

Inquiry into Migrant Settlement Outcomes

Legal Aid NSW Submission
to Joint Standing Committee
on Migration

February 2017

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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 35 community legal centres and 28 Women’s Domestic Violence Court Advocacy Services.

The Legal Aid NSW Children’s Civil Law Service (**CCLS**), established in 2013, provides a targeted and holistic legal service to young people identified as having complex needs.

The Legal Aid NSW Children’s Legal Service (**CLS**) advises and represents children and young people involved in criminal cases in the Children’s Court, including young people appearing before the Children’s Court for parole matters. CLS lawyers also visit juvenile justice centres and give free advice and assistance to young people in custody.

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.

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Introduction

Legal Aid NSW welcomes the opportunity to respond to the Inquiry into Migrant Settlement Outcomes by the Joint Standing Committee on Migration (“**the Committee**”).

Australian multiculturalism has been a remarkable success. Most Australians think multiculturalism has been good for Australia, and surveys of social cohesion indicate that people of different backgrounds usually get on well.¹ Children of immigrants do well in education,² and the unemployment rate for recent migrants is only slightly higher than that of the general population.³

Legal Aid NSW calls for an evidence-based approach to migrant settlement. We acknowledge concerns about a small number of young migrants involved in anti-social behaviour and crime. Responses to that behaviour should focus on their youth, and other risk factors including disengagement, family problems, unemployment, cognitive disability and mental illness rather than migrant status. Best practice approaches to migrant settlement must include immediate assistance on arrival, high quality universal services including health, education, family support and legal services, and community-wide work to eliminate racism.

Legal Aid NSW notes that the character test provisions of the *Migration Act 1958* (Cth) were tightened in 2014 despite concerns raised by the Australian Human Rights Commission, the Refugee Council of Australia, the NSW Council for Civil Liberties and the Law Institute of Victoria. We consider that further changes to the character test are not an appropriate response to anti-social behaviour by young migrants. Deportation is not a suitable response to juvenile offending.

An evidence-based approach

Legal Aid NSW suggests that the Committee take an evidence-based approach to concerns about migrant settlement outcomes.

We recommend that the Committee should

- avoid making assumptions or relying on stereotypes about the involvement of migrant youth in anti-social activity,
- consider the challenges faced by migrant youth, and where anti-social activity is alleged to have occurred, the Committee consider the circumstances that may have contributed to that behaviour,

¹ Scanlon Foundation Survey, cited in Dr Tim Soutphommasane, *The Success of Australia's Multiculturalism*, speech to the Sydney Institute, 9 March 2016.

² OECD, *Education at a Glance 2012: OECD Indicators*, 2012, OECD Publishing, p 92.

³ Australian Bureau of Statistics, *Characteristics of Recent Migrants, Australia*, Nov 2013 6250.0.

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- consider evidence regarding effective responses to anti-social activity, and
 - avoid making significant changes to national migration laws based on concerns about a phenomenon that may be temporary and localised.

Anti-social behaviour and young people

Legal Aid NSW submits that appropriate responses to anti-social behaviour of young migrants should not necessarily focus on their migrant status. Most serious crimes committed by young people, including home invasions, car theft and aggravated burglary are committed by young people born in Australia.⁴

As Richards (2011) notes, “it is widely accepted that crime is committed disproportionately by young people. People aged 15 to 19 are more likely to be processed by police for the commission of a crime than are members of any other population group”.⁵

When young people commit crime, they are more likely to come to the attention of police. As Cunneen and White point out, juveniles (in comparison to adults) are more likely to

- Commit offences in groups
- Commit offences in public areas
- Commit offences close to where they live
- Commit offences which tend to be “attention-seeking and public” and are “episodic, unplanned and opportunistic”.⁶

Research on brain development suggests that the disproportionate involvement of young people in crime occurs because the adolescent brain is still developing until the early 20s. Adolescents are more likely to take risks and to act impulsively and without fully understanding or analysing the consequences of their actions. They are also more vulnerable to peer pressure and prone to overestimate short-term payoffs.⁷

Most young people grow out of offending—rates of offending peak at age 18 to 19 and drop away after that.⁸

⁴ Sarah Farnsworth and Patrick Wright “Victoria youth crime: statistics raise questions about calls to deport youth offenders” www.abc.net.au 6 December 2016.

