‘Common language’ and proficiency tests: A critical examination of registration requirements for Australian Registered Migration Agents

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Synopsis

Registered Migration Agents (RMAs), the practitioners who assist with Australian visa applications and appeals, play a crucial role in navigating these complex legal procedures. RMAs’ registration requirement, including those relating to English language proficiency (ELP), have thus garnered much attention, leading to government-commissioned reviews and inquiries, and amendments to regulations. The most recent changes have attracted scrutiny by the Australian Parliamentary Joint Committee on Human Rights, due to the unequal burden to prove ELP placed on different applicants based on their backgrounds. However, these new requirements ultimately came into force without the government satisfying the Committee that they were human rights-compliant.

This article examines the most recent ELP rules for RMAs and the Immigration Minister’s justifications for these. Drawing on sociolinguistic scholarship, it finds that rules requiring general ELP tests, and categorically exempting certain applicants from testing, rely on problematic assumptions about the nature of language, and are therefore unnecessarily

discriminatory. Given the government aims to ensure specific communicative competencies within the migration advice setting, the analysis concludes that these specific competencies should be the focus of any required assessment.

Introduction

Non-lawyers who assist visa applicants in Australia must be Registered Migration Agents (RMAs). Registration requirements are regularly reviewed and have become increasingly demanding over the years, with major recent changes to the educational and assessment requirements.[1] Communication is central to RMAs' work: they consult with and advise clients; prepare forms, written statements and submissions; and liaise with decision-makers.[2] It is indisputable that RMAs need high levels of English to do their job well, and therefore perhaps unsurprising that English language proficiency (ELP) has featured heavily in reviews. However, for RMAs who have a migration history themselves, the avenues for proving ELP are increasingly burdensome and exclusionary. In the past, applicants from a large range of countries where English is a major language were deemed to have adequate ELP. However, assumed proficiency is now limited to those from a handful of countries, and those who have lived and studied elsewhere – even where English was the medium of instruction – must pass an expensive and demanding ELP test to prove their proficiency.

The introduction of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('the Act') meant that these latest changes met unprecedented official scrutiny by the Parliamentary Joint Committee on Human Rights. Across three reports, the Committee raised the potentially discriminatory nature of requiring test results from some and not others, particularly questioning the rationale behind the small list of exempted countries. This resulted in official

[1] A draft of this article formed the basis of a submission (dated 24 July 2020) to the Department of Home Affairs review, 'Creating a world class migration advice industry', https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/migration-advice-industry .
[2] Smith-Khan (2020), (2017), (2021).

responses from the government, with justifications for these decisions. However, ultimately the changes came into force without the government satisfying the Committee that they were human rights-compliant.[3] This article critically examines these latest language proficiency requirements for RMAs and the government's justifications for them. It expands on the Committee's concerns by applying sociolinguistic scholarship to identify and challenge the language ideologies, or 'taken-for-granted assumptions about how language works',[4] on which the ELP requirements, and the government's justifications, rely.

The article starts by providing background on Australian migration advice and its regulation, then introduces existing scholarship on language tests and ideologies in institutional gatekeeping and explains the article's theoretical framework. Following a summary of the historical and most recent ELP requirements for RMAs, the Committee's concerns are described. The article then critically examines the key ideologies underlying the ELP proof requirements and their justifications. It concludes by confirming the Committee's concerns, and finding that a range of sociolinguistic factors undermine the government's proffered justifications for the current rules. These rules thus have the potential to undermine access to, and the linguistic and cultural diversity of, the RMA profession, and thus to negatively affect visa applicants' experiences of and access to advice as well as migrant-background Australians' professional mobility.

Migration advice and language proficiency

RMAs' work and regulation

In Australia, those wishing to work assisting with visa or migration merits review applications must be officially accredited through one of two pathways. Lawyers with a practicing certificate may offer migration assistance, and since recent reforms, no longer need to become

[3] For a critical overview of the Act, see Williams and Reynolds (2015).
[4] Eades (2012), p 474. See also this issue: Grey and Smith-Khan (under review) and Cho (under review).

RMAs as well. They are regulated by the professional body for lawyers within their state.[5] Non-lawyers must become RMAs. This currently involves undertaking a one-year Graduate Diploma specifically designed for RMAs at any one of a number of approved universities,[6] and then passing a Capstone examination conducted by an independent institution.[7] RMAs are regulated by the Office of Migration Agents Registration Authority (OMARA), within the Department of Home Affairs (DHA).

The regulation of migration advice in Australia has long attracted scrutiny, including successive reviews and inquiries,[8] with power for registration and regulation shifting from the RMA professional association to government.[9] As this article explores, there have also been successive changes to the educational and ELP requirements for RMA registration. These have generally focused on those registering for the first time, as opposed to existing RMAs renewing their registration (an annual requirement). Both newly registering RMAs and those renewing their registration must be Australian citizens, permanent residents or New Zealand citizens with a special category visa, and pass character requirements.[10]

While statistics are incomplete, available data suggests that over half of RMAs are migrants themselves. For example, from 2010 to 2014, registrants relying on test results to prove ELP outnumbered those who were exempted based on having been educated in Australia or in a limited set of other countries.[11] In my ongoing research, both current RMAs and those in training (student-RMAs) have expressed their attraction to the qualification as a relatively

[5] *Migration Amendment (Regulation of Migration Agents) Act 2020* (Cth).
[6] Admission into the Graduate Diploma requires students to have completed an undergraduate degree in any field.
[7] Until 2021, the College of Law conducted this exam. From 2021, there will be a new provider. https://www.collaw.edu.au/news/2020/08/13/announcement-regarding-migration-agents-capstone
[8] Eg Kendall (2014); Department of Immigration and Citizenship (2008); Joint Standing Committee on Migration (2018).
[9] See Smith-Khan (forthcoming) for a critical examination of a recent inquiry.
[10] *Migration Act 1958* (Cth) s 294(1), s 290.
[11] 2010-1: 23% relied on tests, versus 20% exempt; 2011-12: 20% versus 16%; 2012-3: 22.5% versus 20.4%; 2013-4: 26.2% versus 19.7%. The remaining fractions held a legal practicing certificate or were registered in New Zealand, so had already demonstrated ELP. See Annual Reports for those years, via https://www.mara.gov.au/about-us/who-we-are-and-what-we-do/annual-report/.

