

Australian Citizenship
Legislation Amendment
(Strengthening the
Requirements for Australian
Citizenship and Other
Measures) Bill 2017

Legal Aid NSW submission to
the Senate Legal and
Constitutional Affairs
Committee

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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 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW 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.

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.

Legal Aid NSW welcomes the opportunity to make a submission to the Senate inquiry into the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017. Should you require any further information, please contact

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Introduction

Legal Aid NSW welcomes the opportunity to contribute to the Senate Inquiry into the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (**the Citizenship Amendment Bill**).

We are concerned that the Bill creates barriers to citizenship for certain persons, particularly refugees and other vulnerable and disadvantaged persons. Citizenship carries with it important rights and responsibilities, and allows citizens to fully participate in Australian society and national and political life. While it is necessary to have pre-conditions for citizenship, those pre-conditions should not be so onerous that people who have had to flee their home countries, and who genuinely wish to integrate into Australian life, are unable to meet them.

We are also concerned about provisions in the Bill that:

- leave important matters to be defined in legislative instruments
- allow the Minister to overturn certain decisions of the Administrative Appeals Tribunal (**AAT**)
- allow the Minister to revoke citizenship on the basis of fraud or misrepresentation in the absence of a criminal conviction, and
- provide for retrospective application of the amendments.

Legal Aid NSW submits that these provisions breach important rule of law principles regarding Parliamentary scrutiny of legislation, review of executive decisions, and the general principle that laws should be prospective and capable of being known by those subject to it.

Residence requirements

Items 54–57 of the Bill provide that a person must be a permanent resident for four years to be eligible to apply for citizenship. The Explanatory Memorandum for the Bill indicates that a residence requirement:

allows a person the opportunity to gain an understanding of shared Australian values, and the commitment they must make to become an Australian citizen. It also allows them time to integrate into the Australian community and acquire English language skills required for life in Australia as a successful citizen.¹

Legal Aid NSW supports a residence requirement for citizenship, for the reasons outlined in the Explanatory Memorandum. However, the proposed change would mean that residence in Australia on temporary work, partner or humanitarian visas would not count

¹ Explanatory memorandum [144]

towards the four year general residence requirement for citizenship. Legal Aid NSW does not support this proposed change. Residence in Australia on these visas also allows a person to gain insight into Australian values, acquire some English language skills, and commence integration into the Australian community.

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 in Australia. Four years' residence, on a temporary or permanent visa, should be sufficient.

Competent English

The Citizenship Amendment Bill indicates that applicants for citizenship will need to demonstrate competent English.² The Bill specifies that the Minister may determine the circumstances in which a person has demonstrated competent English by legislative instrument, which has not been finalised.³ While it is therefore not known what standard will be required to be eligible for citizenship, Legal Aid NSW is concerned that 'competent English' may be an unreasonably high standard, particularly for some refugees and other vulnerable and disadvantaged Australian residents. We consider that the standard should not be set at 'competent English' as it is currently understood, and that there should be special arrangements for refugee and humanitarian visa holders (detailed below).

What is 'competent English'?

The term 'competent English' is currently understood to require a score of at least 6 in each band of the international English language testing system (**IELTS**) or equivalent. According to the IELTS website:

If English isn't your first language, then you'll need to submit an IELTS score in order to be accepted onto a university programme taught in English. Most universities worldwide require an IELTS Band 6 score, with 6.5 being the most common requirement. So what is required to get IELTS Band 6?

² Items 8, 41, 51.

³ Item 53.

A score of IELTS 6.0 or 6.5 shows that a person is 'competent', meaning they can cope in a classroom situation even though there may be some mistakes or misunderstandings with language.⁴

The Explanatory Memorandum of the Bill indicates that exemptions may be set out in a legislative instrument. It mentions the following possible exemptions: passport holders of the UK, Ireland, Canada, USA or NZ; specified English language studies at a recognised Australian education provider; applicants with a permanent or enduring physical or mental incapacity; applicants aged 60 or over; and applicants with hearing, speech or sight impairment.