⁵ Kelly Richards, “What makes juvenile offenders different from adult offenders?” *Trends & Issues in Crime and Criminal Justice* No. 409 February 2011, 1.

⁶ Cunneen & White 2007, cited in Richards, above n 5.

⁷ Malcolm Ritter, *Experts link teen brains’ immaturity, juvenile crime* <http://abcnews.go.com/Technology/story?id=3943187&page=1>

⁸ Richards, above n 5, 2.

The scientific understanding of brain development is reflected in sentencing principles for young offenders. The NSW Judicial Commission's *Sentencing Benchbook* notes:

*The law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law. Accordingly, allowance will be made for an offender's youth and not just their biological age ... The weight to be given to the fact of the offender's youth does not vary depending upon the seriousness of the offence. Where the immaturity of the offender is a significant factor in the commission of the offence, the criminality involved will be less than if the same offence was committed by an adult.*⁹

Accordingly, when sentencing a young person, courts are required to place greater emphasis on rehabilitation, and give less weight to general deterrence and retribution.

International law also acknowledges that the response to juvenile offending must be different from the response to adult offending. The United Nation Convention on the Rights of the Child ("CROC") requires the law to take into account "the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".¹⁰ Children should be deprived of liberty only as a last resort and for the shortest appropriate period of time.¹¹ The Beijing Rules, which have been adopted by the Committee on the Rights of the Child as giving content to the CROC, indicate that 'strictly punitive approaches are not appropriate'.¹²

Legal Aid NSW calls on the Committee to make recommendations that are consistent with

- scientific understandings of juvenile offending
- established sentencing principles regarding young offenders, and
- Australia's international obligations regarding the rights of children.

The challenges faced by young migrants

Young migrants to Australia face many challenges, including:

- Learning a new language
- Attending a mainstream school that may not respond to their particular needs
- Lack of recognition of prior qualifications
- Limited social capital to assist in accessing economic, educational and social resources, such as referees, networks for employment opportunities
- System issues, including confusion over birthdates, lost paperwork, or an inability to disclose information relating to family configurations and history

⁹ Judicial Commission *Sentencing Benchbook* [15-015]

¹⁰ CROC article 40. Australia ratified CROC in 1990.

¹¹ CROC article 37(b).

¹² United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) Rule 17.

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- Significant responsibilities in their family and community—young people are often the ‘front line’ in the settlement process, having to act as brokers (including interpreters) between services and systems and their parents and community members
 - Surviving and challenging racism.¹³

Young people arriving under Australia’s refugee program have extra challenges. They may have fled war, persecution or oppression. They may have missed years of school or been born in refugee camps. They have often overcome extraordinary hardship, endured significant trauma, and displayed considerable personal courage. Those personal qualities can be of significant benefit to Australia if they are fostered through appropriate education, social support and services.¹⁴

In Legal Aid NSW’s experience, however, past trauma can lead to contact with the criminal justice system. This is demonstrated by the following case studies involving clients represented by Legal Aid NSW’s Children’s Legal Service and Children’s Civil Law Service. Names have been changed to protect confidentiality.

Case studies have been removed from this submission for publication, to protect our clients’ privacy.

And, as demonstrated by the following case study, young refugees may face discrimination, including from those in authority:

Case studies have been removed from this submission for publication, to protect our clients’ privacy.

Particular effort is made by Legal Aid NSW in assisting migrant young people to link them with appropriate and relevant support services in recognition of the challenges facing them.

Best practice in resettling migrant young people

There is considerable evidence available to the Committee regarding best practice in resettling youth migrants. We refer the Committee in particular to the Multicultural Youth

¹³ Centre for Multicultural Youth, *Good Practice Guide, Youth Work with Young People from Refugee and Migrant Backgrounds* 2011, 2.

¹⁴ Department of Immigration and Citizenship *A significant contribution. The economic, social and civic contributions of First and Second Generation Humanitarian Entrants* (The Hugo Report).

Advocacy Network's *National Youth Settlement Framework* (2016). Legal Aid NSW notes three essential elements for successful resettlement.

First, settlement services to assist migrants in their initial steps towards finding accommodation, education and employment. Access to English language learning services is very important to encourage social and economic participation. However, acquiring English before arriving in Australia is not essential to resettlement. Historically, many waves of migrants have arrived in Australia with little or no English and have successfully integrated into Australian society.

