because when I looked at them I thought, ‘Gosh, what does that mean and who is going to determine it?’ As I said, some refugees are very resilient people, which is why they become refugees. They leave their country because they are resilient—

Senator HANSON-YOUNG—I think there are some concerns there about where the torture and trauma is first perceived or understood. Under the way the legislation is currently drafted it is only offshore. What happens when we do accept somebody through a humanitarian access program, they are living in the community but there is a lack of understanding and opportunities and there is isolation that comes from being, as you said, transported and plonked in a new community? That is often where those things can be experienced as opposed to offshore.

Dr Kneebone—Exactly; that is often when they manifest themselves. Trauma is often ex post facto. So I could foresee all sorts of problems with the way it was defined. Again, it is not set out in the legislation who is going to determine that. I think it is going to require lots and lots of assessment.

Senator FIERRAVANTI-WELLS—I was going to come to that.

CHAIR—Senator Feeney was about to jump in on that point.

Senator FEENEY—Just on that point I am a little curious. When you say that the words 'outside Australia' should be removed, are you explicitly suggesting that citizenship and residency status should be influenced by the trauma or torture that persons suffer in Australia? It might strike someone as odd that their circumstances are recognised as dire and traumatic by virtue of the treatment they have received here rather than overseas.

Senator HANSON-YOUNG—Just look at detention centres.

Dr Kneebone—It is well recognised—

Senator FEENEY—I have the privilege of talking to you about these matters whenever you are free. Unfortunately Dr Kneebone has—

Dr Kneebone—I have limited time.

Senator HANSON-YOUNG—Sorry.

Dr Kneebone—Just to use another example: trafficked persons. Persons who are trafficked to Australia can claim refugee status in Australia, for example. Now the trauma they suffer will be from their treatment in Australia at the hands of trafficking persons. Let us take it out of the detention centre example.

Senator FEENEY—That is a good example.

Dr Kneebone—I was not really intending to make a pointed remark about detention centres, although it could be taken as such.

Senator FEENEY—Be my guest!

Dr Kneebone—It could be taken as such! The trafficked person is an example of a person who is at risk if they go back home. A trafficked person is now a recognised category of refugee. They have actually suffered persecution in the host country at the hands of persons here.

Senator FEENEY—Thank you.

Dr Kneebone—That is another issue that I think needs to be looked at.

CHAIR—Senator Hanson-Young?

Senator HANSON-YOUNG—No; I feel as if we are almost going around in circles, now.

Dr Kneebone—I think we are in agreement.

Senator HANSON-YOUNG—I think we are in agreement that there are limitations in trying to be too inclusive—

Dr Kneebone—Too prescriptive.

Senator HANSON-YOUNG—By being too prescriptive about being inclusive you exclude people.

Dr Kneebone—If you are too prescriptive you are going to exclude, so how it is done needs to be thought out very carefully by those who know far more about these things than me.

Senator HANSON-YOUNG—I do think this link between what is in the act and what the assistance and the rights to that assistance are needs to be clarified. Otherwise it can simply be sitting there. What you are saying is that people fall through the gap. Do you have any other suggestions about how we could try to ensure that we link them a bit more explicitly?

Dr Kneebone—In the provision, section 23A, which talks about the citizenship test—just some reference to a test in relation to persons who are entrants under the humanitarian program. I would simply leave it at that. What follows from that is that you are taking into account their legal status under Australian law as well as the obligations that we have to them under international law. Providing that the citizenship instructions are published, I think that that would satisfy.

ACTING CHAIR—I am a little puzzled about your views regarding torture and trauma. You said earlier that you feel uncomfortable about the use of those words. Do you feel as though it should be applied to refugees more in general than people from a disadvantaged point of view in terms of their refugee status and so on? That is my understanding of what you are saying. My understanding of section 21(3B)—and I want to ask you about it—is that you have dropped the word 'permanent', so we have got a person who:

… has a physical or mental incapacity, at the time the person made the application, that is as a result of the person having suffered torture or trauma outside Australia and that means the person:

(a) is not capable of understanding the nature of the application at the time the person made the application; or

(b) is not capable of demonstrating a basic knowledge of the English language at that time; or

(c) is not capable of demonstrating an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship at that time.

I want to ask you about (a), (b) and (c), because these are not ‘and’ but ‘or’. I draw that to the attention of committee members as well. With the insertion of the word ‘or’ surely that has a very broad coverage.

Dr Kneebone—It does.

ACTING CHAIR—I refer to your *Age* article earlier in your evidence. You talked about the three women and you showed the photo of the three women who were illiterate. Would it not cover those three women, for example, in your view?

Dr Kneebone—Yes, it would.

ACTING CHAIR—Yes, it would?

Dr Kneebone—Well, if we take out the ‘torture’ and ‘trauma’ words, yes, it would I would think.

ACTING CHAIR—So then it gets back to your definition of ‘torture or trauma’. Is that what you are saying?

Dr Kneebone—Yes, I think those are very emotive words. I think they are heart-tugging words. Torture has a legal definition but it is a definition that does not cover all persons who are refugees. That is my point.

ACTING CHAIR—Sure, but it is not ‘torture and trauma’; it is ‘torture or trauma’, and those three women—and I do not know the circumstances of the three women you are referring to—could argue, perhaps fairly, that they have undergone at least some trauma outside of Australia, but they cannot satisfy either (a), (b) or (c), so that really opens the door. It is a very broad—

Senator FEENEY—The denial of educational opportunities by a government as a deliberate mechanism for oppression—

Dr Kneebone—You don’t need to go into that. I just think: why introduce new language when you already have terms that describe these people and the circumstances from which they have come. They are either refugees and, as I understand, they are assessed for compliance with the Refugee Convention, or they are persons who have suffered gross abuse of human rights, or whatever the words are. Why not use those words? I just think you open it to trouble by using new language.

ACTING CHAIR—I can understand where you are coming from, but this question is probably more appropriate for the department—to find out whether they believe that the wording of this bill is meeting the objectives stated in the minister’s second reading speech. We will speak to the department later on this afternoon. But the way I read that is that it could be very broadly interpreted and understood and would open the door for a whole range of people, not the very small numbers to which it currently applies.

Dr Kneebone—Actually, the government, in its submission, talks about it only covering a small number, so I think that—

ACTING CHAIR—Yes, I know.

Dr Kneebone—is the problem.

ACTING CHAIR—I think it is a problem.

Dr Kneebone—I do not know whether I have a different view of things from other people, but to me the word ‘trauma’ does not mean an awful lot. It is something that is so subjective. One person can experience a set of circumstances and not be traumatised, but another can be. So why help one but not the other, when they actually come from the same background?

ACTING CHAIR—Yes. So your point is that it could be very broadly defined.

Dr Kneebone—I think it should be defined in terms that are consistent with their status as entrants to Australia.

ACTING CHAIR—No; I know what you think it should be, but I am asking you what the government’s proposal before us is—the bill. Do you believe it could be very broadly defined?

Dr Kneebone—I believe it could be very broadly defined, yes.

ACTING CHAIR—Thank you. I have a second question. On page 9 of your submission, halfway down the second paragraph, which starts with 'The Castan Centre strongly opposes', you say:

Although this is not discussed in the Explanatory Memorandum, the purpose of this amendment is to remove the discretion which the Minister been exercising in relation to this requirement under s.22(6) of the Act in relation to persons who 'will suffer significant hardship or disadvantage'.

And I think you are contrasting that with section 21(5). I want to get a little bit of clarity around that, as to whether that is actually the case, because I have section 22(6) in front of me and I cannot see that there is a link to section 21(5). So can you explain what you are arguing in that statement.

Dr Kneebone—I am not really qualified to comment on that issue in any great detail. I only know from the advice that I was given by your previous witness that section 22(6) has been used by the minister. I have read some of the relevant decisions but I am not an expert in that area.

ACTING CHAIR—Section 22(6) doesn't relate to minors, does it?

Dr Kneebone—I believe that that is the discretion that the minister has been using. That is what I was told—that it was section 22(6). I think that is the discretion that was used—

ACTING CHAIR—All right. We will check the explanatory memorandum. We can check with the department. When I read it, it did not seem to correspond. No problem. Are there any further questions? Senator Fierravanti-Wells.

Senator FIERRAVANTI-WELLS—Dr Kneebone, can I just take you back to the discussion we were having earlier. The bill refers to 'torture or trauma', but the explanatory memorandum refers to 'torture and trauma'—

Dr Kneebone—Yes.

Senator FIERRAVANTI-WELLS—so that is something that we are going to have to look at. When you look at the provisions in clauses 21(3A) and 21(3B), there seems to be a disconnect. I do not know if you have got the bill in front of you; it would be helpful if you did. Proposed subclause (3B) says:

A person satisfies this subsection if the person has a physical or mental incapacity, at the time the person made the application, that is as a result of the person having suffered torture or trauma outside Australia and—

I think it is badly worded, but it goes on to say what the effects of that are. It says:

… that means the person:

(a) is not capable of understanding the nature of the application …

(b) is not capable of demonstrating a basic knowledge of the English language … ; or

(c) is not capable of demonstrating an adequate knowledge of Australia …

It could be that a person is simply illiterate but has never seen torture or trauma or 'torture and trauma'. In other words, there seems to be a disconnect between the severity, if I can put it that way, in the first part of (3B) and—

Dr Kneebone—And the incapacity that results.

Senator FIERRAVANTI-WELLS—what is in effect an incapacity.

Dr Kneebone—Yes. I think that is a very good argument, a very good point.

Senator FIERRAVANTI-WELLS—In other words, the two just do not seem to connect, which brings me back to the point earlier that the current definition is still wide enough to encompass an illiterate person who has never been anywhere near torture or trauma as well as a person who has been traumatised or tortured.

Dr Kneebone—I agree. Also, you could also argue that those women may be illiterate because they have suffered human rights abuses.

Senator FIERRAVANTI-WELLS—It gets back to the point—if I correct the answer that you gave Senator Hanson-Young—that in trying to qualify we are actually discriminating. Whereas, getting back to the other point that we made, maybe the answer here is simply providing greater assistance to the illiterate—please do not get me wrong, just use the descriptions we are using—for example, providing greater assistance to those three women that you talked about or any other person who falls within that broader category rather than being prescriptive?

Senator HANSON-YOUNG—But I think the point there was the emphasis on this being permanent as opposed to—

Senator FIERRAVANTI-WELLS—That is a separate issue, Senator Hanson-Young. Doctor, from a legal perspective, my concern is if you take away the word 'permanent'—if you have a permanent, physical or mental incapacity that is different from having a physical or mental incapacity?

Dr Kneebone—Exactly.

Senator FIERRAVANTI-WELLS—That is really where it opens up—I will not say floodgates—but it broadens it. On the current wording of the legislation, who would be qualified to assess whether a person has suffered torture or trauma or torture and trauma?

Dr Kneebone—Exactly. That was one of my major points. Who will do it? Are you going to start up a new industry of doctors who will certify these things? To me, it does not seem to be very practical.

Senator HANSON-YOUNG—Which is why I say if we were taking their already assessed status—that is what you are suggesting?

Dr Kneebone—Exactly. Why complicate it? They are here; they have been assessed as persons in need of protection. That is why they are here; they are humanitarian entrants. Why not recognise them as a class and then, if they do need assistance, give it to them. But make it clear to everyone what is happening so that people do not feel this test is an obstacle. The test is an opportunity to include people. I think that is the very important message that I would like to leave you with.

ACTING CHAIR—Thank you for your time today.

Dr Kneebone—My pleasure.

[2.43 pm]

RUBENSTEIN, Professor Kim, Private capacity

ACTING CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Prof. Rubenstein—I am a Professor at the ANU College of Law and Director of the Centre for International and Public Law, but I appear in my personal capacity.

ACTING CHAIR—The Centre for International and Public Law has lodged submission No. 7 with the committee.

Prof. Rubenstein—It is actually my own personal submission rather than the centre's submission.

ACTING CHAIR—We will say it is your own personal submission. Thank you for that. Do you wish to make any amendments or alterations to that submission?

Prof. Rubenstein—No, I do not, although I would like to extend the submission.

ACTING CHAIR—No problem. You will now have that opportunity to make an opening statement, at the completion of which I will be inviting members of the committee to ask questions.

