NSWCCL SUBMISSION

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

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Submission to the Legal and Constitutional Committee of the Senate concerning the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (the Bill).

The NSW Council for Civil Liberties (*CCL*) thanks the Senate Committee for the opportunity to comment on this Bill. The issues raised are far-reaching and very serious.

Summary

A. The Bill would create a class of permanent residents who are denied recognition as citizens. This cannot be to the benefit of Australian society.

In the current political climate, CCL fears the new laws will disproportionately impact upon the Muslim community. Rather than fostering a strong multicultural community—our strongest defence against terrorism—this will lead to a feeling of exclusion and is likely to alienate people.

The Bill would leave residents under the threat that their permanent visas might be cancelled. They would not be fully integrated into our society.

Attempts to make Australian citizenship harder to obtain and the political rhetoric about what is "Australian" and what is "un-Australian" will divide, rather than unite, the community.

The Bill is thus a threat to our security. There are no compensatory security benefits, since candidates for citizenship already have to be permanent residents. (See Argument sections 1 and 2)

B. There is no obligation on anyone to adopt "Australian values" which has any relation to their entitlement to be citizens.

The Bill would require new citizens to accept "Australian values", determined arbitrarily by the Minister. There is no clear account of what values count as Australian values. No reason has been given why we should require Australian citizens to accept Australian values, especially when some of those values are prejudiced or mistaken. (See Argument sections 3 and 4)

C. The Bill would give the Minister for Immigration and Border Protection (*the Minister*) extraordinary powers.

The Minister would be given powers to determine the fate of individuals, powers that will be immune from merits review. This is contrary to the rule of law. (See Argument section 5)

The Bill would also give the Minister the power to determine the values to be required of new citizens and the standard of English required by making legislative instruments that cannot be overruled by parliament. This infringes the principle of the supremacy of parliament and the doctrine of the separation of powers. (See Argument section 6)

Thus the Bill is contrary to fundamental democratic values, long championed in Australia.

It is ironic that the legislation that seeks to mandate the acceptance of "Australian values" as a condition of citizenship itself, breaches the values of the supremacy of Parliament, the rule of law, equality under the law and the separation of powers: some of the values that are fundamental to any democracy.

The extended powers create a high risk that they will, by error or design, be subject to misuse and the creation of unfairness. No Minister should have such unfettered powers.

In addition, CCL notes the standard of English proposed as a requirement for citizenship candidates to achieve, is higher than the standard required for some universities. There are, moreover, reasons why people should be accepted as citizens in spite of their poor English.

Recommendation: The Bill should be rejected in its entirety.

The arguments

1. A larger class of people will be denied citizenship. This is dangerous.

It must be remembered here that we are discussing permanent residents.

Denying permanent residents the rights of citizens, especially the right to vote, including the opportunities that come with suffrage, and preventing them from accepting responsibilities, such as jury duty, would create a class of people in the country who lack a source of identification with our community. This will lead to a feeling of exclusion, to alienation, rather than fostering a strong multicultural community—our strongest defence against terrorism.

Worse, they will be insecure, knowing that their permanent visas could be cancelled at any time, leading to their detention or deportation. They will not be integrated into our society, which is highly dangerous.

This alienation will be felt by their friends and relatives; especially by their children.

Thus, there are practical and principled reasons why as many permanent residents as possible should be made citizens.

2. Democratic values are infringed by the bill.

Immigrants enrich Australia both economically and socially. The award of citizenship recognises their value to society, and, more fundamentally, their worth as persons.

Denying people the right to be citizens is, amongst other things, denying enfranchisement. The foundations of democracy lie in the rights of people to have the opportunity to contribute to the future of society, and to have a say in matters that affect their own futures. The basis of these rights does not lie in a person's merits—their virtues or their intelligence—but in their human nature. It was the recognition of this right which led to the enfranchisement of women, of indigenous Australians, and of 18 year olds. It is why prisoners have the right to vote.

To deny citizenship to people who are convicted of crimes would be to inflict upon one section of the population a more severe punishment than on others for the same crime. This goes to the heart of the judicial system, with its values of fairness, justice and equality before the law. These are important values that we should preserve.

