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Foreign Affairs, Defence and Trade Committee
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Dear Honourable Committee Members,

SUBMISSION ON ISSUES FACING DIASPORA COMMUNITIES IN AUSTRALIA

I. INTRODUCTION

My name is Dr Dominic Dagbanja. I am a Senior Lecturer in Law at The University of Western Australia (UWA) Law School, Associate Director – Community Engagement of UWA Africa Research and Engagement Centre and Director of Research of the Organization of African Communities in Western Australia Inc.

Let me express my sincere gratitude to the Honourable Senate of the Parliament of the Commonwealth of Australia for originating the idea of an inquiry and requiring the Foreign Affairs, Defence and Trade References Committee to inquire into the subject of "Issues facing diaspora communities in Australia." I would like to make a submission on the subtheme of "barriers to the full participation of diaspora communities in Australia's democratic and social institutions, and mechanisms for addressing these barriers" with specific reference to English language requirements for Australian visas. I make the submission in my professional capacity as an academic at The University of Western Australia Law School who has researched into English language requirements and Australian visas. I make the submission, which represents my personal views, on the matter by taking extracts from two publications:

1. Dominic N Dagbanja, 'The Invisible Border Wall in Australia' (2019) 23(2) *UCLA Journal of International Law and Foreign Affairs* 221
2. Dominic N Dagbanja, 'A Gamble to Take? Visas and Delegated Legislative Power on English Language in Australia' (2019) XX(XX) *Statute Law Review* 1

It is well established in immigration law and practice in Australia to require noncitizens seeking entry into Australia to study or work or for citizenship to produce evidence to demonstrate their understanding of English language. Proof of English language capability is required even of visa applicants who come from other British Commonwealth countries with English as the official language and English language instruction from primary school to university, such as in many African and Asian countries except countries such as Canada, Ireland, New Zealand, United Kingdom and United States.

English is the official language of Australia. Therefore, it is legitimate to determine whether those seeking to enter into or remain in Australia possess a reasonable level of English language capability to be able to participate in Australian society. However, English language requirements such as tests have become a barrier "to the full participation of diaspora communities in Australia's democratic and

social institutions" because they limit migrants from entering into certain professions and impose unnecessary financial and emotional burdens on them. English language requirements operate more as tools to exclude and disempower migrants so that they do not obtain certain visas or enter certain into certain professions.

My publications engaged with the issue of the legality, merit, fairness, reasonableness and discriminatory nature of the English language requirements for Australian visas and how they lead to the exploitation and exclusion of migrants from fully participating, contributing and benefiting from Australian society. They also raised the issue of the validity of subsidiary legislation on English language requirements and argued that the abusive, discriminatory and unreasonable nature of the English language requirements and their effect on migrants could not have been the intention of the honourable Parliament of the Commonwealth of Australia. The articles established that the intent of the Parliament of the Commonwealth of Australia to create a fair and uniform system of English language standard for all visa applicants irrespective who they are and their nationality un the Migration Act 1958 (Cth), has not been followed and respected by those to whom subsidiary legislative power on English language requirements has been delegated.

It would become abundantly clear that most of the subsidiary legislation English requirements for Australian visas have little do with the purpose of requiring a person to prove their English language capability, which according to the Department of Immigration and Border Protection is "to protect the integrity of Australia's visa programmes, *and to ensure visa holders are able to safely participate in Australian society*."[1] I hope this Submission establishes the case that there are genuine reasons to reform the English language requirements in Australia.

II. THE PROBLEM WITH ENGLISH LANGUAGE REQUIREMENTS

A. The subsidiary legislation "English requirements in Australia are grossly unfair, plainly absurd, unreasonably discriminatory, and place no value on substance and merit. Given their lack of substance and merit, these requirements appear to be aimed principally at … limiting the temporary visa statuses available to applicants to the point where English speakers who are not from the specified countries are barred and excluded from enjoying the rights and protections accorded to Australian citizens and permanent visa holders. English language requirements for Australian visas achieve the effect of a physical border wall and even more: they not only limit entry, but use the excuses of nationality and visa type to promote the exploitation, abuse, and exclusion of migrants."[2]

