



Law Council  
OF AUSTRALIA

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

Senate Legal and Constitutional Affairs Committee

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# Table of Contents

<b>About the Law Council of Australia</b> .....	<b>3</b>
<b>Acknowledgement</b> .....	<b>4</b>
<b>Executive Summary</b> .....	<b>5</b>
<b>General Comments</b> .....	<b>7</b>
Use of legislative instruments.....	7
Increase in Ministerial powers .....	7
Ministerial override discretion.....	7
Certain decisions not reviewable .....	8
Retrospective application of the Bill.....	8
<b>Residence Requirement</b> .....	<b>9</b>
Impact on Irregular Maritime Arrivals .....	9
Impact on tertiary students .....	11
<b>Introduction of an English language test</b> .....	<b>12</b>
Necessity .....	12
The proposed test .....	13
<b>Strengthening the Australian Values Statement</b> .....	<b>14</b>
<b>Strengthening the test for Australian citizenship</b> .....	<b>15</b>
General comments.....	15
Limitation on attempts to pass the test .....	15
<b>Introducing a requirement for applicants to demonstrate their integration into the Australian community</b> .....	<b>16</b>
<b>Amendments relating to children</b> .....	<b>17</b>
<b>Mandatory cancellation and refusal</b> .....	<b>19</b>
<b>Revocation for fraud or misrepresentation</b> .....	<b>20</b>

## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of the Migration Law Committee, the Administrative Law Committee of the Federal Litigation and Dispute Resolution Section, the National Human Rights Committee and the International Law Section in the preparation of this submission.

## Executive Summary

1. The Law Council welcomes the opportunity to comment on the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (**the Bill**).
2. The Bill would make a wide range of amendments to the *Citizenship Act 2007* (Cth) (**the Act**) and the *Migration Act 1958* (Cth) (**the Migration Act**) whose broad purpose is to amend the requirements to become an Australian citizen.<sup>1</sup>
3. Some aspects of the Bill give rise to concern from the Law Council's perspective. These include:
  - The use of legislative instruments to define new citizenship eligibility criteria;
  - The power of the Minister to set aside certain decisions of the AAT on public interest grounds;
  - The impact of the new four year permanent residence requirement on irregular maritime arrivals;
  - The requirement for minors to satisfy a 'good character' requirement;
  - The Minister's power to revoke citizenship on the grounds of fraud or misrepresentation.
4. Further, the Law Council is concerned that the necessity of, and justification for, the proposed amendments has not been adequately demonstrated.
5. The Law Council makes the following recommendations in relation to the Bill:
  - The Bill should not operate retrospectively;
  - Items 126 and 127, relating to the ineligibility of certain decisions from review by the AAT and the power of the Minister to set aside certain decisions of the AAT on public interest grounds, should be removed from the Bill;
  - Direction 72 be amended to remove subsection 8(1)(g) which sets out the provision that affords lowest processing priority to IMAs who hold permanent visas;
  - English language testing thresholds should be lowered from the level proposed in the Bill, with alternative methods to formal testing made available;
  - A definition of the relevant English language threshold should be included in the Bill and not in a legislative instrument;
  - Exemptions from the requirement to take an English test should be broad and flexible;
  - If questions and statements regarding values are to be included, they must be framed in such a way so as not to disadvantage particular migrant groups;

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<sup>1</sup> Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, *Explanatory Memorandum*, 2.

- There should be no limit on the number of times a person can take the citizenship test;
- The matters to be considered in establishing whether an applicant has 'integrated into the Australian community' should be set out in the Bill and not a legislative instrument;
- The whole of the applicant's circumstances should be taken into account in assessing whether the applicant has integrated into the Australian community;
- If a good character requirement for applicants aged 18 years or under is to be introduced, the good character requirement should apply to applicants aged ten years or older;
- Decisions made by the Minister under paragraph 16(2)(c) of the Act should be reviewable and the Minister should be bound by the directions placed on reviewable bodies;
- The power of the Minister to not approve an application for citizenship under proposed subsection 17(4C) should be discretionary, not mandatory; and
- Items 113-115 of the Bill relating to revocation of citizenship on the grounds of fraud or misrepresentation, should be removed from the Bill.

## General Comments

6. The Law Council makes the following comments on broad issues that arise in the Bill.

### Use of legislative instruments

7. The Law Council notes that a number of new citizenship eligibility requirements are not set out in the Bill but instead will be introduced by way of legislative instruments.<sup>2</sup>
8. Moving the criteria from the Bill to legislative instruments renders it difficult to comment on the appropriateness of these specific changes and, in any event, the Law Council considers that these criteria would be more appropriately set out in the Bill. This, and other concerns, are discussed below in relation to the specific amendments.