Prof. Rubenstein—I would like to thank the committee for giving me the opportunity to extend the written submission that I have made. Whilst it would have been more convenient to walk around the corner to the Senate from where I live in Forrest it has given me the opportunity to see my parents, who are based in Melbourne. I thank the committee for at least giving me that opportunity in the course of this hearing.

As I have explained in my submission, I come to the committee from the perspective of having been involved with this amendment in various capacities, so my introduction sets out by background and interest in Australian citizenship law, being the author of *Australian Citizenship Law in Context*. In addition, as a practitioner on the roll of the High Court of Australia I have been counsel in three High Court matters concerning citizenship. More specifically, between November 2004 and June 2007, I was a consultant to the Commonwealth, to the then Department of Immigration and Multicultural and Indigenous Affairs—later the Department of Immigration and Citizenship—in relation to its review and restructure of the Australian Citizenship Act 1948, which of course resulted in the Australian Citizenship Act 2007, which came into force on 1 July. However, it is important to note that I was not a consultant to the department nor involved with the Citizenship Test Amendment Bill that was introduced as an amendment to that 2007 act and, indeed, I made a submission in relation to that amendment bill at the time, which was before this committee on 5 July 2007.

However, in relation to the suggested amendment to the first part of this bill, which was just being discussed as I entered the hearing, in relation to trauma and mental health aspects, I was a member of the independent committee, appointed by the Minister for Immigration and Citizenship, to review the citizenship test, which reported to the minister with this report, which I hope the members of the committee have seen. In relation to the first part of my submission I speak from the knowledge of having been a member of the committee and having consulted with individuals in the course of that role as a member of the committee and in reporting to the minister.

In relation to the second aspect of my proposal, I speak in another capacity, which is that I have kept my practising certificate, which has enabled me to appear in the High Court but has also enabled me to an act on behalf of children who have made applications to review decisions denying them citizenship, under what is now section 21(5). As I have explained there, in the matters that I have been involved in, all of them, except for the one that led to the AAT decision, have been settled in favour of those applicants being granted citizenship under section 21(5), or its predecessor section, section 13(9)(a). Indeed, the AAT decision of SNMX and the Minister for Immigration and Citizenship 2009, which I have provided to the committee, was an important decision in relation to aspects that I will speak to today and as to why I personally will be recommending that the proposed amendment not be made to section 21(5).

It is sensible to begin with the aspect to do with exemption from sitting the test and then move on to the issue of children, if that is amenable to the senators. In relation to the proposed amendment to section 21(3)(a), I would like to take the committee to the independent committee's report and, in particular, to pages 33 and 34. I do not know whether you have that in front of you. I stress the framework within which the exemptions operate under the act in relation to citizenship.

Senator FIERRAVANTI-WELLS—We have it in sections.

Prof. Rubenstein—It is chapter 8, under the heading ‘Exemptions and Earned Citizenship.’ It is on page 34. It is headed ‘8’.

ACTING CHAIR—It is page 85 in our document.

Prof. Rubenstein—Do you have the heading ‘Exemptions and Earned Citizenship’?

Senator FIERRAVANTI-WELLS—Yes.

Prof. Rubenstein—As a starting point in understanding the way in which the citizenship testing was introduced by the amendment act, the act already includes provisions for certain individuals to be exempt from citizenship testing. The next paragraph states, ‘The consequence of this is that testing only extends currently to those between the ages of 18 and 60.’ So, if you are under 18 or over 60, you do not have to sit a test. And here are the important words, ‘And who do not have permanent physical or mental incapacity.’ As defined in the act, that means the person is not capable of understanding the nature of the application at that time. Also, that people:

(ii) aged 18 or over … suffering from a permanent loss or substantial impairment of hearing, speech or sight at that time …

They are the current provisions that are in place in the act that enable people to be exempt from sitting the citizenship test. As the explanatory memorandum to this amendment bill explains, the independent committee recommended that that be amended to extend to a greater class those individuals who can also be exempt from sitting the citizenship test.

Directly under that, under 8.2, you will see that it was through our consultations in the course of that committee that many people raised concerns, broadly speaking, about that term ‘mental incapacity’. One of the strongest points that came from the particular humanitarian group was of the concern for people who had been traumatised and who were not in a mental state strong enough to sit a test but who did actually understand the nature of the application and so therefore did not fall within the current provisions where the mental incapacity is only linked to the concept of just understanding the nature of the application.

We were also advised of a concern that the word ‘permanent’ was one that was troublesome, from the experience of some of the practitioners we met. For medical practitioners who are charged under the policy to make that assessment it is sometimes difficult to test the permanency of mental health, so that was raised as a significant issue broadly in relation to exemptions from the test. So not only the particular group of trauma and torture victims were voicing their concerns, but there was a broader concern about the current provisions in terms of mental health that the word ‘permanent’ was problematic in relation to allowing the principle behind it, and that is that individuals who because of mental health reasons were unable to sit the test were not benefiting because of that terminology of ‘permanent’.

In looking closely at the provisions, it is acknowledged that the 2007 amendment to introduce citizenship testing was a significant change in the way decisions about conferral were processed. Before the citizenship testing regime was introduced, an individual had to acknowledge the nature of the application and to show their adequate knowledge of English and of the rights and responsibilities of citizenship. And, of course, predating the 2007 changes they did not have to have an adequate knowledge of Australia, only an adequate knowledge of the rights and responsibilities or privileges of citizenship. In some ways, just making a statement in relation to the understanding of the nature of the application was sufficient to cover mental health, subject to that concern I just mentioned that some people were expressing in relation to the use of the word ‘permanent’.

So taking into account that broader concern of permanency being a problematic issue in terms of mental health, together with the clear view expressed about the concerns for individuals who are survivors of torture and trauma who would also be affected in their capacity to sit the test not only because of understanding the nature of the application but also because of the new testing regime in relation to English and knowledge of the responsibilities and privileges of citizenship, it was the committee’s view that one could actually improve the act at the same time as taking into account the needs of this particular constituency. So the recommendation, which is on page 34—the next page in your materials—was drafted to take into account both of those issues. That drafting is, with respect, a more simple and straightforward amendment than the one that has been currently proposed in this bill.

At the moment what section 21(3) refers to, as I heard you refer to earlier, is the person having:

… a permanent physical or mental incapacity, at the time … that means the person is not capable of understanding the nature of the application at that time …

The committee's recommendation was to just enlarge that section both to take into account the concerns about permanency and the difficulties of determining permanency with mental health plus to take into account the fact that some mental health issues actually impact on your capacity to sit the test and express your knowledge of the adequacy of English and the rights and responsibilities of citizenship.

So the terminology that I would commend to the committee is that which is on page 34 of the independent report, and that is to amend section 21(3)(d) of the act so that it simply says that 'a permanent physical or mental incapacity at that time means that the person is not capable, due to the physical or mental capacity, of understanding the nature of the application at that time, or demonstrating a basic knowledge of the English language at that time or an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship at that time'. That, quite neatly, deals with the two problems that were raised before the independent committee and which led them to make those recommendations. The distinction we can see between that recommendation and the proposed bill is that that same provision still exists, so it does not deal with that issue of permanency.

Section 21(3)(d) remains as 21(3A) in the bill, and then 21(3B) of the bill introduces the concept of enlarging the link between mental health and English-language testing and adequate knowledge of the rights and responsibilities of citizenship but narrows it to only concern those who have suffered torture and trauma. My submission is that that is not necessary. The wording in the review committee's report would deal more appropriately with the concerns expressed by a range of individuals about those exemption provisions and that the narrowness of 21(3B) is unnecessary. Those people of course would be covered by the provision that the committee recommended, but the concern about that provision as it is drafted, as I have read in other submissions, is (1) about the capacity to determine the mental health linked to torture and trauma and (2) about other people who suffer mental health issues but not because of torture or trauma and who, because they are disabled or because of their mental health, are unable to display a basic knowledge of English or demonstrate an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship. They are not covered by this new, suggested amendment.

ACTING CHAIR—Professor, can we go to questions.

Prof. Rubenstein—Yes, absolutely.

ACTING CHAIR—We do have quite a few questions, so I am sure you will have an opportunity to elucidate some of those points. Senator Feeney.

Senator FEENEY—Just on that very point, could you clarify something for me. If we adopted the wording found on page 35 of the independent report at part 8.3—and I appreciate your point about that wording making proposed clause 21(3B) redundant—

Prof. Rubenstein—Yes, indeed.

Senator FEENEY—what do you think would be the implications for the legislation with respect to the words 'outside Australia' that are presently found in (3B)?

Prof. Rubenstein—Again, it narrows the scope of individuals who can be covered by that provision.

Senator FEENEY—So that is a narrowing that would vanish under your proposition?

Prof. Rubenstein—Correct. That is right. 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.

Senator FEENEY—And evidently you are comfortable with the proposition that the word 'torture' not provide a criterion?

Prof. Rubenstein—I do not think it is necessary. You would be including individuals, in a broader capacity, who fall within that narrower inclusion at the moment. So you capture those individuals because their mental health is, for whatever reason, the basis of their being unable to sit the citizenship test. Under policy guidelines, currently a medical practitioner is responsible for making these determinations of mental health in relation to their capacity to understand the nature of the application. Within that sort of framework the capacity would exist for a medical practitioner to determine that an applicant's mental health was such that they were unable to do any of the three things listed as being necessary for taking the citizenship test.

Senator FEENEY—If we then turn our minds to the S and M X and Minister for Immigration and Citizenship case, in that case, as I understand it, your client would be unable to proceed on the basis they did under the proposed (3B).

Prof. Rubenstein—That case is actually in relation to section 21(5). S and M X is in relation to children under section 21(5), so it is separate to this particular submission.

Senator FEENEY—I see.

Prof. Rubenstein—But the scenario in that matter and scenarios in other matters are where there are parents who have mental health issues. Separately from section 21(5) an individual such as that might be someone in the future who would want to sit the citizenship test but through mental health reasons may not be able to and who would not be captured, but that is—

Senator FEENEY—That is a long bow to save me?

Prof. Rubenstein—Yes, that is right.

Senator FEENEY—Thank you.

Senator FIERRAVANTI-WELLS—I have concerns with the removal of the word ‘permanent’. Twenty years involvement in litigation practice has hardened me to understand that there is a big difference. ‘Permanent’ has a specific meaning. In assessing any incapacity there is a difference between a permanent incapacity and a non-permanent incapacity. Do you agree that, of course, we are opening it up to a potentially much larger group of people?

Prof. Rubenstein—I agree that we are potentially opening it a larger group of people, but I think that the principle underpinning that is consistent with the Australian Citizenship Act, which is that you want to enable people to become Australian citizens rather than preclude them from doing so.

Senator FIERRAVANTI-WELLS—I guess to some extent, Professor, my many years of involvement in this area has also taught me that this is one of the areas that is also prone to a degree of abuse: ‘If there is something there that we can use to get around the legislation and abuse the system then we will.’ Regrettably, this is an area where probably, unlike many other areas, we do see those sorts of circumstances. So I have concerns about dropping the word ‘permanent’ because I have real concerns about that. But we can agree to disagree on that.

Prof. Rubenstein—Can I also extend that a little bit. I appreciate that point and I appreciate that there is the capacity for some people to take advantage of that section. But I think that the dangers for the people who should be within the section who would miss out if we narrow it are sufficient, in my personal policy view, to deal with that. But that becomes a matter of policy.

Senator FIERRAVANTI-WELLS—But I guess in keeping with the spirit of the act, the section was designed to deal with a degree of permanency. Even in your own committee report, we are talking about permanent loss, substantial impairment—hearing, speech, sight et cetera. The object and the spirit of that exemption was to deal with a degree of permanency.

Prof. Rubenstein—Yes.

Senator FIERRAVANTI-WELLS—Let me ask a series of questions. You have probably heard these when we talk to Dr Kneebone. We raised concerns about (3A) and (3B). In effect, you really do believe that (3A) and (3B) are not needed and your advice to the committee is that we basically simply amend section 21(3)(d) and in effect qualify 21(3)(d) more by removing the permanency issue but also by specifying what ‘nature of the application’ means. Is that the gist of what your suggested amendment would be?

