



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND
SECURITY

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

TUESDAY, 4 AUGUST 2015

CANBERRA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

To search the parliamentary database, go to:

<http://parlinfo.aph.gov.au>

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Tuesday, 4 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:

WITNESSES

ABBASOVA, Ms Gulnara, Director, Federation of Ethnic Communities' Councils of Australia	30
BASHIR, Ms Gabrielle SC, Member, National Criminal Law Committee, Law Council of Australia	1
GIBB, Ms Doris, Acting Deputy Ombudsman, Office of the Commonwealth Ombudsman	35
GILLEN, Ms Erin, Senior Policy and Project Officer, Federation of Ethnic Communities' Councils of Australia	30
GRAMMATIKAKIS, Ms Eugenia, Acting Chair, Federation of Ethnic Communities' Councils of Australia	30
KENNETT, Mr Geoffrey SC, Chair, Administrative Law Committee, Law Council of Australia.....	1
McCONNEL, Mr Duncan, President, Law Council of Australia	1
MOLT, Dr Natasha, Senior Policy Lawyer, Criminal and National Security Law, Law Council of Australia	1
NEAVE, Mr Colin, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman.....	35
PILLAI, Ms Sangeetha, Private capacity	12
RUBENSTEIN, Professor Kim, Private capacity	37
WERTHEIM, Mr Peter John, AM, Executive Director, Executive Council of Australian Jewry	24
WILLIAMS, Professor George John, AO, Private capacity	12

BASHIR, Ms Gabrielle SC, Member, National Criminal Law Committee, Law Council of Australia

KENNETT, Mr Geoffrey SC, Chair, Administrative Law Committee, Law Council of Australia

McCONNEL, Mr Duncan, President, Law Council of Australia

MOLT, Dr Natasha, Senior Policy Lawyer, Criminal and National Security Law, Law Council of Australia

Committee met at 14:09

CHAIR (Mr Tehan): I declare open this public hearing of the Parliamentary Joint Committee on Intelligence and Security. This is the first of two planned public hearings for the committee's inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015. These are public proceedings 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 the committee will consider the matter. I now welcome representatives of the Law Council of Australia.

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 some introductory remarks before we proceed to questions?

Mr McConnel: Yes, thank you. The Law Council is the peak body representing the legal profession in Australia. We thank the committee for inviting the Law Council of Australia to appear before you today as part of this important inquiry to discuss the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and what it means to be an Australian citizen.

For the longest time, democracy has been founded on the concept of citizenship and participation by those citizens in the political life of their state. As the bedrock of our democratic system of government, citizenship is not something to be taken lightly or to be changed wantonly. It is the highest form of membership of the Australian community, which comes with great privileges but also with important responsibilities. Rights and responsibilities are interlinked, and one cannot be separated from the other. Rejection of the responsibilities of citizenship has significant consequences for the integrity of the state and fairness to the body of citizens as a whole.

Removing the privileges of citizenship by ceasing an individual's citizenship has significant consequences for a person, including the potential for deportation, detention, prevention from entering Australia and no longer receiving consular assistance overseas. The Australian parliament, the executive government and the courts each have a responsibility to ensure the security and harmony of Australia and its people. Legislative measures to remove citizenship should be carefully considered and must abide with the fundamental legal principles on which our democracy is founded and be a necessary and proportionate response to potential threats.

The Law Council acknowledges that the bill seeks to pursue a legitimate objective of addressing terrorism and providing consequences for citizens who are no longer loyal to Australia and its people. While ultimately it is a matter for the parliament to determine the necessity and appropriate form of the bill, the Law Council has serious concerns with the current form of the bill for a number of reasons. Firstly, the basis and scope of the Commonwealth's power to enact the proposed citizenship legislation appears to be uncertain. Secondly, the grounds for loss of citizenship capture conduct which may be unrelated to a lack of allegiance to Australia or may be minor conduct. Thirdly, the procedures for losing citizenship and subsequent administrative action do not provide proficient safeguards to accord with the rule of law: the presumption of innocence, the right to a fair trial and the right of appeal. Fourthly, it does not provide adequate protections for children or to prevent indefinite detention and effective statelessness. Finally, the partial retrospectivity of the bill is inconsistent with the rule of law.

Consequently, the Law Council recommends that the bill be amended, if it is to be passed, to properly align with fundamental legal principles. Should the committee find that a citizenship cessation scheme is necessary and appropriate, ideally loss of citizenship under the bill should only flow after a conviction by an independent, impartial and competent court or tribunal, particularly where the conduct in question has occurred within Australia. After a conviction, automatic citizenship cessation should not occur but should require a decision by the minister, considering whether the person poses a substantial risk to Australia's security or threatens Australia's international standing. The minister's decision should then afford procedural fairness and be accompanied by effective judicial review. Should such a model not be accepted by the committee, the Law Council's submission

includes a number of suggestions for amendments to the current bill aimed at ensuring that it is limited to its intended purpose, that it incorporates appropriate safeguards and accords more readily with fundamental legal principles such as the rule of law.

The Law Council commends the committee for inquiring into the bill and encourages robust parliamentary debate on the significance and fundamental questions for our Australian democracy raised by this bill and whether a mechanism that automatically strips a person of their citizenship by operation of law is necessary, reasonable or appropriate. To answer specific questions this afternoon Mr Geoffrey Kennett SC is senior counsel from Sydney with expertise in areas of administrative and constitutional law, and Ms Gabrielle Bashir SC is senior council with expertise in areas of criminal law.

Mr NIKOLIC: Thank you for your submission. I note at attachment A of your submission that you talk about the role of the Law Council being representing the legal profession and advising on how 'the justice system can be improved for the benefit of the community.' Is that the entire community or is it those accused of wrongdoing and in this case potential people whose citizenship is at risk?

Mr McConnell: No, we see our role in advocacy as being for the broad community. You will find, I am sure, that the Law Council does not only advocate in the interests of accused persons or people facing the criminal justice system from a defendant's perspective.

Mr NIKOLIC: Could you direct me to that aspect of your submission that talks about improving the justice system for victims of resurgent terrorism? Where is the public interest section here? There is plenty that I have found relating to no retrospectivity of this law, constraints on the minister, requests for exemptions, consideration of rehabilitation prospects of the offender, extra layers of judicial review, requirements for full intelligence assessments by ASIO, reference to the self-executing provisions of the bill and so on, but what section of your submission deals with that public interest dimension that I have mentioned?

Mr McConnell: On one level I think all of the submission deals with it in the sense that what we are advocating for here is that whatever model the parliament chooses to proceed with in the form of legislation does so in a manner which protects the interests of the individual. The interests of the individual includes people who may have committed an offence, they include people about whom there may be intelligence of their connection with an offence but in respect of those people there is not a significant body of information, certainly not the amount of information that might satisfy our court as to their involvement in such activity. We come from the perspective of seeking to ensure a system which provides for the independent and considered determination of the involvement of people in such activities.

Mr NIKOLIC: If we look at some of the conduct and offences captured by this bill, you say at paragraphs 6(a) and (c) of your submission that: 'conduct captured by the Bill should demonstrate a specific lack of allegiance to Australia' and that offences 'should be of a sufficient level of seriousness to trigger citizenship cessation.' If I could turn first of all to conduct, the sort of conduct that is described as engaging in international terrorist activities, using explosives or lethal devices, engaging in terrorist acts, providing or receiving training connected with preparation for engagement in or assistance in a terrorist act, recruiting people for financing terrorism and so on, did you consider that that conduct demonstrates a lack of allegiance and if not what conduct in your view would meet the test that you apply that it has to be sufficiently serious conduct?

Mr McConnell: Yes. There are really two aspects to that: one is some uncertainty around the specific use of terms and concepts attaching to conduct—and I will ask Ms Bashir to elaborate on those; and the other aspect is the connection of whatever the conduct or behaviour is to the concept of either terrorism or a lack of allegiance to Australia. There is throughout not just 33AA but also 35A conduct which is caught that does not necessarily have that connection or that dimension to it. I will invite Ms Bashir to address some of the specific concepts attaching to conduct that raise concerns for the Law Council.

Ms Bashir: If I could first draw your attention to clause 35A, which captures convictions for terrorism offences but also certain other offences. Moving to subclause (3) and in particular subparagraph (e), it picks up, for example, section 29 of the Crimes Act 1914, which is an offence of intentionally damaging Commonwealth property. The fact that it is Commonwealth property is almost deemed in the act and there is no necessity for knowledge, but it does have to be an intentional damage of property. Now, that could capture something like puncturing tyres on a Commonwealth vehicle without knowledge that it was a Commonwealth vehicle. It could capture something like writing your phone number in permanent marker on a soldier's uniform. It just needs to be a property of the Commonwealth. So it can capture activity that is very, very minor and that may be wholly unrelated to not having an allegiance to Australia and also not related at all to terrorism offences. So the breadth of the scope of the bill in that respect is something that the Law Council draws attention to.

In relation to clause 33AA, by virtue of subclause 2(h), one then moves to division 117, which is part 5.5. Again, this is because it picks up division 119, but the definition of what constitutes engaging in hostile activity brings you back to 117.1, the definitions. Again, we see in subparagraph (e) the picking up of unlawfully destroying or damaging any real or personal property belonging to the government or that of any other foreign country. So it does capture an incredibly broad range of conduct and we do have concerns in that respect. When one sees the words:

(h) engaging in foreign incursions and recruitment ...

on the face of it, it looks to be something incredibly serious and potentially related to terrorism, but when one goes to the actual sections, it has the potential to capture incredibly minor conduct and, upon your conviction, you immediately cease to be a citizen. So there is no scope for the range of penalties—for example, if you were simply put on a good behaviour bond for some minor conduct, you would still cease to be a citizen, as opposed to, for example, a very real terrorist act where you are sentenced to life or 25 years or even 15 years in prison. It captures such a broad range of conduct.

Mr NIKOLIC: I take your point. I think you are seeking protections from those instances of minimal damage to Commonwealth buildings, but it would also capture someone using explosions to blow up a building at Holsworthy Barracks as well—would it not?

Ms Bashir: In terms of that, there are different sections that capture explosive devices that are within subclause (3), so one could safely remove clause 29 and still capture that. Could I just go to another aspect that Mr McConnel raised which is to do with the uncertainties in the language that has been used in the bill. In relation to section 33AA what is not clear, and what the Law Council asked to be made clear, is whether it is voluntary and intentional conduct that is sought to be captured. The explanatory memorandum suggests that that is the case, but the legislation does not make that clear. I will take you to a specific example to demonstrate that. If one goes through subsection 2(d) and subsection 3 to the words and expressions used in section 102.2 of the Criminal Code, the meaning is not defined any more specifically than that. It captures all of this section, including the two subsections. Here, it does say that a person commits an offence if the person 'intentionally directs the activities of an organisation,' but in subsection (c) you can see that it picks up knowledge—do you see that?

Mr NIKOLIC: Yes.

Ms Bashir: Whereas subsection (2)(c) picks recklessness as a mental element, so it is wholly unclear upon which mental state the conduct operates in order for cessation of citizenship. We would urge that if these provisions are retained it should be voluntary and intentional.

That may also bring in some protections which are protections under the law for children committing some acts, and we have addressed that in our submission, because under the criminal law certainly if you are under age 10 there is a lack of capacity in terms of your mental state, and between 10 and 14 there should be proof of knowledge of the difference between right and wrong. We do not see any of that addressed within the bill, although the explanatory memorandum suggests it is the intention that that be here somewhere.

Mr NIKOLIC: In terms of protections though, as I understand it, a person losing their citizenship under any of these provisions would be able to seek a declaration from a court that they have not in fact lost their citizenship. Why is that not a sufficient safeguard? As I understand from some of the submissions, it is the fact that it is not explicitly mentioned. I am no lawyer, but is there a need to mention that explicitly, given that both the Federal Court and the High Court have original jurisdiction and it goes without saying?

Ms Bashir: I will ask Mr Kennett to answer that question.

Mr Kennett: Certainly the jurisdiction of those courts is there, and in the case of the High Court it is a constitutionally entrenched jurisdiction. We do not regard it as certain that a person, in the absence of some specific decision having been taken against them, would be able to approach a court for declaratory relief. The court may very well think that it was essentially being asked to give an advisory opinion, and federal courts as a rule cannot do that. It may be necessary for some specific dispute to crystallise, such as if the immigration department arrives at a person's door to take them into detention on the basis that they are no longer a citizen. The person would then clearly have access to the courts for remedies to seek to demonstrate that their detention was unlawful on the basis that they in fact were a citizen. So that level of protection is there.

In a way, that takes us into the merits of the self-executing model that this bill has adopted, which you see most prominently in proposed section 33AA. This appears to have been adopted out of a concern that the decision making power to be reposed in the minister would be vulnerable to constitutional challenge. We can see why that might be and why the parliament may come to the view in the end that the self-executing model is the only way to do this. But we do have some reservations about it largely because it does not provide a process up-front where a

person's status can be authoritatively determined. They may engage in conduct which may not come to anybody's attention for some years. The minister may then issue them a notice, or, indeed, not issue a notice but come to the view that the person has ceased to be a citizen. It may then be some time before that crystallises in any sort of government action against the person, and it is at that point that the person essentially needs to seek to prove a negative. It could be a case of mistaken identity or there could be any number of possible reasons why the person might seek to contend that, no, in fact they have not engaged in this conduct and that they remain a citizen. But they have to seek to prove that several years down the track and generally, at least, without having any access to the intelligence material on which the government action has been based. So the model does have, as we see it, some very real difficulties, although we can see why the drafter has been pushed in this direction.

Mr RUDDOCK: Are you suggesting an alternative that would be constitutionally sound?

Mr Kennett: First I should say that, certainly for my part, I do not presume to give the committee constitutional advice. I am sure that the committee has other sources of that advice and will be hearing later in the day from constitutional experts. We would suggest that a model which would be worth exploring, at least, would be for the minister to seek for a court to make a declaration on the motion of the minister that a person has engaged in conduct and therefore ceased to be a citizen. That would not need to occur on the criminal standard of proof, although a court would, at least ordinarily, want to see some evidence in order to make a finding. A decision by a court and a declaration, on the application of the minister, would seem to us, at least on the face of it, not to be obviously unconstitutional—other people might have different views on that—and would have the merit of providing an authoritative up-front determination of the matter.

Mr NIKOLIC: That self-executing aspect that you talk about has been with us for a long time though, hasn't it? Apart from the self-executing aspect of someone who fought with the enemies of Australia against Australia, the minister has also had discretion, for example, to remove citizenship where someone has fraudulently misrepresented something on an application. If I understand what you are saying, it is that citizenship can still be removed, without all of these new layers of process, for someone who misrepresents or omits information on a form, but where there is a reasonable suspicion of someone's involvement in terrorism we have to have a whole range of additional measures in place. What are we doing to the original law beyond upgrading it to say that we are now trying to bring non-state actors, rather than just the enemies of Australia in a post-World War II construct, into modern legislation?

Mr Kennett: The discretionary revocation of citizenship, as I understand it, is in cases where there has been some misrepresentation in the process of obtaining it.

Mr DREYFUS: And a conviction.

Mr Kennett: Yes. If the minister, or the minister's predecessor, has made a decision to confer a privilege on somebody and then discovers that the privilege was obtained by fraud, then it is relatively easy to see why the minister should have the power to retract that. The provision for automatic loss of citizenship at the moment, I think, is limited to serving in the armed forces of an enemy state. That—so far as I am aware, at any rate—has never been used and never been tested in the courts. It is there. Whether somebody has joined the armed forces of an enemy state will, at least ordinarily, be relatively simple to ascertain. That may not be the case in relation to some of the conduct mentioned in section 33AA, which is more indeterminate in its reach and, of course, a great deal broader than the existing self-executing provisions.

Ms Bashir: Could I add to the answer?

Mr NIKOLIC: We are sort of running short of time, and I understand I am taking up a lot of time. Just one final question before I pass on—

Mr DREYFUS: I would be interested in Ms Bashir's additional comment.

Ms Bashir: It does also answer your question about the difficulties with self-executing. There may be something that lies within the self-executing renunciation by conduct that we have not drawn to the attention of the committee in our written submission that may need to be considered, which is that if one thinks along a continuum of conduct and at the very beginning there is conduct that one may think attracts the self-executing provisions under section 33AA—therefore the person ceases to be a citizen upon commencing the conduct—but there is further conduct which the Crown may wish to bring to trial and obtain a conviction for under section 35A, it may be that, unwittingly, because the person is not a citizen either they have a defence to the criminal offence or it may attract some kind of constitutional arguments or difficulties with jurisdiction in trying the person of the further and potentially more serious offence. That is something we have not brought to your attention in any written document—and we are happy to do so—but it is something that we are concerned about because there may be many different kinds of conduct, and a self-executing provision that operates immediately upon the

commencement of the conduct may unwittingly rob our country of the ability to bring people to trial for even more serious offences.

Mr NIKOLIC: Talking about the trial and conviction—there are clearly difficulties in gathering the same sort of brief of evidence in places like Mosul and Al-Raqqa than there would have been, perhaps, in the aftermath of the Lindt Cafe event, where teams of forensic personnel and police descended and were able to build a brief of evidence. What do we do where it is difficult to provide the sort of brief of evidence for someone involved in egregious terrorist acts with ISIL, let's say, in places like Syria and Iraq, but where our security and intelligence agencies are telling us there is a very clear demonstration of the fact—perhaps not admissible to the standard of Australian law—

Senator BUSHBY: Or alternatively, which could compromise security—

Mr NIKOLIC: or might compromise the basis on which that information has been gained in the intelligence collection cycle. If I understand your argument on conviction, it is either conviction or nought. Unless it can be proven in a court of law, then the person walks. Is that, in essence, what you are saying?

Mr McConnell: No. We also acknowledge that there is capacity for a case to be taken. I think that is what Mr Kennett was alluding to with the idea of the declaration model, that there is a model whereby a case can be taken to a tribunal. There are existing measures in place in Australia where sensitive security intelligence information can be protected from disclosure. You can have ex parte hearings where necessary but you nevertheless have a process that involves a judicial determination of the facts, which then form the basis of a decision by the minister, rather than a self-executing model.

Mr DREYFUS: To pick up on a couple of the comments you have made about possible unintended consequences, I wonder if I could take you to page 15 of your submission, where the Law Council has said:

Under the Bill, a person or child who engages in the required conduct under duress or a Red Cross worker assisting an injured jihadist in Syria could potentially be considered to have lost their citizenship.

I take it that they are just some examples, and it is possible to think of a whole range of other examples of unintended consequences, but could you explain why it is that you have noted those possibilities in terms of the way in which this bill works.

Ms Bashir: In relation to someone who is working as a medical assistant or otherwise to such an agency, if one turns to proposed section 35, there is provision for immediate cessation of citizenship if a person 'is in the service of a declared terrorist organisation'. The explanatory memorandum specifically says, at paragraph 56:

A person may act in the service of a declared terrorist organisation if they undertake activities such as providing medical support ...

Where it is not clear what the intention is or whether there is any particular level of intention or voluntary intent to attach to conduct, and there is no express importation of defences such as duress, we get to the example that you have raised.

Mr DREYFUS: I am conscious of the time that has been allowed for this. I thank the Law Council very much for the very detailed submission that has been provided. I do not want you to think that I am just skipping over anything that you have written in this very helpful submission, but I did want to pick out a couple of things. One of them is the notion of terrorist organisations, which is central to one concept in the bill. We see it in proposed section 35. This is what has been described as the extension of the existing section 35, where there is being added to, or proposed to be added to, the current automatic cessation for serving in the armed forces of a country at war with Australia—if you are a dual citizen—an additional matter, which is 'fights for, or is in the service of, a declared terrorist organisation'. Just for speed, I will say that 'declared terrorist organisation' does not mean not all of those organisations declared under the Criminal Code—at present 20. They are declared by the Attorney-General and, in fact, reviewed by this committee, and unless recommended otherwise by this committee they stay declared, and they are reviewed every three years. We read in the bill, in proposed section 35(4), that it is a subset of those declared terrorist organisations, namely declared terrorist organisations so declared for the purposes of this section—in other words, for the purposes of section 35. Apparently the minister for immigration is to make that declaration. I say that because the minister is said to be the minister for immigration for the purpose of the Citizenship Act.

You have dealt with this at page 13 of your submission, particularly at paragraph 46, and other submitters have raised this point: some of the terrorist organisations which are presently declared terrorist organisations are in fact fighting with each other. The key example that has been offered is the PKK, which is and remains a declared terrorist organisation in Australia. It is in a state of war with ISIL in Syria and in Iraq. Can you see how this could work or what possible criteria might be specified if it is determined to go forward with this particular model,

which is that it is an automatic cessation of citizenship for fighting with a declared terrorist organisation but only those terrorist organisations so declared?

I am wondering if you are able to flesh it out at all.

