PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Advisory Report on the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

Parliamentary Joint Committee on Intelligence and Security

ISBN 978-1-74366-967-9 (Printed Version)

ISBN 978-1-74366-968-6 (HTML Version)

List of Recommendations

Recommendation 1

2.41 The Committee recommends that section 29(1)ca) of the Intelligence Services Act 2001, be amended so to require that the Committee review the operation, effectiveness and implications of sections 33AA, 35, 35AA and 35A of the Australian Citizenship Act 2007 and any other provision of that Act as far as it relates to those sections, by 1 December 2020.

Recommendation 2

2.46 Subject to implementation of the Committee's recommendations, the Committee recommends that the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 be passed.

Terms of Reference

On 28 November 2018, the Attorney-General, the Hon Christian Porter MP, in his capacity as acting Minister for Home Affairs, referred the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 to the Committee for inquiry and report.

Members

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Mr Andrew Hastie MP

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Hon Anthony Byrne MP

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Hon Mark Dreyfus QC, MP

Hon Dr Mike Kelly AM, MP

Mr Julian Leeser MP

Mr Jason Wood MP

Senator the Hon Eric Abetz

Senator David Bushby (to 21 January 2019)

Senator Jenny McAllister

Senator Jim Molan AO, DSC

Senator Amanda Stoker (from 12 February 2019)

Senator the Hon Penny Wong

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1. Introduction

The Bill and its referral

1.1 On 28 November 2018, the Attorney-General, the Hon Christian Porter MP, introduced the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (the Bill) into the House of Representatives.

1.2 In his second reading speech, the Attorney-General noted that the

> ability to cease the Australian citizenship of those who seek to do us harm forms an integral part of our ongoing response to international violent extremism and terrorism. It is a key part of our strategy to keep Australians safe.[1]

1.3 On the same day, the Attorney-General wrote to the Parliamentary Joint Committee on Intelligence and Security (the Committee) to refer the Bill for inquiry and report.[2]

Conduct of the Inquiry

1.4 The Committee resolved to undertake an inquiry into the Bill and details of the inquiry were uploaded to the Committee's website, www.aph.gov.au/pjcis, on 3 December 2018. Calls for submissions were announced the same day, with submissions requested by 11 January 2019.

1.5 The Committee received 19 submissions and eight supplementary submissions. A list of submissions received can be found at **Appendix A**.

1.6 The Committee held a public hearing on 30 January 2019 and a private hearing on 13 February 2019. A list of witnesses appearing at the hearings can be found at **Appendix B**.

1.7 Copies of submissions, the transcript from the public hearing and links to the Bill and Explanatory Memorandum, can be accessed at the Committee's website.

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1 The Hon Christian Porter MP, *House of Representatives Hansard*, 28 November 2018, p. 11762.

2 The Hon Christian Porter MP, *Letter to Committee*, 28 November 2018.

Report Structure

1.8 The Report comprises two chapters:

- This chapter sets out the conduct of the inquiry, discusses the Committee's previous *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Advisory Report on the Allegiance to Australia Bill), and provides an outline of the Bill and its rationale,
- Chapter two includes the Committee's comments and a list of recommendations.

Legislative history

1.9 The *Australian Citizenship Act 2007* (the Act) contains a number of provisions dealing with both acquiring and ceasing Australian citizenship. In 2015, the Government introduced amendments to the Act via the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Allegiance to Australia Bill). The legislative changes broadened the powers of the Minister relating to the cessation of Australian citizenship for individuals engaging in terrorism, and those who are a serious threat to Australia and Australian interests.[3]

1.10 The then Minister for Immigration and Border Protection, the Hon Peter Dutton MP, noted at the time that the Allegiance to Australia Bill addressed

> the challenges posed by dual citizens who betray Australia by participating in serious terrorism related activities …
>
> The concept of allegiance is central to the constitutional term 'alien' and to this the bill's reliance upon the aliens power in the Constitution. The High Court has found that an alien is a person who does not owe allegiance to Australia. By acting in a manner contrary to their allegiance, the person has chosen to step outside of the formal Australian community.[4]

1.11 The Committee conducted an inquiry into the Allegiance to Australia Bill and presented its *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* to Parliament in September 2015.

1.12 The Advisory Report on the Allegiance to Australia Bill made 27 recommendations, three of which were directly relevant to the proposals made in the current Bill. These three recommendations are provided in full in **Appendix C**. In summary the relevant recommendations are:

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3 Explanatory Memorandum - Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, p. 1.

4 Hon Peter Dutton MP, the then Minister for Immigration and Border Protection, *House of Representatives Hansard*, 24 June 2015, p. 7369.

- **Recommendation 7**: an individual's citizenship should not be revoked under section 35A of the Act unless they had been convicted of a relevant offence with a sentence applied of at least six years imprisonment, or multiple sentences totalling at least six years' imprisonment,

- **Recommendation 9**: an individual's citizenship should not be revoked under section 35A of the Act unless they had been convicted of an offence that carries a minimum penalty of 10 years imprisonment, and

- **Recommendation 10**: Section 35A may be applied retrospectively to convictions for relevant offences where sentences of ten years or more were given. However, retrospectivity must not apply to convictions handed down more than ten years prior to the Bill receiving Royal Assent.

1.13 The Committee's recommendations were accepted by the Government and incorporated in the subsequent *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*, which received Assent on 11 December 2015.

Rationale for the Bill - the current environment

1.14 In its submission to the Committee, the Department of Home Affairs noted that:

> At the time section 35A (along with sections 33AA and 35) was inserted into the Citizenship Act, the threat environment was largely characterised by the danger posed to Australia and its interests by foreign fighters, including those who sought to return to Australia after travelling to the conflict zone
> …
> The number of Australians (and other foreign terrorist fighters) attempting to travel to the conflict zone has reduced considerably with the collapse of the self-declared caliphate of the Islamic State of Iraq and the Levant (ISIL). However, the violent ideology of Sunni Islamist terrorist groups, such as ISIL and al-Qa'ida, continues to appeal to a small number of people in Australia, and security and law enforcement agencies remain focused on stopping a terrorist attack in Australia
> …
> As at 3 January 2019, 58 individuals have been convicted and sentenced for Commonwealth terrorism offences in Australia since 2001. Forty-six of these individuals (just over 80% of the cohort) were sentenced in the last three years, after the commencement of the provisions in the Allegiance to Australia Bill from 12 December 2015
> …

> As at 3 January 2019, while 12 individuals offshore have ceased to be Australian citizens as a result of terrorism-related conduct, no individuals have had their Australian citizenship ceased under section 35A of the Citizenship Act.[5]

1.15 The Department went on to quantify the potential impact the Bill would have on citizenship cancellations for Australia-based individuals:

> Having regard to information currently known as at January 2019, the amendments, if passed, may give the Minister the power to cease the Australian citizenship of a further 18 individuals (five currently serving sentences, and 13 who have been released into the community) under section 35A. While the number of eligible individuals may increase, there is no change to the existing safeguards and review mechanisms available under the Citizenship Act – namely, the public interest considerations the Minister must have regard to, and the availability of judicial review following a determination by the Minister.[6]

The Bill in Detail

1.16 The Bill proposes to amend section 35A (Conviction for terrorism offences and certain other offences) of the Act.

1.17 Clause 1 of the Bill proposes repealing existing subsection 35A(1) of the Act and replacing it with a new subsection 35A(1). While the proposed provisions largely mirror those in the current section 35A(1), the Bill makes three major changes:

- A person's citizenship may be revoked if they are convicted of associating with a terrorist organisation under section 102.8 of the *Criminal Code* (and other conditions are satisfied).
  - This offence carries a maximum penalty of *three years imprisonment*, unlike all other offences captured under section 35A which have maximum penalties ranging from *ten years* to *life imprisonment*;

- A person's citizenship may be revoked if the Minister is 'satisfied that the person would not, if the Minister were to determine that the person ceases to be an Australian citizen, become a person who is not a national or citizen of any country'.[7]

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5 Department of Home Affairs, *Submission 5*, pp. 4-5.

6 Department of Home Affairs, *Submission 5*, p. 8.

7 Proposed s. 35A(1)(b)

  - Under the current Act, the person *must* be a national or citizen of another country at the time when the Minister makes the determination.[8]

- A person convicted of a specified terrorism offence need no longer to have been sentenced to a period of imprisonment of at least six years, or to periods of imprisonment that total at least six years, as required under current section 35A. No minimum sentence is required in the legislation in order for someone convicted of a relevant offence to have their citizenship revoked.
  - This provision would apply retrospectively to all individuals who have been convicted of a specified terrorism offence (see below) from 12 December 2005.

1.18 Clauses 2 and 3 of the Bill propose consequential amendments to subsections 35A(4) and (4)(b) of the Act.

1.19 Clause 4 sets out the application provisions that relate to clauses 1 to 3 of the Bill.

1.20 The effect of these clauses is considered below.

How may a person cease to be a citizen?