Prof. Rubenstein—Yes. If I can pick up the tenor of your questioning, if the committee were of the view that the word ‘permanent’ was important, I still think that the wording in 21(3)(d), adding in ‘permanent’, would still be better in one paragraph—

Senator FIERRAVANTI-WELLS—I was going to come to that. That was my next question. I can see where you are going, and I do think ‘nature of the application’ is a much broader criterion than what you are suggesting in terms of reducing it and qualifying it to ‘understanding the nature of the application, the basic knowledge of English and adequate knowledge’ et cetera. I think ‘nature of the application’ is quite wider so I am a bit perplexed as to why you want to qualify that and reduce it, but I will come to that in a moment.

Prof. Rubenstein—Can I just correct you in a way on that?

Senator FIERRAVANTI-WELLS—Sure.

Prof. Rubenstein—The act requires three aspects to become a citizen. You have to understand the nature of the application, and you have to have an adequate knowledge of English, and you have to have an adequate knowledge of Australia and an adequate knowledge of the rights and responsibilities of citizenship.

Senator FIERRAVANTI-WELLS—So what you are doing is simply putting that—

Prof. Rubenstein—Mental health should not just be related only to one of those requirements to become a citizen but should actually be linked to all of them.

Senator FIERRAVANTI-WELLS—I can see where you are going. If there is a concern, and we do believe that there is a concern about permanency, which you may or may not agree with, you say we could still deal with that by the qualifier being that the person is not capable due to the permanent physical or mental incapacity of (1), (2), (3), which would become (a), (b), (c).

Prof. Rubenstein—Yes. Perhaps the reasoning behind the distinction made here, and this is where you would perhaps need some more medical advice, is that if torture and trauma are never going to be determined as permanent then, if there is a fear that that group would therefore not come into that, you do not want to reduce the scope; the principle is that you want to be able to include those individuals.

Senator FEENEY—Hence the original division of the two.

Prof. Rubenstein—Yes. In that sense that would be the concern. I am not a medical practitioner, but if there is clear advice that issues to do with torture and trauma would never be determined as permanent, and there is a desire to keep the term 'permanent' in the legislation, then that would lead to this proposal being better in relation to ensuring that they are included. The ideal scenario is the one that I have provided in terms of what I am putting forward. I would not want a scenario where those torture and trauma victims are not protected from having to sit the citizenship test, in light of the consultation process where we got clear evidence that at the moment they are suffering as a result of that.

Senator FIERRAVANTI-WELLS—But the point is that in the end there is the nature of the citizenship test and the timing. This exemption is really designed for a degree of permanency. They can sit it for a number of times. One only has to look at the pass, and I am just going to come to the question of the pass rates. In looking at this you look at the current citizenship test. Obviously you are experienced with the current test because you were associated with setting up—

Prof. Rubenstein—Reviewing it.

Senator FIERRAVANTI-WELLS—Yes. We are talking about pass rates of 97 per cent. Even in the humanitarian area we are looking at pass rates of 84 per cent. And they usually sit 1.9 times, so that means on average most people sit the test twice, but it is open to them to sit in at longer periods of time. Why are you particularly pushing for one category of people whose circumstances may be temporary and, with time, will alleviate—why should they be exempted from sitting the citizenship test?

Prof. Rubenstein—If you have an opportunity to read the report there is quite fulsome discussion on that in particular. There is a range of reasons, but the one that strikes me most is that the refugee and humanitarian category of individuals who we absorb into the Australian community have particular needs, and those needs are highlighted by their refugee condition by virtue of the fact that they would not otherwise have a country from which they can claim citizenship. All the other categories of individuals have other countries which they can claim citizenship from and they can freely choose to go back to their country of origin. The refugee category are not in that position, and they are the category of people who prize citizenship the most.

The reality is that we are making it more difficult for those who prize citizenship most than for those who have a right to it but may not need it in exactly the same way that refugee applicants do. There is a broad discussion we can have about equality before the law, but equality before the law appears both on a formal sense but also on a substantive sense, and substantively they are not being treated equally because their different starting point is significant. So my view and the review committee's combined view in light of hearing such strong evidence from around Australia was that this particular group of individuals have a different need that needs to be taken into account to in many ways treat them more equally even though formally it is not an equal—

Senator FIERRAVANTI-WELLS—But why can't that be achieved through greater assistance and more acute assistance for their particular needs and circumstances to help them pass the citizenship? Rather than exempting them, why can't we look at an alternative where we lend greater assistance to help them pass? As I

understand it, humanitarian entrants view citizenship and the test as an opportunity to improve their knowledge of English.

Prof. Rubenstein—Absolutely.

Senator FIERRAVANTI-WELLS—So can't we look at this, like Professor Kneebone was saying, from a positive side and, instead of exempting them, lend them greater assistance in terms of passing the test?

Prof. Rubenstein—That is the essence of the report; it is exactly that. The recommendations were to change the nature of citizenship testing so that those people would be encouraged, but the bottom line is that there are certain individuals within that category who are these individuals who have been marked out. It is not all refugee entrants exempted from the test; it is those who have suffered torture or trauma who have been identified as part of that group of entrants with particular mental health needs that are worthy of exemption. If you are to follow that line of argument, there is that clear distinction, although my view is that there are others in our community, beyond those who suffer torture and trauma, who have mental health issues and who we want to include in our community as citizens who should also be included in an exemption capacity.

Senator FIERRAVANTI-WELLS—But, Professor, if their condition is permanent, and once they have satisfied the other criteria, then it does not preclude them from getting exemption under the current provisions.

Prof. Rubenstein—Only in relation to understanding the nature of the application. The evidence that came through to the committee was that people who suffer mental health issues associated with torture and trauma can understand the nature of the application but not be able to sit a test because of the torture and trauma.

Senator FIERRAVANTI-WELLS—In other words, what you are saying is that the changes to the citizenship test that are now being proposed are going to make it harder, whereas the exemption as it currently stands is actually quite broader because it refers to the nature of the application.

Prof. Rubenstein—No, because the current exemption is only for the nature of the application. Someone may have a mental health condition as a result of torture or trauma but in that condition would be able to understand the nature of what a citizenship test is. To understand the nature of the application is just to be able to be, in my understanding, cogent enough to know what a citizenship test is. Someone who suffers mental health issues from torture and trauma would understand the nature of a test but not be able to do a test.

Senator FIERRAVANTI-WELLS—But surely we can assist them to do a test.

Prof. Rubenstein—This is where the evidence came through about testing in itself because of the nature of the torture and trauma experienced. For people who have not even suffered torture and trauma the notion of a test—and this is a much broader issue—can be problematic, but torture and trauma victims have particular—

Senator FIERRAVANTI-WELLS—I appreciate that, but there is also the line in the sand as to the general expectations of the community to value citizenship. Australian legislators have deemed that one of the ways of valuing citizenship—and we are changing the nature of it—is through a test. The test may differ from what it has been under a previous regime, but that is the community expectation. What is now being proposed is to exempt people from sitting that test and, as a consequence, exempt them from a threshold which is at least a basic understanding of English. I am asking this specific question in relation to women. This is a concern that I have—that the testing is one of the few opportunities that women may have to learn English. In some closed communities, that may be their only opportunity. If they do not have to study English to sit the citizenship test, they may be precluded from studying English. In your attempt to be broad-minded, are you actually cutting off opportunities for people who probably need greater assistance, and that is an important threshold for their interaction in Australian society?

Prof. Rubenstein—With respect, not having to pass the test does not preclude you from doing the learning. In fact, the department will be able to give you information in relation to the many avenues that are available for migrants in terms of English language learning that are not conditional upon doing a citizenship test. The other point that I would make in terms of general expectations of the community is that there are already in place exemptions for aspects of the general community that the community accepts as reasonable in relation to mental health—

Senator FIERRAVANTI-WELLS—That have a permanent nature.

Prof. Rubenstein—Yes—

Senator FIERRAVANTI-WELLS—I am not saying this can happen, but I have had enough experience in my 20 years of law to envisage potential circumstances where people start shopping around, just like you shop for doctors and you do all sorts of things in medico-legal law. What is to preclude circumstances like that

arising? What is the test? Who is going to determine it? Are we going to see a complete new industry of people who one day are incapable and the next day are fine? Call me cynical but—

Prof. Rubenstein—With respect, I think there is probably a capacity to be a little less cynical, in the sense that the evidence that came before the committee was not only about refugee applicants in relation to the mental health issue and that doctors were finding it difficult to say that a mental health condition was permanent, and therefore, in my view, there is a broader group within the community who we see as Australian citizens and who are included in practical terms as Australian citizens but who are precluded by law from being recognised as Australian citizens by virtue of their mental health.

My personal view is that I would rather err on the side of including those people as members of the community, even if it means that you are also including others who might otherwise have passed the test and got in but do not have to sit it. That is really a value judgment, but I think the bottom line in relation to the committee's report was that, in addition to that broader purpose, there was a real concern about those individuals who had suffered from torture and trauma.

The other point that I wanted to add earlier is that those percentages are only in relation to those people who actually sit the test. The evidence was very strong that there are a lot of people who do not even go for the test because they fear the nature of the testing framework. So those statistics do not give you the whole picture because they are only about those who choose to sit the test. Much of the committee's material was that there are large groups of the community who are choosing not to do the test and so are in effect being precluded who we cannot count in those statistics.

Senator FIERRAVANTI-WELLS—So, in your own words, that then opens up the potential for a large component to now use this way—I do not want to describe it as a back door, but in the public perception it may well be seen as a back door—to acquire Australian citizenship that does not quite sit perhaps with what I would—

Prof. Rubenstein—But it is a back door that is in a context where those people will continue to live in Australia, continue to be part of the community and continue to be people who we interact with as Australians in all but the law. So, in a way, that formal distinction is one that you are arguing we should keep for a notion of the integrity of the system, but in all real terms they still continue to live and impact us in our day-to-day lives, and we are precluding them because of the concern that some individuals might take advantage of it. We are precluding them and others who are legitimately within the group from being formally recognised as Australians. I would say that symbolically that is a very significant distinction.

Senator HANSON-YOUNG—Going back to the first point you were making rather than necessarily debating whether there needed to be some change, clearly you are saying that actually it was raised in the beginning.

Prof. Rubenstein—Yes.

Senator HANSON-YOUNG—We have heard that the idea of trying to include the definition of' torture and trauma' is perhaps exclusive in its nature.

Prof. Rubenstein—Yes.

Senator HANSON-YOUNG—I used the point before—I am not sure if you were in the room—that we have had the same problem with our various visa categories, because we have now seen the introduction of a complementary protection visa as a way of trying to deal with some of those issues. So there are clearly some problems with the definition of 'torture and trauma'. What you are suggesting is that we do not necessarily have to define those; we just simply ensure that the incapacity covers those for different criteria. Is that what you are saying?

Prof. Rubenstein—Yes, that is right.

Senator HANSON-YOUNG—Reading the submissions of people that have said that we do need to be a bit more inclusive than the status quo, can you see that people are still going to be excluded if we are not acknowledging their current status—and having to go through that process again of determining whether they do have an ability or not to understand or an ability to have taken on those English-language skills to the extent where they can undertake the test? The suggestion of a witness before you was that perhaps we look at the entry category as a way of being able to say, 'Clearly these people need to be given a bit more leniency, because they came in on a humanitarian visa or they have a special circumstance.' How do you feel about using the categories of the entry?

Prof. Rubenstein—I think the concern of the committee was to respond to sentiments being expressed by Senator Fierravanti-Wells that linking it to categories of visas would be seen as giving unfair advantages to different groups. The committee's concern was to make it so that that backlash was not apparent and that it would be actually more inclusive to include those as well as others with mental health conditions who were not properly being included at the moment. The one concern that you have expressed in that question is a concern that we might still not catch them. Perhaps the other way of thinking of it is to use the words 'including suffering, torture and trauma' rather than that being the exclusive categorisation for the physical and mental health condition. In that way, by being express about it, you are making it legislatively clear that that is one of the groups that is included and in our understanding of mental and physical incapacity.

Senator FISHER—Where which to put that amendment in the bill?

Prof. Rubenstein—If you are looking at the proposed 3B as it currently stands you would add it to then read: '(3B) A person satisfies this subsection if the person has a physical or mental incapacity, at the time the person made the application, including a physical or mental incapacity that is as a result of the person having suffered torture or trauma ...'.