### Increase in Ministerial powers

9. The Bill would grant the Minister a number of new and, in some cases, unprecedented powers. These include:
  - A personal, non-compellable power to waive the general residence requirement where the minister is satisfied that either an administrative error made by or on behalf of the Commonwealth causes an applicant to believe that he or she was an Australian citizen or where it is in the public interest to do so;<sup>3</sup>
  - A power to set aside decisions of the Administrative Appeals Tribunal (**AAT**) in certain circumstances in the public interest.<sup>4</sup>
10. The Law Council is concerned with the broadening of executive powers in this context.
11. In relation to the power to set aside decisions of the AAT, the Law Council makes the following comments:

### Ministerial override discretion

- (a) Clause 52A(1) of the Bill applies where the AAT sets aside a decision under s 43(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) (either substituting its own decision or remitting the matter for reconsideration in accordance with any directions or recommendations of the AAT). Where the AAT makes such an order, if the Minister is satisfied that it is in the public interest to do so, the Minister has power to set aside the AAT's decision. Thus, having failed to exercise the power under clause 52(4) to remove a decision from the jurisdiction of the AAT, the Minister may nonetheless simply set aside an AAT decision with which the Minister disagrees. It is difficult to see how the public interest would not already have been taken into account in the AAT's

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<sup>2</sup> See, e.g. Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, Items 53 (competent English, integration into the Australian community), 62-63 (circumstances where person not present in Australia as an unlawful non-citizen), 73 (circumstances where person not present in Australia as an unlawful non-citizen), 78-80 (circumstances where person not present in Australia as an unlawful non-citizen).

<sup>3</sup> Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, Item 68.

<sup>4</sup> *Ibid.*, Item 127.

application of the statutory criteria for the approval of citizenship. In such a case the review process in the AAT may be of little utility.

### Certain decisions not reviewable

- (b) In addition to the new ministerial powers outlined above, decisions made personally by the Minister under sections 17, 19D, 24, 25, 30, 33A, 34 and 36(1) of the Act will not be reviewable by the AAT where the Minister is satisfied that the decision was made in the public interest.<sup>5</sup> The Law Council notes that eligibility for citizenship incorporates elements of the public interest and is designed to give specificity to how the public interest is to operate in this area: thus, good character, criminal conduct and national security are taken into account. A provision for removal of jurisdiction of a merits review tribunal on a case by case basis has the potential to operate ad hoc, according to conceptions of the public interest that may be ad hominem and inconsistent with the public interest and purposes reflected in the Act. The purposes include the object of conferring a right to citizenship upon eligible persons, with an opportunity for merits review where citizenship is refused or revoked. This provision for ad hoc removal of the right to merits review is not ameliorated by the inclusion of a requirement in clause 52B(1) for the Minister to table reasons in the Parliament.

### Retrospective application of the Bill

12. It appears that the Government intends the provisions of the Bill to commence on 20 April 2017.<sup>6</sup> The Law Council opposes the retrospective application of the amendments in the Bill. While the Government did announce its intent to reform the citizenship requirements on 20 April 2017 and, in general terms, outlined some of the changes, the specifics of the proposed amendments were presumably not yet settled given that the Department of Immigration and Border Protection then engaged in a public consultation in relation to some of the proposed amendments. Further, even after the Bill was introduced, the specifics of some requirements that applicants will have to satisfy – such as the ‘competent English’ and ‘integration’ requirements – are still not yet known because they will be dealt with by way of legislative instruments whose introduction will presumably follow the passage of the Bill.
13. As a consequence of the proposed retrospective application of the amendments in the Bill, applicants have faced, and will continue to face, great uncertainty as to whether they will satisfy all the necessary requirements for becoming an Australian citizen. The Law Council further understands that all applications lodged after 20 April 2017 are currently on hold; this may result in not insignificant delays in processing applications.

#### **Recommendations:**

- **Items 126 and 127, relating to the ineligibility of certain decisions from review by the AAT and the power of the Minister to set aside certain decisions of the AAT on public interest grounds, should be removed from the Bill;**
- **The Bill should not operate retrospectively.**

<sup>5</sup> Ibid., Item 126.

<sup>6</sup> Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, *Second Reading Speech* (15 June 2017).