Thus, the Bill is contrary to fundamental democratic values, long recognised in Australia.

3. Australian values.

It is intolerable to suppose that new citizens are obliged accept Australian values irrespective of their justifiability. There have been Australian values that are now recognised as mistaken, or even repulsive. There are others, such as the principle of equal opportunity, which have been the subject of extensive dispute.[1]

In the 1960's a majority of Australians approved of the white Australia policy.[2] Hatred of the Japanese—all Japanese—was rife. Women were expected to confine their activities to the home, and so were forced to resign from public service jobs when they married. Indigenous Australian children were taken from their parents and put into homes or "looked after" by non-indigenous people, in the belief that their families should not be permitted to bring them up. Jews were discriminated against, as were new arrivals from southern Europe, and Chinese.

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[1] See section 4B, below.

[2] If anything can be determined to be an Australian value, that was. The first law passed by the new Federal Government in 2001 enshrined the policy, and it was still stoutly defended in 1970. Yet it was based on pure prejudice.

In earlier years, racist attitudes toward indigenous Australians were even more pronounced—for example, the view that inter-racial marriage involved a disgraceful activity called "miscegenation".

Immigrants to Australia of the time obviously did not have *any* obligation to accept those values when they became citizens. Rather, they had an obligation to oppose them, to join with people such as Gough Whitlam and Malcolm Fraser who sought to change both the values and the law.[3]

The absurdity of the idea that new citizens of a country must adopt its values is even clearer with some foreign examples: immigrants to South Africa had an obligation to struggle against, not for, apartheid; women arriving in England were entitled to seek the franchise; and the very idea that immigrants to Germany in the 19th and early 20th centuries were obliged to accept the German values of anti-Semitism in order to become citizens is repulsive.

Australian values are always open to dispute. New citizens are as entitled as anyone else to engage in those critical disputes.

There is, then, no obligation on new citizens to automatically accept, nor to respect, the values of their new country. They are entitled, even obligated, to contribute to debates about what those values should be.

4. The very idea of Australian Values.

A. If 'Australian values' or 'the values of the Australian people' do not mean 'those values held by a majority of Australians', then the notions are meaningless. The values of all Australians are not homogenous. They change and evolve, and at different rates for different groups. Good examples are the acceptance of equality between heterosexual and same-sex couples and between men and women.[4] Even where people accept the same form of words, they often interpret the words in different ways.

B. Testing "Australian values" requires the nomination by the Minister (or someone else, or perhaps a committee) as the arbiter of "Australian values". If anything is, then surely this proposal is "un-Australian". The ideal of liberty requires that we are free to define our own values and that no government, or government appointed official or committee for that matter, and certainly not the Minister, may dictate to us what we should think, say, feel or value.[5] All Australians should be free to choose their own values, subject to respect for the rule of law and democratic principles.

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[3] Those future prime Ministers could hardly be described as renouncing their citizenship by acting against the Australian values of the time!

[4] There is still no universal agreement that women are the equals of men—amongst members of company boards, or in the Sydney Anglican archdiocese for example.

[5] Subject, of course, to the obligation to avoid causing harm.

It is worthy to note in this connection, that the value statement the Minister has devised in connection with the Migration Act includes the highly contentious principle of equal opportunity. There have been decades of debate about this value. Writers have adopted alternatives—of equal outcomes, of sufficiency of life's goods for human flourishing, of maximising the minimum outcome, or of providing just a decent minimum for example. There have also been streams both of conservative and of libertarian opinion that the principle does not make sense.[6]

C. CCL is concerned that the rhetoric concerning "Australian values" is a knee-jerk reaction to the political climate in the struggle against terrorism. Attempts to make Australian citizenship harder to obtain and the political rhetoric about what is "Australian" and what is "un-Australian" will divide, rather than unite, the community. The idea is highly dangerous politically, as the past activities of the House Un-American Activities Committee in the United States make plain.

