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# Submission to the Legal and Constitutional Affairs Committee

## *Inquiry into the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009*

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## INTRODUCTION:

The Castan Centre for Human Rights Law welcomes the opportunity to make a submission as part of the inquiry into the changes proposed by the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009. We congratulate the government for tackling the concerns of the Australian Citizenship Test Review Committee both in this proposal and through other measures.[1] We note that the government has accepted some of the Review Committee's recommendations with respect to Pathways to Citizenship for disadvantaged groups, which largely encompass entrants under the Humanitarian Program.[2] However we have some concerns about the scope, practicability and workability of the current proposal to create an exemption for those suffering 'physical or mental incapacity' resulting from 'torture or trauma' which has occurred outside Australia. We are of the view that this provision has the potential effect of discriminating against other entrants under the Humanitarian Program.

We welcome the attempt to streamline the sitting of the test and the making of an application for conferral of citizenship but we have concerns about the potential effect of the introduction of such administrative measures upon some disadvantaged groups. We have concerns about the proposed amendment to s.21(5) which affects persons under the age of 18. Indeed we are of the view that the measures in the current Bill may have the effect of undermining rather than strengthening 'the integrity' of the Migration Program.

Our submission is divided into two parts. First, we will comment on each of the proposed amendments. Secondly, we will make some comments of a more general nature.

[1] DICA, *Australian Citizenship Test Review Committee: Recommendations and Government responses.*
[2] Ibid, recommendation 13.

## PART A
## SUBMISSION REGARDING PROPOSED AMENDMENTS

Exemption re eligibility requirements for victims of torture or trauma

The Australian government has clarified that the purpose of the test is to ensure that applicants for conferral of citizenship understand the Pledge of Commitment which is required to be made at the conferral ceremony.[3] Consistent with that, the proposed amendments to s.19G, and s.21(3) modify the eligibility requirements in relation to s.21(3) to include both individuals suffering *permanent* physical or mental incapacity *and* those suffering physical or mental incapacity resulting from 'torture or trauma' which has occurred outside Australia. This latter measure reflects the concerns of the Australian Citizenship Test Review Committee about the disadvantage caused by the test to persons admitted under the Humanitarian Program.

However we submit that the proposed amendments do not provide a clear legal standard and we have some concerns about the scope of this proposal. More detailed reasons for our objection follow a brief background to the issues.

Those admitted under the Humanitarian Program[4] include both refugees and other persons who have been subjected to 'substantial discrimination amounting to gross violation of human rights in their home country'.[5] Together with the Migration Program, the Humanitarian Program forms the second main sector of Australia's planned migration intake. In May 2009 the size of the Humanitarian Program was increased from 13,000 to 13,750 places. It was recently announced that the composition of the Refugee (Resettlement) part of the Humanitarian Program would be spread equally amongst the three regions of Africa, the Middle East and Asia.[6] As the Australian Citizenship Test Review Committee recognized, this cohort of entrants under the Humanitarian Program is

[3] Ibid, recommendations 5, 7.
[4] See http://www.immi.gov.au/media/fact-sheets/60refugee.htm accessed 2 August 2009.
[5] The statistics show that the Humanitarian Program is shared almost equally by refugees (who are selected under the UNHCR's Resettlement scheme) and other humanitarian entrants. See ibid.
[6] Ibid.

disadvantaged, 'both by their circumstances and the nature of the current citizenship test which effectively discriminates against them'.[7] The Committee accepted the submissions of a many community groups[8] which evidenced such disadvantage and listed a number of factors in the background of such persons, which cause such disadvantage in ability to complete the citizenship test, and which lead to discrimination. **The effect of 'torture or trauma' was only one such factor.** For that reason the Committee called for Pathways to Citizenship 'which do not discriminate against migrants and refugee and humanitarian entrants with poor literacy or education levels'.[9] This is consistent with an inclusive approach to citizenship and with the Australian government's international obligations as explained below.

About half of the entrants under the Humanitarian Program are refugees within the meaning of the 1951 Convention relating to the Status of Refugees.[10] As a party to the Convention, Art 34 of the Convention requires Australia to take steps, 'as far as possible, to facilitate the assimilation and naturalisation of refugees.'[11] This measure thus accords with Australia's obligations to refugees under the 1951 Refugee Convention *insofar as such persons meet the criteria of suffering physical or mental incapacity resulting from 'torture or trauma' which has occurred outside Australia*. As we explain below, these criteria will not apply to all refugee entrants, nor to all humanitarian entrants.