## Residence Requirement

14. The Bill would amend the General Residence Requirement to require applicants to demonstrate a minimum of four years in Australia as a permanent resident immediately prior to applying for citizenship, with a maximum of 12 months outside of Australia in this time period.<sup>7</sup>
15. As a general statement the Law Council notes that the 12 month period of permanent residence required by the current Act is lower than other western countries and acknowledges that a significant public debate could well be undertaken to investigate and discuss this important issue of public policy of whether or not a longer period of permanent residence is appropriate or whether the contributions potential citizens make during their temporary residence is sufficient. If so, the Law Council would encourage that debate and we would actively participate in it. Further, the significant reservations expressed below in relation to the impact upon Irregular Maritime Arrivals (**IMAs**) would be significantly reduced if the practical challenges posed to this cohort through General Direction 72 were addressed, as it may well be that this impact is an unintended consequence.
16. The Law Council notes that the Act was completely rewritten on 1 July 2007 such that the previous residence requirement for an applicant to have held permanent residence for 2 years was amended to the current Act which requires 4 years of continuous visas in Australia and 12 months as the holder of a permanent visa. The Discussion Paper does not explain why the current 4 year period (which could be a combination of temporary and permanent visas) is insufficient to meet the policy objectives of the Australian Government. The Law Council considers such a significant change to the process of obtaining Australian citizenship should be explained and subject to careful consultation and rigorous discussion with affected communities.

## Impact on Irregular Maritime Arrivals

17. The Law Council is concerned about the effect of the Bill on IMAs and their immediate family due to the operation of Ministerial Direction 72 'Order for considering and disposing of Family Visa applications' (**Direction 72**). This Ministerial Direction has the practical effect of giving lowest processing priority to people who arrived in Australia by boat who are seeking to sponsor family members.<sup>8</sup>
18. Under Direction 72, permanent resident IMA-sponsored Family Visa applications are still considered lowest priority, however the newly introduced section 9 of Direction 72 makes provision for a delegate to depart from the order of priority if compassionate or compelling circumstances exist or where the application would not be disposed of within a reasonable time.
19. The Law Council acknowledges that the amendments to Direction 72 allow limited provisions for IMAs. However, the Law Council understands that, despite those provisions, in many cases delegates are not in practice departing from the processing order and IMAs who are permanent residents are being denied the ability to reunite with their families.

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<sup>7</sup> Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, Items 54, 56, 57.

<sup>8</sup> Direction 72 commenced on 13 September 2016, superseding Direction 62, which dealt with the order of priority for the consideration and disposal of Family visa applications including but not limited to Partner, Child, Parent and Orphan relative visas.

20. The interaction between the four-year residency requirement and Direction 72 means that IMAs may be significantly disadvantaged. It is not in Australia's interests to hinder family reunion given that settlement outcomes indicate that family reunion assists migrants settle into Australia more quickly. In the event the four year permanent residency period is passed, changes to Direction 72 should be made as outlined below.

21. In any society the family is the basic building block of community, social stability and cohesion. The importance placed on the family is particularly heightened for those who have experienced violence, conflict and the breakdown of social order, as is the case for refugees. As Staver describes:

*... the precariousness of the refugee experience makes family relationships particularly vital. The family can be an important anchor in a social world turned upside down, sometimes remaining the only stable social structure in an otherwise disintegrated society.*<sup>9</sup>

22. As such, refugees often see migration and make migration decisions as family strategies for survival or unity drawing great strength and meaning from their ability to maintain and support family connections.<sup>10</sup>

23. A study and report by the Refugee Council of Australia, *Addressing the Pain of Separation for Refugee Families* has found that:

*Service providers have continued to express concern about the impacts of family separation on the mental health of refugees and humanitarian entrants, citing instances of self-harm and suicidal ideation triggered by family separation ... Family separation deprives people of social and emotional support critical to positive settlement outcomes.*<sup>11</sup>

24. The report also commented on the financial burden for the Australian community:

*Family separation is costly, both to refugees and to the wider Australian community. People who participated in RCOA's research highlighted enormous pressure on people in Australia to support relatives in refugee situation overseas, which was seen to both compound the stress of family separation and impose a significant financial burden on people attempting to settle in Australia. That financial pressure, in many situations, could compel people to forego study in favour of paid work and could place people at risk of workplace exploitation. Many people from a refugee background continue to send their income overseas to support their families, money which would otherwise be injected into the Australian community.*<sup>12</sup>

25. Further, as family separation is a significant causal factor behind negative mental health of many refugees and people seeking asylum, barriers to family reunion contribute to the need for increased mental health services and the costs associated with these services.

