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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
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29 July 2009

Dear Inquiry Secretary

Submission: Inquiry into the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009

Please find attached a submission by Australian Lawyers for Human Rights for the consideration of the Committee.

We stand ready to give evidence at a hearing if required.

Kind regards

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Inquiry into the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009

**Submission to the
Senate Standing Committee on Legal and Constitutional Affairs**

29 July 2009

1 Australian Lawyers for Human Rights

- 1.1 Australian Lawyers for Human Rights (ALHR) is a national network of Australian lawyers active in furthering awareness, understanding and recognition of human rights in Australia. It was established in 1993, and incorporated as an association in NSW in 1998.
- 1.2 ALHR has nearly 1,500 members nationally, most of whom are practising lawyers. Membership also includes non-practising layers, academics, policy makers and law students. ALHR is comprised of a National Committee with State and Territory committees.
- 1.3 ALHR promotes the practice of human rights law in Australia through training, publications and drawing attention to human rights standards. We work with Australian and international human rights organisations to achieve these aims. It is a member of the Australian Forum of Human Rights Organisations and is regularly consulted by government including through the Attorney-General and Department of Foreign Affairs and Trade NGO forums.
- 1.4 Australian Lawyers for Human Rights (“ALHR”) thanks the Committee for the opportunity to contribute to this inquiry and comment in respect of the Australian citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009.
- 1.5 ALHR is a national network of Australian lawyers active in furthering awareness, understanding and recognition of human rights in Australia. It was established in 1993, and incorporated as an association in NSW in 1998.
- 1.6 ALHR has approximately 1,200 members nationally, a majority of whom are practicing lawyers. ALHR’s membership also includes judicial officers, academics, policy makers and law students. ALHR is composed of a National Committee with State and Territory committees.

2 Submissions with respect to proposed s 26(3B)

- 2.1 ALHR previously made a submission to the Senate Inquiry regarding the Australian Citizenship Amendment (Citizenship Testing) Bill 2007. In that submission ALHR raised concerns about:
- the lack of any underlying rationale for a citizenship test as a way of potential applicants demonstrating their suitability in respect of obtaining citizenship and suggested that there were other methods of imparting knowledge of English which would operate as less of a barrier to disadvantaged groups.
 - the proposed changes having a disproportionate negative impact on already disadvantaged and marginalised groups within society which raised issues in respect of Australia's obligations under the International Convention on the Elimination of Racial Discrimination and the International Convention on Civil and Political Rights.
- 2.2 The concerns raised by ALHR and many other NGOs who work with refugees and humanitarian entrants were born out by the initial test results which demonstrated there was a marked difference in the pass rate between migrants who came to Australia on work or family visas and those who came under the humanitarian program.
- 2.3 Refugee and humanitarian entrants have a high uptake of citizenship. People who have arrived in Australia through the Refugee and Humanitarian Program or who have obtained a protection visa after arrival in Australia have permanent residence. The next step to citizenship is particularly important for this group of people. Australian citizens have the right to live in Australia. A permanent resident on the other hand has permission to live here indefinitely provided they remain of good character. Citizenship is also linked to obtaining certain kinds of employment in the Australian public service. For refugees and humanitarian visa holders the most important benefit of citizenship is the sense of inclusion and acceptance into their adopted community.
- 2.4 The introduction of grants in order to provide funding to assist refugees and humanitarian entrants with support to pass the test was a positive development.¹ The citizenship test review and the decision to modify what was covered in the test is also welcomed.
- 2.5 In August 2008 the Australian Citizenship Test Review Committee delivered its report and recommendations relating to the citizenship test.² The issue of an exemption for those who suffer torture and trauma was raised with the Committee who commented as follows:
- 2.6 The Act states, in part, that "a permanent physical or mental incapacity means that the person is not capable of understanding the nature of the application at that time". The Committee considers that many of these individuals would

¹ Media release, Minister for Immigration and Citizenship 'Grants to help refugees with citizenship test', <http://www.minister.immi.gov.au/media/media-releases/2008/ce08055.htm>

² Australian Citizenship Test Review Committee, *Moving forward... Improving Pathways to Citizenship*, August 2008, http://www.citizenship.gov.au/test/changes/_pdf/moving-forward-report.pdf

understand the nature of their application; however, their mental state does not enable them to demonstrate that they have a basic knowledge of the English language, and/or an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship.

2.7 The Committee was also advised that these conditions are not necessarily classified as a “permanent” mental incapacity by the medical profession, even though they preclude a person becoming a citizen due to mental and physical incapacity, thus excluding this group from the exemption provisions.³

2.8 The Committee recommended as follows

It is suggested that section 21(3)(d) could be amended in the spirit of the existing Act to read:

“has a physical or mental incapacity at that time means the person is not capable due to the physical or mental incapacity of:

- understanding the nature of the application at that time; or*
- demonstrating a basic knowledge of the English language at that time; or*

- demonstrating an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship at that time.”⁴*

2.9 However the proposed amendment is narrower than this and states:

26 (3B) person satisfies this subsection if the person has a physical or mental incapacity, at the time the person made the application, that is as a result of the person having suffered torture or trauma outside Australia and that means the person:

(a) is not capable of understanding the nature of the application at the time the person made the application; or

(b) is not capable of demonstrating a basic knowledge of the English language at that time; or

(c) is not capable of demonstrating an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship at that time.