An excessively onerous requirement for some refugees

It is the view of Legal Aid NSW that the requirement to demonstrate 'competent English' is unnecessarily onerous and will discriminate unfairly against certain vulnerable sections of the community. 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.⁵ By definition, every refugee has a "well-founded fear of persecution",⁶ 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).⁷ 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."⁸ 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. This is a valuable program, but in many cases it is not sufficient for refugees to attain proficiency in the English language. Women from non-English speaking countries who migrate to Australia may

⁴ IELTS 'How to Get IELTS Band 6' 28 June 2012 <http://ielts-academic.com/2012/06/28/how-to-get-a-band-6-score-in-academic-ielts/>, accessed 12 July 2017.

⁵ 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

⁶ See *Migration Act 1958* (Cth) sections 36(2)(a), 5H and 5J.

⁷ See *Migration Act 1958* (Cth) section 36(2)(aa) complementary protection grounds.

⁸ Australian Citizenship Council, *Australian Citizenship for a New Century* (18 February 2002), 50, available at <http://www.citizenship.gov.au/pdf/05.pdf>.

have fewer opportunities to learn English as they often have primary responsibility for raising children. This does not allow them the same opportunities to learn and practice English in order to attain the required proficiency.

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.

Legal Aid NSW's proposal

While it is desirable that people who come to Australia learn English, this should not be a primary determinant of whether they qualify for citizenship and whether they have integrated into the Australian community. There are already exemptions from the English test proposed for certain applicants. There should also be an exemption for refugees and humanitarian entrants, including those who have arrived as unaccompanied minors.⁹ Alternatively, there should be an exemption for people with special circumstances, including people who have experienced trauma, torture or special disadvantage.

Legal Aid NSW proposes that:

- The level of English required should be placed at a level lower than 'competent English' as it is currently understood.
- There should be an exemption for refugee and humanitarian visa holders.
- Alternatively, refugee and humanitarian visa holders should be eligible to apply for a special circumstances exception. Special circumstances should include experience of torture, trauma or special disadvantage.
- Course based citizenship testing should be retained for people with low levels of literacy.

Integration into the Australian community

The Citizenship Amendment Bill would insert

- 1) a provision that, for a person to be eligible for citizenship, the Minister must be satisfied that the person has integrated into the Australian community (item 43), and
- 2) a provision that a legislative instrument will specify the matters to which the Minister may or must have regard (item 53).

⁹ We note that young people over 16 will have to demonstrate competent English: see item 51, proposed section 21(5)(d).

Legal Aid NSW considers it inappropriate that the definition of a key concept such as integration into the Australian community be left to delegated legislation and without Parliamentary scrutiny at this stage of the process.

Legal Aid NSW is of the view that the current testing for obtaining citizenship by conferral¹⁰ is appropriate. There is no evidence of which we are aware that suggests that for the vast majority of people, obtaining citizenship by conferral under the current rules is leading to inappropriate grants of citizenship. There is no necessity to introduce a new concept of 'integration' into the *Australian Citizenship Act 2007 (Cth)* (**'the Citizenship Act'**).

However, if the concept of integration is to be introduced, the Bill leaves the question of how integration is to be determined open. It is not known what factors the Minister will be informed by in determining whether a person has integrated into the community. The examples in the Explanatory Memorandum appear uncontroversial. However Legal Aid NSW considers that the matters relevant to the Minister's decision on this key issue should be defined in the Citizenship Act. It should not be left to delegated legislation which does not undergo the same level of public and Parliamentary scrutiny. It is also unclear whether there will be any public consultation on the proposed legislative instrument before it is made.

Strengthened character requirements

The Bill expands the Minister's power to intervene where there are character concerns. Legal Aid NSW has concerns about two areas: the treatment of young people, and the Minister's power to overturn a decision of the AAT.

Young people

Children under 18 will now need to meet the character requirement, with children 16 years or over required to undergo police checks. The Explanatory Memorandum acknowledges that:

This represents a change from current paragraph 21(6)(d) which only requires persons who are aged 18 years or over at the time the application was made to be of good character at the time of the Minister's decision on the application.¹¹

Legal Aid NSW opposes the expansion of these character provisions to deny Australian citizenship to young people, and in particular to children under 16. We refer to our submission to the Joint Standing Committee on Migration into the Inquiry into Migrant Settlement Outcomes (February 2017). While the focus of that submission was on a different migration issue, the following extract is relevant to the Inquiry into the

¹⁰ That is, when a permanent resident applies for citizenship.

