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# Official Committee Hansard

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND  
SECURITY

**Australian Citizenship Amendment (Allegiance to Australia) Bill 2015**

MONDAY, 10 AUGUST 2015

CANBERRA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

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**PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY**

**Monday, 10 August 2015**

**Members in attendance:** Senators Bushby, Conroy, Fawcett, Gallagher, Wong and Mr Byrne, Mr Dreyfus, Mr Nikolic, Mr Ruddock, Mr Bruce Scott, Mr Tehan.

**Terms of Reference for the Inquiry:**

To inquire into and report on:

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

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**OUTRAM, Mr Michael, Deputy Commissioner, Operations, Australian Border Force**

**PEZZULLO, Mr Michael, Secretary, Department of Immigration and Border Protection**

**PHELAN, Mr Michael, Deputy Commissioner National Security, Australian Federal Police**

**Committee met at 16:03**

**CHAIR (Mr Tehan):** I declare open this public hearing of the Parliamentary Joint Committee on Intelligence and Security for the inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015. This is a public proceeding, and the committee prefers that all evidence be given in public. But witnesses have the right to request to be heard in private session. The committee may also determine that certain evidence should be heard in private session. If a witness objects to answering a question they should state the ground for that objection, and then the committee will consider the matter. I now welcome representatives of the Department of Immigration and Border Protection, the Attorney-General's Department, the Australia Security Intelligence Organisation and the Australian Federal Police. Although the committee does not require you to give evidence on oath, I remind witnesses that this hearing is a legal proceeding of parliament and warrants the same respect as proceedings of the house itself. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. The evidence given today will be recorded by *Hansard*. Do you wish to make any additional remarks before we proceed to questions?

**Mr Pezzullo:** Just by way of housekeeping, and my colleagues will add to this answer to the extent that they need to. First of all, in respect of matters that you wrote to the minister about on behalf of the committee, it is our judgement, having carefully looked at both of your letters, that, to the extent that we can provide responses outside of an in camera hearing, agencies and departments have acquitted your requests as best we can. Noting that Mr Dreyfus said last week that a number of matters were still forthcoming, to the extent that that is the case we would ask to be given the opportunity to only canvass those matters in camera, because in some cases they go to operational matters to do with ongoing counterterrorism investigations. That is point 1.

Point 2: in relation to the written responses to those letters that consisted of certain attachments that were discussed at some length last week, we have, in the time since the hearing, reworked two of those attachments that caused a range of issues and concerns to the committee. One step was to reduce the material related to what some of our partner jurisdictions do purely to what is on the public record—in other words, what one could research for oneself—and so, therefore, that attachment is able to be treated as a public document. We have also attempted, as best we can, to revise the document that dealt with persons currently convicted and sentenced to remove material that is not otherwise on the public record.

So we hope and trust that, in the time that we have had since the last hearing, we have better acquitted those requests for information.

**Mr DREYFUS:** If I could start with the constitutional questions, the position is that a large number of the most eminent constitutional lawyers in Australia have told this committee that the bill is unconstitutional or very likely to be struck down by the High Court, and they have identified different parts of the bill with different emphasis. Those academics include Laureate Professor Cheryl Saunders of the University of Melbourne, Professor Adrienne Stone of the University of Melbourne, Professor Helen Irving, a constitutional professor at the University of Sydney, Professor George Williams, a professor of constitutional law at the University of New South Wales, and Professor Kim Rubenstein of the Australian National University. That long list of eminent academics was joined today by the Australian Bar Association in a late submission, which also suggests that the bill could be unconstitutional, and they set out reasons. We have just been told that the committee is not to be

provided—this is the matter that you took on notice, Mr Pezzullo and Ms Jones from the Attorney-General's Department—with the Solicitor-General's advice in relation to this bill. Is that right?

**Mr Pezzullo:** That is so.

**Mr DREYFUS:** So my question is this: how is this committee to proceed in that position where the committee is asked to provide advice to the parliament on a bill that the government has brought to the parliament and where submission after submission and oral witness after oral witness has told this committee that the bill is likely to be struck down by the High Court of Australia? This parliament wants to make laws that are effective. This committee wants to give advice to the parliament about how to make laws that are effective. Can you suggest, Mr Pezzullo, or you, Ms Jones, on behalf of the Attorney-General's Department, how the committee should proceed given that detailed reasons have been advanced by all of these submitters and by those who have appeared before us as to why the bill is unconstitutional and that there has been nothing from the government on the other side of the ledger?

**CHAIR:** Before you answer that, I say that how the committee proceeds will be up to the committee. When it comes to George Williams, he wrote an opinion piece not long after the bill came in which he said that he thought that the bill seemed on the face of it constitutional. Ultimately, how we proceed as a committee will be up to the committee.

I do not know whether you have anything to add to that, Mr Pezzullo.

**Mr Pezzullo:** My opening point in response has been dispensed with with your intervention: how the committee chooses to acquit its duties and obligations is a matter for the committee. I understand the point Mr Dreyfus is raising. All I can repeat is the evidence we gave last week, and it is to be repeated today. The government has advice to hand that suggests that we are on legally sound ground. It is defensible and it is a common practice—common enough almost to be invariably the case—that legal opinions are not made public by way of submission to committees. Otherwise, beyond those general remarks, I would defer to Ms Jones because this is really a matter of legal policy around constitutionality and I defer to my colleague from the Attorney-General's Department.

**Ms Jones:** I would repeat in terms of the evidence that I provided to the committee last week. Obviously, constitutional considerations were looked at very closely in terms of the development of the bill. The bill was drafted with those considerations in mind, and the draft bill as presented is informed by that.

**Mr DREYFUS:** I would have thought that, if the advice is as you have asserted, as ministers have asserted and as the chair of the committee has asserted, the committee would have been able to be assisted by the government with that advice. It remains a concern at least of mine that the committee has been left in the invidious position of a great deal of submission and a great deal of oral evidence given to it as to the unconstitutionality of this bill, with the government and none of the departments here being prepared to assist in any way with detailed reasoning as to why the bill is in fact constitutional. I will leave that on the table for you all to consider. The committee, in my view, would be greatly assisted by more assistance from the government and the departments on this matter.

**Senator WONG:** Chair, if I may: isn't the difficulty that we have had quite a lot of evidence which is putting forward a view casting doubt as to the constitutionality of this proposed legislation and the only answer the government has appears to be: 'Trust us. Take us at our word. It's fine'? Is that right?

**CHAIR:** I am confident that as a committee we will be able to work through this.

**Senator WONG:** You have already told people that you think it is constitutional, so did some people get a copy of the advice but not others? Is that how it works?

**CHAIR:** I am confident that as a committee we can work through this. We have officials here with us. I think what we should do is—

**Senator WONG:** They are just saying, 'Trust us.' They just keep telling us to trust them.

**CHAIR:** We all know there is strong precedent for the position the government has taken. We can sit here for the next hour and a half and go through this; otherwise, we can move to other questions. I would suggest we move to other questions.

**Mr NIKOLIC:** How often did you table the Solicitor-General's advice when you were in government, Senator Wong?

**Mr DREYFUS:** Sorry, Senator Wong, but, in answer to Mr Nikolic's rhetorical question: the Solicitor-General—

**Mr NIKOLIC:** And verballing of witnesses is going on as well about constitutionality or otherwise.

**Mr DREYFUS:** If Mr Nikolic would let me answer the question he has posed: the Solicitor-General's advice—

**Mr NIKOLIC:** I am not asking you questions.

**Mr DREYFUS:** was made publicly available by the former government—

**Mr NIKOLIC:** I asked you no questions.

**Senator WONG:** Chair. I am happy to defer.

**Mr DREYFUS:** in relation to the Malaysia agreement. It was also made publicly available by the former government in relation to an alleged conflict of interest of the Governor-General. There are other examples going back further in time where the Solicitor-General's advice has been made available by governments on both sides of the political fence in order to assist public debate.

**Mr NIKOLIC:** So you used to divulge questions of constitutionality to committees. Is that what you did regularly in government? What nonsense.

**Mr DREYFUS:** What nonsense!

**Senator WONG:** I will make this point so Mr Nikolic can be really clear about what I am saying and possibly what others are saying. I do accept the general principle that advice is not provided, but what I do not accept is that it has never been provided. That is the next point. What I also say is that, in a circumstance where a committee is asked to provide a report on a bill where we have had—I am not a constitutional lawyer, but we have had quite a number of lawyers raise substantial doubts about the constitutionality of this bill, I do not accept that in those circumstances the committee is sufficiently doing its job if it simply takes the word of officials that it is fine without anything further. I am not trying to cast aspersions on the officials, which I think was your implication previously; I assume other people have made the decision not to provide the advice, not Mr Pezzullo. Am I correct in that?

**Mr Pezzullo:** As is ordinarily the case in these cases, it was referred to the competent authorities, who are ministers.

**Senator WONG:** Okay. It was a political decision.

**Mr DREYFUS:** This is a question really for Ms Noble, but I am happy if Mr Pezzullo wants to jump in. It arises from the letter that Ms Noble has provided to the committee dated 21 July and which has already been made a public submission. On the second page of that letter you have taken, as you put it, the 'opportunity to outline the arrangements that will be put in place to support the implementation of the bill subject to its passage through parliament.' I might read the rest of your paragraph. You say:

Operationalising the Act will involve identifying dual nationals to whom one (or more) of the provisions relating to automatic loss of citizenship apply. This will require close cooperation across government. The Department, including the Australian Border Force, will work closely with relevant departments and agencies, including law enforcement and intelligence agencies, to put in place the appropriate steps and processes to support the new provisions. Where available and suitable, existing whole of government intelligence and law enforcement coordination mechanisms will be utilised. In addition, deputy secretaries from relevant departments and agencies will provide information to the Secretary of the Department of Immigration and Border Protection both on cases and other matters, such as the identification of relevant terrorist organisations for the purposes of the Act. The Secretary will bring cases to the attention of the Minister.

Is it correct that the bill does not specify any of the processes that might lead to the deprivation of citizenship under section 33AA?

**Ms Noble:** Yes, that is correct.

**Mr DREYFUS:** The same for section 35?

**Ms Noble:** That is right.

**Mr DREYFUS:** What you have offered there is a description of how the government would deal with depriving an Australian of his or her citizenship—the processes that would be used. Am I right to conclude from that description—which, as you have confirmed, is not anywhere to be found in the bill—that, essentially, the process of deprivation of citizenship would involve a group of public servants meeting in secret and considering secret information and reports, just for starters? Is that right?

**Ms Noble:** What I have tried to describe in setting out that process is what role public servants would play in pulling together information for the minister's attention about the conduct of any particular individual that might fall within the auspices of this bill or subsequently the act.

**Mr DREYFUS:** So it is right that you have described a group of public servants—I am not for the moment going to their seniority—who would be meeting in secret and considering secret information and reports about particular Australians.

**Ms Noble:** We may have a range of information at our disposal to pull together which may actually include information that is also publicly available but, yes, also potentially information from other intelligence agencies—either Australian intelligence agencies or overseas partners—that may well be classified.

**Mr DREYFUS:** And, having pulled that material together which, as you say, may include some material that is public but otherwise will include a whole lot of secret information, this group of public servants is going to write a secret report to the Secretary of the Department of Immigration and Border Protection about the Australian who is potentially to be deprived of citizenship.

**Ms Noble:** It will be a dossier, to the extent that we have been able to pull that together, of what we know or what our international partners know about somebody's conduct.

**Mr DREYFUS:** And the secretary is then going to write a secret report to the minister, who will then be in a position to deprive an Australian of citizenship.

**Ms Noble:** In the normal course of any advice going from a department to the minister, it would be provided in confidence. Then it is the minister who would make his considerations based on the evidence about that person's conduct and also the evidence that we are able to provide about whether or not that person also holds citizenship from another country. Then it is the minister that will make the consideration about at what time and whom to notify of that conduct—which, as you know, is an operation of law about the revocation of their citizenship—and then, indeed, if he were so to decide, if it were in the public interest, to then also immediately rescind any notification.

**Mr DREYFUS:** Again, after this secret decision is made by the minister—and I think you have just adverted to this—the minister does not need, under the bill as it is drafted, to inform anybody and in particular does not need to inform the Australian whose citizenship is to be taken away.

**Mr Pezzullo:** I am very glad to allow Ms Noble to continue to respond, but I would not want to be left uncontested the premise—

**Mr DREYFUS:** Do not think there is a contest. I am trying to get a feel, in the absence of any specification in the bill of any process or arrangements at all and based on the letter from Ms Noble, as to what will happen.

**Mr Pezzullo:** I was going to further amplify the committee's understanding of that matter. The premise which I have seen in the commentary and some of which is also, frankly, coming through the questions, that the minister decides to do something—that is, decides to deprive—has been used in various ways several times in these proceedings last week and in the last few minutes. In particular, 33A is the most operative sector and, I accept, applicable to at least one other: the declared terrorist organisation section. If the parliament sees fit to pass that legislation in its current form, it is the government's contention—certainly based on the advice we have provided to the government and the government's contention—that in that circumstance the minister is not in fact making a decision to deprive anyone of anything. The minister is operationalising because for administrative purposes the fact of someone's renunciation of their allegiance to Australia—their renunciation, in effect, of their citizenship—has already occurred. It has occurred in historical time relative to the processes that you are describing as being secret processes. But if no-one knows about those matters then no action can be taken on the basis that someone has passed from being a citizen to being a noncitizen.

