New South Wales Council for Civil Liberties

New South Wales Council for Civil Liberties Inc
149 St Johns Road
Glebe NSW 2037
Australia
www.nswccl.org.au
Ph 61 2 9660 7582
Fax 61 2 9566 4162
Email office@nswccl.org.au
DX 1111 Sydney
Correspondence to:
PO Box 201
Glebe NSW 2037
Australia

Response to questions taken on notice at the hearing of the Legal and Constitutional Committee concerning the Australian Citizenship Amendment (Citizenship Testing) Bill 2007, on July 17, 2007.

I thank the Committee for the opportunity to respond to these questions after the hearing.

Question 1. In evidence yesterday, the Secretary of the Department of Immigration and Citizenship said that ministerial discretion about questions would not allow any prejudice in the question against one group or against many groups because the general legislation surrounding it prohibited any kind of discrimination and that there were safeguards within that legislation and others. Do you have any response to that?

Response.

Proposed subsection 22A(1) limits the test to the purposes of subsection 21(2A). The latter subsection limits the testing to the requirements of paragraphs (2)(d), (e) and (f). Those three paragraphs would re-enact what is in the principal act, the Australian Citizenship Act 2007, with the exception of the requirement that the applicant have an adequate knowledge of Australia.

Since that set of words must be interpreted to add something to the requirement that the applicant has an adequate knowledge of the privileges and responsibilities of citizenship, the question is raised as to what the knowledge of Australia is to be adequate to.

There is no preamble or other indication of Parliament's intention with these provisions. Not can I see that the rest of the principal act provides any assistance. The qualifiers ‘adequate’ and ‘basic’ do suggest strongly, however, that the legislature's intention is not to raise any significant barriers to citizenship.

It could be argued that Parliament, by including these qualifiers, has clearly indicated its wish for the Minister's power to set a test to be severely circumscribed. (That interpretation would depend, however, on what a court would decide is meant by ‘adequate’.)

Accordingly, a general power to the Minister to set a test 'as he sees fit' would be inappropriate.

But by the same logic, the proposed secrecy provision is clearly inappropriate to the limited power granted to the Minister on this interpretation. Thus it might be argued, per contra, that the secrecy provision indicates that more is involved.

The second reading speech of the Minister suggests that 'an adequate knowledge' is quite far-reaching. He declares 'The test questions will assess knowledge of Australian history, culture and values based on information contained in a citizenship test resource book. It will cover the sorts of things that people learn in their primary and secondary years at school.'

'For generations, Australia has successfully combined people into one community based on a common set of values.

'These values include our respect for the freedom and the dignity of the individual, support for democracy, our commitment to the rule of law, the equality of men and women, respect for all races and cultures, the spirit of a 'fair go', mutual respect, compassion for those in need, and promoting the interests of the community as a whole'

'It is important that Australian citizens understand the values that guide us and how our society works.'[1]

If the speech is used as an indication of the Parliament's intention, then 'adequate knowledge' could be interpreted quite broadly. What is a knowledge of these things adequate to? Why is a person who rejects some of the historical assertions made unfit for citizenship?

The Minister proposes that the material to be tested would be included in a booklet, which would be made widely available. That is to be applauded. It is to be hoped that future Ministers would continue the practice—and that the booklet would not become a book. That however cannot be guaranteed.

Although there are safeguards provided by antidiscrimination legislation, and totally irrelevant material in the test would be excluded, it would be difficult to mount an effective challenge to an unfair test.

First, the test is to be kept secret. There is no requirement that it be released after a group of applicants have taken it; and no requirement that a failed applicant's response be made available to the applicant. One could well imagine members of the Immigration Department arguing that the secrecy requirement prevents them from releasing the two documents at any time.

Second, those restrictions and the surrounding legislation would not prevent a test being administered in selected cases which included obscure material that it would be very unlikely that a targeted group of candidates would know—for example, about the details

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[1] Important as the values listed are, it is worth noting that the historical claims the Minister makes are dubious. For example there may be a general agreement to the principle that people ought to obey the law. But that is not what is meant my 'the rule of law'. It is desirable that there be respect for all races and cultures. But how widespread is it? For how many generations has it been generally accepted?

of how ballots for the Senate are distributed in an election. The historical precedents are well known; English tests using obscure technical language were used in Australia and in the United States—both democratic countries—in the interests of discrimination.