Senator HANSON-YOUNG—So including it rather than stipulating?

Prof. Rubenstein—Yes.

Senator HANSON-YOUNG—That is obviously an option.

Prof. Rubenstein—Yes.

Senator HANSON-YOUNG—Can I take you to one of the concerns that have been raised around the idea of 'assistance' and who determines who should get assistance. Should a right to have that assistance—whether it be through undertaking the test through an alternative pathway and whether it be because people need a certain level of understanding of the English language to be able to pass the test—be stipulated in the legislation? Where should the stipulation as to who decides whether or not that assistance is given lie; where should it be explicit?

Prof. Rubenstein—It is not explicit in this legislative framework, so at the moment it is, in an administrative sense, controlled. The recommendations of the committee have been adopted in the administrative sense in terms of the changes being undertaken at the moment to the nature of the booklet that is used for citizenship testing and to the nature of assistance to groups within the community who will benefit from those changes. At present it is within the administrative capacity of the government of the day to determine that. Your question was: should we make that more explicit in the legislation? There is certainly the capacity to do that to ensure that it does not just stay with the sentiment of the current government, which is inclined to provide that assistance. By putting it in the legislation you would protect against a change in government policy in relation to it.

Senator HANSON-YOUNG—You make a good point about the potential change of government policy, but I was thinking more in the legalistic sense that, if the legislation does not stipulate or make explicit where the discretion lies, if somebody wanted to challenge their ability to access support in order to undertake the test—

Prof. Rubenstein—How would they go about it?

Senator HANSON-YOUNG—Yes: how would they challenge whether or not they had been given access unless it were stipulated?

Prof. Rubenstein—Yes; a very good question. In an administrative law sense, there are various avenues, but I guess the most straightforward would be an Ombudsman framework where you would go to the Ombudsman to seek their support in relation to good governance issues associated with the citizenship test. So there would be a framework for those people who have knowledge or assistance to obtain that help. The Ombudsman would review the citizenship testing framework and make recommendations, which of course are made within a parliamentary setting so that they would then be available for parliament to use as a framework for review. As it currently stands, you are right: there is no judicial review framework to enable an individual to challenge the way in which the citizenship testing regime is being administered, but there would be, through the Ombudsman, the capacity to at least raise it in an accountability framework.

Senator HANSON-YOUNG—Okay. Could I take you to the comments you make on children.

Prof. Rubenstein—I have not really made my submissions in relation to children yet. Would you like me to do that now?

Senator HANSON-YOUNG—Yes, that would be great.

Prof. Rubenstein—Does the committee have any other questions in relation to the testing aspect of the bill?

ACTING CHAIR—Yes, I do and I think Senator Fisher does, and I draw to the committee's attention that we are limited time-wise. Senator Fisher, would you like to ask a question on the matter we are talking about at the moment? Then I will follow up.

Senator FISHER—I want to raise the same issues you traversed with Senator Fierravanti-Wells and, to some extent, with Senator Hanson-Young but perhaps try to peel the banana another way. The act currently does not refer to exempting people in relation to torture and trauma.

Prof. Rubenstein—No; that is right.

Senator FISHER—The bill proposes to do that—

Prof. Rubenstein—Yes.

Senator FISHER—and in the process we are understandably becoming enmeshed in debate about permanent versus something else.

Prof. Rubenstein—Yes.

Senator FISHER—Is there a different method of fixing the madness? Your suggestion to Senator Hanson-Young perhaps was one, but I want to flesh out whether that goes far enough.

Prof. Rubenstein—Yes.

Introducing some sort of exemption relating to people who have been through torture and trauma is introducing a cause for the basis for exemption, whereas the act at the moment and the rest of the bill propose an exemption based on the effect of something which may or may not have been or included torture and trauma. The exemption is largely based on, leaving aside the permanency aspect or otherwise, the effect of mental capacity or otherwise. So is there a way to deal with your concerns about victims of torture and trauma by dealing with the effects of that torture and trauma rather than it being the cause of whatever the effects may be? I wrote down your words. In response to Senator Fierravanti-Wells when she asked, 'Why create a specific category for refugees who have suffered torture and trauma?', you very eloquently said, 'Because they are the ones who want it most. It is most precious to them.' And you said—I think I have this right—that victims of torture and trauma have particular mental health needs. If they have particular mental health needs it is because of that. That would be more properly the basis of any exemption, so can you target that? Sorry, it is a long question. It is the same issue; it is just different way of trying to skin the banana.

Prof. Rubenstein—Yes, although I think that is what the committee was trying to do with this suggestion on page 44, which is to enlarge 21(3)(d) in a way to include the torture and trauma because there is a physical or mental incapacity as a consequence of torture and trauma.

Senator FISHER—But even that recommendation refers to torture and trauma, does it not?

Prof. Rubenstein—No, it does not.

Senator FISHER—Can you take me to the page?

Prof. Rubenstein—Sure. It is under 8.3 of the discussion. In the actual report it is on page 34.

Senator FISHER—Thank you. I have it.

Prof. Rubenstein—What the committee recommended is a new 21(3)(d) which takes out the word 'permanent', which is where we got caught. It says 'has a physical or mental incapacity', so it does not refer to torture or trauma at all. Part of the special thought process of drafting this section was exactly that point.

Senator FISHER—Thank you. Time is short; I now get it. I get that bit of it. In that respect you have said the word 'permanent' could in fact go back in, just in a different place.

Prof. Rubenstein—Yes.

Senator FISHER—Do you have anything else to add?

Prof. Rubenstein—Not on that.

ACTING CHAIR—I have a final question on this point. I want to go back to page 34 and 35 on the exemptions and earned citizenship and the recommendations of the committee, which you referred to in your

submission. Before this person can succeed in applying for this exemption, is it not correct that they need to have been a resident of Australia for some four years?

Prof. Rubenstein—You had to go back to section 21(5). It says a person is eligible to become a citizen if they are 18 or over, a permanent resident at the time and satisfy the resident's requirements. Then we go forward to section 22, which is the resident's requirements. If their application was after the act came into force—because individuals who applied before the act came into force were caught by the earlier resident's requirements—they have to have been present in Australia for a period of four years. That is right.

ACTING CHAIR—I am happy with 'yes' for that.

Prof. Rubenstein—Sure. I just had to make sure myself that I was correct in saying yes.

ACTING CHAIR—You are being a very good professor—most analytical! Therefore, if you have been in Australia for four years, this argument about having a basic knowledge of the English language and the point that Senator Fierravanti-Wells made about the merit of giving people assistance to pass this test surely must come into being. This is the whole point. We want people to become citizens if they apply. We want them to be successful. We want to give them as much assistance as possible. They have lived here for four years anyway, so surely that should encourage us to help them and provide assistance.

Prof. Rubenstein—I think the answer to that is yes. I totally agree. Most of the individuals who made submissions to the committee were very emphatic that that was something that was desired by refugee communities—to learn English—and that they were active in taking that up. But they are not exclusively linked to doing a citizenship test. So, during those four years, individuals will be entitled to certain English language support, which will be encouraged as it currently is. Those individuals, from the feedback we have, take that up. There is an avenue, through the citizenship testing framework, to encourage English language learning, but it is not only through the citizenship testing regime that that has to be done. So the response is that I think they are not mutually exclusive. You can encourage English language learning, and the refugee communities generally are thankful and take up that opportunity. But you might then be precluded four years down the track because of an incapacity to sit a test because of your mental health condition, even though you might actually have that adequate English knowledge and have accumulated enough English to be able to sit the test if you were mentally well. The committee's view was that you should not be precluded from becoming a citizen by virtue of the fact that that mental health precludes you from taking the test even though you might have that capacity.

ACTING CHAIR—I can see that argument, but we will not have to go over it again. I think Senator Fierravanti-Wells has touched on it. The point I made before with the previous witness is that you have the word 'or'. As far as I can see, that opens up the gamut and broadens it. I am not saying that just about anybody can do it, but you remove the word 'permanent' and then you have 'or', 'or' and 'or' in terms of the criteria, and it broadens it enormously.

Prof. Rubenstein—I can explain that too. It comes back to that original point that I made, which is that in order to become a citizen you have to fulfil those aspects of it.

ACTING CHAIR—Yes, I am aware of that.

Prof. Rubenstein—So, if your mental health is such that—although you understand what doing a citizenship test is, you might have a basic knowledge of English and you might even have an adequate knowledge of Australia—you cannot sit a test to prove that because of your mental health condition, this recommendation is saying that, because mental health might preclude you from being able to show any of those aspects, that is sufficient grounds in that specific case. We are talking about people suffering from mental health problems; that is essentially what the group is. It is not an entire visa category. It is egalitarian or equal in the sense of it targeting a special community need by virtue of mental health that has always been in the act and, in my view, was arguably incomplete earlier because of the change in the citizenship test. When the change in the introduction of the citizenship test was made, the earlier reference only to understanding the nature of the application was sufficient because you did not have to take a test for those other aspects and it was only a question of understanding what you were doing in relation to mental health being the issue. But now, with citizenship testing, it actually makes sense to extend what was previously the case to those other aspects that are now testable as a general principle from what was already in the act before. So, in some ways, one could articulate it in the way of just fixing an anomaly that exists in the act, because when the citizenship test was introduced the drafters did not think back to the fact that this mental health exemption should actually be extended consistently with the changes in the citizenship test, which is also part of the philosophy

underpinning the recommendation of the committee that it is not just targeting trauma and torture—although in our view it would include that—but also targeting an anomaly that existed and that in the committee's opinion should not exist.

ACTING CHAIR—Thanks for that.

Prof. Rubenstein—We will move on to the question of children.

ACTING CHAIR—We will; we will move on to children. Senator Hanson-Young had some questions, but if you wanted to introduce—

Prof. Rubenstein—May I make a brief introduction?

ACTING CHAIR—Yes, a brief introduction.

Senator HANSON-YOUNG—Yes, you may.

Prof. Rubenstein—Okay. So in the same way that I tried to set up a framework for understanding the nature of citizenship tests and the exemption, I would just like to briefly introduce the nature of children within the act as a framework for thinking about this amendment to section 21(5). Up to 1986, any person born in Australia became an Australian citizen at birth regardless of the status of their parents. In 1986, there was a change to that which required that the parent be a citizen or a permanent resident. That has a direct impact on children born in Australia. They are one category of children with different rights under the Australian Citizenship Act.

In addition to that, when that change was introduced, a provision was put in the act to say that if a child continues to reside in Australia for 10 years then at their 10th birthday they immediately become an Australian citizen. That recognises that residence in and connection to the country are factors that are relevant in enabling a child to become a citizen, regardless of the status of their parents.

In 1984, predating the 1986 changes to the citizenship by birth provisions, there was a change in the citizenship conferral section, which was then section 13, to enable the minister to grant citizenship to a child under the age of 18. That provision was effectively the predecessor to this section 21(5). That quite deliberately introduced a very broad discretion to enable the minister to grant citizenship to someone who is under the age of 18 separate to the general conferral provisions. With the changes from the 1948 act to the 2007 act, which I was involved in in terms of the restructure of the act, that is made much more understandable when you look at the section 21 that is now in the act. Section 21 now has the general eligibility section. Then it has the sections in relation to permanent physical or mental incapacity. Then it has a section in relation to a person aged 60 or over. It sets up the different categories or groups of individuals who can apply for citizenship by conferral. There are now eight different parts to that.

What stands out here is that the section on children was separate from the others. Under the conferral section, there is an understanding that the matters that are generally applicable are not necessary for children. The only legislative requirement is that you must be under the age of 18 to be eligible to be granted Australian citizenship. Arguably, that section has provided the minister with the capacity and the discretion to take into account the best interests of the child.

There is one other point that I want to make in relation to section 21 is that there is also another provision in relation to statelessness, which does not link to permanent residency in any other way, and people born in Papua because of the specific historical relationship between Papua and Australia. The section is divided up so that there are different categories with different considerations relevant to them.

