**Dr James Renwick CSC SC**

**Independent National Security Legislation Monitor**

# INSLM Review of Terrorism Related Citizenship Loss Provisions

## Public Hearing

## Thursday 27 June 2019, QT Canberra

## Opening Address

# Dr James Renwick CSC SC

# Independent National Security Legislation Monitor

## WELCOME AND OPENING STATEMENT

### Introduction

- We would like to acknowledge the traditional custodians of the lands that we are on, and pay respects to their Elders, past and present.
- Welcome to this hearing under s 21 of the INSLM Act. The hearing is being transcribed and is also being live streamed. I have decided it is not necessary to require evidence today to be given on oath or affirmation. These opening remarks set out my current although not necessarily final views. The substance of some but not all of these remarks was the subject of my recent address to the Lowy Institute in Sydney, the podcast of which is on my website. Some of the remarks are necessarily quite technical.
- I thank our hosts for providing this venue and for facilitating the smooth running of the day.
- Sitting next to me are:
    - My Principal Adviser, Mr Mooney;
    - My Counsel Assisting, Mr del Villar and Mr Buckland.

### The INSLM

- As INSLM I am an independent statutory office holder appointed by the Governor-General under the *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act).
- My statutory functions include:
    - to review the operation, effectiveness, and implications of Australia's counter-terrorism and national security legislation (s 6(1)(a)); and
    - to consider whether this legislation contains appropriate safeguards for protecting the rights of individuals, remains proportionate to any threat of terrorism or threat to national security or both, and remains necessary (s 6(1)(b)).
- In performing these functions, I must have regard to Australia's international obligations, and constitutional arrangements between the Commonwealth, the States and the Territories (s 8).
- The INSLM Act also requires me to consider and report on matters referred to me from time to time by the Prime Minister, the Attorney-General or the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (s 6(1)(c)).

**Dr James Renwick CSC SC**

**Independent National Security Legislation Monitor**

## Background- citizenship review

- The Attorney-General, the Hon Christian Porter MP, has referred for my review the matter of the operation, effectiveness and implications of the terrorism related citizenship loss provisions which have been contained in the Australian Citizenship Act (the Act) since late 2015. These, the 'relevant provisions', are sections:
    - 33AA ('Renunciation by conduct'),
    - 35 ('Service outside Australia in armed forces of an enemy country or a declared terrorist organisation')
    - 35A ('Conviction for terrorism offences and certain other offences') and
    - 35AA ('Declared terrorist organisation').
- In this review I have the benefit of earlier consideration of these and related provisions, on two occasions, by the Parliamentary Joint Committee on Intelligence and Security (PJCIS), which must conduct its own review by 1 December 2019. I have considered those reports and the detailed submissions made to the PJCIS.

## Allegiance

- Although there had been statutory provisions since World War 2 providing for loss of citizenship for those fighting with the enemy, the enactment of the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* considerably expanded the provisions, although using two quite different models.

As s 4 of that Act said as to its purpose:

> This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.

The simplified outline in s 32A of the Act states that one way of losing citizenship is to 'engage in various kinds of conduct inconsistent with allegiance to Australia: '

This notion of allegiance by citizens to Australia is thought by some to be out of date; however there can be no doubt of its current legal relevance. In international law it is referred to for example in the 1961 Convention on Statelessness. In the United Kingdom it has continuing relevance. It also has relevance in Australia.

As three Justices of the High Court said in Singh v The Commonwealth at [200]:

> *The central characteristic of [the] status [of an alien] is, and always has been, owing obligations ("allegiance") to a sovereign power other than the sovereign power in question (here Australia). That definition of the status of alienage focuses on what it is that gives a person the status: owing obligations to another sovereign power.*

The key difference between an alien and a citizen in this context is that the allegiance of the citizen is owed to Australia.

And the Australian Law Reform Commission has said 'the nature and historical origins of the concept of treason… has at its centre the violation of a duty of allegiance to one's country'.

## Constitutional Heads of Power

Some submissions would deny the constitutional validity of the relevant provisions. However, leaving aside for a minute any Chapter III questions, it seems clear to me that there is ample power to enact them.