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<sup>9</sup> Staver A, *Family Reunification: A Right for Forced Migrants? Working Paper Series No. 51*, Refugee Studies Centre, University of Oxford, (November 2008), 6.

<sup>10</sup> The Refugee Council of Australia, *Humanitarian Family Reunion: The Building Block of Good Settlement*, (April 2012).

<sup>11</sup> Refugee Council of Australia, *Addressing the Pain of Separation for Refugee Families*, (November 2016), 2.

<sup>12</sup> Ibid.

26. The Law Council's policy position supports adherence to international obligations, including the right for those who invoke Australia's protection obligations to be reunited with close family members.<sup>13</sup>
27. Further, the Law Council notes that Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*<sup>14</sup> requires that no one shall be subject to arbitrary interference with, among other things, family, and that everyone has the right to protection of the law against such interference. Article 16 of the *Convention on the Rights of the Child (CRC)*<sup>15</sup> mirrors this provision. Further, Article 23 of the ICCPR provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Article 10 of the CRC provides that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.
28. Therefore, the Law Council recommends that Direction 72 be amended to remove subsection 8(1)(g) which sets out the provision that affords lowest processing priority to IMAs who hold permanent visas
29. The Law Council considers that applications should generally be processed in the order that they are lodged unless there are extenuating circumstances requiring acceleration of the processing of a particular application. That is, any deviation from the 'processed in order of lodgement' should flow from a positive decision to confer priority upon a special case rather than a negative decision to penalise a particular case.

### Impact on tertiary students

30. The Law Council notes that if the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (**the Higher Education Bill**), which is currently before the House, is passed, then most permanent residents will no longer be entitled to a Commonwealth supported place for their university education from 1 January 2018. The consequence for these students will be substantially higher fees.
31. While the Higher Education Bill would also extend access to student loans for these permanent residents, the increased fees may nonetheless act as a disincentive for migrants to upskill or otherwise obtain further qualifications. In this respect, the Law Council notes that the Minister, in his second reading speech, said:

*We have prospered and forged a secure and harmonious society. This has been built by people of every possible background, united by common values that include...the pursuit of opportunity through education, employment and entrepreneurship.*<sup>16</sup>

32. The Law Council notes that the combination of the proposed reforms in the Higher Education Bill and the increased residence requirement may operate to reduce the

<sup>13</sup> Law Council of Australia, *Asylum Seeker Policy*, s 7(f).

<sup>14</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>15</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>16</sup> Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, *Second Reading Speech* (15 June 2017).

opportunities for migrants to pursue tertiary education and, having done so, make a valuable contribution to the Australian community.

#### **Recommendation**

- **Direction 72 be amended to remove subsection 8(1)(g) which sets out the provision that affords lowest processing priority to IMAs who hold permanent visas.**

## Introduction of an English language test

33. Item 51 of the Bill would amend subsection 21(5) of the Act to provide that an applicant aged 16 years or over must have 'competent English' to be eligible for Australian citizenship.<sup>17</sup> Item 53 of the Bill would insert a new subsection 21(9) into the Citizenship Act, which would allow the Minister to determine the circumstances in which a person has competent English.
34. Noting that the precise requirements for 'competent English' are not known, as they are to be set out in a legislative instrument, the Law Council makes the following comments.
35. The Law Council has concerns regarding the proposal to introduce an English language test requiring applicants to achieve 'competent English'.

## Necessity

36. 'Competent English' is defined in Regulation 1.15C of the *Migration Regulations 1994* (Cth). An applicant may demonstrate competent English by presenting a United Kingdom, United States of America, Canada, New Zealand or Republic of Ireland passport and being a citizen of that country, or by achieving a certain score in specified tests. The purpose of requiring aspiring citizens to demonstrate this standard of English

reflects the Government's position that English language proficiency is essential for economic participation and promotes integration into the Australian community. It is an important creator of social cohesion and is essential to experiencing economic and social success in Australia.<sup>18</sup>

37. The Law Council notes that the current test for Australian citizenship is in English, meaning that, already, applicants for citizenship must possess a certain level of English knowledge.
38. The Explanatory Memorandum does not demonstrate why the significantly higher threshold for an understanding of English is required. New citizens who have the current level of English knowledge regularly function in and integrate into society. The Australian economy has benefitted from people who speak very limited English. One need look no further than the successful businesses and employment established by humanitarian visa holders and partner visa holders. These visa categories –

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<sup>17</sup> Item 41 would make it a requirement that applicants seeking citizenship by conferral must have competent English.

