

**Submission to Senate Legal and Constitutional Legislation Committee in its Review
of the Australian Citizenship Amendment (Citizenship Testing) Bill 2007**

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I am grateful to the Committee for the opportunity to make a submission on this Bill and I would be happy to appear before the Committee in person.

I am the author of *Australian Citizenship Law in Context* (2002, Law Book Co).

In addition, as a practitioner on the roll of the High Court of Australia, I have been Counsel in three High Court matters concerning Australian citizenship.

Finally, between November 2004 and 30 June 2007, I was a consultant to the Commonwealth of Australia, represented by the Department of Immigration and Multicultural and Indigenous Affairs, later the Department of Immigration and Citizenship (the Department) in relation to its review and restructure of the Australian Citizenship Act 1948 which resulted in the Australian Citizenship Act 2007 which came into force on 1 July 2007.

I would like to stress that I have *not* been a consultant to the Department and have not been involved in any way with this amendment Bill.

I shall set out the areas I would like to comment upon below.

Policy questions:

Should Australia introduce a formal citizenship test?

I responded to the Citizenship Task Force, DIMA call for submissions regarding the policy underpinning this Bill. In answering the question above I stated:

No. Introducing a formal test is not the ideal way of achieving the aims set out in the discussion paper, nor of promoting an inclusive Australian citizenship.

If a formal citizenship test is introduced, it should not only apply to applicants seeking the *grant* of citizenship, but should also be considered as a method of testing for those who automatically become Australian citizens by birth (or through other automatic means). That is, the questions asked of those seeking citizenship by grant could be applied to those people when they enroll on the electoral roll.

Exemptions should apply for testing. The exemptions could mirror the current Act's exemptions in section 13(1) of the *Australian Citizenship Act 1948* (Cth).

I should note that this Bill does allow for the exemptions in the previous Act, now enacted in a slightly different manner in the Australian Citizenship Act 2007 to continue as the amendments only apply to the General Eligibility for conferral criteria.

How important is knowledge of Australia for Australian citizenship?

One of the substantive changes in this amendment Act is the requirement for knowledge of Australia, in addition to knowledge of the rights and responsibilities of Australian citizenship, for citizenship by conferral.

As I said in my submission to the discussion paper:

Knowledge of Australia is a valuable aspect of Australian citizenship, but it is not the only or paramount way of evidencing a commitment to Australia. It is also important and valuable for Australian born citizens. Knowledge of civics is not strong in many Australians by birth, raising questions about the fairness involved in distinguishing citizens by grant with citizens by birth, given citizens are obliged to vote.

Underpinning the introduction of the test is a belief that a test will encourage a greater understanding of English and a commitment to Australia's values. In regard to both of these matters I include my points from my submission to the discussion paper:

What level of English is required to participate as an Australian citizen?

While knowledge of English is desirable and should be encouraged (and existing language education should continue to be provided and even extended further than already exists for those living permanently in Australia), participation as an Australian citizen is not conditioned solely by language capacity, and formal testing is not a desirable way to encourage this outcome.

How important is a demonstrated commitment to Australia's way of life and values for those intending to settle permanently in Australia or spend a significant period of time in Australia?

A commitment to the basic values underpinning a liberal western democracy such as Australia is important in creating a functioning and essentially cohesive community. However, it would be too difficult and arguably divisive to define a singular view of what Australia's way of life and values are. Engendering a commitment to Australia can be encouraged in ways other than formal citizenship testing. Formal testing would not assist in ensuring a commitment to Australia's way of life and values.

Issues arising from comments in the Citizenship Task Force, DIMA discussion paper that are relevant to the policy underpinning this Amendment Act.

The discussion paper stated:

“Australian citizenship is a privilege, not a right”

This is not necessarily so. Australian citizenship is a statutory concept (there is no mention of it in the Australian Constitution), and there are certain people, whom the *Australian Citizenship Act 1948* currently bestows citizenship upon, as a legal right.

While it is possible for the government to amend the Act (as the new Australian Citizenship Act 2007 indicates) it is not clear what the outer limits are for depriving people of their citizenship, or denying recognition of citizenship. The Constitution places limits on the extent to which the Government can define alienage (the constitutional contrast to statutory citizenship) and deprive a person of his/her citizenship, or membership of the Australian “people”.

The discussion paper also stated:

“Along with privileges, Australian citizens have certain legal responsibilities...”

This section implies that the list of responsibilities is exclusive to citizens, when in fact some responsibilities also apply to non-citizens.

For instance, all people residing in Australia are obliged “to obey Australian laws”, and are subject to the consequences of not doing so.

The responsibility of “defending Australia, should the need arise” is not limited to Australian citizens. An extract from my book at pp214-215 is as follows:

The *Defence Act 1903* (Cth) does not exclude non-citizens from voluntarily joining the forces.¹ Neither is there a distinction for the purpose of compulsory conscription. Section 59 outlines who is presently liable to serve in the defence forces in time of war, **and all persons (except those who are exempt from the section or to whom it does not apply) who have resided in Australia for not less than six months and who are over 18 and under 60, are liable.**² Exemptions are on the basis of mental or physical disability. The section does not apply to persons whose presence in Australia is solely related to employment in service of a government outside Australia, or to a prescribed official of an

¹ Section 34.

