The Castan Centre for Human Rights Law welcomes the opportunity to make a submission in relation to the *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017*. The Castan Centre’s mission includes the promotion and protection of human rights. It is from this perspective that we make this submission.

**Summary of Submission**

Citizenship is fundamental to Australia’s self-definition and identity as a nation. The Castan Centre is of the view that any citizenship rules should:

- provide clarity and certainty regarding the requirements for citizenship;
- seek to treat all citizens and prospective citizens in an equal and fair manner;
- encourage new immigrants to become full members of society as promptly as possible;
- acknowledge and seek to address the barriers faced by vulnerable new arrivals such as refugees.

The Castan Centre for Human Rights Law is concerned about the proposed changes to the *Australian Citizenship Act 2007* and believes that the changes should be rejected on the basis that they will increase the hurdles for citizenship and have a negative effect on migrants without actually contributing any substantial benefit. A great deal could be said against the Bill than is included in this submission, which focuses on some of its key aspects as follows:-

1. **Longer period of permanent residence in Australia**

   The Bill amends the *Australian Citizenship Act 2007* to increase the general residence requirement for citizenship by conferral so that any applicant must have been a permanent resident for at least four years before they are eligible to apply for citizenship.

   The proposal to increase the general residency requirement seriously undermines Australia’s stated commitment to integrate immigrants. It forces many immigrants to spend an additional three years as a permanent resident before being able to participate fully in Australian society and to enjoy all rights of full membership in the Australian community.
This change does not strengthen the requirements for citizenship or ‘enable greater examination of an aspiring citizens’ integration’,\(^1\) as the government claims. It will, in many cases, simply delay migrants’ progress towards citizenship and discourage some immigrants from applying for citizenship altogether. Considering it is highly desirable that permanent migrants become Australian citizens, it is difficult to see what positive goals can be achieved by making it harder for immigrants, who are already permanent residents and thus entitled to stay in Australia indefinitely, to become full and participating members of the community.

Moreover, this change will unduly disadvantage refugees and some groups of migrants. Immigrants who arrive in Australia as permanent residents can apply for citizenship immediately upon completion of four years in Australia (and continue to have the benefit of the citizenship of their country of origin in the meantime). Some refugees, many of whom are legally or practically stateless, may not be eligible for or face many extra hurdles in seeking permanent residency in Australia. A 4-year permanent residency requirement for citizenship significantly delays the ability to apply for citizenship for such refugees.

Questions also arise regarding migrants who are in Australia on temporary working visas, for instance under the 457 visa scheme, who need to rely on the cooperation of their employer to be sponsored for permanent residence as a pathway to citizenship. It is well-established that temporary migrants are vulnerable to exploitation and poor working conditions because of this dependency.\(^2\) Under the new rules this the precariousness will be exacerbated for those temporary migrants who are hoping to stay permanently in Australia. Nor will the new rules, which discount any time migrants spent in Australia under temporary visas for the purposes of their citizenship application, assist migrants’ integration into the community.

2. Evidence of ‘competent’ English language proficiency

Raising the language requirement from the current ‘basic’ knowledge of the English language to a minimum level of ‘competent’ knowledge would pose serious difficulties for large

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numbers of applicants. In light of the fact that Humanitarian Programme entrants are most likely to experience difficulties with the current requirements, raising the bar will likely increase the failure rates for former refugees and other migrants with limited formal education. Some of these individuals will never be able to meet the required level of English competency, meaning they will be unable to become Australian citizens. It is difficult to see how community cohesion is improved by permanently excluding some groups of permanent residents from becoming Australian citizens.

3. Integration into the Australian community

The new requirements regarding integration empower the Minister to determine matters in relation to whether a person can be considered to have integrated into the Australian community. These include, among other things, employment status, study and involvement with community groups, as well as ‘conduct that is inconsistent with the Australian values to which they committed throughout their application process’.

The integration requirements seem to be a recipe for arbitrariness, especially regarding the evaluation of applicants’ ‘values’, considering the abstract and indeterminate nature of values and the highly subjective nature of judgments regarding individuals’ conduct that may conflict with them. Criminality and national security reasons already exist as a justification for excluding individuals from citizenship. It is completely unnecessary to add integration requirements which cannot be consistently and fairly applied across the board. Excluding permanent residents from citizenship on the basis of their values is unlikely to assist them to integrate in the community – instead, it will ensure they do not seek to engage with it.

4. Personal Powers of the Minister to act in the ‘public interest’

A core problem with the proposed amendments is that they hinge on what the Minister for Immigration personally views as in the ‘public interest’ and limits review of that decision. For instance, proposed new subsection 52(4) of the Act provides that if a decision is made by

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the Minister personally, the decision is not subject to review by the Administrative Appeals Tribunal (if the notice under section 47 includes a statement that the Minister is satisfied that the decision was made in the public interest).

