



**Submission of the
HUMAN RIGHTS AND EQUAL OPPORTUNITY
COMMISSION**

to the

**LEGAL AND CONSTITUTIONAL AFFAIRS
COMMITTEE**

on the

**AUSTRALIAN CITIZENSHIP AMENDMENT
(CITIZENSHIP TESTING BILL) 2007**

6 July 2007

**Human Rights and Equal Opportunity
Commission**

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A. INTRODUCTION

1. The Human Rights and Equal Opportunity Commission (HREOC) makes this submission to the Legal and Constitutional Affairs Committee in its Inquiry into the *Australian Citizenship Amendment (Citizenship Testing) Bill 2007* (the Bill).
2. HREOC previously provided a submission to the Citizenship Taskforce of the Department of Immigration and Citizenship in response to the Discussion Paper on Citizenship Testing, indicating that it did not support the introduction of a citizenship test by the government. HREOC's submission in relation to the Discussion Paper is available on its website.¹

B. SUMMARY

3. HREOC submits that the Minister is given considerable discretion in determining the nature and form of the citizenship test, while on the other hand is given insufficient discretion to provide alternatives to the test where applicants, because of their particular circumstances, are disadvantaged by having to sit the test. HREOC submits there should be a better balance in the allocation and oversight of Ministerial discretion in these two areas of the Bill.
4. More particularly, HREOC has the following concerns in relation to the Bill:
 - The Bill does not provide clear guidance on how the Minister should exercise his discretion in determining the nature or form of the citizenship test. The Minister's discretion is also not subject to appropriate parliamentary oversight. This leaves open the possibility that a citizenship test could be implemented that disadvantages certain groups of people.
 - The Bill does not allow for alternatives to the citizenship test for applicants who are unfairly disadvantaged by the requirement to sit a test. For instance, the Bill fails to make special provisions for persons who might make worthy Australian citizens yet are unable to pass a formal citizenship test due to past experiences of trauma or persecution or due to limited education.
 - The Bill gives the Minister unlimited discretion to determine the eligibility criteria that a person must satisfy in order to sit the test. HREOC submits that, in view of the eligibility criteria in s 21(2) for applicants, there is no need to provide for further criteria that must be satisfied in order to sit the test.
5. In order to address these concerns HREOC recommends the following:
 - The wide discretion currently conferred on the Minister in determining the nature and form of the citizenship test should be more clearly confined to the eligibility requirements under s 21(2)(d), (e) and (f).

¹ http://www.humanrights.gov.au/racial_discrimination/report/citizenship_paper_2006.html
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- The instrument creating the test should be made a legislative instrument in order to allow parliamentary scrutiny of the Minister's determination in relation to the nature and form of the test (although it may be appropriate that the actual questions are not part of that legislative instrument).
- The Bill should provide a mechanism which provides for exemptions or an alternative process for applicants who are unfairly disadvantaged by having to sit a test.
- Section 23A(3) of the Bill should be removed to ensure that any person who is eligible to become an Australian citizen is also eligible to sit the test. There should be no discretion in the Minister to impose further eligibility criteria for persons wishing to sit the test.

C. NATURE AND FORM OF THE CITIZENSHIP TEST

Clarifying ambiguity

6. Under s 21(2A) of the Bill, the Minister can only be satisfied that an applicant has met the eligibility criteria set out in s 21(2)(d), (e) and (f) if the applicant has sat and successfully completed a test. However, s 23A does not explicitly require that the test be related to the eligibility criteria in s 21(2)(d), (e) and (f).
7. To avoid any potential ambiguity, HREOC recommends that the wording of s 23A should be amended to make clear that the content of any test is directly referable to the criteria in s 21(2)(d), (e) and (f). For example, the current wording of s 23A(1) could be amended to read:

The Minister must, by written determination, approve a test for the purposes of subsection 21(2A) which examines whether the applicant has satisfied the general eligibility requirements set out in sections 21(2)(d), (e) and (f).

