Refugee Legal:

Submission to the Senate Legal and Constitutional Affairs Committee: *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017*

1 Introduction – Refugee Legal

1.1 Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.[1] Since its inception over 28 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration and Border Protection (**DIBP**) Immigration's Advice and Application Assistance Scheme (**IAAAS**) and a member of the peak DIBP-NGO Dialogue and the DIBP Protection Process Reference Group. Refugee Legal has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters.

1.3 We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017* (**the Bill**). The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above.

2 Outline of submissions

2.1 We recommend that the *Australian Citizenship Act 2007* (**the Citizenship Act**) not be amended in the way proposed by the Bill. It is our opinion that the amendments proposed by the Bill represent a radical departure from longstanding Australian citizenship policy and seek to inappropriately delegate broad powers to the Minister to personally decide core aspects of what it means to be an Australian citizen and bar persons from accessing due process. Further, the proposed amendments would have a particularly adverse impact on people from refugee and diverse multicultural backgrounds, and without justification exclude many from ever attaining Australian citizenship in their lifetimes. The proposed amendments represent a concerning shift away from government policy encouraging and valuing diversity and multiculturalism.

2.2 No compelling case has been put forward by the government to warrant such fundamental changes to the statutory framework governing citizenship in Australia. It is

[1] Refugee Legal (Refugee and Immigration Legal Centre) is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. Refugee Legal brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

Defending the rights of refugees.

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Refugee Legal's experience that the current scheme is sufficient to meet the government's expressed policy intent.

2.3 We have identified the following principal concerns with the amendments proposed by the Bill:

a) They constitute an **unwarranted and inappropriate expansion of the personal powers of the Minister**;

b) They would result in a **significant reduction in the integrity of decision-making** for decisions to revoke a persons citizenship on fraud/misrepresentation grounds;

c) They would impose **insurmountable barriers to gaining citizenship** for a significant number of refugees and disadvantaged migrants, including the most vulnerable;

d) They would have a **significantly harsh and discriminatorily impact on children born in Australia**, particularly those whose parents arrived in Australia seeking asylum.

2.4 Each of the above matters are developed below.

3 <u>Unwarranted and inappropriate expansion of the personal powers of the Minister</u>

3.1 The amendments proposed by the Bill seek to significantly expand the Minister's personal non-delegable powers to bar persons from accessing due process and to defer the making of key criteria determining eligibility for Australian citizenship to the Minister that should properly be specified in primary legislation and be subject to further parliamentary scrutiny. Refugee Legal submits that these proposed amendments are entirely inappropriate and unwarranted; no case has been provided by the Government to justify such extensive and draconian changes.

Personal decisions of the Minister in the public interest

3.2 The Bill proposes to significantly expand the personal non-delegable powers for the Minister by providing a new Ministerial authority to intervene in the following circumstances if the Minister personally believes it to be in the public interest to do so:

a) to bar persons subject to adverse citizenship decisions from accessing merits review at the Administrative Appeals Tribunal (**the AAT**); and

b) to overrule AAT decisions that he or she does not personally agree with.

3.3 Item 126 of the Bill seeks to insert new subsection 52(4) to bar a broad range of decisions made by the Minister personally from review by the AAT. Item 127 of the Bill seeks to inserts new sections 52A to provide the Minister with the personal power to overrule certain decisions of the AAT if he or she does not agree with the Tribunal's decision.

3.4 The Explanatory Memorandum to the Bill provides that the policy rationale for this amendment is to address six recent AAT decisions considered by the Government to be "outside community standards" and/or "pose a risk to the integrity of the citizenship

programme”.[2] It is submitted that this policy intent is misconceived, contrary to the rule of law and ignores the legal framework governing the AAT.

3.5 The AAT is tasked with conducting independent merits review of administrative decisions made under Commonwealth laws, that is free from political interference by the Executive branch of government. Its statutory function is to pursue the objective of providing a mechanism of review that is: accessible; fair, just, economical, informal and quick; proportionate to the importance and complexity of the matter; and promotes public trust and confidence in the decision-making of the Tribunal.[3] Importantly, the AAT is compelled by law to review a decision “on the merits and must make the legally correct decision or, where there can be more than one [legally] correct decision, the preferable decision”.[4] For this reason the role of the AAT is to apply the law to the facts and members are prohibited from deciding reviews on the basis of their own personal moral or ideological opinions.

3.6 Because the AAT’s statutory function demands that it make the legally correct decision, as matter of practice it must follow judicial authority and apply legislation as enacted by the legislature (primary legislation - acts) and Executive (delegated legislation – legislative instruments). Any decision that it purports to make that is found by a court of law not to confirm with the law is generally quashed and remitted back to it to decide according to law. In the event the Minister does not personally agree with a particular decision of the AAT it is open to him or her to seek judicial review of that decision and challenge its legality in court. In the event the Government does not agree with the manner in which the relevant legislation is construed by the courts, it is open to the Government to introduce amendments to primary legislation in Parliament or make delegated legislation where appropriate (such as regulations). Such a process is consistent with the rule of law and good governance under a Constitutional democracy.

