



**This Digest replaces an earlier version dated 19 August 2009 to include additional analysis of proposed Government amendments to be moved to introduce special residency requirements.**

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

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

**Date introduced:** 25 June 2009

**House:** Senate

**Portfolio:** Immigration and Citizenship

**Commencement:** Sections 1 to 3 and Schedule 2 on Royal Assent. Schedule 1 on a date fixed by Proclamation or the day after a period of six months after the date of Royal Assent, whichever is the sooner.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### **Purpose**

To amend the *Australian Citizenship Act 2007* (the Citizenship Act) to:

- make it easier for persons who have a physical or mental incapacity as a result of suffering torture or trauma before coming to Australia to be eligible to apply for citizenship;
- allow prospective applicants for citizenship by conferral to sit the citizenship test at the same time as making the application; and
- tighten the eligibility provisions for persons under 18 years of age by requiring that they be permanent residents; and
- introduce a reduced period of residency for Australian citizenship for people in special circumstances.

### **Background**

The citizenship test was launched on 17 September 2007 with testing commencing from 1 October 2007. The primary reason for introducing the test was to ensure that citizenship applicants had the requisite knowledge to demonstrate the requirements of the Citizenship Act which, broadly speaking, are to understand the nature of the application, to have a basic knowledge of English, and to demonstrate comprehension of the responsibilities and privileges of citizenship. The former Minister for Immigration and Citizenship also linked the test to successful integration into Australian society:

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The test will encourage prospective citizens to obtain knowledge they need to support successful integration into Australian society. The citizenship test will provide them with the opportunity to demonstrate in an objective way that they have the required knowledge of Australia, including the responsibilities and privileges of citizenship, and a basic knowledge and comprehension of English.<sup>1</sup>

He further stated that it was ‘the means of ensuring that prospective citizens understand and appreciate Australian values, culture and history’.<sup>2</sup>

The Act that introduced the citizenship test was the *Australian Citizenship Amendment (Citizenship Testing) Act 2007*. In introducing the (then) Bill, a brief explanation of the test was provided by the former Minister for Immigration and Citizenship:

The test is expected to be computer based and consist of 20 multiple-choice questions drawn randomly from a large pool of confidential questions. Each test is expected to include three questions on the responsibilities and privileges of Australian citizenship. The pass mark is expected to be 60 per cent including answering the three mandatory questions correctly. A person will be able to take the test as many times as required in order to pass.<sup>3</sup>

The [Bills Digest](#) on the Australian Citizenship Amendment (Citizenship Testing) Bill 2007 provides discussion and general background on citizenship and policy issues surrounding the citizenship test.<sup>4</sup>

Between 1 October 2007 and 31 March 2009, 111 005 applicants sat the Australian citizenship test. Of that number 107 287 (96.7 %) applicants passed on their first or second attempt at the test. The pass rate of various groups was:

Skill stream	99%
Family stream	94%
Humanitarian program	84% <sup>5</sup>

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1. K Andrews, ‘Second reading speech: Australian Citizenship Amendment (Citizenship Testing) Bill 2007’, House of Representatives, *Debates*, 30 May 2007, p.2.
  2. K Andrews (Minister for Immigration and Citizenship), *Citizenship test launched on Australian citizenship day*, media release, 17 September 2007, viewed 23 July 2009
  3. K Andrews, ‘Second reading speech: Australian Citizenship Amendment (Citizenship Testing) Bill 2007’ House of Representatives, *Debates*, 30 May 2007, p.3.
  4. Sue Harris Rimmer, Australian Citizenship Amendment (Citizenship Testing) Bill 2007, Bills digest, no.188, 2006-07, Parliamentary Library, Canberra, 2007, viewed 28 July 2009, <http://www.aph.gov.au/library/pubs/bd/2006-07/07bd188.pdf>
  5. Department of Immigration and Citizenship, Australian Citizenship Test Snapshot Report, April 2009, viewed 3 August 2009, <http://www.citizenship.gov.au/pdf/cit-test-snapshot-apr-09.pdf>

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## **Basis of policy commitment**

In its 2007 National Platform, the Australian Labor Party stated that its intention to ‘support an inclusive citizenship process for new migrants that encourages the acquisition of citizenship by permanent residents and does not put up unnecessary barriers or extensive delays to the acquisition of citizenship.’<sup>6</sup>

On 28 April 2008, the Minister for Immigration and Citizenship, Senator the Honourable Chris Evans, announced that an independent committee of seven eminent Australians would undertake a review of the citizenship test (the Review Committee). The Review Committee was chaired by Richard Woolcott AC former diplomat and Secretary of the Department of Foreign Affairs and Trade. Other members of the Committee included former Olympian Rechelle Hawkes, SBS director Paula Masselos, refugee advocate Julianna Nkrumah, Australia Day Council CEO Warren Pearson, former Chief of Navy Vice Admiral Rtd Chris Ritchie and legal expert Professor Kim Rubenstein.<sup>7</sup>

In accordance with the terms of reference, the Review Committee examined the operation and effectiveness of the citizenship test since its introduction on 1 October 2007. The report of the Review Committee, [Moving forward...improving pathways to citizenship](#) was released in August 2008. According to the report, the committee looked at ways to improve its operation and effectiveness as the pathway for residents to become Australian citizens. It also considered all aspects of the content and operation of the test, the experiences of applicants in completing the test, the impact on citizenship applications and other related issues.<sup>8</sup>

The Review Committee’s findings and recommendations will be discussed in further detail below.