It is one of the virtues of a democracy that dispute and debate produces better policy than any alternatives. The secrecy of a test would prevent the blowtorch of public scrutiny being applied to it.

The tests should be public documents, and their adoption be subject to agreement by the parliament

As for the objection that to release the tests would defeat the purpose of having them, if the material on which the tests are based is to be a public document, why should the set of questions from which those in the tests are to be selected not be made public?

Question 2. Also you make mention here of what happens in the United Kingdom. I was interested to read at paragraph 3.9 whereby you say they have a website providing sample questions and test preparation. I am not familiar with that. Could you expand upon that and point out how you think that a similar system, I suppose that you are suggesting, may be introduced here in Australia?

Response.

At the time of writing, the material which applicants for citizenship need to know in order to pass the test is all available in a handbook*: Life in the United Kingdom: A Journey to Citizenship* - 2nd Edition (2007). Sample questions based on this text are available on http://www.lifeintheuktest.gov.uk/htmlsite/self_10.html.

The publication of the first edition of the handbook led, unsurprisingly, to the discovery of a number of embarrassing factual mistakes. That illustrates well the importance of making the material public—and well in advance of the setting of the first test.

As the CCL argued in our submission, we do not think that the introduction of a test in Australia is acceptable. But if it is introduced, the UK arrangement, with all the material to be tested made available, but with the whole pool of questions being provided, would be a sensible way of enabling people to prepare for it. It would also add a degree of transparency.

Question 3. On a day-to-day basis, ministers must make decisions that cannot tie down the legislative process by having every minute detail decided by a legislative instrument or public scrutiny by way of a committee or whichever way that process is deemed to take place. This is another one of those issues. I could give you many examples of ministerial responsibility which governs the country on a day-to-day basis without any scrutiny whatsoever apart from the methods that I mentioned earlier. I would suggest that a questionnaire may be one of those detailed issues that should be subject to the minister

having that final discretion.

Dr Bibby—I have two comments. Whether it is a small decision which one might reasonably leave to a minister or whether it is an important one that should be put before the parliament depends upon how significant the consequences are and how major the impact is. The question of who becomes an Australian citizen and the question of who is excluded from becoming an Australian citizen is not a trivial matter at all. We are talking about whether people will be granted very important rights. The notion that this is simply a matter of ordinary discretion that should not be subject to closer scrutiny seems to me to undervalue the significance of being excluded from Australian citizenship. There was a second point, but I am having a 'senior moment'.

PARRY—That is fine. Feel free to come back to it.

Second comment.

What I had intended to say was that powers have been given to the Attorney General and to the Minister of Immigration which are open to serious misuse, and which we believe have been misused.[2]

What I would now add is that the chief defences against the misuse of powers are publicity and access to the courts on merits issues as well as questions of law.

But if this Bill is not amended, those remedies will be denied. One cannot rely on public servants to achieve the same ends.

There can also be surprising interpretations of legislation, as the use of powers in the Haneef case illustrates.

Question 4. Dr Bibby, the Australian Citizenship Act 2007, not the bill before us but the current act, requires that an applicant have a basic knowledge of English and also an adequate knowledge of the responsibilities and privileges of Australian citizenship. Do you support the current act?

Response:

The CCL supports the view that all citizens and all persons who are seeking citizenship should have the opportunity to obtain a good knowledge of English and a good knowledge of the obligations and duties and of the rights and privileges of Australian

[2] We would argue that a number of decisions made by the Department of Immigration in relation to asylum seekers have been contrary to those values which the Minister listed in his second reading speech. We can supply numerous examples, should the Senate Committee wish us to.

citizens.[3] But for the reasons we have given, both in our submission to the present Inquiry and in our submission in response to the *Discussion Paper*, we are not in favour of a test. It is not reasonable to expect every Australian to speak English for a variety of reasons including age, education level and past experiences of trauma. In addition, it is wrong to assume that only English speakers can make a contribution to Australian society. Past experience has shown that many non-English-speaking immigrant groups have contributed.

Martin Bibby
Assistant Secretary
New South Wales Council for Civil Liberties
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[3] We note that the current programmes designed to achieve this are currently under-funded.