3.7 One of the purposes of establishing the AAT was to improve the quality of administrative decision-making by the Australian Government. This aim has been said to be achieved in part due to the availability of review of Government decisions leading to the relevant departments of state to introduce procedures and systems which lead to more acceptable and justifiable decision-making to reduce the incidence of applications for review.[5]

3.8 Decisions made by delegates exercising decision-making powers under the Citizenship Act and reviews of citizenship decisions performed by the AAT are subject to strict codes of procedure specified in primary legislation. These codes of procedure provide for a fair hearing of a person’s matter and accord due process in the making of the decision. However, despite judicial authority in the immigration context stating that the Minister is in most instances generally bound by the rules of common law procedural fairness in the making of his or her personal decisions, the due process afforded to persons affected by decisions by the Minister is generally of a much more limited form.[6] In this respect, those persons who are the subject of personal decisions by the Minister are at

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[2] Explanatory Memorandum, [330] and [331].
[3] *Administrative Appeals Tribunal Act 1975*, Part 1, s 2A.
[4] Administrative Appeals Tribunal (Cth), About the AAT, What We Do, Functions and Powers, Review of Decisions, available at: http://www.aat.gov.au/about-the-aat/what-we-do [accessed 21 July 2017].
[5] The Hon. Justice Garry Downes AM, Former President of the Administrative Appeals Tribunal, *Structure, Power and Duties of the Administrative Appeals Tribunal of Australia,* Bangkok, 21 February 2006, at [44].
[6] See: *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177.

a much higher risk of being denied a fair hearing than those subject to the decisions of a delegate or the AAT.

3.9 It is open to persons adversely affected by personal decisions by the Minister to seek judicial review, in the absence of merits review at the AAT. However, because on judicial review a court is limited to considering only whether the Minister made a legal error in his or her decision, even where the person affected is successful in court the consequence is that the matter is remitted back to the Minister for reconsideration in the same restricted due process with limited avenues for a fair hearing of their case.

3.10 An essential element of any legal or administrative process in Australia that adversely affects a person's rights or interests is a real and meaningful opportunity for that person to present his or her case, be told the substance of the case to be answered and be given an opportunity of replying to it.[7] It is our profound concern that the amendments proposed by the Bill seek to strip persons of this fundamental opportunity. Ultimately, denying a person a fair hearing heightens the risk of an incorrect and unjust outcome. Increasing the risk of an incorrect and/or unjust outcome is significant, particularly given the consequences that would follow - that is, that a person is denied citizenship, or has their citizenship revoked.

3.11 Finally, it is noted that the only precondition on the Minister exercising his or her personal powers in this regard is that he or she believes it to be in the "public interest" to do so. The High Court has held that this term is one which it is difficult to give a precise content,[8] and described it as "a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any object the legislature could have had in view'".[9] In this regard, we submit that these proposed personal powers of the Minister are liable to being exercised by the Minister according to his or her personal or political whim. It is Refugee Legal's experience that "public interest" powers in the migration context have been characterised by arbitrary, inconsistent and unpredictable outcomes. Decisions lack ordinary standards of transparency and accountability under the rule of law, and are routinely devoid of rhyme or reason.

3.12 The proposed expansion of the Minister's unfettered public interest personal powers is entirely unwarranted and in practice would severely subvert the course of justice for individuals by denying access to primary and merits review administrative decision-making processes that have procedural safeguards and ensure a fair hearing of their case. The proposed changes are extensive in reach and would amount to a radical erosion of fundamental legal protections that would in practice ultimately deny many people due process, in the important matter of whether they can become an Australian citizen. No compelling case has been made out to warrant such a radical erosion of fundamental legal protections.

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[7] *Kioa v West* [1985] HCA 159 CLR 550 per Mason J at 582.

[8] *Osland v Secretary, Department of Justice* [2008] HCA 37 at [57] per Gleeson CJ, Gummow, Heydon and Kiefel JJ.

[9] *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaurdon JJ; [1989] HCA 61, quoting *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; (1947) 74 CLR 492 at 505. See also *Osland v Secretary, Department of Justice (No 2)* [2010] HCA 24; (2010) 241 CLR 320 at 329-330 [13]- [14] per French CJ, Gummow and Bell JJ.

Inappropriate delegation of powers to the Minister

3.13 The Bill seeks to grant the Minister with broad personal powers to prescribe the central and determinative statutory criteria governing Australia's citizenship programme with limited avenues for parliamentary scrutiny, including (but not limited to) the following:

a) the requisite level of English proficiency for Australian citizenship ("competent English"); and

b) the matters to have regard to when determining whether the applicant for citizenship has "integrated into the Australian community".

3.14 It is our submission that the Minister should not be personally tasked with determining such crucial aspects of the criteria for Australian citizenship. These powers severely limit parliamentary scrutiny of what it means to be an Australian citizen and amount to an unwarranted and inappropriate delegation of legislative authority to the Executive.

<u>*English test*</u>

3.15 Currently the general eligibility requirements for Australian citizenship by conferral require the applicant to possess "a basic knowledge of the English language".[10] The Department's policy guidelines state that this is understood as having "a sufficient knowledge of English to be able to live independently in the wider Australian community" and applicants are taken to have satisfied this criterion if they successfully pass the citizenship test.[11]

3.16 Items 8 and 53 of the Bill seek to provide the Minister with the personal power to specify, by legislative instrument, the circumstances in which a person has the requisite English proficiency for Australian citizenship ("competent English"). Relevantly, a failure to provide documentation establishing satisfaction of this proposed requirement renders the application invalid (and as such, no avenue for merits review at the AAT is accessible). The proposed new provision applies to applicants for conferral over the age of 16 and provides no statutory parameters on the limits of what the Minister may specify as meeting the requisite standard.

3.17 The policy rationale expressed in the Explanatory Memorandum to the Bill provides that "[t]his amendment 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".[12] The Explanatory Memorandum further provides "[i]t is intended that the instrument will be similar, where relevant, to the *Language Tests, Score and Passports 2015* (IMMI 15/005) prescribed in the Migration Regulations 1994".[13] It is noted that the instrument referred currently specifies: an International English Language Test System (IELTS) test score of at least 6 in each of the four test components of speaking, reading, writing and listening; or a score of at least B in each of the four components of an Occupational English Test (OET).[14]

[10] *Australian Citizenship Act 2007*, Part 2, Division 2, s 21(2)(e).
[11] Department of Immigration and Border Protection, *Australian Citizenship Instructions* (1 June 2016), Chapter 7 - Citizenship by conferral, Knowledge of English language.
[12] Explanatory Memorandum, [141].
[13] Explanatory Memorandum, [141].
[14] *Migration Regulations 1994 - Specification of Language Tests, Score and Passports 2015 - IMMI 15/005* (F2014L01666), [2(B)].

