



Australian Government
Department of Immigration and Citizenship

**SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
INQUIRY INTO THE AUSTRALIAN CITIZENSHIP AMENDMENT (CITIZENSHIP
TEST REVIEW AND OTHER MEASURES) BILL 2009**

**Submission made by the Department of Immigration and Citizenship
July 2009**

Introduction

On 25 June 2009 the Senate referred the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009 for inquiry and report. The Bill seeks to amend the *Australian Citizenship Act 2007* (the Act) to implement the recommendations of the Australian Citizenship Test Review Committee (the Review Committee) agreed to by government and to strengthen the eligibility requirements for citizenship by conferral for applicants under the age of 18. In particular, the Bill:

- provides that certain applicants may be eligible for citizenship without sitting the citizenship test if, at the time of application, they have a physical or mental incapacity that is as a result of suffering torture or trauma outside Australia;
- provides that the citizenship test must be successfully completed within a period specified by the Minister in a written determination; and
- provides that to be eligible for citizenship by conferral, applicants who are under 18 years of age must be permanent residents at both the time of application and the time of decision.

Overview

In April 2008 the Review Committee was commissioned to examine the operation of the Australian citizenship test which was introduced on 1 October 2007. The purpose of the review was to ensure that the citizenship test and application process provided an effective pathway for residents to become Australian citizens. The Review Committee undertook extensive community consultations before compiling their report, *Moving Forward...Improving Pathways to Citizenship*.

On 22 November 2008 the Government announced its response to the Review Committee's Report. The Government fully supported 23 of the 34 recommendations made by the Review Committee and gave in-principle support to a further four recommendations made by the Review Committee.

Those recommendations not accepted by government included: making the test questions publicly available; putting in place interim changes to the test, including the immediate release of all test questions; and that a concept of earned citizenship be introduced into the Act.

The central finding of the review, which the Government endorsed, is that the Pledge of Commitment should be the centrepiece of citizenship testing.

By focusing on the pledge the Government has placed democratic beliefs, responsibilities and privileges of Australian citizenship, and the requirement to uphold and obey the laws of Australia at the heart of the citizenship test.

The Review Committee made a number of other key findings including that:

- citizenship is a valued and important concept and is a key factor in nation building. Its acquisition should be encouraged and facilitated by government;
- the purpose of any citizenship test should be to assess whether a person who wants to become a citizen is conscious of the responsibilities underpinning the Citizenship Pledge of Commitment;
- the present test is flawed, intimidating to some and discriminatory and needs substantial reform; and
- the special situation of refugee and humanitarian entrants and other disadvantaged and vulnerable people seeking citizenship must be addressed.

The recommendations of the Review Committee focused on improvements to the content and administration of the test, the citizenship application process, and ensuring that vulnerable and disadvantaged people were not excluded from becoming citizens because of the test.

The Review Committee expressed a concern that there are no effective alternative pathways to sitting a computer-based test which was in effect marginalising some people from becoming citizens.

The Government is committed to ensuring people who have a commitment to Australia, and who have a strong desire to become Australian Citizens, have the opportunity to do so.

While most of the recommendations made by the Review Committee and accepted by the Government can be implemented without the need for legislative change, two key recommendations require amendments to the *Australian Citizenship Act 2007* (the Act) to enable full implementation of those recommendations.

The Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009 seeks to implement the Review Committee's recommendations by amending the Act to provide:

- an alternative pathway to citizenship for a small group of people who have a physical or mental incapacity as a result of having suffered torture or trauma outside Australia; and
- for better administration of the citizenship and application process by removing the requirement that a person sit and pass a citizenship test prior to applying for citizenship.

It is the Government's intention to provide an alternative test to the formal computer based test by way of a test that includes an education course with a formal

assessment process. However, there is still an identified need to provide an alternative pathway to citizenship for a small group of clients who have a physical or mental incapacity that is a result of suffering torture or trauma outside Australia and, as a result, are not able to learn or retain information which would enable them to pass the citizenship test but who still wish to become Australian citizens.

In the past, these clients have often failed the citizenship test multiple times but had no other means of meeting the legal requirements for conferral of citizenship. Currently subsection 21(3) of the Act provides the citizenship by conferral eligibility criteria for people with permanent physical or mental incapacity who do not understand the nature of the application. This subsection does not provide for those people whose incapacity may not be permanent. However these persons incapacity is such that they are unable to meet other legal requirements for citizenship which are assessed by way of a test.