As we discussed in passing last week—and perhaps this is a good opportunity to amplify our mutual understanding of these matters this afternoon—in seeking to try to modernise the provisions that were first put in place in the 1940s and which I think might even go back to the very first answer I gave to Senator Gallagher, the conundrum that we have been trying to grapple with is that in those days it was not entirely ambiguous but a bit more evident what happened what someone, to use the phrase that I used last week, donned the uniform of the enemy. It was in that context that the provisions were put in place in the 1940s. The world, as we all know, has changed.

Lest it be thought that there is going to be some sort of secret process whereby decisions are taken about a person's—to use a phrase that some of the eminent legal commentators you referred to used last week—that we are somehow as officials going to be sitting around determining someone's innocence, there is no crime. It is what actions they have undertaken that in effect evidence their own breach of allegiance to their country.

So the question of discretion, which goes to the notices that you were asking Ms Noble about, really goes to whether that minister—who is perhaps, in the contention, at least, of the government, best placed to determine what is best, in the public interest, to be done—decides to issue that notice. We tried to look at this in many



different constructs and many different apparatuses. Who else could make that decision about perhaps staying that notice? They might stay that notice for a whole range of reasons that I would not want to discuss in a public forum. This is going to get challenging now, because we discussed some of these matters in camera.

I apologise to you, Chair, and to you, Mr Dreyfus, for that lengthy intervention, but I just want to set out, at least from this side of the table, what our working assumption is: that no-one is going to be deciding whether someone has engaged in traitorous conduct from the point of view of guilt or innocence. It is whether they have engaged in certain conduct. And, because the minister does not sit around doing their own research, someone has to bring that to their attention, and that is the process that Ms Noble is attempting to describe.

**Mr NIKOLIC:** I have a question of clarification on that, Mr Pezzullo. In the last two questions posed by Mr Dreyfus, he referred to an Australian who might have their citizenship taken away. Can I infer from your answer that the information that has been collated refers to a specific category of person who has, potentially, committed serious terrorist conduct or offences that are captured by this bill? So it is not any Australian; it is someone who has committed, potentially, offences or serious terrorist conduct captured by this bill—is that correct?

**Mr Pezzullo:** To particularise that even further: yes, that is all correct, but they have to be dual citizens, and, if we are going to define the persons in their totality, the other limb of this apparatus is that they have either fought for or served a declared terrorist organisation. So the three limbs are: certain conduct that, in itself, represents a repudiation of allegiance; certain listed convictions that are prospective under the legislation; and/or serving or fighting for a declared terrorist organisation. That is the complete answer to the question.

**Mr BYRNE:** Mr Pezzullo, I think my eminent colleague has been pursuing a line of questioning that he will probably come back to, and I will amplify it. One of the things that I am interested in, with respect to the people that we may potentially be depriving of citizenship, have you approached those countries that may be required to accept them and done some preliminary work to find out whether or not they would accept them if we rendered them noncitizens?

**Mr Pezzullo:** Have we approached—

**Mr BYRNE:** You would do it in the normal course of conversation. You would be crazy not to.

**Mr Pezzullo:** The narrow answer to your question is: no, because we have worked up these measures for the National Security Committee's consideration. As to discussion about comparative models in certain other jurisdictions—and this goes to one of the attachments that has been referred to, that was requested to be put together by the chair for the benefit of the committee—we have looked at other jurisdictions. As I said in evidence last week, Mr Byrne, in some cases we have put to the committee in other documents that, since, have had to be further redacted so that the committee can use it a public sense, we have provided some descriptions of the outcomes of those discussions. But as to whether we have put the strict question: 'If we were to do X, how would you react in terms of Y?' the narrow answer to your question is no.

**Mr BYRNE:** So just how many people are, say, potentially fighting overseas who we have identified? How many of these people who are dual citizens would meet the threshold that you have identified so that we would deprive them of their citizenship?

**Mr Pezzullo:** I am not prepared, and I do not think any other colleague at the table is prepared, to discuss that publicly.

**Mr BYRNE:** As I said, the question that I have that concerns me is: if the country does not accept them or a series of them—particularly if they come from one particular country—then they are stateless, and we have agreed that, if they are stateless, we cannot actually deprive them of their citizenship.

**Mr Pezzullo:** There are two dimensions to that, Mr Byrne. The law as proposed, if this parliament sees fit to pass it, would render that inoperative in any event. Any notice that would be issued cannot be issued to a person who would be rendered stateless. In other words, they have to have a second citizenship, and that has to be known to the minister—

**Mr BYRNE:** But if the country rejects them—

**Mr Pezzullo:** Sorry, Mr Byrne, I was going to come to part B. The question of rejection really goes to their treatment when and if they become a non-citizen—that is to say that they did not fall under the auspices of the Migration Act. There is a particular visa apparatus there to deal with what are known ex-citizens. In how you then deal with that person, it is not that they are stateless, because they have another citizenship; is whether or not they can be removed. Just to be very strictly accurate about it, that goes to the operation of the Migration Act not the Australian Citizenship Act.

**Mr BYRNE:** Unfortunately, you went into camera before I could ask you some questions over the telephone in terms of the minister. When the brief form that subcommittee of individuals arises before the minister, if there were a recommendation to revoke then that minister would revoke the citizenship or, potentially—as you have said, and as I have heard for the first time—put a stay on the revocation of that citizenship?

**Mr Pezzullo:** This goes to the question of making it as sustainable and defensible as possible. The bill, as drafted, does not go to the issue of determining whether someone has committed a crime or not. There is a category—one limb—that goes to whether they have been convicted by a court of certain offences. Those offences are listed. No doubt we will come back to that. We had a discussion last week about things like property crime. I am sure we will come back to that. The other matters might have relevance to judicial proceedings, because a person might actually be the subject of a brief of evidence. They might, in fact, be before the courts or might be in the process of being, potentially, convicted and sentenced.

In other matters, the minister is not—as I said before in a roundabout way in answering Mr Dreyfus's last question—being asked to make a decision about whether the person is guilty of anything. The minister is being advised that the person is engaged in certain conduct. That has to meet the threshold set out in the legislation as drafted. So they have either conducted themselves in such a way as to breach their allegiance to Australia or they have served or fought with a declared terrorist organisation—or, to use the acronym, a DTO.

You asked the question of whether the minister has any power. The power in the draft bill, should it be passed by the parliament, would be, in effect, the power exercised by the minister in a non-compellable fashion to say, 'Thank you for advising me of this conduct.' But for a range of reasons—some of which might, in fact, be in the same brief—some of this gets into relatively sensitive ground that I do not wish to rehearse in public. But I will give you one example. The person might be willing to cooperate in relation to certain other matters. And that is as far as I am willing to describe in a public hearing. A minister might well say—and this would be hard for a tribunal, a court, an unelected official to make a public interest judgement here—'Thank you. I am comfortably satisfied that the conduct has occurred.' Before any such notice is signed, a minister has to be satisfied that the officials have got it right in that sense. But for these other considerations—and it could be advice from a law-enforcement agency, from the Department of Foreign Affairs and Trade pertaining to our foreign policy interests or from a security intelligence agency—the minister says, 'Thank you for advising me of this apparent renunciation of someone's allegiance. But, for a whole range of public interest grounds, I am not going to proceed with the issuance of the notice.' So when I said a 'stay', to be strictly accurate to the provisions of the draft bill, particularly 33AA, a minister would immediately rescind the said notice—because the conduct has already occurred—and make a declaration that it is in the public interest that the person be exempted from revocation.

**Senator GALLAGHER:** In the brief that would go to the minister in this circumstance, the brief from the subcommittee of officials would also be using intelligence or other information to advise the minister about the use of the rescission element?

**Mr Pezzullo:** On public interest grounds.

**Senator GALLAGHER:** So officials are having to make that decision. This is where it gets a little confusing, I think, to understand how no decision is ever taken. This line that there is no decision, that it is the conduct itself that loses you citizenship. Yet, it seems to me, following that, there are a whole range of decisions around possibly contested facts and information that comes to this group of officials, who then consider them and then exercise a reasonable amount of influence on the minister either to issue the notice—which puts the loss of citizenship into practical effect—or not. Do you agree that that is the process? In relation to section 33AA, the decisions by the subcommittee are pretty influential in the ultimate decision.

**Mr BYRNE:** I want to amplify that too. Say the minister does rescind the notice. That person then commits an act of terrorism in Australia. Who is responsible? Is the minister then responsible for that person? The person is responsible, because they have committed the act. But, in terms of accountability, if we were then examining an accountability mechanism, would it be us looking at the minister for making that decision?

**Mr Pezzullo:** Mr Byrne, this goes to the fact, as we discussed last week with the committee, that this is not a single solution to the problem of persons operating in contravention of their allegiance. If they are on the radar—as hopefully they would be through the intelligence, security and police process—of being on the pathway to going beyond just merely being radicalised to being willing to commit an atrocity, one would think that there are other ways to skin that accountability, not just simply that their citizenship had not been revoked.

It is another tool—and perhaps colleagues from the Federal Police and ASIO may wish to add to this answer. But you would like to think, as difficult as it is—and ASIO and AFP, in particular, do a terrific job with what are increasingly fast pop-up targets that are moving from radicalisation to extremism to propensity to violence very

rapidly—that the whole apparatus of the state is available to defeat that attack, not whether a notice has been issued or rescinded. I think I am hearing in your scenario that the officials have advised that a notice should be issued. For whatever reason, a minister chooses not to issue—

**Mr BYRNE:** Public interest.

**Mr Pezzullo:** Public interest—and does a recision, and then an atrocity occurs. I guess that would be one of the accountability points for any minister in the government. But I suspect, depending on the magnitude of the attack, there would be probably quite a number of other accountability issues before us.

**Mr BYRNE:** Sure. Who actually requested this piece of legislation? Who was consulted first? Was it ASIO, AFP, Immigration? Where did this come from originally?

**Mr Pezzullo:** It is an organic process in government.

**Mr BYRNE:** I always worry about that term! It is a scary term! We are in an episode of *Yes Minister!*

**Mr Pezzullo:** It certainly—

**Senator CONROY:** I know you spend quite a bit of time on gardening leave, but that is absurd!

**Mr Pezzullo:** I gave some evidence last week about the broad history of this legislation going back to the earlier part of 2014. I guess I will just refer you back to that evidence.

**Mr BYRNE:** This is in camera evidence you are talking about, or a mixture?

**Mr Pezzullo:** I think it was a mixture.

**Mr BYRNE:** Deputy Commissioner Phelan: from an AFP perspective, how necessary is this legislation?

**Mr Phelan:** Obviously, the investigation of counter-terrorism offences is complex, both domestically and offshore, and we need a wide range of tools in our armoury to be able to attack them. It is a very complex crime. It is a very complex situation. With the deprivation of citizenship for dual nationals, particularly if we are talking about those that are offshore, if it means keeping them offshore, then as far as I am concerned that is one less thing I have to deal with.

**Mr DREYFUS:** You can see from the questions that all of my colleagues are interested in how the committee can understand what the process is, in a circumstance where the bill is completely silent about any process, particularly leading up to the deprivation of citizenship using the section 33AA process, which is about an assessment of conduct, or the deprivation of citizenship that we see in section 35, which is primarily fighting with a terrorist group overseas. I am trying to get to a description, not a legal characterisation—that is a matter for others. I think you said that, as an Arts graduate, you found all of this a bit esoteric when you were talking to us last week, so I am not asking for a legal characterisation.

**Mr Pezzullo:** I am a fully qualified manque when it comes to the law, Mr Dreyfus. I am using that in the strict old French sense.

**Mr RUDDOCK:** You are.

**Mr DREYFUS:** A what?

**Mr RUDDOCK:** He is a lawyer manque; he is unfulfilled.

**Mr DREYFUS:** My questions are directed to what is going to happen. It is going to start with a group of public servants—this is just dealing with section 33AA, to make it simpler, which is the conduct that gives rise to a loss of citizenship. A group of public servants is going to meet, possibly communicate with each other in various ways—meet, email each other, call each other—and consider secret information and reports and possibly, as Ms Noble has pointed out, some publicly available information. Then they are going to write a secret brief, which goes to the secretary of the department. Is that right?

**Mr Pezzullo:** So far so good, Mr Dreyfus.

**Mr DREYFUS:** And the secretary is going to write another secret brief, which will go to the minister?

**Mr Pezzullo:** That is broadly accurate, in linear terms pursuant to this legislation. Just to pick up a point that the Deputy Commissioner made—and we are joined here by the Deputy Commissioner of the Border Force, for instance, and other colleagues. By and large these persons are not merely known to us or potentially known to us or likely to be known to us purely through the lens of 33AA. This kind of goes to the answer I was giving to Mr Byrne: if our intelligence, security, policing, Border Force, open source reviews—I do not want to go much more into the methodologies that we employ, this committee is well-seized of those matters. I have already been admonished once but I will try again; through that organic process of—

**Senator CONROY:** Mushrooms grow organically, Mr Pezzullo.

**CHAIR:** So do a lot of crops, Senator Conroy. Please continue, Mike.

**Mr Pezzullo:** Through a process that—I do apologise to Senators Conroy and Wong, I will not have another go.

**Senator WONG:** To be honest, I think that the word 'organic' is designed to obfuscate a step-by-step process.

**Senator CONROY:** Somebody phones somebody.

**Mr Pezzullo:** I understand that.

**Senator WONG:** If X is called by the minister's office, there is a view that this is needed et cetera, or vice versa, there is an operational need identified and a brief comes up. It is not just a sort of amorphous organic process, is it?

