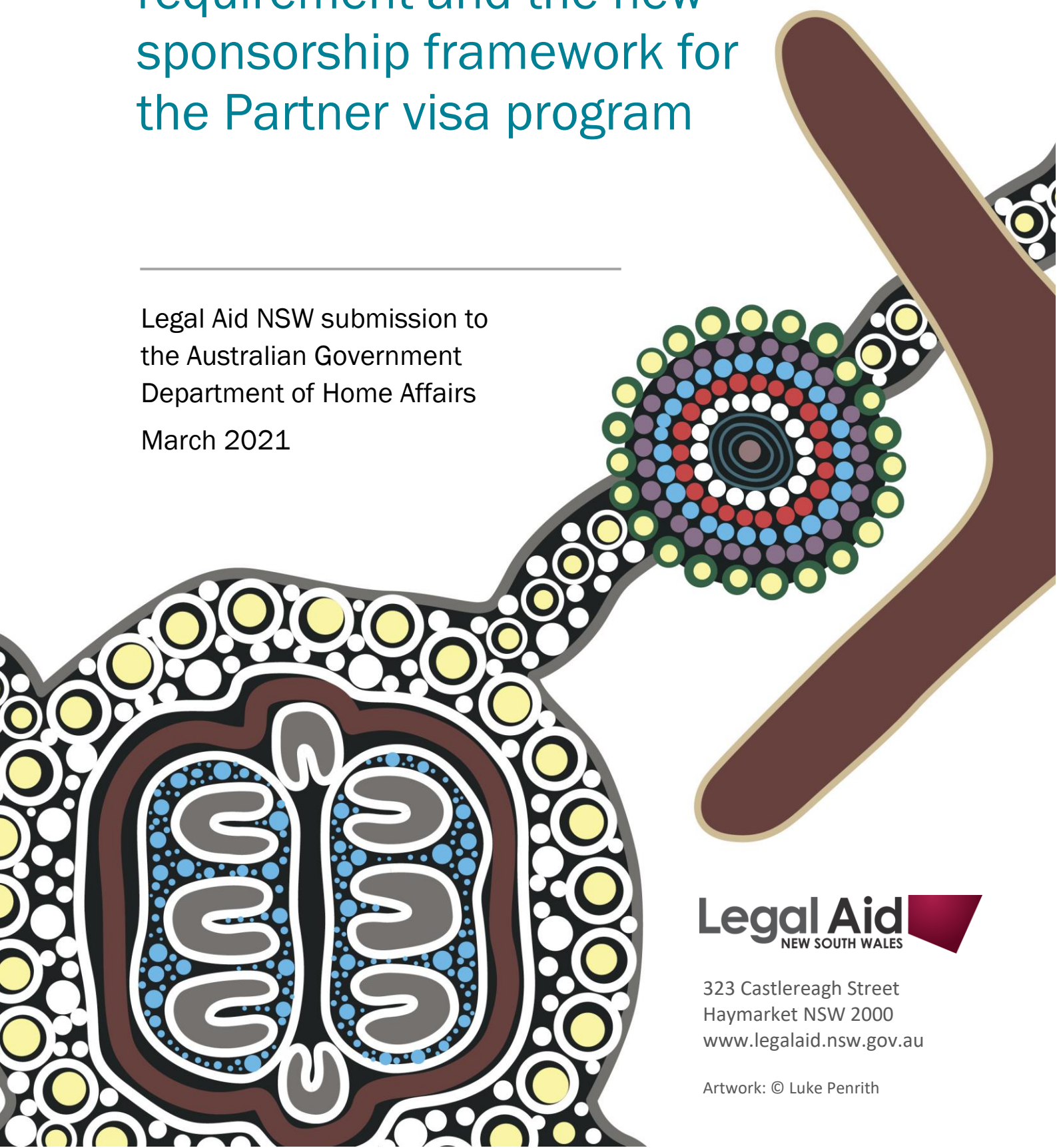


Public consultation on the English language requirement and the new sponsorship framework for the Partner visa program

Legal Aid NSW submission to
the Australian Government
Department of Home Affairs
March 2021



Legal Aid
NEW SOUTH WALES

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines.

The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

Should you require any further information, please contact:

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2. Executive Summary

Legal Aid NSW welcomes the opportunity to provide submissions to the Australia Government Department of Home Affairs public consultation on the proposed English language requirement and sponsorship framework for partner visas.