## **Citizenship Test Review Committee**

As a result of its broad consultations, the Review Committee generally found that:

- organisations linked to migration support programs generally opposed any form of citizenship testing

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6. Australian Labor Party, National Platform and Constitution 2007, pp.220-221, viewed 30 July 2009, [http://www.alp.org.au/download/now/2007\\_national\\_platform.pdf](http://www.alp.org.au/download/now/2007_national_platform.pdf)

7. C Evans (Minister for Immigration and Citizenship) *Independent committee to review citizenship test*, media release, 28 April 2008, viewed 21 July 2009, <http://www.minister.immi.gov.au/media/media-releases/2008/ce08039.htm>

8. Australian Citizenship Test Review Committee, *Moving forward...improving pathways to citizenship: a report*, August 2008, Appendix 1, [http://www.citizenship.gov.au/test/changes/\\_pdf/moving-forward-report.pdf](http://www.citizenship.gov.au/test/changes/_pdf/moving-forward-report.pdf)

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- individuals whose views were sought in the community on the other hand, tended to support some form of test
- there was support from many during community consultations for education in civic responsibilities required of Australian citizens and the desirability that the community provide this education.
- English teachers and language/educational experts generally held the view that the level of English was pitched at too high a level for its intended audience.<sup>9</sup>

The Review Committee also found that there was much criticism of the resource book *Becoming an Australian Citizen*. Many of those consulted considered that while much of the information was interesting, ‘most thought that it represented a particular view of Australian society and history that might not be shared by all Australians. As the basis for a test, it was seen to contain much that was irrelevant to citizenship’.<sup>10</sup>

The Review Committee made a number of **key findings** concerning the citizenship test. In their opinion, the ‘test was flawed, intimidating to some and discriminatory, needing substantial reform.’ They also considered that the purpose of any test should be to ‘assess whether a person who wants to become a citizen is conscious of the main responsibilities underpinning the citizenship pledge of commitment.’<sup>11</sup>

In addition, the Review Committee made 34 **recommendations** of which 22 were fully supported by the Government, four were supported in principle, two were partially supported (elements of the recommendation were supported) and six were *not* supported.<sup>12</sup> In brief, the six unsupported recommendations included:

- Pass mark to remain at 60%
- Concept of “earned” citizenship be introduced
- “earned” citizenship to be decided by a referee
- That a Citizenship Convention be held in 2009
- Test questions be published
- Number of mandatory questions be reduced to two.

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9. Australian Citizenship Test Review Committee, p.12.

10. Australian Citizenship Test Review Committee, pp. 11-12.

11. Australian Citizenship Test Review Committee, p.3.

12. Department of Immigration and Citizenship (DIAC), Australian Citizenship Test Review Committee Recommendations and Government responses, viewed 18 August 2009, [http://www.citizenship.gov.au/test/changes/\\_pdf/recommendations-government-response.pdf](http://www.citizenship.gov.au/test/changes/_pdf/recommendations-government-response.pdf)

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Recommendations made by the Review Committee of particular relevance to this Bill will be discussed below under the ‘main provisions’ section of this Digest.

### **Committee consideration**

The Bill has been referred to the Senate Legal and Constitutional Affairs Committee for inquiry on 25 June 2009 and report by 7 September 2009. Details of the inquiry can be found at the [Senate Legal and Constitutional Affairs website](#).

The Bill was also considered by the Senate Standing Committee for the Scrutiny of Bills but it made no comment on the Bill.<sup>13</sup>

See also the report of the Senate Legal and Constitutional Affairs Committee on the [Australian Citizenship Amendment \(Citizenship Testing\) Bill 2007](#) which recommended (amongst other things) that:

- the operation of the citizenship testing regime be reviewed three years after the Bill's commencement, particularly to gauge the regime's impact on citizenship application and conferral rates and on certain groups within society, particularly refugee and humanitarian entrants (recommendation 1).<sup>14</sup>

### **Commentary on the Review Committee and proposals for change**

There has been much commentary on the Review Committee and its recommendations. Some considered that questions about historical figures and facts such as ‘billiards champion Walter Lindrum and Donald Bradman’s batting average obscured the far more important concept of what it means to be an Australian citizen,’<sup>15</sup> while other reports

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13. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No.9 of 2009*, 12 August 2009, p. 12 viewed 14 August 2009, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2009/d09.pdf>
  14. Senate Standing Committee on Legal and Constitutional Affairs, *Australian Citizenship Amendment (Citizenship Testing) Bill 2007 [provisions]*, July 2007, p.24, viewed 18 August 2009, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/citizenship\\_testing/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/citizenship_testing/report/report.pdf)
  15. Valuing our citizens: the new citizenship test advances Australia fair, *The Australian*, 25 November 2008, p.11, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FHS6S6%22>

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referred to its ‘emphasis on testing arcane historical facts.’<sup>16</sup> There was concerns that Don Bradman would be scrubbed from the test process,<sup>17</sup> that the new test was a ‘significant watering down of the test’<sup>18</sup> while another report referred to the new test being based on the ‘five-line Pledge of Commitment recited by new citizens, which recognises Australia’s democratic beliefs and laws and the rights and liberties of citizens.’<sup>19</sup>

## Financial implications

The Explanatory Memorandum states that these amendments will have minimal impact as funds will be allocated from existing resources.<sup>20</sup>

## Key Issues

The Bill raises three key issues:

- Persons with a physical or mental incapacity as a result of having suffered torture or trauma outside Australia will be exempt from sitting the citizenship test;
- Streamlines the citizenship process by removing the requirement that the citizenship test be successfully completed prior to the lodgement of application. The Minister will also be able to specify a time period in which the test must be successfully completed; and
- Persons under 18 years of age will be required to be permanent residents in order to satisfy the eligibility criteria for citizenship.