3.18 Critically, no policy case has been made by the Government for such a critical deferral to the Minister of a central criterion for determining whether a person is or is eligible to become an Australian citizen. No case has been made for this essential defining characteristic of Australian citizenship to be solely determined by the Minister of the day rather than by the legislature. The standard of English required to become an Australian citizenship is a fundamental matter that should be defined in the Act upon being determined by the legislature, and so hold certainty for people seeking to become future citizens. Refugee Legal's further concerns about the appropriateness of the proposed English testing levels and methods are outlined below.

Integration into the Australian community

3.19 Currently, under the Citizenship Act, applicants seeking to satisfy the general eligibility criteria for citizenship by conferral must demonstrate, among other things, that he or she: has an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship; is likely to reside, or to continue to reside, in Australia or to maintain a close and continuing association with Australia if the application were to be approved; and is of good character. Presently there exists no requirement in law or policy that applicants for citizenship demonstrate their "integration" into Australia.

3.20 Item 43 of the Bill seeks to impose a new evidentiary requirement for people seeking to satisfy the general eligibility criteria for citizenship by conferral requiring the applicant to have provided sufficient evidence to satisfy the Minister (or delegate) or AAT on review that he or she "has integrated into the Australian community". Critically, Item 53 of the Bill seeks to provide the Minister with the personal power to specify, by legislative instrument, the matters that the Minister (or delegate) or AAT on review may or must have regard to when determining whether a person has integrated into the Australian community.

3.21 The Explanatory Memorandum to the Bill provides that matters to be specified by the Minister as mandatory or discretionary considerations in determining whether a person has integrated may include: "a person's employment status, study being undertaken by the person, the person's involvement with community groups, the school participation of the person's children, or, adversely, the person's criminality or conduct that is inconsistent with the Australian values to which they committed throughout their application process".[15] Further, the Department's Discussion Paper on this issue refers to applicants needing to provide "for example, documentation to the effect that people who can work are working, or are actively looking for work or seeking to educate themselves; that people are contributing to the community by being actively involved in community or voluntary organisations; that people are properly paying their taxes and ensuring their children are being educated".[16] Similarly, the Minister in his Second Reading Speech stated applicants will be required to "demonstrate their integration into the Australian community in accordance with Australian values" and that this may include "seeking employment rather than relying on welfare where there is capacity to do so" or "being involved with community groups".[17]

[15] Explanatory Memorandum, [142].

[16] Department of Immigration and Border Protection, *Strengthening the Test for Australian Citizenship*, April 2017.

[17] Parliament of Australia, House of representatives, Hansard: Bills, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, Second Reading Speech, 15 June 2017.

3.22 The question of whether a person has "integrated into the Australian community" is inherently broad and highly subjective. It is absolutely essential that the evidentiary parameters determining such a critical prerequisite for Australian citizenship be determined by the legislature and not by the personal views of the Minister at the time. Once again, no policy case has been made by the Government for such a deferral to the Minister of a central criterion for determining whether a person is or is eligible for becoming an Australian citizen. Refugee Legal's further concerns about the appropriateness of this integration requirement and evidentiary burden are outlined below.

4 Stripping of Australian citizenship for fraud/misrepresentation

4.1 Currently, the Minister and his or her delegates have broad powers to revoke a person's citizenship in a wide number of circumstances where his or her approval of citizenship was directly or indirectly affected by fraud, misrepresentations or the provision of false documents carried out by the person or a third party.[18] Critically, in each instance, before the Minister and his or her delegates can exercise the discretion to revoke a person's citizenship it is first necessary for the person or a relevant third party to have been convicted by a court of law of one or more of a number of criminal offences related to the provision of false or misleading information and documents, concerning that person's migration and/or citizenship processes.

4.2 New s 34AA proposes to replace the pre-requisite requirement of a criminal conviction by a court of law with a significantly lower threshold requiring only that the Minister or his or her delegate be personally satisfied that the person obtained citizenship as a result of fraud, or misrepresentation undertaken by themselves or a relevant third party in connection with his or her entry into Australia or earlier citizenship and visa/migration processes.[19] The proposed new cancellation provision further states that it is irrelevant for the purposes of that cancellation power whether the fraud or misrepresentation in question would constitute a criminal offence, or part of an offence, by any person.[20]

4.3 No case has been made by the government for such an extensive narrowing of due process for such a critical issue as stripping a person of their Australian citizenship. No reference was made to this proposed amendment in the Department's Discussion Paper.[21] Further, no policy rationale is detailed in the Explanatory Memorandum to the Bill explaining why this amendment is necessary. In the Second Reading Speech the Minister, in justifying the change, referred to law enforcement agencies not being in "a position to prosecute all forms of fraud and misrepresentation in the citizenship process, the government is committed to providing the highest levels of integrity where possible".[22] The Minister sought to emphasise "each person being considered for

[18] *Australian Citizenship Act 2007*, s 34
[19] Schedule 1 to the Bill, Part 1, Item 113, s 34AA(1)
[20] Schedule 1 to the Bill, Part 1, Item 113, s 34AA(2)
[21] Department of Immigration and Border Protection, *Strengthening the Test for Australian Citizenship*, April 2017.
[22] Parliament of Australia, House of representatives, Hansard: Bills, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, Second Reading Speech, 15 June 2017.

revocation of their Australian citizenship would be given natural justice before the minister makes a decision […].would of course be open to judicial review”.[23]

4.4 The policy objective of ensuring the Government’s commitment to “providing the highest levels of integrity where possible” is entirely at odds with the practical legal operation of the proposed new provision. As outlined below, it is our submission that in practice, instead of increasing the integrity it would reduce the integrity of decision-making by greatly increasing the margin of error in citizenship revocation decisions by:

a) lowering the standard of proof and omitting the pre-requisite that there be a finding of guilt by the judiciary, and deferring all of the decision-making process to a public servant or the Minister; and

b) severely limiting access to due process for persons affected by excluding the criminal justice system and the legal and procedural protections it affords (including the presumption of innocence, legal defenses, the right to a fair hearing and government funded legal representation etc).