Mr McConnell: I am not sure that I understand the substance of the point. It seems to me that it is arbitrarily confined by that declaration. At least in relation to 35, if you are engaged in the service of some other rogue organisation that is not declared, then 35 does not then apply to you. The same can be said in relation to 33AA or 35A—I am not sure.

Mr DREYFUS: I am trying to tease out, in a sense, the point you are making. Is the Law Council suggesting that not all declared terrorist organisations necessarily pose a direct threat to Australia's interests or are not identifying Australia or Australian interests as targets, as you put it there?

Mr McConnell: I think that is the point of paragraph 46. Some of those organisations that have been declared have not articulated any threat to Australia or Australia's interests—certainly in the direct sense. It is really addressing the issue of that concept of allegiance to Australia. Does the involvement with one of these organisations, entirely unrelated with anything to do with Australia or Australia's interests, meet that element of a lack of allegiance to Australia that is built into the provisions?

Ms Bashir: In relation to each of the sections—section 33AA, section 35 and section 35A—there is a real lack of clarity about confining the cessation of citizenship to an act of terrorism directed against Australia. It is simply not confined in that way by the language currently used in this model.

Mr DREYFUS: I think that is helpful, Ms Bashir. I am trying to paraphrase, I suppose: is the Law Council suggesting that, in order to provide this extension to the existing section 35, it might be appropriate to specify some additional criteria? In other words, just starting with 'declared terrorist organisation' is not necessarily enough.

Ms Bashir: And not just for section 35. Although it is a different point, it does not pick up on the declared terrorist organisation point. But because some of that is imported through subsection (3), for example, of 35A, and also in 33AA, it needs to go so far as to be in those sections as well.

Dr Molt: In relation to the terrorist organisation prescription, we have made the submission that the criteria for declaring a terrorist organisation should be provided in the legislation and, for example, that it should require that the organisation conduct itself in a manner which is prejudicial to Australia's security. That is an example of a potential criterion that could be used.

Mr DREYFUS: If I can move to another matter: have you had a chance to look at the Department of Immigration and Border Protection's short letter—a two-page letter—which is among the public submissions?

Mr McConnell: Yes.

Mr DREYFUS: I wonder if I could direct your attention to the second page of that letter. It is the second last paragraph on the page where the Deputy Secretary of the department starts by saying:

I would like to take this opportunity to outline the arrangements that will be put in place to support the implementation of the Bill, subject to its passage through Parliament.

Ms Noble, the Deputy Secretary, then goes on to, in about 12 lines, describe various cross-government processes—if I can put it in that way. Putting that paragraph together with the bill itself, are you able to give some description or indicator as to whether you can understand what processes are likely to be followed by the government in order to get to a cessation of an Australian's citizenship?

Mr McConnell: No, we are not; but that really underscores the concerns that we have about, firstly, the self-executing nature of the conduct and then the process, I think as described by the Commonwealth Ombudsman, as the legal fiction of there not being a decision, when in fact what this contemplates is that there is a whole gathering of information in a legal vacuum from across various government departments, with, it seems, no controls, transparency or accountability in any of that process ultimately leading to the minister issuing a notice and/or an exemption. So it really underscores the fact that there is an entire vacuum around that process.

Mr DREYFUS: Does that link to a concern that the Law Council of Australia has expressed at paragraph 79, on page 20 of your submission, about the bill's provisions in relation to exempting processes under this bill from a requirement in the ASIO Act?

Dr Molt: Yes, it does. One of the concerns that we have raised is that usually the process, for example, with passports, is that a full and robust security assessment is conducted by ASIO before a decision is made, but under the proposed scheme this process is removed from the bill.

Mr DREYFUS: What is section 39 of the Australian Security Intelligence Organisation Act from which this bill exempts all processes?

Dr Molt: It basically requires ASIO to conduct security assessments before recommending to government departments' various courses of action.

Mr DREYFUS: If the bill were enacted in this form there would be no such requirement for a full assessment?

Dr Molt: It is not clear. Certainly, there will not be a requirement for this particular assessment. Whether ASIO would in the normal course conduct a similar sort of assessment is just not clear.

Ms Bashir: It is specifically provided that section 39 does not apply in relation to section 33AA. I think it is in relation to section 35 and section 35A; it does not apply in relation to any of them. There are review processes that attach to section 39 also, which, by virtue of its non-operation, appear to not be applicable here.

Senator WONG: So that I am clear, if I could just jump in on one point: does that mean the standard in the bill for revoking citizenship or ceasing citizenship is a lower standard, in effect, than the revocation of an Australian passport?

Ms Bashir: Because it is self-executing on the conduct, there are different considerations that apply. So it is not a direct answer to your question, but certainly there are not the same protections involved insofar as the issuing of the notice and the other determinations by the minister, which in themselves apparently have no legal effect. It is probably best if Mr Kennett responds. He might want to answer the question more fully. It does appear that there are secret processes that are not subject to review. Advice will be given to the minister, who then may issue a notice, not necessarily to the person concerned, and that notice does not have legal effect.

Mr Kennett: I think that is right. It is, as we have discussed, a self-executing regime and the minister's notice on the face of it does not have any legal force in itself. So somebody who is the subject of a notice retains the right to go to court and seek to prove that in fact they did not do whatever it is they are supposed to have done, and they therefore remain a citizen. I think the difficulty, or one of the difficulties, is that there are a whole series of administrative acts which will precede, and which will follow, the issuing of a notice by the minister, and this is in part what the Ombudsman's submission is directed at. For the purposes of those administrative acts and for the formation of the minister's opinion, upon which bureaucrats will presumably act until the court says otherwise, that does seem to be without the protections that the ASIO Act confers in other areas.

Senator WONG: In other areas?

Mr Kennett: In relation to other areas where ASIO is called on to make assessments.

Mr DREYFUS: I have section 39 in front of me. It is actually a prohibition on any Commonwealth agency taking any action—I am paraphrasing—of a permanent nature based on anything less than an adverse security assessment—and, as you have all already said, adverse security assessments against citizens can be challenged in the Administrative Appeals Tribunal. If the bill goes forward in this form, that prohibition on a Commonwealth minister or a Commonwealth agency acting on—as I think you put it, Ms Bashir—secret information or a preliminary type of information is removed entirely.

Ms Bashir: That is right.

Mr DREYFUS: As I said, I am just trying to get to the point that you have made. Again, I am not asking you to re-present what you have said in this very full submission. You have made a very strong submission against retrospectivity generally, but you have made a point here. You would appreciate, as you have in your submission, that this committee has been asked to look at whether the bill should be made retrospective in any aspect, but the Law Council here submits:

The Bill as currently drafted has partial retrospective application.

I wonder if one of you might be able to explain that to the committee. The point is made at paragraph 120 of your submission.

Ms Bashir: I think the application provisions are in schedule 1, and it is under No. 8. It indicates: Section 33AA of the Australian Citizenship Act 2007 (as amended ...) applies in relation to:

- (a) persons who became Australian citizens before, on or after the commencement of this item; and
- (b) conduct engaged in on or after the commencement ... (whether the conduct commenced before, on or after ...)

So if there is a continuum of conduct, where the conduct commenced before the commencement of the legislation, it will have—and it appears to intend to have—retrospective application to pick up that conduct that

commenced before the enactment. Similarly, proposed section 35 picks up 'whether the fighting or service commenced before, on or after the commencement of this item'. We see the same again in relation to 35A.

Mr DREYFUS: Again, it is a full part of your submission, but I want to ask you about something which appears at paragraph 110 of the submission. This is all, of course, on the premise that this bill is only dealing with Australian citizens who have another nationality. The Law Council has submitted:

While international law dictates that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality, there is no guarantee that a dual national's/citizen's other country of nationality will not revoke their citizenship and/or refuse to accept them (because of suspected terrorist involvement), effectively rendering that person stateless.

Do I take it from that the Law Council is submitting to this committee that we should not proceed on the basis that the fact of having a nationality other than an Australian nationality automatically means that the Australian citizen in question will be able to go to that other country?

Mr McConnel: That is correct. It means that if there is some impediment entirely outside this bill to that person transferring into that other country, then they will be housed in immigration detention indefinitely.

Mr DREYFUS: Because of the range of possibilities—such as the other country also revoking the Australian citizen's citizenship of that country? Would that be one possibility?

Mr McConnel: That is just one of many possibilities. There are a whole range of actions that another government might take which the Australian government, or indeed the person affected by those provisions, have no control over.

Senator WONG: This is probably at a far more simplistic level. As I understand the Law Council's submission, you have a range of what I would describe as—and I am not diminishing them by describing them as such—principles based on concern around retrospectivity, the rule of law, the effect on children and so forth. But if we turned to the EM, the purpose of this bill is described as being necessary to provide explicit powers for the cessation of Australian citizenship in specified circumstances where a dual citizen repudiates their allegiance to Australia by engaging in terrorism-related conduct. As I understand the nub of your submission, in addition to the principles-based response, what you are saying to us is: there are various aspects of this bill which risk bringing within its ambit conduct which would not accord with that statement.

Mr McConnel: Yes. And in circumstances where the decision about citizenship is not based on a decision, it is of automatic effect.

Senator WONG: Sure. And in circumstances where the redress is limited.

Mr McConnel: Yes.

Mr DREYFUS: In paragraph 114, you summarised the situation which, you are submitting, the proposed new section 33AA and possibly section 35 would create—namely 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 (inconsistently with the presumption of innocence);
- 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);
- 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); and
- a person who cannot demonstrate their innocence risks removal from Australia, including to a country where they may face persecution and where such removal would be contrary to Australia's international obligations.

I want to summarise the Law Council's recommendation to this committee as suggesting that the committee should, in turn, recommend to the parliament that this bill requires very substantial revision and—I am offering this summary, so you can correct it if it is wrong—and that that provision should be based on a court first determining the facts, followed by a ministerial discretion as to whether to act on those facts.

Mr McConnel: Yes.

Mr DREYFUS: That is a fair summary of your recommendation to this committee or your prescription as to how to fix what, as my colleague Senator Wong has said, you have submitted are numerous flaws in the bill.

Mr Kennett: I think it is worth adding that, if our global prescription were not accepted, there are still a number of areas where we would suggest that the detail of the bill could usefully be revisited to define the scope of offences and nature of conduct that would trigger loss of citizenship more restrictively—

Senator WONG: Which, presumably, would be your response to dealing with Mr Nikolic's question about the evidentiary challenges in some conduct being dealt with by a regime that Mr Dreyfus has referenced.

Mr Kennett: Yes.

Mr DREYFUS: You have raised some constitutional concerns. I mention that only to say that we note that you have raised some constitutional concerns, but you have done so in a fairly shorthand fashion. As you have said, you are to be followed by people with constitutional expertise who raise this in greater detail.

Mr Kennett: Yes. There is very rarely a shortage of people with views on the Constitution! We have not come today to add to those.

Mr DREYFUS: Thanks very much.

Senator GALLAGHER: I have a question that goes to an issue that has been raised in other submissions around, essentially, creating two tiers of Australian citizenship. This goes to the breadth of the coverage of the proposed legislation. I think the Federation of Ethnic Communities' Councils raised this and I am asking your view on it. If the bill as proposed creates two classes of citizens—those who can have their citizenship ceased through this bill and those who cannot, and some put that as high as 25 per cent of the Australian population—what is your view on creating a legislative framework that would impose that kind of structure on Australians?

Mr McConnell: I think it is, firstly, a reflection of the obligation that Australia has committed to in respect of avoiding statelessness. Otherwise, one presumes that the model that is being brought forward would apply universally. I think the fundamental objections that we have to this proposal really go to the way in which it would operate on the people affected by it, and that concern is much greater than the concern that it will only apply to a certain sector of the community. I think the selective application of the legislation is unfortunate but unavoidable because of that obligation that Australia is committed to.

Mr RUDDOCK: On the issue of retrospectivity, which I notice you have addressed towards the end of your submission: we have been asked to look at broadening the provisions. You have not specifically addressed that; but, by implication in what you have said, your view is clear. But your view also suggests that it is possible in certain circumstances to legislate in this area retrospectively.

Mr McConnell: Yes.

Mr RUDDOCK: You do not like it—I understand that—and you have set out the reasons for it, but it is possible for the parliament to determine that matter. I would like your view as to the matter we have been asked to consider. If I were to put it to you that there were people—and there are—who have been convicted of serious terrorism offences whose penalties have been exacted and have involved many years of penal servitude but, when they were released, given the nature of the conduct in which they were involved, which was very serious terrorism offences, would you have a view that the parliament, if it so determined, would be acting lawfully in relation to those matters?

Mr McConnell: I do not think that is a view that I could express here today. It is certainly something that we could consider and address you on by way of a further written submission on that specific point. I think the substance of what our answer would be would turn on the question of what you mean by 'lawfully'. Can the parliament legally pass legislation that will survive a court challenge? It depends on the degree of retrospectivity and the nature of the subject matter. Should, as a matter of principle, the parliament pass a law that has retrospective application in that way? According to long-established rule-of-law principles, no it should not.

Mr RUDDOCK: But it potentially could do so lawfully.

Mr McConnell: Yes, undoubtedly there is a capacity for the legislature to pass retrospective legislation, but there will be limits to that determined by such things as the subject matter of the retrospective action and the degree of retrospectivity that is being sought to be applied.

Mr RUDDOCK: I am looking at issues relating to people who were convicted of terrorist offences involving potentially tens of thousands of Australians at a major sporting event. The convictions occurred, and no appeal has challenged those convictions. They seem to me to be extraordinary. If the legislation dealt specifically with such extraordinary activity, in your view it may well be sustainable lawfully?

Mr McConnell: I cannot take it any further than that it might depend on whether you are talking about something that occurred five years ago or 30 years ago. That might be one factor.

Mr RUDDOCK: I think we know how long ago it occurred.

Senator WONG: But is the invitation for the Law Council to come back with a suggestion about a more limited basis of retrospectivity?

Mr RUDDOCK: Yes, they are welcome to come back with further comment.

Senator WONG: I know, but so I understand. I understood your question as seeking a view, if they wished to provide one, as to a more limited basis for retrospectivity. Did I understand that correctly?

Mr RUDDOCK: We have been asked to look at the issue of retrospectivity. I have not put my views, but we are being asked to put our views. I am putting to them the extreme case where I think there may well be broad public support for further extension of this legislation. I think there may be. I really want to know whether we could comfortably make recommendations in that area.

Mr McConnell: I think that, with that intimation, we would probably like to take the opportunity to say something about where the boundaries of any such power might lie.

Mr RUDDOCK: Thank you.

Mr DREYFUS: Mr Ruddock has raised retrospectivity. If this bill were to be made completely retrospective in respect of all of its provisions, the practical effect—leave aside lawfulness—would be to apply a penalty to every person convicted of all of these listed offences, which run into a couple of dozen offences. They are all known individuals; is that right? Everybody convicted of any of these offences is already known by definition because they are convicted in public court, sentenced, sometimes will have served a term of imprisonment and other times will have been given a good behaviour bond. But they have all been convicted in a public court.

CHAIR: That is right. The retrospectivity is only for 35A, so the point you are making is right. It is not the whole bill; it is just one section of it.

Mr DREYFUS: Yes, understood.

CHAIR: But we have to make it clear because you said the whole bill, but it is just that section.

Mr DREYFUS: 35A is the convictions provisions.

Mr RUDDOCK: I thought he was suggesting that we might recommend that that apply retrospectively in relation to the whole range of offences.

Mr DREYFUS: I am assisted by the chair's clarification. In looking at this long list of offences, at a practical level, if there were to be full retrospectivity, it would apply to everybody convicted of any of these offences at any time in the past.

Ms Bashir: Including, for example, intentionally damaging Commonwealth property. In relation to your question about it being a punishment, there is frequently no bright line between protective purposes and punitive purposes, so it may well be expressed as being for the protection of the Australian people but still punitive or having the consequences of punishment. That is one of the real concerns in relation to the constitutionality of the bill that I expect you may be addressed on in subsequent submissions—to pick up on that word.

Mr DREYFUS: On its face, at a practical level, if there were full retrospectivity in respect of this long list of offences, it could capture things like, as in your written submission, graffiti on a public building or tire slashing.

Mr McConnell: Yes it could. Even in respect of offences which go closer to terrorist activities, if I can put it that way, you have, for example, a reference in subsection 3(b) to section 80.2C of the Criminal Code, which talks about advocating as the lowest level of any sort of involvement—certainly lower than attempting, inciting or assisting—in a form of terrorist activity. It includes the concept of recklessness, so someone who is convicted of an offence of that nature at the very lowest level would be picked up by any retrospective application. I understand what Mr Ruddock has on his plate in terms of consideration of the most serious actions or conduct for which a conviction has been recorded, but if that is in consideration by the committee then I would urge that it look carefully at whether any retrospective application should be confined to the very narrowest of circumstances rather than the broad application that would be possible if it were simply applied to 35A.

Mr RUDDOCK: As I said, I have not expressed a view, but I am very mindful of what you have said. We have been asked to look at the retrospectivity issue, and it is obviously a matter to which we are going to turn our mind.

Mr DREYFUS: Am I right in thinking—and you have said yourself in your submission—that, while the government has in most of its statements, the Prime Minister's statements and Mr Dutton's statements described this bill and this set of measures as directed at Australian citizens who are dual nationals fighting with a terrorist organisation, what we actually see in this bill is a far greater reach? You have specifically noted, for example, paragraph 14, but it has just come up again in the context of what retrospectivity might look like.

Mr McConnell: Yes. Section 29 of the Crimes Act brings in behaviour that can be entirely unrelated to the concept of terrorism, but we have identified that that should be removed. Section 33A potentially captures such a

broad range of conduct in the absence of a conviction that it would be very worrying indeed if there were any sort of retrospectivity applied to that.

Mr DREYFUS: Thanks very much.

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

PILLAI, Ms Sangeetha, Private capacity

WILLIAMS, Professor George John, AO, Private capacity

[15:20]

CHAIR: Welcome. 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 a contempt of parliament. The evidence given today will be recorded by Hansard. Do you wish to make some introductory remarks before we proceed to questions?

Prof. Williams: Yes, thank you, Chair. Our starting point in preparing the submission is that we do accept the purpose set out in the explanatory memorandum and the government's object to broaden the grounds of citizenship revocation. We do see the existing grounds in section 35 as being insufficient to deal with some contemporary problems, in particular non-state actors and the like, so we have approached this along the lines of how the bill ought to be drafted to deal with the need to modernise that provision. Our concern is that the bill goes well beyond the purpose set out in the explanatory memorandum and as put publicly by the government. In particular, we are concerned in its operation. Not only may it be unconstitutional, which I will come to in a moment, but it clearly operates in a class of categories that go well beyond terrorism or circumstances that might give rise to disloyalty on behalf of a dual national.

To give a series of quick examples that illustrate the sort of areas that it does apply to: it would apply to a business person travelling to a declared area—let us say Mosul or Al Raqqa—to conduct innocent business; nonetheless committing a crime under the declared area offence but not, in doing so, necessarily suggesting any disloyalty to Australia. It also covers people who incite violence against other groups on the basis of their race, for example. It means that people who were involved in the Cronulla riots, for example, if charged or caught up in that conduct, could equally have their citizenship revoked if they are dual nationals. People who train people who use those skills for terrorism, even if the person, as a trainer, is unaware of what those skills might be used for, such as computer use and the like, could be caught by this. The Red Cross involved in providing humanitarian assistance in war zones or even, as has already been noted, people who commit minor property crimes—not just graffiti artists and the like, but protesters, for example, who might be engaged in a protest on Commonwealth property, a sit-in, for example, that might lead to furniture being damaged.

What these examples demonstrate is that we have a bill providing for automatic citizenship revocation in circumstances that have absolutely nothing to do with terrorism and, indeed, in circumstances where there can be no suggestion, even though these actions may well justifiably in cases be regarded as criminal, that they amount to a lack of allegiance on behalf of that person. Of course, we are applying this not to a small subset of the Australian population, but to four, five, six million people, depending upon the count, many of whom are not aware that they are dual nationals. They could be caught in a wide variety of circumstances that would certainly not be apparent to them.

What this shows in our view is that this bill ought not to be passed in this form. Indeed, I would say that, having read pretty much every one of the 65, now 66, pieces of legislation passed by this parliament dealing with terrorism, that this, unfortunately, is one of the most poorly drafted that I have come up against. It shows great evidence of having been drafted in haste. As Anne Twomey's submission makes clear, there are many unusual discrepancies between the explanatory memorandum and the bill. There are significant gaps in the bill that are surprising oversights—for example, the bill does not deal with the simple issue of what happens if a person is convicted then, on appeal, their conviction is overturned. There is also missing information in the bill dealing with which bits of the Criminal Code are picked up with regard to exceptions to offences of intent and the like. It points to the fact, unfortunately, that this bill is not in a fit state to be passed. Many of these are drafting problems that should have been ironed out prior to its introduction, but they also go not just to textual problems but larger structural problems which suggest, in my view, that this bill more likely than not would be struck down by the High Court if it was to be challenged.

