

# CHAPTER 4

## LEGAL AND OTHER ISSUES

4.1 This chapter discusses the following issues:

- legal and drafting issues;
- the content and nature of the proposed test;
- resourcing and alternatives to citizenship testing; and
- other issues.

### **Legal and drafting issues**

4.2 Several legal and drafting issues were raised during the committee's inquiry, including:

- the nature and breadth of the Minister's determination; and
- the Bill's commencement clause.

### ***Proposed ministerial determination***

4.3 Item 5 of the Schedule to the Bill would insert a new section 23A in the principal Act. Specifically, subsection 23A(1) would require the Minister to make a written determination to approve a test for the purposes of the proposed new subsection 21(2A).<sup>1</sup> Subsection 23A(7) declares that a determination made under subsection (1) is not a legislative instrument.

4.4 The Senate Scrutiny of Bills Committee observed that:

If the determination of a proposed citizenship test is not of a legislative character, then it may be considered not to apply generally to a group of people, but is more of an administrative decision tailored to a particular applicant for Australian citizenship... If the determination is taken to be an administrative decision to approve a test for a particular applicant, then there does not appear to be any provision in the bill for the determination to be subject to any form of merits review under the *Administrative Appeals Tribunal Act 1975*.<sup>2</sup>

4.5 The Department responded to this concern as follows:

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1 Subsection 21(2A) would oblige persons applying for Australian citizenship to sit and successfully complete a test to demonstrate that they understand the nature of their application, that they possess a basic knowledge of English and an adequate knowledge of Australia and the responsibilities and privileges of citizenship.

2 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 6 of 2007*, pp 18-19.

This view seems to be based on the Committee's reading of paragraph 5(2)(a) of the *Legislative Instruments Act 2003* (LI Act), which provides that an instrument is taken to be of a legislative character if, among other things, "it determines the law or alters the content of the law, rather than applying the law in a particular case".

It does not follow, however, that if an instrument does not determine the law or alter the content of the law it must be an instrument that applies the law in a particular case. An instrument that does not determine the law or alter the content of the law may nevertheless be an instrument that applies the law (or makes provision for its application) to a group of people. The Government is of the view that the power in section 23A(1) is a power to make a determination that applies generally and not in relation to a particular case or cases and therefore merits review is not appropriate.

Whatever the precise 'character' of a determination under proposed section 23A(1), the Government does not believe that such a determination, which will approve the content of the new citizenship test, should be subject to the disallowance provisions of the LI Act.<sup>3</sup>

4.6 In oral evidence the Department stated that:

It is also the government's view that the determination should not be the subject of disallowance provisions in the Legislative Instruments Act. This is because the government believes that this is likely to be a source of uncertainty and confusion, especially where potential applicants have sat and passed a test that may then be disallowed.<sup>4</sup>

4.7 HREOC in supplementary evidence informed the committee that under section 15 of the *Legislative Instruments Act 2003* there would be no legal confusion in relation to any rights that might have accrued prior to a disallowance of, or motion to disallow, the minister's determination. According to HREOC, that section of the Act and particularly subsections (b) and (c) make it clear that any rights that have accrued prior to a disallowance or motion to disallow would not be affected.<sup>5</sup>

4.8 HREOC assumed therefore that the 'uncertainty' to which the Department referred would result from the period of time that the Parliament might take to resolve any disallowance motion. HREOC submitted that either administrative or legislative steps could easily be taken to avoid the 'uncertainty', specifically, that:

At the administrative level, the Minister could ensure ... that the test would not be implemented pending resolution of the matter within Parliament. Alternatively, the instrument could be drafted in such a way that either it

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3 *Submission 30*, p. 3.

4 *Committee Hansard*, 16 July 2007, p. 25.

5 HREOC, *Answers to Questions on Notice*, Received 24 July 2007, pp 3-4.

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does not come into effect until the 15 sitting days have elapsed, or if a motion for disallowance is put, pending the outcome of the motion.<sup>6</sup>

4.9 Several other witnesses also commented on matters to do with ministerial discretion, particularly on the breadth of ministerial discretion in the Bill and whether the Minister's determination should be a legislative instrument.

4.10 The Western Australian Government, for example, having canvassed the definition of a legislative instrument as defined under section 5 of the Legislative Instruments Act, submitted that it is 'unclear why the Minister's determination [under proposed subsection 23A(7)] does not have the character of a legislative instrument and [is] therefore capable of being reviewed by Parliament'.<sup>7</sup> The Western Australian Government also submitted that:

While it would not be appropriate for the details referred to in s23A to be contained in the Bill, it would be appropriate that they be made through legislation and therefore subject to an appropriate level of public scrutiny.<sup>8</sup>

4.11 The Centre for Human Rights Education submitted that:

... the Bill provides that there will be a test that a person has to complete and it is for the Minister to approve the actual test by "written determination" (s. 23A(1)) and to also determine what amounts to successful completion of the test (s. 23A(2)). Where then does this leave any scrutiny by Parliament? The design and structure of any proposed test should be transparent, objective and open to public consultation and scrutiny.<sup>9</sup>

4.12 Another submission argued that:

There seems to be no restriction on the minister making determinations on the content, passing grades, means of administration or eligibility to set the test on an individual-by-individual basis, opening up the possibility for abuse similar to that a few decades ago when a test "in a language of the British Isles" was given to a continental European in Gaelic ...<sup>10</sup>

4.13 The B'nai B'rith Anti-Defamation Commission stated that:

It is unsatisfactory for legislation to be passed which leaves all aspects of a proposed scheme to the discretion of the Minister. While the intention at

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6 HREOC, *Answers to Questions on Notice*, Received 24 July 2007, p. 4.