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[7] A report by the Australian Citizenship Test Review Committee, *Moving forward … Improving Pathways to Citizenship*, August 2008, p.11.

[8] Eg. Submission by the Human Rights and Equal Opportunity Commission to the Australian Citizenship test Review Committee, 2008 http://www.hreoc.gov.au/legal/submissions/2008/20080605_citizenship_test.html accessed 15 July 2009, p3, http://www.amnesty.org.au/refugees/comments/8775/- accessed 16 July 2009.

[9] A report by the Australian Citizenship Test Review Committee, *Moving forward … Improving Pathways to Citizenship*, August 2008, p.27. Indeed as acknowledged above the government has accepted the need for Pathways – see DICA, *Australian Citizenship Test Review Committee: Recommendations and Government responses*, recommendations 13-17. See also recommendation 3 re the English language.

[10] In everyday parlance a 'refugee' is a person in flight, a person seeking refuge. However, in international law a 'refugee' is a person who comes within the definition in Art. 1A(2) of the Convention relating to the Status of Refugees, Geneva, 28 July 1951, in force 22 April 1954, 1989 UNTS 137 ('Refugee Convention') and the Protocol relating to the Status of Refugees, New York, 31 January 1967, in force 4 October 1967, 19 UST 6223, 6257 ('Refugee Protocol').

[11] Refugee Convention, Art 34 http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf, accessed 27 July 2009, p32.

Australia has obligations to all humanitarian entrants, to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized by [the ICCPR], without distinction of any kind …'.[12] Further it is required to take 'legislative or other measures' to give effect to such rights.[13] Those rights include the right to 'self-determination', to 'freely determine their political status'.[14] The Universal Declaration of Human Rights 1948,[15] Art 15 recognises the right of all individuals to a nationality. Humanitarian entrants and refugees, who by their very definition, do not have the effective protection of their original country of origin or nationality, must have access to a new nationality.[16] Such persons are equal before the law and entitled to equal protection of the law.[17]

**Our fundamental concern with this proposal is that the legislation privileges some refugee and humanitarian entrants over others whose 'rights' will be buried in policy documents and subject to discretionary 'operational procedures' rather than being enshrined in legislation. This is inconsistent with the legal status of *all* Australia's refugee and humanitarian entrants and with Australia's international obligations as outlined above.**

Our specific concerns with this proposal are as follows:

- The terms 'trauma' and 'torture' are not defined in the proposed amendments. The terms 'trauma' and 'torture' reflect the language which the Review Committee employed to identify a problem, but are not consistent with the legal status of entrants under the Humanitarian Program. Refugees are persons who have a 'well-founded fear of being *persecuted*'.[18] The legal meaning of

[12] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, UN Doc. A/6316 (1966), 999 UNTS 171 ('ICCPR'), Art 2(1).
[13] Ibid, Art 2(2).
[14] Ibid, Art 1(1).
[15] Universal Declaration of Human Rights, Paris, 10 December 1948, GA Res. 217 A (III), UN Doc. A/810.
[16] *Ethnic Communities' Council of Victoria Draft Citizenship Discussion Paper*, http://eccv.org.au/doc/CITIZENSHIPDISCUSSIONPAPER.pdf accessed 27 July 2009, p.7
[17] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, UN Doc. A/6316 (1966), 999 UNTS 171 ('ICCPR') Art 26.
[18] The obligation to accord refugee status to refugees through the protection visa regime is acknowledged in the Migration Act, s.36.

'persecution' is broader than 'torture'. The meaning of 'torture' adopted under international instruments is 'cruel, inhuman or degrading treatment',[19] whereas 'persecution', as both national and international jurisprudence and s.91R of the Migration Act 1958 (Cth) recognize, arises from a broader range of circumstances, including deprivation of means of livelihood or subsistence.