These three key issues will be discussed in further detail below.

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16. P Maley, Test for migrants slated for overhaul, *The Australian*, 29 August 2008, p.5, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FY6ER6%22>
  17. Z Kovacs, Only fair that essence of the nation is put to the test, *West Australian*, 29 November 2008, p.20, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F6F8S6%22>
  18. R Peake, He’s out: Bradman cut from second test, *Canberra Times*, 22 November 2008, p.1, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F9Z5S6%22>
  19. N Berkovic, Howard’s migrant test to be dumped, *Weekend Australian*, 22 November 2008, p.3 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FGZ5S6%22>
  20. Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009, p.2.

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## Main provisions

### Schedule 1 Amendments

#### Persons with a physical or mental incapacity to be exempt from citizenship testing

**Items 1 to 7** amend provisions relating to citizenship by conferral. **Item 1** proposes to amend existing section 19G to remove the reference to *permanent* in the simplified outline to the Subdivision. **Item 3** proposes to substitute **paragraph 21(3)(d)** which relates to a person with a *permanent* physical or mental incapacity at the time they make the application with one referring to new subsections 21(3A) and (3B).

**Item 4 inserts proposed subsections 21(3A) and (3B).** **Proposed subsection 21(3A)** states that a person satisfies the subsection if that person at the time of making an application for citizenship has a *permanent* physical or mental incapacity that means the person is not capable of understanding the nature of the application at that time. **Proposed subsection 21(3B)** relates to a person with a physical or mental incapacity *at the time the person made the application*, where the incapacity is as a result of the person having suffered torture or trauma outside Australia. The extent of the incapacity must be to the point that the person is:

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

These three elements form part of the general criteria for eligibility that people applying for citizenship demonstrate by completing the citizenship test. The practical effect of this proposed amendment is that a person is eligible to become an Australian citizen if the Minister is satisfied that the person satisfies either (3A) or (3B) *and* qualifies in respect of the other elements of subsection 21(3). These elements include:

- that the person is over 18 years
- satisfies the residence requirement or has completed relevant defence service
- will reside in Australia or maintain a close and continuing association with Australia
- is of good character.

The proposed amendments to subsection 21(3) do not change the current provisions relating to *permanent* physical and mental incapacity.

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Existing section 26 requires that a person must make a pledge of commitment. **Item 7 inserts proposed paragraph 26(1)(ba)** to include persons that satisfy **proposed subsection 21(3B)** in the list of persons who are not required to make a pledge. An exception is made for these persons because it means they are not capable of understanding the nature of the application, or are not able to demonstrate an adequate knowledge of English or be aware of the responsibilities and privileges of Australian citizenship at the time of making the application.

The Explanatory Memorandum provides that this amendment is the result of the recommendations of the Review Committee.<sup>21</sup> The Review Committee recommended that section 21(3)(d) of the *Australian Citizenship Act 2007* be amended in the spirit of the Act to include an inability to demonstrate a basic knowledge of English and an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship due to mental incapacity, resulting in those individuals not being required to sit a test.<sup>22</sup> The Government supported this recommendation and agreed that ‘this change will ensure that the test does not disadvantage vulnerable people who most need our support’.<sup>23</sup>

In its discussion of the topic the Review Committee considered that the current exemption criteria did not take into account the group of people who suffered from severe and chronic symptoms resulting from torture and trauma. While they considered that some symptoms may be permanent others, though severe, may not be permanent. They may be hampered by their symptoms which can impair their ability to retain and recall information although they may be capable of understanding the nature of the application at the time. Therefore they would be excluded from the current exemption provisions. The Committee commented as follows:

For survivors of torture and trauma, the use of a formal test which requires a high level of English proficiency, a large amount of study and familiarity in the use of a computer, significantly disadvantages them. There are many people who come to Australia under the Humanitarian Program who fall into this category.<sup>24</sup>

The Review Committee commented that many of these people may understand the nature of the application but may be incapable of demonstrating a basic knowledge of English or knowledge of Australia because of their mental state.<sup>25</sup> **Proposed subsection 21(3B)** accommodates such people by requiring paragraphs (a), (b) or (c) to apply. That is, a person may be capable of understanding the nature of the application but be quite

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21. Explanatory Memorandum, p.2.

22. Australian Citizenship Test Review Committee, recommendation 19.

23. DIAC, Australian Citizenship Test Review Committee Recommendations and Government responses, recommendation 19.

24. Australian Citizenship Test Review Committee, p.34.

25. Australian Citizenship Test Review Committee, p.34.

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incapable of demonstrating a basic knowledge of English or an adequate knowledge of Australia and the responsibilities and privileges of citizenship.