7 *Submission 24*, p. 2.

8 *Submission 24*, p. 2.

9 Centre for Human Rights Education, Curtin University of Technology, *Submission 2*, p. 6; see also CMCF, *Submission 46*, p. 2.

10 Mr David T Bath, *Submission 9*, p. 3.

this time may be innocuous, legislation of this nature should not, as a matter of principle, be allowed to pass through Parliament and to become law.<sup>11</sup>

4.14 Similarly, Ms Anna Samson of the Refugee Council of Australia was concerned that the Bill 'leaves some of the most contentious aspects of the policy within the sole purview of the Minister and beyond the scrutiny of the legislature.'<sup>12</sup> Indeed, some witnesses described the Bill as 'shell legislation'.<sup>13</sup>

4.15 The Australian Christian Lobby, however, submitted that the test questions should be approved by the Minister as a representative of the people.<sup>14</sup>

4.16 To reduce the potential for ministerial discretion, VIRWC suggested that the proposed test should be approved by an independent panel of reputable experts, rather than the Minister.<sup>15</sup> Similarly, the NSWCCCL felt that the Bill should require the test be submitted to a consultative committee.<sup>16</sup>

4.17 HREOC contended that:

... on the one hand, the legislation confers too much discretion on the minister in formulating a citizenship test ... In this regard, the amendments do not limit the minister's discretion or subject it to external scrutiny. On the other hand, HREOC submits that there is insufficient discretion conferred on the minister to formulate alternatives or waive a formal test for applicants with special circumstances or in cases of hardship.<sup>17</sup>

4.18 In its submission to the inquiry, HREOC submitted that the Minister's determination of the proposed citizenship test under proposed section 23A should be made a legislative instrument. HREOC argued that:

The importance of citizenship to Australia's future and its implications for compliance with international human rights standards warrants parliamentary scrutiny of any instrument creating a new citizenship test. This oversight will enhance the credibility of the test process before it is applied to prospective Australian citizens. Additional Parliamentary scrutiny will also ensure that any provisions beyond the scope of the test initially foreseen by Parliament when drafting the empowering act can be addressed.<sup>18</sup>

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11 *Submission 42*, p. 4.

12 *Committee Hansard*, 17 July 2007, pp 9-10.

13 See, for example, Professor Kim Rubenstein, *Committee Hansard*, 16 July 2007, p. 12.

14 *Submission 47*, p. 1.

15 *Submission 20*, p. 5.

16 *Submission 32*, p. 3.

17 Ms Margaret Donaldson, HREOC, *Committee Hansard*, 17 July 2007, p. 1.

18 *Submission 41*, p. 4; see also Dr Ben Saul, Sydney Centre for International and Global Law, *Submission 27*, p. [1]; NSWCCCL, *Submission 32*, p. 6; RACS, *Submission 39*, p. 6.

4.19 HREOC acknowledged that making the determination a disallowable instrument could disclose the test questions. It proposed two possible approaches to address that potential problem.

4.20 First, the Minister's determination might contain the full list of potential questions and state that the test would comprise 20 questions drawn at random from that list. HREOC submitted that there would be a mechanism for ensuring scrutiny over the appropriateness of the questions but that even though the questions would potentially be disclosed, an applicant would effectively need to learn the answers to all of those questions.<sup>19</sup>

4.21 Alternatively, HREOC suggested that the Parliament might delineate in the Bill between:

- a. the Minister's determination on the nature, form, source material and essential features of the test; and
- b. the Minister's determination on the actual questions comprising the test.<sup>20</sup>

4.22 The Victorian Bar informed the committee that in Canada, although the Minister is responsible for compiling the citizenship test, the Minister is guided by the *Citizenship Regulations* 1993 which expand on what 'knowledge of Canada and of the responsibilities of citizenship is to be tested'.<sup>21</sup> The Victorian Bar submission elaborated on the contents of the Canadian regulations as follows:

... regulation 15 describes what is to be tested, and it is all 'knowledge', not the 'acceptance of values' that is the theme of the Australian Minister's second reading speech. Regulation 15 identifies the things of which an applicant for Canadian citizenship is required to have a general understanding: the right to run for elected office, and to vote in federal, provincial and municipal elections; and the chief characteristics of Canadian social, cultural and political history and geography.<sup>22</sup>

4.23 HREOC also referred to the Canadian legislation, noting that it 'more closely confines ministerial discretion than that proposed by the Bill',<sup>23</sup> but concluded that rather than adopt that example it would be preferable if the test were a disallowable instrument.<sup>24</sup> In answer to a question, a witness from HREOC acknowledged that the Parliament would be able to disallow a regulation in its entirety, but would not be able to amend it. The witness concluded that having a regulation tabled and having the

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19 *Submission 41*, p. 5.

20 *Submission 41*, p. 5.

21 *Submission 55*, p. 5.

22 *Submission 55*, p. 5.