quick academic pathway to a white-collar profession. The opportunity to start one's own business, and have flexible working hours around other priorities, is also valued.[12] Becoming an RMA thus creates potential to overcome barriers that some migrants face to finding skilled work after migration, and gender-related barriers to professional mobility.[13] RMAs with their own migration experiences also identify valuable insights and skills that they bring to their work based on those experiences. For example, they report that their diverse linguistic, cultural and national backgrounds create opportunities for clients to use their first language and decrease the need for clients to explain their sociocultural background. Migrant RMAs thus increase the options available for migrant clients in terms of how they participate in migration processes.

Despite these perceived mutual benefits, ELP proof requirements at initial registration have the potential to disproportionately burden or exclude aspiring RMAs with a migrant background. From the limited statistics available, for example, failing to meet ELP requirements by neither being able to claim an exemption nor attain the required test scores has been the most common reason for RMA applications to be refused or withdrawn in recent years.[14] Discussions from critical scholarship related to such policies are provided below, and set the foundations for this article's analytic approach.

Language proficiency, ideologies and gatekeeping

It is axiomatic that professionals engaging with Australian bureaucratic and legal processes need to be skilled communicators in English. However, the way language proficiency is

[12] Data from qualitative interviews in my ongoing research project. At the end of 2019, 39% of RMAs were sole traders. https://www.mara.gov.au/media/682329/MAAR_Jul_Dec_2019_Web.pdf

[13] See, eg Creese and Wiebe (2012), exploring the (gendered) de-skilling of English-speaking African migrants in Canada; and Butorac (2014) exploring the diverse barriers at the intersections of language competence and race for migrant women to Australia.

[14] Not meeting ELP requirements was cited in 2011-12 for 2/5 refusals, 9/11 withdrawals, 2012-13: 5/8 refusals, 5/11 withdrawals, 2013-14: 8/9 refusals, 13/19 withdrawals. See statistics in OMARA annual reports.

conceptualised in law and institutional guidelines often draws on problematic beliefs about language. Discourses that link nation-building and social cohesion with linguistic proficiency are widely mobilised, especially in migration regimes. In Australia, language-based tests have a long history in migration policy, from the infamous European-language dictation tests implemented selectively to exclude 'undesirable' migrants as part of the White Australia policy[15] up to present ELP requirements for skilled migration[16] and de facto ELP testing in citizenship exams.[17]

Moreover, given its colonial origins, the spread of English is 'inextricably bound to (the imposition of) power'.[18] Therefore it is unsurprising that the way the world's various Englishes and English speakers are evaluated and categorised has attracted scholarly criticism.[19] Such examinations span whole fields, for example, from debates on how (and which) English should be taught in various language teaching contexts[20] to the motivations for and effects of granting English constitutional legal status.[21] Scholarship has also critically examined the validity and imposition of language proficiency tests, arguing that tests are generally modelled on particular standard varieties of English that may de-value and disadvantage speakers of other varieties.[22]

Critical scholars encourage us to reflect on the potential for rules about language to function as a proxy for discrimination and control. Language policy expert, Elana Shohamy, argues that rules about language are 'often anchored in ideologies, stereotypes, racism and xenophobia, resulting in linguistic victims'.[23] Taking a critical, sociolinguistic approach, I have elsewhere

[15] McNamara (2011); and see Smith-Khan (2015), examining a de-classified 1955 government memo that describes applying the test to exclude an applicant who was not white enough.
[16] Eg case studies and critical discussions in Frost (2017); Hoang and Hamid (2017); Berg (2011).
[17] Piller and McNamara (2007).
[18] Saraceni (2020), p 635.
[19] Pennycook (2007); Makoni and Pennycook (2007).
[20] Holliday (2008); Rubdy and Saraceni (2006b).
[21] See Leung (2019).
[22] McNamara (2012) Frost (2017); Hoang and Hamid (2017).
[23] Shohamy (2009), p 187.

demonstrated that evaluations of communication are inextricably linked to speaker identity.[24] Exploring the interrelationship of linguistic diversity and injustice, Piller explains:

> The language practices of those who are disadvantaged in other ways – because of their legal status, their gender, their race, or their class – are usually the ways of speaking that are least valued, and language thus becomes one aspect of cumulative disadvantage in diverse societies.[25]

Given this interrelationship, scholars propose an approach that rejects 'racialized assessments of linguistic deficiency at face value' and advocate 'redirecting attention to the historical and contemporary processes that structure the co-naturalization of language and race'.[26]

It is on this basis that the article proceeds. It first maps the language proficiency requirements for RMAs and the official justifications given for these. It asks what beliefs about language underlie these justifications and requirements and considers these against sociolinguistic scholarship. It thus seeks to uncover and de-naturalise problematic beliefs and reasoning to address inequality in this highly-regulated profession.[27]

ELP Requirements for RMAs

While there has been an ELP requirement in RMA registration policy since at least 2001, changes introduced through legislative instruments in 2012 and 2018 show an increasingly exclusionary approach, with fewer applicants able to have their ELP deemed adequate without demonstrating through ELP standardised testing. An overview of the evolving knowledge and ELP requirements for non-lawyer RMAs is provided in Table 1.

[24] Smith-Khan (2019), (2021).
[25] Piller (2016), p 14.
[26] Rosa and Flores (2017), p 641. See also García and Otheguy (2017).
[27] See eg van Dijk (2008).