² My underlining. Prior to the introduction of the *Defence Legislation Amendment Act 1992* (Cth), this section also required persons to be British subjects. In repealing the reference to “British subjects”, there was no substitution with the words “Australian citizen”. In the *Hansard* discussion in regard to this change, the emphasis was upon removing the “discriminatory provisions” of the Act. See Australia, House of Representatives, *Parliamentary Debates* (26 February 1992), p 201 (Mr Duncan); 30 March 1992, p 1402 (Mr Downer); 31 March 1992, p 1490 (Mr Halverson); Senate, *Parliamentary Debates* (28 April 1992), p 1706 (Deputy Leader of the Opposition). Therefore, to require a person be a British subject was not seen as appropriate for “present day realities or requirements” per Halverson. This is in contrast to the *Hansard* debates on the *Defence Act 1903* (Cth) where the Minister for Defence had said that “[e]very citizen has the obligation cast upon him to defend his country in time of war”: Australia, House of Representatives, *Parliamentary Debates* (16 July 1903), p 2274.

international organisation, or to a member of the defence forces.³

Historically, Australia has called upon non-citizens to form part of the defence forces.⁴ The question of whether this was legal was considered by the High Court in *Polites v Commonwealth* (1945) 70 CLR 60. The *National Security Act 1939-1943* (Cth) gave the Governor-General power to make regulations requiring “persons to place themselves, their services and their property at the disposal of the Commonwealth”.⁵ Polites, a Greek national, challenged the validity of the regulations requiring service of resident aliens.⁶

The court held that Parliament had been clear in its intention to include aliens, and according to the principles of national sovereignty, had the power according to its own constitutional framework to impose such a requirement.

These are just two ways in which the starting point for the discussion paper which precedes this Bill reflected some of the complexities of Australian citizenship law and policy, that formal testing will find difficult to articulate.

Moreover, the whole discussion paper examined Australian citizenship primarily as citizenship by grant, and did not fully examine what, if any, the differences should be between automatic citizenship and citizenship by grant, as a matter of values and policy. Concerns regarding a commitment to values are not only reserved to first generation Australians.

Broader comments

In their 2000 report, *Australian Citizenship for a New Century* the Australian Citizenship Council, headed by Sir Ninian Stephen, asked: “How can concepts of citizenship best serve Australia and Australians?” (p 4). This too could be seen as one of the driving forces of this amendment.

In my book, I reflect upon the differences between the legal formal expressions of citizenship and the normative, inclusive, examples of citizenship as membership of the Australian community (that are not necessarily reserved to formal Australian citizens.) (Chapter 5).

In my view, the objectives the Government is seeking to achieve (of a commitment to the western liberal democratic framework upon which Australia is based, and an opportunity to benefit from being a participant in the fullest sense of the Australian community) are best encouraged through means other than compulsory testing of English and Australian values. Education, through the entire primary/secondary/tertiary extra school environment is of great value, together with the extra English language testing available.

³ Section 61C. Note also s 10 of the *National Service Act 1951* (Cth).

⁴ For a more detailed discussion of the historical developments, see Jordens, *Redefining Australians: Immigration, Citizenship and National Identity* (1995), Chapter 8.

⁵ Section 13A.

⁶ See *National Security (Aliens Service) Regulations 1942* (Cth).

Legal Structure

The introduction of an amendment to the Act answers to some extent my comments to the Task Force regarding the introduction of testing. I said:

Finally, within the current legal framework, section 13 (1) of the Act enables the Minister, as a matter of policy, to determine ways in which he/she determines whether an applicant for Australian citizenship fulfils the criteria set out, including “understanding the nature of the application, possessing a basic knowledge of English and an adequate knowledge of the responsibilities and privileges of Australian citizenship” (see p 108 in my book).

If formal testing is introduced, there would be a question of how well that fits within the current legal framework, or whether it would be more certain to amend the Act specifically to provide for the testing of these aspects of citizenship.

Section 52 A of the Act currently allows review of decisions of the Minister under s 13, therefore decisions regarding the testing framework may well fall within AAT review if the Act is maintained in its current framework (also present in the Bill currently before Parliament) for review of decisions regarding citizenship by grant.

This Act provides a more certain legislative framework for the introduction of citizenship testing. In essence, it strengthens the legislative basis for the testing to be introduced.

However, it may be, once the test is released, there will be questions about how well the test fulfills its purpose, and whether as a matter of law it is within the power under which it is introduced. There may be administrative law questions about whether the questions satisfy the criteria that an applicant has “an adequate knowledge of Australia” and “an adequate knowledge of the responsibilities and privileges of Australian citizenship”.

I would be happy to elaborate upon this submission in person.

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