There are three grounds for challenge which give rise to a real prospect that this bill would be struck down. Again, I say this advisedly. I have given evidence to this committee and other committees 20, 30 times, and this is the first time that I am prepared to say that I am confident not only that there is a strong case against this bill, but more likely than not it would be struck down by the High Court. I say that because, firstly, the bill has not cured the underlying problem about ministerial discretion. I can see that it has been drafted to deal with the issue that this decision cannot be made by a minister for constitutional reasons, but the underlying constitutional reason for that is that the decision must be made by court. That is an inescapable aspect of the separation of powers as

determined by the High Court. The self-executing model does still not provide for the decision to be made by a court; it simply amounts to a self-executing piece of legislation that bypasses the court at the critical moment of determining whether the requisite liability arises. It is akin to another statute that, for example, in a self-executing way says that if a person commits murder they are automatically to be jailed, without providing any mechanism for a court to determine that. That equally would be clearly unconstitutional because it bypasses the requirement for a judicial hearing into the determination of facts that give rise to the imposition of a punishment or penalty. Removing a ministerial discretion does not fix that underlying problem. It still suffers from exactly the same issue.

I would also say that section 35 in the existing statute suffers from the same problem. You may wonder why it is sitting there suffering from the same problem. The short answer is that it was drafted in 1948 before the High Court developed these doctrines in the *Boilermakers'* case in 1956. So if you are following that model from 1948 you are following it at a different time in our constitutional evolution before the High Court identified these restrictions as binding in this way. Indeed, if someone was to lose their citizenship under the existing section 35, a challenge would be open to them based upon that 1956 precedent of the High Court.

The second basis of constitutional infirmity relates to voting rights. Here there is an obvious and inescapable problem in that the High Court has identified in the *Roach* and, now, *Rowe* cases that the people of the Commonwealth have a constitutionally protected right to vote. The High Court said in the *Roach* case that right can be removed from the people of the Commonwealth where they are serving a prison sentence of three years or more. What this bill would do is remove the right to vote from people who are not only serving a prison sentence of less than three years but who may have been convicted without going to jail for a single day. It is clearly inconsistent with that finding of the High Court, which is conditioned upon the notion of having a right to vote not because they are citizens but because of the words in the Constitution that they are one of the people of the Commonwealth. That is not something that the parliament can remove a person from; that is the High Court decision. The overbreadth of the conviction element again gives rise to a quite straightforward line of constitutional attack.

The third angle for constitutional attack is that the bill, I think, likely goes beyond the aliens power, which it rightly is based upon, in rendering people to be not part of the Australian community, effectively aliens, in circumstances where the High Court would not see that as legitimate characterisation of that person as no longer being Australian but of being an alien. To take an example: an Australian-born citizen who has also got a second nationality through their parents or grandparents who commits a minor property crime, by virtue of this statute would be rendered into effectively an alien by virtue of losing their citizenship. I think it is very unlikely the High Court would see that as a justifiable and constitutionally permissible exercise of the aliens power, because the High Court is not likely to see an Australian-born person in that category as being an alien. This is not something the High Court has decided in detail, so I cannot point to a clear precedent, unlike the other two grounds; but certainly it is quite vulnerable to constitutional attack on at that third ground.

You put those things together and, as I say, in my view I was very surprised to see the bill as it was drafted, because it does cure the ministerial discretion problem, but in doing so it has created a new set of problems that give rise to a separate set of constitutional issues that require the structure of the bill to be altered or, as I say, in my view I think that it is almost set up to fail in terms of what you are likely to get from a High Court outcome.

The final thing I will say in very brief terms is we raise a number of other principle and policy-based concerns. We note that particularly in removing the effect of section 47 of the Citizenship Act and section 39 of the ASIO Act decisions in this legislation would be subject to fewer procedural protections than would be found with regard to decisions having a far lesser impact on a person's life such as in regard to visas, passport control and the like. I will also say that legislation not only is overbroad, but is structured in a way that can give rise to unfair and effectively unreviewable decisions by removing natural justice rights and also by not crystallising the decision in a minister or a court. By having the effective decisions made within departments, they can become effectively unreviewable because it may not be possible to gain the information or to latch on to a decision that can be effectively challenged. I will leave it there.

CHAIR: Sangeetha, would you like to make some introductory remarks?

Ms Pillai: No.

Mr BYRNE: I want to talk about this very peculiar self-executing law or provision. Theoretically, how many Australians of dual citizenship or nationality could potentially be hit by this self-executing law without even knowing it?

Prof. Williams: We do not have figures. That is because not only is the government understandably not aware of how many dual nationals we have but many Australians are not aware that they are dual nationals. It is determined not by Australian law but by the law of the other country. It may be, for example, that a person is a dual national because of their grandparents' ancestry. The person need not take any steps to actually manifest that citizenship; it may just be automatically conferred upon them. If we look at the statistics, dual nationals are in the range of four, five or six million people. Of that, a very large class of people are not aware that they are dual nationals. In fact, the government's smartraveller website makes the point that people may inadvertently find themselves in difficulties because of this. But I do not have any concrete numbers as to how many would fit in that category.

Mr BYRNE: You are saying that, based on the thresholds of that self-executing law coming into place, many thousands of Australians, people of dual nationality, could be inadvertently captured by it?

Prof. Williams: A lot depends on how many people would be convicted of the relevant offences—damaging Commonwealth property is the one that is likely to have the greatest number of convictions. You would also look at the people whose conduct might be caught. We are certainly talking in the category of hundreds here; whether it is in the thousands, I do not know; we would need statistics on the convictions themselves.

Mr BYRNE: Given that the minister is not exercising discretion, is the power vested in the parliament as the executor of that law?

Prof. Williams: It is a very odd provision in that it is described as self-executing but, of course, it is not; no law self-executes. What it effectively does is push the key decision-making away from the minister and to the department. Indeed the evidence put by the department makes that very clear in terms of how you would expect a range of departmental processes to be engaging with these matters. That is why it does not cure the ministerial discretion point; in the end, it is still the executive that is making the key decisions; it is just not the minister; it is the department that does it. The way the High Court approaches these matters is to look not simply at the form of the law but at the substance—how it operates in practice. You have got on the record a letter from the department itself which would be very useful in High Court proceedings in making it very clear that you can expect the departments will make decisions and engage in these matters in the way that certainly does not cure the prior concern about the executive making key decisions in this regard.

Mr BYRNE: In a sense, the mechanism is that you have an unaccountable group of public officials that make a decision to revoke someone's citizenship and it cannot be reviewed; it can only be potentially contested if the person is notified.

Prof. Williams: That is right. In fact, it is so much worse model when the minister is not making the decisions; at least when the minister is making the decisions it gives you greater clarity about when a decision is made and when certain things occur; you have advice that leads up to that. Yes, the minister would issue a notification—although the bill itself says the minister can do so at the time the minister believes appropriate and to whom the minister believes appropriate. So it does throw up the possibility that the first time a person would be aware that their citizenship has been revoked is when they get a knock on the door from immigration or other officials saying: 'You are no longer a citizen. We are now taking you to immigration detention.' That person need be given no reason for that. Indeed, it may be that the key information underlying that is not something they can get access to. So even though clearly they might attempt to bring it into a court, it is questionable whether that would be effective. And that again throws up a range of constitutional concerns. In the communist case many years ago the High Court said that, if you have got a decision that is not effectively reviewable, that can be a basis for striking down legislation.

Mr BYRNE: When does the law come into effect? This is something that puzzles me. And who makes the judgement that you have broken the provisions? An unelected group of officials—is that what you are saying?

Prof. Williams: The bill is silent on that. The minister's notification is after it has operated—and the minister's notification plays no role in determining whether it operates in the first place. That is where you got the legal fiction; it must be the person working in the relevant departments, as the departmental letter makes clear. That is how we can assume it works. It is unfortunate that the legislation is not more explicit about those matters. I can understand that for constitutional reasons it sought not to but, as I said, it is just creating a new set of problems in doing so.

Mr BYRNE: In your mind, when would that law come into force?

Prof. Williams: According to the law, it comes into force immediately that the conduct is engaged in or the conviction is recorded. A person in a department would make a decision that one or other of those things has happened and would as a result execute the law.

Mr BYRNE: That is when the law would come into force. What legal power does the minister's revocation notice have?

Prof. Williams: It is a very awkward mechanism—and it is one of the uncertainties that we put in our submission. The provision operates automatically a person loses their citizenship. Subsequent to that the minister can notify, if he or she wishes to do so, at some future time. But the person has already lost their citizenship. There is a power of exemption but it is not clear how you exempt someone from the operation of something that has already happened. There is a sequence of events there that I do not think are very well thought out. Again, this is why I suggested I have problems with the structure of the bill. It is not a mechanism that operates well or necessarily fairly.

Mr BYRNE: I cannot really see anything there in terms of the period of time that that person may be stateless without even knowing about it or without having citizenship.

Prof. Williams: In fact, in many cases people will have lost their citizenship without them knowing it or departments knowing it. That is because the person may be unaware of the law or maybe the department has not picked up that the person has engaged in certain conduct. Part of the issues relate also to the fact that the initial provision, in dealing with conduct, covers terrorist organisations in a very broad form—not just ones declared by the minister but ones that could potentially be declared by a court. Until that has happened we do not even necessarily know which terrorist organisations will be caught by this. Again, there is an awkwardness there. Where we are dealing with definitive questions about a person's entitlement to be a member of the community, including their voting rights, we have situations where people may end up voting where they are not entitled to do so and continuing on in ways that are contrary to the law without any process of determining that that has actually occurred.

Mr BYRNE: If you were redrafting this particular piece of legislation, how would you redraft it?

Mr RUDDOCK: To achieve the objective that the government wants.

Mr BYRNE: Thanks. I think that is what these hearings are about. I was just trying to work out whether we can actually get a workable piece of legislation.

Prof. Williams: I think there are two possibilities. One is the one that the Law Council has put, and that is to enable a government official, the minister, to request a court to decide on the evidence that a person should have their citizenship revoked. The other model is the one that we put to in our submission—upon a conviction for a set of offences, where a person is convicted for five years, or whatever it may be, indicating the seriousness of the offence, the minister then has a decision to revoke citizenship where the minister is satisfied that is in the public interest and that the person's conduct that has given rise to the offence demonstrates a lack of allegiance to Australia. On both of those the key is that you need a judicial position up front; the problem is not secured by having it down the track. I recognise the operational concerns that have been raised here—the difficulties in getting evidence and proving these matters—but this is the inescapable nature of Australia's constitutional framework; it does not permit consequences akin to a punishment to be visited upon a person unless the evidence is robust and tested in an appropriate forum.

Mr BYRNE: With all the pieces of legislation that we have contemplated, you are saying you are most confident that this would be the one that would fail the test in terms of constitutionality?

Prof. Williams: I am. For example, when I was dealing with ASIO's questioning and detention powers many years ago I had a lot of policy concerns but it did not raise the same constitutional concerns. Indeed, I had a range of concerns in the provisions we have looked at with foreign fighters, but this one is different in squarely raising constitutional concerns that have been ventilated in public debate through the ministerial discretion. As I have said, that has motivated this bill but it just has not cured the problems. I would be very interested to see any advice, for example, that might have been sought on this, because I was very surprised to see the form that it ultimately took. And yes, that does distinguish it from other legislation; that is why I make this issue pointedly in this case; it is not one I have made in other instances.

Mr BYRNE: The constitutionality is a matter of grave concern to me. I would not mind being briefed by either the Attorney-General's office or the Solicitor-General in respect to that. My concern is that we do not want to have a committee that is looking at a piece of legislation that might wind up being like the Malaysian solution. George, thank you for your evidence. From my perspective it has been very informative.

Mr DREYFUS: Professor Williams, Mr Byrne touched on this but can you outline how this scheme might work in practice? You referred to a letter from the department of immigration dated 21 July, but at a practical level how is this likely to work?

Prof. Williams: The letter is as you would expect. You have a provision that will require people at a departmental level to make decisions. Those decisions are not vested in the minister. It is simply a question as to how the law should be applied and executed in practice. You would expect in particular the immigration department, with other agencies, to have information. It is significant that that information need not be akin to a security assessment, and I think it is very unfortunate that it is not at that level. They make a decision and they inform other agencies. There is no requirement that they inform the person concerned. Those other agencies perhaps take the person into detention because they do not have a valid visa or other reason to be here and the person finds that their name is removed from the electoral roll. I suspect that the first they will know about it is when they get a knock on the door essentially saying: 'You have had your citizenship stripped. You must come with us. You no longer have a lawful reason to be in Australia.'

CHAIR: That is for the conduct provisions, or do you see that for all provisions?

Prof. Williams: With the conviction provisions you would expect that the person would have legal advice that they have been convicted of a minor property crime or whatever it is and automatically they would expect it in that case. What you would expect in that case is that their lawyer will perhaps advise them to divest themselves of their dual nationality before being convicted.

CHAIR: But there is a clear distinction between the two?

Prof. Williams: There is, except that there is a great overlap in that prior to a person being convicted many of those offences fall under the conduct provisions anyway. So it may be that a departmental person decides that the person has committed the conduct so they do not need to wait for a jury to make a decision—it is automatically occurring at the time the conduct is committed. So even before they are arrested the person can be taken up and subjected to immigration detention and the like. It may even be that the person is ultimately acquitted by a jury. But a departmental person may still take the view that the provision has been breached and, even though no conviction has been ordered, there is enough for a departmental official to form that view. So a person may be acquitted but still ultimately find themselves subject to the loss of citizenship.

Mr DREYFUS: So there is one marked distinction between the two types of provisions. Neither section 33AA, 'Renunciation by conduct', nor section 35 require a conviction for the cessation of citizenship to occur. By distinction, section 35A lists a whole series of offences but a conviction for one of those offences is required for the cessation of citizenship. In the case of the conduct based provisions, they could all take place in secret—the process leading to their cessation?

Prof. Williams: They would be secret in the sense that all of these decisions would be internal to the department. There is no requirement to take evidence from the person concerned. Not only are they not secret but, of course, the notification provision in section 47 of the Citizenship Act is removed and you do not even require the normal standards with regard to intelligence information because you do not need a formal security assessment. So yes. I do not have a problem with appropriate activities occurring in secret; it is just that in this case the normal checks and balances that go with secret processes are not there. The consequences are so severe for the person concerned that there is a real policy and constitutional question that goes with that.

Mr DREYFUS: Of course. And certainly every member of this committee understands the need for secrecy in some aspects of intelligence work. But what I was getting too was the sharp difference between a process that is based on a conviction, which by definition will have occurred with an open court and the hearing of evidence, as distinct from these conduct based offences which do not have any prescribed process around them and certainly do not envisage any kind of hearing occurring in public.

Prof. Williams: That is right. It is a stark contrast between those things, and that is why those conduct provisions are especially problematic. In our system of government it is normally accepted that if something of a punishment is to be imposed there will be a non-secret process, usually a court process, subject to the National Security Information (Criminal and Civil Proceedings) Act and other legislation. But this does enable that to be bypassed and it does enable key decisions to be made that can lead to a form of exile without any public or defensible or transparent process going with it. And it would be in a way that bypasses the courts except with the possibility of post decision making review, if that is effective.

Ms Pillai: There is another sharp distinction in that, as George has said, the bill provides for a kind of exile for people who currently hold citizenship without the safeguards that typically exist. Those safeguards do exist with respect to the deportation of permanent resident non-citizens at the moment. So it actually creates a mechanism by which a person who is a citizen, a full member of the community, can be exiled in a way that has less protection than what applies to a person who does not hold citizenship.

Senator GALLAGHER: You are talking there to the difference between the Migration Act and this bill?

Ms Pillai: Yes, that is correct. Division 9 of the Migration Act provides for the deportation of non-citizens in certain circumstances. In the case of conviction, there is a minimum requirement that a sentence of one year be imposed. It also only applies to particular non-citizens and there is also a capacity to deport a non-citizen on national security grounds. But section 39 of the ASIO Act is not excluded in relation to that. This is more onerous—

Senator WONG: This is the full security assessment?

Ms Pillai: Yes.

Senator WONG: This applies even in relation to a national security based deportation of a non-citizen, which is not applicable in the case of a revocation of citizenship.

Ms Pillai: Yes.

Prof. Williams: Section 39 is not simply a protection for the individual; I see it as an important institutional protection for ASIO. It is important that when government acts upon intelligence information they do so on a formal basis so the director-general can understand what information from ASIO is being relied upon. This provides the capacity for departmental officials to act upon informal conversations with junior ASIO officers in ways that simply are not appropriate and in ways that may well even bypass the hierarchy of ASIO because of no longer having that requirement for the security assessment.

Mr DREYFUS: Your submission sets out—you have briefly spoken to this and I am not seeking to go over the whole ground here—three potential grounds of invalidity under the Constitution: conflict with the separation of judicial power; infringement of the implied right to vote; and possible deficiency of constitutional head of power. I am not going to get you to go over that again but I want to ask you about a particular matter you raised on page 2 of your submission under the heading 'Conflict with separation of judicial power'. You have written:

Furthermore, the scheme circumvents the role of the judiciary by bring about a punishment akin to exile as a result of the will of parliament rather than by way of finding of a court. The drafting establishes a scheme that is similar in effect to a bill of attainder.

Not everybody on the committee may be familiar with the term 'bill of attainder'—those of us who went to law school have probably got some distant memory of it. Could you explain what that reference means.

Prof. Williams: What it is referring to is that it is accepted—and the High Court has indicated it—that people cannot be subjected to punishments by way of legislative decision. For example, you cannot have legislation that names certain people and says they are guilty of a crime and need to be jailed. This does not go as far as that because it does not name the people. But it is akin to that because it sets up conduct and says that, if you commit that conduct, you are guilty and can be punished by the loss of citizenship. And that occurs in ways that require no judicial finding. Again, it is a direct legislative imposition of a punishment without the necessary intervening step of a finding of guilt by a court or other finding about citizenship. I raise that because the court has indicated—in the Polyukhovich decision, for example—that bills of attainder are not possible in Australia. It is one of a number of threads to an argument that show that this has got into very dangerous territory, on constitutional grounds.

Mr DREYFUS: Does that comment extend, potentially, to the retrospective proposition that the committee has been asked to look at, which would, in effect, amount to the imposition of a penalty on known persons—that is, if the convictions provision 35A were made fully retrospective?

Prof. Williams: Yes. On the retrospectivity point, certainly as a matter of principle, we strongly argue it should not be made retrospective, but on the constitutional principle it is a weaker argument to say that it would be struck down. The impediments to enacting retrospective laws are far weaker in Australia than to enacting a law that vests the decision in parliament or in a minister. It means that should the committee be minded to recommend retrospectivity—which, of course, we are not urging—it may be possible to do that in ways that do not amount to unconstitutional action.

The argument against it would be the one you put—that, indeed, you are making it retrospective in a way that applies so clearly to such a narrow class of people. So it is akin to a bill of attainder. You are effectively nominating the people subject to this because 'we know who they are' but, as yet, the High Court has not gone that far. It is arguable but a weaker argument than the other propositions that I have discussed.

Mr DREYFUS: On this possibility of constitutional challenge—this is not a question that goes to the three grounds you have identified—do you think the bill is likely to be challenged? You have expressed a view that it is the likely finding, in the court, but my question is the more practical one of whether this bill is likely to be challenged.

Prof. Williams: I have no doubt that it will be challenged, if only because I have already had people approaching me asking how they would bring a challenge if the bill were enacted. Any person who is subject to any of these provisions would have standing in the court to bring a challenge, and you would imagine that a challenge would result in very short order. It is a challenge that would be heard by the High Court itself. You would not need to work up through the courts. It would be heard quickly and expeditiously, I suspect. It is one I do not have any doubt about. It is such an obvious one to bring a challenge to, and I cannot see why someone would not do so in order to escape the loss of their citizenship.

Mr DREYFUS: To go to another matter, the explanatory memorandum for this bill describes the bill in this way:

... the Government is also amending the Australian Citizenship Act 2007 (the Citizenship Act) to broaden the powers relating to the cessation of Australian citizenship for those persons engaging in terrorism and who are a serious threat to Australia and Australia's interests.

There is a passage in your joint submission, Professor Williams and Ms Pillai, at page 5, under the heading 'The Bill is overbroad in extending to conduct not suggesting disloyalty to Australia'. Is it right that this is a bill which captures conduct and convictions that go beyond the description 'persons engaging in terrorism and who are a serious threat to Australia and Australia's interests'?