The proposal that has been made is couched in terms of dealing with the potential for someone who is under the age of 18 to be granted citizenship when that is not necessarily consistent with what one would normally think of as something that is necessary for citizenship, because there are no specific criteria listed. My proposal to the committee is that, rather than using the terminology 'permanent residency' that has been included in the proposed amendment, a change in the articulation of the policy is all that is necessary for people to continue to act lawfully under that section while being consistent with the minister's aim of ensuring that a connection to Australia exists. That would mean that individuals like the applicant in this particular matter and the others who were granted citizenship under 21(5) would still have been able to get citizenship. The department may be able to give you statistics and information about those individuals who have been granted citizenship under this section who would be precluded from being granted citizenship in the future by virtue of this change. That is a very important piece of information to take into account in the decision making.

Who will we be excluding from citizenship who we have otherwise included in the past? Is that something that as a matter of policy parliament is comfortable with—

ACTING CHAIR—I do. I believe—

Prof. Rubenstein—I do. I believe—

ACTING CHAIR—How many?

Prof. Rubenstein—I do not have knowledge of the numbers; I do not have a view on that. Even my knowledge from the six or seven cases that I have been involved is enough for me to feel that those individuals, who clearly had the capacity to be included in the Australian community in a way that is consistent with the Australian Citizenship Act, should be included. The situation with this individual is that they were born in Australia, had only lived in Australia, had a grandparent who was a citizen and had other reasons for continuing to be recognised as what they were living as in practical terms, an Australian citizen. The minister should have the capacity to grant that. I have particular proposals in relation to the changes in policy that would better accommodate what has been expressed.

Senator HANSON-YOUNG—That covers and clarifies what I was asking. It is interesting to put it in the context of where we have come from, because the removal of the automatic granting of citizenship to people who are born in Australia is where this issue of permanent residency arises and the gap between that and the connection to being Australian has been created.

Prof. Rubenstein—Or disrupted.

Senator HANSON-YOUNG—Absolutely. Did the committee the first time around make recommendations about how to remedy that?

Prof. Rubenstein—This is a really important point. The independent committee was only looking at the citizenship test. So this bill has two completely different origins. The first part in relation to the exemption on the basis of mental health is purely to do with citizenship testing. The section in relation to children has nothing to do with citizenship testing; it has its own historical trajectory. So it is very important to keep them separate in your own thinking in terms of the philosophies underpinning. But, that said, they are both part of an act that is about who you determine is entitled to become a member of the community. This provision, which provided for children as a specific category, is an important provision in that it gives the minister the discretion to include individuals who would not otherwise fit in the other categories but should, if the minister is acting in the best interests of the child, be able to granted citizenship. This is in my view a positive, inclusive model that should be retained rather than narrowed to be only applicable to people who are permanent residents.

While I would argue that residency and the amount of time that an individual has been in the country would be a relevant factor, that is something that could clearly be stated lawfully as a matter to be taken into account in making a decision. The framing of the policy could be improved to deal with that issue of lawfulness while at the same time dealing with the minister's concerns in relation to the proper use of that section.

Senator FIERRAVANTI-WELLS—Have you read the department's submission?

Prof. Rubenstein—Yes, the submission in relation to—

Senator FIERRAVANTI-WELLS—Have you seen the comments that the department has made in relation to specifically 21(5)?

Prof. Rubenstein—Yes.

Senator FIERRAVANTI-WELLS—I particularly take you to their comments and where they state that in recent years the provisions to confer citizenship on children under the age of 18 have been increasingly utilised by clients and their agents in an attempt to circumvent migration requirements or as a last resort when all migration options have been exhausted, including requests for ministerial intervention. I assume that we are talking about a small number of people who fall into this category.

Prof. Rubenstein—It would be interesting to know the numbers, actually. The department might be able to provide that.

Senator FIERRAVANTI-WELLS—In their submission, they say that there will be a very small group of people under the age of 18 who will no longer have direct access should this amendment proceed. However, it is anticipated that any such people with exceptional circumstances would appropriately be accommodated

under the Migration Act, if necessary by way of ministerial intervention powers under the Migration Act. What is your view in relation to that?

Prof. Rubenstein—There are two responses that I have to that. One is a concern in relation to the links between the Migration Act and the citizenship act. This is something which is a much broader point that I am interested in in relation to how we view citizenship in Australia. Citizenship is not just a migration issue.

Senator FIERRAVANTI-WELLS—But for some it is.

Prof. Rubenstein—It might be for some, but for others it is not. Because of that, to narrow our policy to do with citizenship law predominantly because of migration policy in my view is problematic. I think there are other ways of dealing with those issues in terms of the way you develop the policy and properly consider each of the cases which would deal with those individuals who are applying. I do not think migration is necessarily the only way of dealing with those, because citizenship is a broader issue about connection to the Australian community. My view would be that you do not need to amend this section in order to deal with those issues. Even though this section might help deal with those issues it is a very blunt way of doing so and it is a way in which you will preclude that group, even if it is a small group, of individuals who would otherwise be able to be granted citizenship but who will not be able to in the way that this provision provides.

Senator FIERRAVANTI-WELLS—The argument is that there is consistency. If everybody else has to be 18, why shouldn't—

Prof. Rubenstein—Children be 18.

Senator FIERRAVANTI-WELLS—Yes. Seriously, Professor—

Prof. Rubenstein—Because there are other avenues in the act which provide for children to become citizens at birth. You do not have to be 18. So that covers any person who is born here who has an Australian parent or is a permanent resident from birth. An equivalent would be to say that no-one is a citizen in Australia until they reach the age of 18, when we all have to sit a citizenship test. Maybe that would be a much more egalitarian way of dealing with it—that we are all stateless until we become 18 and we can prove to our own state that we are capable of becoming citizens.

Senator FEENEY—As long as you take responsibility for deporting residents who fail the test!

Prof. Rubenstein—That might be a useful thing for some people who do not fulfil the character requirements of our own citizenry. Without that tongue in cheek response, I think that citizenship is something that is more than migration and that for children living in our community, who as a state we have a responsibility to as adults in the community, the status of children is something that is distinctive and we have to take into account different matters.

ACTING CHAIR—Can I alert the committee to the time. We will need to conclude in the next few minutes.

Senator FIERRAVANTI-WELLS—The professor has answered my question. You do recognise that there are some people who do not just look at their children in the interests of what is best for them and do use them for specific migration purposes.

Prof. Rubenstein—I do not know any individuals like that and I would not be prepared to judge those individuals, particularly when there are individuals who are acting in the best interests of their child, even if it means separating from their child. I guess it is a question of one's view of human nature. We can agree to disagree. I think the bottom line is that I would rather our legislation err on the side of giving the minister the capacity to make that decision rather than preventing the minister from having that capacity. I think that is something, as a matter of principle in Australian citizenship policy, that we should be erring on the side of. That is clearly a policy issue.

Looking historically at the way the act has operated, there is a way of improving the policy in a way that is lawful under the act as it currently states that would also deal with the issues that have been raised. I would be happy to submit to the committee a restatement of the policy that would, in my view, deal with those sorts of issues. I think the problem with the policy as it currently stands and why this case before the AAT was successful is the emphasis in which it places the decision-making process under that section and that the emphasis could be changed in a way that would still enable the minister to make decisions that are consistent with the integrity of a migration program but also consistent with the capacity to include individuals who would not otherwise be included once you introduce permanent residency as the determinative factor in the children's section.

ACTING CHAIR—I just have a couple of very brief questions. Do you have a specific recommendation regarding children? I have read your submission, and you have asked for a review.

Prof. Rubenstein—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.

ACTING CHAIR—Now for the toughest question today. If the bill as written were to come to the Senate without any of the amendments and suggestions that you have made and others have made, would you vote it down or would you support it?

Senator HANSON-YOUNG—Are you looking for some new members?

Prof. Rubenstein—I would certainly not support the amendment to section 21(5), but if there were no other opening for the section in relation to citizenship testing I would approve it as it is, in the sense that it is an improvement on the current provision in relation to mental health issues. To me, they are quite distinct parts, and they clearly—from the explanatory memorandum—are at different historical trajectories. If you were forced to vote—if I were there and I had the capacity—

ACTING CHAIR—It has not been decoupled, like the ETS legislation and the RET legislation.

Prof. Rubenstein—They clearly are different sections, and they have different motivations.

Senator FEENEY—And one is not an intrinsically complementary measure to another.

Prof. Rubenstein—No, that is right; they are quite separate and they are severable, and I would encourage you to do that. But, ultimately, I would encourage you to make amendments to the first part and not proceed with the amendment to section 21(5).

Senator FEENEY—About 21(3A) and (3B).

Prof. Rubenstein—Yes, that is right, so they are quite distinct.

ACTING CHAIR—In conclusion, and on behalf of the committee, if you want to make any suggestions regarding the policy, we are happy for you to take that on notice and let the committee know your views, if you are interested.

Prof. Rubenstein—Terrific. Great, I would like that.

ACTING CHAIR—We will conclude there for the moment.

Proceedings suspended from 3.57 pm to 4.12 pm

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

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

ACTING CHAIR—Before welcoming our next witnesses, I remind senators that the Senate has resolved that an officer of the department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked to the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. I now welcome our next witnesses. I invite you to make a short opening statement, if you like, at the conclusion of which I will invite members of the committee to ask questions.

Ms Larkins—I thank the committee for inviting the Department of Immigration and Citizenship to make a submission and to appear before the inquiry into the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009. I am assisted by Ms Renelle Forster and Mr Matt Moroney. Their branches have worked closely to enable this bill, which is crucial in being able to fully implement the recommendations made by the citizenship test review committee—the review committee—and supported by government to be introduced into parliament. I understand we have now provided you with an advanced copy of a replacement explanatory memorandum, which has not yet been tabled, which corrects some errors in the original version.

ACTING CHAIR—Just for the benefit of the committee, you are advising us that you have tabled a revised explanatory memorandum, and I am advising you that we have not received it as yet, so it is between you and us, I would imagine.

Mr Moroney—It has not yet been tabled in the Senate because the Senate has not sat since we realised those errors. However, my understanding is that one of my staff members forwarded a copy to Mr Watling, the committee secretary, in advance so that it would be available to senators.

ACTING CHAIR—Have we got a copy?

Senator FIERRAVANTI-WELLS—Is the change only to 'trauma and—

Ms Larkins—No. The change is just to numbering, and to clean up a couple of other things, but they are very minor.

ACTING CHAIR—So it is a numbering change.

Ms Larkins—The paragraph numbering was—

ACTING CHAIR—We have noted that, but it is just that we do not have a hard copy with us. That is fine. If you have a hard copy, you could perhaps give it to the secretary.

Ms Larkins—I apologise. I understood that you had a copy.

ACTING CHAIR—No. I think it has come through on the email, but we do not have it with us in the briefing packs, as it were, for the senators around the table. So I will just note that we do not actually have the hard copy with us. Okay. Again, thanks; please fire away.

Ms Larkins—As well as responding to the recommendations of the Citizenship Test Review Committee, this bill proposes to amend the act with regards to conferral of citizenship on persons under the age of 18 to require them to be permanent residents at the time of application and at the time of decision. This will ensure applicants for citizenship under this provision have substantive and ongoing ties to Australia.

As the committee is aware, Australia is a country built on migration. Since 1945, we have welcomed nearly seven million migrants, including about 700,000 refugee and humanitarian arrivals. Of those seven million people, some six million have gone on to become full and formal members of the Australian community by becoming Australian citizens.

The first Australian Citizenship Act commenced 60 years ago, on 26 January 1949. Over the past 60 years, citizenship legislation has been amended many times to respond to changes in our society, including the

enactment of the current act on 1 July 2007. These changes have been necessary to ensure the legislation remains relevant by responding to changes in society and the way we perceive ourselves as a nation, and by correcting any inequities in the law.

On 1 October 2007, a formal citizenship test was introduced to replace the previous citizenship interview process. In January 2008, the Minister for Immigration and Citizenship, Senator Chris Evans, announced that the test arrangements would be reviewed after six months of operation, by an independent committee. In April 2008, that review commenced with a committee made up of seven eminent Australians. The Australian Citizenship Test Review Committee was tasked to examine the operation of the citizenship test and identify whether there were ways to improve the administration of the test and its effectiveness as the pathway for residents to become Australian citizens. The review committee undertook extensive community consultations before compiling their report, *Moving forward … improving pathways to citizenship*, and the recommendations made in the report. Their recommendations focused on improvements to the content and administration of the test and the citizenship application process and ensuring that vulnerable and disadvantaged people were not excluded from becoming citizens because of the test. Certain amendments contained in this bill implement the review committee's recommendations, in particular those involving disadvantaged and vulnerable clients.