1.21 Proposed new subsection 35A(1) of the Act sets out the circumstances under which the Minister may determine that a person ceases to be an Australian citizen. The Minister must be satisfied that:

- The person has a *relevant terrorism conviction* or *relevant other conviction*,
- The person will not become a person who is not a national or citizen of any country,
- The person has repudiated their allegiance to Australia through their conduct, and
- It is not in the public interest for the person to remain an Australia citizen.

1.22 Each of these factors is considered further below.

The person has a *relevant terrorism conviction*

1.23 Clause 1 of the Bill proposes to insert new clause 35A(1A) into the Act. The proposed subsection states that a person has a relevant terrorism conviction if they have been convicted of an offence/s against:

- Subdivision A of Division 72 of the *Criminal Code*
- Subdivision B of Division 80 of the *Criminal Code*
- Part 5.3 of the *Criminal Code* (except Division 104 or 105)

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[8] *Australian Citizenship Act 2007*, s. 35A(1)(c)

- Part 5.5 of the *Criminal Code (Foreign incursions and recruitment) Act 1978*
- Section 6 or 7 of the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978.*

1.24 The relevant provisions of all the offences that constitute a relevant terrorism conviction are included in a table at **Appendix D**.

Inclusion of subsection 102.8 of the Criminal Code

1.25 These offences largely mirror the existing offences under current section 35A(1) of the Act, with the exception of the addition of subsection 102.8 of Part 5.3 of the *Criminal Code*. This offence (associating with a terrorist organisation), carries a maximum penalty of three years imprisonment and is currently expressly excluded from being used as the basis of citizenship revocation by virtue of subsection 35A(1)(a)(iii) of the Act.

1.26 The Explanatory Memorandum states that the proposed inclusion of the subsection 102.8 offence

> recognises that knowingly associating with a terrorist organisation, on multiple occasions, for the purposes of supporting the terrorist organisation to expand or continue to exist, is a serious offence. It is appropriate that persons convicted of this offence be eligible for cessation of citizenship on conviction, as the offence addresses the fundamental unacceptability of the terrorist organisation itself, by making meeting or communicating ("associating") with its members in a manner which assists its continued existence or expansion, illegal.[9]

Abolition of minimum six year sentence or to periods of imprisonment that total at least six years

1.27 The Bill proposes to remove the requirement in the current section 35A that the person has, in respect of the conviction or convictions, been sentenced to a period of at least six years, or to periods of imprisonment that total at least six years.

1.28 The removal of this requirement, combined with Clause 4 of the Bill (see below), has the effect that any person convicted of a relevant terrorism offence on or after 12 December 2005 will be eligible for citizenship revocation under new subsection 35A(1), regardless of the duration of their sentence. The Explanatory Memorandum states that:

> In light of the evolving terrorist threat, the Government considers it appropriate that the Minister be able to consider for cessation of citizenship all persons convicted of a terrorist offence after 12 December 2005, as conduct which poses harm to the Australian community. This includes, for example, offences against section 102.8 of the Criminal Code in relation to associating with a terrorist organisation for the purposes of supporting the terrorist

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[9] Explanatory Memorandum, p. 4.

> organisation to expand or continue to exist; an offence which carries a maximum penalty of 3 years' imprisonment.[10]

The person has a *relevant other conviction*

1.29 The Bill also proposes to insert new clause 35A(1B) into the Act. The clause introduces a range of non-terrorism offences that may be used as the basis to revoke a person's citizenship. These offences are found in:

- Division 82 of the *Criminal Code* (sabotage, other than section 82.9 - preparing for or planning sabotage offences),
- Division 91 of the *Criminal Code* (espionage), and
- Division 92 of the *Criminal Code* (foreign interference).

1.30 Each of these offences attracts a maximum penalty of between 10 years to life imprisonment. A summary of these offences and the relevant penalty is found in in **Appendix E**.

1.31 Clause 35A(1B)(b) of the Bill requires that a person convicted of one of the offences under Division 82, 91 or 92 of the *Criminal Code* must have been sentenced to a single or cumulative period of at least six years' imprisonment in respect of the conviction or convictions in order to be considered for citizenship revocation. According to the Explanatory Memorandum:

> This amendment is consequential to the repeal of current paragraph 35A(1)(b) and, subject to new paragraph 35A(1)(b), maintains the current operation of subsection 35A(1) insofar as it relates to offences other than terrorism offences.[11]

1.32 In addition, the person must have been sentenced to a period of imprisonment for at least six years or to periods of imprisonment that total at least six years, in relation to an offence outlined under Divisions 82, 91 and 92 of the *Criminal Code*.

The person must not become a person who is not a national or citizen of any country

1.33 Under the current legislation, an individual must be a national or citizen of a country other than Australia at the time when they have their citizenship revoked.

1.34 Under proposed clause 35A(1)(b) of the Bill, this requirement would change to one where the *Minister is satisfied* that the person

> would not, if the Minister were to determine that the person ceases to be an Australian citizen, become a person who is not a national or citizen of any country.[12]

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10 Explanatory Memorandum, p. 6.

11 Explanatory Memorandum, p. 5.

12 Proposed subsection 35A(1)(b).

1.35 In his second reading speech, the Attorney-General noted that the Bill

> provides the minister need only be satisfied that the person will not become stateless if their Australian citizenship ceases. It is well established under case law that where statute provides a minister must be 'satisfied' of a matter, it is to be understood as requiring the attainment of that satisfaction reasonably.[13]

1.36 The Explanatory Memorandum notes that proposed new paragraph 35A(1)(b) will require the Minister to be 'satisfied' the person will not become a person who is not a national or citizen of any country and states that this is

> consistent with other provisions of the Citizenship Act. For example, current paragraph 34(3)(b) of the Citizenship Act provides that the Minister must not revoke a person's Australian citizenship on the basis of certain offences or fraud if the Minister is satisfied that the person would become a person who is not a national or citizen of any country.[14]

1.37 The Explanatory Memorandum—as part of the Statement of Compatibility with Human Rights—notes that

> The new test is consistent with Australia's international obligations to not render a person without the citizenship or nationality of any country stateless and will be applied consistent with longstanding practice as it applies to other provisions of the Act. This test has been used for many cases of revocation of citizenship for serious offences (under section 34 of the Act) and there are well-established practices and processes in place.[15]

The person has repudiated their allegiance to Australia through their conduct

1.38 Proposed clause 35A(1)(c) of the Act requires the Minister to be satisfied that 'the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia'.

1.39 This clause is consistent with current paragraph 35A(1)(d) of the Act.

It is not in the public interest for the person to remain an Australian citizen

1.40 There are a number of criteria the Minister must be satisfied with in order to determine that it is not in the public interest for the person to remain an Australia citizen. These criteria are that same as those found in the existing section 35A(1) and are as follows:

i. the severity of the conduct that was the basis of the conviction or convictions and the sentence or sentences;

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13 The Hon Christian Porter MP, *House of Representatives Hansard*, 28 November 2018, p. 11762.

14 Explanatory Memorandum, p. 5.

15 Explanatory Memorandum, p. 9.

ii. the degree of threat posed by the person to the Australian community;
iii. the age of the person;
iv. if the person is aged under 18—the best interests of the child as a primary consideration;
v. the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
vi. Australia's international relations; and
vii. any other matters of public interest.

Clause 4 – Application and saving provisions and retrospectivity

1.41 Under current section 35A of the Act, application provisions introduced by the Allegiance to Australia Bill allow for retrospective application of the law from 12 December 2005 to 12 December 2015. However, as a safeguard, the law only applies retrospectively to individuals who were convicted between these dates and given a prison sentence of 10 years of more.

1.42 Under Clause 4 of the Bill, the above still applies but only for *relevant other convictions*. The Bill proposes that *relevant terrorism offences* only require that the conviction occurred on or after 12 December 2005. This has the effect of ensuring that anyone convicted of a relevant terrorism offence from 12 December 2005 may be eligible for citizenship revocation regardless of the duration of their sentence.

1.43 On this matter, the Explanatory Memorandum notes that

> In order to respond to the evolving threat environment, this Bill proposes to broaden the threshold for retrospective application to individuals with a relevant terrorism conviction, regardless of the length of the sentence of imprisonment imposed. Between September 2014 and November 2018, Australian agencies led 15 major disruption operations in response to potential attack planning, and charged 93 individuals with terrorism-related offences, with the majority of these events occurring after the passage of the Allegiance Act in December 2015. The amendments in this Bill ensure that one of the important legislative tools available to protect the Australian community from the threat of terrorism remains effective in the current threat environment. The carefully circumscribed definition of a 'relevant terrorism conviction' narrows the retrospective application of the Bill, in line with the PJCIS' comment that retrospectivity be applied with caution. As outlined in paragraph 7, the provisions only appl[y] to terrorism offences which target behaviour that is especially harmful to community safety and amounts to a repudiation of allegiance to Australia. It does not, for instance, include contravention of preventative detention orders or control orders which are designed to enable law enforcement agencies to intervene early to protect the

community and orders under these schemes are made on lower, non-criminal thresholds.[16]

1.44 The Committee's comments on the Bill, and recommendations, are found in the next chapter.

[16] Explanatory Memorandum, p. 13.