One, but by no means the only, available constitutional head of power for the relevant provisions is the power to make laws with respect to "naturalization and aliens": s 51(xix). This is a wide power with respect to a class of persons, and while no doubt it has outer limits, hard though these may be to define, within them it is for Parliament to create and define the status of Australian citizenship. Even if it is not an available head of power, there are others which seem to amply support the provisions.

Insofar as the provisions act upon 'places, persons, matters or things physically external to Australia' they fall squarely within the external affairs power: s 51(xxix). Here, two of the provisions appear to so fall, namely

- s 35 which only applies if by s 35(1) (c), 'the person's service or fighting occurs outside Australia.'
- s 33A which states:

(7) This section does not apply in relation to conduct by a person unless:

(a) the person was not in Australia when the person engaged in the conduct; or

(b) the person left Australia after engaging in the conduct and, at the time that the person left Australia, the person had not been tried for any offence related to the conduct.

In the case of loss of citizenship due to terrorist acts or association the executive power of the Commonwealth read with the express incidental power may also be relevant. Finally, on

the authority of the High Court decision of Thomas v Mowbray, the defence power may also support the laws: s 51(vi).

A view that the laws are valid is of course only the start of my inquiry.

## Necessity and Proportionality

A number of submitters argue that the law is neither necessary nor proportionate to the relevant national security and counter-terrorism threats, although most, as I read them, cannot rule out that, in particular, possibly exceptional cases, the capacity to revoke citizenship may be justified.

I have received what might be called a 'rule of law' submission that the relevant provisions single out dual citizens from other citizens as at risk of losing their Australian citizenship (submissions to the PJCIS review and this review have also highlighted this concern.) While statistics do not exist as to the number of Australians who currently hold dual citizenship, or their other citizenships, current estimates have ranged from 4 to 5 million.

In its submission to this review the **Law Council of Australia** states that equality before the Law is a fundamental principle to our democratic system of government and that the provisions *'single out 'dual citizens' from other citizens as being capable of losing their citizenship…'*.

One answer to this may be that equality before the law must recognise that there are already fundamental differences between citizens and non-citizens, including the rights to vote, to enter the country and to diplomatic assistance abroad, to name only three such rights.

If, as most people would accept, obtaining citizenship on fraudulent grounds may permit its revocation then, if the notion of allegiance is accepted, it is not easy to see why express or implied loss of allegiance should not permit revocation, at least in some circumstances.

Indeed, that 'answer' seems to be accepted by the **Australian Human Rights Commission** which considers that

> *loss of citizenship should never be automatic. These provisions should be strictly delimited to ensure use in only the most exceptional circumstances – and as a last resort where the gravest criminal conduct also repudiates one's allegiance to Australia – after careful consideration, reasonable justification and due process. They should also be subject to robust review and oversight mechanisms*.

**Dr James Renwick CSC SC**

**Independent National Security Legislation Monitor**

## Threats

So let me begin with the threat picture. As has been the case for the past four years, the current threat of a terrorist act occurring in Australia remains at the 'probable' level. Based on my briefings and research my views are that:

- The credible threat of one or more terrorist attacks will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future;
- While more complex or extensive attacks cannot be ruled out and must be prepared for, attacks by lone actors using simple but deadly weapons, with little if any warning, are more likely;
- There can be no guarantee that the authorities will detect and prevent all attacks, although most have been;
- There is also the risk of opportunistic if unconnected 'follow-up' attacks in the immediate aftermath of a completed attack at a time when police and intelligence agencies are fully occupied in obtaining evidence and returning the attacked locality to normality;
- The threats come mainly from radical and violent Islamist action – which, it must always be noted, is not to be confused with the great world religion of Islam which practices peace;
- There are also increasing concerns about radical, violent, right wing activity;
- The implications of the recent atrocities in Christchurch and Sri Lanka, and indeed the likely future roles of the remnant foreign fighters of the so-called caliphate are yet to be fully worked out, but they suggest a complex and hard to predict picture, but no definite reduction in threat.