Prof. Williams: There is absolutely no doubt that that is the case. I accept the need to deal with that narrow class of persons but it goes well beyond that. The property crime is the most obvious example, a minor property crime that might not lead to any term of imprisonment. It might be damaging property in a protest or whatever. It gives rise to automatic revocation of citizenship with the ability of the minister, of course, to exempt down the track. I actually wonder, for that property offence, whether it is even there by mistake, to tell you the truth, because it is one of the inconsistencies with the explanatory memorandum. It is not listed in the explanatory memorandum. All the offences are there but not the property one. I wonder whether it was intended not to put it in, because it does not make much sense to include it, for this reason. But it is there. There is just an irreconcilable conflict between the explanatory memorandum and the bill on this issue.

CHAIR: On occasion, drafting mistakes are made.

Prof. Williams: Absolutely. It is just that in this bill—and I accept that—there are such a large number of them. This is the most problematic, from a drafting point, that I have seen in the bills that I have ever given evidence on to this or other committees. The fact that we are dealing here with a bill that leads to the automatic revocation of citizenship is deeply concerning. I do not know why. I do not want to cast any aspersions as to why except to say that the committee is faced with a bill that the documents you have there do not reconcile, including at the most basic level, as to which offences give rise to the loss of citizenship. That is why I wondered whether a decision had been made to sensibly take it out, but it was taken out of the explanatory memorandum but not the bill. I really do not know.

CHAIR: It is quite possible that a mistake has been made like that. It would not be the first time a mistake has been made.

Mr DREYFUS: Perhaps the chair might inquire of the government whether it is a mistake.

CHAIR: I am sure we can do that at some stage. I do not know.

Mr RUDDOCK: I am sure we would want to test some of these propositions.

Prof. Williams: I would simply say on this point that there are reasons for which property damage could give rise to the revocation of citizenship as an act of terrorism and the like—absolutely—and it is covered in those offences. What you do not need to do is extend it to property crimes with no connection to terrorism. It is an addition that, frankly, makes no sense. The definition of terrorism includes property damage, so it is already there.

Mr DREYFUS: Just continuing on this point, is there anywhere in the bill that applies, if you like, a filter that measures whether the people concerned are a serious threat to Australia and Australia's interests?

Prof. Williams: No, there is not, and that is why one of the unfortunate responses to the constitutional problem of not giving to the minister was to simply say it is automatic, which greatly broadened the class of people who are subject to this. Instead of sensibly having a ministerial discretion to say, 'This person is convicted, but there is nothing in that conviction giving rise to disloyalty, so we would not remove their citizenship,' it is automatic and it should not work that way. The way it should work is that a finding of a particular kind of seriousness invokes the capacity for a minister to make a decision and the minister can do so on appropriate grounds. The minister should be the filter in this case, with appropriate review rights applying to that decision.

Ms Pillai: I would add that the lack of a filter is a policy point. As George said, there should not be citizenship revocation for engagement in conduct that does not actually demonstrate disloyalty or a lack of allegiance to Australia, but it is also a constitutional problem and that speaks to the head of power point that we made in our submission. Parliament probably does have the power to revoke the citizenship of people who demonstrate a lack of allegiance to Australia, such as by posing a terrorist threat or engaging in armed conduct against Australia. There is undoubtedly some scope for parliamentary and executive discretion in determining when that lack of allegiance exists, but as it stands the preamble to the bill states that the conduct in this bill demonstrates a lack of allegiance. Some of it clearly does not, like engagement in the property offence with no requirement of terrorism. That is both a policy problem and a head of power problem.

Prof. Williams: It was on that basis that the High Court struck down Robert Menzies' Communist Party Dissolution Act, on the basis that parliament said, 'We think it demonstrates something,' and the High Court said, 'No, that's for us.' Merely stating that this amounts to a lack of allegiance or, in that case, 'You are a communist,' is not sufficient. The High Court will examine it itself and, if the High Court takes the view that any of the grounds put in the bill do not give rise to a necessary lack of allegiance, we have a real problem, as Sangeetha has indicated, on constitutional grounds, because you are rendering people aliens where there is no valid legal basis for doing that.

Mr BYRNE: Professor Williams, one of the cessation of Australian citizenship offences is advocating terrorism. So is there a set of circumstances where you could have, say, someone between 10 and 14 who advocated a terrorist act falling under that?

Prof. Williams: Yes, you could—certainly with the conduct provisions at the moment. It applies to children of any age. There is nothing put in the bill to apply the normal rules of criminal responsibility and nor are they implicit, because the parts of the Criminal Code picked up do not include those provisions. So, yes, you could pick up children of any age and they could lose their citizenship by virtue of this. When it comes to the conviction points, certainly yes. If you had a child of, more likely, 14 or over and let's say they are convicted of vandalism, then equally yes. In the absence of a filtering mechanism, that is the automatic consequence of the statute.

Mr BYRNE: One element that really troubles me is the ministerial exemption and lack of accountability for that. Do you know of any precedent where a minister is not involved in the process and then there is ministerial discretion and how that could be contested and how that could affect others who would not have had that exemption? To me, that is a very grey area.

Prof. Williams: It certainly is. The most analogous context is in the Migration Act, where you find ministers having very broad decisions with natural justice often excluded. But this takes it even a step further than that asylum seeker context. For example, there is no requirement even to give the person notice. There is certainly no requirement for a fair hearing. Even when it comes to using intelligence information, ASIO does not even have to make a security assessment. The standards we will apply to asylum seekers are often reduced to a bare level, but this takes it even lower for Australian citizens. I certainly am not aware of any situation that has had this package. That is one reason it is concerning and, again, it is one reason why it may well be invalid. In the migration context governments have typically tried to push the envelope as much as possible; this has gone well beyond it.

Mr BYRNE: Is there anything you have seen in the statutes that have been drawn as to why the minister would exercise discretion?

Prof. Williams: The legislation indicates that public interest and related matters might be taken into account, but it is really at large. Of course, the minister does not need to hear submissions from the person affected, so the minister would make the decision as they see fit. It is an unconstrained, unbounded discretion. A court could attempt to review it, of course, but it would be difficult to do so and, even then, it is not the minister making a decision to revoke; it is the minister making a decision to exempt—and all the minister needs to do is to not engage with the material at all. If the minister says, 'I'm not even going to deal with this material' then it is unlikely a court would compel the minister to do so. So the consequence would just occur automatically, without any capacity to even seek to have an exemption applied.

Mr BYRNE: As I see it, they have extracted the minister from the process so that they cannot be challenged constitutionally. If there is advice to that effect I would like to see it at some stage. Secondly, the minister can insert himself to effectively exempt someone, but you do not have to be given the reasons publicly or anywhere else as to why he exercised that exemption.

Prof. Williams: You do not even have to be notified that the minister has made the notification. In fact, what you might expect to happen is: the minister will make a decision and notify other government agencies but make no public notification at all. There is no requirement for any public element to this, so all of this may happen

internal to government. That is why, in the absence of a requirement to put something in the *Gazette* or just tell the person, the first thing the person may know is when they get a knock on the door. In fact, that is probable if only because the authorities may not wish to alert a person beforehand. They may wish the person to find out they have lost citizenship at the moment they are taken into immigration detention.

Mr BYRNE: I think what troubles me, notwithstanding what you have just said, is that we do not know why the minister would exercise that exemption power. You can imagine someone who has the power to do that; in my mind there should be some constraints to that person exercising that power.

Prof. Williams: Certainly. Yes, I agree there should be appropriate safeguards and the decision should be reviewable, but we also need to put in the context that this is, of course, after the event. It has already happened. In fact, citizenship is automatically lost, so we are dealing with something that happens afterwards, where we are not quite clear even how the exemption power works. How do you exempt someone from something that has happened automatically?

Mr BYRNE: You could have a theoretical situation where you would revoke the person's citizenship and they did not even know it, and then the minister could exempt it and the person would not even know that they had not been a citizen for a while.

Prof. Williams: That is quite possible; in fact, it is quite probable that would happen, that somebody may be convicted of a minor offence, they have ceased to be a citizen, they do not know it, and the minister sensibly exempts them—again without having to notify them—and this all happens internally to government without any requirement of publicity.

Mr BYRNE: I think we are entering, in my mind, in that set of circumstances, a very grey area. I will leave it at that. Thank you.

Mr DREYFUS: Professor Williams and Ms Pillai, you have said on the front page of your submission that your primary submission is 'redraft the whole bill'.

Prof. Williams: It is, because the bill does not have a structure at present that means it is likely to withstand constitutional attack. As I said, I think section 35 of the Australian Citizenship Act should be modernised. It should be changed; it should be expanded to deal with non-state actors and the like. But in doing so I think this committee should be aware of the fact that it was drafted prior to the boilermakers case and a new model is required. I really think the department needs to go back to the drawing board and come up with a model that is not reasonably likely to be struck down at the first hurdle. That model does need to involve some core process in terms of making the primary decision.

Ms Pillai: I might add that the explanatory memorandum and the letter from the department state that the objective of this bill is to bring Australian legislation more into line with legislation in foreign countries. There are four countries that are mentioned in the letter—the UK, the US, France and Canada—and this bill as it is currently drafted does not bring Australian legislation closer into line with any of these countries. The broadest model of those four countries is the UK model, which provides for a very wide ministerial discretion to revoke a person's citizenship in the public good. That is not possible here for separation of powers reasons that do not apply in the UK, so that model is ruled out as an option. All of the other models are significantly narrower than the bill that has been drafted here. France and Canada both require a conviction in the overwhelming majority of cases with a ministerial discretion on top of that conviction. The US only allows a person to lose citizenship where they intend to renounce it—as a subjective question—when they engage in particular conduct, and there is an extra requirement of a conviction in certain cases.

Senator WONG: Who determines the subjective intention point in the US model?

Ms Pillai: It is quite difficult. It is quite a complex model, but it is clear that it is a subjective question, so a person cannot, by engaging in conduct that is offensive to the nation or conduct that is violent, be deemed to have intended to renounce their citizenship. It needs to be established that it was their subjective intention to renounce their citizenship. But there are difficulties with actually making that out. It is something that is complex in US law.

But all of those models operate in a way that have safeguards that this model does not have and that target a particular class of people who are going to be on the executive's radar. This bill does not do that by having such sweeping self-executing provisions. Redrafting would not only cure constitutional problems but also be likely to result in a piece of legislation that is more adapted to achieving what parliament wants to achieve with this law.

Mr DREYFUS: One last thing, Professor Williams and Ms Pillai: some of the public statements by government ministers and the Prime Minister are to the general effect that—I will paraphrase—citizenship is a privilege and not a right. Is that something either of you can comment on? And I hasten to say that in the

explanatory memorandum it is described as both. The explanatory memorandum does not say what I just said but rather:

... citizenship does not simply bestow privileges or rights, but entails fundamental responsibilities.

Ms Pillai: It is something that speaks to an area of significant constitutional uncertainty. It is something that has not been resolved by the High Court yet. There was no concept of Australian citizenship at Federation. That came into play in 1948 and sat alongside British subject status for a number of decades. The preamble to the Australian Citizenship Act says all of those things; it describes citizenship as a privilege; it describes citizenship as involving responsibilities. The extent to which that is the constitutional position rather than a rhetorical position is something that has not been mapped out by the court. It appears from dicta in High Court cases, and again we have not had a case where it has been necessary to determine who forms part of a constitutionally protected class of citizens or people of the Commonwealth, but it has been suggested in obiter dicta in the High Court that there is a class of non-alien or a class of people of the Commonwealth who may not be able to have their citizenship removed by parliament. For those people, citizenship may well be a right as well as a privilege, but it is constitutionally uncertain who those people actually are.

Prof. Williams: I think the short answer is that it is both.

Mr DREYFUS: Thanks very much.

Mr RUDDOCK: I am interested in the group of people who are approaching you with a view to challenging this legislation. Are they people to whom you believe the provisions—I do not want you to breach their client confidentiality—

Prof. Williams: No, I am not talking to potential clients. They tend to be solicitors and others who work in this area and who are seeking preliminary advice in my practice as a barrister on what to do if this law is enacted so that, if it is enacted, they are able to move quickly.

Mr RUDDOCK: It seems to me that most of this is likely to be an advisory opinion that you are seeking from the High Court until you have got some people who actually have been deprived of citizenship.

Prof. Williams: That is absolutely correct. But of course the way it operates is that it is automatic at the point someone has committed the conduct, so if you have a client who is already engaging in that conduct then you automatically have a case at that point. And whether or not the minister has made any notification is irrelevant. It is simply the fact that conduct has been committed and, for example, if somebody signs an affidavit saying, 'I have committed certain conduct,' you then have standing according to a High Court law of standing.

Mr RUDDOCK: Can I just explore one other esoteric area of interest. I noted your comments about people who may deprive themselves or renounce their commitment. You raised the question about the numbers of people with dual nationality—and I know that could be very large—but it could be even larger than I think even you had contemplated with the fact that Australians can in fact apply for another nationality, and that would be an additional pool.

I wondered how you thought *Sykes v Cleary* might have some import in relation to this. My understanding is that in relation to *Kardamitsis and Delacretaz* the court determined that there were some countries whose citizenship could not be renounced and that it might still well be the case.

Prof. Williams: Yes, you are right. That authority is certainly relevant to this is in dealing with the disqualification of members of parliament for dual citizenship. What that importantly illustrates is that the question of whether you are dual national is primarily a question of the law of the other country, and that is why so many people are caught by this. This is not an Australian law question; it is whether Greece, Israel or some other country determines you to be a citizen and, if they do, you are dual national. In those circumstances, the High Court has said that your renunciation again needs to be according to the law of that country. They did qualify it by saying that, if that country does not provide a reasonable path, then Australian law will permit you to be recognised as losing that citizenship.

Mr RUDDOCK: I am conscious of that.

Prof. Williams: But that is the only exception to it and that is why it is so difficult for so many people. They just do not know the law of that other country.

Mr RUDDOCK: But I cannot imagine the court would be able to say: 'If you had not been able to renounce because of the law of another country, that you'd taken every step to renounce,' that that had been effective?

Prof. Williams: Yes, I think that is right. If you take every reasonable step and the other country did not recognise it, then you may well be a dual national under Australian law. It is a grey area, and we do not know exactly what that means.

Mr RUDDOCK: I see it differently: I think you would remain a dual national.

Prof. Williams: You may well do, and there is no clear answer to that question.

Mr RUDDOCK: Thank you.

CHAIR: I have a couple of final questions. When it comes to armed conduct against Australia overseas where you would not have the ability, or you might not have that ability, to bring that person back to Australia to get a conviction, if you had proof of that armed conduct and you then went down the conduct provisions in this bill, are you saying there is no constitutional way you can do it?

Prof. Williams: No. I am saying that one option, say, the Law Council model that was referred to where a minister might make an application to a court to get a declaration, and here is the evidence put before the court that satisfies the court on the balance of probabilities, perhaps, that this person has committed conduct of a sufficient seriousness to demonstrate a lack of allegiance. You get an outcome from the court on that basis and you can then use that via ministerial discretion. But what you cannot do is, if you do not have evidence which is likely to pass that test, if you lack robust evidence that is not likely to stand up to scrutiny, you cannot bypass the court or other processes and make that decision directly. You have got to have the intermediate process. I say that recognising very well the difficulties of evidence in these zones. Of course there was the bill last year that sought to repair some of those things in the foreign fighters context, but you cannot avoid the fact that, at base level, you need appropriate evidence of some kind to base a decision. If you do not have it then, constitutionally, you are not permitted to make the decision in the absence of that information.

CHAIR: And would you see an ASIO security assessment as the type of evidence that could be used in such a process?

Prof. Williams: Certainly, yes that is one of the pieces of evidence that no doubt a court would be very mindful of. Indeed, when we look at tribunals or other contexts there has been a high degree of difference to decision-making bodies to those sorts of assessments, including in the context of people who have been subject to detention for very lengthy periods, because of an adverse security assessment. I think what you would do is set up a process whereby the government can put appropriate evidence, including intelligence information, at the body. It would be subject to the national security information act, so, again, these would not necessarily be public proceedings, but, still, you would have a credible independent decision maker who makes the decision at first instance.

Senator WONG: I suppose a different evidentiary standard is problematic, but, bearing in mind your proposition, which is essentially the need for judicial involvement and conviction to effectively flow from the Constitution, how else can the parliament deal with some of the evidentiary and practical concerns which we are focusing on here?

Prof. Williams: To be frank, there is no easy answer to a lot of that. Indeed, this is the same problem that is besetting Western nations around the world. There are thousands of foreign fighters in these war zones and democratic nations to this point have not found satisfactory ways to address that consistent with basic democratic principles for convicting these people, let alone for stripping them of citizenship. I do not have a concrete answer to say that, in all cases, we can get a process that will lead to the outcome that a government might want or we might think appropriate, and that is the price you pay, I think, for living in a democracy, where you have basic fact-finding procedures that sometimes proved to be quite inconvenient in some contexts. But we have them and not only do we have them but they are constitutionally entrenched.

Ms Pillai: To some extent, it is practically cured by what is in other legislation. There are circumstances that there is no easy answer for, but, in that particular example, where you have a person who is engaged in armed conduct overseas and, for whatever reason, you cannot bring them back to Australia to try them to get a conviction to revoke their citizenship, there is the power to cancel that person's passport and prevent them from coming back to Australia, which practically achieves much of what this citizenship revocation bill achieves anyway. It might not be the exact answer that the bill is aiming for, but we are close to a solution in some—

Prof. Williams: It is a good point. There are a variety of other mechanisms such as control orders. There are a range of things that can be applied that provide enhanced regimes of scrutiny and surveillance.

CHAIR: But if you cancelled their passport they could still come back to Australia.

Ms Pillai: If you cancel their passport and do not provide them with a visa, there is—

Prof. Williams: It is, practically, extremely difficult. There may be a legal entitlement, and that is something that may be looked at in the court itself. It may be that there is a constitutional right to return to Australia so long

as you remain a citizen, but it is not clear that is the case and it is possible that, indeed, it may be possible to prevent a citizen from returning to this country, where they represent a security risk.

CHAIR: You are saying that, if you cancel a passport, there is no legal requirement for that person to be able to return to Australia.

Ms Pillai: It is, again, on uncharted constitutional ground, so we do not know sure. If a person who was a citizen and had their passport cancelled attempted to return to Australia, it may well lead to a test case, but, weighing that up against what is in this bill, I would say that that example, where there is good evidence to suggest that a particular person poses a security risk, is more likely to pass constitutional muster than this model of this bill.

CHAIR: So you are saying that, if they have had an adverse ASIO assessment, there would be strong reasons for them not to return to Australia, legally.

Ms Pillai: There would be an argument that they do not have a right to enter; there would be an argument that they do have a right to enter.

Prof. Williams: I suppose what we are saying is that, if there are cases where you cannot revoke citizenship because evidence is not there of a kind that will satisfy a decision maker, the government has a range of other options at its disposal. They may include the passport option, which could be looked at, or they may include other options as well. As we know in this area, it is a mixture of strategies and operational—

CHAIR: But, if you were able to revoke citizenship, there would be no doubt whatsoever.

Prof. Williams: That is right, yes, but the problem here, of course, is that there are limits to what parliament can do in this regard, but it is also why we accept that revoking citizenship is appropriate in some circumstances. It just has to be done legally and in the class of cases to which it is appropriately directed.

CHAIR: 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. Thank you.

WERTHEIM, Mr Peter John, AM, Executive Director, Executive Council of Australian Jewry

[16:20]

CHAIR: Welcome. Although the committee does not require you to give evidence on oath, I remind you 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 a contempt of parliament. The evidence given today will be recorded by Hansard. Do you wish to make some introductory remarks before we proceed to questions?

Mr Wertheim: Very briefly, I would say that most people in my community and, certainly, my organisation are broadly sympathetic to the desire of the government to modernise the legislation – or this part of the citizenship act – to take into account contemporary circumstances and, in particular, the proliferation of international terrorism and the threat that that undoubtedly poses to this country. I suppose our concern in that regard is heightened by the fact that my community—I do not think it is any secret—probably faces a greater level of security threat than the country generally.

On the other hand, we are also very concerned that the bill as it is drafted seems to presume rather than prove that the commission of a particular act or the engagement in certain conduct entails, in and of itself, a severance of the bond of citizenship and a repudiation of allegiance to Australia. In that respect, we see that there is a dilemma there and that the task before the parliament is an onerous one and not a simple one to strike the right balance for.

Of the three reforms that the bill proposes, we believe that proposed sections 35 and 35A, although not without problems themselves, come closest to achieving what the announced purpose of the bill is. Proposed section 33AA, as we have said in our submission, is something that we feel is an overreach, for reasons which better qualified people have already spoken about. But, even with the other two provisions, there are things that we would recommend be added to the legislation to introduce safeguards to it. With regard to section 35, for example, we have given the example of somebody fighting for the Kurdish workers party, the PKK, which is currently a declared terrorist organisation within the meaning of the bill. Mere service with that organisation, even fighting with that organisation, in our view does not necessarily entail a severance of the bond of citizenship and a repudiation of allegiance to Australia. We would take the view that, on the contrary, somebody fighting in that organisation may well feel a degree of sympathy with other Western countries, including Australia, and therefore it should not automatically be presumed that that person is hostile to Australia.