Safety net provisions for vulnerable and disadvantaged clients

The Bill proposes to amend section 21 of the Act by widening the provision to allow for a small group of people who have suffered torture or trauma outside Australia to be eligible for citizenship without having to sit a citizenship test. These people will not have to sit a test if, at the time they make an application, they have a physical or mental incapacity which means at the time the person made the application they are:

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

This proposed amendment will ensure that the most vulnerable and disadvantaged of citizenship applicants will have a legitimate pathway to citizenship. The Review Committee made particular note of refugee and humanitarian entrants who were survivors of torture and trauma who can suffer from disorders that have a severe impact on their ability to retain and recall information.

While the number of people affected by this amendment is expected to be small, without it the Government would be excluding a very vulnerable section of the Australian community from becoming Australian citizens.

In addition to the measures in this Bill, further arrangements are being put in place to assist prospective applicants for citizenship who do not meet the requirements of the proposed amendment to subsection 21(3) but are not able to pass a standard computer based test and need assisted learning. Provision will be made for these applicants by way of an alternative approved test which will be provided for in a determination signed by the Minister.

The alternative approved test will be:

- conducted as part of the Adult Migrant English Program (AMEP) for those who are eligible to participate;

- modelled on the same information contained in the resource book used by standard test participants and will be based on the Pledge of Commitment as recommended by the Review Committee;
- conducted in English and will include assessment tasks based on the legal requirements for citizenship; and
- required to be successfully completed by applicants passing all assessment tasks.

Clients with low English reading levels who are not eligible to participate in an AMEP course or clients who have difficulty operating a computer will be able to access assistance during a standard computer based test. A test administrator can provide assistance by reading out each of the questions and all possible answers for the client. Assistance with operating the computer may also be provided.

Improved administration of the citizenship test and application process

Secondly, the Bill proposes to amend the Act to streamline the citizenship application process. This is in response to the Review Committee's observation that the current process of multiple steps is inefficient for clients and the Department. The proposed changes will streamline the application and test process so that most applicants will only need to attend the Department once. This will make the process more responsive and provide more timely outcomes for clients as well as provide for better use of departmental resources.

Currently under subsection 21(2A), a person must sit and pass the citizenship test before making an application. As a result many clients sit the test months before they are able to meet the residence requirements for citizenship. In doing this they are using resources, including test appointment times, that should be dedicated to those people who are residentially eligible to apply for citizenship and have a desire to become Australian citizens as soon as possible.

The Bill proposes to repeal subsection 21(2A) of the Act and substitute a new subsection 21(2A). New subsection 21(2A) provides that paragraphs 21(2)(d), (e) and (f) are taken to be satisfied only if the Minister is satisfied that:

- the person has sat a test approved in a determination under section 23A;
- the person was eligible to sit that test (worked out in accordance with that determination);
- the person started that test within the period worked out in accordance with that determination and completed the test within the period (the "relevant test period") worked out in accordance with that determination; and
- the person successfully completed that test (worked out in accordance with that determination) within the relevant test period.

Certain elements from current subsection 21(2A) have been inserted into the proposed new subsection 21(2A). Current paragraph 22(1A)(a) that provides that a person has sat an approved test in a determination under section 23A has been reinserted into new paragraph 21(2A)(a); and current paragraph 22(1A)(b) that provides that the person has successfully completed the test (worked out in accordance with the determination) has been reinserted with minor changes.

The proposed new subsection 21(2A) will require the Minister to be satisfied that the person was eligible to sit the test (worked out in accordance with the determination under section 23A). This will enable the Minister to provide under section 23A that to be eligible to sit the test, a person will be required to make a valid application for conferral of citizenship. This will mean that most people sitting a test will also be residentially eligible for citizenship. The purpose of this amendment is also to remove the requirement that a person must sit and successfully complete a test approved in a determination under subsection 23A(1) before making an application.

The proposed new subsection 21(2A) will also provide that the Minister must be satisfied that the person commenced and completed the test within the *relevant test period*. This relevant test period will be worked out in accordance with a determination made under subsection 23A(1). This amendment to subsection 21(2A) is to make sure that an application can be refused if a person does not successfully complete a citizenship test within a reasonable period of time to be specified in the determination.