## ISIL

- A key reason for the enactment of the relevant provisions was to respond to the actions of foreign fighters, especially the members and supporters of ISIL. The Explanatory Memorandum stated that the Bill for the Act was part of 'a multi-faceted approach' to countering the threats to national security posed by the increasing numbers of foreign fighters, known sympathisers and supporters of extremists and potential terrorists.
- As part of this approach, the Government stated that the Bill sought to 'address the challenges posed by dual citizens who betray Australia by participating in serious terrorism related activities', and who represent 'a serious threat to Australia and

Australia's interests', by broadening the circumstances in which a person may cease to be an Australian citizen under the Citizenship Act[1].

- Notably, unlike, say, the declared area provisions (which I have earlier reported on) which have so far applied to Mosul and Raqqa as key ISIL controlled areas, the citizenship provisions are not limited in this way. Some acts attracting the relevant provisions can have occurred anywhere in the world outside Australia.
- Impressive as Australian law enforcement and intelligence is, there must be a high possibility, more likely a high probability, of some, perhaps many Australian dual citizen terrorists operating offshore who have so far escaped official notice. This is significant when it comes to the uncertain operation of ss 33AA and 35.

Let me return to ISIL. Its rise, which led to the so-called caliphate, took almost everyone by surprise. I expect its capacity to surprise will continue. ISIL has produced a large, now widely dispersed, radicalised, highly trained diaspora of actual or potential terrorists, many of whom remain with their supporters and dependants, including children, and most of whom remain outside of their countries of citizenship. And the ISIL threat is wider than this group, large though it is, because of the effectiveness of its message, particularly over the internet, to inspire other attacks. As the UK Home Secretary, Sajid Javid, said in a speech on 20 May this year:

> *In fact, of all the terrorist plots thwarted by the UK and our Western allies last year, 80% were planned by people inspired by the ideology of [ISIL]/Daesh, but who had never actually been in contact with the so-called Caliphate.*[2]

There is much debate about how best for Australia to respond to these threats. The choices are not binary, however. Let me give some examples of what I mean by that.

*First*, loss of citizenship does not necessarily mean there will be no criminal trial in Australia. A person can be extradited to Australia to stand trial, and, if convicted then imprisoned, but be deported upon completion of a prison sentence. Sometimes, though, loss of citizenship will mean that an essential element of the relevant criminal offence will not be met, or will be met only for a very short period, so that the charge does not fully reflect the criminality involved. Thus, for both the foreign incursions offence and the declared areas offence,

---

[1] Mr P Dutton (Minister for Immigration and Border Protection), 'Second reading speech: Australian Citizenship Amendment (Allegiance to Australia) Bill 2015', House of Representatives, Debates, 24 June 2015, pp. 7369–72, accessed 29 August 2015; Explanatory Memorandum

[2] The Rt Hon Sajid Javid MP 20 May 2019; https://www.gov.uk/government/speeches/home-secretary-speech-on-keeping-our-country-safe

where the offence for the former is likely and the latter is certain to have occurred overseas, an element of the offence is that the accused:

- is an Australian citizen; or
- is a resident of Australia; or
- is a holder under the *Migration Act 1958* of a visa; or
- has voluntarily put himself or herself under the protection of Australia.

It might be possible to reinstate citizenship for the purpose of prosecution, although that notion appears a little odd. Further, there must be a real risk that the accused person would put the prosecution to proof of their citizenship, and that may be hard to prove beyond reasonable doubt.

*Second*, loss of citizenship and exclusion from Australia as a result is no guarantee in every case that the threat the person poses to Australia no longer exists (although that might be the result in the particular case). For example, the former citizen may continue to inspire others both overseas and in Australia, they may be free to move about and plan further terrorist acts, and they may for those reasons cause diplomatic friction with allies or partner nations.