B. Fundamental questions need to be raised in relation to the "regulation of English language capability as a criterion for visas in Australia. They include the following. First, is the purpose of an English language requirement such as a test not to ascertain whether non-Australian citizens are able to participate in Australian society using English, and if so, should a further English test be required of temporary visa holders previously assessed as meeting English language requirements and who are already working in Australia? Second, assuming an English test is justified, why should a test result have an expiry date at all or even in relation to persons already present and living in Australia? Third, given that a passport does not really prove that a person actually possesses the level of English language proficiency required as a criterion for the grant of a visa, why should it be allowed as conclusive proof of English language capability? Fourth, why do educational qualifications in English satisfy "Functional English" for *temporary visas*, but do not serve as proof of "competent English" in the case of *permanent visas* unless there is a specific exemption?"[3]

[1] Department of Immigration and Border Protection, *Review of the Implementation of Alternative English Language Proficiency Tests in the Student Visa Programme* (2013) p. 4.
[2] Dominic Dagbanja, 'The Invisible Border Wall in Australia' (2019) 23(2) *UCLA Journal of International Law and Foreign Affairs* 221, p. 222.
[3] Ibid.

C. "[A]n assessment of a visa applicant for a distinct level of English language proficiency in a second or subsequent visa application cannot be justified if the person had already been assessed for functional English or other level of English language proficiency for purposes of the Migration Act and was granted a temporary visa, and the applicant is already present and/ or working in Australia. Similarly, the visa category cannot justify different levels of English language proficiency for different visas if a purposive and realistic distinction is not established among the different levels of English language proficiency or if established at all, practically a visa applicant is not required and is not monitored to use the level of English language proficiency specific to the visa type. Accordingly, the legislative provisions that establish substantive and evidentiary requirements for English competency should be seen as encouraging the exploitation of, and discrimination against, noncitizens based not on substance or merit, but merely on nationality and the visa type."[4]

D. "English language capability as a criterion for Australian visas creates conditions for the extraction of labor and economic contribution from noncitizens already in Australia on temporary visas, and prevents them from acquiring a visa status that would enable them to enjoy the rights and protections accorded to citizens and permanent visa holders. For example, English language educational qualifications that meet employment standards for migrants already working in Australia are not recognized as evidence of "competent English" for a visa such as Subclass 186 (Direct Entry Stream) visa and 186 (Temporary Transition Stream) visa. Educational qualifications in English were in some cases accepted as evidence of "competent English" for a permanent visa, depending on how long the migrant had been working in Australia. If migrants employed by Australian institutions are competent to perform their jobs in English based on their educational qualifications and granted a temporary visa, why would those same qualifications not satisfy the English language requirements for a permanent visa such Subclass 186 (Direct Entry Stream)? Arguably, the Government of 'inclusive' and 'multicultural' Australia does not dispute the English language capability of temporary visa holders to perform their duties using English, and would not question their English language capability for as long as they remain on temporary visas in Australia. What then would be a rational, reasonable, or common-sense explanation for requiring these same temporary visa holders to sit for English test for permanent residency visas?"[5] Both Subclass 186 (Direct Entry Stream) visa and 186 (Temporary Transition Stream) visa require employer nomination yet the current instrument dealing with exemptions has taken away the English language exemptions that were applicable to these category of visas.[6]

E. "Similarly, international students who complete undergraduate and postgraduate programs in Australian universities ranked among the top global universities are required to sit for an English language test when they apply for a postuniversity completion visa. Three questions can subsequently be raised. First, is it possible to complete an undergraduate or a postgraduate degree in English from an Australian university without possessing or acquiring the requisite competency in English? Second, is it possible to complete a degree program at an Australian university and at the same time be unable to function using English in Australia? Prior to gaining admission to these universities most international students would usually be required to sit for an English test to prove their capacity to undertake their studies in English and for the grant of a student visa. Third, how is the global ranking of Australian universities based on their quality to be reconciled with the idea that international students who acquired degrees from such top universities and who had been assessed for English language capability prior to admission must sit for an English test again to prove their English language capacity upon completion if they seek to remain in Australia? Put another way, if the Government of Australia does not dispute the