It is also important to note that this exemption will *not* apply to persons who have a non-permanent physical or mental incapacity as a result of having suffered torture or trauma whilst in Australia. For example persons who have suffered torture or trauma while in immigration detention in Australia.<sup>26</sup> In its submission to the Senate Committee inquiring into this Bill, the Coalition for Asylum Seekers, Refugees and Detainees (CARAD) have urged consideration be given to persons traumatised by their Australian detention experience.<sup>27</sup>

In addition, it is not clear how a person's level of incapacity will be tested and by whom. The Australian Lawyers for Human Rights have argued that if an applicant is required to obtain evidence of their incapacity and how it has arisen, that there are few organisations in Australia who have the expertise to provide services to persons who have suffered torture and trauma.<sup>28</sup> CARAD have also asserted that there is really only one organisation equipped to assist such people and that is ASeTTS: Assisting Torture and Trauma Survivors who specialise in providing expert services to torture and trauma survivors in Perth. They comment that the funding is inadequate to meet the demand, with insufficient qualified staff and long waiting lists.<sup>29</sup>

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26. For a summary of the effects detention, particularly prolonged detention has on the mental health of detainees see: Senate Legal and Constitutional Affairs Committee, *Administration and operation of the Migration Act 1958*, March 2006, pp. 192-193, viewed 4 August 2009, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/migration/report/c06.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/migration/report/c06.htm); Commonwealth Ombudsman, *Department of Immigration and Multicultural Affairs, report into referred immigration cases: mental health and incapacity*, December 2006, Report no.7/2006, viewed 4 August 2009, [http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports\\_2006\\_07/\\$FILE/Report\\_mental-health\\_DIMA\\_Dec2006.pdf](http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2006_07/$FILE/Report_mental-health_DIMA_Dec2006.pdf)
  27. Coalition for Asylum Seekers, Refugees and Detainees (CARAD), Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009*, viewed 6 August 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=a631a7c3-1d39-4473-9cb1-e6c273619245>
  28. Australian Lawyers for Human Rights, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009*, viewed 6 August 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=ae38af8b-a9a3-41aa-be20-a218f67ad0c5>
  29. CARAD, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, p.3.

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## Streamlining the citizenship application and testing process

**Item 2** proposes to substitute **subsection 21(2A)** to remove the requirement that a person must sit the citizenship test *before* the application for citizenship is made. Rather, an applicant must satisfy the following elements:

- a) the person has sat a test (approved in a determination under section 23A)
- b) the person was eligible to sit that test (worked out in accordance with that determination)
- c) the test was taken within the ‘relevant test period’ (worked out in accordance with that determination)
- d) the person successfully completed the test (worked out in accordance with that determination)

If the Minister is satisfied that these elements have been satisfied then paragraphs 21(2)(d) (e) and (f) are taken to be satisfied. Paragraphs (2)(d), (e) and (f) relate to the person understanding the nature of the citizenship application, possessing a basic knowledge of English and having an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship.

Significantly, the Explanatory Memorandum notes that this amendment will not only enable applicants to ‘meet all the requirements for citizenship on the same day’, it will also ‘ensure that a person will not be eligible for citizenship if they are unable to successfully complete the test *within a reasonable period of time* (emphasis added):

By removing the requirement that an applicant must sit and successfully complete the test before applying for citizenship, the amendments will allow eligible applicants in many circumstances to meet all the requirements for citizenship on the same day, including successfully completing the test. However, to ensure that a person will not be eligible for citizenship if they are unable to successfully complete the test within a reasonable period of time, the amendments allow the Minister to specify a period of time within which a person must start the test and complete the test.<sup>30</sup>

To this end, **item 6** proposes to insert **subsection 23A(5A)** to provide that the Minister may make a determination under subsection (1) (approval of test) to determine the period when a person may start the test and the period when the person may complete the test. Significantly, subsection 23A(7) of the Act provides that a determination under subsection 23A(1) is not a legislative instrument and therefore not subject to Parliamentary scrutiny.

**Item 8** proposes to substitute **subsection 46(1A)** to make the provision consistent with proposed subsection 21(2A) which removes the requirement that a person must have sat the citizenship test and successfully completed it before making an application for

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30. Explanatory Memorandum, p.5.

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citizenship. This amendment ‘ensures that the application fee may continue to include a component that relates to the cost of administering the citizenship test’.<sup>31</sup>

The Review Committee recommended as one of their recommendations under the heading of ‘Accessibility, Administration and Resourcing’ that:

Processes be streamlined and realigned to combine citizenship testing with the citizenship application (recommendation 25).

The Second reading speech comments that the Act proposes to amend the application process because of observations made by the Review Committee that the current process of multiple steps is inefficient for clients and the Department. It will mean that most clients need only come to the Department once.<sup>32</sup> The Review Committee commented that DIAC had received many complaints about problems experienced by clients coping with the large distances between a person’s place of residence and the nearest test centre. The Review Committee noted this as a particular concern in remote areas such as northern Western Australia and certain regional locations in New South Wales and Queensland and the matter was also raised in a number of written submissions.<sup>33</sup>

### Persons under 18 years of age must be permanent residents

Existing section 21 of the Act relates to the application and eligibility criteria for citizenship. One of the general eligibility criteria is that a person must be a permanent resident at the time they make the application and at the time of the Minister’s decision on the application.<sup>34</sup> However, existing subsection 21(5) only states 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’. **Item 5** proposes to substitute **subsection 21(5)** to require a person under 18 to also be a permanent resident at time of application and decision in order to be eligible to apply for citizenship.<sup>35</sup> This amendment will make existing subsection 21(5) consistent with existing subsections (2), (3) and (4) ‘to ensure the integrity of the citizenship and migration programs’.<sup>36</sup>

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31. Explanatory Memorandum, p. 8.