**Mr Pezzullo:** Perhaps I am struggling for the right label here. It is not quite as linear as that, and I do not mean any disrespect in saying that. We have colleagues here from the Security Intelligence Organisation and the Federal Police. These colleagues are joined up 24/7—I can give you that absolute assurance—reviewing activities at our border, beyond our border and within our various domestic jurisdictions. This is the same group of officials that Mr Dreyfus was describing that would be looking at a whole range of matters including: 'Are we ready'—I do not wish to trespass too closely into other colleagues' ground—and 'Do we have enough of a brief of evidence here? Do we have passport cancellation grounds here? Do we have certain intelligence and other opportunities here that I do not really want to talk about in public?' It is that same group of people, who are very familiar with one another: they share information at the highest levels of clearance. Perhaps, colleagues, feel free to step in to describe as much as you are willing to in an open forum. I will not say 'organic', and I take Senator Wong's point as very well made. In that systematic way of looking at persons of interest and, in some cases, high-value targets who are the most dangerous that we are dealing with, decisions will be made along the way to say, 'We are now hitting a threshold here for section 33AA action,' for instance. But they are not sitting as a tribunal. The conduct is occurring and, as Ms Noble—

**Mr DREYFUS:** I repeat, Mr Pezzullo, I am not seeking to have you legally characterise anything. I do not want a comparison with a tribunal; I do not want you to get hung up on the legal meaning of the word 'decision'; I do not want you to get hung up on questions of guilt or innocence; I am trying to have you describe this so that this committee and all Australians can understand what is proposed by this bill.

**CHAIR:** I think, Mr Pezzullo—

**Mr Pezzullo:** I am trying to describe, as best I can in an open forum, an integrated approach to counter-terrorism. An element of that, should the parliament see fit to put these powers in place, would be an active consideration being given to section 33AA notices, which would obviously have to be synchronised with other actions. A minister, for instance, would not be advised to issue a notice to a person—and I will have to give a hypothetical that the deputy commissioner or the deputy director-general of ASIO may wish to comment on—who might be the subject of certain other resolution action within a week or a month thereafter. My point is that we would not operate in those silos—a point that perhaps I am making not so adequately.

**Mr DREYFUS:** I think all of us here assumed no silo.

**CHAIR:** Kerri, I think you wanted to add something.

**Ms Hartland:** Could I add a couple of comments. Certainly, if citizenship were removed from an individual and that individual was in Australia, and they continued to be here through other visa mechanisms and they continued to be of interest, then I assure the committee that, from an intelligence point of view, we would not stop having an interest in them and we would look for other avenues, as the secretary has said.

As Mr Phelan has said to the committee, similarly we see this as not a panacea. This is a complex environment; it is a rapidly escalating environment in a lot of cases. We need to have every tool at our disposal; this is but one of those tools, but it does not stop us from doing other things.

We envisage, on ASIO's part, that the support that we will provide really mirrors what is a pretty well-established process in which we provide support to, for example, law enforcement agencies, such as the AFP, in terrorism prosecutions. It is a very similar process in that case. In some cases, there will be, as has been described earlier, open-source-type material—publicly available material—that is used; in other cases, it will be highly sensitive intelligence; and there will be everything in between.

**Mr Outram:** Perhaps I could assist, Chair. There is a very mature architecture, operationally, in Australia around the counter-terrorism arrangements and framework. The Australian Border Force is now well and truly part of that. That view of the operational environment—of who is doing what, and what the sorts of risks and threats might be—occurs through quite formal mechanisms; it is not ad hoc or the odd email or phone call. There

are quite formal mechanisms to make sure that we are joined up, we do not have gaps, we do not duplicate effort and we do not make mistakes.

Within the Border Force, if the decision is that we would like to establish as a matter of fact that somebody is engaged in certain conduct or has another form of citizenship available to them, then quite a thorough, detailed investigation will occur within our national security branch in the Border Force, based on information that we will then obviously pull in from a range of other organisations to put, ostensibly, a brief of evidence together for presentation to the committee and, ultimately, the secretary and the minister. A lot of effort has to go into preparing that material and pulling that investigation together, so clearly we want to be sure, firstly, that we are not duplicating effort and that our partners see that as a valid intervention, a disruption activity, in relation to the particular individual we might be looking at. That would be part of an ongoing dialogue, because the environment may change. It may well be that, at some point whilst we are pulling that brief together, somebody will say, 'Things have changed. That individual has now popped up on a radar somewhere else and, in fact, we want to take a different approach to dealing with that particular risk.' So it is a very mature framework in the national security community that we are part of, and we are very joined up. It is certainly not informal.

**Mr DREYFUS:** Thanks very much, Mr Outram. I am going to go back to the questioning, which is designed to establish in simple terms what process is going to be followed. I am not suggesting, and I do not think that anyone here would suggest, that we do not have proper communications between our counter-terrorism agencies, or that it is not joined up or that it is not diligent. That is not where the question is going to. With that in mind, I will start again. The decision that is going to be made about whether or not someone has committed conduct as described—and at the moment I am not going to ask questions about the long list of conduct in section 33AA—is going to be made by a group of public servants. So far so good?

**Mr Pezzullo:** They will have to satisfy themselves that it has occurred.

**Mr DREYFUS:** Right. There is a decision. Someone, be it a group or an individual, possibly a senior public servant, is going to make it. Is that right?

**Mr Pezzullo:** Are they making a decision? They are pulling together an information brief that suggests that they are satisfied that the conduct has occurred.

**Senator WONG:** They have to determine the facts. They have to be satisfied.

**Mr Pezzullo:** Yes.

**Senator WONG:** We are getting caught up on terminology. He is not suggesting it is a judicial decision.

**Mr DREYFUS:** I am not. I am trying to use the words of fact.

**Senator WONG:** He is not saying it is a decision of the court, but you have to decide whether the facts have been established.

**Mr BYRNE:** They have to satisfy themselves.

**Mr Pezzullo:** We have to satisfy ourselves, that is the case.

**Senator WONG:** You cannot satisfy yourselves without deciding that the facts have been established. It is not in the ether, is it? You do not get a vibe of the facts.

**Mr Pezzullo:** There are all sorts of decisions that we take every day, some of which are administrative and some of which are reviewable in different sorts of ways.

**Senator WONG:** Mr Dreyfus has not used the word 'reviewable' et cetera. I understand that you are avoiding it because there is a legal architecture that you are trying to—

**Mr NIKOLIC:** Why can't Mr Dreyfus speak for himself?

**Senator WONG:** Just relax, Andrew.

**Mr NIKOLIC:** She is telling us what Mr Dreyfus is saying.

**Senator WONG:** I am being helpful.

**Mr Pezzullo:** If it assists the committee, in relation to Senator Wong's characterisation in that small 'd' sense of decision—yes, a group of officials have to decide to do their job diligently.

**Senator WONG:** We can talk in non-capitalised decisions. Would that make everybody happier?

**Mr Pezzullo:** Certainly it makes me more comfortable.

**Mr DREYFUS:** As is normally the case we have encountered with most intelligence work and most counter-terrorism work, this work is going to be done in secret?

**Mr Pezzullo:** I think it would all be done in secret.

**Mr DREYFUS:** Right. And most of the information that these public servants—

**Mr Pezzullo:** We do not tweet and we do not advise—

**Senator WONG:** Some of you do. Do you tweet, Mr Pezzullo?

**Mr Pezzullo:** I would not know how to, Senator.

**Mr DREYFUS:** Most information that is going to be looked at by these public servants—

**Mr Pezzullo:** We would do it confidentially, yes.

**Mr DREYFUS:** You would do it confidentially, and most of the information that the public servants involved are going to be looking at is secret information?

**Mr Pezzullo:** I think it is a fair supposition to think that most of it would be what we would describe as classified, which is not say that some of it would not come from what we call 'open source' research.

**Mr DREYFUS:** And the information that is going to be provided to the Secretary of the Department of Immigration and Border Protection is going to be in the form of a brief, presumably—some kind of document.

**Mr Pezzullo:** There will be some sort of artefact, yes—a document.

**Mr DREYFUS:** It is not an 'artefact'—it is a document, isn't it?

**Mr Pezzullo:** It is a document.

**Mr DREYFUS:** And that is also going to be secret?

**Mr Pezzullo:** It will be classified, yes.

**Mr DREYFUS:** Secret and classified?

**Mr Pezzullo:** Classification is the broader concept. Secret is a particular level of classification.

**Mr NIKOLIC:** Could I just clarify something? Mr Pezzullo, when you are discussing terrorist-related activity, how often do you do that in the public domain in the interagency environment? Does that happen frequently? In your department, perhaps?

**Mr Pezzullo:** Interagency? Never, I can assure you. We do not often have public outings like this. You have been very gentle with us.

**Mr DREYFUS:** After this brief has been considered by the secretary, another brief will go to the minister?

**Mr Pezzullo:** Under the construct described in Ms Noble's letter, the secretary of the department would put a briefing to the minister, that is right.

**Mr DREYFUS:** Is there any other construct?

**Mr Pezzullo:** No, we do not have one in contemplation. Given the consequence of the matters in discussion, we felt that something that the secretary signs off was the appropriate level of authority.

**Mr DREYFUS:** And on receipt of the brief by the minister, the minister can then sign a form which deprives an Australian of their citizenship?

**Mr Pezzullo:** The minister can sign a notice that says that that person has renounced their citizenship by way of their conduct, because we would couch the relevant paperwork in the terms of the legislation.

**Mr DREYFUS:** I am actually looking at one of the few bits of the bill that—

**Mr Pezzullo:** This is the 33AA notice?

**Mr DREYFUS:** Yes. It spells this out. The minister 'becomes aware'—that is the phrase used in the bill. He becomes aware because the secretary has sent him a secret brief.

**CHAIR:** A classified brief.

**Mr DREYFUS:** I am using lay words, just for the assistance of everybody here. 'Secret' is a lay word. It does not have any technical meaning. It just means what it sounds like: secret.

**Mr NIKOLIC:** Chair, can I just seek a point of clarification. What I heard was that the information would be a combination of open-source material and perhaps non-open-source material. 'Secret material' has a particular and specific meaning which I do not think Mr Pezzullo has used. So, whilst my learned colleague might be seeking to simplify things, he should try to make a more accurate representation of what the witness has said.

**Mr DREYFUS:** We will go straight to the brief. The minister has got the brief from the Secretary of the Department of Immigration and Border Protection, and he then signs a form which deprives an Australian of their citizenship as a matter of law.

**Mr Pezzullo:** He signs a notice that that has occurred.

**Mr BYRNE:** Or exercises discretion not to. Am I clear?

**Mr Pezzullo:** Read strictly, the notice has to be signed, because the minister—

**Mr BYRNE:** So he has no discretion. He has to sign the notice.

**Mr Pezzullo:** I could foresee a situation—

**Mr BYRNE:** We had this discussion last week.

**Mr Pezzullo:** Yes, we did, and I guess I am just trying to be abundantly cautiously accurate here. I guess I could foresee a situation where the secretary and/or other officers have not done their job very well and have not satisfied the minister that the notice is in a fit state to be signed. In that sense—

**Mr BYRNE:** Is he forced to sign it if the brief is normal, or not?

**Mr Pezzullo:** If the minister becomes aware of behaviour that fits the criteria. But I guess I am just contemplating a circumstances—

**Mr BYRNE:** So there is no discretion, then.

**Mr Pezzullo:** No, there is no discretion under the law, but I can envisage a circumstance where a minister says, 'You haven't convinced me.'

**Mr DREYFUS:** So after this secret process is completed the minister does not need to inform the Australian whose citizenship has been revoked until the minister thinks it is appropriate.

**Mr Pezzullo:** That is right. It is not a requirement. You are accurately paraphrasing the relevant provision. It is not a requirement of the legislation for the person themselves to be notified. The legislation in its current form says the minister determines to whom the notification is sent and the timing.

**Mr DREYFUS:** And when.

**Mr Pezzullo:** And when.

**Mr DREYFUS:** And in what way.

**Mr Pezzullo:** Yes.

**Mr DREYFUS:** Just to complete the process, whether or not the minister ever gives notice to the Australian whose citizenship has been revoked, he never has to give reasons.

**Mr Pezzullo:** Not in the notice, no.

**Mr DREYFUS:** So, just to recap, we have a secret process conducted by Australian public servants looking at secret, classified information, some of it possibly publicly available, who are going to write a secret report to the secretary of the department, who writes another secret report to the minister, who signs a form that revokes the Australian's citizenship, and the Australian never needs to be told and never needs to be given reasons. Have I got that right?

**Mr Pezzullo:** The only characterisation I would wish to slightly recast—because you are asking me if you have it right in terms of all the words that you have used—is 'signs a form revoking the citizenship'. To be accurate to the bill—

**Mr DREYFUS:** No, I actually said 'signs a form which deprives an Australian of their citizenship'.

**Mr Pezzullo:** Well, it gives notice that that person does not have citizenship.

**Mr DREYFUS:** I am trying to use a neutral word that does not have a legal meaning, and that is why I am using the word 'form'. The minister is going to sign a form.