<Table 1: Knowledge and ELP requirements for non-lawyer RMAs over time>

In 2001, applicants were required to demonstrate that they had passed English in the final year of secondary education in Australia or New Zealand *or* obtained a degree or diploma there; *or* passed English in the final year of secondary education 'in selected English-speaking countries' within the last two years; *or* had an International English Testing System (IELTS) score of 6 out of 10 overall in General Training or Academic tests.[28] This meant recent migrants who completed tertiary education in Australia were likely to be able to demonstrate ELP without undertaking a test, similar to ELP requirements for skilled migration during that period.[29]

Until at least September 2007,[30] the ways of demonstrating ELP were fairly flexible. Applicants could point to a combination of living, working and/or studying at various levels amounting to a total of ten years, in one or more of an extensive list of 56 'selected English-speaking countries' that were 'identified by the United Nations website as having English as a major language.'[31]

During this period, the knowledge requirements for new RMAs increased, with the introduction in 2006 of a six-month full-time Graduate Certificate qualification to be undertaken from an OMARA-approved tertiary institution.[32]

In 2010, the ELP proof rules for new RMA applicants tightened to require minimum IELTS scores of 6.5 in each subtest (each subtest involves assessing one of four language skills:

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[28] See webpage archived at https://web.archive.org/web/20010606153153/http://www.themara.com.au/mara/agents/initial_registration.html on 27 April 2001. Full details were available by requesting a Registration Pack, and are not publicly available.

[29] See Frost (2017), whose examination of the evolving ELP requirements for skilled migration over time demonstrates a similar pattern to those for RMAs.

[30] Archived versions of information sheets and application forms are unavailable in the period between 2nd September 2007 and early 2010.

[31] MARA Information sheet 0106, M01 – 12/2006v1. The list of countries appears in Appendix 1, and proof options within the application form itself.

[32] *Prescribed courses and exams for applicants for registration as a Migration Agent (Regulation 5(1)(a)) - IMMI 06/056.*

listening, speaking, reading and writing) and 7 overall (calculated based on the combined subtest scores). Further, these scores had to have been attained the Academic IELTS test only (whereas the General IELTS test was previously another option). Instead of taking the Academic IELTS test, applicants from 2010 onwards could attain a score of 100 overall in the Internet Based Test of English as a Foreign Language (TOEFL), scoring a minimum of 22 in each subtest. At the same time, education exemptions tightened to requiring both passing English when completing high school *as well as* completing a three-year degree, with both education stages taking place in Australia, New Zealand, Canada or the United Kingdom (UK), *as well as* residing in that country throughout the applicant's relevant secondary and tertiary studies. An exemption was available for applicants from other locations who could show the equivalent amount of education and residence *or* prove 'being born, educated and spending your formative years' in 'a country where English is the predominant business and community language', however, a list of specific countries was no longer incorporated.[33] Instead, individuals claiming this exemption were to 'be considered on a case by case basis', suggesting room for discretion.

A survey of RMAs in 2010 sought to evaluate the likely impact of further expanding and raising ELP test score requirements, and identified a proportion of existing RMAs who expressed doubt about being able to meet the raised scores if tested.[34] While the government initially intended to introduce equivalent requirements to those described above for existing RMAs renewing their registration, this plan was subsequently scrapped and the heightened requirements remained for initial registration only.[35] These changes are explored below.

[33] MARA Application form, Information sheet M01 – 01/2010v2. However, this type of discretion results in diverse interpretations, relying on officers using their own beliefs about language: see Piller (2001).
[34] Australian Survey Research Group (2010).
[35] OMARA Operational Report 2013-4.

2012-2018 requirements

While knowledge requirements had appeared in legislative instruments earlier, ELP requirements were included for the first time in law in 2012, through amendments to the *Migration Agents Regulations 1994* (they had previous been in policy texts only).[36] For the most part, these remain in force. Applicants exempt from testing are those satisfying one of two 'Education Options'.[37] The first option includes those who successfully completed secondary school with a minimum of four years' study at secondary level *and* obtained a Bachelor degree or higher, where both were from institutions in an 'approved country', *and* English was the primary language of instruction, *and* the individual resided in that country during study. The second option includes people who completed the equivalent of Australian Year 10 or 12, *and* completed at least 10 years of primary and secondary schooling, with the same residence and language of instruction conditions. The list of approved countries includes only the Republic of Ireland, United States of America (US) and Republic of South Africa, in addition to Australia, New Zealand, Canada and the UK.[38] All other applicants were required to show the same test scores as in 2010.[39]

The 2018 legislative instrument maintains these rules in substance, except slightly lowering the required TOEFL scores to 'align with' IELTS scores.[40] However, the 2018 changes also introduced new knowledge requirements: the completion of a 12-month Graduate Diploma (instead of the six-month Graduate Certificate)[41] and a minimum result of 65 percent in both written and oral components of an external 'Capstone Assessment'.[42]

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[36] *Migration Legislation Amendment Regulation 2012 (No. 3).*
[37] *Prescribed courses and exams for applicants for registration as a Migration Agent (Regulation 5) – IMMI 12/035.* Replaced shortly after (to address wording issues) by *Prescribed courses and exams for applicants for registration as a Migration Agent (Regulation 5) - IMMI 12/097.*
[38] *IMMI 12/035* para 4.
[39] *IMMI 12/035* para 6.
[40] *Explanatory statement – IMMI 18/003* para 7(b).
[41] *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018* para 6.
[42] *IMMI 18/003* para 7(1).

Human Rights considerations

The legislative amendments have attracted discussion regarding human rights considerations. The explanatory statement for the 2012 legislative amendments includes a Human Rights Statement of Compatibility. It acknowledges the requirements' potential to affect human rights, specifically those related to the rights to work and to non-discrimination.[43]

It describes 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.
>
> Clients of RMAs must be able to rely on the agent's professional skills, especially those from non-English speaking backgrounds. Where a registered migration agent fails or is unable to adequately represent advice or assist clients because they do not have proficient skills in English, this can result in failed visa applications or unnecessary delays in status resolution, unwanted expense incurred by the clients of RMAs, or litigation.[44]

This frames ELP requirements as aimed at ensuring RMAs can conduct the specific activities involved in their work.