32. P Wong, ‘Second reading speech: Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009’, Senate, *Debates*, 25 June 2009, p.6.

33. Australian Citizenship Test Review Committee, p.39.

34. Existing paragraph 21(2)(b) of the *Australian Citizenship Act 2007*

35. Section 5 of the *Australian Citizenship Act 2007* defines a *permanent resident* generally as a person who is in Australia and holds a permanent visa. There are other elements relating to special category visas in the definition.

36. Explanatory Memorandum, p.6.

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The Review Committee did not make any recommendations regarding the requirement that a person under 18 be a permanent resident to be eligible for citizenship.

Significantly, the minister has had the ability to grant citizenship to minors since 1948 when the provision in Division 3–Citizenship by naturalisation read as follows:

Section 15(3) Notwithstanding anything contained in the preceding provisions of this Division, the Minister may, upon application in the prescribed form, grant a certificate of naturalisation as an Australian citizen to an alien who is not of full age.<sup>37</sup>

Similarly, the *Australian Citizenship Act 1948* section 13(9) in the consolidation made just prior to the 2007 Act being passed read as follows:

(9) Subject to subsection (11), the Minister may, in the Minister’s discretion, upon application in accordance with the approved form, grant a certificate of Australian citizenship to a person:

(a) who has not attained the age of 18 years;...<sup>38</sup>

However, in the second reading speech Senator Penny Wong stated that the ‘provision is being exploited and is undermining both the citizenship and migration programs.’<sup>39</sup> To this end it is worth noting that the Minister has a discretion in existing subsection 24(2) to refuse to approve the person becoming an Australian citizen despite the person being eligible under existing subsection 21(5).

It appears the amendment contained in **item 5** is intended to ‘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’<sup>40</sup> which would require assessment of policy considerations (including residency requirements) and the best interests of the child.<sup>41</sup> However, as Professor Kim Rubenstein of the Australian National University asserts:

“Exploitation” is being used by the Minister in a negative sense here and I would suggest the section is there to be available to children who have a real connection to

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37. The age of majority at that time was 21 years.

38. *Australian Citizenship Act 1948* section 13(9) consolidated to 1 July 2006.

39. P Wong, ‘Second reading speech: Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009’, Senate, *Debates*, 25 June 2009, p.4.

40. P Wong, ‘Second reading speech: Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009’, Senate, *Debates*, 25 June 2009, p.7.

41. Department of Immigration and Citizenship, Australian Citizenship Instructions (ACIs), registered as an official departmental instruction on 01 July 2009, Chapter 5 Citizenship by Conferral, accessed using Legend database.

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Australia and who will suffer hardship if not granted citizenship. These concepts are entirely consistent with the principles underpinning the current Australian Citizenship Act framework. That is, it is an avenue to ensure that the “best interests of the child” are taken into account in making profound decisions about whether they have a sufficient connection to the Australian community and also in promoting an inclusive and tolerant and harmonious society.<sup>42</sup>

Professor Kim Rubenstein considers that the proposed amendment of subsection 21(5) is a very significant proposed amendment and urges the Parliament to seriously review this suggested amendment.

The Australian Lawyers for Human Rights have similarly emphasised that such a ‘blanket amendment disregards the rights of children and focuses on the legal status of their parents.’ They would prefer to see the provision incorporate ‘the best interest principle’ from Article 3 of the Convention on the Rights of the Child.<sup>43</sup>

Victoria Legal Aid (VLA) made the following comments in their submission:

The proposed amendment to s.21(5) of the *Australian Citizenship Act 2007* (Cth) would limit a discretion which is of long standing in Australian citizenship law. This discretion allows the Minister to grant Australian citizenship to persons under 18 years of age. The amendment would allow the Minister to exercise this discretion only where the applicant for citizenship was, at the time of the grant of citizenship, a permanent resident, as opposed to the current regime giving discretion to grant citizenship to applicant’s under 18 even if they are not permanent residents.

VLA notes that a broad discretion to grant citizenship to minors formed part of the regime under the Australian Citizenship Act 1948 (Cth), and was retained when the new legislation came into effect in 2007. This broad discretion, allowing the Minister to grant citizenship to persons under 18 years of age, recognises that children are a particularly vulnerable group. There can be extraordinary and compelling reasons for the grant of citizenship to children. The presence of this discretion in Australian citizenship law recognises that the unique vulnerabilities of children sometimes raise unusual circumstances, where a grant of citizenship is warranted. The Minister should have the power to deal with those unusual and compelling circumstances appropriately.

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42. K Rubenstein, Director of the Centre for International and Public Law, ANU College of Law, ANU, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, p.2.