2. Consideration of the Bill

2.1 The Committee has considered a range of material as part of its inquiry, including the 17 submissions from groups and individuals and evidence from witnesses at the public hearing. The Committee has also taken into account its previous *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Advisory Report on the Allegiance to Australia Bill) that included examination of section 35A of the *Australian Citizenship Act 2007* (the Act).

2.2 As part of its inquiry, the Committee has identified six key issues relating to the Bill. These are considered below, along with the Committee's comment and recommendations.

Lowering the conviction threshold

2.3 As noted in the previous chapter, the current section 35A of the Act makes citizenship cancellation conditional on a number of factors including that a person must have been convicted of a specified offence that carries a penalty of no less than a maximum 10 years imprisonment.

2.4 Although the Bill retains this requirement for *relevant other convictions* (espionage, sabotage and foreign interference), the inclusion of an offence against section 102.8 of the Criminal Code (associating with a terrorist organisation) as part of a *relevant terrorism conviction*, reduces this requirement to a maximum penalty of three years imprisonment for that

specific offence. All other relevant terrorism conviction offences maintain at least a ten year maximum penalty. Currently, section 102.8 of the Criminal Code is expressly excluded from section 35A of the Act.

2.5 The Department of Home Affairs justified the inclusion of this lower threshold in its submission to the Committee. It said that inclusion of the offence

> recognises the serious nature of knowingly associating with a terrorist organisation, on multiple occasions, for the purposes of supporting its expansion or continued existence, in light of the current and evolving terrorism threat.[1]

2.6 In its Advisory Report on the Allegiance to Australia Bill the Committee considered that

> revocation of citizenship under proposed section 35A should only follow appropriately serious conduct that demonstrates a breach of allegiance to Australia.[2]

And that

> the provision should more appropriately target the most serious conduct that is closely linked to a terrorist threat. Accordingly, the Committee recommends removal of offences with a maximum penalty of less than 10 years imprisonment and certain Crimes Act offences that have never been used.[3]

2.7 Many submitters expressed concern with the inclusion of section 102.8 of the Criminal Code (associating with a terrorist organisation) as part of a *relevant terrorism conviction*.[4]

2.8 Dr Rayner Thwaites stated that inclusion of this offence is

> likely to bring considerable legal and practical difficulties in its wake. Its "potential capture of a wide range of legitimate activities" can be predicted to

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1 Department of Home Affairs, *Submission 5*, p. 7.

2 PJCIS, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, p. 115.

3 PJCIS, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, p. 115.

4 See Law Council of Australia, *Submission 14*, p. 11; Australian Human Rights Commission, *Submission 4*, pp. 13-14; Australian Lawyers for Human Rights, *Submission 7*, pp. 3-4; Australian Federation of Islamic Councils, *Submission 12*, p. 4; Executive Council of Australian Jewry Inc., *Submission 17*, p. 3 and Human Rights Law Centre, *Submission 19*, p. 5.

> be counterproductive in securing widespread community engagement with counter-terrorism measures.[5]

2.9 Submitters' broader concerns are encapsulated by the Australian Human Rights Commission (AHRC) who argued that the

> three year maximum penalty for committing the offence of associating with a terrorist organisation also indicates that Parliament considers it a much lower order offence than the other offences set out in proposed s 35A(1A) which could result in up to ten years' imprisonment.
>
> The Commission considers that the inclusion of the less serious offence of 'associating', within the ambit of the citizenship-stripping powers, has not been demonstrated to be reasonable, necessary or proportionate.[6]

Lowering of sentencing threshold

2.10 The Bill proposes to remove the requirement that the person has, in respect of the conviction or convictions, been sentenced to a period of at least six years, or to periods of imprisonment that total at least six years. This amendment only relates to *relevant terrorism convictions*. The Bill maintains that individuals convicted of relevant other convictions (espionage, sabotage and foreign interference) must continue to have been sentenced to a single or cumulative period of at least six years' imprisonment in respect of the conviction or convictions in order to have their citizenship revoked.

2.11 The Explanatory Memorandum states that:

> It is no longer the intention that the minimum 6 years' sentence period applies to persons with a relevant terrorism conviction. The effect of this is that the Australian citizenship of any person convicted of a relevant terrorism offence on or after 12 December 2005 will be subject to cessation of citizenship under new subsection 35A(1) (see item 4). In light of the evolving terrorist threat, the Government considers it appropriate that the Minister be able to consider for cessation of citizenship all persons convicted of a terrorist offence after 12 December 2005, as conduct which poses harm to the Australian community. This includes, for example, offences against section 102.8 of the Criminal Code in relation to associating with a terrorist organisation for the purposes of

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5 Dr Rayner Thwaites, *Submission 8*, p. 14.

6 Australian Human Rights Commission, *Submission 4*, p. 14.

> supporting the terrorist organisation to expand or continue to exist; an offence which carries a maximum penalty of 3 years' imprisonment.[7]

2.12 The six year minimum sentence was included in the *Australian Citizenship Act 2007* to reflect the Committee's concerns outlined in its Allegiance to Australia Report. The Committee recommended that citizenship could not be revoked unless the person was convicted of a relevant offence with a sentenced applied of at least six years imprisonment, or multiple sentences totalling at least six years' imprisonment.[8]

2.13 As with the lowering of the conviction threshold discussed above, a number of submitters raised concerns with the lowering of the sentencing threshold.[9] For example Australian Lawyers for Human Rights stated that

> the removal of the prerequisite relating to a minimum sentence and term of imprisonment before a person is considered for loss of citizenship undermines judicial discretion and the determinations of the criminal justice system, for example in circumstances where the criminal law system has already found a person to be of minimal risk to the Australian community and therefore has imposed a very short sentence, or no sentence or term of imprisonment. Removing the prerequisite which demonstrates the seriousness of the relevant crime or crimes means that the legislation is no longer clearly proportionate to the offence.[10]

2.14 The Law Council of Australia noted that the six year penalty only applying to *relevant other offences* and not to *relevant terrorism offences* appeared to be arbitrary. It noted that 'relevant other convictions such as those for espionage offences can carry significant penalties just as terrorism offences can and, arguably, both kinds of offences may evidence that a person has

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7 Explanatory Memoradum, p. 6.

8 PJCIS, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, p. 117.

9 See: Professor George Williams and Dr Sangeetha Pillai, *Submission 1*; pp. 5-6; Australian Human Rights Commission, *Submission 4*, pp. 13-16; Australian Lawyers for Human Rights, *Submission 7*, p.4; Australian Federation of Islamic Councils, *Submission 12*, p.4; Law Council of Australia, *Submission 14*, pp. 11-12; Professor Kim Rubenstein, Associate Professor Matthew Zagor and Dr Dominique Dalla-Pozza, Submission 13, p. 3-5 and Human Rights Law Centre, *Submission 19*, pp. 6-7.

10 Australian Lawyers for Human Rights, *Submission 7*, p.4

repudiated his or her allegiance to Australia (the constitutional grounding for the Act)'.[11]

Statelessness

2.15 Under Article 15 of the *Universal Declaration of Human Rights*, every individual has a right to a nationality.[12] Australia is a State Party to the *1954 Convention relating to the Status of Stateless Persons* (the 1954 Convention),[13] and the *1961 Convention on the Reduction of Statelessness* (the Statelessness Convention).[14] The United Nations High Commissioner for Refugees explained that the Statelessness Convention's purpose

> is to prevent and reduce statelessness, thereby guaranteeing every individual's right to a nationality. Consequently, Australia has an obligation to take measures to avoid statelessness.[15]

2.16 Submitters raised concerns that the proposed new powers under section 35A of the Act risk contravening Australia's obligations under the Statelessness Convention.[16] In particular, submitters noted that the amendment to allow for citizenship deprivation in cases where the Minister is satisfied that the citizen concerned would not, through revocation, 'become a person who is not a national or citizen of any country', may lead to a person becoming stateless.

2.17 The Department argued that such a lowering of the threshold was

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11 Law Council of Australia, *Submission 5*, p. 11.

12 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 15.

13 UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, : <https://www.refworld.org/docid/3ae6b3840.html> viewed 22 January 2019.

14 UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175. United Nations

15 United Nations High Commissioner for Refugees, *Submission 9*, p. 1.

16 See: Professor George Williams and Dr Sangeetha Pillai, *Submission 1*; pp. 5-6; Australian Human Rights Commission, *Submission 4*, pp. 8-9; Professor Helen Irving, *Submission 6*; pp.3-4; Dr Rayner Thwaites, *Submission 8*,;United Nations High Commissioner for Refugees, *Submission 9*; Immigration Advice and Rights Centre, *Submission 10*, p. 10; Australian Federation of Islamic Councils, *Submission 12*, pp. 7-9; Law Council of Australia, *Submission 14*, pp. 7, 12-15 and Human Rights Law Centre, *Submission 19*, pp. 8-9.