The 2018 changes also came with an Explanatory Statement including a Human Rights Compatibility Statement. However, this Statement concludes that the legislative instrument does not raise any human rights issues, arguing it does not exclude applicants 'provided they

[43] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 6, 2.
[44] *Explanatory statement - Migration Legislation Amendment Regulation 2012 (No. 3);* also, *Explanatory statement – IMMI 12/035* paras 19-20.

meet the specified standards, which are reasonable and transparent.'[45] Neither this nor the 2012 Explanatory Statement discuss the reasoning behind test exemption criteria and why these are narrower than in the past.

While the 2012 changes avoided the scrutiny of the Parliamentary Joint Committee on Human Rights, it took issue with the ELP rules replicated in the 2018 amendments.[46] While accepting that the amendments' stated objectives are likely to be legitimate, it questions the potential discrimination of individuals based on national origin. Particularly, it suggests that the required test results appear to create a disproportionate burden:

> It is unclear from the information provided that merely completing 10 years of primary and secondary education, to the equivalent of Australian Year 10 level, would ensure a person possesses a level of English proficiency equivalent to that of a person who achieves the required IELTS or TOEFL iBT scores. Consequently, it appears possible that persons who are not educated in Australia, or in another prescribed country, may be required to meet a potentially higher standard of English language proficiency than their Australian (or prescribed country) counterparts in order to be eligible for registration as a migration agent. This raises concerns as to whether the differential requirements would be effective to achieve the stated objectives, and whether the differential requirements are based on reasonable and objective criteria.[47]

The Committee questions the fairness of requiring a person to take a test, even when they have been educated in English, simply because they do not come from a prescribed country, suggesting it is not the 'least rights-restrictive means of achieving the stated objectives'. It concludes by asking the Immigration Minister to explain how the measures are effective to achieve the stated objectives, whether they are reasonable and proportionate and the least rights-restrictive possible.[48]

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[45] *Explanatory statement – IMMI 18/003,* Attachment A.
[46] Parliamentary Joint Committee on Human Rights (Parliament of Australia) (2018c), section 'Requirement for certain persons to complete additional English language exams to register as a migration agent', from p 65 ('PJCHR Report 3').
[47] PJCHR Report 3 para 1.231.
[48] PJCHR Report 3 para 1.235.

The Minister provided a written response to the Committee's queries, and the Assistant Minister provided a further response to further questions.[49] These provide valuable insight into institutional discourses about language proficiency and offer an opportunity to unpack the ideologies underlying these. The next section takes up this examination, critically discussing the key themes and assumptions arising from the institutional justifications for the ELP requirements. This commences below with an exploration of situations where applicants are assumed to have adequate ELP.

Assumed proficiency

Territoriality as proficiency

Both current and historical RMA registration rules have included a list of countries within which residence and education in English is assumed to automatically prove adequate ELP. This option draws on a belief that language is inherently connected with place. This approach, known in scholarship as the 'territorial principle', is a popular conception of language. Banal examples include the visual representation of particular languages by national flags, representing languages on world maps, and the assumption that someone is a particular nationality because of the language(s) they speak, or the accent they have.[50]

Similarly, this is a common ideology on which to base institutional ELP proof requirements and exemptions. For example, Bodis's research maps ELP requirements for the admission of international students across Australian universities, where lists of countries for which ELP is assumed determine who is exempted from showing test scores to prove proficiency.[51]

[49] Parliamentary Joint Committee on Human Rights (Parliament of Australia) (2018b) ('PJCHR Report 4'), Appendix 3; (Parliamentary Joint Committee on Human Rights (Parliament of Australia), 2018a) ('PJCHR Report 5'), Appendix 3.
[50] Piller (2016), ch 3.
[51] Bodis (2020), (2021).

Likewise, in migration processes, exemptions to language testing based on country of origin have been included in residency and citizenship rules, as explained above.

The territorial principle is clearly in play, given the government's choice to limit exemptions to particularly countries of residence rather than relying on education in English alone. The Committee emphasises this:

> the instrument would require a person to complete an English proficiency test irrespective of whether their education was primarily in English, if the person did not complete their education in a prescribed country. For example, English may be the primary language used in an institution (for example, an international school) in a country that is not a prescribed country. Further, a number of universities consider that secondary and tertiary studies completed in English from countries that are not listed in the instrument satisfy the English proficiency requirements necessary for entry into the migration law program. This raises questions as to whether requiring a person who was educated primarily in English to also sit a proficiency test is the least rights-restrictive means of achieving the stated objectives of the measure.[52]

Therefore the Committee raises the potentially unreasonably discriminatory nature of obliging certain groups of registrants to take a test to prove their English even when they have completed all their education in English, and have successfully been admitted at an Australian university on the basis of this proficiency (and presumably also completed the Graduate Diploma and successfully passed the Capstone Assessment in English).

Although pervasive, linking place with language is problematic. Piller, for example, argues that by framing residence in a particular country as indicative of full proficiency in a standard version of a language, the territorial principle homogenises the inherently diverse linguistic profiles of individuals in that place: the 'real-life practices of real-life speakers may be rendered invisible'.[53] We need look no further than Australia for an example: successive censuses map increasing multilingualism, and significant numbers of people who self-report as having

[52] PJCHR Report 3, para 1.234.
[53] Piller (2016), p 45.

limited ELP.[54] Even for monolinguals, it should seem obvious that different individuals within society have vastly different literacy skills, ways of speaking, and abilities to communicate within particular professional and social contexts.

The Committee's query points at the potential for this diversity, comparing place-based exemptions with the required test scores for non-exempt applicants:

> it is unclear from the information provided that the exemption for a person who completed their school education at an institution in one of the prescribed countries where they were resident is rationally connected to the stated objective. This is because it is unclear that this would necessarily ensure the person's proficiency in English at the required level.[55]

The government's response to these concerns introduces further territory-based language ideologies, centred on the idea of a 'common language'.[56]

The 'common language' mindset

The most recent ELP rules reduce the countries on the test exemption list from 56 to just seven. When queried by the Committee on the selection of these particular countries, the Assistant Minister replies:

> 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, USA). Therefore

[54] Grey and Smith-Khan (2020).
[55] PJCHR Report 3, para 1.232.
[56] See discussion of this term in NSW law in Grey and Severin (in preparation), this issue.