These proposed measures will ensure that the process of applying for citizenship and sitting the test are efficient and streamlined and that testing resources will only be directed towards those people who are also residentially eligible for conferral of citizenship.

Requirement for applicants under 18 to be permanent residents

The other proposed amendment to the Act contained in this Bill concerns applicants for citizenship by conferral who are under the age of 18 at time of application. Currently subsection 21(5) of the Act provides that a person is eligible to become an Australian citizen if the Minister is satisfied that the person is aged under 18 at the time the person made the application.

The policy instructions in relation to this provision requires that most people under the age of 18 be a permanent resident at time of application

Subsection 24(2) confers a discretion to the Minister to refuse to approve a person becoming an Australian citizen despite the person being eligible to become an Australian citizen under subsection 21(2), (3), (4), (5), (6) or (7) of the Act. The Act does not specify any criteria for the exercise of this discretion, however the discretion is limited to the "subject matter, scope and purpose of the statute" (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J). The policy instructions provide an aid to decision-makers exercising the discretion under subsection 24(2) and a decision-maker must consider the circumstances of a particular case in deciding whether it is appropriate to apply the policy in exercising the discretion.

In the case of an applicant who does not meet the policy requirements, the full circumstances of the case, including the best interests of the child, are taken into consideration to determine whether the application nevertheless warrants approval outside of policy because of the exceptional nature of those circumstances. The legislation in the past had been left deliberately broad in order to accommodate very exceptional cases that came to the attention of the department.

Provisions in the Act in relation to children

Eligibility for Australian citizenship is based on a close and continuing association with Australia. This is expressed through a combination of *jus soli* (where a child born on Australian territory is eligible to be an Australian citizen) and *jus sanguinis* (where a child born to an Australian citizen parent is eligible to be an Australian citizen) and citizenship by naturalisation.

Children born in Australia can only acquire citizenship automatically if they have a parent who is either an Australian citizen or permanent resident at the time of birth. This requirement, a modified version of the *jus soli* principle, was introduced in 1984 to discourage temporary residents and unauthorised arrivals from travelling to Australia to give birth with the express purpose of the child gaining automatic citizenship.

The Act does make provision for some children in special circumstances in Australia including:

- those children born in Australia but who are not Australian citizens at birth and have been ordinarily resident in Australia throughout the 10 year period immediately before their 10th birthday become Australian citizens by operation of law on their 10th birthday (paragraph 12(1)(b));
- those children who are permanent residents and are adopted in Australia under Australian law by an Australian citizen become Australian citizens by operation of law on the completion of the adoption (section 13);
- those children abandoned in Australia and whose origin is uncertain may by operation of law become Australian citizens (section 14);
- those children born outside Australia with at least one Australian citizen parent at the time of birth may apply for citizenship by descent (section 16);
- those children adopted overseas in accordance with the Hague Convention on Intercountry Adoption by at least one parent who was an Australian citizen at the time of adoption may apply for citizenship (section 19C); and
- those children born in Australia who are considered to be stateless may apply for conferral of citizenship (subsection 21(8)).

These provisions address and expand upon Australia's international obligations to certain children in Australia and those born to or adopted by Australian citizens overseas.

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. This can result in children being conferred citizenship but there being no or little prospect of their family remaining lawfully in Australia or returning to Australia in the foreseeable future because there is no migration option available to those family members.

Subsection 21(5), and a similar provision in the *Australian Citizenship Act 1948*, were not intended to be used in this way. It was not the intention, for example, that an unauthorised arrival in Australia who was under 18 years of age at time of their arrival would have the right to Australian citizenship on their arrival.

Proposed amendments in this Bill will require that all applicants under the age of 18 must be permanent residents at the time of application and decision to be eligible for citizenship by conferral. This is consistent with current policy. This amendment will prevent children who are in Australia unlawfully, or, who along with their families, have exhausted all migration options, from applying for citizenship in an attempt to prevent their removal from Australia.

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. Once granted a permanent resident visa under the Migration Act they would have a pathway to citizenship.

The amendments in relation to applicants under the age of 18 are to ensure the integrity of both the citizenship and migration programs.