Wide Ministerial discretion in devising the test

8. Other than its reference to the eligibility criteria (d), (e) and (f) in s 21(2A), the Bill provides no limit to the Minister's discretion in formulating a test or multiple tests. Indeed, pursuant to s 23A(6), the Minister's determination may 'cover any other matter related to the test the Minister thinks appropriate.' While HREOC agrees that some flexibility is both necessary and desirable, HREOC believes that these provisions cast the Minister's discretion in excessively wide terms without providing appropriate safeguards.
9. For instance, there is scope within the Bill to allow the Minister to formulate different tests for different applicants.² HREOC agrees that it may be appropriate in some circumstances to have more than one form of test, such as to make provision for applicants with special needs. However, HREOC is concerned that there is no adequate safeguard in the Bill to ensure that the creation of different tests does not operate unfairly against particular categories of applicants.

² See, eg, the discussion in the Explanatory Memorandum for the Bill at [22].

10. In order to address these concerns, HREOC recommends that:
 - a. The Minister's determination in devising the test should be made a legislative instrument; and
 - b. The Bill should be amended to allow for appropriate exemptions and alternatives.
11. These issues are discussed further below.

D. LEGISLATIVE INSTRUMENT

Determination should be a legislative instrument

12. HREOC recommends that the Minister's determination of the proposed citizenship test under s 23A be made a legislative instrument.
13. The importance of citizenship to Australia's future and its implications for compliance with international human rights standards³ 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.⁴
14. Making the determination a legislative instrument could be achieved by amending the proposed s 23A(7) in the Bill to read:

A determination made under subsection (1) is a legislative instrument.
15. The effect of this change will be to make the instrument which creates the test subject to disallowance under s 42 of the *Legislative Instruments Act 2003* (Cth), thus preserving legislative oversight before the test comes into force. HREOC acknowledges the difficulty in providing satisfactory guidelines in the Bill on how the Minister should exercise his or her discretion in formulating the proposed test. HREOC therefore considers that making the determination a legislative instrument would provide an essential safeguard, by making the final determination setting out the test subject to Parliamentary scrutiny.

Disclosure of test questions

16. In making the Minister's determination a legislative instrument, HREOC acknowledges that this raises a potential issue as to disclosure of the test questions.

³ See HREOC submission to the Citizenship Taskforce, Department of Immigration and Multicultural Affairs on the Discussion Paper *Australian Citizenship: Much More Than Just a Ceremony*, September 2006, http://www.humanrights.gov.au/racial_discrimination/report/citizenship_paper_2006.html

⁴ HREOC is not alone in raising this issue. See Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2007, p 32 (Tony Burke, Honourable Member for Watson)

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17. One approach to this issue might be for the Minister's determination to contain the full list of potential questions and state that the test shall comprise 20 questions drawn at random from that list. In this way, there is a mechanism for ensuring scrutiny over the appropriateness of the questions. Furthermore, even though the test questions are potentially disclosed, an applicant would effectively need to learn the answer to **all** of those questions in preparing for the test.
18. Alternatively, Parliament may prefer to 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.
19. Using this approach, the former determination would be a legislative instrument whereas the latter need not. However, under this approach HREOC considers it important that the Minister's determination in the former category should specify the source material forming the subject of the test questions. In this regard, HREOC notes the following statement by the Minister in his second reading speech for the Bill:
- The material which will form the basis of the citizenship test will highlight the common values we share, as well as something of our history and our background. It is currently being drafted and will be released once completed.
- The booklet will give migrants to Australia the information they need to better understand what it means to be an Australian, what Australia will do for them, and what they are expected to do in return, for this country. It will give a brief summary of our history, our heritage, our symbols, our institutions and our laws, as well as what migrants need to do to apply for citizenship.⁵
20. HREOC considers that it is appropriate that the content of this booklet should form part of the relevant legislative instrument. This will provide Parliamentary scrutiny over the material forming the subject of the test to ensure that it is appropriate. Indeed, given that the booklet will seek to summarise 'what it means to be an Australian', as well as 'our history, our heritage, our symbols, our institutions and our laws', the content of this booklet may well raise issues that would be appropriate for Parliamentary debate. In addition, the actual content of the final questions (which under this approach would not be subject to scrutiny) would be clearly limited by reference to this booklet.