[4] Ibid p. 224
[5] Ibid pp. 225-226
[6] Migration (LIN19/216: Exemptions fromSkill, Age and English Language Requirements for Subclass 186, 187 and 494 Visas) Instrument 2019

standards and quality of education in Australian universities in terms of the qualifications and skills they equip graduates with, and bearing in mind English is the medium of instruction and that non-Australian citizens would have been assessed for English language proficiency prior to their admission, why would the Government require non-Australian citizens who acquire degrees from these institutions to sit for an English test again when they apply for a post-study visa? Arguably the regime of English language requirements in Australia is, or is largely, about applicants' nationality and visa type, and is rarely about their actual capabilities in English."[7]

F. The "absurdity, lack of merit, principle, and fairness in the English language requirement is demonstrated by the fact that noncitizens who complete university degrees (undergraduate or postgraduate) in Australia are still required to sit for English language tests when they apply for a postuniversity qualification visa or when they seek to enter certain professions, including nursing and immigration agency practice."[8] "The *competent English* language requirements … do not have any regard for any level of educational qualification attained by noncitizens coming from outside the countries from which passports are accepted as conclusive evidence of English language capability. The requirements also do not have regard for situations in which a person holding requisite qualifications in English is already employed and working in Australia and performing his or her duties using English deemed satisfactory by employers. If a person holds an educational qualification in English, has been appointed and is already teaching Australian children or if a person holds a nursing degree and is already caring for aging Australians using English at an Australian residential care facility, for instance, that person would have met the underlying purpose of the English language requirement, which is to assure that noncitizens who come into Australia are able to use English. Yet, these facts are irrelevant for ascertaining a person's "competency" in English … Still, a passport suffices even though not everyone holding the specified passport necessarily possesses the required level of English language "competency." If it is conceded that a person's qualifications justify his or her work in English in Australia, then it is not clear why the same qualifications are treated having no evidentiary value in determining the person's English language capability when they apply for a permanent visa."[9]

G. The "lack of principle and fairness is also revealed from the setting of expiry dates to English language tests results. If English language tests are genuinely aimed at ascertaining a person's English language capability and a person sits for that test and passes it proving he or she possesses the required level of English language tests, the objective sought by setting an expiry date for the test is less clear. It becomes particularly bizarre, anomalous, superfluous and artificial to require persons already present in Australia, whose English language use capability is not disputed, to sit for an English test again solely because a previous test has expired."[10] "Requiring non-citizens who hold educational qualifications in English and who are already working in Australia to sit for an English language test and *setting an expiry date to an English test result* is not only plainly unreasonable and abusive, it cannot seriously, sincerely, and genuinely be said to be about their English language capability.[11]

III. HOW TO ADDRESS THE ENLGISH LANGUAGE REQUIREMENTS' BARRIERS

A. According to the Department of Immigration and Border Protection is "to protect the integrity of Australia's visa programmes, *and to ensure visa holders are able to safely participate in*

[7] Dagbanja, above note 2, pp. 226-227
[8] Ibid pp. 243-244.
[9] Ibid p. 259
[10] Ibid p. 244.
[11] Dominic Dagbanja, 'A Gamble to Take? Visas and Delegated Legislative Power on English Language in Australia' (2019) XX(XX) *Statute Law Review* 1 at 11.

Australian society."[12] Migrants already present in Australia and who are working in Australia would have met the very purpose of the English language requirements. The fact of their employment in Australia should be sufficient proof of their English language capability and they must not be required to sit for English language test. "For individuals already working in Australia, it does not make sense to ask them to sit for an English test when they seek to join a certain profession or apply for visa. For such persons, it should be conclusive that they possess the required level of English language competency or Regulations should be made under § 505 of the Migration Act for individuals and organisations to be able to provide the Minister with information as to the English language capability of persons working with such individuals and organisations."[13] The Australia Government cannot sincerely say it intends to treat migrants fairly and include them in the Australian society and economic opportunities yet require migrants who are already present and working in Australia and paying taxes into the Australian economy to sit for English language tests merely because of nationality and the category of visa migrants apply for.