Submissions to this review have argued that revocation of citizenship may, in practice, prove ineffective in terms of enhancing Australia's security. For example:

- **The Executive Council of Australian Jewry** point out that Professor Greg Barton[3] has expressed the view that Australia's security would not be improved by revoking the citizenship of a terrorist like Neil Prakash given that Prakash's skills as a terrorist include the use of social media and other online media to propagandise, to attract recruits, and to direct them to commit terrorist acts. The submission does go on to say that stripping citizenship may be effective in some circumstances.
- **Dr John Coyne and Dr Isaac Kfir**, who will be appearing here this afternoon, point out that there is no substantive empirical evidence supporting the claim that stripping citizenship will act as a deterrent to dual nationals considering undertaking acts of terrorism or travel to become foreign fighters, and that the provisions may cause more danger to Australia and our allies as individuals affiliated with ISIL seek out new safe havens from which they could continue their propaganda campaigns.

I will be interested to hear the government agencies' responses to these concerns.

[3] Professor Greg Barton –Research Professor & Chair of Global Islamic Politics – Alfred Deakin Institute for Citizenship and Globalisation

**Dr James Renwick CSC SC**

**Independent National Security Legislation Monitor**

## Children

There has been much reporting about the plight of children born in, or those who travelled as children to, the so called caliphate. Let me say something about children in this context, although I will be careful to say nothing which could interfere with Australia's diplomatic and aid efforts, past or continuing.

The position of children and young people is not straightforward. Of course, as a matter of humanity, reflecting the terms of the Convention on the Rights of the Child, the plight of very young children is distressing and there is general hope for their safe return. Beyond the very young, the position becomes more complex. As I said in my recent report to the Prime Minister concerning the *Prosecution And Sentencing Of Children For Terrorism Offences*,

> There are … parallels between child soldiers and Australian children in territory controlled by ISIL: the fact that each are certainly victims does not mean they cannot also become perpetrators, and thus they remain a cohort of interest.

That remains true even though ISIL no longer controls territory as it once did. As a matter of law, the cohort of children needs to be divided, between:

- those under the age of criminal responsibility, which is 10,
- those under 14 where there the presumption against criminal intent applies,
- and those between 14 and 18 who are to be tried and punished as juveniles in the differing ways our federal system allows.

It is very possible that there were young Australians over 14 years of age who have committed one or more terrorist offences or breached the declared area provisions which made it a crime to be in Mosul and Raqqa without reasonable excuse. And within these groups no doubt the level of criminal culpability will vary. This makes the submissions about the adequacy of legal protections for children all the more important.

## The current Citizenship review

There are two types of citizenship revocation provisions in the Australian Citizenship Act.

## Conviction-based provisions

First, the fairly conventional provision in s 35A.

The requirements that must be met to empower the Minister to revoke a person's citizenship under s 35A are:

- the person has been convicted of a specified offence related to terrorism;
- the person has been sentenced to at least six years imprisonment for such offences;
- the person is a national or citizen of a country other than Australia;
- the Minister is satisfied that the person's conduct demonstrates that they have repudiated their allegiance to Australia; and
- the Minister is satisfied that it is in the public interest for the person to no longer be an Australian citizen, having regard to certain factors.

My preliminary view is that such provisions pass muster under the *INSLM Act*, at least for the following reasons.

- First, there is a conviction by a jury – so the terrorist conduct is established.
- Second, there is a substantial sentence imposed by a judge, which shows the level of seriousness of the conduct.
- Third, the person will not be rendered stateless.
- Fourth, given the ongoing relevance of allegiance in Australian law, it seems to me too absolute to say that citizenship revocation for terrorists is never justified or is never an effective way to protect the Australian community, the real question is what the public interest requires.

The argument in favour of citizenship loss might proceed like this:

- As I have mentioned, citizenship still has at its core the notion of allegiance;
- Just as it can be expressly disavowed by renunciation, it can be impliedly disavowed by inconsistent conduct: the paradigm historical case of this was spying or fighting for the enemy during World War II.
- Although there are no longer declared wars between nation states, Australian action as part of the coalition against ISIL is not so very different seen from the point of

view of an Australian citizen who fights for ISIL against the Australian Defence Force or its allies.