<sup>18</sup> Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, *Explanatory Memorandum*, 23.

subclasses 200-204, 866, 785, 790, 309, 100, 820 and 801 – have English skill of any level as a criterion.

39. The proposed ‘competent English’ requirement may have unintended consequences of imposing unnecessary impediments on first-generation migrants, who may not be as equipped with the English language as subsequent generations. This is despite the clear economic contributions of humanitarian entrants as noted in a report commissioned by the (then) Department of Immigration and Citizenship:

*[A]s time passes the workforce participation level of humanitarian entrants converges towards the Australian average, and in the second generation there is an increase in the labour force participation rate and a decrease in the unemployment rate. The findings also show that for the second generation of these groups, a clear majority have a higher level of participation than those who were born in Australia. The first generation arrivals that completed their education in Australia also tend to have a higher level of workforce participation, often higher than the Australia-born.<sup>19</sup>*

40. The Law Council notes that humanitarian entrants’ contribution to the labour force is not insignificant in some regional areas and lower skilled jobs.<sup>20</sup> Further, humanitarian entrants ‘display greater entrepreneurial qualities compared with other migrant groups’,<sup>21</sup> with contributions to the economy extending beyond labour force participation.<sup>22</sup>
41. The introduction of a test to enhance economic and social participation is not, in this sense, substantiated by economic or social data. As such, the Law Council queries the necessity of the proposed English language test and recommends the Committee carefully consider whether an English language test is justified.

## The proposed test

42. However, if an English language test is introduced, the Law Council makes the following comments:

- (a) The Bill should include further exemptions from having to satisfy the English language requirement. The introduction of the proposed competent English requirement may disadvantage particular groups, such as refugees and humanitarian entrants. Such individuals may not have had the benefit of education or may have experienced torture or trauma, and consequently may find learning a new language difficult. Further, the five hundred hours of the Adult Migrant English Program may be insufficient to enable visa holders to obtain the English score proposed. There are numerous variables, including starting age, learning capacity and environment, which impact how long a language takes to learn. If an English requirement is introduced, additional resources must be allocated to the settlement sector to assist individuals to learn English. The Law Council submits that exemptions must be broad and flexible. Further, if the English test is implemented, it must not operate so as to discriminate against certain groups of applicants.

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<sup>19</sup> Department of Immigration and Citizenship, Australian Government, *A Significant Contribution: The Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants – Summary of Findings* (2011).

<sup>20</sup> *Ibid.*, 42.

<sup>21</sup> *Ibid.*, 38.

<sup>22</sup> *Ibid.*, 42.

- (b) The level of English required should be lower than the currently proposed standard of ‘competency’ and there should be alternative methods, apart from a formal test, to satisfy the English language requirement. The level of English could be demonstrated through a test or other means, such as the completion of an appropriate English language course resulting in a certificate being issued. The Law Council proposes that education institutions could offer an English language course which could satisfy the English requirement for citizenship where a certain grade level is obtained in the course. The Law Council encourages the Government to work with English language course providers with a view to establishing such an alternate means of satisfying the English language requirement. Further, English testing should not be limited to the International English Language Test System (**IELTS test**), which was designed for the assessment of language ability for tertiary study, but should be extended to the broader range of language testing including at the very least the Occupational English Test, Test of English as a Foreign Language internet-based Test (**TOEFL iBT**) Pearson’s Academic (**PTE Academic**) and the like as has now been implemented in nearly all visa categories that require English.

43. In summary, if an English requirement for citizenship is to be introduced, the Law Council submits that the standard of English required be lower than presently proposed, that the requirement can be met other than by undertaking a test, and that the exemptions be broadly defined and flexible.

**Recommendations:**

- **Exemptions from the requirement to take an English language test should be included in the Bill and these exemptions should be broad and flexible;**
- **English language testing thresholds should be lowered from the level proposed in the Bill, with alternative methods to formal testing made available;**
- **A definition of the relevant English language threshold should be included in the Bill and not in a legislative instrument.**

## Strengthening the Australian Values Statement

44. Item 119 of the Bill would insert new subsection 46(5) into the Act. Proposed subsection 46(5) would allow the Minister to determine, by legislative instrument, an Australian Values Statement and any requirements relating to an Australian Values Statement. New subsection 46(6) would make it clear that any determination under proposed subsection 46(5) is not subject to disallowance.
45. The Bill’s Explanatory Memorandum does not provide any detail as to what any new Australian Values Statement might contain. However, the Law Council notes that the Discussion Paper which preceded the introduction of the Bill stated that the Australian Values Statement will be amended to add a reference to the fundamental requirement of allegiance to Australia and to require applicants to make an undertaking to integrate into and contribute to the community.<sup>23</sup>

<sup>23</sup> Australian Government, *Strengthening the Test for Australian Citizenship* (April 2017), 17.