> it is considered by the Department that people from the specified countries are more likely to meet the English language requirement.[57]

While this explanation refers to 'publically (sic) available information', no source is cited.

The text goes on to provide definitions of this idea of 'common language' to further justify the countries on the list. It first defines countries with English as 'the common language' as those in which most people are 'native' English speakers. Rooted in the territorial principle, native-speakerism is a pervasive ideology that links high language proficiency with being raised with a particular first language. Critical scholars convincingly argue that – contrary to popular assumptions – native speakers are not inherently better communicators in particular professional domains nor necessarily more knowledgeable in or about their first language than others who acquire the language in some other way.[58] This is particularly obvious when context-specific communicative competence or effective communication is foregrounded, instead of abstract linguistic proficiency. In fact, it may well be that those who are multilingual and have the habit of interacting and speaking with a diverse range of people are often better equipped to communicate more effectively with a diverse client base.

Even putting aside this issue, individuals from many of the countries on the previous, longer exemption list – or indeed from any country – could be native speakers of English. So this alone is not enough to justify the government's choice of the seven 'approved countries'. The explanation further suggests that it is not enough for individuals to be native speakers themselves. Their country of residence must be one where the *majority* of the population are native speakers, so the probability of the applicant's ELP is sufficient. This draws on an idea linked with territoriality, coined the 'monolingual mindset'.[59] This is a belief that nations, societies and individuals are at their best when monolingualism is the norm. It can underpin,

[57] PJCHR Report 5, Appendix 3.
[58] Holliday (2008); Rubdy and Saraceni (2006a).
[59] Clyne (2004).

for example, a preference for communication only in one language. This mindset erroneously assumes that language learning and use is a zero-sum game in which learning, using or being exposed to another language undermines one's competency in the first.[60] At a societal level, this can manifest in a belief that the local variety of English can be tainted by the presence and influence of other languages.[61] Sociolinguistic research strongly contradicts these beliefs. The belief that bilingualism undermines proficiency in the majority language has been refuted by applied linguistics research.[62] The belief about the inferiority of local varieties has been addressed by foregrounding the inherently socio-political nature of the categorisation and evaluation of languages and language varieties.[63] However, this monolingual mindset remains pervasive, particularly in societies founded on one-nation-one-language discourses.[64]

Curiously, the next definition of a common language given in the text is one that 'in any given country gives (sic: is given) prominence over other languages spoken inside the country by the people'. The fact that many of the mainly ex-colonial countries on the earlier list have (often only) English as the official language would arguably demonstrate that English has been given prominence over other languages. However, this does not align with the currently 'approved countries', some of which – like Australia – do not give English any official status. The inclusion of Canada within this definition is also particularly problematic, given the official status of French.[65]

[60] Clyne (2004), (2005).
[61] Jenkins (2006).
[62] Eg Clyne (2005).
[63] See eg Makoni and Pennycook (2007); Pennycook (2007); Saraceni (2020).
[64] Piller (2016).
[65] See Leung (2019).

But why South Africa?

The Committee expressed dissatisfaction with the above explanation, and particularly highlighted the inclusion of South Africa on the list of approved countries, noting its absence from the Minister's reasoning.

> the assistant minister's response has not provided sufficient information as to why some English speaking countries have been specified and others have not. For example, it is unclear why South Africa has been specified noting it is also unclear whether it meets the minister's own criteria of being a country where English is a 'common language'. It may be that there are other factors that mean that the specification of the seven countries (as opposed to other countries where English is widely spoken) is based on reasonable and objective criteria. For example, an assessment may have been made about meeting certain educational standards, literacy levels or the prominence of English in those countries. As this kind of information has not been provided, it remains unclear whether the requirements are based on reasonable and objective criteria.[66]

In terms of how 'common' English is in South Africa, while it is used in government and some business contexts, the country has 11 official languages, Afrikaans and nine 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,[67] meaning that South Africa's inclusion seemingly contradicts the territory- and common-language-based justifications outlined above.

This raises the question: why would South Africa be included but not many of the other countries previously listed? Many of these other countries – spanning the Caribbean, Africa, South and South-East Asian and the Pacific– have English as one or even the sole official language, and/or English is widely used as a language of government, study and business. In some of these countries, there are many people who have English as a first or even only language. Using territorial, native speaker or 'common language' rationales, it is difficult to

[66] PJCHR Report 5, para 2.273.
[67] Galloway and Rose (2015), p 72.

understand why none of these countries would be recognised where South Africa is. Conversely, including South Africa on the current list raises the question as to whether those rationales were used to choose the approved countries in the first place, or rather only offered to justify the list retrospectively.

A closer look at the shared characteristics of the seven approved countries is that they are the only ones from the longer previous list that are either British settler-colonies (Australia, Canada, New Zealand, South Africa, United States), the UK itself, or very closely connected – both geographically and politically - with the UK, in the case of Ireland.[68] By contrast, the 49 countries that previously but no longer appear in the list are post-colonial states.[69]

The different value given to the presence and nature of English and its speakers in these seven countries versus the other 49 suggests that socio-political influences are at play. The ideologies discussed above have developed in a post-colonial, nation-building context. It is therefore impossible to critically examine the way languages (and different varieties of a language) and their speakers are named, standardised, categorised and evaluated, and their use enforced, without reference to the socio-political contexts in which these processes occur.[70] Piller addresses the connection between nation and language:

> The nation state guides the perception of what the ideal language is and who the ideal speaker is through numerous institutional practices that usually render languages and speakers with long-standing ties to a polity as prototypical citizens, and migrant languages and speakers as problematic.[71]

This preference for speakers who are 'prototypical citizens' with 'long-standing ties to a polity' resonates strongly with the inclusion of the seven approved countries, all of which are

[68] There is some cross-over of categories. For example, Australia and the US have been involved in various colonial and/or 'administrative control' roles in various states, and Ireland has significant British colonial history.
[69] See Appendix 1. It is worth noting that in some countries, eg some Caribbean states, the UK still has some post-independence legal control, in the form of a Constitutional Monarchy government and/or the Privy Council remaining the final court of appeal.
[70] Makoni and Pennycook (2007); Pennycook (2007).
[71] Piller (2017), p 102.

closely politically aligned with Australia, and all have white-majority or white elite populations.