> consistent with the existing provision in paragraph 34(3)(b) of the Citizenship Act, which provides the Minister must not revoke a person's citizenship on the basis of certain offences if satisfied that the person would become someone who is not a national or citizen of any country.[17]

2.18 Some submitters disagreed with this characterisation of the proposed new power.[18] For example, Professor Helen Irving argued that section 34 of the Act

> concerns the revocation of citizenship acquired by conferral, and applies to persons who commit offences or fraud in relation to or during the process of applying for citizenship. It indicates that the Australian citizenship of such persons was not obtained or held validly. Their situation is importantly different from cases where a person holds Australian citizenship that has been acquired legitimately under Australian law.[19]

2.19 A number of submitters also commented on the possibility that, if not accepted by a second country a person could become subject to indefinite immigration detention.[20]

2.20 The Department of Home Affairs gave evidence that Bill was compliant with international law and advice was provided to the Department of Home affairs by the Chief General Counsel of the Australian Government Solicitor(AGS) and Office of International Law at AGS.[21]

Constitutional validity

2.21 Neither the Bill's Explanatory Memorandum, nor the Department's submission, deal with the issue of constitutionality. In the Advisory Report on the Allegiance to Australia Bill, the Committee noted that the Explanatory Memorandum to 2015 Bill

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17 Department of Home Affairs, *Submission 5*, p. 7.

18 Professor George Williams and Dr Sangeetha Pillai, *Submission 1*; p. 6, Professor Helen Irving, *Submission 6*; p. 3.

19 Professor Helen Irving, *Submission 6*; p. 3.

20 Australian Human Rights Commission, *Submission 4*, p. 19; Professor Helen Irving, *Submission 6*; p.4; Australian Federation of Islamic Councils, *Submission 12*, p. 11; Law Council of Australia, *Submission 14*, p. 13-15; Refugee Legal, *Submission 16*, p. 2 and Human Rights Law Centre, *Submission 19*, p. 9.

21 Department of Home Affairs, *Supplementary Submission 5.1*, pp. 5, 9.

states that 'the principal source of power for a person's Australian citizenship ceasing is the aliens power in section 51(xix) of the Constitution'. In so doing, the Bill relies on the concept that an 'alien' is 'a person lacking allegiance to Australia'. However, there has not yet been a High Court case in which it has been necessary for the Court to decide the constitutional meaning of 'alienage', or for it to determine the 'outer limits' of Parliament's power under section 51(xix).[22]

2.22 A number of submissions and witnesses discussed the constitutional validity of the Bill.[23] The submitters expressed concerns in relation to two key constitutional questions:

- the Commonwealth's ability to legislate to remove citizenship, especially in cases relating to minor conduct with no necessary disloyalty element, and
- the proportionality of any removal of citizenship.

2.23 These points are encapsulated by Professor George Williams and Dr Sangeetha Pillai as follows:

- Removing the minimum sentencing threshold for citizenship loss on the ground of a 'relevant terrorism conviction' would increase the risk that the scheme would infringe the principle established in *Roach v Electoral Commissioner*. This is because passage of the Bill would mean that the manner in which the scheme pursues its purpose of fostering national security is less likely to be considered proportionate.
- Removing the minimum sentencing threshold decreases the likelihood that s 35A will be found to be 'with respect to' one of the Commonwealth's heads of power. This is because extending the Minister's citizenship revocation powers to apply in cases where a person has committed more minor conduct with no necessary disloyalty element is likely to weaken s 35A's connection with both the aliens power in s 51(xxix) and the defence power in s 51(vi).
- Extending the Minister's citizenship revocation powers to cases where the Minister is satisfied that the citizen concerned would not, through

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22 PJCIS, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, p. 24.

23 See: Professor George Williams and Dr Sangeetha Pillai, *Submission 1*; p. 5; Professor Helen Irving, *Submission 6*; pp. 1-2; Dr Rayner Thwaites, Submission 8 and Immigration Advice and Rights Centre, *Submission 10*, p. 3; Law Council of Australia, *Submission 14*, pp. 18-19; and Peter McMullin Centre on Statelessness, *Submission 15*; Executive Council of Australian Jewry, *Submission 17*, pp. 4-5.

> revocation, 'become a person who is not a national or citizen of any country' would increase the likelihood of s 35A overstepping constitutional boundaries. This would weaken s 35A's connection with the aliens power.[24]

2.24 In addition the Australian Human Rights Commission raised the issue of whether removal of citizenship was punitive and thus a penalty that could only be imposed by a court acting under jurisdiction conferred by Chapter 3 of the Constitution.[25]

2.25 These issues were discussed extensively in Chapter 3 of the Allegiance to Australia Report.[26] It its comment, the Committee stated that some members of the Committee held concerns about the ability of the proposed legislation to withstand constitutional challenge and that these members considered that

> although it is ultimately a matter for the High Court to determine the constitutionality of any Bill, it is incumbent on governments and parliamentarians to legislate in a manner which minimises the risk of a successful constitutional challenge. This is particularly so where the Parliament is considering national security legislation that impacts on the fundamental rights of individuals.[27]

Judicial review

2.26 The Senate Scrutiny of Bills Committee set out the issue around judicial review when it stated:

> While the minister's decision would be subject to judicial review, merits review of the decision is not available. The proposed amendments enable citizenship to be removed if the minister 'is satisfied' that the person would not become a person who is not a national or citizen of any country. Although the exercise of this determination would be subject to a requirement of legal reasonableness, there would be limited scope for the minister's opinion to be reviewed. For this reason, the intensity of permissible judicial review would

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24 Professor George Williams and Dr Sangeetha Pillai, *Submission 1*; p. 5.

25 Australian Human Rights Commission, *Submission 4*, p. 17 and Law Council of Australia, *Submission 14*, p. 18.

26 PJCIS, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, p. 33.

27 PJCIS, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, p. 33.

> be considerably lower than is allowable under the current provision, which requires that 'the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination'. Under the current provision, the question of whether a person is a national or citizen of another country is a jurisdictional fact that could be reviewed by the court for correctness, rather than merely on the basis of whether the minister's opinion on the question was formed reasonably.[28]

2.27 The Explanatory Memorandum states that:

> The right to a fair trial and fair hearing are not in any way affected or limited by the proposed amendments. In any judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been exercised according to law. A person also has a right to seek declaratory relief as to whether the conditions giving rise to the cessation of citizenship have been met.

2.28 A number of submitters expressed concern around the issue of judicial review. In particular they referred to the statement by the Senate Scrutiny of Bills Committee that 'the intensity of permissible judicial review would be considerably lower than is allowable under the current provision'.[29]

2.29 Professor Williams and Dr Pillai stated that

> Currently, the question of whether a person who has lost their Australian citizenship holds citizenship of a foreign country can be reviewed by a court as a question of jurisdictional fact. Under the proposed change, the only judicial review ground available will be the more limited reasonableness ground.[30]

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28 Australian Senate, Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 4-5.

29 See Professor George Williams and Dr Sangeetha Pillai, *Submission 1*; p. 6; Australian Human Rights Commission, *Submission 4*, p. 10; Professor Helen Irving, *Submission 6*; p. 3; Australian Lawyers for Human Rights, Submission 7, p. 4; Immigration Advice and Rights Centre, *Submission 10*, p. 5; Professor Kim Rubenstein, Associate Professor Matthew Zagor and Dr Dominique Dalla-Pozza, *Submission 13*, pp. 10-11 and Law Council of Australia, *Submission 14*, p. 18.

30 Professor George Williams and Dr Sangeetha Pillai, *Submission 1*; p. 6.

2.30 Similarly Professor Helen Irving pointed out that '[F]actual error in deciding that a person holds foreign citizenship and will not be rendered stateless by revocation of their Australian citizenship may, thus, remain uncorrected.'[31]

2.31 The Professor Kim Rubenstein, Associate Professor Matthew Zagor and Dr Dominique Dalla-Pozza recommended that

> the Bill be amended to provide a right to full merits review of any decision regarding deprivation of nationality by adding s 35A to the decisions where merits review is available (by amending s 52 of the Australian Citizenship Act 2007).[32]

Retrospectivity

2.32 Current section 35A of the Act applies retrospectively. An individual convicted of a specified offence between 12 December 2005 and 12 December 2015 may have their citizenship cancelled, but only if the person was sentenced to a period of imprisonment of at least 10 years in respect of that conviction.

2.33 The Bill proposes maintaining the same principle for *relevant other convictions* (espionage, sabotage and foreign interference). However, in the case of *relevant terrorism convictions*, the Bill abolishes the 10 year minimum sentence requirement. Proposed section 4 of the Bill enables citizenship cancellation in cases where an individual received a relevant terrorism conviction on or after 12 December 2005, regardless of the duration of their sentence. The Bill imposes no minimum sentence requirement.

2.34 In its Advisory Report on the Allegiance to Australia Bill, the Committee considered the issue of section 35A having a retrospective application and found that

> on balance the Committee determined these to be special circumstances. The Committee formed the view that past terrorist–related conduct, to which persons have been convicted under Australian law, is conduct that all

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31 Professor Helen Irving, *Submission 6*, p. 3. See also Australian lawyers for Human Rights, *Submission 7*, p. 4.

