



## Précis Paper

### Recent Reforms to Citizenship-Stripping Legislation

Sangeetha Pillai of Monash University, discusses the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) and the changes that the legislation has brought to Australian law.

#### Discussion Includes

- Citizenship as a Constitutional concept, both in Australia and internationally, and the history of legislation affecting citizenship
- Does Australian law allow for dual citizenship?
- What are the significant aspects of the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth)?
- How does the amending Act differ from the first draft of the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth)?
- What rights of review are available to a person affected by the amending Act and what other safeguards are there?

## Précis Paper

### Recent Reforms to Citizenship-Stripping Legislation

1. In this edition of BenchTV, Sangeetha Pillai (Lecturer) and Jaimee Burke (Solicitor) discuss the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) which was enacted to empower the revocation of citizenship for dual citizens who travel to the Middle East and engage in terrorism related conduct. Ms Pillai is a Lecturer in the Faculty of Law at Monash University who researches in the area of constitutional law with a specialty in citizenship law.

#### The Concept of Citizenship

2. Although the Commonwealth Parliament has legislated on the issue of who holds citizenship and the parameters of that status since the *Australian Citizenship Act 1948* (Cth), the power to do so is not expressly inscribed in the Australian Constitution. Accordingly, the precise basis of the Commonwealth's power to regulate citizenship and the boundaries of this power are unclear.
3. Internationally, citizenship tends to arise either because a person is born in a country ('birth right') or because their family is a citizen of the country ('blood line').
4. Dual citizenship is possible under the *Australian Citizenship Act 2007* (Cth).

#### The Initial Draft Legislation

5. The *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) amended the *Australian Citizenship Act 2007* (Cth). Ms Pillai cautions that it is necessary to see this legislation in the context of a whole series of national security legislation passed following the 9/11 terrorist attacks. The government took the view that it was necessary for it be easier to revoke the citizenship of those who were involved in the perpetration of terrorism or were dangerous to the public good.
6. Other jurisdictions have enacted similar legislation including the UK under the *British Nationality Act 1981* (UK). There, the Home Secretary has broad powers to revoke the citizenship of dual citizens and even those who hold solely British citizenship – where it is for the public good. It was initially proposed that the Australian legislation would substantially mirror the UK legislation in providing powers to the Immigration Minister to revoke citizenship when *he or she* felt that the citizen was a danger. This proposition would have been problematic in our jurisdiction given the strict separation of powers expressed in our written constitution that is not present in the UK. The separation of powers under the Australian

Constitution requires that certain kinds of matters should be determined by the courts and this would likely include such a determination.

7. In light of this concern, the initial draft legislation presented to Parliament did not provide powers to the Minister but instead included three categories of 'self-executing' provisions which had the effect that dual-citizens would automatically lose their Australian citizenship when certain conditions were met. This form of provision is not new. A self-executing citizenship loss provision for when a citizen fights in the armed forces of another country has existed for some time. In addition to this provision, the initial Bill included self-executing provisions for where a citizen acted for a declared terrorist organisation, where they have been convicted of certain offences under various pieces of terrorist legislation or where they engage in certain conduct even without being formally convicted.
8. Thus, the Bill provided for two different bases in which self-executing provisions applied – (1) where conviction was necessary and (2) where an accused's conduct could lead to a conviction but formal conviction was not necessary for revocation. Neither of these bases required the Minister to adjudicate. Nevertheless, the Bill was widely criticised for three primary reasons and ultimately not enacted, at least in that original form. The first criticism of the Bill was that this mechanism of self-executing citizenship revocation still did not involve the judiciary determining whether they had actually engaged in the relevant conduct – although it was no longer the Executive (through the Minister) determining whether citizenship should be revoked, it was effectively the Legislature who was now determining revocation rather than the Judiciary.
9. A second criticism of the draft legislation was that the sheer breadth of grounds on which citizenship revocation was possible was unreasonably broad. Furthermore, many of these grounds only seemed tangentially related to terrorism e.g. being convicted for the offence of damaging Commonwealth property would ground citizenship revocation under the original legislation. It was not even required that an offender needed to commit the offence for the purpose of undermining national security. Finally, the initial Bill did not contain necessary safeguards such as requiring the Government to inform persons when they have lost their citizenship; the revocation provision did not exempt children (in fact children of those who committed certain terrorist offences could be deported simply because of that fact); neither were there requirements of natural justice nor proper processes for the handling of information gathered by Intelligence Services.
10. In light of these concerns, a Parliamentary Joint Committee recommended major alterations to the Bill and these were ultimately accepted in the subsequent legislation.