4.5 In order for a court to convict a person of a criminal offence the prosecution must prove “beyond reasonable doubt” that the relevant mental and conduct elements of that offence are established. This evidentiary standard of proof is “the highest standard of proof that our law demands”[24] and “must carry a high degree of probability”.[25] However, the evidentiary standard proposed by new s 34AA requires that the Minister (or delegate) be satisfied according to the civil law evidentiary standard of “balance of probabilities”. This is a much lower standard and merely requires the Minister (or delegate) be satisfied that it is “more likely than not”.[26] Further, under the current criminal conviction regime Australian citizens liable to having that status revoked or cancelled have the added protections of legal defences that apply in that jurisdiction, including those expressly provided for in the Criminal Code (such as duress and lack of capacity).

4.6 The combination of this much lower standard of proof and the fact that it would being applied by a public servant as opposed to a judicial officer makes this proposed amendment entirely disproportionate with the policy intent. It also greatly increases the serious risk of persons being unduly stripped of their Australian citizenship due to the much greater margin of error that applies to the power proposed by the Bill.

4.7 The lower standard of satisfaction proposed by the Bill reflects the standard which currently applies to the discretionary cancellation regime for temporary and permanent visas under the *Migration Act 1958* (**the Migration Act**). It is submitted that the extension of this much lower evidentiary standard to the Citizenship Act is entirely disproportionate with longstanding Government policy on the legal protection afforded to Australian citizens and amounts to an unwarranted and profoundly concerning erosion of the concept of what it means to be an Australian citizen.

[23] Ibid.
[24] Judicial College of Victoria, Victorian Criminal Charge Book (2012) 1.7.2.
[25] *Miller v Minister of Pensions* [1947] 2 All ER 372, 373, per Denning LJ.
[26] Judicial College of Victoria, Victorian Criminal Charge Book (2012) 1.7.2.

4.8 Finally, it is important to note the consequences by operation of law when a person ceases to become an Australian citizen. For persons outside Australia at the time, they are not granted another visa to enter Australia; and for persons present in Australia at the time, they are granted a permanent visa permitting them to remain in Australia but not to depart (even for a temporary period).[27] Following this, any cancellation or revocation of citizenship may have far-reaching adverse consequences for the individual beyond just being stripped of their Australian citizenship. We provide the following case study, by way of example:[28]

> *Reem is a national of Syria who travelled to Australia on a temporary partner visa to reunite with her husband who had been resettled to Australia through the United Nations High Commissioner for Refugees process. For the purposes of the partner visa application they provided to the Department a certified copy of their marriage certificate. Some years later Reem is granted a permanent partner visa, and subsequently Australian citizenship. She obtains an Australian passport to travel to Turkey to visit her parents living in a refugee camp. While Reem and her husband are in Turkey the Department of Immigration and Border Protection send her a letter by post to their home address requesting she provide an explanation within 28 days for why the name on her marriage certificate is spelt differently than any of the names she previously disclosed to the Department. Reem is not made aware of the letter and subsequently a delegate of the Minister makes a decision to revoke Reem's citizenship under new s 34AA for the reason that the delegate believed it to be more probable than not that the marriage certificate was fraudulent, and that it was in the public interest to revoke her citizenship. Due to Reem being outside Australia at the time of the revocation she has no visa to return to Australia and is left stranded in Turkey.*

4.9 The serious practical consequences of revocation of citizenship further underscores the importance of fair and certain legal processes for people affected – as are provided by criminal law in the current framework. The proposed introduction of a significantly lower standard premised on a "more likely than not" level of satisfaction by a public servant is deeply concerning.

5 English language testing

5.1 Refugee Legal is profoundly concerned with the proposed requirements for a person to demonstrate "competent English", indicated in the Explanatory Memorandum to be intended to be defined as an IELTS test score of 6 or equivalent. Such a requirement is not appropriate in the context of citizenship in its form or substance. Further, it would have particularly adverse impact on people from refugee and multicultural backgrounds.

5.2 The proposed amendments and standard for "competent English" are drawn from the term in the Migration Regulations 1994*,* as used in the visa context.[29] "Competent English" is at the upper end of the levels of English proficiency required of visa applicants, and is applicable to certain permanent skilled visas.[30] It has been observed

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[27] *Migration Act 1958* (Cth), s 35.

[28] This case study and those that follow are based on experiences of our clients, and are modified to ensure de-identification of any personal particulars.

[29] *Migration Regulations 1994* (Cth) r 1.15C.

[30] See Subclass 189 - Skilled—Independent; Subclass 190 - Skilled—Nominated; Subclass 186 - Employer Nomination Scheme.

that it is a high standard that would not be obtainable by many Australians with a low literacy background.[31]

5.3 It is not appropriate for English testing for skilled migration and tertiary education to be transposed to the very different matter of Australian citizenship. If some level of English proficiency is required, the level and manner of test should reflect the focus of participation in Australian society. IELTS is a testing scheme designed to test academic English, with a high focus on literacy skills. Its suitability has been questioned even in the visa context:

> *[IELTS] was developed specifically to test the English of international students wishing to enter English-speaking universities or other training programmes. Its content and design do not meet the needs of tests to assess proficiency for vocational purposes or for general survival purposes.*[32]

5.4 Currently, the primary source of English language tuition for new migrants and refugee/humanitarian entrants is the Government's Adult Migration English Program (AMEP).[33] Critically, AMEP's stated objective is to provide English language tuition for eligible adult permanent migrants and humanitarian entrants who do not have "functional English". A recent independent review of AMEP found that the AMEP benchmark of functional English is, by definition, insufficient for participation in Vocational Education and Training (VET) beyond the Certificate I/II level, and higher education, and considered by some stakeholders and AMEP participants as insufficient to gain employment.[34] It is not reasonable or fair to require of citizenship applicants a far higher standard of English proficiency than they are supported to obtain.