In summary, Legal Aid NSW opposes the introduction of an English language requirement for sponsors and applicants for partner visas. We consider that such a requirement unnecessarily discriminates against people from countries where English is not the national language and has the real potential to interfere with the right to respect for the family that is contained in the *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a signatory.

If, however, an English language requirement is to be introduced, adequate exemptions should be provided so that it does not disproportionately discriminate against vulnerable members of the Australian community.

In light of the limited time available for the making of submissions (effectively 7 business days), this submission will focus on Topic 4 of the proposed English language requirement, being:

In what circumstances should a person be exempt from needing to meet the English language requirement? What evidence should be accepted to support a claim for an exemption?

Recommendations

Recommendation 1

That the Australian Government does not introduce English language requirements for sponsors and visa applicants for partner visas at the visa application and grant stage.

Recommendation 2

If the English language requirement is to be introduced, the following persons should be exempt from needing to meet the requirement:

- Sponsors and partner visa applicants who have one or a combination of the following factors:
 - advanced age (we suggest over 60 years)
 - low literacy levels (even in their own language)
 - those with a permanent or enduring physical or mental incapacity, including cognitive impairments.
 - those with hearing, speech, or sight impairments
- Visa applicants who, under the current regime, would have obtained a partner visa on the basis of the domestic and family violence exemptions in the *Migration Act 1958* and *Migration Regulations 1994*

- sponsors and visa applicants who have the care of a young child/children
- visa applicants whose sponsoring partner has died prior to the grant of a partner visa and are experience grief following the death of a sponsor
- sponsors who are refugee and humanitarian visa holders and their partners (the visa applicant).

3. About Legal Aid NSW immigration services

Legal Aid NSW provides legal services in the area of migration law, principally by lawyers in the Government Law team in Legal Aid's Civil Law Division. Our services include advice and representation of clients in relation to visa applications lodged with the Department of Home Affairs, review applications to the Administrative Appeals Tribunal's Migration and Refugee Division, and judicial review proceedings following an adverse Tribunal decision

Legal Aid NSW regularly advises and acts for visa applicants at all levels of the application and review process. We have extensive practical experience acting for clients, predominantly women, who have experienced family violence and are facing the immigration consequences of separation from their violent sponsor as a result. We also have considerable experience working with asylum seekers and newly arrived refugees.

The comments provided in this submission draw substantially on the practical experience of the Legal Aid NSW's lawyers in providing advice and advocating on behalf of our clients.

4. English language requirement not supported

Legal Aid NSW opposes the introduction of an English language requirement for sponsors and visa applicants for partner visas. Such a requirement unnecessarily discriminates against people from countries where English is not the national language and has the real potential to interfere with the right to respect for the family that is contained in articles 23 and 17(1) of the *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a signatory.

The Attorney-General's Public sector guidance sheet on the Right to respect for the family¹ makes a number of relevant points which apply to this proposed measure. For example, it specifically stipulates that legislation and policy which provides for the entry into Australia of persons under migration laws in circumstances that may affect the unity of a family should consider whether the right to respect for the family and protection from arbitrary interference is affected.

Australia is a multicultural nation that has derived great economic, social, and cultural benefits from migrants, many of whom have arrived without familiarity with the language, culture, and customs of Australia. There are processes in place to ensure that prospective Australian citizens have an adequate knowledge of the English language, Australian culture, and the responsibilities of citizenship, and it seems unnecessary to introduce language requirements at the visa application and grant stage.

In addition to keeping partners apart, based on the limited information in the consultation paper there appears to be the real possibility that an English language requirement will also adversely affect the rights of children of the relationship to be reunited with the sponsoring parent, in the event that the sponsoring parent cannot meet the English language requirement.

An English language requirement may also adversely affect the rights of children of the relationship in other ways. In the event that the visa applicant parent (usually the primary visa applicant) cannot meet the English language requirement for a permanent partner visa, the children will also remain on temporary visas, potentially for an extended period. This can adversely affect the visa applicant's and their children's access to services which may be predicated on holding a permanent visa, such as access to certain types of Centrelink payments and education courses.

¹ Accessed on 26 March 2021 at <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-respect-family>

Although it is desirable that people who come to Australia learn English, this should not be a primary determinant of whether they should qualify for a partner visa.

Recommendation 1

- That the Australian Government does not introduce English language requirements for sponsors and visa applicants for partner visas at the visa application and grant stage.