2.10 The proposed amendment requires proof that an applicant’s mental incapacity is related to torture and trauma which occurred outside of Australia. ALHR has some issues in relation to this. Presumably this will require an applicant to obtain such evidence. There are very few organisations that specialise in providing expert services to torture and trauma survivors in Australia and the demands upon them are not met with adequate corresponding funding. ALHR understands that waiting lists for counselling services are high.

³ Ibid 34

⁴ Ibid 35

- 2.11 ALHR is concerned that time and resources of such organisations may be taken up in the provision of expert reports in respect of persons seeking exemptions from the test. Such resources could be surely put to a more beneficial use.
- 2.12 ALHR would prefer the proposed Bill be amended to be in line with the broader statement of exemption put forward by the Australian Citizenship Test Review Committee. This would allow a broader range of health professionals to provide such an assessment and not burden the already stretched resources of torture and trauma services.

3 Children and applications for Citizenship

- 3.1 The ALHR is concerned about the proposed amendment and insertion of s 21(5) into the Australian Citizenship Act 2007 that requires a child to have permanent residency in Australia before they can be eligible for citizenship. The Minister in his second reading speech stated that:

Proposed amendments in this Bill will require that applicants under the age of 18 must be permanent residents to be eligible for citizenship by conferral. This is consistent with current policy. This amendment will prevent children who are in Australia unlawfully, or, who along with their families, have exhausted all migration options, from applying for citizenship in an attempt to prevent their removal from Australia.

- 3.2 ALHR would urge the Parliament to act upon actual evidence of the migration consequences of a child's citizenship status. Similar arguments were raised at the time of the 1986 amendments to the *Australian Citizenship Act 1948* (Cth) which removed the right of children born in Australia to acquire citizenship unless one or more of their parents were Australian citizens or permanent residents. The Human Rights Commission queried whether it was really necessary to take citizenship away from Australian-born children:

it is of the view that the risk can be over-stated. It considers the suggestion that 'the floodgates' might be opened is without foundation. Over the past five years, the Commission has received only twenty-seven complaints (and two inquiries) relating to Australian-born children whose parents are under threat of deportation or have been deported. Allowing all of these persons to stay would hardly constitute a trickle, let alone a flood⁵

- 3.3 Articles 7 and 8 of the United Nations Convention on the Rights of the Child (1989) seek to protect the child's right to nationality. In particular, Article 7(1) protects the 'right to acquire a nationality' and Article 8(1) requires States Parties to 'respect the right of the child to preserve his or her identity, including nationality'.⁶

⁵ Human Rights Commission, *The Human Rights of Australian-born Children whose Parents are Deported*, August 1986, Report No 18, 3.

⁶ This right is also contained in the Universal Declaration of Human Rights (1948), art 15(1); the International Covenant on Civil and Political Rights, art 24(3), and; the International Convention on the Protection of the Rights of All Migrant Workers and their Families, art 29.

- 3.4 A blanket amendment such as this is of concern to the ALHR. Such an approach disregards the rights of children and focuses on the legal status of their parents.
- 3.5 The ALHR would prefer to see an amendment that provides that in deciding whether an applicant under the age of 18 years of age be eligible for conferral of citizenship incorporates the best interest principle from Article 3 of the Convention of the Rights of the Child.
- 3.6 In considering the Australian Citizenship Bill, the Senate Legal and Constitutional Committee recommended that the Bill should include a provision which provided that 'in all decisions affecting the rights and interest of a child, the best interests of the child shall be a paramount consideration.'⁷ A proposed amendment to include such a provision was rejected by the Australian Senate.⁸
- 3.7 There may well be situations where a child does not have a parent who will apply to register them as an Australian permanent resident; for example where the relationship between the child and his or her parent(s) is acrimonious and their parent refuses to co-operate in the application process. Another example from past times could be the children of the East Timorese asylum seekers who were resident in Australia for up to a decade without any visa or citizenship status.

Conclusion

- 3.8 ALHR thanks the Committee for this timely inquiry and stands ready to provide evidence if necessary.

⁷ Senate Legal and Constitutional Committee, *Inquiry into the provisions of the Australian Citizenship Bill 2005 and the Australian Citizenship (Transitional and Consequential) Bill 2005*, AGPS, Canberra, 2006, Recommendation 13 at [3.91].

⁸ Commonwealth of Australia, *Hansard*, Senate, 27 February 2007, 8-10. The Australian Democrats' Senator Andrew Bartlett attempted to introduce an amendment to the Bill to include s 10A to provide that '[w]henever a decision is taken under this Act in relation to a child; the best interests of the child must be the paramount consideration.'