46. The Law Council also notes that the Discussion Paper which preceded the introduction of the Bill proposed including questions about Australian values in the citizenship test.
47. While the values test and specific amendments to the content of the citizenship test are outside the scope of the Bill, the Law Council considers the proposition that the role of government includes introducing and prescribing a set of values for aspiring citizens is a contestable one. Indeed, such prescriptions of 'Australian values' are arguably unnecessary.
48. The Law Council also considers that the requirement that applicants make an undertaking to 'integrate' into the Australian community is nebulous and lacks specificity.
49. In the absence of specificity, the Law Council proposes that no undertaking to 'integrate' be included in any proposed Australian Values Statement.
50. Further, if integration is to be included in the Australian Values Statement, the Law Council considers that further clarity is required in relation to this requirement. In particular, it is not clear precisely what 'integration' means and how integration is to be assessed.

## Strengthening the test for Australian citizenship

### General comments

51. Departmental statistics show that refugee or humanitarian entrants are six times more likely to fail the present Australian citizenship test than other applicants.<sup>24</sup> This points to the need for additional support to be provided to that cohort during the citizenship process, particularly as Refugee and Humanitarian visa holders are not required to provide evidence of English language as part of applying for visas. This also applies to partner and family sponsored visas which do not have an English language requirement and as such this cohort may also be affected.
52. However, the Law Council notes that if questions and statements regarding values are to be included, they must be framed in such a way so as not to disadvantage or target particular migrant groups.

### Limitation on attempts to pass the test

53. Item 82 of the Bill would insert new subsection 23(3A) into the Act. Currently, the Minister can make a determination as to the eligibility criteria for sitting the citizenship test. New section 23(3A) would provide a non-exhaustive list of matters that the determination could cover, which include the fact that a person has previously failed the test, did not comply with the rules of conduct or was found to have cheated.
54. The intent behind this amendment appears to be to cap the number of times a person may sit a citizenship test. The Explanatory Memorandum to the Bill states that;

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<sup>24</sup> Department of Immigration and Border Protection, *Australian Citizenship Test Snapshot Report* (30 June 2015).

*...applicants are able to sit the citizenship test an unlimited number of times. Not only does this reduce the integrity of the testing arrangements but it is also administratively and financially burdensome for the Government.<sup>25</sup>*

55. It is not clear how these proposed limitations could advance any of Australia's objectives under its migration and citizenship programs. The Law Council considers that there should be no limit on the number of times a person can take the citizenship test. Currently, the cost for a citizenship including a test is \$285 or \$40 if a concession rate applies. Any concern in relation to cost could potentially include additional fees where an applicant needs to sit the test more than 3 times, provided the cost is not made prohibitive and includes a concession rate as currently applies.

**Recommendations:**

- **If questions and statements regarding values are to be included, they must be framed in such a way so as not to disadvantage particular migrant groups.**
- **There should be no limit on the number of times a person can take the citizenship test.**

## Introducing a requirement for applicants to demonstrate their integration into the Australian community

56. Item 43 of the Bill would insert new paragraph 21(2)(fa) into the Act, which would provide that the Minister must be satisfied that the applicant has integrated into the Australian community. The matters the Minister must take into consideration in determining whether this criterion has been satisfied will be set out in a legislative instrument.<sup>26</sup>
57. The Law Council considers that greater specificity is needed regarding the meaning of 'integration'. The criteria for citizenship should be certain and capable of being readily understood by applicants.
58. The Law Council queries what, in the above framework, is different from the present requirement of good character for aspiring citizens, as set out in section 21 of the Act. It is unclear how an aspiring citizen's integration will be measured. Media statements suggest that applicants may need to show evidence of employment, or of seeking employment, membership of community organisations, and enrolment in school for school-aged children.<sup>27</sup> This may prejudice single parents, those with mental or physical health issues, the elderly, and, again, those with refugee or humanitarian backgrounds. The Law Council thus recommends that the whole of the applicant's circumstances be taken into account when assessing integration.
59. Further, caution must also be exercised in terms of correlating integration with employment. Again, individuals with refugee or humanitarian backgrounds may be disadvantaged. A report commissioned by the Department of Immigration and

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<sup>25</sup> Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, *Explanatory Memorandum*, 36.

