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Re: Submission to Review 'Creating a world class migration advice industry'

I am a researcher with qualifications in both law and sociolinguistics. My current research examines Registered Migration Agents' (RMAs) regulation and work, with a particular focus on communication and language. I am also researching the educational experiences of prospective RMAs undertaking the Graduate Diploma in Migration Law and Practice.

This submission draws on this research to address Theme 1 of the review, 'A qualified industry', and in particular the suitability of the existing requirements for initial registration related to English language proficiency ('ELP'), as set out in *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018*.

1. Current ELP Requirements for New RMAs

Since 2012, persons wishing to become an RMA need to demonstrate completion of the required education and assessments, and separately demonstrate ELP. The options to demonstrate adequate ELP require applicants (1) to satisfy an education/residence option, or else (2) obtain specified IELTS or TOEFL scores. The most recent iteration of these rules, *IMMI 18/003* largely retains the 2012 requirements, with slight adjustments to the required TOEFL scores, and the introduction of the new knowledge requirements: the Graduate Diploma and Capstone Assessment.

1.1 ELP through Education/Residence

Applicants wishing to demonstrate ELP without having to obtain IELTS/TOEFL test results need to demonstrate that they:

- Successfully completed secondary school with a minimum of four years' study at secondary level **and** a Bachelor degree or higher in an 'approved country', **and** English was the primary language of instruction **and** they resided in that country during study.

OR

- Successfully completed the equivalent of Australian Year 10 or 12 **and** completed at least 10 years of primary and/or secondary schooling, **and** English was the primary language of instruction **and** they resided in that country during study.

The 'approved countries' include Australia, New Zealand, Canada, Ireland, UK, US, and South Africa.[1]

1.2 ELP through testing

Applicants who cannot satisfy the above options must sit an IELTS Academic or TOEFL and achieve the requisite minimum scores in each sub-category and a minimum score overall.[2]

2. Human Rights Scrutiny

Across three reports in 2018, the Joint Parliamentary Committee on Human Rights (JPCHR) scrutinized the latest version of the ELP rules introduced in 2018.[3] The Committee questioned the rationale behind the criteria for exemption from testing - the need to demonstrate not only substantial English-medium education, but *also* that this education had been undertaken while living in a particular country.

It raised the potential for this to place an unfair and disproportionate burden on people coming from other countries excluded from this list, and sought justifications as to why people who had resided in the 'approved countries' should be exempt from testing, and not others, who may in reality have very high English proficiency and may have received their entire education in English.

The Minister and the Assistant Minister provided responses to the JPCHR's queries, presenting justifications for the particular choice of 'approved countries' and the need for both residence and education. However the Committee ultimately concluded that it was 'unclear from the information provided whether the specification of these particular countries is based on reasonable and objective criteria', finding therefore that it was 'not possible to conclude that the measure is compatible with the right to equality and non-discrimination.'[4]

ELP testing has been found to have significant financial, psychological, and opportunity costs for those required to undertake it.[5] Based on available figures, it is estimated that over half of prospective RMAs are likely to fall into the category of persons who are required to undertake an ELP test.[6] Therefore these rules have the potential to affect a large proportion of prospective

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[1] *IMMI 18/003* s 7(2). Previous instruments were *IMMI 12/035* and *IMMI 12/097.*

[2] *IMMI 18/003* s 7(4), s 8.

[3] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Third Report of 2018; Fourth Report of 2018; Fifth Report of 2018* ('PJCHR Fifth Report'), 'Requirement for certain persons to complete additional English language exams to register as a migration agent'.

[4] PJCHR Fifth Report, para 2.275

[5] See eg Frost, K. (2017). *Test impact as dynamic process: Individual experiences of the English test requirements for permanent skilled migration in Australia.* (PhD), University of Melbourne; Hoang, N. T., & Hamid, M. O. (2017). "A fair go for all?" Australia's language-in-migration policy. *Discourse: Studies in the Cultural Politics of Education, 38*(6), 836-850.

[6] See eg 'target group' in Australian Survey Research Group. (2010). Survey of registered migration agents about proposed English language changes: Report of findings.

RMAs, making it important to ensure they are designed in a way to most effectively meet their aims, while minimizing the potential for discrimination and unnecessary burden.