5. Breaching the rule of law, contrary to a vital democratic value.

The Bill proposes a procedure by which the Minister makes a decision, the Administrative Appeals Tribunal (AAT), having examined the evidence that is presented to them on behalf of the Minister, overrides it, and Minister is then to be able to override the decision of the AAT (See item 127). This is a truly extraordinary grab for power.

It is supposed that the Minister will always know better than the AAT, since he has access to the advice of the public servants in his department. One might ask, why is that advice not provided, with all the detail that he has been given, to the AAT?

The Bill also proposes that certain of the Minister's decisions, where he has taken account of what he believes to be the public interest, should not be the subject of merits review at all (See item 126). The argument in the Explanatory Memorandum (*the EM*) is truly extraordinary. 'As an elected Member of Parliament, the Minister represents the Australian community standards and values and what is in Australia's public interest. As such, it is not appropriate for an unelected administrative tribunal to review such a personal decision of the Minister on the basis of merit, when the decision is made in the public interest.'

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[6] J.R. Lucas, for instance, in *The Principles of Politics*, Oxford University Press, Oxford 1966, Robert Nozick, *Anarchy, State and Utopia*, Basic Books, New York 1974 chapter 7, Richard Epstein, *Equal Opportunity or More Opportunity*, Civitas, London, 2002, and Buchanan et al., 'The Right to a Decent Minimum of Health Cover, *Philosophy and Public Affairs*, 13(1), a984 pp. 55-78. CCL does not endorse any of these various views—but they show some of the ways in which the principle of equal opportunity is contentious.

It is not just that the Minister himself has been given amazing wisdom, knowledge and insight. It seems any member of the parliament whatever, in the House or in the Senate, individually, is better able to determine what should be done *in an individual case* than a tribunal of experienced judges.

The argument is not made any better by the fact that similar powers were inserted into the Migration Act in 2015, as the EM reminds us. That should never have been allowed to happen. Rather, that fact, and this part of the Bill (together with the culture of secrecy) are evidence of a most unhealthy tendency to make the executive answerable to no one.

These are recipes for mistaken and inferior decisions.

There are reasons for the rule of law. Ministers are prone to making wrong decisions, especially where public opinion has been aroused. They are subject to pressures. They can be overly sure of their own wisdom. It is precisely to balance these concerns that judges are appointed with protected tenure and given the power to overturn biased and prejudiced decisions.

Is it so long since the Haneef affair that its lessons have been forgotten? Here is a summary. The then Minister for Immigration was wrong. Some officers of the Australian Federal Police who advised him were wrong. Members of the Department of Immigration were either wrong, or acceded to his or her demands without managing to show him he was wrong. No one apparently knew what every regular supermarket shopper knew, that SIM cards were widely and cheaply available. When these facts were finally pointed out to the Minister and when a court granted Dr. Haneef bail, the Minister used the character test in s.501 of the Migration Act to wreck his reputation and have him deported. That is, the Minster refused to admit, or could not be persuaded, that he was wrong.

And of course, Ministers can act corruptly.

Individual Ministers, suffering from none of these defects, may chafe at the restrictions placed by the rule of law on what they believe to be the best course of action. But even if the courts and tribunals sometimes get it wrong too, justice, fairness and the public good are best served by a system which places curbs on executive power.

6. The supremacy of parliament and the separation of powers. Two more vital democratic values.

The Bill proposes that the Minister should be able to make a legislative instrument (an "Australian values" statement and requirements relating to that statement) that parliament cannot disallow.[7] This is a second, extraordinary, grab for power.

[7] Item 119

The principle established by the Glorious Revolution of 1799 was that decisions by the crown are subject to the determination of parliament. The executive's role is to administer, not to legislate.

The doctrine of the separation of powers also includes the principle that legislation is up to the parliament, not the executive. Though the executive may have to make regulations on a temporary basis, parliament should always be able to override them. The tabling of a statement (as proposed in item 68) is not enough.

These principles were hard won—the English civil war was fought over them. They are respected and have been scrupulously observed in every country that has inherited British democracy. Except, it seems, in Australia.