The Castan Centre raises the following concerns in relation to these amendments:

(a) The introduction of wide, personal public interest powers into the Citizenship Act increases the danger of arbitrariness in the granting and revoking of citizenship. We have made submissions about the personal, non-reviewable powers of the Minister for Immigration on previous occasions to the Committee (in relation to the Migration Act) and we reiterate them here. We also note that other bodies have also raised concerns about the use of ‘public interest’ provisions, most recently Liberty Victoria, which raised a number of legal questions about the unrestrained, arbitrary nature of such powers.5

(b) The removal of the ability of affected individuals to utilise merits review to the AAT for certain citizenship decisions raises dangers for the transparency and accountability of executive decisions. We note that although it may still be possible for individuals to appeal a decision to the Federal Court via judicial review, this is a very limited avenue. This is particularly so given the core statutory criteria is a wide one – what is in the ‘public interest’. Australian courts have interpreted terms such as ‘public interest’ or ‘national interest as involving largely political questions6, rather than legal matters which can be reviewed by a court. As such, it will be difficult for individuals to successfully argue there has been an error of law (and therefore obtain a judicial review remedy) in the proposed new regime, where the public interest criterion is utilised.

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6 Plaintiff S156/2013 Minister for Immigration and Border Protection [2014] HCA 22 at para 40: ‘What is in the national interest is largely a political question’.
5. The Power of the Minister to overturn decisions of the AAT

We express concern with the introduction of amendments which will permit the Minister for Immigration to overturn a decision of an independent review body: the Administrative Appeals Tribunal (‘AAT’). This undermines transparency and accountability of executive decisions, limits the potential for independent scrutiny and also has the propensity to reduce public confidence in the AAT.

Independence and public confidence in the AAT

We note that the AAT is designed to be an independent statutory body and has been operating successfully since its establishment in 1976. The independence of the AAT is linked to public confidence in the decision-making of the Tribunal – a principle reflected in Section 2A of the AAT Act:

2A Tribunal’s objective

In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:

(a) is accessible; and
(b) is fair, just, economical, informal and quick; and
(c) is proportionate to the importance and complexity of the matter; and
(d) promotes public trust and confidence in the decision-making of the Tribunal.

We believe that introducing a provision to permit the Minister for Immigration to overturn a decision of the AAT where s/he believes it is in the ‘public interest’ to do so is problematic as it will undermine the independence and public trust and confidence in the AAT – a body which is a respected and important part of the Australian legal system.

As Justice Deidre O’Connor noted in 2001:

Australia has a system of administrative review that is, in many ways, an example of world's best practice. However, there is no point having a comprehensive system of administrative review if it is not truly independent. This is particularly so at the beginning of the 21st-century, a time when citizens are demanding greater accountability from governments, when there is mass communication, greater public awareness, and less 'automatic' respect for traditional institutions. (1) The rationale for the very existence of administrative
review is undermined, unless the public are confident that administrative decision-makers (2) and the institutions to which they belong are competent and independent.  

Although proposed new section 52B requires a statement to be tabled when the Minister sets aside a decision of the Administrative Appeals Tribunal in the public interest, and therefore provides some level of transparency, we argue that this does not answer out the fundamental concern with the introduction of a Ministerial power to overturn AAT decisions.

We also argue that the continuing operation of the AAT in carrying out a merits review and oversight function in relation to citizenship decisions free from ministerial intervention is a vitally important component of the rule of law, particularly given that Australia lacks a national bill of rights.

**Migration Act and Citizenship Act provisions**

The Government has argued that the proposed power to override AAT decisions merely aligns the Minister’s powers over citizenship with those which already exist in relation to visa cancellations (in the Migration Act). Indeed, there are a number of references in the Explanatory Memoranda to sections of the Migration Act which set out similar ‘public interest’ powers which are exercisable personally by the Minister and which permit the overriding of AAT decisions. We make the following comments on this:

(a) Some of the wide, personal provisions which were first introduced into the Migration Act (via sections 351 and 417) were passed in order to allow the Minister for Immigration to exercise a humanitarian power. For instance, s417 of the Migration Act provides that the Minister may substitute a more favourable decision than the one handed down by a tribunal ‘if the Minister thinks it is in the public interest to do so’. This is therefore a substitution by the Minister which acts as a beneficial provision to applicants. The use of personal public interest powers to reject or revoke citizenship under the Citizenship Act is a very different matter - it is granting unconfined powers which lead to a denial of a benefit to an individual.

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Additionally, in this contentious area of the law, the relevant statutory provision should set out clear and detailed legal criteria, rather than broad notions of ‘public interest’ which can lead to arbitrary decisions.

(b) Whilst section 501-501A of the Migration Act contain similar provisions to those proposed in the current Citizenship Bill, these relate to refusal or revocation of visas. The current Bill deals with refusal and revocation of citizenship, which is a much more serious step given that it involves persons lawfully in Australia with a settled status (some of whom may have lived in Australia for many years). We therefore argue that existing Ministerial substitution decisions based on the public interest which may currently exist in the Migration Act cannot be equated to proposed changes to the Citizenship Act in order to justify those amendments.