23 Ms Margaret Donaldson, *Committee Hansard*, 17 July 2007, p. 2.

24 Ms Margaret Donaldson, *Committee Hansard*, 17 July 2007, p. 3.

opportunity for debate might provide the people affected with some assurance or comfort.<sup>25</sup>

### ***Commencement***

4.24 The Scrutiny of Bills Committee expressed concern that the provisions of the Schedule are to commence on Proclamation, but that no time has been specified within which the amendments must commence. That committee has sought the Minister's advice as to whether it would be possible to make the necessary arrangements for the test and for any computer systems needed to conduct the test within a fixed period after Assent to limit the 'currently unfettered discretion granted to the Minister'.<sup>26</sup>

4.25 The Department informed this committee that the Government intends to commence testing on 17 September 2007 'subject to the passage of the legislation through the Parliament and meeting logistical requirements within a short time frame'.<sup>27</sup> A Departmental witness told the committee during the public hearing on 16 July that the Department is currently 'on track to meet this date'.<sup>28</sup>

### ***Other drafting issues***

4.26 Two other significant issues were raised in relation to the drafting of the Bill.

#### *Ambiguity about test questions*

4.27 HREOC submitted that ambiguity exists in relation to whether the test questions would necessarily be related to the eligibility criteria. HREOC considered that proposed section 23A should be clarified, as it does not specifically require the citizenship test to be related to the eligibility criteria in paragraphs 21(2)(d), (e) and (f). HREOC recommended that, to avoid any potential ambiguity, the wording of proposed subsection 23A(1) should be amended to make clear that the content of any test is directly referable to the criteria in paragraphs 21(2)(d),(e) and (f).<sup>29</sup>

4.28 In response to questions on this suggestion, the Department noted:

Proposed subsection 21(2A) expressly states that paragraphs 21(2)(d), (e) and (f) are taken to be satisfied, if and only, the person sat a test approved in a determination under section 23A and proposed section 23A expressly states that the Minister must by written determination approve a test for the purposes of subsection 21(2A).

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25 Ms Margaret Donaldson, *Committee Hansard*, 17 July 2007, p. 4.

26 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 6 of 2007*, p. 18.

27 *Submission 30*, p. 1.

28 *Committee Hansard*, 16 July 2007, p. 25.

29 *Submission 41*, p. 3; see also Ms Margaret Donaldson, HREOC, *Committee Hansard*, 17 July 2007, pp 5-6.

The department considers that there is no ambiguity and that it is clear that the content of any test is directly referable to the criteria in 21(2)(d), (e) and (f). Indeed, a test approved under proposed subsection 23A(1) may only be for the purposes of proposed subsection 21(2A) and those purposes relate only to the criteria in 21(2)(d), (e) and (f).<sup>30</sup>

### *Eligibility criteria*

4.29 Some witnesses submitted that under proposed subsection 23A(3) the Minister would have an unfettered discretion to determine eligibility criteria for persons sitting the test. HREOC, for example, suggested that proposed subsection 23A(3) be removed from the Bill because that section would allow the Minister's determination to set out additional eligibility criteria for sitting the proposed test. HREOC submitted that, in view of the eligibility criteria in subsection 21(2) of the Bill, there is no need to provide further criteria that must be satisfied in order to sit the test. Ms Donaldson of HREOC described this power as 'superfluous and unnecessary' and further submitted that:

The inclusion of additional eligibility criteria might lead to a situation where the minister is able to block certain applicants from taking the test despite these applicants satisfying all other eligibility criteria for citizenship.<sup>31</sup>

4.30 The Department responded to this concern as follows:

... the concern is that a determination may establish eligibility criteria that are inappropriate and unfair, with no parliamentary scrutiny and no opportunity for disallowance. Our legal advice is that the determination making power in proposed section 23A does not allow the minister to set eligibility criteria for sitting the test that are inconsistent with the provisions of the act and, in particular, with the general eligibility criteria in subsection 21(2).

... The power is required for two purposes. One is to ensure that the resources available for testing are used only for prospective citizens. The second is to enable access to any special tests ... to be limited to those for whom the special test is intended.

...To help alleviate the concerns about test eligibility criteria, the government intends to amend the bill by inserting a note that will explain that the power [to] set eligibility criteria to sit the test does not allow the minister to set criteria that are inconsistent with the act and, in particular, inconsistent with the general eligibility criteria for citizenship.<sup>32</sup>

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30 Answers to Questions on Notice, received 27 July 2007, referred to as [Question 1 (written)].

31 *Committee Hansard*, 17 July 2007, p. 2.

32 *Committee Hansard*, 16 July 2007, pp 25-26.

## Testing 'knowledge of Australia': content and nature of the test

4.31 As outlined in Chapter 2, the proposed citizenship 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, which must be answered correctly. The Department stated in its submission that 'the test questions will assess knowledge of Australian history, culture and values based on information contained in a citizenship test resource book'.<sup>33</sup>

### *What are Australian values?*

4.32 Concerns were raised during the committee's inquiry about the possible content and potentially subjective nature of the proposed citizenship test questions. In this context, many submissions were critical of the testing of 'Australian values'.<sup>34</sup>

4.33 As outlined earlier in this report, several submissions queried the efficacy of the test as means of testing commitment to such values.<sup>35</sup> Many also objected to the concept of 'values' as too subjective. For example, the NSWCCCL argued that:

There is no objective way to determine what are the 'common values we share'... Virtually no values could be identified which are universally held by Australian citizens.<sup>36</sup>

4.34 Similarly, the Centre for Human Rights Education at the Curtin University of Technology was concerned that:

The idea of 'Australian values' is particularly subjective and open to considerable manipulation and political skulduggery. On a practical level we also query how such knowledge would be tested. How do we formulate a multiple choice question that would adequately test and assess a person's "values"?<sup>37</sup>

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33 *Submission 30*, p. 2; see also The Hon. Kevin Andrews MP, Minister for Immigration and Citizenship, *House Hansard*, 30 May 2007, p. 4.