5.5 A recent academic study undertaken by the Australian National University found that zero percent of AMEP attendees who completed 500 hours of training between 2004 and 2012 reached the equivalent of IELTS 6.[35] That study further concluded a significant number of those people would *never* satisfy an English language requirement of IELTS 6.[36]

5.6 Requiring a high standard of English literacy, through such a testing format, would have a disproportionate impact on refugees and other vulnerable and disadvantaged migrants. Many of the people that Refugee Legal has assisted over the past years arrive in Australia with little to no English. Some quickly acquire English language skills, but for others, there are significant barriers. These include limited educational opportunities, due to place of birth or the disruption of displacement. Many people, including from countries such as Afghanistan or Burma, may not be literate in their own language.

[31] University of Melbourne Language Testing Research Centre, 'Submission to the Australian Government Department of Immigration and Border Protection on the discussion paper "Strengthening the test for Australian Citizenship" (May 2017), p 4.

[32] Dr David Ingram AM, 'Submission to the Inquiry by the Productivity Commission into the Migrant Intake into Australia' (June 2015) http://www.pc.gov.au/__data/assets/pdf_file/0011/190379/sub016-migrant-intake.pdf.

[33] As administered by the Department of Education and Training under the *Immigration (Education) Act 1971* and the *Immigration (Education) Regulations 1992*.

[34] Acil Allen Consulting, *AMEP Evaluation*, Final report to the Department of Education and Training, 22 may 2015, p XI.

[35] Henry Sherrell, "A new class of migrants: the never-to-be-citizens", Inside Story, 27 April 2017, available at: http://insidestory.org.au/a-new-class-of-migrants-the-never-to-be-citizens [accessed 21 July 2017]

[36] Ibid.

Learning to read and write in English, particularly to a high level of proficiency, will in many cases be unattainable. Those at the greatest disadvantage include older refugees, survivors of torture and trauma, and women who face additional obstacles in attending English classes due to family responsibilities. Even while accessing the Government's AMEP towards the attainment of "functional English", these vulnerable and disadvantaged refugees and migrants will not be capable of meeting the "competent English" criterion.

5.7 It is also clear that for many clients of Refugee Legal, citizenship is considered the final and fundamental step in securing enduring protection. These are people who have been deprived of the statehood of their birth and Australian citizenship is critical in replacing that void, and providing them with a sense of national identity and feeling of belonging. For many refugees and disadvantaged migrants, the proposed amendments to the English language requirement would prove an insurmountable barrier to gaining citizenship. Additionally, the introduction of such requirement would be contrary to the principle of Article 34 of the Refugee Convention, to as far as possible facilitate refugees to gain citizenship.

6 Integration into the Australian community

6.1 As outlined above, items 43 and 53 of the Bill seeks to impose a new evidentiary requirement for citizenship by conferral applicants to provided sufficient evidence to demonstrate that he or she "has integrated into the Australian community", and to provide the Minister with the personal power to specify the matters to have regard to when determining whether a person has integrated into the Australian community.

6.2 Currently, under the Citizenship Act, applicants seeking to satisfy the general eligibility criteria for citizenship by conferral must demonstrate, among other things, he or she: has an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship; is likely to reside, or to continue to reside, in Australia or to maintain a close and continuing association with Australia if the application were to be approved; and is of good character. Presently there exists no requirement in law or policy that applicants for citizenship demonstrate their "integration" into Australia.

6.3 As stated above, the Minister in his Second Reading Speech opinioned in this regard that applicants will be required to "demonstrate their integration into the Australian community in accordance with Australian values" and that this may include "seeking employment rather than relying on welfare where there is capacity to do so" or "being involved with community groups".[37]

6.4 No case has been made by the government why this proposed amendment is necessary. No evidence has been provided to indicate the above-referred current requirements and criteria for citizenship applicants are insufficient or incompatible with the notion of what it means to be an Australian citizen. It is our concern that the broad scope and highly subjective nature of the term "integration", coupled with the Minister's overarching personal power to define this term, risks this requirement being influenced

[37] Parliament of Australia, House of representatives, Hansard: Bills, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, Second Reading Speech, 15 June 2017.

by the Minister of the time's own personal opinions that may not be representative of the legislature or the Australian population generally.

6.5 Refugee Legal is also deeply concerned that the proposed integration evidentiary requirement represents a radical shift from longstanding government policy encouraging and valuing diversity and multiculturalism.

7 General residence requirement

7.1 The Bill proposes to increase the permanent residency period required to be eligible for citizenship by conferral. At present, the general residence requirement for citizenship by conferral is established in s 22(1) of the Citizenship Act as a period of four years as a lawful resident, with a minimum of 12 months as a permanent resident prior to making the application for citizenship. Item 54 and 56 of the Bill propose to amend the section to require four years present in Australia as a permanent resident.

7.2 The Explanatory Memorandum provides the following explanation of the proposed amendments:

> *This period 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. Extending the general residency period strengthens the integrity of the citizenship programme by providing more time to examine a person's character as a permanent resident in Australia.*[38]

7.3 In our submission, this does not provide a logical or evidence-based justification for the proposed amendments. The general residence period would not be extended by the Bill – rather, the change is to the amount of the four year period that a person must hold permanent residence. No explanation is provided as to why a person's immigration status as a temporary or permanent residence makes a difference to the matters of a person gaining an understanding of Australian values, or acquiring English language skills, while they are living in Australia. The current residency requirement equally encompasses these matters and allows the same time to "examine a person's character".