<sup>26</sup> *Ibid*, 24.

<sup>27</sup> The Hon Peter Dutton MP with the Hon Malcolm Turnbull MP, Prime Minister, *Media Release: Strengthening the integrity of Australian citizenship* (20 April 2017).

Citizenship, as it then was, notes that humanitarian entrants 'tend to spend their entire lives and raise their families in Australia... entrants thus demonstrate a greater commitment to life in Australia [than other settlers]'.<sup>28</sup> The report also notes the barriers to employment for this cohort, including exposure to persecution, limited or disrupted education, lack of knowledge and networks, lack of documentation, and misinformation. Typically, this cohort is also younger than other migrants on arrival to Australia. Despite these barriers, the report shows a strong level of workforce and societal participation amongst these cohorts, particularly with the passing of time.<sup>29</sup> The Law Council considers the fact that these barriers exist should be acknowledged and accounted for in any change to the citizenship law.

60. Similarly, many refugee or humanitarian entrants 'may be unaware that their activities are considered to be volunteering so that they understate their involvement as volunteers when surveyed'.<sup>30</sup> Humanitarian entrants are noted for making 'major contributions across a spectrum of Australian life – the arts, sport, science, research, business and community', in particular the latter, and their contributions increase over time.<sup>31</sup> The fact that they are likely to understate their involvement, or not realise they are, in fact, able to demonstrate integration through their community activities, means they may be less likely to apply for, and advance evidence in support of, Australian citizenship.
61. This requirement may further discourage migrants from applying for citizenship by making the criteria administratively overwhelming and uncertain, with potentially negative consequences.
62. In any event, if there is to be a requirement to integrate, the Law Council considers that the matters to be taken into account in assessing an applicant's 'integration' should be set out in the Bill and not a legislative instrument.

**Recommendations:**

- **The matters to be considered in establishing whether an applicant has 'integrated into the Australian community' should be set out in the Bill and not a legislative instrument;**
- **The whole of the applicant's circumstances should be taken into account in assessing whether the applicant has integrated.**

## Amendments relating to children

63. The Bill would make a number of amendments to the citizenship regime that are specifically focused on minors. These include Item 20 of the Bill, which would amend the Act to provide that a child born in Australia will not acquire Australian citizenship on his or her tenth birthday where:
- The child was born in Australia to a parent who had diplomatic privileges at any time during the 10 year period referred to in paragraph 12(1)(b) of the Act;

<sup>28</sup> Department of Immigration and Citizenship, Australian Government, *A Significant Contribution: The Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants – Summary of Findings* (2011).

<sup>29</sup> *Ibid.*, 51 and 55.

<sup>30</sup> *Ibid.*, 46.

<sup>31</sup> *Ibid.*, 51 and 55.

- The child was born in Australia and was an unlawful non-citizen at any time during the 10 year period referred to in paragraph 12(1)(b) of the Act;
- The child was born in Australia and at any time during the 10 year period referred to in paragraph 12(1)(b) of the Act, was outside Australia and, at that time, did not hold a visa permitting the person to travel to, enter and remain in Australia;
- The child was born in Australia to a parent if the parent did not hold a substantive visa at the time of the child's birth, the parent entered Australia one or more times before the child's birth and, at any time between the day the parent last entered Australia and the date of the child's birth, the parent was an unlawful non-citizen.

64. The Act, consistent with the previous 1948 Act, contains the deemed grant of Australian citizenship on a child's 10<sup>th</sup> birthday when they were born in Australia and were "ordinarily resident" in Australia in that 10 year period. It is the experience of our Members that this deemed grant of citizenship arises in only a modest number of situations per year and almost without exception in the situation where the child has been unlawful for all or most of their short lives. It is the opinion of the Law Council that this very long standing provision serves a very important public policy objective in protecting the interests of vulnerable children. As currently drafted, the Bill would remove the benefit of this provision from the children in actual need of this legislative protection and instead in essence only leave the provision open to children who in effect have little need of it. As such the Law Council firmly opposes this aspect of the Bill.

65. The Law Council notes that these provisions may be inconsistent with the CRC.<sup>32</sup> In any event, it may well be inappropriate for a child to be penalised for the actions of his or her parents.