- Entrants other than 'refugees' under the Humanitarian Program have suffered gross human rights abuses which are deemed to be less than 'persecution'. Thus (even accepting the equation of persecution with torture, which we do not) the term 'torture' is not appropriate to describe the cause of psychological harm for entrants under the Humanitarian Program.
- 'Trauma' (which may mean simply 'injury') is similarly undefined but in this context appears to refer to the *psychological effect* of traumatizing incidents. It is submitted that 'trauma' in this proposal does not have an independent meaning, legal or otherwise, except as an assessment of the effect of events upon an individual. The Explanatory Memorandum states that this amendment will apply only to those who 'suffer from psychological disorders as a *direct* (emphasis added) result of having experienced torture and trauma' (although this is not stated in the proposed legislation). It is unclear by whom and how this assessment will be made. How can a direct link between acts which have taken place in another country and the applicant's current condition be established? In our view, the effect of this amendment will be to introduce new criteria which are themselves unclear and open to interpretation \ challenge.
- Moreover, we note that the proposed legislation refers to the effect of 'torture *or* trauma', whereas the Explanatory Memorandum refers to the combined effects of

[19] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, UN Doc. A/6316 (1966), 999 UNTS 171 ('ICCPR') Art 7; Universal Declaration of Human Rights, Paris, 10 December 1948, GA Res. 217 A (III), UN Doc. A/810 Art 5; cf Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, UN Doc. A/39/51 (1984), 1465 UNTS 85 ('CAT') Art 1 where 'torture' is defined as 'severe pain or suffering, whether physical or mental, … intentionally inflicted'.

'torture *and* trauma'.[20] This suggests further lack of clarity as to the purpose of the amendment.

- Proposed s.21(3A)(a)(b)(c) sets out the effects which the trauma or torture must have had on the applicant in order for that person to fall within the eligibility exemption. This will mean that each individual who claims its benefit will be required to be individually assessed before the exemption is applied. As noted above, it is said that the effect must be a direct one. This requirement will add another layer of process and discretion to the legislation which may increase the trauma for individuals and lead to possible challenges to the exercise of that discretion.
- It is well recognized that individuals respond to trauma in very personal ways. It is misleading to associate refugees with trauma or traumatic responses as many refugees are very resilient people who cannot be characterized in that way. We are concerned at the inappropriate association of refugees with 'torture *or* trauma' through this proposal and at its potential to exclude refugees who do not exhibit symptoms of trauma. This is contrary to the Australian government's international obligations to facilitate the assimilation and naturalisation of *all* refugees as explained above, and potentially discriminates between refugees according to their individual vulnerability.
- Further, it is arguably discriminatory to single out disadvantage in the nature of a psychological disorder as the basis of an exemption to the eligibility requirements. There are as noted above many other explanations for disadvantage which affects a person's ability to understand the nature of the Pledge. Australia has international obligations to *all* entrants under the Humanitarian Program to assist them to integrate and to transit to citizenship.
- It is our submission that it is not appropriate to limit the benefit of the provision to persons for whom the psychological damage from torture or trauma has occurred *outside* Australia. It is now well established and documented that many refugees have been re-traumatised by their treatment in Australia, and have suffered trauma

[20] *Australian Citizenship Amendment (Citizenship Testing) Bill 2007 – Explanatory Memorandum,* http://www.austlii.edu.au/au/legis/cth/bill_em/acatb2007558/memo_0.html accessed 3:00pm Thursday 16 July 2009, p.2.

from prolonged detention or as disadvantaged holders of temporary visas in the community whilst under Australia's care and jurisdiction.[21] It is not fair and reasonable to limit the benefit of the provision thus.

We are concerned that as presently proposed, this amendment can be employed as an instrument of exclusion. **We propose that the amendment should reflect the equal legal status of *all* persons admitted under the Humanitarian Program, and that the exemption should apply to all such persons who can establish that they are disadvantaged as described in the proposal.** That is, the amendment should refer to any disadvantage which arises from the background leading to their legal status as a humanitarian entrant which disables them from fulfilling the eligibility criteria as described. It is our view that these matters are of such importance that they should be stated in legislation, rather than being relegated to the Citizenship Instructions and delegated to officials for implementation. Such amendment would ensure the integrity of Australia's Migration Program and ensure that the government is complying with its international obligations as outlined above.

Minister's determination of the time limit for taking the test (s.21(2A))

The Castan Centre welcomes the attempt by the Government to 'streamline' the citizenship process by allowing a candidate to file an application prior to the successful completion of the test. However we have some concerns about the increased discretion of the Minister by conferring a power to determine the time limit for completion of the test.[22] Moreover, if the proposed amendment creating an exemption for victims of 'torture or trauma' proceeds, the bulk of entrants under the Humanitarian Program may be disadvantaged by a rigid time-frame.