32 Professor Kim Rubenstein, Associate Professor Matthew Zagor and Dr Dominique Dalla-Pozza, *Submission 13*, p. 11.

> members of the Australian community would view as repugnant and a deliberate step outside of the values that define our society.[33]

2.35 However, the Committee recommended that section 35A only apply retrospectively 'to convictions for relevant offences where sentences of ten years or more have been handed down by a court.'[34]

2.36 A number of submitters raised concerns with the proposed amendment to the retrospective application of the Bill, in particular, the abolition of the 10 year minimum sentence safeguard for relevant terrorism convictions.[35] As one example the Australian Human Rights Commission submitted that

> The retrospective application of the citizenship removal powers in the Allegiance Act was restricted to individuals who had been convicted of a relevant offence, with a term of at least ten years imprisonment in the ten years prior to the passage of that Act. This implemented a recommendation made by the PJCIS. It is unclear why the implementation of that PJCIS recommendation is now being reversed.
>
> Removing the ten year imprisonment requirement risks lessening the proportionality of the limitation on human rights, given that the severe consequences of citizenship removal could be applied to persons who have been assessed by a court as having comparatively lower culpability.[36]

Committee comment

2.37 In its Advisory Report on the Allegiance to Australia Bill the Committee recommended that

> the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to complete a review of the revocation

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33 PJCIS, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, p. 128.

34 PJCIS, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, p. 128.

35 See Australian Human Rights Commission, *Submission 4*, pp. 16-18; Australian Lawyers for Human Rights, *Submission 7*, p. 5; Australian Federation of Islamic Councils, *Submission 12*, pp. 9-10; Law Council of Australia, *Submission 14*, pp. 16-18;

36 Australian Human Rights Commission, *Submission 4*, p. 18.

of citizenship provisions in the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 by 1 December 2019.[37]

2.38 Section 29(1)(ca) of the *Intelligence Services Act 2001* was amended as recommended by the Committee. This amendment made it a function of the Committee to review, by 1 December 2019, the operation, effectiveness and implications of sections 33AA, 35, 35AA and 35A of the Australian Citizenship Act 2007 and any other provision of that Act as far as it relates to those sections.

2.39 It is important that the additional provisions proposed by this Bill are reviewed to determine their operation as intended, their effectiveness in helping to protect the Australian community, and their implications and any unintended consequences that may have become apparent.

2.40 Therefore the Committee recommends that section 29(1)ca) of the *Intelligence Services Act 2001*, be amended to require that the Committee complete its review of the operation, effectiveness and implications of sections 33AA, 35, 35AA and 35A of the Australian Citizenship Act 2007 and any other provision of that Act as far as it relates to those sections, by 1 December 2020 (rather than 1 December 2019).

Recommendation 1

2.41 The Committee recommends that section 29(1)ca) of the Intelligence Services Act 2001, be amended so to require that the Committee review the operation, effectiveness and implications of sections 33AA, 35, 35AA and 35A of the Australian Citizenship Act 2007 and any other provision of that Act as far as it relates to those sections, by 1 December 2020.

2.42 The Committee notes that section 51((3) of the Australian Citizenship Act 2007 (Citizenship Act) requires the Minister, if requested by the Committee, to arrange for the Committee to be briefed where, as set out in section 51((1) of the Citizenship Act, the Minister

- gives or unsuccessfully attempts to give a notice under paragraph 33AA(10)(a) or 35(5)(a);
- gives or unsuccessfully attempts to give a notice under paragraph 35A(5)(a);

[37] PJCIS, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, p. 183.

- makes a determination under subsection 33AA(12), 35(7) or 35A(7).

2.43 The Committee confirms its standing request to the Department of Home Affairs and other relevant agencies, as per section 51C(4) of the Citizenship Act, for detailed written briefs to accompany the notifications provided to the Committee when the Minister does any of the above.

2.44 It is the expectation of the Committee that these written briefs would cover matters set out in section 51C(5) of the Citizenship Act. This will assist the Committee in determining if there are outstanding matters on which it may require an oral briefing.

2.45 Subject to implementation of the recommendations made here, the Committee recommends that the Bill be passed.

Recommendation 2

2.46 Subject to implementation of the Committee's recommendations, the Committee recommends that the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 be passed.

Mr Andrew Hastie MP

Chair

A. List of Submissions

1 Professor George Williams & Dr Sangeetha Pillai
2 Mr Terry Dwyer
3 Ms Janine Truter
4 Australian Human Rights Commission
5 Department of Home Affairs
- 5.1 Supplementary
- 5.2 Supplementary
- 5.3 Supplementary (confidential)
- 5.4 Supplementary (confidential)
- 5.5 Supplementary (confidential)

6 Professor Helen Irving
7 Australian Lawyers for Human Rights
8 Dr Rayner Thwaites
9 UNHCR
10 Immigration Advice & Rights Centre (IARC)
- 10.1 Supplementary

11 Science Party
12 Australian Federation of Islamic Councils
13 Professor Kim Rubenstein, Associate Professor Matthew Zagor and Dr Dominique Dalla-Pozza
- 13.1 Supplementary

14 Law Council of Australia
- 14.1 Supplementary

15 Peter McMullin Centre on Statelessness
16 Refugee & Immigration Legal Centre
17 Executive Council of Australian Jewry
18 Federation of Ethnic Communities' Councils of Australia
19 Human Rights Law Centre

B. List of witnesses appearing at the public hearings

Public Hearing - Wednesday, 30 January 2019

Parliament House, Canberra

Law Council of Australia

- Dr David Neal, Co-Chair, National Criminal Law Committee
- Mr Geoffrey Kennett, Chair, Administrative Law Committee
- Mr David Prince, Chair, Migration Law Committee
- Dr Natasha Molt, Director of Policy

Australian Human Rights Commission

- Mr Edward Santow, Human Rights Commissioner
- Ms Jennifer Lim, Senior Lawyer

Professor George Williams & Dr Sangeetha Pillai

- Professor George Williams
- Dr Sangeetha Pillai

ANU Law School ANU College of Law

- Professor Kim Rubenstein, Professor
- Dr Dominique Dalla-Pozza, Senior Lecturer

Department of Home Affairs

- Ms Linda Geddes, Commonwealth Counter-Terrorism Coordinator
- Ms Pip De Veau, General Counsel, First Assistant Secretary
- Mr Luke Mansfield, First Assistant Secretary
- Ms Susan Williamson-de Vries, Acting Assistant Secretary
- Mr Ian Deane, Special Counsel

Immigration Advice & Rights Centre

- Mr Ali Mojtahedi, Principal Solicitor

Private Hearing - Wednesday, 13 February 2019

Parliament House, Canberra

Department of Home Affairs

- Ms Linda Geddes, Commonwealth Counter-Terrorism Coordinator
- Mr Michael Rendina, Deputy Commonwealth Counter-Terrorism Coordinator
- Mr Ian Deane, Special Counsel

C. Offences constituting a 'relevant terrorism conviction'

Table 3.1 Offences constituting a relevant terrorism conviction

Act/Provision	Offence	Maximum Penalty (Imprisonment)
Criminal Code section 72.3	international terrorist activities using explosive or lethal devices	Life
Criminal Code section 80.1	treason	Life
Criminal Code section 80.1AA	treason—assisting enemy to engage in armed conflict	Life
Criminal Code section 80.1AC	treachery	Life
Criminal Code section 101.1	terrorism acts	Life
Criminal Code section 101.2(1)	providing or receiving training connected with terrorist acts	25 years
Criminal Code section 101.2(2)	recklessly providing or receiving training connected with terrorist acts	15 years
Criminal Code section 101.4(1)	possessing things connected with terrorist acts	15 years
Criminal Code section 101.4(2)	recklessly possessing things connected with terrorist acts	10 years
Criminal Code section 101.5(1)	collecting or making documents likely to facilitate terrorist acts	15 years
Criminal Code section 101.5(2)	recklessly collecting or making documents likely to facilitate terrorist acts	10 years
Criminal Code section 101.6	other acts done in preparation for, or planning, terrorist acts	Life
Criminal Code section 102.2(1)	directing the activities of a terrorist organisation	25 years