7.4 By requiring a longer period of permanent residence, the proposed amendment would operate to particularly affect the ability of certain refugees to acquire citizenship. Refugees who arrived in Australia without a valid visa are only eligible to be granted a Temporary Protection visa (TPV) or Safe Haven Enterprise visa (SHEV). The SHEV provides possible pathways to permanent residence, which take many years to pursue. The following case study provides an example:

[38] Explanatory Memorandum, [144].

Ali arrived in Australia in September 2012 by boat after fleeing persecution in Iran due to his religion as a Christian. The Minister lifted the bar and Ali lodged an application for a SHEV in November 2015. He was found to be a refugee, and was granted a SHEV in December 2016. Ali met and married his wife Lucy, an Australian citizen. They are living in a designated regional area, and Ali is working full-time without accessing Centrelink. After three and a half years, he meets the 'pathway requirements' to be eligible to apply for other Australian visas. As soon as he can, in June 2019, Ali applies for a partner visa. As he is in a long term relationship with his wife, he is granted a permanent partner visa in December 2020.

Under the existing residence requirement, Ali would then be eligible to apply for citizenship one year later, in December 2021. At this point, he will have been resident in Australia for over 9 years. If the residence requirement is changed in the way proposed by the Bill, he will not be eligible until December 2024. He will have spent over 12 years living in Australia.

7.5 It is our submission that the amendments proposed by the Bill are not necessary for their stated intent of allowing or assessing a person's character as a member of Australian society. The amendments would impact disproportionately on refugees who face a long path to be eligible to be granted a permanent visa. For people who have been temporarily resident in Australia for many years and then obtain permanent residence, and aspire to obtain citizenship, there is no justification for adding a further three year period of waiting.

8 Children born in Australia

8.1 The Bill seeks to restrict eligibility to acquire citizenship by birth for children born in Australia, where neither parent is a permanent resident or citizen. Refugee Legal submits that the proposed amendments would operate arbitrarily and unfairly to exclude certain children born in Australia from acquiring citizenship, and would impact disproportionately on the children of refugees.

8.2 Section 12(1)(b) Act currently provides that a child born in Australia automatically acquires Australian citizenship if that child is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born. Item 20 of the Bill seeks to introduce a number of new exceptions to this "ten year rule", including that a child born in Australia would not acquire citizenship on their tenth birthday if:

a) at any time during the 10-year period, the child was present in Australia as an unlawful non-citizen;

b) at any time during the 10-year period, the child was outside Australia and did not hold a visa permitting the person to travel to, enter and remain in Australia (with the exception of New Zealand citizens);

c) a parent was an unlawful non-citizen at any time between that parent's last entry to Australia and the child's birth, and did not hold a substantive visa at the time of the child's birth.

8.3 Item 135 provides that the amendments would apply in relation to 10-year period that ends on or after commencement (set by item 2 as a day to be fixed by Proclamation), whether the birth occurred before, on or after that commencement. This means that the proposed exceptions would apply retrospectively to children already born in Australia who have not yet turned ten years old.

8.4 The Explanatory Memorandum states that the proposed amendments:

> *[…] seek to encourage the use of lawful pathways to migration and citizenship by making citizenship under the '10 year rule' available only to those who had a right to lawfully enter, re-enter and reside in Australia throughout the 10 years. People who do not meet the proposed requirements will no longer have an incentive to delay their departure from Australia until a child born to them in Australia has turned 10 years of age, in the expectation that the child will obtain citizenship and provide an anchor for family migration or justification for a ministerial intervention request under the Migration Act.*[39]

8.5 No reference is made to this proposed change in the Department's Discussion Paper[40] and no explanation of the policy need is contained in the Minister's Second Reading Speech.[41] No evidence has been raised to suggest that the scenario referred to in the Explanatory Memorandum has become a widespread problem requiring a legislative response. Further, the effect of the proposed amendments would extend well beyond their stated objective, and operate in an arbitrary way. The proposed amendments would exclude many children from acquiring citizenship by birth, solely on the basis of matters that are outside their control, and in many cases outside the control of their parents.

Unlawful non-citizen

8.6 There are many circumstances in which a person may become an "unlawful non-citizen" (that is, not holding a visa),[42] in the course of pursuing lawful migration pathways. The bridging visa framework within the Migration Act is complex, and legal and administrative issues frequently lead to the result that there is a gap between the expiry of a person's visa, and the grant of a further bridging visa.

8.7 A common example is where a person has applied for judicial review of a decision of the AAT in relation to a visa application. Even where a person is able to make an application for a further bridging visa before their existing bridging visa expires, there is no guarantee that it will be granted in a timely manner. Even if there is a gap of one day, the person is an "unlawful non-citizen" during that time. Similarly, persons in compelling circumstances who wish to apply to the Minister for intervention are often required by law to wait for any current bridging visa to expire before being legally eligible for the grant of a further bridging visa, rendering them "unlawful" for the relevant period. This

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[39] Explanatory Memorandum, [50].

[40] Department of Immigration and Border Protection, *Strengthening the Test for Australian Citizenship*, April 2017.

[41] Parliament of Australia, House of representatives, Hansard: Bills, Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, Second Reading Speech, 15 June 2017.

[42] *Migration Act 1958* (Cth), s 14 states that: 'a non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen'. Section 13 defines a lawful non-citizen as 'a non-citizen in the migration zone who holds a visa that is in effect'.

also applies to the family members (including children) of that person included in the bridging visa application.