In any location, the concept of one standard ideal variety of English is a socio-political construct, rather than something that exists in reality. Further, ideal speakers do not all speak the same. For example, even the UK itself, which is held up as the home of the highly-valued British English, has a plethora of regional varieties of English, diverse ways of speaking associated with different social classes, ages, genders, and ethnic groups.[72] Even among this plethora of varieties associated with different places and social groups, individuals use language in innumerably diverse ways, shifting between different ways of speaking depending on social context.[73]

This homogenising discourse, therefore, inaccurately and unfairly reifies speakers; between those who by birth and/or citizenship are imagined as speakers of a highly-valued variety, and those who do not fit this profile and must strive to attain and then prove proficiency in one of these valued varieties through testing. These discourses thus create the potential for covert racial or national discrimination:

> Language is ideally suited as a marker of distinction because unlike most other key bases for social stratification (e.g., class, gender, race) it is relatively fluid and—seemingly—not inscribed in the body. …More so than most bases of social stratification, language thus dissimulates its operation.[74]

This means that discrimination based on race or national origin, which are protected against by law,[75] can be repackaged as a concern with language proficiency.[76]

[72] Galloway and Rose (2015), ch 4.
[73] This idea is foundational to sociolinguistics. See Labov (1972); Gumperz (2009).
[74] Piller (2016) p 62. For a description of overt and covert language policy, see Shohamy (2006).
[75] *Racial Discrimination Act 1975* (Cth) ss 9-10.
[76] See also this issue, Grey and Smith-Khan (under review), and Grey and Straus (under submission).

Below, the analysis continues with an examination of testing, uncovering similar and additional ideologies, and demonstrating the unequal burden for those without the privilege of assumed proficiency.

Testing requirements

This section considers testing more closely, exploring the current tests and introducing scholarly criticisms of their design and use, to examine their appropriateness for ensuring RMAs' ELP.

Existing scholarship has investigated the individual toll for skilled migrants relying on ELP test scores to apply for permanent residency in Australia. A case study of two prospective migrants demonstrated the extensive financial, psychological and opportunity costs associated with ELP test requirements.[77] For one applicant, this involved substantial costs related to English courses, and repeated test fees. Despite already being employed in her skilled profession in Australia, ultimately she was unable to apply for permanent residency and could not remain in the country, due to not obtaining the required scores. Another study of four prospective migrants shared similar experiences.[78] Test requirements and outcomes affected employment participation, with one participant having to give up their professional job and take up casual work to accommodate test preparation training. Another had to take an alternative visa path that required her to move to a different part of the country to avoid the ELP requirement she could not meet. The experience of repeated test-taking also had significant impacts on individuals' self-image and social participation. This means that instead of being a highly accessible career path for recent migrants, the process for becoming an RMA risks replicating the types of barriers migrants often experience when seeking to access skilled

[77] Hoang and Hamid (2017). The IELTS test currently costs $355.
[78] Frost (2017).

work. Requirements are likely to additionally disadvantage women and others with limited incomes or capital.

A plethora of existing research challenges the validity of such tests and their application in a range of settings.[79] Multiple problematic ideologies are relied on in their use. Highly relevant for the current study is that the tests have simply not been designed to assess skills required to work as an RMA, which are enumerated in a set of Occupational Competency Standards.[80] Even when assessing prospective students, which is its primary purpose, the suitability of the IELTS Academic test has been problematised. Pilcher and Richards interviewed university lecturers across a number of faculties and found that the 'English' required in the diverse courses varied greatly. They argued that the IELTS assesses elements of ELP that are not always relevant to or valued in specific academic disciplines. Each discipline has its own 'unique ideological and psychological elements' in how English is used, as well as unique vocabulary.[81] They conclude that if ELP testing is required to ensure students are equipped with necessary skills to participate in a given academic discipline, they should be assessed with reference to those specific contexts. Similarly, research has found that while by no means perfect itself, occupation-specific testing is preferred by health professionals, with some identifying that preparing for an occupation-specific language test was also beneficial in helping them improve both confidence and competence in their professional communication.[82] Tests like IELTS and TOEFL simply do not assess for context-specific language in this way and thus can only reflect a supposedly 'general' or 'neutral' type of proficiency.[83]

[79] See literature review in Frost (2017).
[80] Department of Immigration and Border Protection (2016).
[81] Pilcher and Richards (2017), p 14.
[82] Macqueen, Pill, and Knoch (2016). Macqueen et al. and other papers in the same special issue engage critically with occupation-specific language testing, and the conceptual boundaries between communication skills and language proficiency.
[83] See Chang (2011). Of course conceptualisations of what is general or neutral are ideologically, culturally and socially informed themselves.

Requiring a particular numerical score evokes the scientific authority of numbers. It assumes that language proficiency is something that can be objectively and consistently measured whereas the fluctuating scores of individual test-takers across multiple sittings immediately challenges this assumption.[84] Requiring a set score also suggests that this score represents the required level for the given profession context. However, while justifications for requiring particular test scores cite the importance of ensuring that RMAs have ELP, there is no explanation for the basis on which a *particular* score demonstrates the type and level of proficiency required for RMAs to meet occupational standards of communication. The fact that in the past, IELTS scores of 6 were considered adequate but no longer are only underlines this.[85] On its face, the particular number chosen is arbitrary, except that a higher number is simply equated with better communication skills.