3. Rationale

3.1 Purpose

At the time of introducing these requirements in regulations in 2012, the government described the amendment's purpose as being to:

> ensure that RMAs have a demonstrated level of proficiency in the English language, which is an essential factor in providing immigration assistance to clients. In particular, RMAs require proficiency in English to:
>
> - understand the relevant legislation and departmental policies, and apply those to the client's individual circumstances;
> - accurately and comprehensively prepare applications, as well as other documentation, supporting their client's claims against legislated visa criteria; and
> - effectively advocate on behalf of their clients with the department, review bodies and other organisations.[7]

In response to the JPCHR's scrutiny in 2018, the Assistant Minister explained:

> The Department seeks to ensure that the migration agent industry is able to service a clientele that may have little or no English language capability. The capacity of a migration agent to convey instructions and information to and from the Department on behalf of a vulnerable client is often critical to the outcome of the visa application.
>
> The duties of migration agents include, not just the completing of forms and the handling of funds on behalf of visa applicants, but also interpretation of complex legislation and its application to the circumstances of a particular applicant. Migration agents are also required to provide clear advice and information, prepare detailed submissions and review of visa applications provided for in the *Migration Act 1958* (Cth).[8]

3.2 Choice of 'approved countries'

In response to the Committee's queries about country choice, the Assistant Minister explained:

> Similarly, to Australia, English is the common language (ie the majority of the population are native English speakers) in the USA, UK, Canada, Ireland and New Zealand. According to publically available information in 2015, 54 sovereign states and 27 non-sovereign entities had English as an official language, however only six had English as the common language (Australia, USA, UK, Canada, Ireland and New Zealand). A common language in any given country gives prominence over other languages spoken inside the country by the people. Often it is one that is spoken by the majority of the population of the country (e.g. Australia,

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https://www.mara.gov.au/media/42288/English_language_survey_report.pdf; and OMARA Operational reports between 2010-2014, which reported the percentage of applicants who satisfied ELP requirements via each available method.

[7] *Explanatory statement - Migration Legislation Amendment Regulation 2012 (No. 3);* Also, *Explanatory statement – IMMI 12/035* paras 19-20.

[8] PJCHR Fifth Report, Appendix 3.

> USA). Therefore it is considered by the Department that people from the specified countries are more likely to meet the English language requirement.

The Committee pointed out that this explanation did not mention South Africa, the seventh country on the 'approved country' list, and expressed doubt as to whether it would fulfil the 'common language' criteria set out.[9] For example, while English is used in government and some business contexts, the country has 11 official languages – Afrikaans and 9 Indigenous languages as well as English. Further, recent estimates suggest that only 9.6 per cent of the population has English as a first language, and three other official languages – Zulu, Xhosa, and Afrikaans – all have more native speakers.[10] While not raised by the Committee, it may be equally questionable whether Canada meets this definition, given the co-prominence of French.

There are also some unanswered questions about why other countries do not meet this definition. For example, past ELP requirements for RMAs included a much longer list of 56 'approved countries' that at the time were recognized because of the prominence given to English in those places.[11] It is difficult to understand why some of those countries where English is the sole official language, is the primary language of government and commerce, and is sometimes more widely spoken as a first or additional language than, for example, in South Africa, would not be included in this list of approved countries.

4. Scholarly Insights into Language Proficiency, Native-Speakers and Monolingualism

Reference to linguistics scholarship provides valuable insight into some of the understandings about language upon which the ELP rules and their justifications appear to rely. Privileging countries with a 'common language' draws on the ideas that native-speakers, especially in locations where one language heavily dominates, have higher proficiency.

4.1 Native-speakers

Scholarship across applied and sociolinguistics has identified and examined the tendency for language to be closely associated with place. This is evidenced in beliefs, for example, that Australians speak English, Chinese people speak Mandarin, or Mexicans speak Spanish. While it is undoubtedly true that many people in those locations are likely to speak varieties of those languages, discourses that connect nation with language can reinforce oversimplified understandings of language as static and stable 'objects', and homogenize the diverse individuals and their language skills and practices in any given location.[12]

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[9] PJCHR Fifth Report, para 2.273.
[10] Galloway, N., & Rose, H. (2015). *Introducing Global Englishes*. Abingdon and New York: Routledge, p 72.
[11] MARA Information sheet 0106, M01 – 12/2006v1.
[12] Piller, I. (2016). *Linguistic Diversity and Social Justice: An Introduction to Applied Sociolinguistics.* Oxford: Oxford University Press.