**Mr Pezzullo:** But you are also using the word 'deprives'.

**Senator WONG:** Well, they had it before and then they do not have it.

**Mr DREYFUS:** Would you prefer 'loss' or 'cancel' or 'revoke'?

**Mr Pezzullo:** It is the contention that it gives notification that the person is no longer a citizen.

**Senator WONG:** It is just a legal fiction.

**Mr BYRNE:** Before Mr Dreyfus continues—just for my education, when in effect do they lose their citizenship—at what point?

**Mr Pezzullo:** Under 33A it is the government's contention that is explained—Ms de Veau will remind me if I have got this wrong. The act of renunciation, to hark back to an example I used last week in the open session with Senator Gallagher in relation to her question, was in effect the moment you donned the uniform of the enemy. I

think that is the phrase I used—the difference being that in 1948 that meant something different to what it means today. Your traitorous or treasonous conduct was self-executing at that point.

**Mr BYRNE:** But you have got a threshold.

**Mr DREYFUS:** It is on the notice.

**Mr BYRNE:** Yes, it is on the notice but I am saying that technically that person—to me it is a really grey area. Notwithstanding the fact that you might be committing a treasonous act, someone has got to determine that.

**Mr Pezzullo:** It is no different from the 1940s, I guess. You could not simply go around saying—

**Mr BYRNE:** But that has never been tested in court.

**Mr Pezzullo:** that that person fought for the Waffen SS.

**Mr BYRNE:** No, and I do not disagree with that. But that has never been tested in court. What we are about here is making a piece of legislation workable. You are saying that the person commits that act, but that is then determined by the subcommittee that meets, isn't it? That is the first official point where they come together and say, 'This person has ticked this threshold.' Isn't it when they first meet to determine it that the person has had their citizenship revoked? It is self-executing in the legislation but there has to be a group of people who come together and say, 'This person has done it.'

**Mr Pezzullo:** That certain actions occurred—

**Mr BYRNE:** No—they could be running around not knowing anything but there is a group of people that comes together and says, 'This person has done this; it meets the threshold.' Then it is more like everyone who has done these things overseas—let us use overseas as the example—is then presumed to have lost their citizenship but the formalisation of that process occurs through a group of people who meet and say, 'That person has done this', then that gets referred to the secretary. It is just the timeline of that person's citizenship being—and how it is then determined and what the actual status of that is. Then you are saying that you have an appealable element to that as well. The person who has had their citizenship revoked can sort of appeal it as well. Then there has got to be a decision that is made. My concern is just about the mechanism that is used to validate that the person has lost their citizenship, the process that occurs for that to be formalised—which is contestable, obviously, but protects the minister and the individuals involved. I just wanted to sort that out in my own mind because I do see a lot of grey and therefore concern. But I will throw to my learned colleague to pursue those matters further.

**Mr DREYFUS:** When this process is complete and the minister has become aware of this conduct—to use the phrase in the bill—it arrives at that situation because public servants have decided to recognise a certain set of facts or a certain range of conduct; otherwise it has no operation. Isn't that right?

**Mr Pezzullo:** Strictly speaking, I guess the minister could research the matter themselves. But those of you who have been ministers know how challenging that would be in terms of your own workload. We are here to support and advise ministers so, absent any other process, it would be an administrative process run under the auspices of normal public service support to ministers, absolutely.

**Senator WONG:** Except generally public servants help ministers with their decisions. It is not a normal process, is it? Generally advice is given to ministers in order for ministers to make decisions. In order to maintain what one witness has described as the legal fiction in this legislation, you have to suggest that the minister is not making the decision.

**Mr Pezzullo:** Perhaps I did not articulate it particularly clearly. The minister is certainly in a non-compellable fashion making a decision in a sense to set aside the advice. This is where we—

**Senator WONG:** Or to accept it.

**Mr Pezzullo:** I am sorry?

**Senator WONG:** Or to accept it.

**Mr Pezzullo:** Well, indeed.

**Senator WONG:** To not set it aside.

**Mr Pezzullo:** But to set it aside to execute a rescission decision, if you like, simultaneously, because ultimately ministers are accountable for the public interest. There might be foreign policy grounds, there might be sensitive intelligence or operational matters that put a minister in a position where they say, 'Okay, thank you, you have convinced me. You have established the facts. But you have also drawn attention to a number of other considerations and I am not going to proceed with this.' That would be within the gift of the minister and the legislation is clear, in its face, in that regard.

**Mr BYRNE:** Sorry, not proceed with what?



**Mr Pezzullo:** With the notice.

**Mr BYRNE:** You just told me before that—

**Senator GALLAGHER:** Making a decision.

**Mr BYRNE:** By making a decision about the recision, now, so—

**Senator GALLAGHER:** The minister makes the decision.

**Mr Pezzullo:** About the recision, yes.

**Mr BYRNE:** So even though the minister might have been compelled to make the decision by that group of people—

**Mr Pezzullo:** Yes. Well, the facts are the facts, Mr Byrne.

**Mr BYRNE:** he then issues a recision after he issues the notice.

**Senator WONG:** No, that is not the point.

**Unidentified speaker:** The facts are the facts.

**Mr BYRNE:** That is the incongruity in this. The minister gets taken out of that, so they cannot be contested, apparently. We have not seen the advice on that though. Then what happens is that the minister, after he or she is obligated to issue that notice, says, 'Well, actually, I might issue a recision notice.' Can you see how to some people on the outside that looks a bit, I am trying to think of the appropriate descriptor—confusing?

**Mr Pezzullo:** Mr Byrne, I do not know how that looks to anyone but it strikes the government, I guess, and we who advise the government that that is the neatest way to bring to bear—

**Senator WONG:** Well, that is a joke.

**Mr Pezzullo:** public-interest considerations that should not really be in the gift of unelected officials. In other words, are our foreign-policy interests outweighed, or in the balance of weighing, better served by a recision being—for instance, to use that example—immediately executed? So the minister decides to exempt on the basis of the public-interest benefit, because there might be a foreign-policy reason not to proceed; there might be an operational—

**Mr BYRNE:** But that would be in the brief, anyway. Then the question is: if you do not proceed with it, then hasn't that decision been taken by that group of individuals who gave the brief to the minister?

**Mr Pezzullo:** We cannot be in a position to compel the minister to make a particular decision on those discretionary grounds. They would have to weigh those matters up for themselves, because they have the power to make the decision in relation to an exemption on public-interest grounds to effect a recision.

**Mr BYRNE:** Just track it back a bit. Say, for example, someone crosses that threshold; there are some very important—your words—foreign policy or public-interest reasons why that notice should not be issued. Do the people then not proceed to give that brief to the minister, or do they provide that brief to the minister that says that the notice has got to be issued? But, then, there has to be a recision; so what is the process there?

**Mr Pezzullo:** We would be duty bound, under the legislation, to draw it to the minister's attention because the conduct has occurred. To use the phrase that I have used several times: a person has donned the uniform of the enemy. That is not something that you would keep from a minister. It is a pretty weighty matter.

**Mr BYRNE:** But the minister does not have any capacity. When you give that brief to the minister you are saying, 'By the way, you are going to have to issue this revocation notice because the threshold has been cut and none of us have any power to make a decision. But what you can do is issue a recision.' So that brief that goes to the minister says, 'By the way, you are going to issue a revocation notice and, by the way, we are recommending you issue a rescinding notice as well.' And that could be in that brief.

**Mr Pezzullo:** To not get into too sensitive ground, I could see a circumstance that was alluded to earlier, when the coordination processes in our counter-terrorism apparatus kick in and the AFP, for instance, advise that an operation is going to go to resolution, say, in four weeks time. There is no way that Australia Post would turn up with a telegram saying, 'Here is your notice'—because the minister has found the relevant notice—that would be done in such a way as to compromise that AFP operation.

**Mr BYRNE:** You have got no capacity because, you are saying, there is no decision maker to actually stop that process from occurring. It is just a process that occurs and then you have to stop it. You are saying it is an automatic process. It happens. No-one has any discretion to proceed or to not proceed. The only discretion that is involved is the notice gets issued and then it potentially gets rescinded.

**Mr Pezzullo:** Yes.

**Mr BYRNE:** That is the only discretion, you are saying—

**Mr Pezzullo:** Yes.

**Mr BYRNE:** that exists in this legislation.

**Mr Pezzullo:** On the face of the current bill, yes. It is because you do want to allow that capacity to differentiate between the issuing of a notice—either to the person directly or to other persons—where there is no other factor at play that would prevent you from proceeding versus, say, compromising, let us say, a joint AFP-state counter-terrorism operation.

**Mr BYRNE:** So every person who reaches that threshold—say, potentially, everyone who is overseas or in this country—will automatically proceed to a notice being issued?

**Mr Pezzullo:** Well, if they have donned the uniform of the enemy, they have done it—

**Mr BYRNE:** Or committed any other thresholds. It is not just that—there are other thresholds that are involved.

**Mr Pezzullo:** If the parliament says—

**Mr BYRNE:** They are thresholds that we are looking at here. So if they hit those thresholds then there is an automatic process that gets set in train. These people say, 'Look, that notice has been,' and there are other matters that are discussed, but it is an automatic process once those thresholds are hit that then irrevocably lead to that minister issuing a revocation notice, the only discretion being that the minister can rescind that. Is that what you are saying?

**Mr Pezzullo:** I will just check with Ms De Veau—

**Mr BYRNE:** In every set of circumstances and in all of the pieces of legislation that we have before us—

**Mr Pezzullo:** That is the legislation, on the face of it.

**Mr BYRNE:** the threshold gets hit and there is an automatic process that goes to the minister. There is nothing that stops that from happening?

**Ms De Veau:** That is correct, other than it is not the notice that gives effect to the loss of citizenship; it is the conduct.

**Mr BYRNE:** The act, the conduct.

**Ms De Veau:** What the minister is doing by issuing a notice, having been made aware, is putting in place the consequences of the loss that has already occurred. Once again, there is no discretion to issue it once he has been made aware other than as to whom and when—as Mr Dreyfus pointed out, appropriately. The other discretion is to rescind the consequences of the conduct; that is, to rescind the operation of the act. It does not mean that the conduct did not occur or did not meet a particular threshold. It is simply to say that, given the circumstances, it is in the public interest to remove the person from the operation of these provisions.

**Mr BYRNE:** Just to reassure myself: all the thresholds we have met here—and one of those includes Commonwealth property, although that has been cleared, so say for some of the other thresholds that we have seen—every time someone hits that threshold there is an automatic process, onshore or offshore, that is set in train. The minister has no discretion; the minister just issues the notice after being alerted to the fact. So this committee apparently just alerts them to the fact, with other coordinating briefs, that these matters have occurred. The only thing that would go to the minister, potentially, is, 'Well, by the way, you might have to rescind this notice that you have issued because there are other factors.'

**Ms De Veau:** He or she might also be advised as to the factors that might delay the sending of the notice, or direct particular people to be advised by the minister.

**Mr Pezzullo:** Hence the discretion around timing. In that hypothetical example I gave before about an AFP operation going to resolution, it might be that the minister is minded to issue the notice but at a later point. And not to the person involved, because that might tip them off about the AFP operation.

**Mr BYRNE:** So they are still not a citizen; automatically, their citizenship has been revoked. As you have said, it is self-executing. Then the minister sits on it because he or she has been advised. Then what happens if the matters are resolved? How does the minister not issue a notice?

**Mr Pezzullo:** In some cases, as was just intimated, the stay or the rescission might be permanent for whatever range of reasons, or it might be temporary.

**Mr BYRNE:** This is a new element—there is discretion, because you are saying that there can be a stay on the issue of that notice.

**Mr Pezzullo:** As Mr Dreyfus directed our attention to several times in the earlier exchange, there is discretion in two elements of the issuance of the notice. One is in relation to the person to whom it is issued—it might be issued to the police, or it might be issued to the intelligence agencies or it might be issued to other parties so that they can be seized of that and be aware of what the minister has decided. Or the minister could come to the view, 'I'm not going to issue this at this particular point in time because I've been advised that that would compromise operations,' for instance.

**Mr BYRNE:** So there is the discretion not to issue that notice?

**Ms De Veau:** Only to delay it. It must be issued. The only discretion in relation to the notice is when—

**Mr BYRNE:** To delay notice—a delay.

**Ms De Veau:** But there is no discretion not to issue a notice once the minister has become aware.

**Mr BYRNE:** What if he decides to delay for two years? That is not issuing a notice, that is—

**Mr Pezzullo:** There might be solid public interest grounds for that.

**Mr BYRNE:** I am not saying that. But you can see from that that it is not issuing the notice, effectively. So there has been the exercise of a discretionary power not to issue a notice, in effect.

**Mr Pezzullo:** It would turn on the circumstances. A two-year delay—

**Mr BYRNE:** Do you see my point, though?

**Mr Pezzullo:** Yes, but a two-year delay—

**Mr BYRNE:** But the legislation allows for that—you have just told me.

**Mr Pezzullo:** If there were higher order public interest grounds, and the minister has weighed up those grounds, that would no doubt be the decision a competent and responsible minister would make. But it would turn on the circumstances.