34 See, for example, Scots of Victoria, *Submission 3*, p. 1; Professor Ingrid Piller, *Submission 19*, p. 11; VIRWC, *Submission 20*, p. 5; Federation of Community Legal Centres (Vic), *Submission 28*, p. 2; National Council of the St Vincent de Paul Society, *Submission 35*, p. 1; CMCF, *Submission 46*, p. 2; The Victorian Bar, *Submission 55*, p. 3; Community Relations Commission, *Submission 56*, p. 1; Ms Misty Adoniou, ACTA, *Committee Hansard*, 16 July 2007, p. 20; Dr Martin Bibby, NSWCCCL, *Committee Hansard*, 17 July 2007, p. 15; cf Dr Stephen Chavura, Festival of Light, *Committee Hansard*, 17 July 2007, p. 27; the Hon. Dr Bob Such, MP, *Submission 16*, p. [1].

35 See, for example, Professor George Williams, *Submission 7*, pp 1-2.

36 *Submission 32*, p. 2; see also Dr Martin Bibby, NSWCCCL, *Committee Hansard*, 17 July 2007, pp 15-16.

37 *Submission 2*, p. 6; see also Castan Centre, *Submission 14*, p. 2.



4.35 Mr Sam Wong of the Canberra Multicultural Community Forum also told the committee that:

It is almost impossible to draft questions to test Australian values, particularly concerns like mateship, respect for freedom or commitment to democracy. Testing people on common values, which implies that there is only one set of Australian values and one type of Australian citizen, undermines the vital role that multiculturalism and diversity play in Australian society.<sup>38</sup>

4.36 Several submissions pointed out that the government's discussion paper on the citizenship test listed several values – such as freedom, democracy, respect for the rule of law, equality, non-discrimination – which are not uniquely Australian.<sup>39</sup> FASSTT suggested that 'as such, there should not be an expectation that potential citizens do not already hold these values'.<sup>40</sup>

4.37 There was also some discussion during the committee's inquiry as to the extent to which Australia's Judeo-Christian heritage should be acknowledged and reflected in the proposed test. For example, the Centre for Human Rights Education at the Curtin University of Technology was concerned about:

...reports that the test will be focused on applicants demonstrating an understanding of "Judeo-Christian" values and British/Western traditions. Such values and traditions do not necessarily reflect the multicultural composition of Australia today.<sup>41</sup>

4.38 However, the Australian Christian Lobby told the committee that it:

...strongly supports the Minister's comments that applicants should be required to acknowledge Australia's Judeo-Christian heritage. This does not require prospective citizens to share the Judeo-Christian faith, but it would make clear that their new country's historical context is Judeo-Christian, rather than of any other faith or ideology.<sup>42</sup>

4.39 In response to a question from the committee as to whether it would be desirable to include in the test questions about Australia's Judeo-Christian heritage, a departmental witness responded that:

... part of Australia and its history would go to our belief system, so I imagine that that is an area that will be covered in the resource book.<sup>43</sup>

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38 *Committee Hansard*, 16 July 2007, p. 2.

39 VIRWC, *Submission 20*, p. 5; FASSTT, *Submission 8*, p. 4.

40 *Submission 8*, p. 4.

41 *Submission 2*, p. 6.

42 *Submission 47*, p. 1; see also Mr David Yates, Australian Christian Lobby, *Committee Hansard*, 16 July 2007, pp 8, 9-10.

43 *Committee Hansard*, 16 July 2007, p. 28.

### ***English language issues***

4.40 Another issue raised frequently in evidence was the requirement for prospective citizens to demonstrate a basic knowledge of the English language.<sup>44</sup> For example, it was felt that this requirement could discriminate against prospective citizens from a non-English speaking background. It was also pointed out that people with limited English skills can still make an important contribution to Australian society.<sup>45</sup>

4.41 On the other hand, some witnesses felt that the requirement for a basic knowledge of English was appropriate. For example, the Festival of Light Australia submitted that 'before citizenship is granted, applicants should be required to demonstrate a level of English sufficient to allow them to understand and participate in the political process.'<sup>46</sup> Similarly, Mr David Yates of the Australian Christian Lobby told the committee that :

It is exactly the same as most other countries that have tests. Again, Holland, the UK, Canada, the USA and South Korea all require a basic understanding of their own native tongue. We do not see why it should be any different in Australia. We do recognise that there are some people on the humanitarian visa side who may not necessarily have a proficiency in English, but to operate in the country we think it is common sense to at least have a basic knowledge of English. So we strongly support that an outcome of becoming a citizen requires that you do have a basic knowledge.<sup>47</sup>

4.42 The committee notes that paragraph 21(2)(e) of the Act currently requires the Minister to be satisfied that an applicant for citizenship by conferral has (among other things) a basic knowledge of English, and this requirement is not being amended by the Bill.<sup>48</sup>

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44 See for example, Centre for Human Rights Education, Curtin University of Technology, *Submission 2*, p. 4; Queensland Public Interest Law Clearing House, *Submission 22*, p. 2; Australian Catholic Migrant and Refugee Office, *Submission 48*, p. 1; cf Festival of Light Australia, *Submission 4*, pp 1-2.

45 See, for example, Ms Voula Messimeri-Kianidis, FECCA, *Committee Hansard*, 16 July 2007, p. 3; FECCA, *Submission 51*, p. 3; Mr Sam Wong, CMCF, *Committee Hansard*, 16 July 2007, p. 4; Mr Paul Power, Refugee Council of Australia, *Committee Hansard*, 17 July 2007, p. 8.