At least half a century of sociolinguistic research provides overwhelming evidence that this homogeneity is far from the reality. In any given location, different people have a wide range of language proficiencies and practices. One need look no further than Australia, where recent censuses have mapped increasing multilingualism.[13] Further, research demonstrates the dynamic nature of language: individuals use language in diverse ways depending on factors including gender, age, ethnicity, class, life experiences and context.[14] This means that it is incorrect to assume that everyone in a given country will speak a certain language in a standard way or have the same literacy skills simply due to having been born or having lived in that location for a certain period of time.

Similarly, as the Committee raised, it is equally impossible to assume, that (all) individuals who have lived and studied in an 'approved country' would achieve the test scores required of other applicants. Indeed, research demonstrates that when native-speakers *are* required to take general ELP tests, the outcomes are just as unpredictable and inconsistent as for other candidates. For example, a recent case study describes how a British man who only spoke English failed to achieve the IELTS scores required for migration purposes and obtained inconsistent results over several sittings before finally achieving the scores required.[15]

4.2 Monolingualism

The above rationale also gives preference to countries where English is a 'common language', and is given prominence. This draws on the belief that monolingual environments – those in which one language is dominant and bilingualism is discouraged – are preferable. Described as the 'monolingual mindset' by prominent Australian linguistics scholar, Michael Clyne, this includes the belief that the presence or use of more than one language 'contaminates' or undermines language acquisition, and is therefore detrimental. Clyne and others have comprehensively dispelled this belief, demonstrating a wide range of educational, linguistic and societal benefits stemming from multilingualism.[16] Indeed, in a setting like migration advice, where clients necessarily come from a diverse range of cultural and linguistic backgrounds, RMAs having skills in multiple languages, and an appreciation of multilingual societies (which are in fact much more common than monolingual ones), should be highly valued.

[13] The proportion of households where English is the only language spoken has steadily decreased across the four censuses this century: 80% in 2001, 78.5% in 2006, 76.8% in 2011 and 72.7% in 2016: Australian Bureau of Statistics *2016 Census QuickStats* (2016).
[14] Labov, W. (1972). *Sociolinguistic Patterns*. University of Pennsylvania Press; Galloway & Rose, n 9, ch. 4.
[15] Hoang & Hamid, n 5.
[16] See eg Clyne, M. (2005). *Australia's Language Potential.* Sydney: University of New South Wales Press.

Therefore, assumed proficiency based on the 'approved country' list and 'common language' rationale does not reflect existing scholarship and has the potential to place an unfair burden on some applicants based on their background.

4.3 Language testing for professional purposes

Assuming that native speakers, and people who have lived in particular English-dominant contexts, are more highly proficient erases another highly important consideration: professional context. As the Department has emphasised, the purpose of the ELP requirements is to ensure that RMAs are competent language users *in conducting their professional activities*.

This raises the question of whether general English language tests like IELTS and TOEFL are an appropriate way to ensure that applicants have the required skills. These general proficiency tests have not been designed to assess context-specific communication.

Research has advocated for testing that is more specific to the particular context for which the test is being administered.[17] For example, the Australian medical profession offers a range of ELP test options, and research with stakeholders identified a preference for occupation-specific language testing over more general tests, finding the latter arbitrary in content and genre. Past candidates opined that preparing for the Occupational English Test for health professionals (OET) had a number of benefits in terms of increasing both their competence and confidence in communicating in the workplace. This meant that overall it both met the professional body's objective to assess the specific language skills required for work in the medical profession, and contributed to further professional development for candidates.[18]

The OET was both developed by and continues to involve rigorous ongoing validation and refinement by language testing researchers, in collaboration and consultation with occupational experts, providing a strong evidence base for its suitability.[19]

5. Comparable Standards in Other Professions

The explanatory statement for the 2012 amendments cites similar ELP rules in other professions in Australia to support those chosen for RMAs. This includes the medical and legal professions, which both have similar categories involving education and residence in 'approved