E. ALTERNATIVES AND EXEMPTIONS

Citizenship test will not apply to all applicants

21. HREOC notes that the *Australian Citizenship Act 2007* (Cth) currently provides separate eligibility criteria for certain categories of applicants. For example,

⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2007, p 6 (Kevin Andrews, Minister for Immigration and Citizenship).
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there are separate eligibility criteria for applicants who, at the time of making an application:

- a. have a permanent physical or mental incapacity at that time that means the person is not capable of understanding the nature of the application at that time (s 21(3));
 - b. are suffering from a permanent loss or substantial impairment of hearing, speech or sight (s 21(4));
 - c. are aged over 60 (s 21(4));
 - d. are aged under 18 (s 21(5)); or
 - e. are stateless and do not have reasonable prospects of acquiring the citizenship or nationality of another country (s 21(8)).
22. While the Bill does not seek to amend these provisions⁶, HREOC is of the view that s 21(4) is unnecessarily wide and based on the outdated assumption that people with physical, vision or hearing disabilities would necessarily be unable to undergo similar procedures to other applicants. A preferable approach is to ensure that such people applying for citizenship are subject to the same requirements as other applicants but that there is additional provision made to ensure that adequate facilities are available for such people to sit the test.
23. On this basis I recommend that the *Australian Citizenship Act 2007* be amended to remove the special provision for people with hearing, speech or sight impediment or loss and to make additional provision to ensure such people are not disadvantaged by the citizenship procedures.

Flexibility to cater for persons unfairly disadvantaged by the test

24. HREOC is concerned that the Bill does not give the Minister discretion under s 21(2A) to consider whether individuals or categories of applicants, other than those outlined in ss21(3) – (8), might be disadvantaged by having to sit the test. In this regard, HREOC notes that the wording of s 21(2A) is strict, requiring that the Minister is taken to be satisfied of the matters in paragraphs (d), (e) and (f) ‘if and only if’ the applicant has passed the relevant test.
25. HREOC considers that the Bill should make provision for an applicant, in appropriate cases, to:
- undergo an alternative procedure for satisfying the eligibility conditions under s 23(2)(d), (e) and (f); or
 - be exempted from satisfying the eligibility conditions under s 23(2)(d), (e) and (f).

⁶ See the Minister’s second reading speech for the Bill: Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2007, p 6 (Kevin Andrews, Minister for Immigration and Citizenship). *Submission of the Human Rights and Equal Opportunity Commission to the Legal and Constitutional Affairs Committee on the Australian Citizenship Amendment (Citizenship Testing Bill) 2007, 6 July 2007*

26. By way of illustration, applicants who have experienced trauma due to witnessing or experiencing serious bodily injury, rape, torture, murder or armed conflict, or applicants who have very limited education, may be at a serious disadvantage in having to pass the test. To avoid such persons being unfairly prevented from obtaining Australian citizenship, HREOC considers that it would be appropriate to provide a mechanism which enables applicants to apply to the Minister for an alternative procedure that does not disadvantage them.⁷
27. HREOC submits that a suitable alternative procedure would be to enable an applicant to undergo an interview with an officer of the Department of Immigration and Citizenship to assess the requirements of s 23(2)(d), (e) and (f), along similar lines to the procedure that exists currently. This alternative procedure could be conditional upon the applicant sitting and failing the written test (either once or on a number of occasions) or could simply be triggered by an application to the Minister. In exceptional cases, it might also be appropriate for the Minister to waive the testing requirement altogether for a particular applicant.

Comparison with other jurisdictions

28. HREOC's recommendations to include a discretion to provide an alternative procedure or to waive the relevant eligibility requirements in exceptional cases follows the practice in other jurisdictions.
29. For example, in Canada, the *Citizenship Act 1985* requires a prospective citizen to demonstrate that he or she:
- a. has an adequate knowledge of one of the official languages of Canada; and
 - b. has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship.⁸
30. However, the applicable test procedure makes allowance for a person to demonstrate compliance with the above eligibility criteria by undergoing an interview with a citizenship judge as an alternative to formal testing.⁹
31. The Canadian legislation also provides the Minister with a discretion to waive either of the above eligibility criteria on 'compassionate grounds'.¹⁰ A further discretion is granted to the Governor in Council to direct a grant of citizenship where there exist circumstances of 'special and unusual hardship' or to 'reward services of an exceptional value to Canada'.¹¹ The Canadian legislation also provides that before a citizenship judge rejects an application for citizenship, the citizenship judge must consider whether or not to recommend an exercise of