There are other circumstances that might apply that the draft legislation, because of its automaticity, seems to overlook. For example, there could be a situation where somebody is kidnapped by a terrorist organisation and, under threat of their own life, succumbs to Stockholm syndrome, for example, and is thereby induced to serve with that terrorist organisation. Those of us who are old enough remember the Patty Hearst case in the 1970s, where a young woman was kidnapped, brutalised by a terrorist organisation, held hostage and treated in an appalling fashion and was in obvious terror of her life, and then, after a time, seemed to succumb to Stockholm syndrome, became a member of that organisation and participated in some of its violent activities, including one armed bank robbery.

A situation like that could happen to any of us, really. In that particular situation, when she was ultimately freed, it took some time to deprogram her, but she did eventually become her old self—if I could put it that way—and, to my knowledge, has never reoffended. Her loyalty to her home country—in this case the United States—has never really been in question. Again, it is an extraordinary case, but legislation has to be sufficiently sophisticated to take into account situations like that and exceptions like that. It cannot be presumed that, if a person who has dual citizenship serves with a declared terrorist organisation, it automatically means that they are hostile to Australia and that their citizenship should be revoked.

Similarly, with section 35A, where somebody has been convicted—again, I do not want to rehash old ground, because I have been listening to other submissions here—it seems quite clear that some of the convictions could be for offences that, even though they might be regarded as severe offences by a court and result in a penalty of imprisonment, might nevertheless not be so serious as to be regarded as a complete repudiation of a person's allegiance to Australia. Again, we have concerns in that regard.

Finally, with regard to the proposed section 33AA, again, quite apart from the constitutional questions that have been raised as to whether or not it is an exercise of judicial power, we have policy concerns as to whether it is appropriate for—as it were—public servants or officials behind closed doors to come to certain conclusions about somebody's conduct which have very severe consequences for that person, and which that person might not even become aware of until after the event, if at all.

For all of these reasons, we think that there are safeguards required—further safeguards than those that have been envisaged in the legislation—for all three of the sections. We think that probably sections 35 and 35A are more salvageable, if I can put it that way. Section 33AA requires a complete rethink. Although we are broadly sympathetic to the desire of the government to meet its responsibility to the Australian people, which is the first responsibility of government—namely, to ensure their safety—on the other hand, we do not want to introduce laws that ultimately defeat the very purpose of the legislation, which is to enhance, enforce and underline Australian values, including the value of democracy and the rule of law.

Mr DREYFUS: In the last paragraph of your submission, in respect of proposed new section 33AA, you have said this:

The rule of law—which is one of the citizenship values that the government has proposed—demands that citizens not be subjected to punishment by administrative fiat, but only through the due process of the law, which remains the most reliable method for testing the merits of allegations of wrongful conduct.

Do I take you to be saying, in effect, that section 33AA does not provide any due process?

Mr Wertheim: That is the view that we have taken. In fact, I have said elsewhere in the submission that if it were enacted in its present form it would open the door wide to error and abuse. Because there is no opportunity there for allegations of particular conduct to be tested in any authoritative way and for the person concerned to have a say or at least an opportunity to answer allegations against him or her, it does seem to us that that danger is there. That is why we cannot support that particular section in its present form.

Mr DREYFUS: You have made the general point, which I suppose applies to all three of the methods for revocation of citizenship, that the consequence is a form of penalty—indeed, a severe penalty.

Mr Wertheim: Yes. We wrestled with this. It may not amount to punishment under a criminal statute in the sense that it does not involve a fine or imprisonment or any of the traditional consequences that flow from criminal guilt. On the other hand, stripping somebody of their citizenship is, on any measure, a drastic action and one that does severely penalise the person in the generic sense, even if its technical legal status might be in question.

Mr DREYFUS: You have mentioned the desirability of having the criminal standard 'beyond a reasonable doubt' apply to findings about conduct. Do you have a view on how that might be achieved? That might be too hard a question, Mr Wertheim, because, as we have seen from the two previous groups of submitters we have had today, their position was complete, or at least substantial, redraft. Just say if you think it needs a substantial redraft, but can you see a way in which, working with the current bill, you could require the criminal standard to be used? Can you make a suggestion along those lines?

Mr Wertheim: Sure. This is in relation to proposed section 33AA. One of the concerns that we had was that when the minister decides to or—actually it is not even a decision, it is mandatory. Let me start that again. The language of the bill is mandatory. The minister 'must' issue a written notice, so there is no discretion as far as the issuing of a notice is concerned. But the administrative processes that lead up to that step seem obviously to require the minister to look at certain material that is put before him or her and then to act on it. Now, it is not clear from the legislation whether the conclusion to be drawn from the material as to whether or not the requirements of the act have been met is to be decided on the basis of the criminal standard of proof or the civil standard of proof, and what is particularly disturbing is that the conduct is defined in terms of the Criminal Code. So it is clearly criminal conduct that we are talking about, and it is not clear from the legislation how the minister is to make an assessment that the evidence or the material put before him or her satisfies the requirements of the Criminal Code that need to be satisfied in order to bring the notice into operation. It is just not clear whether the minister needs to act as a court would act: 'beyond reasonable doubt' or 'on the balance of probabilities'. It seems to me a glaring gap in the legislation and highlights, if anything, the inherent weakness of that particular proposed provision. It seems to us that the only way of curing that, really, would be with some sort of a court process.

Mr DREYFUS: Just while I think of it, Mr Wertheim, in case some doubts arise later, not only is Mr Goot, the president of the ECAJ, a legal practitioner of long standing, being senior counsel in Sydney, but you also, before becoming the executive director of the Executive Council of Australian Jewry, were a legal practitioner of long standing?

Mr Wertheim: That is correct. I was a solicitor for 32 years, but I retired from the law six years ago, so I do not have a current practising certificate.

Mr DREYFUS: Thank you.

Mr BYRNE: Mr Wertheim, looking at the mechanism, I was just quite struck by your testimony then. In essence, the minister may actually have no power to prevent that notice from being issued, because he is obligated

by law and cannot do it. But then he could subsequently revoke it or exempt it if he did not agree with it. Doesn't it put the minister in a rather difficult position? He might not agree with the notice being issued, but he then gets the power to create an exemption.

Mr Wertheim: That is our reading of it. The relevant notice provisions in all three proposed sections are in mandatory language. They all say that the minister must issue the written notice.

Mr BYRNE: Because they cannot insert the minister into the process. For example, as the former Attorney-General would know, he would have had the power to issue or not issue warrants. On the basis of the evidence, it does not matter: the existing minister gets a recommendation and he is then obligated to execute that even though he might have reservations. That person then effectively becomes a non-citizen for whatever period of time. If he actually really disagreed with that then he could issue an exemption, but then to some extent there is no accountability mechanism as to why he would do that to anybody and he does not have to explain it to anybody as to why he did it.

Mr Wertheim: That is right; that is my reading of it. In fact, I think it goes even further than what you have put. The wording of the relevant subsection in each case is:

If the Minister becomes aware of conduct because of which a person has, under this section, ceased to be an Australian citizen, the Minister must give written notice to that effect ...

It is not clear what the opening words really mean 'if the minister becomes aware of conduct'. That could mean they read about it in a newspaper or online somewhere. It is not necessarily indicative of an internal departmental process. If that is the intention it certainly does not say that. Then it goes on to say that the minister's hands are bound and that they must issue the notice.

Mr BYRNE: Yes.

Mr Wertheim: Then if the minister is of the view that in all of the circumstances it is justified, the minister may, at the minister's discretion, revoke the notice and exempt the person from its effect. I think the role of the minister is, in the first instance, one of being an automaton having the minister's hands bound by the legislation and then second, after the event, being in a position to exercise a discretion to revoke. They are the reasons we have also suggested to the parliament to have a look at amending all three of those provisions to provide the minister with the discretion earlier on, at least not to issue the notice—

Mr BYRNE: Yes.

Mr Wertheim: if in all the circumstances it appears to the minister that, although, prima facie, the requirements of the legislation have been met, there are other mitigating circumstances that suggest that the person's loyalty to Australia has not really been abrogated.

Mr BYRNE: From what I can hear in your testimony, and also Professor Williams, is that you have a process that undertakes a very extreme course of action, but there is no line of accountability if something goes wrong. It binds the minister, even though the minister might not agree with it. The only action that can be taken is by the minister to potentially revoke it via exemption. That is the only safeguard you have and the minister is not obligated to explain why he or she did that to anybody. I just think that is a very fraught process.

Mr Wertheim: And indeed I understand that the minister is not required to give notice to anyone of the revocation.

Mr BYRNE: Thank you. That is all from me. I found your testimony very persuasive.

Mr DREYFUS: I had another question in relation to a statement made on page 2 of your submission, Mr Wertheim. I just want to check that I have understood it correctly. At about the middle of the page, you are making a general point that revocation of citizenship should apply only to persons who:

- (i) have another citizenship to fall back on, that is dual nationals; or
- (ii) have an indefeasible legal right of access to citizenship of another country under the laws of that country, and are not barred for any reason from taking up residence in that country.

Do I take it that your view of this is that, even if you got citizenship somewhere else, that does not necessarily, depending on the country, give you the right to go to that other country.

Mr Wertheim: I am not sure of the answer to that question. I think if you are a national of that other country there is at the very least an international obligation towards third countries on the part of that other country to admit you. But I am not an authority in that area and I really would not want to hazard a guess. The second part of the section of our submission that you have read from really addressed somebody with sole Australian citizenship but with the right to apply to another country for citizenship. It seems to us that the mere eligibility to apply for citizenship elsewhere is not enough to get around Australia's obligations not to make somebody stateless. There

needs to be something stronger than a mere eligibility of citizenship in another country. There needs to be an infeasible right and also a right of residence.

Mr DREYFUS: Yes, I think all of us can probably hope that we will not have to get to that question, because the bill is premised on the Australian citizen in question being a dual national or, to use the words of section 35, someone who 'is a national or citizen of a country other than 20 Australia'.

Mr Wertheim: There was I think a request in relation to one of the sections as to whether or not it should be extended to sole nationals who have the right to apply.

Mr RUDDOCK: I have a mischievous question. We have a great deal of material available on comparative law in relation to Canada, New Zealand, the United Kingdom, the United States of America and France. What is the situation in Israel?

Mr Wertheim: I would not know. I am sorry; I just do not know what the situation is over there. You would have to ask somebody who is an expert on Israeli law, and I am not that person.

Mr RUDDOCK: I do not know how they would deal with the issue of people who may be terrorists and demonstrate no commitment to Israel.

Mr Wertheim: It is a very interesting question, because they have had situations in the past, to my knowledge, in which Jewish citizens of Israel have engaged in espionage activities on behalf of countries that are at war with Israel or have declared themselves to be in a state of war with Israel. That is quite a number of other countries in the neighbourhood.

Mr RUDDOCK: They may have some initiatives that we have not even contemplated.

Mr Wertheim: It may be well worth your while to have a look, but—sorry—I just do not know the answer to your question. I would have thought that the order of magnitude of the threats they face would be much higher than, fortunately, we are faced with here in Australia.

Mr NIKOLIC: Going back to your comments about declared organisations that are hostile to Australia being automatically swept up, as I understand the provisions in the bill the minister has the capacity to provide a subset of declared organisations. It is not necessarily an automatic transference of those organisations declared by the Attorney-General. So, the minister could list those organisations, like Daesh, that are specifically opposed to Australia and our democratic beliefs, rights and liberties. I wonder why that is not a sufficient safeguard, in your view, to get around the PKK point you made in your introduction.

Mr Wertheim: It may well be, and the PKK point might also be overcome by the fact that their listing is due for review imminently—in fact, I think this month—and it may not be continued. So there is always that possibility as well. But I take it that you are referring to subsection (4) of proposed section 35—the definition of a declared terrorist organisation is not automatically an organisation that is listed in the Criminal Code but one that has further been declared for the purposes of this legislation. That could be the case, but, again, it is left to an administrative process, and—

Mr NIKOLIC: With respect, not necessarily an administrative process; the minister has to make a declaration about which organisations on that list linked to terrorism offences, linked to allegiance, potentially fit the definition in the bill. So, if not that safeguard, then what safeguard such that you are in a position to propose what more you would do in that respect?

Mr Wertheim: Even with the PKK, its listing occurred quite early in the piece, I understand, and its listing has been renewed several times. So it is quite possible that even with the process that is envisaged under subsection (4), an organisation like that might be listed again for the purposes of this act. It has undergone renewal on at least two occasions, to my knowledge. Even that does not necessarily mean that it is a safeguard. The safeguard we are recommending is simply that the minister be given a discretion not to issue the notice. That seems to us to be the best or at least a superior form of safeguard, because it means the minister can view the totality of the circumstances, the nature of the terrorist organisation or the alleged terrorist organisation, as it is presently constituted and as its operations presently apply to Australia, and make a judgement on that basis, rather than just a sort of blunt instrument listing.

Mr NIKOLIC: In relation to the other countries that have acted in this regard—to pick up Mr Ruddock's point—I understand that Canada enacted in June 2014 the Strengthening Canadian Citizenship Act, and the UK enacted legislation in July 2014. I understand that some 25 people have been deprived of their citizenship. With France, there is not necessarily retrospectivity in terms of offence but retrospectivity in relation to date of citizenship—a 15-year time frame within which a person who committed a terrorist offence became a French citizen. That has been found to be constitutionally sound. Regarding those examples I have just mentioned and the

people who have been deprived of their citizenship as a consequence of their involvement in terrorism, and some of the case studies you raised initially—innocent presence, Stockholm syndrome—have you done any studies of these countries as to where that might have been the case and where it gives rise to the sorts of concerns you have mentioned?

Mr Wertheim: No, I have not done a particular study of those particular countries or of the cases in which those pieces of legislation have been applied. These are just situations that have come up in the past in a more general sense. As far as I understand, in the UK the legislation that was introduced last year and of which you speak was in response to a particular case in which an Iraqi national, I think it was, was found to have engaged in particular terrorist activities and revoking of citizenship was sought. It could not be revoked, because the person was a sole UK national. Although that person might have had the right to reacquire Iraqi nationality, that was held by the court to not be sufficient and the person retained their UK nationality. That is my understanding: the UK brought into effect the Immigration Act 2014, which sought to get around that problem by applying the revocation of the citizenship provisions that were already there to persons who were sole UK citizens but had the right to acquire citizenship in another country.

That was not without controversy. I cannot say what the situation was in France or in some of the other cases you referred to, but in relation to the UK I am aware of an opinion that was prepared by Professor Goodwin-Gill of Oxford University. I have a copy of it here. It at least challenged the legislation on the basis that it might bring Britain into noncompliance with its international obligations to other countries.

Mr NIKOLIC: Yet 26 people have been deprived of their citizenship in the United Kingdom. To assist you with the French example, the French decision in January 2015: the top court in France, the French constitutional court, upheld the government's decision to strip a French-Moroccan dual national, Ahmed Ahnoui, of his French citizenship after he was convicted of terrorist offences. But I will leave it there.

Mr Wertheim: And that was following a conviction by a court.

CHAIR: I have a question about this issue of loyalty or disloyalty. It seems to me that it might not be quite as straightforward as it might seem. For instance, if you are fighting for a declared terrorist organisation, that organisation might not be fighting against Australian soldiers and therefore might not be a direct security threat to Australian soldiers on the ground. But it could be fighting against an ally, and there might be Australian soldiers who have been seconded from our armed forces who are fighting or are part of that ally's forces that the terrorist group might be taking up arms against. Where do you see the line on this whole question of disloyalty?

Mr Wertheim: I do not think it should be necessary that the terrorist organisation be engaged in combat activities against Australia specifically. I do think that other terrorist organisations potentially constitute a security risk to Australia, even though they are not engaged at the present time in combat operations against Australian forces. Indeed, many if not most of the terrorist organisations that are declared as such at the present time under the Criminal Code are not engaged in any combat operations against Australia per se, and may never have been. However, where those organisations operate under an ideology that seeks expressly to impose itself as a way of life or a system of government on other countries and expressly reserves for itself the right to do so by military force, then, ipso facto, that kind of an organisation is a threat to Australia and indeed to every democratic country. So it would I guess come down to its ideology and its declared beliefs, particularly its declared attitude to the use of force in spreading its beliefs.

CHAIR: So you would think that if a terrorist organisation was committed to just the overthrow of one government then that might not necessarily be a threat to Australia, but if it was for democratic governments then it should be?

Mr Wertheim: Certainly the first case you mentioned, yes. If it is simply an organisation that is concerned entirely with the internal governance of a particular country that Australia has nothing to do with, another part of the world, and it is purely for the sake of changing the system of government in that country and goes no further—if it is not part of a general ideology to impose a way of life or a system of government beyond their own country—then probably they would not be regarded as threat to Australia and they should be exempted. But I think one needs to be very, very careful about how one does that. It is obviously a matter of fine judgement in each case. Most of the terrorist organisations with which we are now concerned operate under an ideology that is not confined in the way you have given as an example; they operate under a much broader ideology that is seeking to extend their control and their power to other countries and doing so in a way that expressly reserves to themselves the right to use armed force to do that. There is no limit on the extent to which they seek to spread their ideology by those means. So, we would be very foolish to not take that into consideration.

Mr BRUCE SCOTT: You mentioned that something should perhaps be inserted in the law where the minister has the discretion to issue a notice and you suggest there should be something in the law that empowers the minister to not issue a notice. I would have thought the very fact that he has discretion to issue one also implies that he has the discretion not to issue. You suggest that there should be something put in there. Could you explain that?

Mr Wertheim: My concern was that the bill as drafted does not give the minister a discretion about issuing a notice. It is in mandatory language. It says that the minister 'must' issue the written notice on becoming aware of the conduct. There is no discretion. And what we are recommending is that that be softened so that the minister is given a discretion not to issue a notice, notwithstanding that mandatory language.

Mr BYRNE: If the minister intervened and chose not to exercise discretionary power, would that then create any constitutional issues?

Mr Wertheim: As to whether or not it is an exercise of a judicial power, I am not sure of the answer to the question. I would have thought not but I am very reluctant to express any firm opinions about the constitutionality or otherwise of this legislation; that is for superior minds to mine. But not interrupting the status quo, not exercising a discretion, not disturbing somebody's citizenship rights, it would seem to me that it would be a bit of a stretch to regard that as an exercise of a judicial power.

Mr BYRNE: I am keen to get your assessment because I remain deeply concerned about a minister just being required to issue a notice that he or she may have a problem with. To my way of thinking, that whole line of accountability, particularly with those who have made the decision, which I am presuming on the basis of some information that may be a committee of people, puts the minister in a very problematic position. I am attracted to the proposition of potentially the minister being able to not exercise that power and then provide some form of statement of reason as to why the recommendation to revoke the citizenship was not proceeded with. Is that something that you would be comfortable with?

Mr Wertheim: I would be very comfortable with that. In fact, I think that is pretty much what we have recommended bar the statement as to reasons. But I think a statement of reasons would be entirely in order in those circumstances.

CHAIR: As there are no more questions, thank you for giving evidence at the hearing today. 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.

ABBASOVA, Ms Gulnara, Director, Federation of Ethnic Communities' Councils of Australia

GILLEN, Ms Erin, Senior Policy and Project Officer, Federation of Ethnic Communities' Councils of Australia

GRAMMATIKAKIS, Ms Eugenia, Acting Chair, Federation of Ethnic Communities' Councils of Australia

[16:58]

CHAIR: I now welcome representatives of the Federation of Ethnic Communities' Councils of Australia. Although the committee does not require you to give evidence on oath, I remind witnesses that this hearing is a legal proceeding of the 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 the parliament. Do you wish to make some introductory remarks before we proceed to questions?

Ms Grammatikakis: Yes we would. First of all, I would like to thank the committee for giving us the opportunity to present today at this hearing. FECCA is the national peak body representing Australians from culturally and linguistically diverse backgrounds. We support multiculturalism, community harmony, social justice and the rejection of all forms of discrimination and racism, and our policies are developed around the concept of empowerment and inclusion, and are formulated with the common good for all Australians in mind.

We believe citizenship is a symbol of acceptance into the Australian community and is highly valued by migrants and refugees. FECCA believes that citizenship policy has an important role to play in achieving and maintaining social cohesion in the Australian community by giving migrants a sense of belonging to this country and community. Our primary concerns are that we believe the citizenship amendment bill before this committee has the potential to create two categories of citizens. We believe that disproportionately this will affect migrants, their children and grandchildren and also have the potential to affect social cohesion in our society.

In addition, FECCA holds a number of concerns in relation to children's rights under this bill, which are foundational in international human rights law. We also believe that the bill leaves open the potential for refoulement of Australians who entered this country as humanitarian entrants. We would also like to highlight the insufficiency of the bill to provide important safeguards to protect fundamental rights including the right to a trial and access to the rules of natural justice. Our recommendation to this committee is that this bill is not passed in its current form and that the committee reviews and reconsiders the bill before it puts it forward.