## The Final Product

11. The *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) did retain the three bases for revocation although the interaction between the bases was appropriately amended. Again, citizenship can be revoked if you:
  - i. Act in the service of a declared terrorist organisation; or
  - ii. Are convicted of a listed offence; or
  - iii. Are engaging in particular terrorism related conduct without a conviction.
12. The Act ensures that there are only very limited circumstances in which citizenship can be revoked without a conviction and will usually require that the conduct was engaged in as an attempt to attack the Commonwealth and that it was committed overseas. Additionally, for those requiring conviction, the Act no longer provides for automatic citizenship revocation, rather it provides a discretion to the Minister to revoke where a minimum sentence of 6 years has been imposed. Further safeguards including a restriction on the number of offences that will result in revocation have also been employed in order to narrow the legislation originally presented – for example, damage to Commonwealth property is no longer grounds for citizenship revocation. That said, there remains controversy surrounding some of the remaining offences which enliven citizenship revocation. Also, s 39 of the *Australian Security Intelligence Organisation Act 1979* (Cth) now requires that better safeguards are applied in dealing with children, with notions of natural justice being imported and the requirement that people will usually need to be informed of their loss of citizenship. Finally, the Act provides for limited rights of review for those stripped of Australian citizenship.

## Possible Constitutional Challenges?

13. Ms Pillai explains that it is likely that the Act will be the subject of some form of constitutional challenge when its provisions are finally utilised to revoke someone's citizenship. The High Court's guidance as to the extent to which the Commonwealth is empowered to legislate on citizenship has been long awaited. In the explanatory memorandum to the Act, the Commonwealth has indicated that they rely upon the Aliens Power under s 51(xix) of the Constitution to validate the legislation and reliance may also be had on the Defence Power under s 51(vi).
14. Whether dual-citizens can be characterised as 'aliens' remains an open question, however it seems likely that the Commonwealth would at least be empowered to revoke the citizenship of a dual-citizen who has been convicted of engaging in a terrorist attack outside Australia. On the other hand, other provisions of the Act would be less likely to withstand judicial consideration. One such provision allows revocation of citizenship for entering an area

considered to be a 'no go zone' by the Commonwealth, even for conducting business, visiting friends or for religious pilgrimage, nor is it necessary that the accused had a hostile intent.

15. It is also possible that the enacted legislation might be subject to similar concerns as the initial proposition regarding possible contraventions of the separation of powers. A particular concern may arise in relation to the retrospective operation of certain provisions that allow the revocation of citizenship for those convicted of a serious terrorism offence where they were convicted in the last 10 years and were subject to a 10 or more year sentence. Although retrospective laws have been accepted in the past, the concern with this form of retrospective law is that it affects a very specific group of people and effectively punishes them for crimes for which they have already been punished.
16. Finally, critics of the Act also note that the practical effect of the Act significantly overlaps with powers the Executive and Legislature have in relation to the issuance of passports and control orders.

## **BIOGRAPHY**

### Sangeetha Pillai

Sangeetha Pillai is a Lecturer in the Faculty of Law at Monash University in Melbourne. She researches in the area of constitutional law, with a speciality in citizenship law, and has recently completed a PhD in the area. Her work has appeared in leading journals and she has presented at a range of Australian and international conferences. She has also collaborated on a number of submissions to parliamentary and public inquiries, and commented on issues pertaining to citizenship and national security in the public domain.

### Jaimee Burke

Jaimee Burke is a Solicitor at AR Conolly and Company

## **BIBLIOGRAPHY**

### Focus Legislation

*Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth)

### Legislation

*Australian Citizenship Act 2007* (Cth)

*Australian Security Intelligence Organisation Act 1979* (Cth)

*British Nationality Act 1981* (UK)