8.8 The consequence of the proposed amendments for affected children is exclusion from automatically acquiring citizenship on their tenth birthday, irrespective of whether the parents and child were ultimately successful in their application for a visa, and were at all times pursuing "lawful pathways to migration". In this way, the amendments proposed by the Bill go beyond their stated policy intent. They hold the potential to exclude children who have spent their formative years in Australia and would otherwise entitled to Australian citizenship, on the basis of administrative decisions concerning the grant of a bridging visa.

8.9 The proposed exception would have particular adverse impact on children born in Australia to parents who are seeking asylum and who arrived by boat. Section 46A of the Migration Act prevents an "unauthorised maritime arrival" from making a valid application for a visa, unless the Minister determines to "lift the bar". As a result of amendments in 2014,[43] s 5AA(1A) now deems that a child born in Australia to a parent who is an unauthorised maritime arrival, is also an "unauthorised maritime arrival". These children (and their parents) accordingly have no ability to apply for a bridging visa to ensure that they remain at all times a lawful non-citizen, as much as they may wish to. Instead, whether they hold a bridging visa is entirely dependent on the Minister. It is our experience that in practice, children and parents in this circumstance are often left "unlawful" in the Australian community for extended periods of time through no fault of their own and despite them taking all steps possible to regularise their status with the Department. It also our observation that it is not unusual for some members of a family in these circumstances to be granted a further bridging visa, while other members of the same family not.

8.10 The effect of the proposed amendments would be to place eligibility for citizenship by birth in dependence on this administrative process. If a child born in Australia did not hold a valid bridging visa at any point, no matter how brief, they would be excluded from acquiring citizenship by birth upon reaching ten years of age (even if they are soon after determined to be a refugee, and have held substantive visas since that time). Due to the gaps in granting bridging visas, the practical effect would be that the majority of children born in Australia to parents who arrived in Australia by boat without a visa will be ineligible for citizenship. A fundamental matter such as eligibility for citizenship should not be permitted to turn on an administrative decision as to the grant of a bridging visa – where that is out of the control of the child and parents concerned, and has in practice operated in an arbitrary and unpredictable way.

Status of parent

8.11 The exception relating to the status of a child's parent would likewise disproportionately and unfairly impact refugee children. Under the proposed amendment, where a child's parents arrived in Australia without a valid visa, and had not been granted a protection visa by the time of the child's birth, the child would not acquire citizenship on their tenth

[43] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

birthday. This would be the case irrespective of whether the family is subsequently granted protection and entitled to remain in Australia.

8.12 There are a large number of children in this situation, again arising from the changes in policy and protracted delays in processing the "legacy caseload".[44] This meant that many children were born to refugee parents at a time when they did not yet hold a substantive visa, because they had not yet been permitted to apply for protection or have their application processed. To provide an example of a situation that is not uncommon amongst our clients:

> *Latifa was born in Melbourne in December 2012. Her parents are ethnic Hazaras from Afghanistan, who fled that country and travelled to Australia by boat earlier that year. At the time she was born, her parents were living in the community on bridging visas. They were waiting for the Minister to lift the bar to allow them to apply for a protection visa. In September 2015, the bar was lifted to allow the family to make an application for a TPV or SHEV. The family lodged an application for a SHEV. They were found to be refugees, and were granted SHEVs in October 2016.*
>
> *While the SHEV provides a possible pathway for Latifa's family to apply for another type of visa, such as a skilled visa, they are unlikely to be eligible. Latifa's parents had limited educational opportunities in Afghanistan. They now speak English well, but have difficulty reading or writing. Latifa's father is working as a labourer. When their SHEV expires, they are only eligible to apply for another SHEV or a TPV. As the only protection visas available to them are temporary, Latifa will not be eligible to apply for citizenship by conferral. While Australia is the only country she has ever known, she does not have any foreseeable prospect of ever acquiring Australian citizenship.*

8.13 As reflected by this example, the proposed amendments would create a difference in eligibility for citizenship based on the visa status a child's parents that is not principled or justifiable. If a child is born to parents present in Australia on a temporary work or student visa, who continue to hold temporary visas until that child is ten years of age, the child will automatically acquire Australian citizenship. If, however, a child is born to asylum seekers lawfully present, who are granted temporary protection visas and continue to hold such visas until that child is ten years of age, that child will not be a citizen.

8.14 The notion that children born in Australia would be treated so disparately, on the basis of their parents' immigration status at the time of entry to Australia before the child's birth, offends standards of fairness and non-discrimination. The nature of these proposed exceptions are incompatible with the principles underpinning the citizenship by birth provisions.

8.15 Until 1986, all children born in Australia automatically acquired citizenship (regardless of the visa status of their parents). Amendments in 1986 limited the introduced the current "ten-year rule",[45] as a response to concern that people without permanent residence were seeking to stay in Australia through the birth of a child in this country.[46]

[44] Being those persons who arrived in Australia by boat without a visa prior to 19 July 2013.
[45] *Australian Citizenship Amendment Act 1986* (Cth).
[46] Peter Prince, 'We are Australian - The Constitution and Deportation of Australian-born Children', Parliament of Australia, Research Paper no. 3 200304, available at:

Still, the automatic acquisition of citizenship for a child born in Australia who is "ordinarily resident" for the first ten years of their life, recognises the deep bond arising from those formative years. It reflects a principle that a child born in Australia, who has only ever known this country through their childhood and has a meaningful connection to our society, should acquire citizenship.

8.16 No sufficient justification has been proposed for eroding this principle. The amendments proposed by the Bill would operate discriminatorily and unfairly to exclude certain children from citizenship by birth, particularly children of refugees, on the basis of administrative decisions concerning their parents' status.