Criminal Code section 102.2(2)	recklessly directing the activities of a terrorist organisation	15 years
Criminal Code section 102.3	Membership of a terrorist organisation	10 years
Criminal Code section 102.4(1)	recruiting for a terrorist organisation	25 years
Criminal Code section 102.4(2)	recklessly recruiting for a terrorist organisation	15 years
Criminal Code section 102.5	training involving a terrorist organisation	25 years
Criminal Code section 102.6(1)	getting funds to, from or for a terrorist organisation	25 years
Criminal Code section 102.6(2)	recklessly getting funds to, from or for a terrorist organisation	15 years
Criminal Code section 102.7(1)	providing support to a terrorist organisation	25 years
Criminal Code section 102.7(2)	recklessly providing support to a terrorist organisation	15 years
Criminal Code section 102.8	associating with a terrorist organisation	3 years
Criminal Code section 103.1	financing terrorism	Life
Criminal Code section 103.2	financing a terrorist	Life
Criminal Code section 119.1(1)	entering foreign countries with the intention of engaging in hostile activities	Life
Criminal Code section 119.1(2)	engaging in a hostile activity in a foreign country	Life
Criminal Code section 119.2	Entering, or remaining in, declared areas	10 years
Criminal Code section 119.4(1)	Incursions into foreign countries - preparatory acts	Life
Criminal Code section 119.4(2)	Incursions into foreign countries – accumulating weapons etc.	Life
Criminal Code section 119.4(3)	providing or participating in training	Life

and (4)		
Criminal Code section 119.4(5)	giving or receiving goods and services to promote the commission of an offence	Life
Criminal Code section 119.5	allowing use of buildings, vessels and aircraft to commit offences	Life
Criminal Code section 119.6	recruiting persons to join organisations engaged in hostile activities against foreign governments	25 years
Criminal Code section 119.7	Recruiting persons to serve in or with an armed force in a foreign country	10 years
(Repealed) Crimes (Foreign Incursions and Recruitment) Act 1978 section 6	Incursions into foreign States with intention of engaging in hostile activities	20 years
(Repealed) Crimes (Foreign Incursions and Recruitment) Act 1978 section 7	Preparations for incursions into foreign States for purpose of engaging in hostile activities	10 years

Source: Criminal Code; Crimes (Foreign Incursions and Recruitment) Act 1978 (repealed)

D. Offences constituting a 'relevant other conviction'.

Table 4.1 Offences constituting a 'relevant other conviction'

Act/Provision	Offence	Maximum Penalty (Imprisonment)
Criminal Code section 82.3	Sabotage involving foreign principal with intention as to national security	25 years
Criminal Code section 82.4	Sabotage involving foreign principal reckless as to national security	20 years
Criminal Code section 82.5	Sabotage with intention as to national security	20 years
Criminal Code section 82.6	Sabotage reckless as to national security	15 years
Criminal Code section 82.7	Introducing vulnerability with intention as to national security	15 years
Criminal Code section 82.8	Introducing vulnerability reckless as to national security	10 years

Criminal Code section 91.1(1)	Espionage dealing with information etc. concerning national security which is or will be communicated or made available to foreign principal with intention as to national security	Life
Criminal Code section 91.1(2)	Espionage dealing with information etc. concerning national security which is or will be communicated or made available to foreign principal reckless as to national security	25 years
Criminal Code section 91.2(1)	Espionage—intentionally dealing with information etc. which is or will be communicated or made available to foreign principal	25 years
Criminal code section 91.2(2)	Espionage—recklessly dealing with information etc. which is or will be communicated or made available to foreign principal	20 years
Criminal Code section 91.3	Espionage communicating or making available security classified information	20 years
Criminal Code section 91.8(1)	Espionage on behalf of a foreign principal with intent as to national security	25 years
Criminal Code section 91.8(2)	Espionage on behalf of a foreign principal reckless as to national security	20 years
Criminal Code section 91.8(3)	Espionage conduct on behalf of a foreign principal	15 years
Criminal Code section 91.11	Soliciting or procuring an espionage offence or making it easier to do so	15 years
Criminal Code	Preparing for an espionage	15 years

section 91.12	offence	
Criminal Code section 92.2(1)	Intentional foreign interference	20 years
Criminal Code section 92.2(2)	Intentional foreign interference – involving targeted person	20 years
Criminal Code section 92.3(1) and (2)	Reckless foreign interference	15 years
Criminal Code section 92.3(2)	Reckless foreign interference – involving targeted person	15 years
Criminal Code section 92.4	Preparing for a foreign interference offence	10 years
Criminal Code section 92.7	knowingly supporting a foreign intelligence agency	15 years
Criminal Code section 92.8	recklessly supporting a foreign intelligence agency	10 years
Criminal Code section 92.9	knowingly funding or being funded by foreign intelligence agency	15 years
Criminal Code section 92.10	recklessly funding or being funded by foreign intelligence agency	10 years

Source: Criminal Code

E. List of relevant recommendations - Allegiance to Australia Bill 2015

The following recommendations from the Committee's *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* are directly relevant to the proposed amendments in the current Bill.

Recommendation 7

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to give the Minister discretion to revoke a person's citizenship following conviction for a relevant offence with a sentence applied of at least six years' imprisonment, or multiple sentences totalling at least six years' imprisonment.

In exercising this discretion, the Minister should be satisfied that:

- the person's conviction demonstrates that they have repudiated their allegiance to Australia, and
- it is not in the public interest for the person to remain an Australian citizen, taking into account the following factors:
  - the seriousness of the conduct that was the basis of the

- conviction and the severity of the sentence/s,
- the degree of threat to the Australian community,
- the age of the person and, for a person under 18, the best interests of the child as a primary consideration,
- whether the affected person would be able to access citizenship rights in their other country of citizenship or nationality, and the extent of their connection to that country,
- Australia international obligations and relations, and
- any other factors in the public interest.

The rules of natural justice should apply to the Minister's discretion under section 35A.

Recommendation 9

The Committee recommends that the list of relevant offences in proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to exclude offences that carry a maximum penalty of less than 10 years' imprisonment and certain Crimes Act offences that have never been used.

The Committee notes that the following offences would be removed:

- Section 80.2, *Criminal Code Act 1995*, Urging violence against the Constitution, the Government, a lawful authority of the Government, an election, or a referendum,
- Section 80.2A(1) *Criminal Code Act 1995*, Urging violence against groups,
- Section 80.2B(1) *Criminal Code Act 1995*, Urging violence against members of groups,
- Section 80.2C, *Criminal Code Act 1995*, Advocating terrorism,
- Section 25 *Crimes Act 1914*, Inciting mutiny against the Queen's Forces, Section 26 *Crimes Act 1914*, Assisting prisoners of war to escape, and
- Section 27(1) *Crimes Act 1914*, Unlawful drilling.

Recommendation 10

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be applied

retrospectively to convictions for relevant offences where sentences of ten years or more have been handed down by a court.

The Ministerial discretion to revoke citizenship must not apply to convictions that have been handed down more than ten years before the Bill receives Royal Assent.

Minority Report by Labor members

Minority report by Labor members of the Parliamentary Joint Committee on Intelligence and Security

Labor members of the Committee continue to support cancelling the citizenship of Australians who are dual nationals and who have demonstrated that they no longer owe allegiance to Australia. That is why Labor members joined with our colleagues to recommend the passage of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the "Allegiance Bill"), which first introduced section 35A into the Australian Citizenship Act 1997 (the provision that the government is now seeking to amend).

Labor's demonstrated commitment to strong and effective national security laws is one of the key reasons why Labor members of the Committee can not support the majority report.

Under the current section 35A, a person may have their Australian citizenship cancelled if they are convicted of a prescribed terrorism offence, they are given a prison sentence of at least 6 years and they hold the citizenship of another country. The Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (the "Citizenship Bill") would amend section 35A of the *Australian Citizenship Act* by:

- significantly expanding the Minister's existing power to revoke a person's Australian citizenship, to people who have committed a broader range of offences and who have never been given a prison sentence; and
- amending the requirement that a person must as a matter of fact be a citizen of another country, to a requirement that the Minister merely has to be *satisfied* that the person would not become a person who is not a national or citizen of any country if the person has their Australian citizenship revoked.

If the changes in this bill are implemented, it would be for the Minister for Home Affairs to *personally* decide whether a person who is convicted of a prescribed offence "has repudiated their allegiance to Australia" – even if that person has not been given a prison sentence by a court. And it would be for the Minister to *personally* decide whether a person is (or possibly could become) a citizen of another country, based not on the objective facts relevant to the subject's citizenship status, but rather, on the Minister's opinion.

Fundamentally:

- we are concerned that the Citizenship Bill is unconstitutional; and
- in addition to concerns about the bill's constitutionality, we have serious doubts about the ability of the current Minister for Home Affairs to exercise such a broad and subjective decision-making power consistently, responsibly and in Australia's national interest.

The Citizenship Bill is likely to be unconstitutional

Labor members of this Committee are not prepared to ignore the evidence presented by eminent constitutional lawyers and scholars who have told this Committee – including our Liberal colleagues – that the Citizenship Bill is likely unconstitutional, and if so found would be struck down by the High

Court of Australia. Professors George Williams and Kim Rubenstein, for example, told the Committee on 30 January 2019 that it is "more likely than not" the laws would be struck down by the High Court. Moreover, in a formal legal opinion obtained by the Shadow Attorney-General, one of Australia's most eminent constitutional lawyers, Peter Hanks QC, concluded that there would be a "substantial risk" of this happening (see paragraph 14.3). That opinion is set out at **Attachment A** of this dissenting report.