⁷ See *Submission of the Human Rights and Equal Opportunity Commission to the Citizenship Taskforce on the Australian Citizenship Discussion Paper*, [44]-[49], available at:

http://www.humanrights.gov.au/racial_discrimination/report/citizenship_paper_2006.html

⁸ Citizenship Act R.S., 1985, c. C-29, ss 5(1)(d) and (e).

⁹ See description of test procedures at: <http://www.cic.gc.ca/english/citizenship/cit-test.asp>

¹⁰ Citizenship Act R.S., 1985, c. C-29, s 5(3).

¹¹ Citizenship Act R.S., 1985, c. C-29, s 5(4).

discretion on these grounds, namely compassionate grounds, special and unusual hardship or exceptional value to Canada.¹²

32. Similarly, in New Zealand, the *Citizenship Act 1977* allows the Minister to grant citizenship to the applicant if the Minister is satisfied that granting citizenship ‘would be in the public interest because of exceptional circumstances of a humanitarian or other nature relating to the applicant’¹³.
33. HREOC considers that the above approaches provide an important safeguard, by providing an element of flexibility to accommodate the individual circumstances of particular applicants who might be unfairly prejudiced in having to pass a formal citizenship test, but who would nevertheless make worthy Australian citizens.

Proposed amendments to the Bill to address these concerns

34. Whilst there would be more than one approach in amending the Bill to address the concerns outlined above, HREOC suggests that s 23(2A) of the Bill could be amended to read:

Paragraphs 2(d), (e) and (f) are taken to be satisfied if the Minister is satisfied that:

- (a) the person has, before making the application, sat a test approved in a determination under section 23A and successfully completed that test; or
- (b) the person has, before making the application, undergone an interview with a delegate of the Minister and satisfied that delegate that the applicant meets the eligibility requirements under paragraphs (d), (e) and (f); or
- (c) there exists exceptional circumstances that satisfy the Minister that it would be appropriate to waive the requirements of paragraphs (d), (e) and (f) on compassionate grounds.

35. In addition, a new s 23(2B) could be inserted in the Bill to read:

- (1) For the purposes of section 23(2A)(b), before undergoing an interview an applicant must first satisfy the Minister that there exists special circumstances to show that it would be more appropriate for that person to undergo an interview than a test.
- (2) In deciding whether to grant an applicant’s request under paragraph (1), the Minister shall have regard to the following factors:
 - (a) the level of education and/or literacy of the applicant;

¹² Citizenship Act R.S., 1985, c. C-29, s 15.

¹³ *Citizenship Act 1977* (New Zealand), s 9(1)(c).

(b) whether the applicant has experienced trauma or persecution which might materially impact upon his or her ability to prepare for and pass a test; and

(c) whether there are other compassionate grounds indicating that an interview would provide a more appropriate method for assessing the applicant's eligibility under sections 21(2)(d), (e) and (f).

F. ELIGIBILITY FOR SITTING THE TEST

36. Section 23A(3) of the Bill provides that the Minister's determination to approve the citizenship test can also include eligibility criteria as to who may **sit** the test. This section applies in addition to the criteria in s 21(2) which specify the basis on which a person is eligible to become a citizen.
37. HREOC submits that, in view of the eligibility criteria in s 21(2), there is no need to provide further criteria that must be satisfied in order to sit the test.
38. The inclusion of additional eligibility criteria in s 23A(3) might lead to a situation where the Minister has a discretion to block a person from sitting the test who would otherwise meet the eligibility criteria in s 21(2).
39. HREOC's proposal in this regard is similar to the approach adopted in Canada, where there are no additional eligibility criteria for sitting the test in addition to the eligibility requirements for citizenship itself.¹⁴

¹⁴ For a discussion of who can apply for Canadian citizenship, see: <http://www.cic.gc.ca/english/citizenship/retain-eligibility.asp>