The government is committed to retaining formal citizenship testing but recognises that there are a small number of people who, because of their experiences before arriving in Australia, are not able to undertake a citizenship test in any form. The proposed amendments will provide an exemption from taking a citizenship test to those people who have suffered torture and trauma outside of Australia which means they are not capable of demonstrating or understanding certain eligibility requirements for citizenship. The eligibility requirements include being able to demonstrate a basic knowledge of the English language and an adequate knowledge of Australia and the responsibilities and privileges of Australian citizenship. This amendment will assist the most vulnerable. In addition, other administrative measures are being put in place to assist those migrants who have difficulty demonstrating that they meet the legal requirements of citizenship.

An alternative citizenship test administered through a course will provide assisted and supported learning. The course will cater for the needs of a broad range of people, particularly those who are disadvantaged and vulnerable but still have the capacity and desire to learn with assistance. The course is currently being developed by educational experts, with material based on the content of the citizenship resource book. The course will still be defined as a test, and during the course each participant will be assessed against the legal requirements for citizenship, and a record of the assessment will be kept.

Assistance will also be provided to those who have difficulty demonstrating that they meet the legal requirements for citizenship during a standard computer based test—so they will get assistance during the test. This means that a test administrator will be able to read out all the questions and possible answers and assist in the operation of the computer if required. The resource book on which the test and course are based will be translated into 37 community languages, and the language in the resource book and the test questions will be simplified. The citizenship test, whether it is a course or a computer based test, will be part of a meaningful pathway for all those aspiring to become Australian citizens and aims to encourage prospective citizens to learn and understand the rights and responsibilities we all share as Australians. The amendments in item 2 in the bill seek to streamline the citizenship test and application process to provide a better and more efficient client experience.

Finally, the bill contains amendments which will mean that persons under 18 will be required to be a permanent resident at the time they apply for citizenship and at the time of decision. This is to clarify in the legislation who is eligible for Australian citizenship under section 21(5) of the act. Furthermore, it will ensure that only those people under 18 who have been assessed under the Migration Act and who hold a permanent visa as a result will be eligible to become Australian citizens. The amendments provide clarity for both decision makers and applicants and allow for consistent application of the law. Children under the age of 18 who are unable to meet the proposed requirements for citizenship will, where appropriate, be able to seek ministerial intervention under provisions contained in the Migration Act 1958 and, if successful, they will have a pathway to citizenship.

Thank you for giving me the opportunity to make these opening comments to the committee. We would be very happy to answer any questions that the committee may have.

ACTING CHAIR—Thank you, Ms Larkins.

Senator FIERRAVANTI-WELLS—We have had a discussion this morning about the changes to 21(3) and the proposed changes (3A) and (3B). Are you saying that people who fall within those exemptions or who

will now fall under the exemption of physical or mental incapacity will do this education course with a formal assessment process? Is that what you are proposing? It is not a test; it is just an alternative approach?

Ms Forster—No. For those coming under that particular provision, it is an exemption. They have completely different requirements to satisfy. So it is an exemption that is proposed there.

Senator FIERRAVANTI-WELLS—At the moment, we have the formal computer test, and you are going to introduce a new way of testing, which is this education course?

Ms Forster—Which is a form of a test.

Senator FIERRAVANTI-WELLS—It is a form of a test but different.

Ms Forster—A different pathway.

Senator FIERRAVANTI-WELLS—It falls under the form of assistance, if I can put it that way. It is the same sort of category as that of person who is in the assisted test and an administrator can talk them through the computer based test. You are extending that.

Ms Forster—That is right. That would form under the general eligibility provisions, which are part of 21(2) and the provisions relating to the exemptions are outside the general eligibility provisions.

Senator FIERRAVANTI-WELLS—I would like to look at numbers, because I have a real concern about the dropping of the word 'permanent'. How many people currently get citizenship conferred on them?

Ms Forster—That is a very basic question. I will just go to the right piece of paper, if you do not mind.

Senator FIERRAVANTI-WELLS—If it is easier, I am happy for you to take it on notice. I would like details of the conferral and how many people who have permanent physical or mental incapacity are currently conferred citizenship under the section 21(3). Under the current provisions, how many people are we actually talking about who have citizenship conferred on them? Whilst we are at it, it would be useful to know how many conferrals we have generally.

Ms Forster—As it turns out, I do not have the exact number of conferrals but I can easily get that. We are looking at around 110,000 a year.

Senator FIERRAVANTI-WELLS—One hundred and ten thousand!

Ms Forster—That is people who obtain citizenship.

Senator FIERRAVANTI-WELLS—By conferral.

Ms Forster—That is right. For people with permanent incapacity, based on the stats that I have at hand, we are looking at potentially 100 applications, of which only X number would be approved. Unfortunately, the way the information is contained within the system does not allow us to pinpoint it and press a button to get it out.

Senator FIERRAVANTI-WELLS—It takes a bit of time. I accept that.

Ms Forster—It is a small number.

Senator FIERRAVANTI-WELLS—You will probably take this on notice. I would prefer you to take it on notice and provide it to me than us take the time this afternoon to go through it.

ACTING CHAIR—Can I just clarify that it is 110,000 by conferral—

Ms Forster—Who have obtained citizenship per annum. It is around that number. I have not got the exact number.

ACTING CHAIR—That compares with 138,155 from 1 October 2008 to 30 June 2009. That is what the report says.

Ms Forster—That number that you are talking about is the number of people who have sat a test, as opposed to people who have become citizens. That is a different number.

ACTING CHAIR—But it is over the same period?

Ms Forster—No. The number that you are referring to is from October 2007 to 30 June 2009.

ACTING CHAIR—Yes, but what about the figure you are referring to?

Ms Forster—I do not have that and I would rather take that on notice to absolutely clarify that number and the period.

Senator FIERRAVANTI-WELLS—Could you do so, and compare apples with apples? In other words, could you take the sorts of figures that we are looking at in terms of the citizenship test outcomes? If we compare apples with apples, that will make it a lot easier.

Ms Forster—We will certainly do our best to do that.

Senator FIERRAVANTI-WELLS—Thank you.

ACTING CHAIR—Can I just correct the record? Did you say 2007 or 2008, Ms Forster?

Ms Forster—When you quoted the number 138,155 from the snapshot? I believe that is what you were referring to.

ACTING CHAIR—Yes. You said 2007, didn't you?

Ms Forster—In the time between 1 October 2007, which is when the test was first introduced, and 30 June 2009, we have down that 138,155 clients sat an Australian citizenship test. That is different from people who obtained citizenship.

ACTING CHAIR—Thank you.

Senator FIERRAVANTI-WELLS—If you could give us the figure for conferrals over that period so we can just have an idea, we would appreciate it.

Ms Forster—Definitely.

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.

Ms Larkins—I do not think that was the intent. I think the government has spelled out its intent in its response to the review and it is intending to ensure that there is equity in access to the test, ability to pass the test and ability for people to gain citizenship.

Senator FIERRAVANTI-WELLS—My concern in this is the exemptions that you now want to create. That is why I am interested to know the issues in relation to permanent incapacity. I am sure you would agree that, by dropping the word 'permanent', you are going to now open up conferral to a much wider group of people.

Ms Forster—Perhaps I can explain that particular provision. Certainly, in relation to the review committee's recommendation and the text around it—and we have just heard from Professor Rubenstein around that—when the government responded to the review committee it was very clear that the permanent incapacity was a long-term provision, and yes, indeed, it relates to very, very few types of people; it has clearly only ever related to those few types of people. The government decided to agree to make a change in relation to a very small cohort—essentially a concession to the type of group that had been highlighted in the consultations with the committee. The government's response to the review committee's recommendation was published and is publicly available—I will read out a particular sentence that says it very clearly:

> 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) …

Very clearly, in terms of the drafting of this particular provision, which has been discussed a lot today, the government's policy position is relatively clear. There is no concept to take away that original provision of

permanent disability. Those people with a permanent disability are still going to need to be assisted through those exemptions. What has been agreed is to insert a particular provision relating to that very small cohort that the government has agreed, based on the review committee's discussions, need particular assistance. This is not about trying to broaden it any further than those particular ones that have been listed in the government response as being particularly vulnerable clients.

ACTING CHAIR—You keep saying 'small' and 'very small' numbers. Can't you tell us the numbers?

Ms Forster—I cannot tell you the number of people who have experienced torture or trauma who also will not be able to at that time be capable of understanding the nature of the application or have a basic knowledge of English or adequate knowledge—

ACTING CHAIR—But you must have some idea. That is the whole point of your amendments.

Senator FIERRAVANTI-WELLS—You have plucked one category of people. I am not advocating one way or the other, but you are in effect plucking out one group of people. What about the trafficked women, for example. There are other people potentially who could fall into this, but you have one group and you are now creating, in effect, a special provision just for that group. But, legitimately, other groups are just going to turn around and say, 'What about us?' Is this the thin end of the wedge? Are we now going to start seeing inserted a whole serious of exemptions for a whole series of people just to appease a particular group?

Ms Larkins—I think the government's intent—as it has spelt out and as Ms Foster has read out—was to respond to our particular group, which was a focus of attention of the committee, which did quite a comprehensive set of consultations and review of the provisions.

Senator FIERRAVANTI-WELLS—We have heard a lot today, but I think you need to look at the actual effect of the provisions as drafted. Without agreeing with or disagreeing with Professor Rubenstein, the suggestion that was made by the committee was simple but it was also clear, and it achieved the simple objective of removing the word 'permanent'. It would then encompass a broad spectrum, including the torture and trauma people, who I think would have been covered now anyway.

What you have now done is insert a new provision. That provision creates new categories of people. It does not just deal with your trauma or torture people; it actually says:

A person satisfies this subsection if the person has a permanent physical or mental incapacity, at the time the person made the application, that means the person is not capable of understanding the nature of the application at that time.

Why have you put (3A) in? Isn't it just a repetition of paragraph 21(3)(d) of the current provision anyway? That is my first question. I do not quite understand. Are you removing (d) and substituting (3A)? That is not very clear. The next provision says:

A person satisfies this subsection if the person has a physical or mental incapacity …

You take away permanent and create a much broader category of people. I use that example of practising in the personal injuries area. There is a big difference between permanent and non-permanent incapacity, and if you have not worked that one out then I think you had better go back to the drawing board. Here it says:

A person satisfies this subsection if the person has a physical or mental incapacity, at the time the person made the application, that is as a result of the person having suffered torture or trauma—

but apparently the explanatory memorandum says torture 'and' trauma—

outside Australia and that means—

a certain set of circumstances. They are not 'and', they are 'or'. So you are potentially opening up a whole new group of people who will come under this provision. If you wanted to specifically target one group by expanding and by dropping the word permanent, I do not think you have thought the thing through. I think you are creating.

Ms Larkins—I will ask Ms Forster to respond on the details, but I will just say that I think the government's policy intent is clear in its response. We have listened to the discussion today and we have read the submissions to the committee.

Senator FIERRAVANTI-WELLS—I appreciate that. I am not arguing the policy.

Ms Larkins—We have listened today to the people who appeared before the committee and we have read the submissions, and we will look at whether the drafting has adequately expressed the government's policy intent. I will get Ms Forster to respond to your particular issues.

Ms Forster—In relation to the insertion of (3A), you will recall Professor Kim Rubenstein's arguments around the need to include something beyond a lacking of understanding of the nature of the application. At the moment, under 21(3), which relates to permanent physical or mental incapacity, there is a provision that says:

the person has a permanent physical or mental incapacity, at the time the person made the application, that means the person is not capable of understanding the nature of the application at that time.

That relates to the current section 21(3)(d). The review committee's argument that the government has agreed to is that, in fact, there seems to be an anomaly in that particular provision in which it no longer adequately reflects the other general eligibility provisions, which also include requirements under normal provisions around people understanding the nature of the application and their ability at that time to have a basic knowledge of the English language, to demonstrate an adequate knowledge of Australia and to know the responsibilities and privileges of Australian citizenship. You are absolutely right; in relation to (3B) there is no mention of 'permanent', and that was quite intentional in the government's policy statement.