It should go without saying that the government of Australia should respect the nation's Constitution, and that Australians are not made safer by laws that are struck down by the High Court as unconstitutional. And yet the government's conduct suggests that these basic principles have been ignored by both the government and our Liberal colleagues on the Committee.

When it comes to the Citizenship Bill, these are far from academic points. The government is not proposing to *add* a power to the *Australian Citizenship Act.* Rather, the government is proposing to amend the existing power under section 35A to cancel the Australian citizenship of citizens with dual nationalities who have been convicted of a terrorism offence for which they have been sentenced to 6 or more years in prison**. If the Citizenship Bill proceeds and section 35A is struck down by the High Court, there will be no section 35A at all. This would mean that the existing regime, which Labor supports, would be removed with the effect that serious terrorists with dual nationalities could no longer be deprived of their Australian citizenship under the *Australian Citizenship Act*.**

Given those are the likely consequences of proceeding as the government proposes, it is extraordinary that the government has so far refused to provide either the Committee or the Australian people with *any* assurance whatsoever that the Citizenship Bill is constitutionally sound.

As well as trying, and failing, to obtain assurances from representatives of the Department of Home Affairs during a public hearing of the Committee, the Shadow-Attorney General wrote to the Attorney-General on 1 February 2019 seeking assurances directly from him (**Attachment B**). That letter has not been responded to.

In summary, despite the considered legal concerns that have been cogently presented to the Committee in public evidence by many eminent constitutional experts:

- the Attorney-General of Australia – who is tasked with upholding the rule of law – refused to deal with the legitimate public concerns about the constitutional risk of this bill;
- the Explanatory Memorandum does not mention to the Constitution of Australia at all;
- the submission of the Department of Home Affairs to the Committee did not mention to the Constitution of Australia at all;
- during the public hearing on 30 January 2019, the Department of Home Affairs admitted to the Committee that the government has never sought the advice of the Solicitor-General – whose advice is routinely sought in relation to complex constitutional questions – about the prospects of the Citizenship Bill surviving a constitutional challenge, or how the Citizenship Bill could be amended to put it on a stronger constitutional footing (see **Attachment F**); and
- representatives of the Department of Home Affairs refused – in response to questions from Labor members of the Committee – to reveal anything about the advice that the government apparently *has* received regarding the prospects of the Citizenship Bill surviving a constitutional challenge.

This is nothing short of a remarkable state of affairs, made especially so in light of the fact that the former Attorney-General, Senator George Brandis, misled this Committee in 2015 about the legal advice the government received about the constitutionality of the existing section 35A (among other provisions). The history of that episode is set out in the Shadow Attorney-General's letter to the Attorney General (**Attachment B**).

It is very disappointing that our Liberal colleagues on this Committee have not dealt responsibly with these concerns. This Committee has a responsibility to the Parliament and Constitution which ought to transcend immediate political concerns.

The Minister for Home Affairs

In addition to concerns about the constitutionality of the Citizenship Bill, submitters to the Committee's inquiry expressed a number of other concerns, including that:

- despite recent comments from the current Attorney-General that "retrospective criminal law is probably the most serious and unwarranted thing that any government anywhere, in any democracy can do" (**Attachment C**), the Citizenship Bill would apply retrospectively (to 12 December 2005) without qualification;
- there would be no merits review available for anyone whose citizenship is revoked under section 35A;
- as a matter of law, the amendments to section 35A would make it possible for the Minister for Home Affairs to render a person stateless in contravention of the Convention on the Reduction of Statelessness 1961 – a scenario previously publicly ruled out by the former Attorney-General; and
- the removal of the current requirement that the person has been sentenced to a period of at least 6 years in prison, or to periods of imprisonment that total at least 6 years, may result in arbitrary decision-making and the personal, subjective ministerial power under section 35A being used in a disproportionate manner.

Following the recent fiasco concerning Neil Prakash, and putting to one side the constitutional issues, we hold serious doubts about the ability of the current Minister for Home Affairs to exercise such a broad subjective decision-making power responsibly or in Australia's national interest. The Minister's "determination" that Mr Prakash is a citizen of Fiji, and therefore eligible to have his Australian citizenship stripped under section 35 of the *Citizenship Act*, was made without any consultation with an expert on Fijian citizenship law or any discussion with the Fijian government about Mr Prakash's citizenship status. Moreover, the Fijian government has unequivocally stated that Mr Prakash is *not* a citizen of Fiji and never has been.

Based on the available evidence, Mr Prakash is almost certainly *not* a citizen of Fiji and so – unless he is a citizen of a country other than Fiji and Australia – he remains an Australian citizen under Australian law.

The damage that the current Minister for Home Affairs did to Australia's relationship with Fiji, an important partner, resulted directly from his inept administration of section 35 of the *Australian Citizenship Act*. That damage was both entirely avoidable and completely pointless. Now the Minister

is seeking to further expand his power under section 35A to make uninformed, subjective determinations with the potential to impact Australia's foreign relations.

The Committee's 2015 Report

The proposed amendments to section 35A of the *Australian Citizenship Act* are directly contrary to three of the bipartisan and unanimous recommendations made by this Committee in its *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (the "2015 Report"):[1]

> **Recommendation 7**: an individual's citizenship should not be revoked under section 35A of the Act unless they had been convicted of a relevant offence with a sentence applied of at least six years imprisonment, or multiple sentences totalling at least six years' imprisonment.
>
> **Recommendation 9**: an individual's citizenship should not be revoked under section 35A of the Act unless they had been convicted of an offence that carries a minimum penalty of 10 years imprisonment,
>
> **Recommendation 10**: Section 35A may be applied retrospectively to convictions for relevant offences where sentences of ten years or more were given. However, retrospectivity must not apply to convictions handed down more than ten years prior to the Bill receiving Royal Assent.

As recently as *June 2018*, this Committee re-endorsed the 2015 report. In its *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, the Committee noted its

> *previous recommendation that section 35A should be limited to offences that carry a maximum penalty of at least 10 years imprisonment. Under the current Bill, a conviction for the offence of 'preparing for or planning sabotage offence' (proposed section 82.9) is punishable by a maximum penalty of imprisonment for seven years. Accordingly, the Committee considers this offence should not be included within the scope of section 35A.*[2]

The majority report provides no explanation as to why this Committee's 2015 Report, which was unanimously re-endorsed by this Committee as recently as 8 months ago, should no longer be supported.

The government's process

In addition to the many other issues raised in this dissenting report, Labor members have a broader concern about the process – or lack of process – leading to the introduction the Citizenship Bill on 28 November 2018.

When Labor and the government passed the Allegiance Bill in 2015, the government established a clear and deliberative process for reviewing and, if necessary, amending the citizenship revocation provisions introduced by that bill (including section 35A). That process was established in response to two of this Committee's other recommendations from its 2015 Report (**Attachment D**).

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[1] PJCIS, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015.

[2] PJCIS, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, June 2018, p. 334.

- First, the then-Minister for Immigration and Border Protection, Mr Dutton, promised in the Explanatory Memorandum for the Allegiance Bill that the Prime Minister would refer the citizenship revocation provisions (including section 35A) to the Independent National Security Legislation Monitor (the ***Monitor***) who would report by 1 December 2018 (**Attachment E**).
- Second, this Committee would – with the benefit of the Monitor's report – review the same provisions and report by 1 December 2019.

That process, which was recommended in 2015 by a Liberal-majority Committee chaired by Mr Dan Tehan MP and endorsed by the current Minister for Home Affairs as the responsible Minister, has not been observed. The promised referral to the Monitor was never made and the review by this Committee has not yet taken place. To date, the government has offered no explanation. The government's failure to honour and act upon commitments made to this bipartisan and statutory committee shows a disregard for the Parliament and convention.

Instead of observing its own commitment, on 22 November 2018 the Minister for Home Affairs and the Prime Minister announced that "the government will seek to change the Australian Citizenship Act so dual citizens convicted of a terrorism offence in Australia could lose Australian citizenship irrespective of the sentence they receive". The Citizenship Bill was introduced into the Parliament a mere six days later on 28 November 2018. During a public hearing of the Committee on 30 January 2019, the Committee learned the following.

- Despite assertions by the Department of Home Affairs that "discussions about possible reforms to strengthen these provisions" had been going on for some time, officials from the Department admitted that the Citizenship Bill was drafted the day after the Minister for Home Affairs' announcement on 22 November 2018.
- Before the Minister and Prime Minister made their announcement on 22 November 2018, ASIO had never specifically asked for any of the changes proposed in the Citizenship Bill.
- The Department of Home Affairs was asked directly whether the reason why the current section 35A of the *Australian Citizenship Act* has not been used by the Minister for Home Affairs since it was introduced in 2015 was because of the "adequacy" of that provision. In response, the Department answered "[n]o, it hasn't been a factor".

The relevant excerpts from the public hearing are reproduced in **Attachment F**.

At no time has the government offered any adequate justification either for the Citizenship Bill itself or the haste with which it has been dealt with.