46 *Submission 4*, p. 1.

47 *Committee Hansard*, 16 July 2007, pp 10-11.

48 See also the Department, *Committee Hansard*, 16 July 2007, pp 26 and 35.

4.43 However, some submitters were concerned that the proposed test may actually require more than a basic knowledge of English, and would therefore exceed the requirements of the Act.<sup>49</sup> For example, according to Professor Tim McNamara:

...if such a test were administered exclusively in English, and as a written test, it would represent a de facto language test at a far higher level than is required in the legislation and would also represent a literacy test.<sup>50</sup>

4.44 In the same vein, Ms Adoniou of ACTA told the committee that the proposed test questions would be 'an extraordinarily difficult English language hurdle for people to jump over'.<sup>51</sup>

4.45 The NSWCCCL suggested that the resource booklet supporting the test should be available in various languages.<sup>52</sup> The NSWCCCL also suggested that the Bill should require the Minister to make the citizenship test available in a language of the applicant's choice.<sup>53</sup>

4.46 A representative from the Department told the committee that the resource booklet will only be made available in the English language, and 'the fact that the test will be conducted in English makes it important that the resource materials are based in English'.<sup>54</sup> At the same time, the representative reiterated that applicants for citizenship, including refugee and humanitarian entrants, are currently already required to satisfy requirements that they have a basic understanding of English and an adequate knowledge of their rights and responsibilities.<sup>55</sup>

4.47 The representative also suggested that the citizenship test and application is 'part of a journey rather than simply a destination in itself' and that:

The department is placing increasing and significant emphasis on pre-visa or information at the time of visa. We are revamping material that has existed for many years about life in Australia and soon we will be producing a new document called Life in Australia. It will be available in a full range of community languages and provide very similar information about life in Australia as will be contained in the citizenship test book. People will have had access to that sort of material in their own language or certainly in more than 20 languages some years before they have considered

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49 NSWCCCL, *Submission 32*, p. 4; Professor Tim McNamara, *Submission 33*, p. 12; ACTA, *Submission 34*, p. 1; RACS, *Submission 39*, p. 2; Australian Christian Lobby, *Submission 47*, p. 2.

50 *Submission 33*, p. 12.

51 *Committee Hansard*, 16 July 2007, p. 21.

52 *Submission 32*, p. 3.

53 *Submission 32*, p. 5; see also ACTA, *Submission 34*, p. 4 and Ms Katie Wrigley, RACS, *Committee Hansard*, 17 July 2007, p. 24.

54 *Committee Hansard*, 16 July 2007, p. 26.

55 *Committee Hansard*, 16 July 2007, p. 26.

applying for citizenship. So I think we regard citizenship as being the final step of fully participating in the Australian community, but it follows many other steps that have occurred in the journey of the person from being a visa applicant to becoming a prospective citizen.<sup>56</sup>

### *Availability of questions and supporting material*

4.48 The fact that the proposed test questions and supporting resource booklet have not been made publicly available was also an issue for some. For example, the Castan Centre observed that it is difficult to comment on the validity of the test when very little is known about the content of the test itself:

This lack of specific information clouds the ability of the community and Parliament to properly assess and debate this new proposal.<sup>57</sup>

4.49 Others also suggested that the resource booklet and test questions should be subject to a public consultation process.<sup>58</sup>

4.50 Professor Rubenstein raised with the committee the issue of the legal validity of the test. She informed the committee that the Department acknowledges that in order for the test to be lawful it must be within the scope of the Act, but that given that the questions will not be made public, there is no avenue available to allow for scrutiny of whether the test people sit is in fact lawful. In her view, it would be preferable that the test questions be made public as a matter of transparency and legal accountability given that the test is a threshold test for such an important legal status.<sup>59</sup>

4.51 However, as outlined in Chapter 2, the Department told the committee that the test questions would be kept confidential on the basis that this would discourage rote learning of the answers.<sup>60</sup>

4.52 In response to the committee's request for examples of the sorts of test questions that might be asked, a representative of the Department told the committee that the questions had not yet been written. However, the representative further stated that:

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56 *Committee Hansard*, 16 July 2007, pp 26-27; see also Answers to Questions on Notice, received 27 July 2007, [Question 8 (written)].

57 *Submission 14*, p. 2; see also Country Women's Association of New South Wales, *Submission 25*, p. 2; Australia/Israel and Jewish Affairs Council, *Submission 26*, p. 2; NSWCCCL, *Submission 32*, p. 6; National Council of the St Vincent de Paul Society, *Submission 35*, p. 1; Newcomers Network, *Submission 36*, p. 3; Darebin Ethnic Communities Council, *Submission 38*, p. 1; Professor Kim Rubenstein, *Submission 18*, p. 1.

58 See, for example, Mr Mark Kulasingham, FECCA, *Committee Hansard*, 16 July 2007, p. 3; NSWCCCL, *Submission 32*, p. 6; CMCF, *Submission 46*, p. 1.

59 Professor Kim Rubenstein, *Answers to Questions on Notice*, 20 July 2007, pp 1-2.

60 *Submission 30*, p. 3.