43. Australian Lawyers for Human Rights, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009*, viewed 10 August 2009, <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=ae38af8b-a9a3-41aa-be20-a218f67ad0c5>

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VLA does not accept that the presence of a broad discretion under s.21(5) threatens the “integrity of the citizenship and migration programs.”...<sup>44</sup>

## Application

**Item 9** provides that amendments made by items 2, 3, 4, 5, 7 and 8 apply to applications made on or after those items commence. However, item 2 does not apply in relation to a person *if* an application is made on or after that commencement and the Minister is satisfied that prior to that commencement, they had already successfully completed a test.

## Schedule 2 Amendments

### Amendments to be moved on behalf of the Government relating to special residence requirements

On 31 August 2009 the Minister for Immigration and Citizenship announced that the Government proposed to introduce changes to Australia’s residency requirements. According to the Minister, ‘these changes will create a smoother path to citizenship for elite athletes and people in specialist professions and enable Australia to benefit from the talents and skills they bring to our country’:

The revamped requirements will create a fairer system for people who, due to circumstances beyond their control, are currently ineligible for citizenship. These changes will lead to more gold medals for Australia at sporting events, as well as providing a real win for the national workforce.<sup>45</sup>

An article in the *Australian Financial Review* observed that following the changes, ‘Russian-born ice skater Tatiana Borodulina would be eligible to compete for Australia at next year’s Winter Olympics in Vancouver’. It also reported that Tennis Australia’s Director ‘was delighted with the changes’ because ‘it is impossible for tennis players to become citizens while continuing in their profession because of the amount of time they are required to be in Australia’.<sup>46</sup>

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44. Victoria Legal Aid, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Australian Citizenship Amendment (Citizenship Test Review and other Measures) Bill 2009*, viewed 10 August 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=8e4c2232-92fc-4096-b1e3-319c5f7e2136>
  45. C Evans, ‘Citizenship changes for elite athletes and frequent flyers’, *media release*, 31 August 2009, viewed 9 September 2009, <http://www.chrisevans.alp.org.au/news/0809/immimediarelease31-01.php>
  46. A Symonds, ‘Fast lane for sporting migrants’, *Australian Financial Review*, 1 September 2009, p.7.

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However, the Shadow Minister for Immigration and Citizenship, the Hon Dr Sharman Stone MP was reported to have commented that ‘other migrants would be “quite rightly annoyed” at a “special class for those to [sic] win medals just for Australia”’.<sup>47</sup>

On 8 September the Senate Committee inquiring into the Bill finalised its [report](#) in which it recommended that the Bill be passed. However, the Senate Committee did not inquire into Schedule 2 of this Bill and therefore in effect only considered half the Bill (Schedule 1). It did not consider the amendments to be moved on behalf of the Government to introduce the special residency requirement (Schedule 2) as these were only made publicly available on 9 September 2009. It is not clear why these proposed amendments were introduced three months after the Bill was introduced. Moreover, these amendments are not directly related or consequential to the amendments contained in Schedule 1 of the Bill.

### **The current residency requirement and existing flexibilities**

Existing paragraph 21(2)(c) of the Act provides that a person is eligible to become an Australian citizen if (amongst other things) the Minister is satisfied that the person satisfies the residency requirement as set out in existing section 22 of the Act. A person satisfies the residency requirement if they are lawfully present in Australia for a period of four years, including a period of 12 months as a permanent resident immediately prior to making their application.<sup>48</sup> Prior to 1 July 2007, under the (repealed) *Australian Citizenship Act 1948* (the 1948 Act), a person was only required to have been physically present in Australia as a permanent resident for periods totalling at least two years out of the five years immediately before applying including one year during the two years immediately before applying.<sup>49</sup>

The current Act, like its predecessor contained numerous exemptions and concessions to the residency requirement for a person:

- who has overseas absences;
- who has been confined in prison or psychiatric institution;
- who is the spouse or de facto (including same-sex) partner of an Australian citizen;

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47. A Symonds, ‘Fast lane for sporting migrants’.

48. ‘Schedule 3 (Application and transitional provisions) of the Transitional Act provides that in the absence of any other relevant provisions, the residence requirements of the old Act (one in two years and two in five years) apply to people who became permanent residents before the commencement of the Act [1 July 2007], provided they apply for citizenship before 1 July 2010’: Department of Immigration and Citizenship (DIAC), Citizenship Instructions as at 1 July 2009, ‘Chapter 5: Citizenship by conferral’, accessed using Legend database.

49. Subparagraph 13(1)(d) and (e) of the *Australian Citizenship Act 1948*.

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- who is the surviving spouse or de facto (including same-sex) partner of an Australian citizen;
- who is in an interdependent relationship with an Australian citizen;
- who would suffer significant hardship or disadvantage;
- who was subject to an administrative error.<sup>50</sup>

Existing flexibilities within the current Act to cater for the people specifically targeted by the Schedule 2 amendments will be briefly discussed below.

#### Overseas absences

Existing subsections 22(1A) and (1B) of the Act provide that ‘a person must have been *present in Australia* for at least three of the four years immediately prior to application, including at least nine months in the 12 months prior to application’.<sup>51</sup>

This in effect means that a person could spend a total of 12 months overseas (in the four years before lodging their application) including three months in the 12 months prior to lodging their application (as a permanent resident) and still satisfy the existing residency requirement for citizenship.