- The Australian Citizenship Act, reflecting constitutional case law and legal history recites that Australian citizenship is a common bond, involving reciprocal rights and obligations. If, then, 'a federal offence is, in effect, an offence against the whole Australian community'[4] - a serious terrorism offence is the paradigm case of an offence against the Australian community and one which may break the common bond.
- If, all of that is accepted, then there is a logical argument that it *may*, I emphasise, *may*, be in the public interest in an individual case to revoke citizenship.[5] But because there may be many competing factors a decision must be made considering the facts in each particular case, and as s 35A permits.

## Operation of law/conduct-based provisions

In contrast there are two quite unconventional 'operation of law provisions' (ss 33AA and 35). These provide for the loss of Australian citizenship by automatic operation of law on the occurrence of specified facts.

Both operate in relation to a person who:

- is a national or dual citizen of a country other than Australia and of Australia;
- is 14 years of age or more;
- is outside Australia; and
- engages in fact in specified forms of acts related to terrorism - such as committing a terrorist act, or participating in foreign conflict, such as fighting for a declared terrorist organisation; in which case then

section 33AA applies in relation to 'conduct engaged in on or after 12 December 2015 and s 35 applies in relation to 'fighting for or being in the service of a declared terrorist organisation that occurs on or after 12 December 2015.

In relation to the conduct specified in s 33AA (2), s 33AA (3) provides that the section only applies if the person engages in the conduct with the intention of advancing a political religious or ideological cause and with the intention of either coercing or influencing by intimidation the government of the Commonwealth or a State Territory or foreign country, or intimidating the public: this might be summarised as 'terrorist intent'.

---

[4] In Pham, the plurality of the High Court said (2015) 256 CLR 550, [24]. "As Kirby J observed in Putland v The Queen, a federal offence is, in effect, an offence against the whole Australian community and so the offence is the same for every offender throughout the Commonwealth.

[5] The First INSLM's final Annual Report so stated.

So, by **operation of law**, without any further event such as conviction by jury or decision by a minister, official, judge or Tribunal member the person then and there loses their Australian citizenship. Whilst the loss of citizenship occurs automatically with immediate effect, precisely when this occurs in any particular case is likely to be unascertainable by government. This raises a number of practical difficulties for government agencies which I will highlight shortly in these remarks.

Upon the relevant Minister[6] becoming aware of citizenship so ending under s 33AA, 35, or 35A, he or she must give (or make reasonable attempts to give) notice to the person of their citizenship ending, as soon as practicable unless there is a decision made on the grounds of security, international relations etc. not to notify, in which case the former citizen will not be aware of their loss of citizenship.

The Minister may reverse the revocation, but is under no compulsion even to consider such action. If, however he does so, Parliament must be advised of the fact and reasons for doing so.

In contrast to my preliminary views on s 35A, my preliminary view of ss 33AA and 35 is that each is problematic so that they do not pass muster under the INSLM Act for at least the following reasons:

- First, the law operates in an uncontrolled and uncertain manner. The Australian government has publicly announced that s 33A has operated to deprive 12 persons of Australian citizenship although, mainly because of Ministerial decisions not to notify the affected persons, the names of the persons are not known, except for Neil Prakash. It is almost certain that there are more, perhaps many more, persons whose conduct and circumstances triggered the operation of the law but who are not known to the authorities. The most obvious group of such persons are those who fought for ISIL without the knowledge of Australia, but the same could be said of as yet unknown terrorist recruiters or financiers anywhere in the world. The government should be able to say at any particular time who is and who is not a citizen, but this law prevents it from definitively doing so.

- Second, the law lacks the traditional and desirable accountability which comes with a person taking responsibility for a decision whether that is a Minister, an official, a judge or a tribunal member. The High Court has held that an essential element of any judicial or administrative process in Australia that adversely affects a person's rights or interests is a real and meaningful opportunity for that person to present his

[6] Formerly the Attorney-General, now the Minister for Home Affairs.

or her case, be told the substance of the case to be answered and be given an opportunity of replying to it[7]. The citizenship stripping provisions in question prevent persons affected from being afforded procedural fairness and due process.