5. Topic 4: Exemptions from the English language requirement

If, however, an English language requirement is to be introduced, the consultation paper acknowledges that there are circumstances in which sponsors and visa applicants will not be able to satisfy an English language requirement.

Such a requirement should contain appropriate exemptions so that it does not disproportionately discriminate against vulnerable members of the community and their partners, adversely affect their ability to be with their partner and, where relevant, children.

In addition, care must be taken to ensure that the framing of the English language requirement should not be overly onerous. The practical effect of an unnecessarily harsh requirement can lead to a separation of family members under migration laws.

Legal Aid NSW strongly suggests that if an English language requirement is to be introduced, there should be further consultation undertaken once the proposed legislative provisions are drafted, to allow a full and meaningful examination of the proposed changes by the community, and to allow adequate time to properly respond. The proposed changes are significant and should be properly scrutinised.

5.1 Factors that may affect either or both of the sponsor and partner visa applicant

Based on our extensive casework experience in this area, we submit that exemptions should properly include people who we consider will not be able, or will find it very onerous, to satisfy the English language requirements because of one or a combination of the following factors which may affect either or both of the sponsor and partner visa applicant:

- advanced age (we suggest over 60 years)
- low literacy levels (even in their own language)
- those with a permanent or enduring physical or mental incapacity, including cognitive impairments
- those with hearing, speech, or sight impairments
- visa applicants who, under the current regime, would have obtained a partner visa on the basis of the domestic and family violence exemptions in the Migration Act and Regulations. This issue disproportionately affects women, and some of the factors include:

- where an abusive/controlling sponsoring partner has prevented the applicant from learning English or going out to attend classes²
- visa applicants who are living in refuges due to domestic and family violence
- visa applicants who are afraid to go out in public to mitigate the risk of violence from their ex-partner
- visa applicants who have physical injuries from assaults from their ex-partner
- visa applicants who have no access to Centrelink payments.

Studies show that adults experiencing the effects of past or current trauma are particularly challenged in learning a new language due to factors such as post-traumatic stress disorder, depression and experience concentration and memory loss.³

5.2 Visa applicants who have the care of a young child/children

This issue disproportionately affects women from non-English speaking countries who apply to migrate to Australia. They often have fewer opportunities to learn English due to primary responsibility for raising children, which does not allow them the same opportunities to learn and practice English in order to attain the required proficiency. We do not consider that these barriers can be easily overcome by the development of online learning modules by the Adult Migrant English Program, as noted in the consultation paper. Nor does the provision of childcare at AMEP centres of learning mitigate the difficulties that these visa applicants will experience.

5.3 Sponsors who are refugee and humanitarian visa holders and their partners

Refugees represent a particularly vulnerable and disadvantaged group within the broader migrant community in Australia. The experiences of refugees before they come to Australia significantly affect their physical and mental health. Refugees have fled persecution and many have been subject to torture, suffering trauma as a result of war and conflict and are more vulnerable to health issues. In addition to these issues, refugees who are older, who are not literate in their own languages, who have disabilities, and who are raising children or caring for others, all face extra challenges in being able to learn English.⁴

² See for example Partnership against Domestic Violence, *Barriers for Limited English Proficiency Survivors*, accessed on 29 March 2021 at <https://padv.org/barriers-for-limited-english-proficiency-survivors>

³ See Jane Isserlis, *Trauma and the Adult English Learner*, July 2000, accessed on 29 March 2021 at https://www.cal.org/caela/esl_resources/digests/trauma2.html

⁴ Refugee Council of Australia, *Settling in Australia: The challenges*, 26 December 2019. Accessed on 29 March 2021 at <https://www.refugeecouncil.org.au/settlement-challenges/>

Recommendation 2

If the English language requirement is to be introduced, the following persons should be exempt from needing to meet the requirement:

- Sponsors and visa applicants who have one or a combination of the following factors:
 - advanced age (we suggest over 60 years)
 - low literacy levels (even in their own language)
 - those with a permanent or enduring physical or mental incapacity, including cognitive impairments.
 - those with hearing, speech, or sight impairments
- visa applicants who, under the current regime, would have obtained a partner visa on the basis of the domestic and family violence exemptions in the *Migration Act 1958* and *Migration Regulations 1994*
- visa applicants who have the care of a young child/children
- visa applicants whose sponsoring partner has died prior to the grant of a partner visa and are experiencing grief following the death of a sponsor
- sponsors who are refugee and humanitarian visa holders and their visa applicant partners.



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