Convention on the Rights of the Child

8.17 As is noted in the Bill's Statement of Compatibility with Human Rights, the proposed amendment to acquisition of citizenship by birth engages Article 7 of the Convention of the Rights of the Child. Article 7(1) provides:

> *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.*

8.18 Article 8(1) further provides:

> *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*

8.19 Also relevant is article 3(1):

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

8.20 The Bill's Statement of Compatibility with Human Rights opines that the proposed provision is consistent with Article 7 because it "encourages lawful residence, […] encouraging citizenship applicants to register their children's birth" and "does not derogate from a child's right to nationality".[47] In our submission, this does not consider the practical effect of the proposed amendments outlined above – that is to exclude many children born in Australia who have spent their formative years from the acquisition of citizenship, on the basis of matters to do with their migration status that are outside their or their parents' control. Rubenstein & Field explain the importance of citizenship to preserving a child's identity:

> *The Convention [on the Rights of the Child] requires states parties to ensure their national law implements children's right to acquire a nationality and to preserve their identity without unlawful interference. In Australia, citizenship is the legal prerequisite for belonging to the national group. However, a child may identify as Australian without*

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http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0304/04RP03#the1986 [accessed 21 July 2017].

[47] Explanatory Memorandum, p 83-84.

being a citizen. Indeed, in a number of cases, the Administrative Appeals Tribunal has drawn on analysis of a child's sense of identification with the Australian community as the basis of a decision to grant the child Australian citizenship. ***This evidences a recognition, both internationally and by domestic decision-makers, of the importance of Australian citizenship, not only in securing children's rights, freedoms and political identity, but in recognising and formalising their identity****.*[48] [emphasis added]

8.21 Those authors' observations concerning the 2009 amendments limiting citizenship by conferral for children resonate strongly with the present proposed amendments:

The amendment [to s 21(5)] narrowed the scope for consideration of children's citizenship in the broader sense, rendering a child's citizenship dependent on their residency status under the Migration Act 1958 (Cth). ***This is evidence of a focus on immigration policy and the circumstances of family members and other people who accompany a child in Australia, rather than on the interests of the child themselves****.*[49] [emphasis added]

8.22 Where no evidence-based policy case has been made out for the proposed narrowing of acquisition by citizenship by birth, the serious impact on the interests of children born in Australia is not justifiable.

9 Facilitating citizenship for refugees

9.1 Article 34 of the *Refugee Convention* provides that:

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

9.2 This recognises that refugee situations are often enduring, and that naturalisation provides a durable solution for protection. Leading refugee law professor James Hathaway explains the significance of the provision:

In contrast to simple local integration, enfranchisement through citizenship is legally sufficient to bring refugee status to an end. Becoming a citizen bespeaks a qualitatively distinct level of acceptance of the refugee by the host state. Once a citizen, not only is the refugee guaranteed the right to remain and to enjoy basic rights as required by the Refugee Convention and general norms of international human rights law, but he or she is entitled also to take part as an equal in the political life of the country.[50]

9.3 The obligation that Australia has accepted, to facilitate as far as possible the naturalisation of refugees, should be held at front of mind in considering the Bill. Article 34 has the effect that "state parties are expected to make a good faith effort to help

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[48] Kim Rubenstein and Jacqueline Field, 'Conceptualising Australian Citizenship for Children: A Human Rights Perspective' (2013) 20 *Australian Journal of International Law* 77, 84 (footnotes omitted).
[49] Ibid 86 (footnotes omitted).
[50] James C Hathaway, *The Rights of Refugees under International Law* (CUP, 2005) p 980.

refugees meet the usual requirements for acquisition of the host state's citizenship".[51] This duty means that states "are encouraged to dispense with as many formalities in their naturalization process as possible so that refugees are positioned to acquire citizenship with the absolute minimum of difficulty".[52] The proposed amendments would have a particular adverse impact on refugees and operate as a practical barrier to obtaining citizenship. The amendments proposed by the Bill are contrary to this principle recognised by Australia and the international community.

9.4 Unlike most migrants who establish themselves in Australia and choose to seek Australian citizenship, refugees do not have the protection of their country of citizenship (or former habitual residence in the case of stateless persons) – they are unable to return to their places of origin. Australian citizenship holds particular significance to refugees, because it provides the protection and belonging that was not available in their country of origin. Recognising this underlines the importance of considering the impact that the proposed changes would have on this group of aspiring citizens.

9.5 No policy case has been made by the Government to warrant the imposition of what in many instances be unattainable criteria for highly vulnerable people who the Australian government has agreed to provide protection to, and who have no other country to call home.

10 Retrospective application

10.1 Refugee Legal also holds deep concerns with the retrospective effect of the proposed amendments and the adverse impact this will have on individuals who have applied for citizenship prior to the enactment of those legislative changes.

10.2 This effect of the proposed amendments offends the longstanding legal principle of the presumption against retrospectivity. Retrospective laws are commonly considered inconsistent with the rule of law as they make the law less certain and reliable. A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints "justified expectations".[53]

10.3 In Refugee Legal's experience it is highly unusual for Parliament to pass laws in the immigration/citizenship context that apply adversely and retrospectively , to alter core eligibility criteria applying to an earlier application lodged that has already engaged a different and more beneficial statutory process.

11 Conclusion

11.1 Refugee Legal is profoundly concerned that the amendments proposed by the Bill represent a radical and wholly unwarranted departure from longstanding Government policy on what it means to be an Australian citizen.

[51] Ibid p 985.
[52] Ibid p 985-986.
[53] HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276.

11.2 The proposed changes seek to inappropriately grant the Minister of the day with sweeping new powers to personally decide core aspects of what it means to be an Australian citizen and to bar persons from accessing due process. The changes would also in practice impose an insurmountable barrier to gaining citizenship for a significant number of highly vulnerable refugees and disadvantaged migrants, and have a significantly harsh and discriminatorily impact on certain children born in Australia.

11.3 For these reasons we submit that the Citizenship Act not be amended in the way proposed by the Bill.

Refugee Legal

21 July 2017

Defending the rights of refugees.

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