In relation to that, in the consultative process that the review committee undertook—this has come from those community consultations—there was concern around an inability for a medical practitioner to say that somebody's incapacity to relate to or demonstrate those particular requirements was permanent. Perhaps it would be very longstanding, but perhaps there would be hope that one day that person who had indeed suffered a very traumatic and difficult experience may, with assistance, recover. It might be a very longstanding and difficult process.

That was the concern expressed, if you like, through those community consultations and which was reflected in the review committee's report, and it is indeed the cohort of people that the government identified in its formal response as well. So, as Ms Larkins has said, we would be very happy to go away and look at this provision in the greatest of detail to ensure that it does encapsulate adequately the government's intent, particularly based around the discussions today. However, I think it is fair to say that the government intent and the policy intent there is very, very clear.

Senator FIERRAVANTI-WELLS—Well, Ms Forster, I would like some figures put. You are obviously embarking on, potentially, opening up this whole situation, and I would really like to see the facts and figures—the figures, more importantly—that the government is relying upon to justify why it is doing this. I mean, you must have some idea of potentially the number of people, considering the sort of figures that we are talking about already for conferral. If you are talking 110,000 conferrals per annum, and if you now expand considerably one of the—

Ms Forster—That is total conferrals—sorry.

Senator FIERRAVANTI-WELLS—That is total conferrals?

Ms Forster—Right.

Senator FIERRAVANTI-WELLS—But that is a big number. That is quite a lot of people. If you now expand one of those provisions by dropping 'permanent'—any doctor will certify that somebody has got an incapacity. Are we going to see a whole new industry? I ask that question based on 20 years of litigation experience.

Ms Larkins—And I think the government's policy intent is quite clear. It is not to expand this provision—

Senator FIERRAVANTI-WELLS—Well, if it is not then can you provide me—

Ms Larkins—to the extent that you are describing.

Senator FIERRAVANTI-WELLS—Well, I would like to see the figures that justify why the government does not believe that it is expanding the number of people, because if you are telling me there are 110,000 conferrals, already, in the broader category, I would really like to see how many you are thinking are going to be in this category, because once you drop 'permanent', this is going to be an interesting little loophole for people to go around, and I would like that answer.

ACTING CHAIR—On that point, could I interpose: can you please advise the committee how many are currently exempted and have their citizenship conferred upon them under the current legislation.

Ms Forster—I would have to take that on notice.

ACTING CHAIR—You must know that.

Ms Forster—I would have to take that on notice.

ACTING CHAIR—We are having a hearing on this bill. We are talking about the exact provision. We are debating this specific provision that you are seeking to amend, and you keep saying it is a small number. Are you telling the committee that you do not know the specific number that are currently exempted under section 21(5)?

Ms Larkins—We do not have that detail with us, and we do have some issues with how data is collected in relation to conferrals. We will be able to give you some indicative numbers of what that has been in the last period, but—

ACTING CHAIR—When can you do that? Now?

Ms Larkins—I do not know about now—

Senator FIERRAVANTI-WELLS—You will have to do it pretty quickly, because we have got to—

ACTING CHAIR—I find that almost incomprehensible. I am sorry—with the greatest respect: I find it incomprehensible that we are having a committee hearing today and you do not know how many are currently exempted under section 21(5).

Senator FIERRAVANTI-WELLS—Section 21(3).

ACTING CHAIR—Section 21(3).

Ms Larkins—We will take that on notice. It is really a reflection of the way that we have collected that data to date.

Senator FIERRAVANTI-WELLS—There was some evidence given earlier from the snapshot. I want to check my understanding of it. I am looking at this document here, if you have got it. Some questions were asked about the pass rates under the humanitarian program, and this figure of 54 per cent was quoted. I am looking at page 6 of the snapshot. You are saying there that there were 12,727 clients. About half, 54 per cent, passed on their first attempt. On page 4 of the snapshot, you say:

> The percentage of Humanitarian program clients who passed the test on their first or subsequent attempt is 84% …

Does that 84 per cent refer to 84 per cent of 12,727?

Ms Forster—That is right.

Senator FIERRAVANTI-WELLS—So roughly 16 per cent is around the 1,800 mark, 1,900 or thereabouts. We are talking about people who do not pass on the 1.9 average number of tests per client.

Ms Forster—1.9 tests, yes.

Senator FIERRAVANTI-WELLS—Somewhere else I see that it says you can sit the test as many times as you like. In other words, I assume that those, say, 2,000 people can come back and sit the test. Those 2,000 may be picked up in the subsequent figures.

Ms Forster—Yes.

Senator FIERRAVANTI-WELLS—So it is not accurate to say that there are hundreds of people out there who are discouraged totally from sitting the test because they do not pass it the first time?

Ms Forster—I would not say that. What I would say is that the statistics are showing that it is indeed a snapshot. So at this particular point in time, you are right, 16 per cent had not yet passed the test.

Senator FIERRAVANTI-WELLS—So it is incorrect to draw the assumption from those figures that there are hundreds of people out there who are never going to sit the test because there is a failure to pass. That was the effect of the evidence that was given this morning. We pressed them on the statistical information.

Ms Forster—These statistics obviously relate to people who have shown up to the department and who have attempted a test. They clearly do not relate to anybody who has not actually turned up to the department. This is only a snapshot of those people.

Senator FIERRAVANTI-WELLS—I appreciate that but that is why I asked you the question because other people were using it to draw a particular conclusion which I thought was incorrect. Recently we had the incident which involved various people, Somalis and other people, here in Melbourne. Are you aware whether the citizenship of those people was conferred?

Ms Forster—I do not have that information with me today.

Senator FIERRAVANTI-WELLS—If you could take that on notice I would like to know about those people who are under consideration. You would probably be aware of their immigration status. I do not need

names but I would like to know whether their citizenship was acquired by conferral or was actually through sitting the test and going through the proper processes

Ms Forster—Or by birth.

Senator FIERRAVANTI-WELLS—Or by birth, thank you.

Ms Forster—I can certainly see what I am able to provide you within the bounds of normal privacy et cetera.

Senator FIERRAVANTI-WELLS—I do not want to names, I simply want the information about X number of people who were either charged or arrested. I take it that the change to 26(1)(b) is to do with the pledge exemptions. It is really mirroring the previous provision and extending it in relation to the pledge.

Ms Forster—That is right.

Senator FIERRAVANTI-WELLS—In your submission under the heading 'Improved administration of the citizenship and application process' it says 'Applicants for citizenship currently must also complete the citizenship test before they make an application. However, these amendments allow for the test to be taken at the same time as the application for citizenship is lodged. The amendments will allow the minister to determine when a person may resit the test if failed on the same day.' I am not quite sure about this. Does this mean that you can start the test on one day and complete it on another?

Ms Forster—No.

Senator FIERRAVANTI-WELLS—Is the explanation for this that some people are sitting the test way in advance of when they are actually eligible to—

Ms Forster—That is the exactly the case. The gap between the two is a difficulty for us, in that people can sit the test ahead of applying—

Senator FIERRAVANTI-WELLS—Eligibility.

Ms Forster—That is right.

Senator FIERRAVANTI-WELLS—So that is just a technical correction in that circumstance. You have heard the evidence today on the section 21(5) point, and I asked those questions because I support this. I think it would be appropriate if the department gave us some statistics in response to the evidence that has been given today, just to put some statistical analysis on the bones of the issue that has been raised. Could you go through the evidence and respond with some statistical material in relation to that?

Ms Forster—We can do that.

Senator HANSON-YOUNG—I have a question in relation to the recommendations that you did not pick up from the review committee's report. My understanding is that there were six of them that were not supported. Have you got them in front of you?

Ms Forster—I will search valiantly. However, I can talk in general terms about them.

Senator HANSON-YOUNG—They are that the pass mark remain at 60 per cent, that a concept of earned citizenship be introduced, that earned citizenship be decided by a referee, that a citizenship convention be held in 2009, that test questions be published and that the number of mandatory questions be reduced to two. Could you give me some explanation as to why they were left out?

Ms Forster—I can do so in general terms, and they are outlined in the government response to that report. There were some recommendations that related to the mandatory questions being reduced to two and the questions being made public immediately. Those recommendations were put forward in the context of some interim recommendations of the review committee, from memory, that related to the period between the response of the review committee coming out and the ability of the government to introduce a new book, a new test, a new framework, the legislation supporting it et cetera. The government decided against doing that. That was a government policy decision. Instead, it has said it wanted its energy and focus to be put into the new test framework, the new book et cetera.

In relation to pathways to citizenship and a potential for earned citizenship, the government's response says:

> The Committee recommended that a concept of "earned" citizenship be introduced. The Government does not support this recommendation as it believes that this concept would effectively introduce 'classes' of citizenship.

They had a very general principle underlying citizenship—that is, if you are between the ages of 18 and 60 and are not exempt from doing the test through that particular provision then you should indeed demonstrate that

you have an understanding of the concepts which are outlined in the pledge of commitment. That was the general principle underlying that and it was felt that the concept of earned citizenship had the potential to establish two classes of citizens in that way.

I am sorry; this is the last one. In terms of the ongoing question of whether the test questions should be publicly available, the government response was that they did not support them being publicly available. They said instead:

Maintaining the confidentiality of the test questions will—

continue to—

ensure the integrity and rigour of the test is not diminished.

That response is publicly available. I am very happy to pass that on to you, Senator.

Senator HANSON-YOUNG—That is fine; thank you. Could I just get you to respond to the concerns that have been raised by the other witnesses we have had here today, particularly in relation to this idea of introducing the terminology of 'torture and trauma' set out in, I guess, the policy direction. I take on board that the intent may be clear, but in terms of the actual wording the intent to be more inclusive may be clear but it might actually end up being exclusive. We were given a number of different examples as to why that would be. I understand that you said that perhaps you would go away and take that on board. Why, specifically, did you use that terminology? Is it because that was the terminology that was used consistently throughout the committee review process—

Ms Forster—That is correct.

Senator HANSON-YOUNG—rather than necessarily linking it to something that is a bit more consistent?

Ms Forster—It was definitely the terminology coming through from the consultation process and the submissions that the review committee received from a number of organisations, as well as the review committee report itself. The government response, as we said, is that the intent is very clearly around providing a pathway for that cohort of people whose experience, it is very clear, has not been great. Right now it would mean that they were unable to demonstrate the other requirements of citizenship.

Senator FEENEY—I will just make a point there. That is not right, is it? That is not the language that the committee used. Please, obviously, correct me if I have erred. Senator Hanson-Young talks about the legislation introducing new or different language. I think her point is right. If you look at part 8.3 of the committee report—of course, I am talking about *Moving forward … improving pathways to citizenship*—there is some language down there which one witness has proposed should replace (3A) and (3B). You may have heard that evidence. It was certainly her recollection as a member of the committee that the language of 'torture and trauma' and 'permanent' was a new innovation.

Senator FIERRAVANTI-WELLS—I am glad that Senator Feeney has asked that question, because it is important.

Ms Forster—Yes. Senator, perhaps I need to make sure I have understood your question there. In relation to the government intent in picking up the discussion points that the review committee relayed in their report, throughout their discussion they were talking about particular survivors of torture and trauma for whom the use of testing may not be appropriate. Perhaps the review committee report—

Senator FEENEY—But they suggested a phraseology in their report, and in their suggested phraseology they do not use the terms 'trauma' or 'torture'.

Ms Forster—No, they have not.

Senator FEENEY—They use the phraseology 'has a physical or mental incapacity at that time' et cetera.

Senator FIERRAVANTI-WELLS—Why didn't you adopt that terminology—following on from Senator Feeney's question? Can we have some explanation? It seems very simple. Then you have gone into the very convoluted (3A) and (3B), which are fraught with their own legal issues.

Senator FEENEY—It was not my intention to shatter the line of questioning; I was just concerned that you were—

Senator HANSON-YOUNG—That is fine, because this is where we were going.

Ms Larkins—I think there are probably two issues. One goes to the government's response to the report, which has been stated. In responding to that recommendation and the discussion of the review committee, the

government proposed a particular change to provisions, in the form that is spelt out in its response, that are quite specific to torture and trauma. We can talk about whether in our drafting of that provision we have accurately reflected the government’s policy intent, but I think the government’s policy intent is clear and is on the record.