If there is to be a legislative requirement that citizens demonstrate a commitment to certain values, those values must be enshrined in the legislation itself and confined to a very few overarching principles that are the foundations of democracy.

7. Speaking English.

It is, of course, desirable that all permanent residents in Australia, whether citizens or not, should be able to communicate in English. Adequate government support should be provided to make that happen, and CCL supports encouraging residents and citizens alike to learn the language. However, it should be realised that learning a new language as an adult is difficult, especially for older people (and not just those over 60), and that it can take a long time. Moreover, humanitarian entrants might find it difficult to learn a new language if they are suffering from torture and trauma—as CCL argued in 2006.[8] Economic circumstances, such as long working hours and childbearing responsibilities, may make learning English difficult.

Yet, as we argued then, it is not reasonable to assume that only English-speaking citizens can make a contribution to the community. Non-English speaking residents and citizens can quite effectively, for example, raise families, work, volunteer their time to help others and remain informed through the non-English media. Further, there are Indigenous Australians who cannot speak English.

Over the last hundred years, Australia has had a very successful immigration program which has enriched the nation in many ways. That many of these migrants were not proficient in English was correctly not seen as a barrier to their acceptance in this country.

[8] Submission to the Legal and Constitutional Committee's Inquiry into the provisions of the Australian Citizenship Bill 2005, at 92-94

We should not be preventing migrants from becoming citizens because of the difficulties of learning English. Exclusion is bad policy.

Matters of detail

Item 53 and elsewhere: integration.

There are small but significant religious groups within Australia that do not accept integration as a good—closed religious orders, for example, the Plymouth Brethren, gated communities. One may debate the arguments that support their views, of course. There are also people who home school their children. That may not be good for the children, nor the community. However, it is going too far to take a position that implies that the parents really ought not to be citizens.

Criminality by persons under the age of 18.

This is a group that it is particularly dangerous to alienate. The enthusiasm demonstrated here to exact revenge upon criminals exemplifies a common attitude amongst Australians. That is not a value the Parliament should be supporting.

Item 20. Proposed subsection 12(4): preventing children born in Australia, who have been here for ten years but have been "unlawful non-citizens", from becoming citizens.

The proposal here continues a policy of maligning refugees and then legislating to make their lives poor. In this case, it is the children who are made to suffer in order to encourage their parents to leave. The original requirement that children born in Australia of non-citizen parents had to wait until they had been here for ten years before they were granted citizenship arose from the moral panic of 1986. The supposition is that parents who have arrived without visas delay their departures until one of their children born here turns 10, and then can obtain permanent residence on the basis of family connection. One must ask how often this really happens. Is this an attempt to foster further prejudice against refugees?

In any case, it is contrary to the spirit of the Convention on the Reduction of Statelessness.[9] As CCL argued in 2006,[10] the waiting period should itself be reduced, to reflect that the fact that children will be socially integrated into the community long before they are ten years of age.

Items 36, 90, 104 and elsewhere.

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[9] Convention on the Reduction of Statelessness [1975] ATS 46. Entry into force in Australia, 13 December 1975. Article 1(2)(b).

[10] Submission to the Legal and Constitutional Committee's Inquiry into the provisions of the Australian Citizenship Bill 2005, at 90.

While it is clear when a person has been convicted of a security offence, the question of whether a person is *a risk* of committing such an offence is not clear at all. Trivial risks are unlikely to be accepted by the courts, but what else will count? The items should be clarified or rejected, especially since an applicant's being a security risk *mandates* that the Minister reject an application, or (item 90) cancel an approval.

Items 8, 45, 46, 53

The definition defines 'competent English' in relation to a legislative instrument, to be determined by the Minister. Due to the importance of this matter, and the fact that it may exclude people from citizenship for the whole of their lives,[11] the requirement should have been defined in the Bill.

Recommendation

CCL considers that the Bill should be rejected in its entirety because of its many flawed and undemocratic provisions.

This submission was prepared by Dr Martin Bibby on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Senate Committee.

Yours sincerely,

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[11] Or at least until they turn 60