Updating the TOEFL scores in 2018 to 'align with' the IELTS ones draws on this same assumption, that two different tests can be designed and administered in such a way as to consistently and objectively arrive at identical results. Presenting similar arguments when examining university admissions rules, Bodis points out that there is no research to provide evidence that different test scores can be equivalent. She goes on to examine the stated purposes of different ELP tests, and how they aim to measure ELP, noting diversity across different test types. As she argues, by equating one test's numerical score with a numerical score from another the variability of tests designs, structures and purposes is completely erased, presenting an unrealistically homogenized and decontextualized understanding of language use and proficiency.

[84] See eg Hoang and Hamid (2017) and Frost (2017).
[85] I thank Agnes Bodis for sharing her emerging research with me. In her ongoing study, she notes inconsistent score requirements for international student admission in different universities, and explores, inter alia, ideologies related to numerical scores.

The RMA registration requirements equate 'homogenous' native-speaker proficiency with particular test scores, by providing testing exemptions for certain categories of people. The Committee raises this issue: how can one possibly decide that every person that has lived and been educated in a certain environment would automatically meet the equivalent test score and thus be deemed to have been held to the same standard as those required to take the test? Once again, this relies on an assumption that all native speakers have an imagined ideal Standard English proficiency, when really individuals have diverse practices, and different competencies across different contexts. The experience of a monolingual English-speaking Scottish man in Hoang and Hamid's study, and his extensive struggles to achieve the IELTS scores required for skilled migration, is just one example of this fallacy.[86]

A further numerical feature arises in the ELP requirements: test scores are only accepted if they are less than two years old at the time of applying for registration.[87] This aligns with and reinforces the scientific measurement discourse. While language attrition is a real phenomenon, a review of relevant scholarship has found it is a complex process, dependent on a vast range and combination of individual attributes and circumstances.[88] Again there is inequality between ELP proof types: the life experiences on which exempt applicants can demonstrate ELP without a test have no expiry date. This once again aligns with the imagined ideal standard (native) speaker: if they are imagined to speak homogenously, their language practices are not expected to change due to time, travel, social environment or any other factor.

Requiring (only) those who are presumed to be non-native speakers to prove their ELP every two years aligns with the discourses above that prefer monolingualism over multilingualism, and that see use of other languages as a threat to English language learning and maintenance.

[86] Hoang and Hamid (2017).
[87] *IMMI 18/003* para 9(1)(d)-(e).
[88] Bardovi-Harlig and Stringer (2010).

In practical terms it also means a significant cumulative burden for these individuals: those required to take a test to become an RMA may have already paid for and sat multiple tests in the past, for example to apply to study in Australia, and/or as part of their application for permanent residency. Apart from the financial burdens involved,[89] this is a further reminder that they remain inferior to Australian-born citizens and those from a select few other countries. Unlike the latter groups, these RMAs are confronted with interminable gatekeeping. Even though they are usually Australian citizens or permanent residents, who may have English as a first or only language, and/or may have spent their whole lives working and studying in only English, this group is always assumed (linguistically) deficient and so must prove and re-prove otherwise.

The decontextualized and simplistic understanding of language on which tests, scores and their application rely is further reinforced by a trend within the rules towards less flexibility relative to previous policy. While in the past, OMARA presented the way it applied the ELP requirements as 'flexible' and 'fair', with room for discretion,[90] this is no longer the case. ELP is presented as an adequate-inadequate binary depending solely on acquiring the required test scores. Further, while the government seeks to add extra legitimacy to the choice by citing similar rules used by other professional bodies[91] to draw on the value of commonly-accepted standards,[92] those bodies offer a range of alternatives for applicants who do satisfy the residency/education or test score requirements, demonstrating much greater flexibility. For

[89] As of mid-2020, the overall cost for one attempt of both components of the Capstone is $2750: OMARA (Date unknown-a), Initial RMA registration is $1760 professional indemnity insurance is approximately $400, and required National Police Check is a minimum of $42: OMARA (Date unknown-b). Each IELTS attempt costs an additional $355. Annual salaries for RMAs for positions advertised on indeed.com.au range from $30,000 to $60,000.

[90] Eg 'The new policy has been administered fairly and flexibly, and where necessary applicants have been given additional opportunities to provide evidence of their English language proficiency.' OMARA Operational Report 2009-2010. The policy that year allowed ELP to be considered on a case-by-case basis. See 'ELP Requirements for RMAs' section above.

[91] *Explanatory statement - Migration Legislation Amendment Regulation 2012 (No. 3).*

[92] Macqueen et al. (2016).

example, while the Australian Health Practitioners Regulation Agency refers to the same seven countries for assumed ELP, it requires fewer years of education/residency, offers flexibility in recognising sub-test scores over multiple sittings or older test results in combination with local work or study experience, and also recognizes test results from an exam specifically designed for healthcare professionals.[93] Australian rules for legal practice admission also provide that applicants may be exempted from obtaining required ELP test scores where they otherwise satisfy the authority that their ELP 'is comparable to the proficiency demonstrated by' obtaining those test scores.[94]

The range of issues addressed above suggest that the required test scores are inappropriate to measure the specific communication skills required of RMAs. Likewise, assuming that those exempt from testing have the communication skills required to pass the tests, or those needed to be RMAs, is equally problematic.

To overcome this type of injustice, Holliday proposes that instead of concentrating on actual or assumed general proficiency in a particular standard variety of a language, it would be preferable to focus on communicative success or competence in particular professional social or professional contexts.[95] For example, a chemistry professor who is a non-native English speaker but uses English as the medium of communication in her work would be highly competent discussing chemical compounds and managing and liaising with lab assistants. By contrast, I, as a white, Australian native speaker of English, know very little about chemistry and would have an extremely limited capacity to communicate in that professional setting. In a migration advice setting, this means competence would involve both an ability to understand

[93] See Medical Board of Australia (2015).
[94] Law Admissions Consultative Committee (2015), 6.3 (b).
[95] Holliday (2008).

and discuss migration-related matters, and the ability to effectively communicate these matters with both departmental officials and a (linguistically) diverse client-base.