**Ms De Veau:** One example might be where the conduct has also enlivened a prosecution that is on foot. It might be that, having been made aware that the charges have been laid and the prosecution is proceeding before the courts, it would be appropriate for the minister to say, 'I'm going to forestall issuing a notice until such time as we find out the outcome of the charges before the court and proceed to consider use of the other provisions that hinge upon a conviction'—if indeed the same conduct is caught in those provisions.

**Mr DREYFUS:** You have raised an eventuality that many of the submissions have raised, which is the possibility that conduct will have been identified under the administrative processes that we have been discussing here at the same time or some other time than a prosecution takes place arising from the same conduct. Could one of you confirm the proposition that has been put in a number of submissions that you could have a situation where an Australian was acquitted by a judge and jury of a terrorism offence—that is, there is no conviction against them—but nevertheless the administrative processes that we have been talking about here produced the brief to the minister, or the brief to the secretary followed by the brief to the minister, asserting that conduct had occurred satisfying section 33AA and that notwithstanding an acquittal there could be a process which led to the deprivation of citizenship of that very same Australian.

**Mr Pezzullo:** Can I contemplate a circumstance where 33AA conduct has been discerned in an environment where a brief could not be put but a person has also conducted themselves such that the AFP could bring a brief 'onshore' and they get off on the onshore matter but there are sufficient grounds to proceed with the 33AA offshore matter? Yes, I can contemplate that scenario.

**Mr DREYFUS:** My question assumes that it was the same conduct.

**Mr Pezzullo:** That is fairly speculative.

**Mr DREYFUS:** I am asking you to confirm that this possibility arises under this legislation. I am not asking you to speculate. I am just asking what the possibility is under the legislation.

**Mr Pezzullo:** Understood. On the same facts that would be in a brief of evidence?

**Mr DREYFUS:** I will repeat my question. Is the conduct which gave rise to the prosecution which resulted in an acquittal the same conduct that is examined and acted upon for the purposes of section 33AA leading to, out of the same conduct, a deprivation of citizenship?

**Mr Pezzullo:** But not a criminal conviction?

**Mr DREYFUS:** I have said that.

**Ms Jones:** Looking at the circumstances—and obviously this is a hypothetical—

**Mr DREYFUS:** It is a hypothetical.

**Ms Jones:** In a situation where a court could not be satisfied on the evidence available to it that the conduct amounted to criminal conduct, the sorts of considerations that would be put before the minister might not be able to satisfy the conduct requirements in the legislation. If a court was not satisfied that there was irrelevant conduct, as set out in this bill, you may find that the group that is looking at the conduct to provide information to the minister would arrive at a similar position.

**CHAIR:** This was a matter of discussion in camera, so I think we need to be a little cautious.

**Mr DREYFUS:** I do not accept the suggestion that my question touched on anything that was said in camera—and I would not wish it to. I am asking for confirmation, which I have not yet received, as to whether or not it is possible—arising from the same facts, arising from a particular set of conduct that has been prosecuted, and given rise to an acquittal—that one could nevertheless have, under section 33AA, the administrative processes that we have been discussing, leading to a deprivation of citizenship?

**Mr Pezzullo:** Is it possible that matters that are known to the executive through certain sources and methods, particularly those employable overseas, where there is an absence of witnesses, there is an absence of statements taken—

**Mr DREYFUS:** My question did not go to any of those matters.

**CHAIR:** It does though; that is the thing.

**Mr Pezzullo:** I have to answer it as best I can in an open hearing.

**Mr DREYFUS:** It is actually a much simpler question than that.

**Mr Pezzullo:** With due respect, the answer turns on this: would it be possible for a court to not be satisfied—because of the rules of evidence—such that an acquittal was secured, but the court was not satisfied because, quite properly, witnesses have not been able to be brought before them and all the rest of the proper workings of the criminal justice system, and yet the conduct still occurred? Under the bill that is before you, the conduct as it occurred under section 33AA—and I am sorry for my confusion earlier where I gave two different examples with offshore conduct and onshore conduct—we would still be duty-bound to bring those matters to the minister's attention, yes.

**Mr DREYFUS:** So the answer is 'yes'?

**Mr Pezzullo:** It is conceivable that a notice would have to be issued in a circumstance where potentially a court would not be satisfied under the rules of evidence that those matters had occurred but we knew they had occurred, and because of the absence of witnesses—they might be dead; they might have been killed or whatever—or the manner in which the information was secured; that is why we are getting into slightly sensitive ground. Is it possible that there would be a differentiated outcome? Thinking through it logically, the answer would be yes.

**Mr DREYFUS:** I am sorry for digressing, because it took so long. The ombudsman—in relation to the cessation of citizenship provisions under section 33AA—in his written submission to this committee, referred to 'the legal fiction that the cessation of citizenship occurs by operation of the statute conceals administrative decision making that must logically occur for the bill to operate'. The ombudsman is right, isn't he, Mr Pezzullo? It is a legal fiction to suggest that the cessation of citizenship occurs by operation of the statute, and he is right to say that it conceals the very administrative decision-making that we have here been discussing?

**Mr Pezzullo:** Some of these matters were canvassed in camera, so to answer your question I will summarise—

**Mr DREYFUS:** It is not of assistance to the committee's processes for you to answer questions repeatedly saying 'these matters were canvassed in camera'.

**CHAIR:** No—

**Mr NIKOLIC:** He can answer the question how he wishes.

**Mr DREYFUS:** If there is a reason why you do not wish to answer a question, Mr Pezzullo, you should advise the committee—

**CHAIR:** No, what Mr Pezzullo stated was a statement of fact—

**Mr NIKOLIC:** Correct.

**CHAIR:** And, Mr Dreyfus, I think you should understand that, because you were in the hearing when he made that statement.

**Mr NIKOLIC:** Hear, hear.

**Mr DREYFUS:** And other members of the committee were not and the public certainly was not.

**CHAIR:** And you were. So what he is saying is that this issue was canvassed. And he is correct in saying that. If you want to say: 'Can you expand on that now we are back in public?', that is fair. But what he has stated was what actually happened.

**Mr DREYFUS:** Chair, with the greatest of respect, this is a public hearing. This intelligence committee, with the greatest of respect, is accustomed to dealing with some matters in camera and other matters in public. I am acutely aware—

**CHAIR:** Exactly, and when Mr Pezzullo says this was addressed on Wednesday, I think he is just stating facts, so I think we should allow him to state facts. Now, you can continue.

**Mr Pezzullo:** If it can assist the committee—through you, Chair—there are certain elements where it gets back to this almost epistemological question of how it is we come to know things and how we can act on things. I need to set that aside because it just keeps us driving back to this question of how officials come to know things. I will just deal with the central contention in Mr Neave's submission. As I said, he is a respected and trusted colleague; he is an independent officer; he has a clear view to state on this matter. There has been a bit of discussion this afternoon as to how things are characterised. I think to characterise it as a legal fiction is an interesting, expressive way of putting it. Because we are in a public forum I am not going to let it go by. I do not know that I would agree with that characterisation. 'Fiction' has a certain imputation associated with it. I am not going to the Ombudsman's submission here. Would someone characterising this process as a fiction come to the same view in relation to the earlier form of the construct in the 1940s which dealt with fighting for the enemy. Those were not matters of fiction. They happened. The question was, what was done about them? How was someone brought to justice or how did they have their citizenship dealt with? We have been grappling with that in the construct of this legislation, and the complexity of the issues that have arisen at both of our hearings, I guess, are a testament to this. How do you deal with facts that have already, if you like, established themselves, almost, through a person's conduct? Again I keep saying—and I am happy to use a different formula if someone wants to give it to me—if someone has gone over to the enemy, given that the nature of the enemy these days has changed, those things are not fictitious. To the extent that we come across hard evidence—and I am using that term in the small-e, non-capitalised sense of the evidence—to the extent that we come across those matters, should this legislation come onto the statute books, we would be duty bound to bring those matters to the minister's attention.

I understand the point—because we did canvass this last week—that the statement has not been made that we would operate, in a sense, to create fictional facts. I am sure that is not the contention. The idea of it being a legal fiction, as I understand it, is to say that there is a veiling of what is otherwise a process that public officials undertake. I think that is the point of the statement. I just think that—

**Mr DREYFUS:** I think it might shorten things, Mr Pezzullo, if I can say to you—

**Mr Pezzullo:** I just do not agree with the characterisation.

**Mr DREYFUS:** that that is my understanding of what the Ombudsman is saying and what other people who have submitted to this committee that it is a legal fiction are saying. No-one is suggesting that Commonwealth public servants are going to make up facts. The term 'legal fiction' is directed to the cessation of citizenship occurring by operation of the statute, when in fact what will occur is some quite complex administrative decision making.

**Mr Pezzullo:** We are back to where we were earlier in terms of administrative decision making. I am trying not to be cute here at all, as I would hope the committee would appreciate. It is the government's contention, on the face of both the legislation, the second reading speech and the explanatory memorandum, that officials are not engaged—indeed, nor is the minister, with one very significant, stellar exception that we have discussed and canvassed before with Mr Byrne and others—in administrative decision making of that type commonly understood. We are assembling facts and drawing them to the attention of the only person who can make a public interest decision, in effect, not to proceed. We are constructing those files of information that were described at the very start of these proceedings.

**Mr DREYFUS:** I am going to ask you to confirm whether the Commonwealth Ombudsman has got these things right. This is in the next bit of his submission, where he is trying to describe his understanding of what is going to happen. He writes, first, at page 2 of his submission:

In order for the Minister to 'become aware' that a person has engaged in particular conduct or been subject to a relevant conviction—

those are the two possibilities—

someone, presumably an official, must form the view that the relevant conduct has been engaged in or a relevant conviction recorded.

Is that right?

**Mr Pezzullo:** That is a statement of basic fact.

**Mr DREYFUS:** He goes on in the next sentence:

It is not clear on the face of the Bill, but it is reasonable to assume, that the source of advice to the Minister to enable him or her to 'become aware' of the conduct will be his or her department, law enforcement and intelligence agencies.

Is that right?

**Mr Pezzullo:** Agencies at large who have access to this kind of information.

**Mr DREYFUS:** Then he says:

For an official to come to a view that a person has been convicted of a particular offence is relatively straightforward and capable of external verification.

Do you agree with that?

**Mr Pezzullo:** That is, on the facts, correct.

**Mr DREYFUS:** Then he says:

However, to come to a view that a person has engaged in a particular activity will require an official to make assessments of facts and law.

Is he right?

**Mr Pezzullo:** At least we are not in the ground of decisions. They certainly need to assess facts, intelligence and other forms of reports. I am more comfortable, Mr Dreyfus, with 'assessment', because I think that is actually closer to the work that will be undertaken.

**Mr DREYFUS:** Then Mr Neave, the Commonwealth Ombudsman, goes to some problems, or some deficiencies in the bill, which other submissions have pointed to. The Commonwealth Ombudsman submits this—and I am asking you about it to see what the government's view is of this:

The Bill does not indicate to what standard (for example reasonable suspicion, balance of probabilities, or beyond reasonable doubt)—

They are three possibilities—

the official must be satisfied in order to provide the advice to the Minister.

That is correct, is it not, that the bill does not specify?

**Mr Pezzullo:** Other than by operation of how administrative advice is put to ministers. I might ask Ms De Veau or Ms Jones to speak to questions of—if I can use the term—burdens of proof, or standards of evidence.

**Mr DREYFUS:** I will just expand on the question, since you referred to it. Mr Neave, the Commonwealth Ombudsman, has raised a question here. I am sharing the question. What standard would be applied by—

**Mr Pezzullo:** On the face of the bill, as drafted, those phrases and words are not used. I might ask the General Counsel and/or the Deputy Secretary from the Attorney-General's Department to put to the committee what the conventional practice would be in this area.

**Ms De Veau:** Again, the starting point is: the cessation of citizenship occurs by operation of law based on the occurrence of a certain event. Then, if the next step under the legislation is that there is an obligation to issue a notice upon the minister becoming aware, the question is: what does 'awareness' mean and what do they need to be aware of? We would say that awareness is a knowledge that something has occurred. It is more than a belief or a suspicion. It does not require absolute proof. It involves a clear degree of mental apprehension. The minister needs to be satisfied by way of an awareness. Before a notice can be issued that the minister is aware that the event has occurred, there needs to be that clear degree of mental apprehension—or knowledge—that it has occurred. That would be knowledge based on a high degree of probability as to the facts underpinning the assessment. We would say that the same type of awareness is required as to whether the person is dual citizen. Then, upon the minister becoming aware that that event occurs, it sets in train a series of motion. Of course, there is the judicial review available for a person to—

**Mr DREYFUS:** I am not asking about judicial review. Mr Neave, the Ombudsman, was not talking about judicial review. He is simply talking about the standard to be applied.

**Mr Pezzullo:** I might see if Ms Jones has anything to add. These are questions of legal policy, to some extent.

**Ms Jones:** In fact, I would just defer to the description given by Ms De Veau. I think that is accurate.

**Mr DREYFUS:** So, as a matter of practice in the Commonwealth public service, a high degree of probability?

**Ms De Veau:** That is what underpins the awareness. It does not mean that the threshold for the issuing of a notice is a high degree of probability. It is an awareness. Awareness is knowledge that is underpinned by that high degree of probability that the event has occurred.