B. "Section 5(2) of the Migration Act defines 'functional English' '[f]or purposes of this Act'. The definition does not limit the scope of application of functional English to any provision of the Act. It defines functional English for purposes of this entire piece of legislation or for the Migration Act as a whole, manifesting Parliament's intention to establish a uniform standard of English language capability that applies to all visas and applicants. This means that the Migration Act has defined the scope of application of functional English as the level of English language capability for all purposes of the coming into and presence in Australia of non-citizens whenever regulations are made specifying the evidence to use to prove this level of English language capability. The scope and effect of the definition of functional English in the Migration Act thus applies in subsidiary legislation made to give effect to section 5(2) of the Migration Act. This means subsidiary legislation specifying the evidence of functional English such as Regulation 5.17 made for the purposes of section 5(2) has effect and shall apply for all purposes of the Migration Act as a whole in consonance with the unlimited scope Parliament itself has given to functional English."[14] "The Minister and Governor-General have given operative effect to section 5(2) of the Migration Act. First, Regulation 5.17 of the Migration Regulations was made '[f]or the purposes of paragraph 5(2)(b)' of the Migration Act, specifying among others educational qualifications as evidence of functional English. Second, the Specification of Evidence of Functional English Language Proficiency 2015 instrument (IMMI 15/004) was also made to specify evidence of functional English in accordance with both section 5(2)(b) of the Migration Act and Regulation 5.17 of the Migration Regulations."[15] "Section 4(2) of the Act says Parliament 'intends that this Act be the only source of the right of non-citizens' to enter or remain in Australia. As the Act defines functional English for purposes of the Act and Regulation 5.17 has been made to give it to section 5(2), no further statutory purpose of the Migration Act on the subject of English language capability is served by requiring an additional and different levels of English language capability such as competent English."[16] Therefore, there is a legal basis under the Migration Act and Migration Regulations to exempt persons holding relevant educational requirements in English from sitting for an English language test.

C. According to section 504(1) of the Migration Act, "matters required, permitted, necessary or convenient to be prescribed for purposes of the Migration Act must be prescribed by regulations. Section 5(1) defines the word prescribed as meaning, prescribed *by regulations*. Thus, the Minister cannot make instruments on matters that must or are permitted, necessary or convenient to be prescribed by regulations. Regulation-making power is vested in the Governor-General under section 504 of the Migration Act with no power reserved for the

[12] Department of Immigration and Border Protection, above note 1, p. 4.
[13] Dagbanja, above note 2, p. 265.
[14] Ibid p. 17.
[15] Ibid p. 18.
[16] Ibid p. 9.

Governor-General to sub-delegate this power to the Minister."[17] The extent of the power of the Governor-General to delegate subsidiary legislative power under the Migration Act and the possibility of invalid and abusive subsidiary legislation having been made on English language capability need the investigation of the Senate and the Parliament of the Commonwealth of Australia in general.

D. The question of the level of English language capability a person must possess for purposes of living and working in Australia and the evidence to use to prove it are matters that need to be decided at the national level by the Parliament of the Commonwealth of Australia instead of being left to ministerial pleasure. Parliament is in a position to say migrants wanting to enter or to stay in Australia must possess a specified level of English language capability and to specify the evidence to use to prove that level of English language capability. Section 5(2) of the Migration Act reveals the intention of Parliament to bring about this level of uniformity and consistency across category of visas and visa applicants irrespective of their nationality but the Migration Act fell short of precision on the evidence. The current regime of English language requirements and the abuse inherent in them makes the intent of Parliament in this provision otiose. Therefore, there "is the need to clarify the intentions of Parliament in § 5(2) of the Migration Act in order to create a single and uniform criterion of functional English for purposes of the Act. The system should be fair and merit-based, focused on the evidence rather than merely on nationality or on the visa type."[18] "The Australian Government cannot preach 'Australian values' of fair play, equality of treatment under law and equality of opportunity and at the same time maintain English language requirements that are plainly unfair, unreasonably discriminatory and ignore substance and merit. In consonance with Australian values and the Migration Act, delegated legislation on English language capability must be merit-based by focusing on the substance of the evidence of actual level of English language capability. Nationality and visa category must not be used to excuse abuse, exclusion and exploitation contrary to Australian values."[19] The Parliament of the Commonwealth of Australia is in a position to determine the level of English language capability migrants must possess when they seek to enter or remain in Australia and the evidence to prove it, and should take the matter directly by itself rather than delegate the power which is susceptible to abuse and exploitation contrary to the original intent of Parliament.