Ensuring profession-specific communication skills

It seems axiomatic that for language proficiency requirements to be legitimate, they should reflect the types of communicative skills needed for the particular context in question. For RMA registration, these more specific skills are usually cited as the reason for needing an ELP requirement in the first place.[96] Indeed, this is the justification given for the updated ELP requirements in 2012.[97] Research exploring work-related visa requirements has provided abundant examples of people who simply should not have needed to demonstrate any (or at most, very little) ELP to prove their suitability for their particular work and/or workplaces.[98]

Advanced literacy and oral skills in English are undoubtedly essential for the provision of migration assistance in Australia. However, the IELTS and TOEFL tests have simply not been designed to test for the particular communication skills required for this work. Therefore, first, those who must take one of those tests are unnecessarily and unfairly burdened. Second, those who are exempt based on origin and education are assumed to have specific communicative skills that cannot be guaranteed. In fact, by imagining language as simple and static, institutional discourse overlooks important profession-specific communicative skills. These include the ability to effectively communicate with people from diverse linguistic and cultural backgrounds, which is essential for all RMAs, including monolingual English-speakers. Further, it subordinates and makes invisible the important roles that other languages play in

[96] Eg *Explanatory statement - Migration Legislation Amendment Regulation 2012 (No. 3);* also, *Explanatory statement – IMMI 12/035* paras 19-20.
[97] See '2012-2018 requirements' sub-section.
[98] Berg (2011); Piller and Lising (2014).

migration advice for many RMAs and their clients. If the goal is to ensure that RMAs have the relevant communicative skills, registration rules should evaluate these specific skills.

In the lead-up to introducing the Capstone, OMARA opined that an external exam which tests specific knowledge and requires that applicants demonstrate requisite listening, reading, writing and speaking skills could mean that separate ELP requirements could be removed.[99] More recently, the College of Law, the examining body responsible for the Capstone, indicated that candidates are likely to fail the exam if they have inadequate English proficiency,[100] suggesting that the requisite ELP is demonstrated through successful completion of the Capstone.

Both the Graduate Diploma and Capstone assess practice-specific knowledge and communication, including written and oral communication tasks that simulate actual practice. The Capstone comprises both a 3.5 hour written component and a separate 1.5 hour oral component. It has been designed specifically to test the Occupational Competency Standards (OCS) for RMAs,[101] which cover the different activities RMAs do in their work (most involving language skills), from conducting initial consultations, through liaising with the Immigration Department, to establishing and managing a practice.[102] OMARA explains:

> The Capstone provides candidates with the opportunity to demonstrate that they are able to provide professional advice on Australian migration matters in accordance with the OCS. The assessment integrates work tasks and experiences expected of registered migration agents in everyday practice.[103]

[99] Kendall (2014), p 127.
[100] OMARA (Date unknown-a).
[101] OMARA (Date unknown-a).
[102] Department of Immigration and Border Protection (2016).
[103] OMARA (Date unknown-a).

Meeting the required 65 per cent in both the written and oral components appears to be a difficult feat for many candidates. As of July 2020, the average success rate was 21 per cent,[104] indicating that on its own, the Capstone is a stringent test.

The Capstone is new and it will be necessary to review its design and implementation to evaluate how effectively it succeeds in measuring the attributes it aims to test.[105] Indeed, it has already faced considerable criticism.[106] However, given that it specifically aims to evaluate prospective RMAs on the communicative skills (and knowledge) required for their work, there is a strong argument that additional ELP requirements are redundant.

Of course, assuming that the Capstone Assessment is capable of effectively and fairly measuring communicative competencies should not be accepted uncritically. If anything, the assumptions about language use and proficiency uncovered and challenged in this article indicate the importance in interrogating the rationale behind rules about language proficiency and use. These may seem logical and common sense, but referring to relevant linguistic expertise demonstrates how problematic they can be.

The same applies for communicative-competence based evaluations and leads to the conclusion that any review of the Capstone should include consultation with applied linguists with expertise in the design of occupational competence-based testing. Such consultation would need to include ascertaining whether or how well the Capstone evaluates the under-acknowledged language work involved in communicating with linguistically diverse clients, including using other languages, working effectively with interpreters and adjusting English language use to best accommodate clients' proficiencies.

[104] OMARA (Date unknown-a).
[105] The Capstone's content has not been made publicly available.
[106] See eg. submissions made to the Department's latest (2020) review: https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/migration-advice-industry

Conclusion

Human rights-centred scrutiny has been helpful in identifying issues of potential discrimination and inequality within the current rules governing initial registration for RMAs. The government's responses to this scrutiny provide a window into dominant discourses about RMAs and their language use and proficiency. Applying a critical sociolinguistic lens has allowed a further critical examination of both the rules and justifications offered for them.

This examination has found that the reasons offered for automatically assuming an adequate level of proficiency for applicants from specific countries rely on a number of problematic ideologies that relate language proficiency to place. The shift from a more comprehensive list of places to a much shorter one and the incomplete reasons given for this change reinforces the likelihood that socio-political ideologies help shape how ELP is conceptualized in this context. Drawing on sociolinguistic research, the article has demonstrated that these ideologies contradict the complex, dynamic, interactive and socially-situated nature of language. Therefore, the reasons given for why it is not discriminatory to require people from particular countries to undertake ELP tests and not others are not made out.

Requiring particular scores in tests that have not been designed to assess the specific language skills required to practice as an RMA is equally problematic. Exempting some applicants from taking this test, based on assumptions that their 'general' ELP is adequate, appears to indicate that the government is confident the Capstone assessments are enough to ensure these individuals have the specific communicative competence required to work as RMAs.

Therefore, it is difficult to understand why any applicant who has successfully passed these occupation-specific competence-based and highly rigorous examinations would not be

assumed to be adequate communicators, regardless of their origin. Removing the unequally burdensome and inappropriate 'general' ELP test requirement would thus go some way to ensuring that rules for newly-registering RMAs are reasonable and proportionate and, most importantly, non-discriminatory. They would equally help to maintain valuable cultural and linguistic diversity within the profession, which can only stand to benefit its client base.

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