I would prefer not to get into speculation as to what a question might or might not be, but I think there is sufficient information in the public domain from statements by the minister for people who have an interest in this matter to be quite clear that we are talking about questions that go to Australia, our values, history, geography, political system and national symbols. That will become more apparent when the test book is soon released. It is not the intention of the government to release the questions.<sup>61</sup>

4.53 The representative also told the committee that the test questions would be drafted by consultants and that:

Once the resource book is launched or released by the minister then the resource book will go to the consultants. They will start drafting a bank of questions based on the content of the resource book. That bank will go through processes that the development of questions for any testing regime will go through. The final set of questions will end up in the IT system that will run the test and that system will randomly generate 20 questions for each test-taker.<sup>62</sup>

## Resourcing and alternatives

4.54 Several submissions suggested that the resources spent on implementation of the proposed citizenship test could be better spent on improving settlement, orientation, language and education programs for new migrants.<sup>63</sup> Many felt that such 'programs are more likely to achieve the aim of increased knowledge of Australia than imposing a formal citizenship test'.<sup>64</sup>

4.55 For example, Professor Williams submitted that:

Questions need to be asked about whether the money spent on this test could be better used on other types of education and programs that might have a longer term impact. There may well be better ways of producing a more harmonious and cohesive community based upon shared knowledge and values.<sup>65</sup>

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61 *Committee Hansard*, 16 July 2007, p. 27.

62 *Committee Hansard*, 16 July 2007, p. 37; see also p. 31.

63 See, for example, Centre for Human Rights Education at the Curtin University of Technology, *Submission 2*, pp 6-7; Professor George Williams, *Submission 7*, p. 1; Scots of Victoria, *Submission 3*, p. 1; FASSTT, *Submission 8*, p. 3; Castan Centre, *Submission 14*, p. 4; VIRWC, *Submission 20*, p. 3; ECCV, *Submission 31*, p. 3; ACTA, *Submission 34*, p. 4; National Council of the St Vincent de Paul Society, *Submission 35*, p. 2; National Ethnic and Multicultural Broadcasters Council, *Submission 37*, p. 2; B'nai B'rith Anti-Defamation Commission, *Submission 42*, p. 2; CMCF, *Submission 46*, p. 3; Refugee Council of Australia, *Submission 49*, p. 2; Victorian Government, *Submission 53*, p. 2; Ms Anna Samson, Refugee Council of Australia, *Committee Hansard*, 17 July 2007, p. 11.

64 FASSTT, *Submission 8*, p. 3.

65 *Submission 7*, p. 2.

4.56 Similarly, Mr Wong of the Canberra Multicultural Community Forum expressed the opinion that:

There are more practical and effective ways of using funds that will be spent on developing, administering and monitoring the proposed test—for example, on English language classes, ongoing community integration programs, employment skills programs, community support services, reciprocity programs—such as volunteer and community participation agreements—or a range of social cohesion or education programs. The focus of any citizenship funds should be on ensuring successful settlement and on ongoing support to ensure good citizenship, rather than on one-off multiple-choice tests.<sup>66</sup>

4.57 The Refugee Council of Australia also proposed that the funding for the citizenship test should be reallocated to allow a further expansion of English language services. In this context, the Refugee Council suggested that the Australian Government consider expanding the eligibility for English language training to include refugees on temporary protection visas — who currently do not have access to federally-funded English language courses.<sup>67</sup>

4.58 Others, such as the Ethnic Communities' Council of Victoria and the B'nai B'rith Anti-Defamation Commission, suggested that current programs could be improved by allowing more flexible delivery and providing childcare, to allow greater access for migrants with family and employment commitments.<sup>68</sup> The B'nai B'rith Anti-Defamation Commission felt that 'this would be a far more appropriate expenditure than spending money on an untested, educationally dubious process'.<sup>69</sup>

4.59 Some suggested that completion of a civics education course could be required as an alternative to undertaking the proposed test, particularly for people given an exemption from the test.<sup>70</sup> The NSWCCCL, in suggesting that the Bill should provide alternatives to the test, pointed out that:

For example, in the UK, citizenship applicants who have not attained a certain level of proficiency in English can satisfy the citizenship test requirement by attending an English for Speakers of Other Languages

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66 *Committee Hansard*, 16 July 2007, p. 2.

67 *Submission 49*, p. 3; and also Mr Paul Power, *Committee Hansard*, 17 July 2007, p. 9; see also FECCA, *Submission 51*, p. 7.

68 *Submission 31*, pp 1-2, 5; see also Mr Paul Power, Refugee Council of Australia, *Committee Hansard*, 17 July 2007, p. 13; and Department, Answers to Questions on Notice, received 27 July 2007, [Questions 4 and 5 (written)].

69 *Submission 42*, p. 2.

70 See, for example, ECCV, *Submission 31*, p. 4.

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course which covers citizenship materials. In this system, the focus is on educating instead of screening future citizens.<sup>71</sup>

4.60 Several witnesses felt that, in order to achieve the proposed policy objectives of the Bill, the citizenship test could be replaced altogether with a requirement for prospective citizenship applicants to complete a relevant course. For example, Dr Ben Saul of the Sydney Centre for International and Global Law recommended that, instead of the test, it would be preferable:

...to engage potential citizens in a course, a series of seminars, or other program of instruction, over a period of time, in which they can genuinely learn about the rights and responsibilities of citizens, and the political community which they hope to shortly join. Participatory learning through civics education classes has a much greater chance of cultivating a deep and lasting knowledge of Australia than a one-off test...<sup>72</sup>

4.61 Australian Lawyers for Human Rights (ALHR) suggested that this course could be modelled on the Adult Migrant English Program course entitled 'Let's participate: A course in Australian citizenship'. In their view:

...that mode of imparting knowledge about Australian society should be preferred over a citizenship test as one which places comparatively less emphasis on rote learning and offers more opportunities for participation and discussion about Australian society and what it means to be an Australian citizen.<sup>73</sup>