E. The English language requirements in Australia exempts holders of passports from Canada, Ireland, New Zealand, United Kingdom and United States from the English test requirements. These countries accept educational Qualifications in English as satisfactory prove of English language capability for purposes of citizenship and other visa applications. Yet, these educational qualifications, which are the original evidence of English language requirements in these countries, are not acceptable in Australia. How can it be that educational qualifications in English that are acceptable in these jurisdictions as proof of English language capability for purposes of issuing their respective passports to migrants are not acceptable evidence of English language ability in Australia but the passports from these countries are acceptable? In a place such as New Zealand, an employer can testify as to the English language ability of a visa applicant, even in the case of an application for citizenship. The acceptance of passports from these countries as conclusive prove of all levels of English language capability for an Australian visa will only make sense, if equivalent evidence accepted as satisfactory proof of English language ability for purposes of a passport in these countries, including educational qualifications in English, is acceptable in Australia as proof of English language capability.

F. The setting of an expiry date to English language test result is something that needs to be abolished by the Government of the Commonwealth of Australia. For a person who is present in Australia, and who may even be working in Australia what would be a reasonable,

[17] Ibid.
[18] Ibid p. 264.
[19] Ibid p. 265.

common sense justification in relation to the purpose of the English language requirement to set an expiry date to an English test result obtained by such a person? Australian values of fair play, respect for human freedom and dignity and equality of opportunity must reflect in the laws of Australia and in the way Australia treats people, whether citizen or noncitizen.

G. Individuals who hold relevant educational qualifications in English including from Australia must not be made to sit for English language test to prove their competency in English whether they are applying for a visa or to enter certain professions.

H. The extent to which current decisions refusing visas comply with the Migration Act needs the investigation of the Senate. An example of such an issue is whether since the Migration Act allows a visa applicant to supply certain information as part of the evidence to meet a visa criterion, the Minister can nevertheless refuse to consider such information when supplied in making a decision to refuse visa application by relying solely on the criteria for the visa specified in a subsidiary legislation. "According to section 55(1) of the Migration Act, '[u]ntil the Minister has made a decision whether to grant or refuse to grant a visa, the applicant may give the Minister any additional relevant information and the Minister must have regard to that information in making the decision'. Section 54(1) of the Migration Act provides that the Minister 'must, in deciding whether to grant or refuse to grant a visa, have regard to all of the information in the application'. These provisions require the Minister to assess the probative value of all information in an application in relation to the purpose for which each piece of information is supplied (whether specifically required or not) and to determine whether the information can establish the fact it seeks to prove. If the Minister must have regard to such additional information yet could ignore or disregard it merely because it is not the specific evidence required, then what would be the statutory purpose of sections 54(1) and 55(1) of the Migration Act?"[20] "By sections 54(1) and 55(1) of the Migration Act, the evidence to use to prove a criterion for a visa consists of the required evidence or the additional relevant information or both. By these provisions, the evidence to prove a criterion for a visa cannot be limited to evidence specifically required. This is clearly the interpretation to give to sections 54(1) and 55(1) of the Migration Act because if an applicant can provide the evidence or information required by a legislative provision prescribing a criterion and its evidence, the applicant would not need to avail himself or herself of section 55(1) anyway. The right to provide additional relevant information available to applicants in section of 55 of the Migration Act is intended to promote objective fairness in the assessment of applications for visas so that visa applications are not refused for want of a specific evidence when there is an undisputed evidence legally permitted."[21] Yet, there is at least one case in which the Minister for Home Affairs refused a visa application without specifically pronouncing on the probative value of evidence of educational qualifications in English and a letter by an employer attesting to the visa applicant's satisfactory performance of their duties using English supplied by the applicant. The decision of the Minister was later affirmed by the Administrative Appeals Tribunal[22] even though both decisions did not dispute the probative value of this information which was supplied under section 55(1) of the Migration Act and should have been assessed under section 54(1) of the Act. Often cases of this nature are not appealed to a higher body, it is not always the lack of merit to the case. It may well be for financial reasons and other practical considerations.

Thank you for the kind opportunity to make this submission.

Dr D Dagbanja.

[20] Dagbanja, above note 11, pp. 12-13
[21] Ibid p. 13
[22] Case No. 1815214, 6 September 2019.