Mr DREYFUS: You have expressed a really fundamental policy concern about the creation of two classes of citizens. But given international obligations that Australia has as a party to the Convention for the Reduction of Statelessness, is there any way around this? Just to take the point on which there seems to be the most agreement in most submissions, which is that something akin to the present Citizenship Act—namely, fighting for a foreign power against Australia—which is already a ground for cessation if you are a dual citizen, even if this bill were limited to fighting for a declared terrorist organisation, it still could not reach beyond someone who is a dual citizen.

Ms Gillen: The reason we raise it is as national peak we have state and territory members and a lot of them have done consultations with the communities. People have been raising this that they are really concerned that this puts them at a different level of citizenship to people who do not hold dual nationality. I think that the concern comes from the breadth of the provisions of the amendment bill. So as has been raised under what might be minor conduct, a person who does not hold a dual nationality would simply go through the criminal justice system. They may serve a term of imprisonment but once they are done they can resume their life in Australia whereas for that same conduct a dual national may find their citizenship automatically ceased or their citizenship revoked. So I think it is really about the breadth of provisions. We are suggesting that if the parliament feels that revocation of citizenship is an appropriate way forward to address the security concerns, that it is confined to conduct that is of a level of criminality that warrants such a serious consequence as revoking citizenship and that it follows a conviction.

Mr DREYFUS: Thank you very much. On that same note, you have observed in your submission on page 2 that there is not available information on the number of Australians who hold dual citizenship. You referred back to a parliamentary paper from 2000, which made an estimate the four to five million in that year and the Australian Citizenship Council making a roughly similar estimate in the same year of 4.4 million. I am a bit surprised that it is not possible to get a more precise number on this. Are you prepared to hazard a guess or make an estimate because that was 15 years ago? Would it be likely to be more? Let's be very imprecise and just say it is likely to be more.

Ms Grammatikakis: I think it will be more, definitely. But, again, we do not have the numbers. It is through our experience with the communities and the organisations that we work with and the anecdotal evidence that we hear. So I think it would be safe to say that it would be more but I think it would be terrific if there was a way in which we could quantify and get some more precise numbers. But it would definitely be more, not less.

Ms Abbasova: If I could add to that, clearly the ABS does not collect data on this issue nor does it collect data on the number of stateless people in Australia. We certainly look at the figures of people born outside of Australia and that is roughly a quarter of the population and another quarter of people have at least one parent born overseas, so potentially they have that citizenship as well due to those factors. I would certainly say it would be more but the lack of data is certainly not helpful.

Mr DREYFUS: We have the Department of Immigration coming before the committee. They may be able to help. But it is not a statistic that is collected by the ABS?

Ms Gillen: No.

Senator GALLAGHER: You touched on, in your submission and again in your opening statement, the rights of children. I am just wondering if that has come up through your consultations with your state and territory organisations?

Ms Grammatikakis: Yes that has been raised. I think the feedback received was that it was felt that children should be exempt or there should be safeguards around children. If the citizenship of the parents is revoked, children should not be automatically revoked. That is one of the concerns. In reviewing this bill, I think what has been suggested is that safeguards be provided and that around the area of children, it becomes a bit more tight and a bit more prescriptive. But overall, concerns around revoking automatically children's citizenship by virtue of revoking the parents' citizenship has come out strongly.

Ms Gillen: I will elaborate a little on our particular concerns in relation to children. They are twofold. The first is, as highlighted, if a child's parent has their citizenship revoked or automatically ceased under this bill, the child could be subject to section 36 of the Citizenship Act, which allows the minister a discretion to revoke the child's citizenship. There are some provisos on that. But our concern is that, given the breadth of the provisions here and the number of people who might fall under the new provisions, we might find an increase in the number of children who could have their citizenship revoked under section 36.

The second point is that there is nothing in the bill to exempt children from the loss of citizenship on the basis of conduct that they themselves may have undertaken, which is extremely concerning. I will defer to the Law Council submission on this. I think they make some very good points in relation to the level of conduct that some of the offences in the bill actually refer to.

Mr DREYFUS: Ms Gillen, in your earlier answer you referred to the fact that FECCA is in fact a federation of a range of constituent bodies and that those constituent bodies had conducted consultations on this bill. Are you able to provide the committee with a list of the constituent bodies that make up FECCA?

Ms Gillen: Certainly.

Ms Abbasova: That is publicly available on our website.

Mr DREYFUS: I understand that.

Ms Abbasova: We could certainly provide that.

Mr DREYFUS: Perhaps you could provide that to the committee secretariat. I wanted to follow up on something you said on page 2 in the passage dealing with statelessness. In the second-last paragraph above the heading 'If the Minister becomes aware of conduct' it says:

While the Explanatory Memorandum expressly states that the purpose of limiting the Bill to nationals or citizens of countries other than Australia is to ensure that a person will not become stateless, FECCA maintains concerns that there is still scope for this to occur.

Are you able to explain further what your concerns are?

Ms Gillen: The concerns might be that the country may not accept the person for some reason. Something that I know has been ventilated in the press a bit has been the idea that, if Australia does not want someone due to their terrorist conduct, perhaps the country that they hold dual nationality with may also not want them. Our other concern would be for humanitarian entrants into Australia who may hold dual nationality but the country of their second nationality is the site of their persecution. They would not be able to return there safely and would possibly end up in immigration detention awaiting a safe return.

Mr DREYFUS: Is that last matter that you raised something that the bill could make express provision for?

Ms Gillen: There is scope for the committee to look at that. It is certainly a concern of ours that there is no safeguard in relation to people who are humanitarian entrants into Australia.

Ms Abbasova: There may however be other scenarios that are outside of the scope of humanitarian entrants and that having explicit reference to that case only would exclude a number of other cases that we cannot envisage at this stage but are possible.

Mr DREYFUS: I offer you an example: someone who is in the situation of having arrived in Australia lawfully who could have claimed refugee status but did not, but nevertheless they fled from another country, of which they remain a citizen, obtained Australian citizenship without ever having activated the provisions of the refugee convention, but nevertheless could have done so, and remain at risk of persecution or death on return. That is the other possible scenario that would activate those humanitarian concerns. Is that right?

Ms Gillen: Yes, it could do.

Mr DREYFUS: Are you able to tell us any more—just in summary; I do not want hours of it—about the committee consultations on this bill across Australia? The question is going not to the member organisations and the constituent bodies of FECCA but, rather, the outcome of the consultations.

Ms Grammatikakis: We consulted widely and the feedback received informed the submission that we put to the committee. The consultations were done through organisations and networks that we have, either members or other stakeholders that we engage and communicate with; also through individual contact with key individuals within the communities that we have as partners and engage with, and the feedback that we received, as I highlighted, has informed the submission. I am not sure if that answers the question or what other aspects—

Mr DREYFUS: That is fine. Thank you very much.

Ms Grammatikakis: That did take place across the whole of Australia, in each state of Australia.

Mr DREYFUS: Thank you.

Senator GALLAGHER: In summary, what I get from your submission is that people are aware of the need to look at the emerging issue that is not addressed currently under the law, of people fighting not for nation states, and there is acknowledgement that there is an issue to look at, but the breadth and scope and processes in the bill have caused concerns for the communities that you represent.

Ms Grammatikakis: That is correct. There is recognition and the government should be commended for taking this opportunity to review the citizenship policy. They accept that and support that. But what we are hearing and what we are saying here today is that there needs to be some further consideration as part of this exercise to look at the detail and to provide safeguards and to consider further some scenarios that perhaps have not been considered, including what safeguards can be put in place to ensure that, as much as is possible, all scenarios are covered.

Ms Abbasova: Essentially, the submission represents the summary of what the community concerns are. One particular issue that we highlight through the submission is the concern around social cohesion. That goes to our point around creating two classes of citizenship potentially and creating the vulnerability for migrants and refugees in Australia who hold dual citizenship or are eligible for it. The impacts for social cohesion or, rather, erosion of social cohesion, are quite significant and are certainly a major concern for our organisation.

Mr NIKOLIC: Following on from that point, I get the link between taking away citizenship, the impact on social cohesion and a sense of belonging, Ms Grammatikakis, which you said in your introduction. Was there any feedback at the consultations about the effect on social cohesion in the country of terrorist conduct and terrorist offences encapsulated in the bill?

Ms Grammatikakis: There is concern. The feedback that we heard is that citizenship has always been viewed by many as a very positive experience. It is a pathway to being, if you like, inducted formally into the Australian community. It is very symbolic and very valued. What we are hearing is that reviewing this policy is an opportunity for the government to achieve its objectives and, also, to not look at the negatives but look at how we can strengthen the positive effect that citizenship has for strengthening social cohesion within the Australian community. This is an opportunity to use this process to strengthen those elements, not only for members of the community who wish to become Australian citizens but for the whole community to use citizenship as a tool to engage about what citizenship is and what civic responsibility is. Also, through that, there is identity and who we are as Australian people. Many view this as an opportunity to look at those elements as well and strengthen those elements and use this as a tool to engage with the broader community to build our communities and social cohesion.

Mr NIKOLIC: I get that point. I accept everything you have said. There are positive aspects of citizenship. But the reverse of that is that those who benefit from the privileges of citizenship—and I am one of those people—then may engage in the conduct and offences in the bill. Surely that would have the reverse effect of what you are describing. My question was: in the consultations that FECCA has accomplished around the country, was there any feedback on the negative effects on social cohesion, where those privileged people who win the great lottery of life and become Australian citizens then engage in those sorts of behaviours, which is a betrayal of all of those positive things that you just articulated? Was there any feedback about the negative aspects on social cohesion and, therefore, the requirement to act in response to those negative impacts?

Ms Grammatikakis: There is a recognition that there could be the potential for there to be a negative impact on social cohesion. There is also a strong recognition and acknowledgement that, where such behaviour does take place, it needs to be addressed swiftly and through the law and through other instruments that are there to ensure that that behaviour is punished or addressed through the law. There is definitely a recognition that it can have a counterproductive effect on social cohesion but, equally, also a recognition that it needs to be called out and addressed through this policy or through other instruments that are there.

Ms Gillen: As we have said, there is recognition of terrorism as a threat to our community and to our country. But I think what has come out of the consultations is the idea that that is a common threat to all members of the Australian community and the real concern about the bill is that it divides that community in addressing what is a common threat.

Mr NIKOLIC: So, as an extension of the request by Mr Dreyfus for a list of organisations, is it possible to get a little more of an understanding beyond what you have provided here of the outcomes from those consultations as to what people think is a reasonable response to some of the negative consequences of those who support resurgent terrorism and engage in the sorts of offences and conduct highlighted in the bill?

Ms Grammatikakis: Yes.

Mr NIKOLIC: Thank you.

CHAIR: I have a question with respect to how children are dealt with, especially those children under the age of 10. If their parents had dualism and were involved in a serious terrorist act and under the bill had their citizenship revoked, my assumption would be that you think that it would be in the best interests of the child that they would not have their citizenship revoked and they would go into foster care or go to a grandparent. Is that basically the point—

Ms Gillen: Not necessarily. We are not making any presumptions as to what would be in the best interests of a child in that circumstance. We are saying that there needs to be a safeguard in place to ensure that the best interests of the child are the priority consideration. Whether that is to go into care or whether that is to go with their parent who has lost citizenship is not for anyone to deem except in a specific context where you have a specific set of facts to make that decision on. If the parliament were to go ahead with a model like this, we would like to see extra safeguards in place to ensure that the best interests of the child are a priority consideration.

CHAIR: Could you see any situation where, if the parents had been convicted of a serious terrorist offence and did have their citizenships revoked, it would be in the child's best interests to have their citizenship revoked and to accompany the parents?

Ms Gillen: I am certainly not going to speculate on something like that.

Senator GALLAGHER: Ms Gillen, is your point, though, that in the bill the best interests of the child should play some role in determining the outcome of either their cessation of citizenship or their retaining of citizenship? So, rather than you forming a view about what is in the best interests of the child, there should be some test?

Ms Gillen: Yes. We think it should be a priority consideration. But our other recommendation is that children should be exempt from the provisions whereby they would have their citizenship revoked based on their own conduct. But, in relation to their parent's conduct, the best interests of the child should certainly be a consideration.

CHAIR: In defining 'child', would that be zero to 10 or between 10 and 14? How would you define a child?

Ms Gillen: Eighteen.

Ms Abbasova: Following on from an earlier question on what is reasonable in terms of consultations with our constituency across Australia, I believe that we have provided a summary of that. If you look at our submission, it is summarised on page 4 where it says:

We support the judicial system, the rule of law, and the right to a fair trial.

If the parliament chooses to go with the citizenship revocation approach, this is exactly what the reasonable response would be in the view of our constituency, as opposed to the very broad, sweeping range of provisions that the current bill provides for.

Mr NIKOLIC: Ms Abbasova, I am talking to the specific rather than the general. If there have been extensive consultations, I imagine there have been minutes produced and documents that would provide some specificity to the points that people were raising both for and against. I would be interested in those views if they were available.

Ms Abbasova: I would not be aware if there were any minutes. This submission was prepared with input from members. We have not asked for any minutes, but we will certainly find out if there were any.

Mr NIKOLIC: So verbal input?

Ms Abbasova: In writing to us. We have not seen any original documents from the consultations, but we can certainly ask if there were any and provide them.

Mr NIKOLIC: Thank you.

Senator WONG: I assume FECCA regularly consults with members and partner organisations about a whole range of policy matters. That is certainly my experience. Is that correct? I am assuming that it is not an unusual proposition for your organisation to go and engage with partner organisations and members about particular policy issues. Was this different in any way from other consultations you have held on other aspects of settlement services or other points around multicultural policy?

Ms Abbasova: No. It is exactly the same process that we follow.

Senator WONG: So if you do not have reams of minutes, I suppose you can just indicate that to the committee at the appropriate time.

Mr NIKOLIC: The only reason I ask—

Senator WONG: You can ask, and they can give you the answer they are going to give you, rather than being cross-examined.

Mr NIKOLIC: I have read the submission with interest, but within my community and within my travels I have heard other perspectives raised beyond those in the submission. So I am just asking—

Senator WONG: You can make a submission too but I guess—

Mr NIKOLIC: I am just asking that if there are minutes I would be interested to see those, because I know that there are elements of the ethnic community that I engage with that have views beyond those that have been expressed. I am just asking if they are. If they are not, that is fine. I will leave it to you to decide if there are or are not.

Senator WONG: I am sure that Mr Nikolic can point the committee to other submissions that he would like us to look at.

Ms Abbasova: An important point that we would like to make is that ethnic communities are not a homogenous group, of course, and there are a multitude of views and perspectives.

Mr NIKOLIC: Indeed.

Ms Abbasova: The membership that we have across Australia that provided input into the submission has been captured as accurately as possible.

Mr NIKOLIC: Thank you.

Senator GALLAGHER: And the submission is signed off by the organisation?

Ms Abbasova: Yes.

CHAIR: Thank you for giving evidence at the hearing today. 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.

GIBB, Ms Doris, Acting Deputy Ombudsman, Office of the Commonwealth Ombudsman

NEAVE, Mr Colin, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman

[17:29]

CHAIR: I now welcome the Commonwealth Ombudsman and representatives. 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 some introductory remarks before we proceed to questions?

Mr Neave: Yes, thank you. I make the general point that the context in which the Ombudsman's office would approach the scheme of a bill such as this one would be to examine it from its perspective, which is a very keen interest in effective and efficient administration in the public sector and also the possible involvement of the office in the future. For that reason, we have concentrated, in the short submission which we made, on two aspects of the matter. First of all, the fact that citizenship occurs by operation of the statute, which in turn could well conceal an administrative decision-making process, given that that must logically occur for the bill to operate. We also make some comment about the practical effects of the loss of Australian citizenship on individuals who might lose it.

In relation to the first aspect, we think parliament might consider, or regard as desirable, clearly acknowledging the reality of administrative actions which will underlie the operation of the new provisions and more clearly spelling out the standards by which officials—who could well be providing advice in this matter—should undertake a process leading to the provision of that advice. Thank you.

CHAIR: Thank you.

Mr DREYFUS: I am going to have a letter handed to you and to Ms Gibb. You might have had a chance to look at it, because it is among the public submissions. This is a letter from the Department of Immigration and Border Protection—specifically, the Deputy Secretary Rachel Noble—dated 21 July. It has been included, and released, as part of the committee's public submissions. On the second page of this letter, Ms Noble, as she puts it, takes an opportunity to outline the arrangements that will be put in place. I will give you a moment to read that 12-line paragraph. It is really picking up the point you have just made orally and, to some extent, in your submission—that parliament ought to clearly acknowledge the administrative processes which you are certain will underlie the giving of the notification, to use the terminology in the bill.

Am I right in thinking that Ms Noble—albeit in a fairly shorthand fashion—describes the quite complex mechanisms and communications that are going to be put in place, not only by her own department, Australian Customs and the newly renamed Australian Border Force, which is part of Immigration, but by other relevant departments and agencies, which are all going to work together to produce information for the minister? The last sentence reads:

The Secretary will bring cases to the attention of the Minister.

I take it that you, as Ombudsman, are suggesting that it would be far better if whatever process were adopted were spelled out in the bill?

Mr Neave: I think that the parliament should consider providing a framework in the bill. That is effectively what we suggest in our submission. However, it will depend upon the detailed discussions which might take place once the bill has passed as to whether or not the process set out by the deputy secretary would be sufficient. At this point in time, it is a little difficult for me to say whether we would be able to achieve the outcome or objective—which, I think, would be wise—by discussion. At the moment, it is fair to say that the situation is unclear. As we say in our submission, parliament should consider having at least a framework for processes and procedures within the bill.

Mr DREYFUS: You have also referred to the framework used in this bill as a legal fiction, saying:

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.

I wonder if you might expand further on that phrase 'legal fiction'?

Mr Neave: A legal fiction is a fact assumed, or it can be created by courts. The scheme of this act results in the cessation of citizenship by operation of a statute. I have made the point already that it conceals an administrative act. The minister does not decide—but something administrative must have happened, possibly without the knowledge of the person affected by this decision. An ombudsman will say, for example, that the person has not been afforded procedural fairness, perhaps, if the person affected is not dealt with fairly. It is not

quite the same circumstances if there has been a conviction by court, but that whole process of automatically deciding citizenship goes, either by way of a conviction or by way of something occurring, amounts to a legal fiction.

Mr DREYFUS: A number of the submissions have raised a concern that the bill exempts entirely everything to do with the process of cessation of citizenship from the effects of section 39 of the Australian Security Intelligence Organisation Act. Is that something you have looked at? In asking, I am conscious you do not have, other than in respect of mandatory data retention, an oversight role in respect of ASIO.

Mr Neave: No, we certainly do not; the inspector-general is responsible there. No, I have not looked at that issue. But the point we make in our submission is that depending upon the circumstances the ombudsman may have jurisdiction in relation to administration, or that could be the responsibility of the Inspector General of Intelligence and Security.

Mr DREYFUS: The other point you raised under the heading 'Practical effects on the immigration detention network' raises the point that while the legislation and the explanatory memorandum in the second reading speech—and government statements, one could add—all assume that a dual citizen who loses their Australian citizenship will immediately be able to or readily travel, as is your phrase here, to the country of which they hold citizenship. But you say:

Experience from the broader immigration detention context would suggest that this is unlikely to be so in all cases.

Can you give some examples of that experience?

Mr Neave: There are numerous examples of people, here, in Australia who are unable to return to the countries from which they came, because the countries from which they came will not accept them. I am foreshadowing that the result of the withdrawal of Australian citizenship on the basis that that person is a dual citizen will be that that person will not necessarily be welcomed back into the country in respect of which he or she has citizenship; therefore, that person will be detained here, in Australia. In respect of those people, my office will be required to prepare a report after two years if a person is in detention for two years, and six months thereafter in respect of other people who are here because they are in detention, because they have lost Australian citizenship and because they have citizenship of a country which will not accept them back.

Mr RUDDOCK: I am aware that, in relation to Iran, that is a well-known practice. I am assuming you would have some information. For instance, do you know whether that would apply to Lebanese, to Bosnians, to Afghans?

Mr Neave: No. I cannot give you that information right now, but it is probably information which would be within the knowledge of the immigration department.

Mr DREYFUS: The Iranian case to which Mr Ruddock has just referred is something that is presently applying to several hundred Iranians who are in immigration detention and who Iran is refusing to accept, even though we as a country would wish to forcibly return them.

Mr Neave: Yes. I am not sure of the number, but I certainly know—

Mr DREYFUS: Neither am I, but we have been told publicly by the foreign minister that it is in the hundreds.

Mr RUDDOCK: Thank you. I notice that you are seeking some guidance, and I have taken note of it.

CHAIR: Thank you for giving evidence at the hearing today. 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 it to the secretariat as soon as possible. If the committee has any further questions, the secretariat will write to you. Thank you for your time.