4.62 However, Professor Tim McNamara warned that while such courses may have a beneficial impact:

The British experience is that while there is a strong demand for such courses, there are unfortunately long waiting lists for them. Proper provision for such courses would need to be made if they are to represent a realistic alternative.<sup>74</sup>

4.63 A representative of the Department pointed out that the government was already administering a range of programs in this area, including the Adult Migrant English Program. He also noted that there were a number of programs being run by other Departments, such as the Language, Literacy and Numeracy program and the Workplace English Language and Literacy Program (run by the Department of Education, Science and Training). The representative told the committee that 'when

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71 *Submission 32*, p. 5; Dr Martin Bibby, NSWCCCL, *Committee Hansard*, 17 July 2007, p. 17; see also RACS, *Submission 39*, p. 7.

72 *Submission 27*, p. 2; also Australian Catholic Migrant and Refugee Office, *Submission 48*, p. 1.

73 *Submission 44*, p. 7.

74 *Submission 33*, p. 11.

you take all programs across all portfolios, the estimated outcome for 2006-07 is in the order of \$285 million'.<sup>75</sup>

## **Other issues**

### ***Fee increase***

4.64 A few submissions noted that the citizenship application fee would double for those sitting the proposed citizenship test – from \$120 to \$240. National Legal Aid was concerned that those needing to take the test multiple times might pay additional fees.<sup>76</sup> The NSWCCCL was concerned that the fee 'might cause financial hardship or even preclude some applicants from applying for citizenship'.<sup>77</sup> The Council suggested that there should be a fee waiver for those on low incomes, and that any charges should be conditional on receiving citizenship.<sup>78</sup> RACS suggested that the additional fee would have a 'particularly harsh impact on refugees unable to easily afford this additional expense'.<sup>79</sup>

4.65 On the same note, the Australian Christian Lobby submitted that:

The fees charged for the citizenship test should be set carefully so that the cost does not deter applicants. It would be unfair for citizenship to be available to those who can afford to pay for the test, but denied to those with lower incomes.<sup>80</sup>

4.66 On learning that the fee would be \$240, Mr Yates from the Australian Christian Lobby told the committee that they felt this fee was a 'fair price'.<sup>81</sup>

4.67 In response to questioning on this issue, the Department told the committee that the fee would only be charged once, no matter how many times a person sat the citizenship test, because:

The payment does not actually become 'eligible' until the person applies for citizenship, which is after they have successfully completed the test. They approach us and sit the test, and if they fail they can simply continue to sit it. When they are in receipt of a test result that says they have passed,

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75 *Committee Hansard*, 16 July 2007, p. 35; see further Answers to Questions on Notice, received 27 July 2007, [Question 5 (Hansard)].

76 *Submission 57*, p. 7.

77 *Submission 32*, p. 5; see also Newcomers Network, *Submission 36*, p. 3; RACS, *Submission 39*, p. 2; B'nai B'rith Anti-Defamation Commission, *Submission 42*, p. 3.

78 *Submission 32*, p. 5.

79 *Committee Hansard*, 17 July 2007, p. 22.

80 *Submission 47*, p. 2.

81 *Committee Hansard*, 16 July 2007, p. 8.



they can then lodge their citizenship application and that brings with it the application fee.<sup>82</sup>

4.68 The Department also noted that fee concessions and exemptions are available. For example, a concession fee of \$40 would be available to applicants who sit the test and who have a permanent financial disadvantage and are recipients of certain pensions from Centrelink or the Department of Veterans' Affairs.<sup>83</sup>

### *Australia's international obligations*

4.69 Concerns were also expressed during the committee's inquiry that the Bill could be inconsistent with Australia's international obligations.<sup>84</sup> For example, the Office of the United Nations High Commissioner for Refugees (UNHCR) pointed out that Australia has obligations under the 1951 Refugee Convention<sup>85</sup> and the 1954 Statelessness Convention<sup>86</sup> to facilitate, rather than obstruct, the acquisition of citizenship by refugees and stateless persons.<sup>87</sup> It therefore recommended that any exemptions from the testing regime should be extended to include refugees and stateless persons.<sup>88</sup>

4.70 ALHR suggested that the Bill could be in contravention of Australia's obligations under the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of all forms of Racial Discrimination*.<sup>89</sup> That suggestion was based on the Bill's potential to operate in a discriminatory manner against particular groups of people, such as people from a non-English speaking background. ALHR therefore recommended a number of amendments to the Bill to address these concerns. These included that the Minister's determination be a legislative instrument; that conditions be placed on the Minister's determination

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82 *Committee Hansard*, 16 July 2007, p. 29.

83 *Committee Hansard*, 16 July 2007, p. 29; see further: <http://www.immi.gov.au/allforms/990i/citizenship.htm> (accessed 17 July 2007).

84 See for example, Centre for Human Rights Education, Curtin University of Technology, *Submission 2*, p. 3; Castan Centre, *Submission 14*, p. 3; LHMU, *Submission 40*, p. 3; ECCV, *Submission 31*, p. 4; ALHR, *Submission 44*, pp 3-7; UNHCR, *Submission 50*; The Victorian Bar, *Submission 55*, pp 7 and 16-17; see also Ms Anna Samson, Refugee Council of Australia, *Committee Hansard*, 17 July 2007, p. 9.

85 *1951 Convention relating to the Status of Refugees*: see further UNHCR, *Submission 50*, p. 1.