[17] See eg Pilcher, N., & Richards, K. (2017). Challenging the power invested in the International English Language Testing System (IELTS): Why determining 'English' preparedness needs to be undertaken in context. *Power & Education, 9*(1), 3-17.
[18] Macqueen, S., Pill, J., & Knoch, U. (2016). Language test as boundary object: Perspectives from test users in the healthcare domain *Language Testing, 33*(2), 271-288.
[19] See eg Pill, J. & McNamara, T. (2016). How much is enough? Involving occupational experts in setting standards on a specific-purpose language test for health professionals. *Language Testing, 33*(2), 217-234.

countries' and ELP testing.[20] In terms of ELP based on residence, such rules are equally open to the scholarly criticisms outlined above. However, it is important to note some differences of approach. In both medical and legal profession registration standards, there is substantially greater flexibility and a wider range of options to prove ELP.

For example, the *Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission to the Australian Legal Profession* offer greater flexibility. Although they require higher IELTS scores than those required of RMAs, and also list 'approved country' exemptions, the Principles also provide that applicants may be exempted from obtaining required test scores where they otherwise satisfy the authority that their ELP 'is comparable to the proficiency demonstrated by' obtaining those test scores.[21] This creates the opportunity for admission boards to assess individual proficiency on a case-by-case basis, in recognition of individual linguistic diversity. This contrasts with the strict requirements for RMAs for which no such option applies.

Similarly, the Australian Health Practitioners Regulation Agency requires fewer years of education/residency in the 'approved countries', and offers the option to demonstrate a combination of scores over multiple test sittings, where no one test meets the required scores (a challenge commonly cited in the literature[22]). It also recognizes several different test types, including the OET, described above, and makes additional concessions for people who have local work or study experience.[23]

6. Capstone Assessment and Professional Competence

Aside from minor changes in 2018, the current ELP requirements were largely introduced well before the current more strenuous knowledge requirements represented by the Graduate Diploma and Capstone Assessment. Prior to the introduction of the Capstone, OMARA anticipated that 'it may be possible to have the exam structures so it tests reading writing speaking and listening skills in English, so the need for an English language requirement may be removed.'[24]

While the Capstone's design and implementation will undoubtedly attract ongoing scrutiny and amendment, OMARA's prediction was realised. The Capstone is comprised of both a written and oral component, involving a variety of tasks that require candidates to demonstrate

[20] *Explanatory statement - Migration Legislation Amendment Regulation 2012 (No. 3).*
[21] Para 6.3(b).
[22] Frost; Hoang & Hamid, n 5.
[23] See Medical Board of Australia, *Registration Standard: English Language Skills,* 1 July 2015.
[24] Kendall, C. N. (2014). *2014 Independent Review of the Office of the Migration Agents Registration Authority: Final Report*, p 127.

profession-specific language skills. It has been specifically designed to test against the Occupational Competency Standards (OCS) for Registered Migration Agents, requiring them to 'demonstrate that they are able to provide professional advice'. The assessment specifically 'integrates work tasks and experiences expected of registered migration agents in everyday practice'.[25]

Therefore, while revisions may be required over time, the Capstone is designed to provide the type of context-based assessment of communicative (and other) competences recommended by existing scholarship. This means that this form of assessment is much more likely to assess the types of language skills necessary for RMAs' work than the existing ELP categories.

Further, and importantly, *all* prospective RMAs must pass the two Capstone components to qualify for initial registration. Therefore reliance on the Capstone to demonstrate the requisite ELP for registration as an RMA would remove the need to identify appropriate ELP test exemption categories, or even to consider ELP on a case-by-case basis (if this were an option). This would result in more efficient and simplified application processing for OMARA. It would also avoid the potential for discrimination between different applicants, ensuring the registration of highly qualified, and linguistically and culturally diverse RMAs, to best meet the needs of an equally diverse client base.

7. Recommendations

7.1 Profession-specific assessment of occupational competencies, currently provided by the Capstone Assessment, is an appropriate and adequate means to ensure RMAs have the language skills necessary to do their job well. Separate ELP requirements should be removed.

7.2 Applied linguists with expertise in language testing should be consulted in reviews of the Capstone for assessment elements that deal explicitly with communication.

[25] OMARA. (Undated). 'Capstone assessment - frequently asked questions.' Retrieved from https://www.mara.gov.au/becoming-an-agent/registration-requirements/knowledge-requirements/capstone-frequently-asked-questions/