¹¹ Item 52

Citizenship Amendment Bill, particularly for recently arrived migrant children and young people arriving under Australia's refugee program:

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.¹²

Most young people grow out of offending—rates of offending peak at age 18 to 19 and drop away after that.¹³

International law also acknowledges that the response to juvenile offending must be different from the response to adult offending. The United Nations *Convention on the Rights of the Child* 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'.¹⁴

Denying a child access to citizenship due to offending as a juvenile amounts to a failure to promote the child's reintegration into society, and may have other adverse long term consequences, particularly when the other members of the family are granted citizenship.

Minister's power to overturn a decision of the AAT

The Citizenship Amendment Bill inserts a new section 52A which provides that the Minister may set aside certain decisions of the AAT. The justification given in the Explanatory Memorandum is that certain significant decisions of the AAT were 'outside community standards'.¹⁵

However the AAT has extensive experience in conducting merits review of administrative decisions. The proceedings in the Tribunal are adversarial, so the Minister and his or her Department are represented by competent lawyers who put the Department's case at its highest. They cross examine witnesses and make submissions in support of the decision which is adverse to the applicant. The AAT is also bound to take account of Ministerial policy in its decision making.¹⁶ It is open to the Minister to appeal a decision to the Federal Court on a question of law.

In these circumstances, it is inappropriate to vest in the Minister a power to override the AAT's decision. The exercise of Ministerial discretion in these circumstances undermines

¹² Malcolm Ritter, *Experts link teen brains' immaturity, juvenile crime* <http://abcnews.go.com/Technology/story?id=3943187&page=1>

¹³ Kelly Richards, "What makes juvenile offenders different from adult offenders?" *Trends & Issues in Crime and Criminal Justice* No. 409 February 2011, 1.

¹⁴ *Convention on the Rights of the Child* article 40. Australia ratified this Convention in 1990.

¹⁵ Explanatory Memorandum [330]

¹⁶ *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979 2 ALD 634. See also *GZQZ and Minister for Immigration and Border Protection (Citizenship)* [2017] AATA 1052 where the AAT applied this rule.

public confidence in the Tribunal process and may dissuade people for exercising their right of review.

For these reasons, Legal Aid NSW opposes the introduction of this Ministerial discretion.

The Minister's power to revoke citizenship

Legal Aid NSW has concerns about the proposed new section 34AA which gives the Minister the discretion to revoke a person's citizenship in circumstances where the Minister is satisfied that the person became a citizen as a result of fraud or misrepresentation. Currently the Minister can revoke for fraud or misrepresentation, but there must be a conviction for an offence in relation to the citizenship application.¹⁷ Legal Aid NSW considers that the proposed new provision places too much power in the executive, and that a conviction for an offence should be a precondition for revocation for fraud or misrepresentation. Such a precondition ensures that a decision to revoke citizenship is at least made on objective grounds.

The retrospective nature of the legislation

The Bill includes amendments that are said to apply to applications for citizenship made on or after 20 April 2017.¹⁸ Legal Aid NSW considers that legislation with retrospective operation should be rare and accompanied by proper justification. However the Explanatory Memorandum contains no justification for the retrospectivity, beyond referring to the date of the announcement of the changes.

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.¹⁹ 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.²⁰ 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.²¹

Our clients have reported to us that the Department of Immigration is not processing citizenship applications lodged on or after 20 April 2017. In some cases potential applicants have been discouraged from applying. One of our clients was able to lodge an online application on 21 April 2017 and said she received an email telling her that her application would be affected by the changes, and has not heard anything else since.

¹⁷ *Australian Citizenship Act 2007* s 34.

¹⁸ Items 136, 137 and 139.

¹⁹ Tom Bingham "The Rule of Law" (2008) 1 *Judicial Studies Institute Journal* 121, 124.

²⁰ *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, [30].

²¹ Senate Standing Committee on Scrutiny of Bills, *The Work of the Committee in 2014* (Parliament of Australia) 39.

Another client reported that the Department refused to take her citizenship application at the counter.

It appears that that intention is that applications lodged from that date will need to meet the new requirements, even though they were lodged prior to the legislation being passed by Parliament.

We submit that the Department ought to be accepting and processing applications that are lodged on or after 20 April 2017 according to the legislation as it currently stands.

Retrospective legislation will sometimes be justified if it addresses significant injustice.²² However, the Explanatory Memorandum does not specify any injustice is being addressed. 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.

²² Australian Law Reform Commission *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws* ALRC Report 129, Ch 13 “Retrospective Laws”.