ACTING CHAIR—We have not got an answer as to exactly why you have used the words ‘torture and trauma’; we have had different witnesses this morning saying that, in an international law sense, nobody knows exactly what they actually mean, whether it is international law—

Senator HANSON-YOUNG—‘Torture’ in Guantanamo Bay is something different to what it is in Australia.

ACTING CHAIR—It means different things to different people.

Senator FIERRAVANTI-WELLS—There was no definition in any of the legislation.

ACTING CHAIR—It is a different definition to different people. Why is that?

Ms Larkins—The government’s policy intent was to recognise that there are a group of individuals who suffer from psychological disorders as a direct result of having experienced torture and trauma. We have then taken that intent and drafted that. I think we have heard all of the discussion today and read the submission and there is a question so we will go away and have a look at whether we have adequately drafted to meet the government intent.

Senator HANSON-YOUNG—I guess the next question is: why is there the restriction of that only being seen as an issue if it is experienced offshore, out of Australia, as opposed to in Australia? There are a few examples of that; I think the trafficking of women was a very good example. Somebody, perhaps, would not have applied for refugee status if they had not been brought here against their will, for example. What is the department’s response to having it restricted like that?

Ms Larkins—Again, I think that is another of the drafting issues. It has been very valuable to read the submissions and listen to people today, and we need to go away and have a look at whether our drafting of those provisions is the best expression of the government’s policy intent, so we will be doing that and talking to the minister about those issues.

ACTING CHAIR—Do you have any specific guidelines for defining ‘incapacity’?

Senator HANSON-YOUNG—As in the status quo and not the proposed legislation?

ACTING CHAIR—Either; both, in fact. You are removing the word ‘permanent’ and I would like to know if there are guidelines within the department that you use to define ‘incapacity’ because this is a very big area, and it covers a whole gambit of things?

Senator FIERRAVANTI-WELLS—Following on from that, could you see if there are any guidelines that specifically relate to section 21 in terms of conferral. Given the number of people we are talking about, it would be useful to have any of those guidelines within the department dealing with conferrals generally, which of course include section 21(3).

Ms Forster—The whole of section 21?

Senator FIERRAVANTI-WELLS—Yes.

Ms Forster—Yes, certainly.

ACTING CHAIR—If you are happy to take that on notice for both the current legislation and the proposed amendment—any guidelines, policy or directions in the broadest reference possible.

Ms Forster—Yes, they are all probably available, Senator.

ACTING CHAIR—You have used the words ‘trauma or torture’, could you also take on notice why you have not used the word ‘and’?

Senator FIERRAVANTI-WELLS—The explanatory memorandum at page 6 refers to ‘torture and trauma’ and then ‘torture or trauma’.

ACTING CHAIR—That is right.

Ms Larkins—It is another one of the drafting issues to be picked up.

ACTING CHAIR—And then have a look at the word 'or' when you are going through (a), (b) and (c) and look at drafting it as (a) or (b) or (c) and particularly look at the word 'or' because that, again, opens it up and provides a very broad definition.

Senator HANSON-YOUNG—I have a jump in topics as the other question I have is in relation to the response to the issues that have been raised in relation to children. What is the department's response to the criticisms that this is going to create a gap where, perhaps, a gap is not desirable?

Ms Forster—We have heard those issues and, as per the original submission from the department for those children and adults for that matter who come through the migration pathway, there is a normal and natural relationship between migration and citizenship. That is a government position. If you have an orderly migration program, people come through that migration program. We hope and, in fact, encourage people to become citizens after a period of time, when they are in a position to meet the requirements for citizenship. That is a longstanding policy position.

In relation to children, yes, section 21(5) is a very open provision, and it has been open in that way without other requirements around it for a very long time. However, the general policy stance that you should indeed be a permanent visa holder to first obtain citizenship has been in the instructions for some time in terms of the guidelines to staff and the policy requirements. Where we have had a change in the types of applications that are being received and that are going to the administrative tribunal relates primarily to children who are not permanent visa holders and, in a number of those cases, who have been through other Migration Act provisions, including a usual application, and when that has been refused it has gone to review and review has upheld the departmental decision. There have been instances of those same applicants seeking ministerial intervention. The minister has considered the circumstances of the child and, in many circumstances, their family, and it has been knocked back there as well. For the client to then have available a direct pathway to citizenship when they have had their circumstances considered all the way through those usual provisions is something that is a relatively new thing that we have been seeing within the case load. Indeed, this provision is specifically designed to stop that occurring. However, we also heard today that there was a belief that some people are unable to apply through the Migration Act provisions and not have their circumstances considered. We do not believe that is the case.

Senator HANSON-YOUNG—What about the point that was made by the previous witness that perhaps we should be dealing with this issue through policy as opposed to repealing this particular section of the current act?

Ms Forster—It is dealt with under policy at the moment. Unfortunately, it has been opened through tribunal overturns.

Senator HANSON-YOUNG—This relates to a question that Senator Barnett asked. Given the two very different parts of what this amendment bill is doing—the exemption and the issues relating to children—in the department's view, is there any problem with decoupling those two sections?

Ms Forster—I would have to think about that. They are together because we have particular amendments that all relate to the one bill. So, for tidiness, we would normally proceed with one bill and one debate et cetera. That would still be the tidiest way of proceeding, and that would be our position. That stated, we will obviously consider the position of the committee.

Senator HANSON-YOUNG—They clearly do not impact on each other?

Ms Forster—They are very clearly designed for very different things and they have emanated from very different policy stances.

Senator FEENEY—I only have one question, which was triggered by a remark of yours, Ms Forster—

Ms Forster—Oh dear!

Senator FEENEY—concerning the treatment of persons under 18 years of age. Professor Rubenstein in her submission said, speaking of section 21(5):

> If the current amendment is made, then cases like the applicant in *SNMX and Minister For Immigration and Citizenship* would no longer be eligible for Australian citizenship.

It sounded to me a moment ago like you are prepared to contest that proposition. I am interested in you making that argument.

Ms Forster—In a moment I will hand over to Mr Moroney, as somebody who knows more details of those types of cases, but in the general policy provision, if an applicant under the age of 18 obtains a permanent visa

through the Migration Act, whether that be through the usual migration pathway or through ministerial intervention, with the discretion that the minister has under the Migration Act, there is nothing stopping that child from obtaining citizenship. What the provision does is say: 'We want to see that permanent visa first. We want to know that your circumstances have been considered under the Migration Act provisions that already exist.' Should you have a permanent visa, you are indeed most welcome to apply for citizenship. There is no bar as such.

Senator FEENEY—And you are saying that the applicant in the case cited by Professor Rubenstein would have—

Ms Forster—I will have to talk to my colleague.

Mr Moroney—Senator, I think it is quite clear that Professor Rubenstein is correct insofar as, if that amendment was made, immediately the applicant in that case would not qualify under 21(5).

Senator FEENEY—That does not trouble me, so long as they can qualify some other way.

Ms Forster—Through some other pathway.

Mr Moroney—I think that the implication might have been drawn that the shutter then comes down completely on the child.

Senator FEENEY—That is how I understood the evidence.

Mr Moroney—There are pathways through the Migration Act to assist that child to get permanent residency. In the case of SNMX, as I understood the judgement as read, the parents were applicants for a protection visa and were unsuccessful and they went through to merits review. As a matter of migration law, they have a section 48A bar if they are not the holders of a substantive visa. If the child was not an applicant under the—

Senator FEENEY—That is right.

Mr Moroney—Then there is no section 48A bar in relation to that child. The child is free to make an application for a protection visa in his own right. I am not saying that he would succeed, but the pathway to the RRT and then to 417 is available to the child. That is not the only way that the child could get ministerial intervention. If the child made an application for any other substantive visa onshore and was unsuccessful—

Senator FEENEY—But the child was a Sri Lankan citizen, I think, technically.

Mr Moroney—Yes, that is right.

Senator FEENEY—That does not change your evidence?

Mr Moroney—No, because we are talking about the Migration Act now.

Senator FEENEY—I am just saying he is not a stateless person. I would think that would cut certain routes.

Mr Moroney—No. The child would have, depending on the circumstances, no statutory bar in relation to making a substantive visa application—

Senator FEENEY—In their own right.

Mr Moroney—in their own right. Then, in the case of unsuccessful application, they go through to the MRT. Let's make the assumption that the MRT refuses—then there is a further discretion to the minister under section 351 of the act. Let's assume all of it goes wrong and the child is now an unlawful noncitizen and the child and the parents are in immigration detention under section 189. The minister has a non-compellable power to grant any visa, permanent, temporary or bridging, to any person in immigration detention. All of those public interest powers that I have just mentioned, 417, 351 and 195A, are non-compellable—that is true. It is personal to the minister—that is true. It is also in the public interest. To extrapolate that the child would not have a pathway to potential citizenship is, with the greatest respect, incorrect.

However, it is undoubtedly true, as Professor Rubenstein stated, that, until the child got to permanent resident status and then satisfied the eligibility criteria for citizenship in his own right, as a permanent visa holder—let us make an assumption that the powers have been exercised in the child's favour—in this country, with the right to permanent visa status, the child would be on the pathway eventually to citizenship, in a normal course. So, while Professor Rubenstein is undoubtedly correct in relation to shutting down immediacy in that case, the pathway is not shut off.

The other thing which I think is really important in relation to the SNMX case is that the child was born in Australia to Sri Lankan parents. When the child got to the AAT it was five. Not surprisingly, the AAT said that the child exhibited all of the characteristics of a young Australian child aged five, as you would expect. The net result of that case is that the child has attained Australian citizenship because the decision maker has said that the child should be an Australian citizen—and that is as it should be. The child had a right under Australian law to apply, and the review processes have worked. At the end of the day, as was so poignantly pointed out in the evidence of the mother, the father and the grandmother of the child, and also that of the professional witnesses, the department or the minister may be faced with a very difficult dilemma insofar as the parents, as I understood it—

Senator FEENEY—Have been separated from the child.

Mr Moroney—Well, I do not know whether they have actually been, because I do not know the disposition of the case afterwards. But it did raise the possibility of separation of the family by choice, and it is a very difficult position—

Senator FEENEY—And I am really not advocating the particulars of that case at all. I am really just interested in being reassured—as I think I have been—that the amendments do not shut down a pathway in those kinds of instances.

Mr Moroney—No. But Professor Rubenstein is undoubtedly correct, and it is definitely the result of that amendment, that the immediacy of the path for that child, once the amendment is passed, is gone. The child cannot get through the gate of 21(5).

Ms Larkins—And that is the government's policy intent—that people are, first, residents, before they become citizens.

ACTING CHAIR—I have one final question in terms of the numbers, again, in regard to the children affected by section 21(5). Do you have those with you or would you like to take that question on notice?

Ms Forster—I will take that on notice, to make sure I give you the accurate figures. As to the numbers who have actually come out in recent years: yes, we will get those for you.

Senator FEENEY—We had evidence earlier today that the number was very, very small indeed—does that, off the cuff, sound right to you?

Ms Forster—I would rather get those numbers to you and leave it at that.

ACTING CHAIR—We have had 'small', 'very small', and now 'very, very small'!

Ms Forster—Yes, indeed. We will get accuracy around those things.

ACTING CHAIR—If we could get clarity around that, that would be appreciated. I would just like you to look at the third last paragraph of Professor Rubenstein's submission, where she says:

> … I would strongly encourage you as a Committee to invite the Department of Immigration and Citizenship to provide the committee with a complete history of the provision regarding children—in particular the history of s 13(9)(a) of the former Act which is the direct predecessor to the current s 21(5) …

If there is something you can provide us with, on notice, just to inform the committee in that regard, that would be appreciated.

Ms Larkins—We can give you that.

ACTING CHAIR—Thanks very much, and thanks for your patience—we have gone a bit over time, but I think there was some merit in pursuing those final questions. I would like to thank the committee and the witnesses who have given evidence to the committee today in relation to the bill. I now declare this meeting of the Senate Standing Committee on Legal and Constitutional Affairs adjourned until tomorrow morning.

Committee adjourned at 5.19 pm