

Constitutional issues associated with integration: the question of citizenship

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by Kim Rubenstein

Lecturer in Law
University of Melbourne

When asked to look at constitutional issues associated with integration of immigrants in Australia, the question of citizenship is appropriate to consider. Citizenship is important in terms of the *Migration Act 1958*, as it appears that the principal support for the Act is derived from the 'naturalisation and aliens power' (section 51 (xix) of the Constitution).

The concept of citizenship is also vital for integration issues because it represents membership of a community.

As Michael Walzer has said, 'admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them there could be no communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of common life' (M. Walzer 1983, *Spheres of Justice: A Defence of Pluralism and Equality*, p. 62). This will therefore address two issues associated with citizenship: the *Migration Act 1958* and the question of integration.

Citizenship and the Migration Act 1958

The *Migration Act 1958* is concerned with 'the entry into and presence in Australia of aliens,

and the departure from Australia of aliens and certain other persons' (preamble).

The Act itself does not define aliens, although it has defined them in the past. The development of Australian independence has had an influence on the meaning of the term 'alien'. Before 1984 Australians had dual identities. We were both Australian citizens (by virtue of the legislation in 1969) and also British subjects. However, in 1981 Britain removed the concept of British subject from its legislation and Australia was the only country to use the concept. In 1984 the notion of 'Status of British Subject' was discarded, leaving Australian citizenship as the sole status.

The *Shorter Oxford Dictionary* defines alien as 'belonging to another person, place or family; esp. to a foreign nation or allegiance'. The High Court in *Nolan v. Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 defined an alien generally as a person born outside Australia whose parents were not Australian citizens and who has not been naturalised under Australian law or a citizen who has ceased to be a citizen by an act or process of denunciation. In essence, this means they are non-citizens.

Under the *Migration Act 1958* non-citizens' movement in and out of Australia is regulated and non-citizens can become illegal entrants and subject to deportation under certain circumstances.

The status of citizenship is therefore fundamental to migration law in that it controls the Commonwealth Parliament's power to legislate in this area. The principal head of power relied on in relation to the Migration Act is, in fact, the 'naturalisation and aliens' as it regulates the movement of aliens in and out of

the country. The High Court of Australia has not provided a conclusive view on the scope of the immigration power itself. Justice Gibbs of the High Court stated that a 'person who has immigrated into Australia will pass beyond the range of the power when the act or immigration is at an end - i.e. when that person has become a full member of the Australian community' (*Ex parte Henry* (1975) 133 CLR 369 at 373).

So the notions of citizenship and absorption into the Australian community are vital in a legal sense as well as in terms of a sense of nationhood and identity.

Notions of nationhood - integration

Citizenship is a fundamental concept in terms of integration. If a community wants to foster a sense of inclusion among peoples from different backgrounds then citizenship can be a useful tool. The meaning of Australian citizenship has been raised as a matter for inquiry for the Senate Standing Committee on Migration. It has had referred to it the following issues to consider:

- (a) Australian citizenship, the place it should hold in Australian society, ways of making it carry more meaning for all Australians, and how the Act might be amended to enhance these objectives.

At present citizenship in Australia is acquired in the following ways: (i) by birth, if at the time of the person's birth in Australia, at least one parent is an Australian citizen or an Australian permanent resident; (ii) by adoption if adopted by an Australian citizen; (iii) by descent, if a parent is an Australian citizen and registers the child's name at an Australian consulate within 18 years of the birth, or (iv) by grant of citizenship. The Act itself does not set out what Australian citizenship actually involves - what the rights, obligations and duties of Australian citizens are.

- (b) The appropriateness of the present

discretionary provisions of the grant of Australian citizenship (ss. 13(4)(b)(i)-(v), (9) of the Act).

These discretionary provisions set out criteria to be satisfied in relation to the granting of citizenship to permanent residents. At present, they include having been in Australia as a permanent resident for a total of two years immediately before the application. They also include being at least 18 years old, capable of undertaking the nature of their citizenship application, having a basic knowledge of English, understanding the responsibilities and privileges of Australian citizenship, being of good character, and likely to live permanently in Australia or maintain close and continuing association with Australia.

- (c) Section 17 of the Act in relation to dual citizenship, any inconsistencies on the operation of the section and how such inconsistencies may be overcome.

The inconsistency is as follows - a person who is an Australian citizen and who acquires the nationality or citizenship of a foreign country and does so with the sole and dominant purpose of acquiring that nationality shall cease to be an Australian citizen. Therefore, an Australian citizen is not able to seek another citizenship.

However, a person who is a citizen of another country and is a permanent resident in Australia and seeks to become an Australian citizen is entitled to maintain the previous citizenship if the country of origin entitles that person to take on another citizenship without losing their current citizenship. The right to dual citizenship therefore depends on the country of origin.

For example, a German citizen who seeks to become an Australian citizen, as far as I am aware, does forfeit his or her right to German citizenship, but that decision is made by the German not the Australian Government.

Therefore, the anomaly is that some Australian citizens are entitled to dual citizenship and others are not - it depends on the birthplace of

the Australian citizen. While this is so, a recent decision of the High Court of Australia in relation to dual citizenship displays that dual citizens are treated differently with respect to their eligibility to be a Member of the Commonwealth Parliament.

The Constitution sets out the grounds for disqualification from office in section 44 and one of those is:

44 (i) Any person who is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power shall be incapable of being chosen or sitting as a Senator or Member of the House of Representatives.

In the High Court case *Sykes vs Cleary* (1993) 67 ALJR 59, the persons concerned were Australian citizens and in their oaths of citizenship had renounced all other citizenship. However, by the law of the original country they were still citizens. The Court held that those persons must take reasonable steps to divest themselves of the other citizenship and as none of them has done so they were disqualified by virtue of section 44. This caused much discussion within the Australian community and it is discussion relevant to the Australian *Citizenship Act 1958* and the notion of dual citizenship.

In this world in which we now live, with heightened connections between countries and a sense of community reaching beyond national borders, one has to ask is the sense of loyalty to one country, and one country only, so important for citizenship?

(d) The appropriateness of the current provisions of the Act in relation to deferral and deprivation of citizenship.

These currently include the case explained above, renunciation by the person, and serving in the armed forces of an enemy country.

(e) The acquisition of citizenship of

overseas-born children of Australian citizens.

This has been discussed above in relation to the present law for obtaining citizenship. As can probably be sensed from the terms of reference, the notion of citizenship is not altogether clear and comprehensible and it is certainly worthy of a review of this kind. However, this emphasises the importance of the need to determine what it means to be a member of the Australian community and this has an immediate effect on the alien or non-citizen who wishes to integrate. For the most fundamental way of integrating in a formal or legal sense is to become a citizen of that country. Unfortunately, as we can see from human experience, often the formal or legal expression may be just that, and it is important to translate that to a practical and meaningful expression of membership of a community. That must ultimately involve a sense of commonality and common purpose, even if it is as abstract as respecting each other's rights to lead different lifestyles. At the core of all this is some sense of humanity and respect for one another.

These are matters that Australians are seeking to deal with in both an abstract and concrete way. The concrete can be seen in the *Migration Act 1958* and the direct effect that citizenship has on constitutional and legal issues related to it.

But perhaps more fundamental is the question of integration. How do we continue to foster a culture in which people from diverse backgrounds and experience can comfortably create a community at the same time as nurturing their own experience? Citizenship may be vital in answering that question.

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