#### Significant hardship or disadvantage

Under existing subsection 22(6) ‘periods of lawful residence, other than permanent residence, can be treated as periods of permanent residence if the applicant can demonstrate that they would suffer significant hardship or disadvantage if those periods were not treated as periods of permanent residence’.<sup>52</sup> The Department’s Citizenship Instructions provide guidance on what would constitute significant hardship or disadvantage. It might include:

academic (eg research, academic scholarship) or **other (sporting etc) potential is being limited or restricted**, because the opportunities to reach that potential is

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50. See subsections 22(1)—(11) *Australian Citizenship Act 2007*. There are other exemptions for people who have completed defence service etc.

51. DIAC, Citizenship Instructions as at 1 July 2009, ‘Chapter 5: Citizenship by conferral’, accessed using Legend database.

52. DIAC, Citizenship Instructions as at 1 July 2009, ‘Chapter 5: Citizenship by conferral’, accessed using Legend database.

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available only to an Australian citizen, to the extent that it causes significant hardship (emphasis added).<sup>53</sup>

In addition, it is interesting to note that under paragraph 13(4)(b) of the (now repealed) 1948 Act, the Minister also had discretion to treat a period during which the applicant (as a permanent resident) was not in Australia as a period in which they *were* in Australia if they were engaged in activities that the Minister considered ‘**beneficial to the interests of Australia**’.<sup>54</sup> There is no corresponding provision within the existing Act to broadly make concessions to the residency requirement on this basis.

Schedule 2 proposes to create two distinct residence requirements. Existing section 22 will remain the same and contain the *general* residence requirements while **proposed section 22A** will create *special* residency requirements for persons representing Australia at international events and **proposed section 22B** will create *special* residency requirements for persons engaged in specified kinds of work which require the person to travel regularly outside Australia.

**Items 1, 2 and 3** of the Schedule of Government Amendments propose to substitute in paragraphs 21(2)(c), 21(3)(c) and 21(4)(d) references to ‘residence requirement’ with references to ‘general residence requirement’ and ‘special residence requirement’.

**Item 4** substitutes the reference in **subsection 22(1)** to residence requirement with general residence requirement and amends the heading to section 22 to ‘General residence requirement’.

### Special Residence Requirement A – persons representing Australia at international events

**Item 5 inserts new section 22A** relating to special residence requirements for persons representing Australia at international events. The applicant must meet all the requirements set out in proposed section 22A.

The applicant must satisfy the following criteria:

- the applicant seeks to represent Australia at an international event specified in subsection 22C(1)<sup>55</sup>; and

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53. DIAC, Citizenship Instructions as at 1 July 2009, ‘Chapter 5: Citizenship by conferral’, accessed using Legend database.

54. see subparagraph 13(4)(b)(ii). The Minister could also treat a period ending before the five years referred to in paragraph 13(1)(e) as a period within the five years.

55. Proposed subsection 22C(1) provides that the Minister may by legislative instrument specify the international events that apply.

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- the applicant needs to be an Australian citizen to do so; and
- there is insufficient time for the applicant to satisfy the general residence requirement; **and**
- the head of an organisation specified in subsection 22C(2)<sup>56</sup> or a person of senior position states in writing to the Minister that the applicant has a ‘reasonable prospect’ of being selected to represent Australia at that event; **and**
- the applicant has been in Australia for at least 180 days during the two year period immediately before making the application; **and**
- the applicant was in Australia for at least 90 days during the 12 month period immediately before making the application; **and**
- the applicant was ordinarily resident in Australia during the two year period immediately before making the application; **and**
- the applicant was a permanent resident for the period of two years immediately before making the application; **and**
- the applicant was not an unlawful non-citizen during the two year period immediately before the applicant made the application.

As previously mentioned, a person satisfies the current residency requirement if they are lawfully present in Australia for a period of four years, including a period of 12 months as a permanent resident immediately prior to making their application. Under this proposed amendment the time a person must actually be physically ‘present in Australia’ will be reduced and the time a person must be a permanent resident will increase. In summary, a person will satisfy the special residency requirement if they are:

- ‘ordinarily resident’ in Australia throughout the period of two years (as a permanent resident) immediately prior to making their application; and
- ‘present in Australia’ for a total of at least 180 days (which is approximately 6 months) during that period (two years), including at least 90 days (which is approximately 3 months) in the year immediately before applying; and
- satisfy the other criteria of proposed subsection 22A(1).

**Proposed subsection 22A(2)** provides that an applicant who has been confined in a prison or a psychiatric institution by order of a court will not satisfy the requirement in paragraph 22A(1)(c) of having to be present in Australia for at least 180 days before making the application. However the Minister may decide under **proposed subsection 22A(3)** that subsection (2) does not apply to the applicant and that it would be unreasonable for it to

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56. Proposed subsection 22C(2) provides that the Minister by legislative instrument specify the organisations who may give notice to the Minister of an applicant with a ‘reasonable prospect’ of representing Australia at an event.

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apply having taken the circumstances that led to the confinement into account. Significantly, proposed subsections (2) and (3) mirror existing provisions of the Act in subsections 22(1C) and 22(5A) relating to the current residence requirement.