[21] See Parliament of the Commonwealth of Australia, JSCM, 'Immigration detention in Australia; Community-Based Alternatives to Detention' May 2009.
[22] See See http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/citizenship_testing/submissions/sub14.pdf accessed 2 August 2009. Our concern derives from the broad discretion in s.23A of the Act.

**The Castan Centre recommends the implementation of a fixed term period during which the citizenship test ought to be taken by applicants, with the right to apply to the Minister if particular circumstances compel an extension.** The aim would be to introduce a greater degree of flexibility into the process.

New requirement that persons under 18 need to have permanent residency at the time of application and decision of Minister to be eligible for citizenship (s.21(5))

The Castan Centre strongly opposes the reasoning behind this amendment which is based on the 'need' for consistency or 'integrity' with the requirement that applicants for citizenship are 'permanent residents', as provided by s.21(2)(b), (3)(b) and (4)(b) of the Australian Citizenship Act. 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'. This discretion has been exercised in favour of a small number of minor persons who were born in Australia to non-citizen parents who may have unsuccessfully sought refuge in Australia.[23]

This amendment will also have the effect of removing the right to seek review of such decisions in the AAT.

In relation to this proposal, we argue that there is another 'need', namely as the Convention on the Rights of the Child[24] ('CROC') states, the best interests of the child should be a primary consideration in all actions concerning children.[25] To require a child to be a permanent resident, to hold a permanent visa, prior to being allowed to apply for citizenship may be viewed as being in conflict with this Convention. The effect of this

[23] See *SNMX and Minister for Immigration and Citizenship* [2009] AATA 539 (21 July 2009).
[24] *Convention on the Rights of the Child*, Art.3(1), http://www.unhchr.ch/html/menu3/b/k2crc.htm accessed 27 July 2009.
[25] Convention on the Rights of the Child, Article 3(1).

amendment will make it impossible for vulnerable children, to obtain certainty about their future. Such children are unlikely to be granted permanent visas. This proposal has the effect of discriminating against this group of children, and effectively imposing a penalty or punishment, in contravention of Art 2 of CROC. It also offends the principle of family unity. Article 23 (family life) of the ICCPR stipulates that steps should be taken to protect the family unit and Art 10 of CROC emphasises the importance of family reunification.

This measure appears to be designed to ensure that children born in Australia to non-citizens do not bypass the terms of s.12 of the Act. It appears to be designed to force the parents of such children to return to their countries of origin. However, it must be recalled that Australia has absolute obligations not to refoule failed asylum-seekers who may be at risk of 'torture' if returned to their countries.[26]

In this context the use of the word 'integrity' which in every day usage means 'ethical' or 'moral' is disingenuous. Indeed under CROC Australia undertakes 'to ensure the child … protection and care' (Art 3(2)). Further if 'integrity' is equated with consistency as the Explanatory Memorandum implies, then our argument set above for equal treatment of all humanitarian entrants in relation eligibility criteria should be accepted.

## PART B
## OVERALL CONCERNS

We refer to our previous Submission[27] and in particular to the discussion about inclusive citizenship, namely 'the notion of integration and the development of a strong sense of community'. Whilst we welcome the government's articulation of the object of the citizenship test as being focused upon understanding the Pledge, we are concerned that the net effect of the current proposals is to increase the use of the citizenship test as an

[26] ICCPR Art 7, CAT Art 1.
[27] See http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/citizenship_testing/submissions/sub14.pdf accessed 2 August 2009.

exclusionary device in relation to vulnerable groups of people. Indeed, it is concerning to see the legislative process being used in this way, rather than as an instrument to clarify the nature of rights relating to citizenship.

Further, the Centre suggests that consideration should be given to transferring the administration of the citizenship test to an independent body. Indeed, it is submitted that an independent organisation such as the HREOC may be better suited to determining the test questions or, alternatively administering the test as they hold significant expertise in dealing with minority groups. By using such independent body in the process would limit the appearance of Minister's absolute discretion and, hence, give the appearance of a more transparent process of citizenship testing.

## PART C
## CONCLUSION

In conclusion, for the reasons stated, we oppose this Bill because of its potential to enable the citizenship test to discriminate against vulnerable groups of people. We would however support the streamlining measures (s.21(2A)) provided that sufficient guarantees are given to protect vulnerable persons.