86 *1954 Convention relating to the Status of Stateless Persons*: see UNHCR, *Submission 50*, p. 1.

87 UNHCR, *Submission 50*, p. 3; see also Centre for Human Rights Education, Curtin University of Technology, *Submission 2*, p. 3.

88 UNHCR, *Submission 50*, p. 5.

89 *Submission 44*, pp 2-7; also Castan Centre, *Submission 14*, p. 3; ECCV, *Submission 31*, p. 4; The Victorian Bar, *Submission 55*, p. 7.

power; and that the Minister be provided with a residual discretion to waive the requirement to pass a test, where it might cause unfairness.<sup>90</sup>

4.71 The committee notes that these suggestions were discussed earlier in this chapter.

### ***Other issues***

4.72 Several submissions raised other concerns relating to citizenship, such as the situations of former permanent residents who have been unable to obtain Australian citizenship. The committee considers that these issues are outside the scope of the changes proposed by the current Bill.<sup>91</sup>

### **Committee view**

4.73 The committee acknowledges concerns that the Bill gives the Minister a very broad discretion to formulate the proposed citizenship test, and it has some reservations about this broad discretion. The committee also accepts that there is some support for the notion that the citizenship test should be subject to parliamentary scrutiny by way of a disallowable legislative instrument. However, it is concerned about the practicality of that notion, given the detail and possible frequent changes to those details that would be contained in any such instrument, and the parliamentary process that would allow only for disallowance of the entire instrument.

4.74 The committee is also mindful of the Department's claim that if the Minister's determination were disallowable this would be likely to be a source of uncertainty and confusion, especially where potential applicants for citizenship had sat and passed a test that might then be disallowed. However, the committee also notes HREOC's suggestion that section 15 of the *Legislative Instruments Act 2003* addresses any legal confusion, and that any uncertainty that might arise during the time taken for a determination to be considered by the Parliament could be addressed by administrative or legislative means.

4.75 The committee has been informed that the government intends that the test questions will only test knowledge of matters that will be based on material in a published resource book. The committee is reassured by the Department's evidence that the test questions will need to be consistent with the legislation.

4.76 However, the committee has also been informed that the Australian Government proposes that the test questions themselves will be kept confidential. The committee acknowledges the Department's evidence that this will discourage rote-learning of the questions and answers, but notes that candidates would need to learn by rote over 200 questions.

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90 See further *Submission 44*, pp 10-11; also FECCA, *Submission 51*, p. 2.

91 See, for example, Mr Michael Young, *Submission 5*; Mr Bruce Calderbank, *Submission 6*; Ms Jo Agar, *Submission 11*; Ms Cathy Agar, *Submission 15*; Ms Diane Agar, *Submission 21*.

4.77 Given the apparent level of community disquiet about the questions that might be included in the test, and that, as a general rule, delegated legislation should be transparent and disallowable, the committee suggests that the test questions be tabled in the Parliament to provide additional reassurance to those concerned. It would also help to ensure transparency and accountability of the proposed regime. The committee does not, however, consider that the test questions should be disallowable.

## **Recommendation 2**

### **4.78 The committee recommends that the proposed citizenship test questions be tabled in parliament.**

4.79 In relation to other drafting issues, the committee welcomes the Department's intention to clarify certain ambiguities in the Bill. The committee supports the proposal to insert a note in the Bill to explain that the power to set eligibility criteria to sit the test does not allow the Minister to set criteria that are inconsistent with the Act or the general eligibility criteria for citizenship.

4.80 However, the committee is still concerned that proposed subsection 23A(1) does not specifically require that the test be related to the eligibility criteria in paragraphs 21 (2)(d),(e) and (f). Despite the Department's evidence, the committee considers that this provision is ambiguous, and that it would be appropriate for the Bill to be amended to clarify this ambiguity.

## **Recommendation 3**

### **4.81 The committee recommends that proposed subsection 23A(1) of the Bill be amended to specifically require that the test relate to the eligibility criteria in paragraphs 21 (2)(d),(e) and (f).**

4.82 The committee is disappointed that the proposed resource booklet, upon which the test questions will be based, had not been finalised and made publicly available by the time of the inquiry. As a result the committee finds it somewhat difficult to comment on the nature and content of the proposed citizenship test. The committee encourages the government to finalise and release the resource booklet as soon as practicable.

4.83 As to concerns about the requirements for a basic knowledge of the English language, the committee notes that this is a requirement in the existing Act. The committee further considers that any concerns about the nature and content of the test, and whether the test proves to be more difficult to pass for certain groups within society, is a matter that can be assessed as part of the review proposed in recommendation 1.

4.84 The committee also considers it important that migrants be given adequate support and resources to enable them to pass the test. Indeed, the committee recognises the broader importance of resourcing for settlement, orientation, language and education programs for new migrants. The committee acknowledges the Department's evidence on this issue and recognises that the government is already

devoting considerable resources to these areas, including on English language training programs such as the Adult Migrant English Program, and on settlement programs, particularly for refugee and humanitarian entrants.

4.85 Finally, the committee notes the Department's evidence on the proposed fee increase for those who sit the citizenship test. The committee is comfortable with the proposed fee increase for those who sit the proposed citizenship test, particularly in light of the fee concessions that are available. The committee is also reassured by the Department's advice that the fee will only be payable once, no matter how many times a person sits the citizenship test.

#### **Recommendation 4**

**4.86 Subject to the preceding recommendations, the committee recommends that the Bill be passed.**

Senator Guy Barnett  
**Chair**