THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/PWvk:1383695

17 July 2017

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: Natasha.molt@lawcouncil.asn.au

Dear Mr ~~Smithers~~ Jonathan,

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

Thank you for your memorandum dated 26 June 2017 requesting input for a Law Council submission to the inquiry into the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (the "Bill").

From a rule of law perspective, the Law Society of NSW strongly opposes the Bill in its entirety. We query the necessity for the proposed amendments, given the Government has not demonstrated any national security or other appropriate need.

Most significantly, the Law Society has serious concerns in relation to the unprecedented level of discretion that would be afforded to the Minister over the entire citizenship process, including the proposal that the Minister have power to override certain citizenship decisions made by the Administrative Appeals Tribunal (see proposed s 52A). It is of particular concern that the Bill proposes that many of the Minister's discretionary powers are to be later determined by legislative instruments rather than in the primary legislation. In the Law Society's view, broad executive powers are a threat to democratic institutions, including the rule of law, as well as Australia's international law obligations.

The Law Society notes that the Law Council made comprehensive submissions in respect of the Australian Citizenship and Other Legislation Amendment Bill 2014, which was the subject of previous inquiry, and on which the current Bill is largely based. We support the Law Council's views as set out in the 2014 submissions, and highlight a few issues of particular concern in this Bill below.

1. English competency

Item 53 of the Bill provides for amendments to s 21 of the current legislation, that the Minister would be empowered to determine the circumstances in which a person has competent English. The Explanatory Memorandum notes that such determination may be made, for

example, through requiring an examination, or through other circumstances such as being a passport holder of certain countries.

Noting the broad language employed by the Bill, we have concerns about the compatibility of these provisions with Australia's international law obligations. In our view, an English competency test is strongly reminiscent of the dictation test used under the White Australia policy. That test was facially neutral, but had the effect of discriminating against particular groups of people from Australia for decades. If the new English competency provisions operate in a similar fashion, in our view they would likely be in breach of Australia's obligations under Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) and the provisions of the *Convention on the Elimination of Racial Discrimination* (CERD). Further, as with the Bill in its entirety, there is no demonstrated need for these provisions. The Explanatory Memorandum to the Bill itself notes that the current legislation already "requires applicants to possess a basic knowledge of the English language; this is presently assessed through the existing citizenship test."[1]

We note that determination through holding passports from certain countries prima facie discriminates based on country of origin and is likely to engage Article 26 of the ICCPR.

2. Residency requirements

The Law Society strongly opposes the proposed changes to the general residence requirements for conferral applicants seeking Australian citizenship for the reasons set out below.

New paragraphs 22(1)(a) and (b) provide that a person satisfies the general residence requirement for the purposes of s 21 if the person was present in Australia as a permanent resident throughout the person's residency period immediately before the day the person makes the application, and the person was not present in Australia as an unlawful non-citizen at any time during that period. Currently, conferral applicants are required to demonstrate four years residing in Australia, including one year as a permanent resident.

In the experience of the Law Society's members, this requirement is likely to impose significant hardship on individuals, with minimal discernible benefit in respect of strengthening the integrity of Australian citizenship. Our members advise that this amendment to the general residence requirements are most likely to adversely affect individuals currently waiting to meet the general residence requirement, particularly those who arrived in Australia as an unauthorised maritime arrival and are currently on a subclass 866 protection visa ("protection visa").

Current migration policy effectively prevents an unauthorised maritime arrival on a protection visa from having an application for family members to come to Australia considered until they become Australian citizens (see Direction 72 issued under s 499 of the *Migration Act 1958* (Cth)). They can lodge an application for a child or partner visa, but the applications will, in practice, only be processed once they are granted citizenship or where there are circumstances of a compelling nature.

If the Bill is passed, many individuals are likely to have to wait six to eight years before they can sponsor their family members to come to Australia. We note also that if an individual fails the new citizenship test three times in a row, they will be barred from applying for citizenship again for another two years.

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[1] Explanatory Memorandum, at 78

We are aware of a case of an individual who has not seen his three sons for five years because he is unable to have his sponsorship for a child visa considered until he is a citizen. During this time his wife has passed away, so his children are in the care of distant relatives. In this example, this individual would have to wait another three years to merely commence the consideration process for the child visas.

The Law Society notes that Article 17 of the ICCPR 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 or attacks. Article 16 of the *Convention on the Rights of the Child* (CRC) 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." Further, 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.

3. Disclosure of personal information

The Law Society has concerns in relation to the use and disclosure of personal information, set out in proposed s 53A. It is not immediately clear what this provision means in respect of use and disclosure "for the purposes of the Act and regulations." However, it is certainly conceivable that use and disclosure of personal information in some circumstances could offend Article 17 of the ICCPR on privacy.

Thank you for the opportunity to comment. The Law Society would support strong submissions by the Law Council in opposition to this Bill. Should you have any questions or require further information, please contact Vicky Kuek, Principal Policy Lawyer on (02) 9926 0354 or email victoria.kuek@lawsociety.com.au.

Yours sincerely,

Pauline Wright
President