**Proposed subsection 22A(4)** provides the Minister with discretion to treat a period as one where the applicant was a permanent resident but because of an administrative error, the applicant was not a permanent resident during that period for the purposes of paragraph 1(f). Similarly, this provision mirrors existing subsection 22(5) under the general residence requirement.

**Proposed subsection 22A(5)** provides that for the purposes of paragraph 1(g) the Minister has discretion to treat a period as one in which the applicant was not in Australia as an unlawful non-citizen but because of an administrative error, the applicant was an unlawful non-citizen during that period. This provision mirrors a provision in existing subsection 22(4A) under the general residence requirement.

### Special residence requirement B – persons engaged in particular kinds of work requiring regular travel outside Australia

**Proposed section 22B** inserts criteria concerning the special residence requirement for persons engaged in particular kinds of work that takes them regularly out of Australia. The following criteria apply to persons in this category:

- the person is engaged in work that is specified in subsection 22C(3)<sup>57</sup> which requires the person to travel regularly outside Australia; **and**
- the person was engaged in that work for at least two years out of a four year period immediately before the person made an application and that during that four year period the person travelled regularly outside Australia as a requirement of that work; **and**
- the person was in Australia for 480 days during the four year period immediately before the person made an application; **and**
- the person was in Australia for 120 days during the 12 month period immediately before the person made an application; **and**
- the person was a permanent resident for 12 months immediately before the person made the application; **and**
- the person was not an unlawful non-citizen during the four year period immediately before the person made the application.

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57. **Proposed subsection 22C(3)** provides that the Minister may specify via a legislative instrument kinds of work for the purposes of paragraph 22B(1)(a). The Minister's media release suggests examples of international airline pilots and offshore oil rig workers: C Evans, op.cit.

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In summary, a person will satisfy the special residency requirement if they are:

- ‘ordinarily resident’ in Australia during the four years prior to making the application;
- physically ‘in Australia’ for a total of at least 480 days (which is approximately one year and four months) in the four years prior to making the application, including at least 120 days (which is approximately four months) in the year immediately prior to making their application; and
- a permanent resident for the duration of the year immediately before lodging the application; and
- satisfy the other criteria of proposed subsection 22B(1).

Therefore, while the person needs to be ‘ordinarily resident’ (as opposed to physically present) in Australia for a period of four years prior to making the application, this amendment will significantly reduce the amount of time the person is required to be physically present in Australia. The amount of time the person is required to be a permanent resident will remain unchanged.

It is not clear how ‘regularly’ a person is required to travel outside Australia in order to come within the ambit of **proposed subsection 22B(1)(a)**.

**Proposed subsection 22B(2)** provides that if a person was confined in a prison or a psychiatric institution by order of a court, the person does not satisfy the requirement in subsection 22B(1)(c) that the person be in Australia for at least 480 days during a four year period. The Minister may however decide under **proposed subsection 22B(3)** that subsection (2) does not apply to the person having taken the person’s circumstances into account and that it would be unreasonable to apply subsection (2).

Note that proposed subsections (2) and (3) mirror existing provisions in subsections 22(1C) and 22(5A) under the general residence requirement.

### Approval when persons not present in Australia

Existing subsection 24(5) prevents the Minister from approving certain people becoming citizens when they are not physically present in Australia. **Proposed paragraph 24(5)(aa)** provides in effect that the Minister can approve a person becoming an Australian citizen if they satisfy the new special residence requirements referred to in proposed sections 22A or 22B even if they are not physically present in Australia at the time.

### Application

**Item 8** states that the amendments made by Schedule 2 will apply to applications made on or after it commences (the day the Act receives Royal Assent).

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## **Concluding comments**

### Schedule 1

The Bill implements certain of the recommendations of the Australian Test Review Committee concerning the streamlining of processes relating to the conduct of the citizenship test. It implements another recommendation of the Committee concerning persons with physical or mental incapacity as a result of suffering torture or trauma before coming to Australia. However, the Parliament may wish to also consider the group of persons who are part of the Humanitarian stream but who have not suffered torture or trauma outside Australia but who may have developed some form of mental illness subsequent to their arrival in Australia perhaps as a result of their time spent in detention. As discussed above, a number of submissions to the Senate Standing on Legal and Constitutional Affairs' inquiry into the Bill have expressed strong concerns regarding the proposed amendments requiring children to be permanent residents.

### Schedule 2

In September 2009 the Government announced that it intended to move amendments to the Bill. These amendments propose to insert new provisions into the Act to expand the residency requirements to create *special* residency requirements for specific people who may have difficulty satisfying the existing residential requirements. Though there may arguably be a need to restore greater flexibility in the Act to specifically address the difficulties experienced by elite sportspeople and people in occupations requiring regular travel outside Australia it may similarly be argued that the proposed amendments introduce an unnecessary level of specificity and complexity to the 2007 Act. To this end, it is worth remembering that the 1948 Act was replaced by the 2007 Act which was designed to amongst other things improve clarity and ease of use. The proposed insertion of special residency requirements (through proposed sections 22A and 22B) may also be viewed critically on the basis that these provisions have not received the same level of scrutiny as the other provisions of the Bill. In addition, it may be arguable that notwithstanding existing flexibilities in the Act, the proposed ability to 'fast-track' the citizenship of certain people who have spent significantly less time in Australia may sit uneasily with other potential citizens whose citizenship may be of equal or greater benefit to Australia.

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