- Third, because of the blanket nature of the law and the lack of individualised consideration, there will inevitably be cases where it is not in the public interest to cancel a particular person's citizenship: examples of relevant factors can readily be imagined: actually, they don't need to be imagined because they are already listed as reasons to be taken into account in a revocation decision in s 33AA(17) , namely:

- the severity of the conduct engaged in;
- the degree of threat posed by the person to the Australian community;
- the age of the person;
- if the person is aged under 18--the best interests of the child as a primary consideration – that reflects Australia's obligations under the Convention on the rights of the child;
- whether the person is being or is likely to be prosecuted in relation to the conduct engaged in, and, I would add, the extent to which they might be prepared to be a Crown witness against co-accused or others;
- the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- Australia's international relations;
- any other matters of public interest.

None of those matters is considered when the law first operates: to that extent the operation of the law is disproportionate to the threat posed and in any event human rights in relation to the loss of the valuable right of Australian citizenship are insufficiently safeguarded.

I consider there is much force in the Department of Home Affairs' submission that:

> *Each of these individuals' circumstances are unique and complex. In managing the risk presented by these individuals to Australia's safety and security, a suite of measures, that are sufficiently nuanced and can be applied on a case-by-case basis, is paramount.*

It is partly because that is so that I consider both that the operation of law provisions do not pass muster under the INSLM Act and should be repealed, but there remains a need for a

[7] *Kioa v West* [1985] HCA 159 CLR 550 per Mason J at 582.

fair system which allows for Australian citizenship to be removed also in some cases where that is in the public interest.

Fourth the problems are compounded by the capacity of the Minister not to give notice of the loss of citizenship: the revokee may well order their life on the basis that they remain a citizen when they do not. Take the possibility of an Australian woman who decided to have another child wrongly thinking the child will be Australian: there is no technical breach of either the Convention on the Rights of the Child or the Convention on Statelessness, but it is highly problematic.

Fifth, there are real problems with review and scrutiny. Although the courts can make a declaration that at the relevant time the person was not in fact a dual citizen and thus cannot have lost their Australian citizenship, challenging the conclusion by an inter-departmental committee that the disqualifying conduct has occurred cannot easily be challenged, if it can at all.

Finally, I note issues raised by the Department of Home Affairs in its submission to this review. In its submission, the Department notes that the operation of law provisions impact:

- on criminal justice processes,- I will be discussing this in detail with the AFP later this morning;
- on intelligence agency powers and authorities given these differ depending on whether a person is an Australian citizen or non-citizen: in particular, ministerial authorisations will be required for certain acts against Australians, but not non-citizens, which makes ignorance about citizenship status highly problematic; and
- on the ability of Australia to manage its broader bilateral relationships,- the Neil Prakash case is an example of that where Australia and Fiji are publicly at odds about which country he is a citizen of.

For all of these reasons, I consider at this stage that these operation of law principles must be repealed, and retrospectively, but also there should be some mechanism replacing them.

## Chapter III

Before considering what might replace the operation of law provisions, I must consider the arguments that Chapter III of the Constitution might prevent a ministerial decision making model, or indeed a model where there is merits review with a tribunal 'standing in the shoes of' the decision maker.

It is important to recall, that unlike many Chapter III cases, this law does not involve:

- punishment involving the loss of liberty such as detention,
- the adjudication of or punishment for criminal guilt.

There seems little difficulty with s 35A, the conviction-based ministerial decision model, where the fact of criminal conviction enlivens possible exercise of the Ministerial power to revoke citizenship: that seems on all fours with what the plurality of the High Court recently said in Falzon v Minister for Immigration [2018] HCA 2:

> [88] What s 501(3A) does is to require the cancellation of a visa in certain circumstances. **It confers a power, which the Minister has a duty to exercise, to determine whether a non-citizen can enter, or remain in, Australia. That power is administrative in character. It forms no part of the judicial power of the Commonwealth. In particular, the exercise of that power does not trespass on the exclusively judicial function of determining or punishing criminal guilt.**
>
> [89] The Parliament has a broad choice as to the factum upon which a power to cancel a visa will operate. The factum relevantly identified in s 501(3A) is the Minister's state of satisfaction that a non-citizen has a "substantial criminal record" and is serving a full-time custodial sentence. **The need for a person to have a substantial criminal record and to be serving a custodial sentence does not mean that the cancellation of a visa is directed to the imposition of punishment for criminal guilt.** The purpose of cancelling a visa pursuant to s 501(3A) is to exclude from the Australian community a class of persons who, in the view of the Parliament, should not be permitted to remain in Australia. Cancellation of a visa for that purpose does not involve any determination or punishment of criminal guilt and does not involve the exercise of judicial power. [emphasis added]