RUBENSTEIN, Professor Kim, Private capacity

[17:48]

CHAIR: I now welcome Professor Kim Rubenstein to the table. Although the committee does not require you to give evidence under 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 a contempt of parliament. The evidence given today will be recorded by Hansard. Do you wish to make some introductory remarks before we proceed to questions?

Prof. Rubenstein: Thank you, I would like to do that. I am grateful for the opportunity of presenting before you and am delighted to be able to engage fully in an area of interest of mine both as an academic and also as an Australian citizen. All Australian citizens will be fundamentally affected by this bill. I am grateful for the opportunity to really provide an avenue for this committee to think very seriously about the place of this bill in our Australian democratic system.

As my submission—which I hope you have all read—has outlined, I have broad concerns about the overall purpose of the bill. I am happy to take questions in relation to that in terms of the trajectory of citizenship in Australia and the way that it has evolved from being understood solely as subjects of the Commonwealth, that move from being a subject of the Commonwealth to being both a subject and a citizen and then finally that evolution to solely being Australian citizens.

In addition to that being a reflection of a change in our relationship with the Commonwealth and with the United Kingdom, I think it also profoundly represents a change in terms of Australia's multicultural society and a vibrant, democratic nation in a globalised world, in that status of citizen is something quite profoundly different to the status of subject. It is a status that reflects an equality between both members of the citizenry and also the relationship between individual and the state. My first main concern is the change that I believe that these revocation amendments make to the proper balance in relation to the executive and the individual in relation to membership in the community.

The second concern that I have is in relation to what I believe is a worthwhile purpose of this government, which is to be concerned about issues to do with terrorism. I have absolutely no concern or objection to a government doing what it should do to protect its citizenry, but I firmly believe that it should not be in the context of citizenship. I see citizenship as being something much more profound. There are better ways and more appropriate ways for us as a nation to be dealing with the concerns about terrorism in a globalised world. I think that even more particularly, in relation to the fact that this bill ultimately is targeting dual citizens in a multicultural nation, the consequence of that will actually be counterproductive to the very principles of trying to create an inclusive society where members of the community are not attracted to terrorist activities or to activities there are against the Western, liberal democratic system. I see the bill as having a possible counterproductive outcome for the very purpose that it is being introduced.

Those are my two broad concerns about the purpose and objective of the bill. Then, as I have explained in my submissions, I have key concerns in relation to the mechanics of the bill and the constitutionality of the bill. Those aspects come back to the fact that citizenship in the Australian Constitution is a curious subject, in the sense that Australian citizenship is not set out in the Australian Constitution, so it leaves the parameters and the extent to which the Commonwealth can legislate in this area less clear than other areas in the Constitution. But from the aspects of constitutional law that have developed over the years in dealing with some of these issues, there are very real concerns about the constitutionality of these provisions.

Then beyond those strict constitutional law questions, there are more profound rule of law questions that many of the submissions have been raising for committee's concern in relation to knowledge of the law and knowledge of when you have lost a profound status such a citizenship. That is, being bound by a system where individuals are aware of the legal framework that they are working within and the status that they hold at any given time. Then, in relation to rule of law concepts in terms of the automatic nature of these provisions, there are the consequences that has in relation to people's status and a clear sense of their position in society. I am happy to answer questions in relation to the specific provisions and concerns I have, as I have set out about the bill.

The final point that I make is in relation to an issue that I have raised in the context of the overall purpose of the bill, which is the notion of the vulnerability of dual citizenship. In a globalised world, in which dual membership and connections to more than one nation state are becoming more and more common, we are seeing this bill representing a backward step in terms of the disadvantage of taking up dual citizenship. The consequence of this bill is that dual citizens are placed in a vulnerable position in Australian society. It is something that actually has an impact on all members of the community. It is not just the potential terrorists who are effectively

more vulnerable but all Australian citizens. To make that point, before I answer questions: I had the opportunity of making a submission to the citizenship consultations that the Hon. Philip Ruddock is a member of—

Mr RUDDOCK: I am sorry I was away at the time.

Prof. Rubenstein: You were away, but I had the opportunity of presenting before Senator Concetta Fierravanti-Wells. I made the point to her, on reading her very impressive biography, that she is a person who would be vulnerable under this particular legislation. I will give you a reason to help you understand that. According to her biography, which is a very impressive multicultural biography, she represents the Australian Italian community at an international level through the General Council of Italians Abroad. She has been given awards. She is a knight of the Order of Merit of the Italian Republic. I would say that is wonderful in terms of the connections between Australia and Italy and the benefits that flow to Australians and to Italian Australians as a result of that. Over the years, she has participated in a number of other organisations, including fundraising activities associated with CO.AS.IT. CO.AS.IT is an Italian association of assistance. As I explained to her, it could be that, when she was a member of CO.AS.IT, that body gave support to an Italian Australian member of the community, a family in need of support, and that family might have had a member of that family who—on various of the provisions under the revocation powers in relation to criminal conviction, that funding might have assisted someone who had used that for terrorist activities. Theoretically, under the legislation, because the senator was a member of CO.AS.IT and fundraising for CO.AS.IT, that could lead to a conviction under the provisions, under these revocation powers. That would, as a matter of automatic consequence on conviction, lead to a loss of citizenship. That might seem an extreme example to you, but in reality it is caught within the provisions as they currently are placed. I think it is a good reminder that not only those sorts of provisions but the provisions in relation to destroying Commonwealth property that are included in the range of convictions are far too wide, but they are reflective of what I think is a profound problem with the legislation in terms of its purposes not being properly reflected in the nature of the legislation.

Senator FAWCETT: I am glad to report for Senator Fierravanti-Wells that, by virtue of the fact that she is a senator, she would not be at risk, because she cannot have dual citizenship.

Senator WONG: You might have missed the earlier conversation about that point, which was quite an interesting one—with the Law Council and Mr Ruddock.

Senator FAWCETT: We will move on to some of the principles under the heading of the intent of this bill. You have written in here quite a bit about the concept of allegiance in the context of a globalised world. It strikes me—and I would like you to explain if you could—that you are almost challenging the concept of the Westphalian nation-state and the concepts of loyalty and belonging to your primary state that you call your nation. Could you expand a bit on that?

Prof. Rubenstein: Yes. I would love to have the opportunity. I brought the book along that I am the editor of: *Allegiance and Identity in a Globalised World*. I commend it to those who are doing work associated with this bill to have a look at. This book drew together academics from both around the country and internationally to look at these questions about allegiance in a globalised world. It does not in any way say that it is going to be the end of the nation-state but rather that it is more and more common for people to have multiple connections to multiple nation-states, without that undermining any single one. I think the best way of understanding this is to think of our approach to marriage as opposed to parenthood. I think this bill sees citizenship like marriage—that you can really only have one partner, one allegiance—whereas we have moved to a situation where citizenship is like parenting: we can have more than one child and we can love more than one child without that undermining our love for any single child. We can have connections to more than one nation-state without that undermining our connection. I think of allegiance as a real and meaningful connection to a nation-state. It is only when there is that direct conflict between the two, where one is leading to the end of the other—so when you have one child who is seeking to kill the other child—that there is a conflict in your parenthood. That is the only context where a notion of direct conflict arises. I believe that we should think of allegiance like parenthood and that this bill does not reflect that at all.

Mr RUDDOCK: Excuse me wanting to challenge it.

Prof. Rubenstein: Sure.

Mr RUDDOCK: There may be some states that do not have the same values that we have. You may say a person can share them, but there are some states that are quite explicit that they do not acknowledge different religions. I guess the point I am making is that you might have difficulty in having shared values that are common and across the board if the states have in fact quite different approaches. For me, citizenship has those certain elements of commitment to the rule of law, parliamentary democracy and accepting people of different

backgrounds, different faiths and different religions; but the fact that you accept those differences does not mean that you forgo the common elements that bind us altogether.

Prof. Rubenstein: This is a really interesting discussion about the nature of the allegiance or shared values, because allegiance is about your responsibility to the continuation of the nation-state. We can look around Australia today and see many people who have very different values, but that does not undermine their sense of connection to Australia. They might express those values differently. That is where the criminal law system comes in—to say a society accepts or does not accept those values or behaviours. I would argue that the criminal law is relevant to an expression of a rejection of those values, as opposed to—

Mr RUDDOCK: But I might argue that the criminal law, if you actually look at some of the people who have been convicted of terrorist offences, is having no impact. People are going into our jails and being further radicalised, and those who have been convicted are radicalising people.

Prof. Rubenstein: But then I think the attention should be to that legislation rather than using another piece of legislation, like the citizenship legislation.

Mr RUDDOCK: You are suggesting citizenship is so much more important that it ought not to be threatened.

Prof. Rubenstein: Yes.

Mr RUDDOCK: I am saying it is so important that, if there is a threat to that for those people who are engaged in terrorism, it may have a greater import on their behaviour than our criminal legal system.

Prof. Rubenstein: I guess there are two responses to that. One is that the attack on those values is not necessarily an attack on the citizenship, and I guess it is a different configurations of the meaning of citizenship as a form of membership, and membership does not mean that you all have to think the same thing. We live in a diverse society—

Mr RUDDOCK: I think it does in relation to what I believe is the commitment to the rule of law and to parliamentary democracy and to those elements that I talked about. There are some people who think the commitment is only to difference. While I think we should be tolerant of those differences—

Prof. Rubenstein: But the commitment to the rule of law is a commitment to the system of the rule of law, which includes the system whereby citizenship is the foundation to that rule of law. So, once you start attacking citizenship, you are also in effect attacking the very system of the rule of law that you are seeking to protect. You get yourself in a bind in that respect because you are actually undermining the core fundamental value of the rule of law.

Mr RUDDOCK: I should not have interrupted my colleague.

Prof. Rubenstein: But it does strike at that different conception of the nature of the value of citizenship in a society. I would respectfully submit that the criminal law system is a more appropriate system because it is affirming the nature of the role of law in society as the means to deal with different expressions of value. Then the consequential question goes to: if you do remove those people from the Australian community, you are still left with those sole Australian citizens who express those same values. To that extent, you are creating a very unequal system in relation to the ways in which the rule of law plays out to dual citizens versus single citizens. Then there are the further international law questions of how we are being responsible as an international citizen by sending out all those people who reject those principles. We are not saying, 'You can't do them,' we are just saying, 'You can't do them on our shore.' And we are actually members of an international community, where we have committed to fighting against terrorism in an international world. We are saying, 'We are only fighting to the extent that it does not happen on our territory and therefore other countries can be responsible for those citizens.' That of course is another normative question as to Australia's role in an international system which has been committed to fighting against terrorism.

Senator FAWCETT: If I can bring you back, using your analogy: every parent will know that children have their own personalities and make their own decisions. The argument you were running there was that you can have allegiances to two places—in the case of Senator Fierravanti-Wells, to Italy and to Australia.

Prof. Rubenstein: Yes.

Senator FAWCETT: But the case that we are looking at here is where people make a choice, to say, 'My allegiance, in the current context, is to the caliphate and I'm going to leave Australia and I'm going to pledge my allegiance to the caliphate.' So the allegiance is not to the other country where they might have citizenship. They have actually gone to a third place to engage in activities that are not consistent with their obligations as an Australian. In fact, in some cases, they are actively seeking to kill our citizens or service men and women who are over there. So, in a case like that, would you still argue that that person should be accepted as part of a big happy

family of Australians, as opposed to accepting the fact that they have actually exercised their own free will, they have made a decision that they do not want to be part of us? Why should we extend to them the privileges that come with Australian citizenship if they have voted with their feet in their actions to depart from what is accepted as normal, acceptable humane behaviour?

Prof. Rubenstein: I think there are two elements to my response. One is that I do believe that the criminal law should come down upon them. I do not agree with any of that action and I think that we need to do something. But it is about prosecuting them and making them responsible for that activity, being part of the global international fight against that activity, and punishing them in a way where they can be put in jail and told that that is totally unacceptable as Australian citizens, as opposed to banishing them as a result of that.

The second aspect to it, which is directly related to the bill, is in relation to former section 35. I understand the point that you are making and I think that it is a fair point if you accept section 35, as it currently exists, as being a section that has been there since 1948. I do appreciate that the nature of the globalised world means that connection to a nation state, because of the nature of the world, is not just through nation states. So with respect to membership of an organisation that is seeking to fight directly against Australia, if you accept section 35 you can modernise that section and only that section in terms of this bill's purpose. To me, that would be the extent to which it would be proper within the framework, at the place and citizenship in Australian society. So that section 35, as it currently stands, as I have noted, has never been constitutionally tested, so we are not sure whether it would actually hold. But, in the event that it did, I think modernising that would properly take into account your concerns.

Mr DREYFUS: I want to ask something by way of clarification, which Mr Byrne has asked me to ask, just before I go to some constitutional questions with Professor Rubenstein and that is whether the Solicitor-General's advice will be made available to the committee. Mr Byrne has mentioned it to some other witnesses, but that is because you, Chair, actually said on public radio this morning that the Solicitor-General has said that this bill is constitutional. It affects the questions I am going to ask of Professor Rubenstein.

CHAIR: No, we will not be—there is a practice that that will not be made available to the committee.

Mr DREYFUS: Why is that, because you have actually revealed to all of Australia the substance of the advice?

CHAIR: I have not revealed the substance of the advice at all. Let us have the discussion with the professor and then if you want to have this discussion when we have finished, I am happy to continue with it.

Mr DREYFUS: We will take it up again then, but you have made it clear on public radio this morning: you said, 'The Solicitor-General says that this bill is constitutional.'

CHAIR: All right. Let us have the discussion once the advice—

Senator WONG: Chair, the issue of constitutionality has been raised not just by Professor Rubenstein but by, I think, the Law Council, Professor Williams and other submitters. Leaving aside your willingness as the chair to make public comments about the constitutionality, it is difficult for us to explore with witnesses if that advice is to remain secret.

CHAIR: I am happy to have this conversation, but it is quite clear that, in the end, if there are challenges to the High Court, it will be the High Court who will ultimately make those decisions.

Senator WONG: But you are the chair of the committee and you are making public statements about it already.

CHAIR: I have not made public statements about it. I reiterated points that had already been made. I am happy to continue these conversations, but I do not think we should do so while we have the professor as a witness. If you want to do so after this, when we have finished with the professor, I am happy to do it.

Senator BUSHBY: The Attorney General's Department may be able to assist the committee with some of our concerns to some degree tomorrow as well.

Mr RUDDOCK: It has not been the practice of the Commonwealth—I think there may have been one occasion on which it may have happened—to make its legal advice public. It is not tabled in the parliament and—

Mr NIKOLIC: You did not do it.

Mr RUDDOCK: My expectation would be—and I would hope that the government would have regard to the comments that have been made on constitutional issues—that, if there needs to be some consideration of that, we may see that emerge. And I would hope that all of the submissions that have raised these issues will be brought to the attention of the relevant advisors. But I do not know that we are going to be trying to juxtapose the government's advice against the opinions that we are receiving.

CHAIR: Ultimately, it will be the High Court that will decide it.

Senator WONG: Chair, I would accept that, but that is not what you said this morning on radio. You said that the Solicitor-General would—

CHAIR: Every grab that you have had—

Senator WONG: Every grab?

CHAIR: With every news grab that you have had, do you want me to just grab a sentence or two and then just hold you to that?

Senator WONG: No.

CHAIR: So I think we can have a—

Senator WONG: Hang on, that is a red herring. You are the chair of a committee and you have made a public statement about the Solicitor-General's advice.

Mr BRUCE SCOTT: We have a witness before us. I think we should go back to the witness.

CHAIR: We need to have a private meeting.

Mr NIKOLIC: Absolutely, instead of this nonsense.

Senator WONG: Because you have been so polite so far today, Andrew.

Mr BRUCE SCOTT: We should go back to the witness we have before us.

Mr DREYFUS: I was hoping to shorten this. Professor Rubenstein, you said that there are a number of aspects of this bill that are arguably unconstitutional.

Prof. Rubenstein: Yes.

Mr DREYFUS: Perhaps starting with the existing provision—which is section 35, but originally was section 17 of the 1948 Act—what is your view about the constitutionality of the existing section 35 or as proposed to be added to in this bill, with the addition of the notion of fighting for or being in the service of a declared terrorist organisation?

Prof. Rubenstein: I might add a broad point which is relevant to the discussion that has gone on: as I said in my introduction, because the area of citizenship has been so unclear in its constitutional evolution, it would be very difficult for anyone to say that this is clearly constitutional. We do not have clarity in relation to the breadth of parliament's power in relation to the aliens' head of power, and we do not have clarity in relation to the meaning of 'the people of the Commonwealth', which is what I am going to come to.

Section 35 was actually the former section 19. The reason you referred to section 17 is that, up until 4 March 2002, there was a provision, of which many members are aware, which said that if you were an Australian citizen and you took up another citizenship you automatically lost your Australian citizenship. That was the former section 17. It never saw a new section because it was repealed under the legislation—

Mr RUDDOCK: Very keen to do it.

Prof. Rubenstein: It was a very important step relevant to our earlier discussion about globalisation and the fact that we are multiple citizens, without that undermining our allegiance. To this question, it represented the removal of that one other provision, which was automatic loss of citizenship. So we had that section and we have this current section 35 of automatic loss if you fight for a country at war with Australia. In the public discussion that went on for many years—as members of this committee well know, there were many years of discussing whether we would repeal that section—there was an opinion that the former Senator Bolkus, when he was minister for immigration, had obtained from the late Ron Castan QC. The advice that he sought was as to the constitutionality of section 17 of the act, which provided for that automatic loss if you took up another citizenship, and the advice of Castan was that that section as it stood was unlikely to be constitutional because of the way that it automatically moved someone out of 'the people of the Commonwealth'. This is my very old copy of the Constitution; it looks like this because it goes with me wherever I go and is a message to my students that the Constitution impacts on every day of their lives in Australia. The reference in the Constitution to 'the people of the Commonwealth' has been used significantly by the High Court in relation to the principle of representative democracy and to the implied freedoms that are associated with that provision.

Part of that argument, and I refer to it in my book on Australian citizenship law, was tabled in *Hansard* at the time as further support for the need to repeal that section, not only because of the normative policy value in getting rid of that section but also because there was a real question as to whether in fact it was constitutional. Those concerns about constitutionality are exactly the same concerns that apply to the current section 35, if parliament were able to remove someone from the 'people of the Commonwealth' in an automatic fashion. In that

sense—the limitations on what parliament can do in relation to a person's membership of and constitutional status of 'people of the Commonwealth'—this section raises the same issues. Now, it has never been—

Mr RUDDOCK: That is not the argument that persuaded me to repeal it. I will have a talk to you about that.

Prof. Rubenstein: That is fair enough.

Mr RUDDOCK: I will have a talk to you about that. That was not the argument.

Prof. Rubenstein: We can indeed. But the issue is significant in relation to the fact that section 35 of the act has never been tested. When I was doing the research for my book, I called the department to inquire how many people had lost their citizenship under what was formerly section 19, now section 35, and the advice was—and it is referred to in here—that no-one has ever lost their citizenship under that section because that section has never been operational because Australia has never formally been at war with another country. As a matter of international practice and executive practice, while we have participated in wars, we have never formally been at war with another country, so that provision has never been enlivened. That is why it has never been constitutionally protected. And section 17, the dual citizenship section, was repealed before there was any constitutional challenge to it.

So, as a core question, it is unclear whether section 35 as it stands will be deemed constitutional. The context in which we will get to see that is if this section is passed and someone loses their citizenship under the amended version of section 35. As it is placed, it is still using that core notion, which is the essence of that provision, so one the challenges will be that it is beyond parliament's power to remove someone from 'the people of the Commonwealth' in an automatic fashion. That is part of the argument in relation to section 35 that also carries on to the principles under these new provisions in proposed sections 33AA and 35A.

Mr DREYFUS: Professor Williams, who has made a detailed submission with his colleagues from the University of New South Wales and who was here earlier today with Ms Pillai to give evidence to us, said that in his view it was highly likely that the provision would be challenged on a constitutional basis. Would you agree with that—not whether or not that challenge would succeed but that it is highly likely that there would be a constitutional challenge from someone affected?

Prof. Rubenstein: If someone is affected by these provisions—that is assuming that the executive identifies somebody who is subject to these new provisions and that person is affected by these provisions—I have no doubt that there would be a challenge about the constitutionality of the use of these amended provisions.

Mr DREYFUS: Professor Williams also—and I took careful note of his oral evidence to us—said that he had given evidence to parliamentary inquiries on 20 or 30 occasions, very often dealing with questions of constitutionality, but that this was the first time, he said, 'I am prepared to say I am confident' that the legislation under consideration by a committee would be 'struck down'. Do you share that view?