**Mr NIKOLIC:** Just to follow up on that: when you are determining levels of confidence in relation to material that you are putting before ministers—be that the many ministerial submissions that, I am sure, you present—how do you arrive at determining your levels of confidence? How do you weight the advice? Could you talk a little bit about how that process works.

**Ms De Veau:** It would depend on what is going to occur with the information. Here, you are aiming to make the minister aware. The weight of assessment that you need to say the information, when put together, amounts to: it is going to have to satisfy that awareness with that explanation of what 'awareness' means.

**Mr NIKOLIC:** Is there a degree of confidence? For example, in intelligence assessments, I imagine that you articulate a level of confidence in relation to the information you are presenting. Is that anticipated as part of this advice that might be presented?

**Mr Pezzullo:** Given the import of the consequences that flow, and particularly given the decision that the minister might be asked to consider—to not proceed with the notice at that particular point or to that particular person—we would anticipate any self-respecting minister would want a high degree of confidence that they were acting on sound grounds. They would get that both on the face of the document and perhaps by way of follow-up meetings with the person who put the advice—in this case, the secretary—but they might well seek to call in other statutory officers. The minister might be minded to probe the level of confidence that we have, but if we are doing our job properly we would give him or her that confidence on the face of the submission that we provide.

**Mr NIKOLIC:** And that assessment that you provide would be a function of the personnel at that interagency meeting—for domestic events, I imagine the AFP and others; for overseas events, other agency heads—presenting the information—

**Mr Pezzullo:** Administratively, we have started from day one on the assumption that the better quality advice would be joined-up advice so that every agency that has got something to say on the issue or has got fragments of the information that pertain to the conduct—which we keep coming back to; we are not making decisions about someone's guilt or innocence, and I am not seeking to characterise it from that point of view—or anyone who has got something to contribute to the dot-joining exercise, if I can use that term, would come to the table. Most of the agencies here would actually be represented, but other agencies would be involved. We have referred a couple of times to our foreign policy interests, for instance, so DFAT would be involved. The short answer to the question is: we would not only express our level of confidence in the information but also anticipate that any minister of the Crown faced with both the notice and a potential exemption, from the point of view of the public interest, to either rescind or stay the notice would want to be convinced about the matters to at least the same level of confidence, if not more.

**Mr NIKOLIC:** I imagine the nexus between the bureaucracy and the polity in presenting that advice would be like coordinating comments from the other agencies that are involved in contributing to that assessment and their relative confidence in making that assessment. Would that also be available to the minister as it went forward?

**Mr Pezzullo:** I think, as a matter of practice, the better course in such a matter would be to provide the minister with a joined-up piece of advice that effectively comes from an interagency board or interagency committee. The better practice would be, if there were strong dissenting views, you would almost go to the point of not putting the minister in the position of seeking to deliberate. It would really be the secretary's job, and that of the senior officers, to come to a consensus. If the consensus were not there or if there were a consensus on the conduct—there is no question about the conduct—but there were some tactical or strategic considerations that went to some of those public-interest questions that I alluded to earlier, it might be that the minister would be given options as to how to deal with the notice along the lines that we discussed earlier with Mr Byrne and with other members of the committee. It might be, and I hope I do not take too much liberty here, a statement to the effect that the commissioner of the AFP would prefer that, notwithstanding the conduct—it has been comfortably and well established—but to do with other matters, the commissioner's advice is X. Or the Director-General of Security provides the following comment or advice. That would weigh not on the operation of law provision, because the facts are whatever we can establish to the level of confidence that we can express to the minister, but on those public-interest considerations that we have talked about, on and off, throughout these proceedings.

**Mr NIKOLIC:** Thanks, Mr Pezzullo.

**Mr DREYFUS:** To go back to my question, it was the Commonwealth Ombudsman who raised this question on what standard might apply, because the bill was silent on the question. He offers three possibilities: reasonable suspicion, balance of probabilities or beyond reasonable doubt. Can I take it from the answers that have been given that—put to one side the fact that the bill is silent about it—it will not be beyond reasonable doubt?

**Mr Pezzullo:** I think Ms De Veau said we would have to be comfortably satisfied or satisfied. I will not put words in your mouth.

**Mr DREYFUS:** A degree of probability, I think.

**Mr Pezzullo:** I agree with what Ms De Veau says.

**Ms De Veau:** The minister needs to be aware that an event occurred and that awareness was knowledge, which we say has to be based on a high degree of probability as to the facts underpinning it. Of course, there is a question of judicial review, which will have a different approach to it.

**Mr DREYFUS:** I have many more questions, but I am conscious that I have taken up quite a deal of the two hours that have been set aside for this particular hearing. When is it proposed that we reconvene?

**CHAIR:** It was not. I am happy for you to just continue on.

**Mr DREYFUS:** This hearing has been set for two hours between four and six.

**CHAIR:** That was because I thought you would need two hours, but if you need longer—I do not know, Mr Pezzullo, whether you are—we still have another 20 minutes.

**Mr DREYFUS:** No, I am going to take it up. I was actually going to defer to colleagues, because they might want to ask some questions themselves.

**CHAIR:** No, we are happy for you to continue.

**Mr Pezzullo:** As veterans of many committee experiences, including estimates, we are entirely in the hands of your committee.

**Mr DREYFUS:** I wanted to continue exploring the consequences of the deprivation of citizenship. One of those consequences, as a number of the submissions to the committee have pointed out, is that an Australian citizen may be taken into immigration detention.

**Mr Pezzullo:** Well, a former—an ex-citizen.

**Mr DREYFUS:** An Australian citizen, who has been deprived of their citizenship, will become an ex-Australian-citizen. Is it the case that in most, or even all, circumstances the former Australian citizen will be detained?

**Mr Pezzullo:** One circumstance would be if they are offshore, then—

**Mr DREYFUS:** Let us deal with, just for the purposes of this hypothetical scenario, the onshore ex-Australian-citizen.

**Mr Pezzullo:** Then the Migration Act kicks in, because they have the status of being an ex-citizen, and the notification of that is by means of the minister's document. Each and every case would be slightly different, so I do not know that I can give you a blanket response. The Border Force Commissioner, who is responsible for enforcing the Migration Act—that is why the Border Force are represented at these proceedings; they are hard-wired into the process—would have a plan, because, as I have said on and off through these proceedings, it is inevitably going to be the case, Mr Dreyfus, that the persons of interest who might fall within this net—let us say it is a 33AA—would be of interest to other agencies for all sorts of reasons. Mr Outram, in his day job, has an investigations division and, indeed, a national security sub-branch within that division. They would consult with any number of agencies. We would take a view and provide advice to the minister wearing our other hat, as the department of immigration, on detention options that in some cases might be warranted, if the circumstances warrant it. In other cases there is the potential that removal action has already been packaged up as part of the advice given, so that the minister is blessed with both Citizenship Act advice and Migration Act advice. I can foresee that circumstance too. So there is not a 'one size fits all' answer.

**Mr DREYFUS:** No, I was simply wanting to ascertain that detention is distinctly a possibility.

**Mr Pezzullo:** It is a possibility, yes.

**Mr DREYFUS:** I want to put to you a number of propositions that the Law Council of Australia put in their written submission, about the consequences of the proposed new section 33AA. This is at paragraph 114 of their submission, and I will say this in advance so that we do not trip up over it: the Law Council, in their submission, use the words 'offence' and 'conduct' somewhat interchangeably. They said:



In summary, the proposed new section 33AA and possibly section 35 creates a situation in which:

- an Australian citizen, may be required to be detained on the basis of a mere suspicion that they have committed such an offence, rather than on the basis that they have actually committed an offence and thereby renounced their citizenship

Is that right that an Australian citizen may be required to be detained on the basis of a mere suspicion?

**Mr Pezzullo:** Logically that cannot be right, because they could not be detained if they were an Australian citizen.

**Mr DREYFUS:** Okay, let's not trip up over the semantics of it. A former Australian citizen—

**Mr Pezzullo:** It is a pretty important semantic distinction.

**Mr DREYFUS:** One moment they are a citizen, and the next moment, as a result of the operation of the processes that we have been discussing under section 33AA, they have ceased to be an Australian citizen.

**Mr Pezzullo:** With the issuance of the minister's notice.

**Mr DREYFUS:** So let's not trip up over that point.

**Mr BYRNE:** Are you sure about that, or is it just the conduct?

**Mr Pezzullo:** We would not know about that.

**Ms De Veau:** The other key point is that they would default immediately to an ex-citizen's visa. That is the language—

**Mr BYRNE:** Hang on a second. You have just said in your testimony that they are an ex-citizen the moment the conduct is committed, not when the minister issues the notice.

**Ms De Veau:** That is right.

**Mr BYRNE:** I am just picking you up on that, Mr Pezzullo.

**Ms De Veau:** And a person who has lost their citizenship automatically defaults to an ex-citizen's visa, which is one of the reasons that—

**Mr BYRNE:** But they are an ex-citizen from the moment there is conduct. According to the legislation, it is when the conduct is committed. Then awareness happens. You just said, Mr Pezzullo, it was when the minister issues a notice.

**Mr Pezzullo:** You are right, Mr Byrne. Administrative consequences have to flow, and until the minister has issued the said notification it is not available to us, as officials, to act in relation to an Australian citizen, in that manner. You are absolutely correct.

**Mr DREYFUS:** In the Law Council's proposition, substitute for 'an Australian citizen' the words 'a former Australian citizen who has ceased to be an Australian citizen by reason of section 33AA'. Is the Law Council right in saying of such a person that they may be detained on the basis of a mere suspicion that they have committed such an offence, rather than on the basis that they have actually committed an offence?

**Mr Pezzullo:** They would not be detained on the basis—and we are through the first half of the clause, so we have common language there. In relation to the back half of the phrase that you have read, again, I fear that logically it cannot be right, because there would be no detention of a former citizen based on suspicion of the commissioning of an offence, because that really goes to the operation not of 33AA but of the relevant section 35, the conviction one.

**Mr DREYFUS:** I am going to keep moving, Mr Pezzullo.

**Mr Pezzullo:** The answer, logically, is 'no'.

**Mr DREYFUS:** I take that as a 'no'.

**Mr Pezzullo:** They just need to be more precise with their terms, perhaps, and it might assist me, as an arts graduate, to understand what they are talking about.

**Mr DREYFUS:** What I am doing is giving the government an opportunity to comment on submissions that are being made to this committee by submitters. The second proposition they put in same paragraph is:

In summary, the proposed new section 33AA and possibly section 35 creates a situation in which ... the decision to detain is made by officers of the executive rather than being connected with the judicial process (eg, detention in custody pending a judicial trial).

Is that right?

**Mr Pezzullo:** Administrative detention is available in circumstances outside the operation of the criminal justice system, just by mere operation of the Migration Act. There are delegated decision makers that flow from

the minister right through to other officers, myself included, in terms of how persons will be both detained and dealt with under administrative detention for the purposes of the Migration Act. That is not custodial attention, and it is not detention pursuant to the operation of the criminal justice system. So logically that statement cannot hold true.

**Mr DREYFUS:** I will read it again to you, Mr Pezzullo:

The proposed new section 33 AA ... creates a situation in which ... the decision to detain is made by officers of the executive, rather than being connected with the judicial process.

That is true, isn't it? Because in section 33AA we have administrative decision making, we have public servants making decisions—or, as you wanted to say, reaching conclusions—

**Mr Pezzullo:** Assessing facts, I think.

**Mr DREYFUS:** and then making a decision to detain.

**Mr Pezzullo:** They are logically separated, because the decision to detain is only able to be enlivened under the Migration Act. There is no detention capacity under the Citizenship Act. The executive has to have come to the consciousness—the minister's notice is the vehicle, and I stand corrected by Mr Byrne—that someone is an ex-citizen, in effect, when the minister tells us that they are, even though the conduct predated that. We cannot detain people criminally. We do not do that absent criminal justice proceedings. My department, and the Border Force in particular, exercises a regime of detention that falls under the Migration Act.

**Ms De Veau:** For instance, a person would default to the ex-citizen's visa, and then there would be an administrative decision under the Migration Act as to whether that visa should be cancelled for any of the relevant grounds under the Migration Act, with the appropriate review mechanisms that attach to that administrative decision.

**Mr Pezzullo:** And that triggers a whole set of merit and other review points that are pertinent to the Migration Act.

**Ms De Veau:** So perhaps the incorrect assumption in that submission is that, upon the loss of citizenship, you move directly to detention. Well, you do not.

**Mr DREYFUS:** But here they are talking about someone who has been taken to detention—and that is why I commenced by asking Mr Pezzullo if it is possible that someone will be taken to detention.

**Ms De Veau:** And they may be—but because their ex-citizen visa has been cancelled.

**Mr DREYFUS:** The third proposition that the Law Council put forward in this paragraph is that the proposed new section 33AA creates a situation in which 'in order to be released from detention the person will, in practical terms, have to prove their own innocence (effectively reversing the normal burden of proof in relation to criminal offences and operating inconsistently with the presumption of innocence)'. Is the Law council right?