As to the 'operation of law' provisions, there equally seems little difficulty with Chapter III. In *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7 the Authority could investigate whether a licence holder had committed an offence for the purposes of determining what action if any to take about the licence, including by taking court action. A plurality of the High Court said:

> [33] it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action.

…

> [49] In determining that a licensee has breached the cl 8(1)(g) licence condition, as a preliminary to taking enforcement action, the Authority is not adjudging and

> punishing criminal guilt. It is not constrained by the criminal standard of proof and it may take into account material that would not be admitted in the trial of a person charged with the relevant offence. It may find that the broadcasting service has been used in the commission of an offence notwithstanding that there has been no finding by a court exercising criminal jurisdiction that the offence has been proven. Where a person is prosecuted for the relevant offence, the Authority is not bound by the outcome of the criminal proceeding and may come to a contrary view based upon the material and submissions before it**.**
>
> …
>
> [58] The finding that **Today FM**'s broadcasting service was used in the commission of an offence does not resolve a controversy respecting pre-existing rights or obligations**.** It is a step in the determination of breach of the cl 8(1)(g) licence condition and is the foundation for the Authority to institute civil penalty proceedings in the Federal Court of Australia or to take administrative enforcement measures…
>
> 59. It is well settled that functions may be judicial or administrative depending upon the manner of their exercise**…**

Finally, as Gleeson CJ said in Re Woolley; Ex Parte Applicants M276/2003:

> [17] Punishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function. On the other hand, the particular form of detriment constituted by the deprivation of liberty usually (although not always) follows adjudgment of criminal guilt, and the circumstances in which deprivation of liberty may be imposed upon a citizen by the State otherwise than by way of judicial punishment are limited.

So it seems to me that replacing the operation of law provisions with a Ministerial decision coupled with merits review, which is what I presently favour, causes no constitutional difficulties in so far as the Minister or the Tribunal would need to form an opinion as to whether the physical elements of the various terrorism offences exist.

For some time, the Security Appeals Division of the Administrative Appeals Tribunal has been able to review decisions on security grounds to refuse to grant, or to cancel the grant of, an Australian passport. The Tribunal is an independent body presided over by a Judge; in the Division, there will be three members sitting. The Tribunal, like the Minister, may act on the basis of material that appears probative even if, as will often be the case, it does not meet the test of strict admissibility under the Evidence Act. The Tribunal's decision may be appealed on a question of law to the Federal Court which would see both open and closed

reasons. There is often much sensitive intelligence material which cannot be disclosed to the revokee, but the Tribunal adopts a more inquisitorial model and tests the intelligence material in private in the absence of the revokee.

My preliminary view however is that these existing procedures could be adapted here.

In his submission to this review, **Dr Rayner Thwaites**[8], who will be here this afternoon, points out '*No reason has been offered as to why Australia could not make statutory provision for a right of appeal from a revocation decision to a tribunal*'. This is essentially the model used in the UK in the Special Immigrations Appeals Commission (SIAC).

I also note in its submission to this review, the Australian Human Rights Commission (AHRC) recommends that a decision leading to a loss of citizenship should be subject to independent merits review, and to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). However, I note that the **Law Council** does not support a broader role for the AAT to review citizenship revocation. I will be interested in exploring this issue with each of them.

I would favour the UK model of using Special Advocates to represent the interests of the revokee in the closed session. The Commonwealth is about to appoint special advocates to deal with control order confirmation hearings, as was considered in an earlier report of mine. The Tribunal would apply all the factors the Minister may currently apply in deciding whether to reverse the revocation.

So, with those opening remarks, I welcome the government agencies and invite their opening statements.

**27 June 2019**

[8] Senior Lecturer in Public & Administrative Law,- University of Sydney