Prof. Rubenstein: I am confident of certain provisions being struck down, because there are very clear expressions about a person losing their citizenship for a matter that is not proportionate to the objectives of this particular act. For instance, I would be very strongly of the view that the provisions in relation to loss of citizenship on conviction of certain Criminal Code offences, including that of defacing Commonwealth property, are not at all proportionate to the notion of an expression of allegiance to Australia and would be seen as beyond the scope of the powers, and so, at the very least, that section, in my mind—

Senator WONG: That is not a judicial power point.

Prof. Rubenstein: It is not actually even a judicial power—

Senator WONG: No, but the legislation goes beyond the relevant power—

Prof. Rubenstein: The legislative power.

Senator WONG: even with a conviction—sorry to interrupt.

Mr DREYFUS: That is all right. So you would call it a head-of-power point.

Prof. Rubenstein: It is a head-of-power point regarding the capacity to make a law of that nature, which is beyond the power of the parliament.

Mr DREYFUS: Yes. To give it context, Professor Williams identified three classes of challenge or three bases, one being the judicial power of the Commonwealth—the Boilermakers point—the second being the issue of the Roach case point, which you have made—

Prof. Rubenstein: Proportionality, yes.

Mr DREYFUS: which is described as 'the people of the Commonwealth' point, and the third being this question of head of power, which is the way Professor Williams described it. You put the same point but another

way—under the head of power, the aliens power—and that particular example has been identified as wildly beyond the aliens power—

Prof. Rubenstein: The breadth of that power, yes.

Mr DREYFUS: and disproportionate, and therefore highly likely to be struck down.

Prof. Rubenstein: It is beyond the power of the parliament.

Mr DREYFUS: Yes. That is helpful. Regarding the statement that you have made about the purpose of the act, I just want to make sure I have understood what you have said. Starting at the bottom of page 2 and going over onto page 3, you have set out the purpose of the act as in section 4 in the bill, and then said:

I do not believe that the statement 'conduct incompatible with the shared values of the Australian community' is clear and that it necessarily leads to the next sentence of demonstrating that they have 'repudiated their allegiance to Australia' whatever that may actually mean.

As I understand it, the key point is the next point you make:

There are many actions of individuals that do not represent shared values in a western liberal democratic nation and they are generally criminalized ...

And that is really your point: that the criminal law is there to deal with antisocial conduct—conduct that is antithetical to the values that we share, conduct that the parliament on behalf of the community of Australia has determined should be criminal and punished, if found so by a court of competent jurisdiction.

Prof. Rubenstein: Exactly, and I think that is my most profound concern about this act and really does, with respect, respond to the discussion that the Hon. Phillip Ruddock and I have had in relation to people who exhibit some rejection of values that we see and hold dear. An equivalent is paedophilia in society. That is abhorrent to any society, but we would never think of banishing dual citizen paedophiles. In a system of a rule of law where we have a criminal framework for dealing with antisocial behaviour or behaviour that is against the basic values of our society, that is the avenue through which a system of the rule of law deals with it, rather than banishing those individuals or saying, 'You can no longer be a member of our community.'

Mr DREYFUS: You make another point that I do not think anyone else has made, which is that the idea of conduct leading to renunciation by conduct of your citizenship is actually at odds with the way in which renunciation in the act at present is restricted. I wonder if you could expand on that, perhaps by reference to the notion that the Law Council drew attention to in their submission, which is that member states of the United Nations have been required by the United Nations, in a Security Council resolution in 2004 in the fight against terrorism, to cooperate fully in the fight against terrorism and to deny safe haven and bring to justice through prosecution or extradition any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.

As I understand what the United Nations resolution means and what Australia's position up until now has been, we deal with terrorism by a range of measures under the criminal law. That is why we have legislated so frequently over the last decade and a half to deal with acts of terrorism, in their various guises, and to criminalise a whole range of conducts associated with terrorism. I wonder, in that context, whether you could expand on that, as you put it, conflict between providing for renunciation by conduct, in respect of a whole lot of conduct that is already criminalised, and that being at odds with the current restriction on renunciation in the Citizenship Act?

Prof. Rubenstein: Certainly. The current section 33 in relation to renunciation provides an individual with the opportunity to seek to renounce their citizenship, but it is an application. It is not something one can unilaterally do. In fact, members of parliament may be aware that there are various Indigenous Australians who have sought to renounce their Australian citizenship by virtue of their belief that the treatment of them as Australian citizens has not been sufficient, and they want to renounce their Australian citizenship.

As I have explained, it is all very well for an individual to want to renounce their citizenship but they do not have the power to do that. It is the government of the day that has to consider whether that is in the best interests of both the individual and the nation. Part of that is in relation to our international obligations against statelessness. The provisions that restrict it—in particular, in relation to the current minister—are in relation to ensuring that person does not become stateless, but the principle underpinning it is that it is not a unilateral act that an individual can or cannot fulfil. Yet this act is saying that the individual not only has the capacity but also without knowledge, necessarily, that their action is going to lead to that, will, of their own accord, renounce citizenship. It is an inconsistent meeting of provisions in relation to renunciation.

The points you are making, Mr Dreyfus, in relation to Australia's obligations that the Law Council has referred to, I see as being part of that broader issue—in terms of Australia's responsibilities as an international citizen and our commitment to the international rule of law—which has a very clear message that all nation-states are

fighting against terrorism and seeking to bring to justice those terrorists. That is the point I was seeking to make earlier in response to some of the questions that this desire to exclude someone is totally inconsistent not only with our domestic notion of citizenship but also with our international notion of being active good citizens. We are, effectively, not fulfilling our obligations within the United Nations system and our commitments to resolutions to dealing with terrorism in the criminal-law framework.

Mr DREYFUS: Because, if I understand you correctly, we are not seeking to deal with our own citizens who have committed criminal terrorist acts but, rather, simply banishing them.

Prof. Rubenstein: That is right. In fact, we are taking out that connection to Australia so that we no longer have to deal with them and we are allowing other countries to do the work that is ultimately our responsibility.

Mr DREYFUS: Making it definitely another nation's problem.

Prof. Rubenstein: Yes.

Mr DREYFUS: You said in relation to the proposed new section 33AA, on page 4 of your submission:

Indeed there are many oddities in this section including the use of criminal law definitions without the protections of the criminal law framework in place. Another is the term 'acts inconsistently with their allegiance to Australia' – a term which is unclear ... – even if it is then specified in subsection (2).

I wonder if you could expand on that point about the oddities and about the specific oddity of that term?

Prof. Rubenstein: Many of the submissions have raised concerns with the committee about the use of the criminal code in a framework where the criminal law is not the framework for the consequences of using those definitions. The oddity is that you are bringing in definitions and concepts from an act where those definitions and concepts are set up in a framework where there are the protections of the rule of law to ensure that the proper levels of probity, of evidence finding and so forth, are relevant to the consequences of those definitions. They do not appear here within this act, and so the oddity is that you are seeking to use principles and provisions from an act where there are protections and place them in the context of another act for, as I have said several times now, something as profound as membership of the nation-state. Within a criminal law context your liberty, of course, is taken, and it is significant if you are placed into jail, but this is that on multiple levels, in terms of the fact that you are forever removed from that community by virtue of the loss of status of citizenship. So I think the mixing of those principles is concerning as well as being unusual or an oddity.

In relation to the second part, this consistent reference to acting inconsistently with one's allegiance to Australia, our discussion today, with very well-respected members of this committee, shows that there are different views about what 'allegiance to Australia' means. If we as a community are going to reject someone on the basis that we think that they no longer hold that connection to Australia, there must be a much more substantial democratic engagement with what that represents, rather than a piece of legislation such as this, which seeks to automatically—

Mr RUDDOCK: I do hope we will have that.

Prof. Rubenstein: I would implore parliament to hold that discussion in a way that is totally productive rather than counterproductive, because I think the real concern about placing these discussions in the context of citizenship, and the context of dual citizenship, is that in a country like Australia, which is made up of so many people with connections to other nation-states, it comes back to my point about increasing the vulnerability of people who would otherwise feel secure in their membership of Australia. That would have a counterproductive consequence in relation to these other avenues that we are seeking to fulfil in terms of educating against terrorism and making people feel committed to the Western liberal democratic system.

Mr DREYFUS: What is the vulnerability that you are talking about?

Prof. Rubenstein: The direct vulnerability to loss of citizenship, which means loss of your capacity to live in the nation-state that you have been intimately connected with—

Mr RUDDOCK: Yes, that is what it does mean.

Prof. Rubenstein: and the associated vulnerability to families. So it is not just the individual.

Mr RUDDOCK: Very significant consequences.

Prof. Rubenstein: Absolutely so.

Mr RUDDOCK: And it may influence whether they are prepared to be involved in terrorist activity.

Prof. Rubenstein: But it also may influence, with respect, their sense of connection to the Australian community if they feel that they are not being treated equally and they are seen as other. They might not

otherwise have even thought about terrorist activity, except that the public discourse is now seeing them as other, as suspect and as not equal members. I think that that is the issue.

Mr RUDDOCK: I think we are slightly at issue. I would like to hear whether you have in mind—because it may be helpful—amendments to the Criminal Code that you think are more likely to have an impact on those who are engaging in terrorist activity.

Prof. Rubenstein: I would certainly be happy to call my expert colleagues in the criminal law to do that for you, and they can be consulted easily in relation to the Criminal Code. My expertise is in citizenship, and I am more than happy to speak about those areas that I am an expert in.

Mr RUDDOCK: You have been putting the argument to us on the basis that amendments to the Criminal Code could achieve it, but you cannot tell me of any way in which they might.

Prof. Rubenstein: Because, with respect, I am doing it in the context of our belief in a system of a rule of law where we have a Criminal Code. We could get rid of the Criminal Code altogether—

Mr RUDDOCK: No, I am not suggesting that at all.

Prof. Rubenstein: if we did not believe in those fundamental principles that are at the base of our system of a rule of law. Why shouldn't they apply to dual citizens in the way that they apply to any other citizen?

Mr RUDDOCK: The point I made before is that we have already dealt with those who engage, on behalf of a foreign power, against our forces, and I regard those who engage in a terrorist organisation that does not even respect the rule of law as doing something that is far more heinous. I think there is a real prospect that measures of this sort could influence people's willingness to engage in this sort of behaviour, and I cannot see—with the radicalisation that is going on in our jails and the sort of behaviour that, we are aware, continues for those people that have been convicted—that the criminal law system is having any impact.

Prof. Rubenstein: I would encourage the committee to gather evidence exactly on that point and to see how experts in the areas of radicalisation and antiradicalisation can operate in—

Mr RUDDOCK: They certainly have not been bringing submissions to us suggesting alternative ways in which we might deal with it.

Prof. Rubenstein: But that does not mean that they cannot be sought out.

Mr DREYFUS: This bill, on its face, Professor Rubenstein, is seeking to deal with, at the broadest, people who have committed a range of already criminalised conduct, or criminal offences, and have been convicted for those offences, and others who have engaged in wrongdoing, if I could put it at the broadest. If it becomes law, how does the bill create vulnerability for, if I can call them, innocent dual citizens—people who have neither been convicted nor engaged in the range of conduct that the bill is directed at?

Prof. Rubenstein: It creates an acceptance within our democratic system that you can start to identify matters that are seen as inconsistent with the values of a society. It is the beginning of a slippery slope of other matters such as, as I have said, paedophilia or other aspects that we do not want to encourage in our society. Once you allow the executive to determine that there are aspects of behaviour that then lead to your exclusion from society, what is to stop those next steps in relation to other activities? There are people who are vulnerable because they are actually not aware that their activity—so my case of Senator Fierravanti-Wells, for instance; people who are dual citizens who might be supporting CO.AS.IT and not realising. There are those who are doing things innocently that would come within the scope of the criminal law as it stands. But I think your point is: how would it be of concern to others? My point is: as a matter of principle, it starts a road towards the executive's power excluding individuals. History, beyond Australia, shows that that is of real concern. In one of the High Court cases that has been referred to, *re Ame ex parte and the Commonwealth*, the court did recognise the concern against deprivation of nationality because of the capacity for dictatorial systems to then utilise those principles in creating a very antidemocratic framework.

Mr DREYFUS: Even if the list of offences under 35A, which is the clearest part of this bill that is conviction based, were limited to a narrower range of convictions, or a narrower range of offences, would you still retain the view that the bill reinforces the vulnerability of which you have spoken?

Prof. Rubenstein: Yes, because it still comes within the concern about the automatic loss on that conviction as opposed to a further question as to whether that conviction, in and of itself, represents a proper understanding of repudiation of allegiance or something directly at conflict with the continuation of the nation-state.

Mr DREYFUS: In your submission you have described these amendments as 'very harsh measures'. Is that something you could expand on?

Prof. Rubenstein: It really relates to my earlier point that any right that is relevant in a democratic society is linked ultimately to your membership, your status within that society. We can think of the core aspects of citizenship—voting rights, the rights of residents, the capacity to serve in the public service. Those aspects become contingent. So the harshness is in terms of the notion of the right to have rights. That is essentially cut out of the framework. So the consequences of the loss of citizenship are extreme in terms of the capacity to exercise any of the rights associated with the Australian Constitution.

Mr DREYFUS: Thank you very much, Professor Rubenstein.

Prof. Rubenstein: Can I just respond to this letter?

Mr DREYFUS: Oh, yes. I handed it to you and then forgot about it.

Prof. Rubenstein: You did give it to me, and I did read it. I thought I would just give you a brief response.

Mr DREYFUS: I will just preface that by saying: I asked Mr Neave and some other witnesses about it, and I am going to ask the department about it when they turn up tomorrow. The department has, in a two-page letter, taken an opportunity to give some indication of the arrangements that will support the implementation of the bill. To paraphrase, these will involve: a lot of communication between a lot of government departments; sharing of information, leading up to the secretary of the Department of Immigration and Border Protection who will then bring the matter to the attention of the minister.

Prof. Rubenstein: I have read that paragraph, and it does not make clear to me how that would be done. It is just a broad statement that there would be close cooperation across the government. The point that I would like to make—and the Hon. Philip Ruddock might also like to comment—in the context of the provisions to do with the repeal of dual citizenship, one of the issues at the time in relation to the idea that if you took up another citizenship you lost Australian citizenship was that it was actually difficult to know who was not a dual citizen in that there was no automatic system for countries to let Australia know that someone who was an Australian had taken up their citizenship. So, in reality, there were a lot of people who were dual citizens who may not have even been aware themselves that they were citizens, and certainly the Australian government was not aware. That was one of the other aspects of the concern—

Mr RUDDOCK: The real matter of concern was that there were a lot of Australians who were dual nationals and who could not forsake it—

Prof. Rubenstein: Yes, renounce the other citizenship.

Mr RUDDOCK: because the country that accorded them nationality or citizenship refused to recognise renunciation. Places like Greece, I think, were—

Prof. Rubenstein: There were multiple reasons for it, but one of them was an operational reason, in that it was difficult between governments to actually identify who had citizenship of other countries.

Mr RUDDOCK: I am not sure that is the reason that I was able to persuade my colleagues.

Prof. Rubenstein: That was certainly one of the issues of discussion. I think that that highlights the concern that is alluded to, and it is not clear here. I think it would be very interesting to ask how that would actually operate in an international sense in determining exactly who is a dual citizen of the other countries. It is not impossible, but it is not clear as to how that would happen. So, operationally, I think there are really significant practical questions that flow from that paragraph. It would be interesting to ask them to reflect on the operation of that former section 17 regarding dual citizenship when that was an issue that was certainly raised in various parliamentary reviews of the former dual citizenship provisions. So I just thought I would add that.

Mr DREYFUS: Is that uncertainty that you have been talking about one of the reasons that nobody seems to know how many dual citizens there are?

Prof. Rubenstein: Yes, absolutely. It is unclear because of that lack of knowledge on the part of many people in terms of their eligibility and recognition of citizenship of another country and also the lack of recording of those individual's citizenships of their other countries and so forth.

Mr DREYFUS: Are you able to hazard a guess? FECCA were here before and said that the last statistic that had been offered was four to five million in 2000.

Prof. Rubenstein: I do not have any capacity to do that. But, in relation to the nature of a multicultural society like Australia, it is profoundly likely that most people have some connection to someone who is a dual citizen.

Mr DREYFUS: Thanks, Professor Rubenstein.

Mr NIKOLIC: Professor Rubenstein, just so I understand your perspective on some of the cases that have already been decided in Australian law, can I just run very quickly through four examples and could you respond whether you think these cases meet the test relating to allegiance and conduct encapsulated in this bill?

Prof. Rubenstein: Sure.

Mr NIKOLIC: Mr Mohamed Elomar, born in Tripoli, Lebanon, was found guilty of participation in a conspiracy to do acts in preparation for a terrorist act, was sentenced to 28 years with non-parole of 21 years. Mr Abdul Hasan, born in Bangladesh, was convicted of participation in a conspiracy to do acts in preparation for a terrorist act, was sentenced to 26 years, non-parole 19 years and six months. Mr Faheem Lodhi, born in Pakistan, was convicted of a series of offences, including doing a certain act in preparation and collecting documents connected with the preparation for a terrorist act and possessing a certain thing connected with preparation for a terrorist act. Mr Benbrika, born in Algeria, was convicted and sentenced to 15 years with a non-parole period of 12 years for terrorist related offences. Do any of those cases reach a standard perhaps where their allegiance to Australia, where their egregious breach of their first loyalty to Australia and its people, deserves more than just the criminal law dealing with them?

Prof. Rubenstein: I understood your question as to whether they would come within this act, and you have referred to them being born in other countries. As we know, being born in Australia does not mean that you become a citizen. So we are not sure that each of those people who were born in other countries are necessarily dual citizens in terms of bringing them within the purview of the act. In each of the offences that you referred to, we would need to look to see under these provisions whether they would come under those provisions. But your more profound question—which is, in essence: should activity like that be seen to be sufficient to bring one within the context of a government's power to say, 'You no longer are a member of our community'? My overall policy approach to that is that it is the criminal law that we should be using to punish people and that we do not use citizenship as a form of punishment for abhorrent behaviour. There is no question that we should identify it as abhorrent, that we should criminalise it, but the essence of my submission is that we cannot use citizenship as the frame for punishment or as a frame for saying, 'You are no longer committed to this country.' The notion of renunciation is there to say that if an individual explicitly makes the claim to the government that they no longer want to be recognised as an Australian citizen—that is very different for us to determine that their action is actually representing that. That has also been recognised internationally within the US system and other western liberal democratic systems. It is not for the executive. It comes back to my basic point: it takes the balance away from equality between citizens, between the individual and the state, and gives that power back to the state in a way that is of concern in a western liberal democratic society.

Mr NIKOLIC: So in your view the countries that have done that, that have gone down this path—the United Kingdom—

Mr DREYFUS: Which are they?

Mr NIKOLIC: I did not interrupt you, Mr Dreyfus—

Mr DREYFUS: I am interrupting because the premise of this question is false.

CHAIR: Let him ask the question first—

Mr NIKOLIC: I have been listening patiently to your extended and Shakespearean soliloquy these past hours, but if I could just say: those countries that have gone down this path, Professor—

Mr DREYFUS: This is truly pathetic. The premise to the question should be: no country has gone down this path. If you ask a question that says, 'other countries have gone down this path—

Mr NIKOLIC: You ask your questions, Mr Dreyfus, and I will ask mine. Professor, I am talking about those countries that have seen it necessary to take away the citizenship of dual nationals. The highest court in France has found it legal for France to have done that for a Tunisian man recently, as I understand. I understand the United Kingdom has done it on some 27 occasions, along with Canada and others. Your view is that, in taking away the citizenship of those countries in response to the sort of conduct that we are trying to encapsulate in this bill, those countries have erred as well.

Prof. Rubenstein: There are two points to make. One is that the legislation in other countries is very different to what this legislation is doing—

Mr NIKOLIC: But the principle of acting against citizenship—

Prof. Rubenstein: Yes. I understand what you are saying.

Mr NIKOLIC: You are saying you can see no circumstances. So I guess my question to you—

Prof. Rubenstein: I appreciate the question, because I think it is important. I think that there has been a lot of criticism of those countries for taking that step in relation to the very principles that I am arguing for. So even though steps have been taken to amend legislation to provide, in different contexts, the revocation of citizenship, I accept that that has been done. There is a lot of critique of that in relation to the consequences of that for the democratic framework of those countries and also for the issues that we have been talking about in terms of the counterproductive consequences of that.

Mr RUDDOCK: You had better send me some of the critique—

Mr NIKOLIC: I would like to see some of the critique as well.

Mr RUDDOCK: I did not hear much of it while I was there.

Prof. Rubenstein: I am very happy to. There is an entire website that I can send to the committee. I am happy to do that. It is a whole feature on a critique of the banishment and the use of exile in that context.

Mr RUDDOCK: I simply say: we have been there and we did not get it while we were there. It was not top of the mind.

CHAIR: Thank you for giving evidence to the hearing today. 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.

Prof. Rubenstein: Thank you.

Committee adjourned at 18:50