**Mr Pezzullo:** Again, with respect, logically it cannot be right because the Migration Act detention regime is distinct from other forms of custodial detention—which I think are being intimated here; it is some weeks since I have read their submission; I might have misread it. There is no-one in immigration detention who has to go through a reverse onus of proof through a criminal justice process to demonstrate their 'innocence'—I think I have paraphrased that right—because, under the Migration Act at least, no-one is detained under our criminal justice regime. They may well be of interest to the Federal Police or to other authorities for crimes they have committed that fall under criminal justice—and there is a lot of liaison between the Australian Border Force and the AFP and other agencies about those cross-jurisdictional questions. Perhaps it is just a colourful and expressive way to put it—and maybe I have misheard it—but the sense that if you are in migration detention in the circumstances that Ms De Veau has just postulated you have to prove yourself innocent presumes that there is some kind of criminal justice process on foot under the Migration Act. But logically, under the way that act works, that cannot be so.

**Mr DREYFUS:** The Law Council is dealing with the effect of the proposed new section 33AA. I think you have accepted that at least some former Australian citizens whose citizenship has been taken away by section 33AA will go into detention.

**Mr Pezzullo:** Migration detention.

**Mr DREYFUS:** Migration detention. What will they have to do to get out of migration detention?

**Mr Pezzullo:** Under the Migration Act there are a whole range of statutory provisions. There are case law provisions and there is discretion open to decision makers to overturn—

**Mr DREYFUS:** I am not looking for a thesis-length explanation of the book-length provisions in the Migration Act. I am trying to get to a simple proposition about someone whose citizenship is being revoked under section 33AA who has been taken into migration detention.

**Ms De Veau:** Again, they only come into detention by virtue of their ex-citizen visa being cancelled for one of the established grounds under the Migration Act.

**Senator BUSHBY:** But presumably somebody could lose their citizenship by virtue of their actions. They automatically then get an ex-citizen visa.

**Ms De Veau:** Automatically at law.

**Senator BUSHBY:** Ignoring other interests that might occur they could remain in Australia under that visa and not in detention?

**Ms De Veau:** Correct.

**Mr BYRNE:** Wouldn't you do a threat assessment? There should be something here; you've got to tighten this up. Without cutting across what Mr Dreyfus is saying, basically you should put something in there where there is an assessment that this person poses a threat, which would then lead to the person being detained. That is what you would be doing, isn't it? You say there are thresholds in the Migration Act—but you could tidy that up a bit.

**Ms De Veau:** That is the way the law is going to operate. At the moment, a person who loses their citizenship defaults to that visa.

**Mr BYRNE:** Of course.

**Ms De Veau:** It may be that there are, for instance, grounds to put up a submission to have that visa cancelled on character.

**Mr BYRNE:** So it is not beyond the bounds of reason to define that more clearly if this is what we are talking about, is it?

**Mr Pezzullo:** Are you suggesting a consequential amendment to the Migration Act? This all operates under the Migration Act.

**Mr BYRNE:** I understand. I think we could use a form of words in the explanatory memorandum that potentially deals with that just to clarify it.

**Ms De Veau:** So the answer to Mr Dreyfus's question is that the person would come out of detention in the same way that a person who has had their visa or right to stay in Australia cancelled for character or other grounds—that is, to go through the review processes that are available under the Migration Act.

**Mr DREYFUS:** The fourth point that the Law Council puts forward is this—and perhaps I would ask you not to focus on the use of the term 'innocence'. They say:

... a person who cannot demonstrate their innocence risks removal from Australia, ...

Is that right? Forget they have used the word 'innocence'. What they are saying is that someone has had their citizenship removed under section 33AA, the minister has signed the form and they have been taken into immigration detention. They are putting the proposition that that person, unless they can find a way through a legal proceeding to avoid this consequence, faces removal from Australia. Is that right?

**Mr Pezzullo:** Accepting that I am striking out a pretty loaded phrase, if we use—

**Mr DREYFUS:** I am asking—

**Mr Pezzullo:** With all due respect—

**Mr DREYFUS:** I have offered you the way to avoid the loaded phrase, Mr Pezzullo.

**CHAIR:** Mr Pezzullo, can I say that we appreciate your patience.

**Mr Pezzullo:** We are in the hands of the committee; I do not know what anyone else had to do. These are serious and complex matters, Mr Chair, and we need to explain them as best we can.

If we misspeak and use those sorts of phrases, hopefully we will get the same licence that has been afforded to the Law Council. But I will accept Mr Dreyfus's suggestion: strike-out 'innocence'. Would they have to demonstrate that they have a lawful right to remain in Australia? Yes.

**Ms De Veau:** Again it comes back to this. I mentioned judicial review earlier. There is the ability for a person who the executive says has engaged in conduct such that their citizenship has been lost to seek declaratory relief before the court to say that the conduct did not occur. The court reviews the material and makes a determination as to whether the conduct did or did not occur.

So the 'innocence' is important there, because it would not necessarily be that it could only be overturned on the basis that they established their innocence to a particular burden but rather that the court reviewed the material and said, 'No, it is not so.'

**Mr Pezzullo:** 'Innocence' in the sense that the Law Council understands it or should understand it.

**Mr DREYFUS:** In our earlier discussions about the process that is going to be used under section 33AA: on a number of occasions, Mr Pezzullo, you have referred to the possibility provided in the legislation that the minister might rescind the notice that he or she has signed. I want to take you to another submitter, the Australian Human Rights Commission. It has made a lengthy submission to the committee which offers some comments about what they describe as the minister's 'personal noncompellable discretionary power' to exempt individuals from operation of the new laws. They say that that power to exempt individuals will not cure the numerous deficiencies they have pointed to. And the first proposition they put is that the exemption power is bestowed on the minister personally and is nondelegable. For the assistance of colleagues, I am reading from paragraph 31 of the Human Rights Commission's submission. I will read it out:

The exemption power is bestowed on the Minister personally and is non-delegable. The Minister is necessarily a member of both the executive and the legislature. That means that the power cannot be exercised by an independent decision maker.

Is the Human Rights Commission right?

**Mr Pezzullo:** It is certainly personal, because the minister the office of the minister is named in the legislation. It does not allow for delegation, and it has to be exercised personally. I just would offer, by way of dicta on the way through that—

**Mr DREYFUS:** I thought you were an arts graduate, Mr Pezzullo!

**Mr Pezzullo:** Well, I just failed at the two units of administrative law I think I vaguely remember doing; I should have paid more attention!

With all due respect to Professor Triggs and her submission, in giving you that answer, factually, I do not necessarily accept that part of the contention because you have built in the other quote that says to remedy all the faults and flaws that the commission thinks are there. In other words, I do not accept, necessarily, or agree with the commission's description of flaws and deficiencies in the legislation. But read narrowly, as a description of the minister's powers, I think that is a fair rendition of them.

**Ms De Veau:** There are a number of other powers where the minister considers the public interest. Those powers, as they sit in the Migration Act at the moment, are also personal and non-delegable, in part because it is considered that the minister is the best person to be making judgments about the public interest. Examples include: section 46A, the lifting the bar on unauthorised maritime arrivals being able to apply for a visa; section 195A, the granting of a visa by someone who is already in immigration detention, regardless of whether they have applied for that to occur or whether they meet the criteria. There are a number of Migration Act powers in the same category as being made personal and non-delegable, where the minister has to consider something in the public interest. Others include section 197AB about making a residence determination to place a detainee in community detention. Then there are sections 351 and 417, where the minister can substitute an adverse decision of the Migration Review Tribunal or the Refugee Review Tribunal for a more favourable outcome and can grant a visa where one has already been refused. So there are a number of established powers that link to the public interest that had been designed in the same way.

**Mr DREYFUS:** Thanks very much, Ms De Veau. I think we are going to have to call it quits there because this hearing was just scheduled for the two hours, and we are going to have to find another time. I thank you all very much for your—

**CHAIR:** No. We are here now to finish this session. You have your opportunity to—

**Mr DREYFUS:** I have not finished my questioning.

**CHAIR:** You have had ample opportunity and you have further opportunity now. The officials are here. Mr Nikolic, do you have a question?

**Mr Pezzullo:** We are in the hands of the committee, Chair.

**CHAIR:** Thank you, Mr Pezzullo.

**Mr NIKOLIC:** Just on the paragraph that Mr Dreyfus was referring to, paragraph 31d, the Human Rights Commissioner also says:

There is no possibility of merits review of a decision of the Minister.

Is that an accurate—

**CHAIR:** Mr Nikolic, I would hate to interrupt. It looks like we are about to lose our quorum. So while we have a quorum, I will draw this to a conclusion. I thank you all very much for your time here. It is been greatly appreciated. You have gone beyond the call of duty to be here. I thank you very much for your attendance here today.

Could I ask a member to move that the evidence given before the committee today be accepted as part of the record of the committee inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015—

**Mr NIKOLIC:** So moved.

**CHAIR:** Thank you, Mr Nikolic. Could I ask a member to move that the committee receive as evidence to the inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 the additional submission provided by the Australian Bar Association and authorise it for publication.

**Mr DREYFUS:** So moved.

**Proceedings suspended from 18:04 to 18:15**

**HOWELL, Mr John, Lawyer, Australian Human Rights Commission**

**TRIGGS, Professor Gillian, President, Australian Human Rights Commission**

*Evidence was taken via teleconference—*

**CHAIR:** I now welcome representatives of the Australian Human Rights Commission, who are joining us via teleconference again. Thanks again for joining us, and apologies for the slight delay.

**Mr DREYFUS:** Thank you very much, Professor Triggs and Mr Howell for joining us again. On Wednesday, in relation to questions from Senator Bushby, you volunteered to have a look at how the possible review mechanisms might work. You said at page 18 of the Wednesday *Hansard* that you would go back and look at how the declaration would work, and Senator Bushby said that he would appreciate that. In effect, you took it on notice.

So, I have a mechanical question as to how that has gone and when you are going to be able to provide that further advice about the review mechanism, or judicial review mechanism or declaration mechanism to the committee?

**Mr Howell:** The commission intended to supply the response to those questions on notice by this Wednesday. That was the date which the committee secretariat had requested those for.

**Mr DREYFUS:** That is great—sorry, that is the left hand not knowing what the right hand is doing! I thank you very much for that.

In your submission, the Human Rights Commission discusses the impact of the exclusion of section 39 of the ASIO Act. I wonder if you could just tell us what the effect is of section 39 of the ASIO Act? And if the bill were to be amended so that there did need to be a formal security assessment, what impact do you think this might have on the operation of the bill in practice?

**Mr Howell:** The effect of the exclusion of section 39 of the ASIO Act means that administrative actions can be taken under the bill, if the bill is passed, without a formal ASIO security assessment being provided. That means, potentially, that an advice from ASIO which does not meet the same threshold could be relied upon.

There is also a subsequent effect insofar as security assessments as they relate to Australian citizens are reviewable by the appropriate division of the Administrative Appeals Tribunal. Excluding the operation of section 39 of the ASIO Act within this bill would have the effect that advice from ASIO would not be reviewable insofar as it were relied upon to cancel or revoke the citizenship of Australians.

**Mr DREYFUS:** How do you balance the potential need for swift action to be taken against individuals suspected of terrorism related conducted or terrorism related offences—that need—with the desirability of more complete evidence, such as a full ASIO security assessment?

**Mr Howell:** Perhaps Professor Triggs would like to add to this. Obviously, we acknowledge that there are circumstances when very rapid action is warranted. On the other hand, given the severity of the nature of the consequence—loss of citizenship—it is very important that those consequences are not visited upon people unless there is an adequate evidentiary basis. On the one hand, I am aware that security agencies can sometimes provide assessments very quickly. The commission is not in a position to say whether that would or would not always be possible. If that were a very real and pressing concern, then perhaps alternative mechanisms would have to be considered. For example, it might be a provisional suspension rather than a full cancellation. Events could be made absolute once a formal assessment was provided. As I say, the commission would not be able to really comment on the necessity for that type of extra measure, not knowing all the circumstances of the agencies that might be providing this advice.

**Prof. Triggs:** Could I just add that of course the implication of your question is important. There may be occasions when the minister has to act quickly. Of course we accept that there may be circumstances in which that is true. But what is worrying is that there is no process for ensuring that the evidence is of a credible nature to warrant even, for example, suspension—as distinct from cancellation—or automaticity. As you will know very well, Mr Dreyfus, it is quite possible to have a duty judge on a 24-hour process by which these matters can be assessed independently as well as through the minister. I think these are the sorts of checks and balances that need to be in the legislation in order to meet the quite reasonable need to act quickly.

**Mr DREYFUS:** Thank you. At paragraph 35 of your submission you noted a number of consequences of loss of citizenship. There is one of those in particular that I want to ask you about. You said:

Loss of citizenship may also lead to loss of a passport, removal from the electoral roll and loss of entitlement to social security benefits.

Then you said:

It will change the activities that intelligence organisations such as ASIS and the ASD—the Australian Signals Directorate—can undertake with respect to a person.

Could you elaborate on what those changes are—that is, the changes to the activities that ASIS and ASD can undertake—and whether there are any human rights implications?

**Mr Howell:** I am probably not in a position to give a complete answer now. I can provide further detail with the written responses to other questions on notice, if that would be of assistance to the committee. The reference in the submission is a reference to some of the changes that were made in the previous suite of national security legislation last year. The functions of some of Australia's internationally operating intelligence agencies are, in general, restricted to investigating activities of non-Australian citizens. The ways in which they can proceed are more limited with respect to Australian citizens. For example, to carry out certain functions there might be a need for some ministerial approval if the target of that particular function is an Australian citizen. I am happy to revisit the legislation and provide a slightly more detailed response and advice if that would be of assistance.