66. Further, Items 51, 52, 100 and 102 will require all applicants, including those under 18 years of age, to be of good character. The Explanatory Memorandum to the Bill notes that 'the Department is aware of children aged under 18 with serious character concerns. The amendment would not have a significant impact on children overall, but will capture those young people who are of character concern and that the Australian community reasonably expects should not be extended the privilege of Australian citizenship at that time.'<sup>33</sup>

67. Further, Item 26 of the Bill would amend the requirements for citizenship by descent such that all applicants, irrespective of their age, must satisfy the good character requirement.

68. The Law Council queries the utility of extending this requirement to all children, irrespective of their age. It is noted that the Department's guidelines for assessing good character focus upon the applicant's respect for Australian law and, in particular, any serious criminal conduct or fraudulent dealings the applicant may have engaged in.<sup>34</sup> In this respect, the Law Council notes that, by virtue of the doctrine of *doli incapax*, children under ten years of age are deemed to not be criminally responsible for conduct that would otherwise amount to a criminal offence.

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<sup>32</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>33</sup> Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, *Explanatory Memorandum*, 26.

<sup>34</sup> Citizenship Policy, 147.

69. Further, the Law Council notes that section 501 of the Migration Act permits the cancellation of a visa where there are character concerns, including where character concerns are disclosed for the first time in a citizenship application. In that context the Law Council cannot see any justification for the replication of similar provisions to section 501 of the Migration Act in the Act. If character issues have been satisfactorily dealt with while an applicant holds a visa, the Law Council cannot see the utility to having the same consideration processes (with all the practical, emotional, financial and legal consequences) occur again as part of the citizenship process.
70. Accordingly, if a good character requirement for applicants under 18 years old is to be introduced, the Law Council recommends that the requirement to be of good character apply to applicants aged ten years or older.
71. Further, in relation to Item 26 of the Bill, the Law Council's view is that the Minister should be, at the very least, bound by the same directions placed on reviewable bodies and that decisions should be reviewable (both on the merits and judicially).

**Recommendations:**

- **If a good character requirement for applicants under 18 years old is to be introduced, the good character requirement should apply to applicants aged ten years or older.**
- **Decisions made by the Minister under paragraph 16(2)(c) of the Act should be reviewable and the Minister should be bound by the directions placed on reviewable bodies.**

## Mandatory cancellation and refusal

72. The Bill would introduce a number of provisions into the Act that require the Minister to cancel an approval where a decision on the application has not been made and the Minister is satisfied that the person's application would not be approved because the Minister is not satisfied of the person's identity, the person is a risk to national security or the person has been convicted of a national security offence.<sup>35</sup>
73. The Bill would also introduce new subsection 17(4C) into the Act, which would provide that the Minister must not approve a person becoming an Australian citizen under section 17 if the person has committed an offence in certain circumstances. Of particular concern to the Law Council is the mandatory nature of the provision; in the Law Council's view, it is more appropriate for there to be a discretion on the part of the Minister, which would allow for individual circumstances and any relevant mitigating circumstances to be taken into account.

**Recommendation:**

- **The power of the Minister to not approve an application for citizenship under proposed subsection 17(4C) should be discretionary, not mandatory.**

<sup>35</sup> Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, Items 28, 90 and 104.

## Revocation for fraud or misrepresentation

74. Items 113-115 of the Bill would provide the Minister with a discretionary power to revoke a person's Australian citizenship where the Minister is satisfied that the person became an Australian citizen as a result of fraud or misrepresentation with the person's entry to Australia, the grant of a visa or the person being approved as an Australian citizen.
75. The Explanatory Memorandum to the Bill states that 'unlike section 34 of the Act, it is not necessary for the person to have been convicted of an offence...in order for the Minister to be able to revoke Australian citizenship...'<sup>36</sup> However, the Law Council notes that the current section 34 is broader in scope than the Explanatory Memorandum makes it out to be. As such, the Law Council queries the necessity of this new power of revocation. In any event, the Law Council's view is that revocation of citizenship in this context should require a conviction for a criminal offence<sup>37</sup> and that the suspicion or belief of the Minister or their delegate as to the existence of past fraud should not be sufficient for such action to be taken against what is a fundamental concept of Australian society. Further, the Law Council considers that the power of revocation should be subject to independent review, given the serious consequences that may arise from revocation of citizenship.

### **Recommendation:**

- **Items 113-115 of the Bill relating to revocation of citizenship on the grounds of fraud or misrepresentation, should be removed from the Bill.**

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<sup>36</sup> Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, *Explanatory Memorandum*, 50.

<sup>37</sup> See Law Council of Australia, *Submission on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 9.