Second, universal services such as high quality health, education and employment placement services are critical. Access to justice, including legal advice and education, are also an important component of success.

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. About half of the assistance provided concerned immigration matters, 21% concerned family law and 28% was for other civil law matters.

Legal Aid NSW also provides community legal education workshops to Migrant Resource Centre staff, clients and communities. This program not only improves access to justice for a very disadvantaged group, but as a form of early intervention, prevents the escalation of minor legal problems

Third, social cohesion and integration are long term goals. They are not the sole province of government or non-government service providers, but require a whole-of-government and community-wide commitment to eliminating racism, welcoming new arrivals and celebrating diversity.

The character test

Legal Aid NSW has a number of concerns about the character test provisions of the *Migration Act 1958* (Cth). The power to cancel visas is very broad. While the cancellation of a permanent visa for juveniles on any grounds is a cause for concern, of particular concern is the impact of the mandatory visa cancellation regime.

The requirement for mandatory cancellation of a visa in certain circumstances has the potential to work significant injustice. Since December 2014 a person's visa is mandatorily cancelled if, in broad terms, they are in prison and have been sentenced to a term of imprisonment of 12 months or more. "Imprisonment" is defined to include any form of punitive detention in a facility or institution, and includes participation in residential drug rehabilitation facilities or programs for the mentally ill.

While the person who has their visa mandatorily cancelled can seek revocation of that decision, the right to seek revocation is difficult to enforce. In particular, the legislation

allows only 28 days from the date of notification of the mandatory cancellation to seek a revocation. No extension of time is possible.

There are a number of hurdles for a person in custody to seek revocation. It is difficult to access legal advice or even access facilities with which to send the revocation request to the Department such as faxes, email or postal facilities. Assistance offered by welfare officers in jail is, in the experience of Legal Aid NSW, very uneven. Anecdotally, clients contacting our services by telephone have said that it is difficult to get Corrective Services staff to assist them to send revocation requests. Given the dire consequences of a visa cancellation, failure to lodge a revocation request on time may lead to significant injustice if it leads to a removal from Australia.

The potential for such injustice is even more apparent in respect of juvenile offending. The hurdles for juveniles to seek revocation, especially juveniles whose first language is not English, are even more difficult to overcome because of the factors referred to above. The material needed to make comprehensive submissions on revocation is extensive and detailed, and should refer to the factors in Ministerial Direction 65. In our experience it is, in most cases, beyond the ability of many of those affected, and especially juveniles, to respond in a sufficiently detailed way without legal assistance. However, legal aid is not available to assist with revocation requests. We note that no additional funding was provided to Legal Aid NSW following the introduction of the mandatory cancellation regime in 2014.

Legal Aid NSW considers that it is inconsistent with good policy and Australia's international obligations to deport juveniles just on the basis of their offending, particularly those who have refugee or humanitarian visas and have most, if not all, of their immediate family in Australia.

The Minister also retains other powers to cancel a visa even if the mandatory cancellation provisions are not met. Some of those provisions can be seen to operate in practice to adversely affect young people. For example, one of the grounds for cancellation of a visa is that the Minister reasonably suspects that the person has an association with a group or person who has been involved in criminal conduct.¹⁵ Legal Aid NSW considers that this is a very low threshold of proof for cancelling a visa. Another ground for cancellation is that there is a mere 'risk' that the person would engage in certain behaviours, including that the person will 'incite discord' in the community.¹⁶ Again, this is a very low threshold.

The potentially punitive approach taken to young persons in the current character test is inconsistent with the approach taken in sentencing law, Australia's international legal obligations, and well accepted scientific understanding of brain development in young people.

Legal Aid NSW therefore recommends that

¹⁵ *Migration Act 1958* s 501(6)(b).

¹⁶ *Migration Act 1958* s 501(6)(d).

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- 1) section 501 be amended to make clear that the provisions regarding cancellation on character grounds do not apply to people aged under 18,
 - 2) when considering the application of the visa cancellation provisions to an adult migrant, offences committed when a person is under 18 should not be taken into account,
 - 3) The definition of a term of imprisonment should reflect the non-parole period aspect of that term (that is, 12 months full time custody), and
 - 4) Sentencing options that have a clear rehabilitative function should be excluded from the definition, including custodial sentences served in the community by way of participation in a residential drug rehabilitation facility or mental health facility, home detention or intensive correction order.