

Strengthening the Test for Australian Citizenship

Legal Aid NSW submission to
Department of Immigration and
Border Protection

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323 CASTLEREAGH ST
HAYMARKET NSW 2000 / DX 5 SYDNEY

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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) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

In partnership with Settlement Services International, Legal Aid NSW provides accessible legal services to culturally and linguistically diverse community members experiencing disadvantage and limited access to legal assistance. Outreach clinics are operated in eight locations, according to need. Legal Aid NSW also provides community legal education workshops to Migrant Resource Centre staff, clients and communities.

Our Immigration Service provides legal advice, assistance and representation about family, refugee and humanitarian visas and Australian citizenship. We also give advice on detention, removal, cancellation procedures and exclusion periods.

Legal Aid NSW welcomes the opportunity to respond to the changes discussed in the paper "Strengthening the Test for Australian Citizenship". Should you require any further information, please contact

Bill Gerogiannis
Senior Solicitor
Government Law
Civil Law Division
Legal Aid NSW

or

Katie Wrigley
Senior Solicitor
Government Law
Civil Law Division
Legal Aid NSW

Introduction

Thank you for the opportunity to comment on the proposed changes to the *Citizenship Act 1948* (Cth). Legal Aid NSW is concerned that the proposed changes to the residence requirements, the English test and the citizenship test will make citizenship more difficult to achieve for vulnerable Australian residents. We consider that the benefits and responsibilities of citizenship should be extended to certain categories of migrants who have lived in Australia for four years and who are of good character, but who have not yet mastered English. We would welcome the opportunity to make further submissions when the proposed legislation is introduced into the Parliament.

Residence requirements

The proposed change would mean that residence in Australia on temporary work, partner or humanitarian visas would not count towards the four year general residence requirement for citizenship. Legal Aid NSW does not support this proposed change.

Many clients of the Legal Aid NSW Immigration Service come to Australia on temporary partner visas which may then lead to a permanent visa. A number of clients on this pathway are victims of domestic and family violence after arrival to Australia. They may come to Australia as a prospective spouse, then spend two more years as a temporary partner visa holder, and then be eligible to apply for, and receive, a permanent visa. A person in this position faces the prospect of waiting a minimum of six years before they can apply for citizenship. In many cases it will be longer.

Legal Aid NSW does not consider that a longer period of permanent residence is necessary to examine a person's integration with Australia. Four years' residence, on a temporary or permanent visa, should be sufficient.

The proposed change will have real and tangible effects, as it will lengthen the period before Australian residents can access the full benefits and responsibilities of citizenship. These benefits and responsibilities include the right to vote and the right to obtain an Australian passport and travel as an Australian. Gaining access to rights and benefits such as these is necessary to fully participate in Australian society and national and political life.

English language testing

Legal Aid NSW considers that refugees should be exempt from the requirement for formal English testing.

Refugees represent a particularly vulnerable and disadvantaged group within the broader migrant community in Australia. Health professionals and researchers commonly estimate

that between four and 35 per cent of refugees have been subject to torture.¹ By definition, every refugee has a “well-founded fear of persecution”,² and everyone granted protection visas by Australia has been at real risk of significant harm (or is a member of the same family unit as such a person).³ Refugees have often endured long and treacherous journeys fleeing persecution in their home countries to seek protection in Australia and, in many cases, have faced years of separation from close family members and uncertainty as to their ultimate fate.

Some refugees will quickly acquire competence in English. However there are others, who will have arrived in Australia with little or no English language skills, and will struggle to learn English due to trauma, other psychological conditions relating to past experiences of persecution, lack of education in their home countries or illiteracy in their native language. The Australian Citizenship Council has suggested the experience of torture can result in “a diminished capacity to learn a new language.”⁴ The stress and pressure created by a formal testing environment could disproportionately affect refugees, particularly those who are victims of torture and trauma.

Refugees who hold permanent protection visas are eligible for 510 hours of free English language tuition through the Adult Migrant Education Program (AMEP). This is a valuable program, but in many cases it is not sufficient for refugees to attain proficiency in the English language. Legal Aid NSW considers that it may be appropriate to require competence in English from certain categories of migrants, such as skilled entrants. However it would be unjust to deny the benefits of citizenship to those who have entered under the humanitarian program, have fulfilled residence requirements and are of good character, but have not yet developed competence in English. There are already exemptions proposed for applicants over 60 years of age, under 16, or people with enduring or permanent mental or physical incapacity. There should also be an exemption for refugees. Alternatively, there should be an exemption for people with special circumstances, including people who have experienced trauma, torture or special disadvantage.

The citizenship test

For similar reasons, many refugees will experience difficulty with the citizenship test because of the lack of written English skills. Refugees from countries suffering from civil wars or internal armed conflicts frequently have had an interrupted or otherwise limited education. Some refugees have been denied education because of discrimination or poverty, and are illiterate in their native language or languages. If a person fails the

¹ International Rehabilitation Council for Torture Victims, *About Refugees, Asylum Seekers, IDPs and Torture* (March 2006), available at

http://www.urvt.org/rokdownloads/Reports_Publications/About_refugees_IDPs_and_torture1.pdf

² See *Migration Act 1958* (Cth) sections 36(2)(a), 5H and 5J.

³ See *Migration Act 1958* (Cth) section 36(2)(aa) complementary protection grounds.

⁴ Australian Citizenship Council, *Australian Citizenship for a New Century* (18 February 2002), 50, available at <<http://www.citizenship.gov.au/pdf/05.pdf>>.

citizenship test, it is may be because they did not understand the question, rather than because they are not committed to Australia's values.

Legal Aid NSW considers that the course-based citizenship test should be retained for people with a low level of English literacy. Alternatively, refugees should be exempt from the cap on the number of times a person may take the citizenship test.

Retrospective legislation

Legal Aid NSW is concerned that the discussion paper proposes legislative changes that will apply to applications received on or after the Government's announcement on 20 April 2017.

Legislation with retrospective operation should be rare and accompanied by proper justification.

Retrospective laws are not consistent with the rule of law principle that the law should be public, prospective and capable of being known by those who are subject to it.⁵ This principle is evident in the approach of courts to the interpretation of statutes, such that courts will not readily interpret a statute as having retrospective effect unless the intention of the legislature to do so is clear.⁶ Similarly, the Senate Standing Committee on the Scrutiny of Bills expects that the explanatory memorandum for a bill with retrospective operation should detail the reasons retrospectivity is proposed.⁷

Applicants for Australian citizenship who apply after 20 April 2017 cannot know what law applies to their application, because that law has not yet been passed by Parliament. While the discussion paper provides information about what that law is likely to be, the discussion paper also indicates that the legislation will be 'informed by responses to this paper'.

Retrospective legislation will sometimes be justified if it addresses significant injustice or loss of revenue.⁸ However, the discussion paper does not provide any justification for the retrospective nature of the proposed legislation. Legal Aid NSW cannot see how any significant injustice or harm would result if the current law were applied to applications lodged before any legislative amendment. Legal Aid NSW therefore considers that any legislative changes should apply prospectively, from the date of commencement.

⁵ Tom Bingham "The Rule of Law" (2008) 1 *Judicial Studies Institute Journal* 121, 124.

⁶ *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, [30].

⁷ Senate Standing Committee on Scrutiny of Bills, *The Work of the Committee in 2014* (Parliament of Australia) 39.

⁸ Australian Law Reform Commission *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws* ALRC Report 129, Ch 13 "Retrospective Laws".