**Mr DREYFUS:** We would appreciate that, Mr Howell. I will leave that for you to respond in writing and I will move on. Many of the submissions that the committee has received have expressed concern about the processes outlined in the bill, particularly the procedural fairness provisions—the relative absence of procedural fairness provisions is the way in which some submitters have put it. In your view, what are the key amendments that would strengthen the bill in this regard?

**Prof. Triggs:** We made a number of recommendations that you will see at paragraph 11. I think the key procedural safeguard would be that the notion of automaticity must be given some legal substance through a process, so that in fact it would not be automatic. There would have to be some process within the department, ultimately reviewable, that would measure the facts known to ASIO and the department against the criteria for loss or repudiation of citizenship, and a determination made. We believe that that determination should be through a proper judicial process with a judge or tribunal making the determination. So, in short, we are saying that the idea of automaticity is really inconsistent with the doctrine of separation of powers and the role of the judiciary in determining matters according to whether the facts trigger one of the consequences under the new bill.

**Mr DREYFUS:** I was interested in key propositions, so thank you, Professor Triggs. You comment that the deprivation of citizenship that this bill would introduce does not take into account the relative seriousness of the conduct in, for example, proposed section 33AA. It has been suggested by other submitters that revocation, or deprivation of citizenship, should only occur after a conviction for more serious offences that result in a penalty of 10 years jail or more. Would you consider reference to the actual sentence, as some submitters have referred to it, to be a more proportionate approach?

**Mr Howell:** That kind of a threshold sentence would certainly be a much stronger protection to ensure that only the most serious conduct was captured by the provisions of the bill. From a human rights law perspective it is not possible for us to say precisely what that threshold should be. Having some threshold would certainly be an improvement on the bill as it currently stands.

**Prof. Triggs:** While I would agree that the threshold, at that level, would make very clear the level of seriousness, I fear that it would not really get to the nub of the problem again. The real question is: have the acts been ones which threaten Australia and threaten Australians in a meaningful way. Frankly, I would think it much more important to give the reviewing body the discretion to determine whether this is a really serious matter or not. Certainly, the number of years as a maximum penalty would be an important guide, but I would be inclined not to use it as a benchmark and only as a guide.

**Mr DREYFUS:** Does that relate to one of your recommendations being that any decision or mechanism to deprive a person of citizenship should take into account the particular circumstances of the person and their conduct?

**Prof. Triggs:** Yes, that is exactly what I am getting to. As we have made a point in other contexts on the difficulty of mandatory sentencing provisions, the critical human rights perspective is that the circumstances of the individual should be considered by the determining body. That would inform my own view that an arbitrary number of years is not really entirely to the point.

**Mr DREYFUS:** Elsewhere in your recommendations you recommend that the phrase 'in the service of a declared terrorist organisation', which appears in proposed section 35(1)(b)(ii), should be defined. This is a submission that we have had, to like effect, from other submitters including UNICEF and the Law Council, to

name a couple. What does the Human Rights Commission see as the key issues arising from the section in the bill, in its currently drafted form?

**Prof. Triggs:** We have not gone into any detail, as you will see from our submission on this point. The primary concern is the phrase is one that does not have any established jurisprudence. It is very unclear exactly what it means. It is not as simple, as you would appreciate, as saying 'whether one is part of the armed forces of a body'. This is the complexity of creating new laws that recognise that we do not have insignia for Army or hierarchies. We do not have that kind of clarity with an army. It is obvious that one has to come up with different tests for what can often be just singular actions. But I think 'in the service of' is a very broad term and, if it were to be retained, it would be helpful if it could be explained what exactly that means.

**Mr DREYFUS:** Thank you, Professor Triggs. At paragraph 43 in section 10 of your submission, on page 13, you have made submissions to this committee about the retrospectivity reference that the committee has been given, namely 'whether the proposed amendments relating to loss of citizenship as a result of criminal conviction should be made retrospective'. In particular, you have referred to article 15(1) of the International Covenant on Civil and Political Rights, to which Australia has acceded. You make a comment at paragraph 46 that the fact of the effect of a measure being a penalty is not determined by the way in which a state chooses to describe it. I just wonder if I could direct your attention to what was said in the second reading speech for this bill, where the following sentence appeared:

The intention of the changes is the protection of the community and the upholding of its values, rather than punishing people for terrorist or hostile acts.

Does the fact of the government having chosen to describe the intention of the bill in that manner alter the way in which the effect of the bill is to be considered for the purposes of article 15 of the International Covenant on Civil and Political Rights?

**Mr Howell:** I might start by talking about it in a domestic context. The way a court would approach questions of interpretation of what the intention of a statute is will be by construing the language of the statute, first and foremost, and that will be determinative. It is only if there is any uncertainty about that process that secondary materials would become relevant. The same would be true in the international sphere. Whether a particular measure is punitive in nature must be determined by looking at what the actual measure is, why it is being imposed and what the functioning of the regime is. That is how the true character of the measure would be determined.

**Mr DREYFUS:** You have drawn attention at paragraph 47 to a range of factors that would be relevant to determining the effect of the loss of citizenship. Is it the commission's view that it would be regarded as a penalty?

**Prof. Triggs:** I think our view is that this is a penalty.

**Mr DREYFUS:** I ask you then to turn to another matter, which is the effect of this bill in relation to Australia's international obligations to children. Are you able to explain why it is that you consider this bill does not meet Australia's international obligations to children?

**Prof. Triggs:** As you will know, there are very special provisions under the Convention on the Rights of the Child that are listed in the submission. I think our feeling is that children will have their citizenship cancelled in the same way as an adult, but, at least by reference to the Convention on the Rights of the Child, in a sense higher standards apply on the basis of the best interests of that child. Loss of citizenship as a penalty, which we have already stated, appears to be even more arbitrary in relation to a child than it is in relation to an adult. So, when one goes through these various provisions of the convention, it seems that there are even more powerful arguments in relation to a child than there would be in relation to an adult.

**Mr Howell:** Perhaps I could quickly add to that. We have focused particularly on the core obligation that, in any action being taken in relation to a child, the child's best interests must be a primary consideration. Given that, in respect of loss of citizenship by conduct, the loss occurs automatically, there is simply no place in the regime that would be established by this bill for the best interests of the child to be taken into account.

**Prof Triggs:** Adding to that is the other point, of course—and we have stated it; I am really stating what is already there—that a child is considerably less culpable to the extent that fault or culpability is a relevant consideration. And of course it should be in relation to an adult; this really does not apply to children.

**Mr DREYFUS:** You have set out article 3 of the Convention on the Rights of the Child, which requires:  
... the best interests of the child shall be a primary consideration



in all actions concerning children. I wonder if you could elaborate on the points that you made at paragraph 41 of your submission, as to the matters that would have to be considered in looking at the 'best interests'? In particular, what changes would you recommend to the bill that address these issues of how to consider the best interests of the child?

**Prof Triggs:** Assuming that there were processes and that this were not automatic, one would hope that in considering whether loss of citizenship were to be the ultimate penalty by that determinative body that that body would be able to receive evidence in relation to the interests of the child affected. There might be an advocate for the child, or the determining authority would be able to look at special evidence that related to that child as distinct from the adult.

In other words we are really asking for a process, and that during that process the interests of the child would be taken into account as a primary consideration. For example, we know that the High Court has talked about this in the Teoh case; how it is that administering officials—government officials—would view the particular circumstances of the child and how that child would be affected by loss of citizenship. We have seen dramatic instances of children being affected by their parents' decisions very much in the media already.

**Mr DREYFUS:** In section 11 of your submission you have noted in a very shorthand way—if I can say so—differences from other countries with the proposed regime in this bill. I just want to check that there are in fact differences. You have said, first of all:

The United States provides for renunciation of citizenship; however, it is necessary that a person intend to renounce their citizenship.

Under that kind of regime—and I think you referred to the notable US Supreme Court decision in Vance vs Terrazas—there is no part of intention at the subjective level that is required to be found in this bill, is there?

**Prof Triggs:** No, not at all. This section, as you said, has been done in a very brief way, and if some comparative work were helpful we would certainly be happy to look at it in more detail. But we have certainly been struck by the United States provisions, which set out quite a comprehensive list of acts which will constitute the renunciation. But as you know, in the Vance decision the Supreme Court went further than the list and said that more was required, and that a full—presumably subjective—intent is required before that renunciation can be determined against somebody. That really should be a pointer by comparison with the bill that you are considering, because there is no such intent required insofar as can be discerned from the bill. I think it unlikely that any court would ever inject a subjective intent into this legislation, but that of course is a matter for a court in interpreting whatever language of the bill emerges.

**Mr DREYFUS:** You have noted the different path the United Kingdom has gone down, but in relation to Canada you have said:

Canada allows for revocation of citizenship for persons convicted of certain offences. However, account is taken of the severity of the offending. Affected persons are informed of the grounds of the decision and allowed make submissions. Avenues of appeal are available.

Are there any parts of the Canadian regime that might be adopted, to some advantage, in any Australian regime of revocation of Australian citizenship?

**Prof. Triggs:** This model, along with the others, should be looked at for comparative purposes and to establish a model. Obviously, with this model, the determining body would be looking at how serious the act was, which is something we just discussed a few moments ago. Importantly, they are to be informed of the grounds of the decision and they have a capacity both to make submissions and to have an appeal. That is a model that Australia should look at as being a fair one that at least responds to the human-rights concerns and the seriousness of loss of citizenship. Clearly, you can see, even from these very brief descriptions of other jurisdictions, comparable jurisdictions, that the models and the requirements are significantly more compliant with basic human-rights standards.

**Mr DREYFUS:** Finally, I want to ask you about something that appears in the statement of compatibility with human rights in the explanatory memorandum. It is at page 32 of the explanatory memorandum. The bill provides, in effect, that a dual national who engages in certain conduct will be held to have repudiated their allegiance to Australia—whereas sole nationals who engage in identical conduct will not. We see in the statement of compatibility with human rights, referring to article 26 of the International Covenant on Civil and Political Rights, at paragraph 29, the statement explains this as 'differentiation' and therefore not a breach of the human right of equality before the law, which is what article 26 of the covenant is directed to. Does the commission agree with this characterisation of the application of the bill to dual nationals as 'differentiation'?

**Mr Howell:** In so far as 'to differentiate' is automatically taken to be non-discrimination, I do not think it is a proposition we, respectfully, could agree with. Discrimination involves treating people differently. The question of whether there is discrimination will depend on whether there is some justifiable reason for treating people differently. With respect to this particular aspect of the bill, there has been a little bit of commentary that I have seen. It is certainly arguable that this type of distinction may breach article 26 of the covenant, but we are in a situation where there is also an obligation that Australia has to avoid rendering sole nationals stateless by depriving them of their citizenship. Insofar as the question is, 'Is this a mere differentiation and therefore not discrimination?' that is, perhaps, with respect, a slightly simplistic analysis.

**Prof. Triggs:** But there could be some complications, in terms of interpreting article 26, because discrimination is prohibited on specified grounds. One of those grounds is status and you could say that this is a discrimination on the ground of status as a dual national as distinct from a single national. The question mark that I would have in my mind, and I do not know the answer, is: would an international tribunal, for example, say that you would be entitled to make the differentiation because you are actually protecting the rights of a single national as distinct from a dual national? I am not quite sure what the answer to that is. I do think this is not really relevant to the core question, here, which is that you are taking away citizenship from a particular class of persons and that may not be justifiable in all the circumstances.

**Mr DREYFUS:** Can I explore that a little bit with you, because it is a particularly difficult question? Let us just look at the extreme case of someone who goes to fight with a proscribed terrorist organisation in Syria and commits dreadful acts of terrorism. Australia is not free to act against that person in relation to their citizenship if they are a sole citizen, because of our obligation under the Convention on the Reduction of Statelessness. So I would just ask you to accept that. With that limitation in mind, that it is not open to Australia to pursue revocation of citizenship for a sole citizen, isn't Australia nevertheless free to apply its own determination of our own national circumstances, our own national security setting and our own view of citizenship and nevertheless take this legislative action against dual citizens?

**Prof. Triggs:** Yes. That is why I feel that, if an international tribunal were to be asked this question, I think the tribunal would be very likely to say that you not have exercised the sovereign power to take away citizenship in relation to somebody who would be thereby made stateless. Therefore, the only option Australia would have to exercise its sovereignty would be to take away citizenship from somebody who is a dual national. It is entirely likely that international jurisprudence would accept the power of the state to act in this apparently differentiating way but in order to preserve the obligation not to be stateless. So I think your analysis is correct in that international law would not stand against the sovereign right of states to withdraw citizenship. But the question then is: in what circumstances can that citizenship be withdrawn in a way that is consistent with international legal standards and the rule of law domestically?

**Mr DREYFUS:** Thanks very much, Professor Triggs. That concludes my questions. Thank you, Mr Howell, and we look forward to receiving the piece of additional work that is going to come later in the week.

**CHAIR:** Thank you for giving evidence at the hearing tonight. You will be sent a copy of the transcript of your evidence, to which you may suggest corrections. If you have been asked to provide any additional material, please forward this to the secretariat as soon as possible. If the committee has any further questions, the secretariat will write to you.

*Resolved that these proceedings be published.*

**Committee adjourned at 18:48**