The rule of law is a fundamental principle of all western democracies, including Australia. The rule of law requires that all citizens, including ministers, are subject to the same laws and that those laws are consistently and impartially applied. The conferral of an extremely broad and subjective decision-making power on the Minister of Home Affairs to deprive a person of Australian citizenship, based not on proved objective facts but on the Minister's state of mind without merits review, opens the door to arbitrary decision-making in this critical context.

Labor members of the Committee will not join our Liberal colleagues in recommending the passage of this legislation in its current form. If enacted, it is likely to undermine our nation's existing security

laws by giving convicted terrorists an easy win in the High Court, to result in further embarrassment to Australia and to damage our regional security relationships.

Moreover, given the relationship of this legislation to the international effort against transnational terrorism and the consequent risk to Australians abroad, which has been tragically demonstrated on a number of occasions, we believe that firmer review arrangements must be incorporated in the legislation. Such a review mechanism should include a specified time frame.

Lowering the sentencing threshold

Labor members have listened closely to the evidence of the Department of Home Affairs and we believe there may a case for lowering the current sentencing threshold in section 35A from 6 years to 3 years. Subject to receiving appropriate assurances on the question of constitutionality, if the Citizenship Bill had been confined to amending the sentencing threshold in that manner, we believe that we may have been able to support it.

Recommendation 1

Labor members of the Committee recommend that the Citizenship Bill in its current form not be passed.

Recommendation 2

Labor members of the Committee recommend that the Prime Minister immediately refer the citizenship revocation provisions introduced by the 2015 Allegiance Bill to the Independent National Security Legislation Monitor for review.

Hon Anthony Byrne MP

Deputy Chair

Senator Jenny McAllister

Hon Mark Dreyfus QC, MP

Senator the Hon Penny Wong

Hon Dr Mike Kelly AM, MP

Attachment A

Constitutional issues raised by the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth)

A. Introduction and Summary of Conclusions

1. I have been briefed to provide a short, urgent advice on the constitutional validity of the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (Cth) (the **Bill**). I am instructed that:

   1.1 the Bill was introduced into Parliament on 28 November 2018;

   1.2 the Bill was referred to the Parliamentary Joint Committee on Intelligence and Security on 30 November 2018; and

   1.3 the Bill is currently the subject of an inquiry by the Committee (the **Inquiry**).

2. If passed, the Bill will amend s 35A of the *Australian Citizenship Act 2007* (Cth) (the **Act**). Section 35A of the Act empowers the Minister to make a determination that a person has ceased to be an Australian citizen in certain circumstances, and was introduced into the Act by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (the **2015 Amending Act**).

3. Three principal constitutional objections have been raised in the submissions to, and evidence before, the Inquiry.[1] For the reasons that follow, I consider that, in summary:

   3.1 there is a reasonable argument available that the amendments proposed in the Bill are not supported by a head of legislative power, because they do not fall within the Commonwealth Parliament's power to make laws with respect to "naturalization and aliens" conferred by the *Constitution*, s 51(xix);

   3.2 there is also a reasonable argument (although possibly not as strong as the first argument) that the Bill purports to authorise a Minister to exercise the judicial power of the Commonwealth, in breach of Chapter III of the *Constitution*; and

   3.3 there is a weaker argument available that the Bill is constitutionally infirm because it removes "the capacity of a person to vote in federal elections" in a way that is inconsistent with the principles set out in *Roach v Electoral Commissioner*.[2]

   I address each of those points in further detail below.

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1 See, for example, Hansard, Parliamentary Joint Committee on Intelligence and Security, 30 January 2019, pp 3, 8-9; Law Council of Australia, Submission to the Inquiry, 16 January 2019, paragraphs 64-72; Dr Thwaites, Submission to the Inquiry, 11 January 2019, paragraphs 35-42; Dr Pillai and Professor Williams AO, Submission to the Inquiry, 20 December 2018, paragraph 4; and Professor Irving, Submission to the Inquiry, 10 January 2018, 1.2-2.3.

2 (2007) 233 CLR 162.

4. Before turning to the substance of the advice, I note that due to the urgency of the advice, the three points discussed below are necessarily presented in an abbreviated form. However, each of the points involves significant subtlety and nuance, and careful consideration would need to be given to the framing of each point if the constitutionality of the proposed amendments were to be litigated.

B. Advice

(1) SECTION 51(XIX) OF THE *CONSTITUTION*

5. As explained above, the submissions to, and evidence before, the Inquiry raise for consideration whether the amendments proposed by the Bill are supported by a head of legislative power.[3] While parts of the Act may be supported by different heads of legislative power,[4] the "naturalization and aliens" power is most likely to be invoked as the power supporting passage of the Bill, in line with the Explanatory Memorandum to the 2015 Amending Act.[5] However, there is some uncertainty as to whether this head of power would support the proposed amendments.

6. It is clear that "the power conferred by s 51(xix) is a wide power".[6] However, it is equally clear that "Parliament cannot, simply by giving its own definition of 'alien', expand the power under s. 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word".[7] That is to say, Parliament has a broad scope to legislate with respect to "aliens", but is not fully at liberty to "decide the meaning of that description".[8]

7. If the scope of the "aliens" power was litigated in this context, the central issue would therefore likely be whether the persons, to whom the proposed s 35A would apply, are

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3 See, for example, Hansard, Parliamentary Joint Committee on Intelligence and Security, 30 January 2019, pp 3, 9; Law Council of Australia, Submission to the Inquiry, 16 January 2019, paragraphs 64-72; Dr Thwaites, Submission to the Inquiry, 11 January 2019, paragraphs 35-42; Dr Pillai and Professor Williams AO, Submission to the Inquiry, 20 December 2018, paragraph 4; and Professor Irving, Submission to the Inquiry, 10 January 2018, paragraphs 2.1-2.3.

4 For example, the "immigration and emigration" power: s 51(xxvii); the "defence" power: s 51(vi); and the "external affairs" power: s 51(xxix): Rubinstein, *Australian Citizenship Law* (2nd ed, 2017) paragraph 4.10.

5 See Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, paragraph 10.

6 *Koroitamana v The Commonwealth* (2006) 227 CLR 31, 38 [11] (Gleeson CJ and Heydon J).

7 *Pochi v Macphee* (1982) 151 CLR 101, 109 (Gibbs CJ). See also *Singh v The Commonwealth* (2004) 222 CLR 322, 329 [4]-[5] (Gleeson CJ), 343 [36]-[37] (McHugh J), 382-383 [151] (Gummow, Hayne and Heydon JJ) and 429 [305] (Callinan J).

8 Rubinstein, *Australian Citizenship Law* (2nd ed, 2017) paragraph 4.70.

"aliens". The High Court has considered the meaning of "alien" on a number of occasions,[9] and has offered several different definitions or descriptions.

7.1 By way of example, in *Nolan*, a majority of the Court accepted that Parliament could "treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian".[10]

7.2 In *Singh v The Commonwealth*, the High Court interpreted the term "alien" in a way that gave significant weight to its meaning at the time of Federation, with the plurality finding that "the central characteristic of [the status of 'alien'] is, and always has been, owing obligations (allegiance) to a sovereign power other than the sovereign power in question …".[11]

8. There is some uncertainty as to whether the class of persons, to whom the proposed s 35A would apply, would meet either of those descriptions. Given that the provision operates on people who are (at least at present) Australian citizens, it is unlikely that the class of persons would wholly or predominantly be "aliens" in the sense described in *Nolan*.

8.1 It might be asserted, in defence of the proposed s 35A, that the class of persons to whom the proposed s 35A will apply, would be "aliens" in the sense described in *Singh*, on the basis that those persons owe obligations to their foreign country of citizenship.

8.2 On the other hand, the dilution of the criterion in the proposed s 35A(1)(b) (from an objective test of foreign nationality or citizenship to a subjective, evaluative judgment by the Minister) would likely make that defence of the proposed s 35A more difficult, and increase the prospect of the legislation being found to be invalid.

8.3 However, my views are necessarily tentative, in circumstances where the Court has not yet considered whether it would be possible to designate as an "alien" a person who was born in Australia, to parents who were Australian citizens.[12]

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9 See, for example, *Pochi v Macphee* (1982) 151 CLR 101; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Re Patterson, Ex parte Taylor* (2001) 207 CLR 391; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 and *Singh v The Commonwealth* (2004) 222 CLR 322.

10 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 185-186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ) (emphasis removed), endorsing the judgment of Gibbs CJ in *Pochi v Macphee* (1982) 151 CLR 101, 109-110.

11 See, for example, *Singh v The Commonwealth* (2004) 222 CLR 322, 398 [200] (Gummow, Hayne and Heydon JJ); see also at 383 [154], 385 [159], 399 [201] (Gummow, Hayne and Heydon JJ), cf. 343 [38], 351 [58] (McHugh J) and 437 [322] (Callinan J). See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) §193.

12 See, for example, Hanks, Gordon and Hill, *Constitutional Law in Australia* (4th ed, 2018), [10.324].

(2) CHAPTER III OF THE *CONSTITUTION*

9. The evidence before the Inquiry also raises for consideration whether the Bill may impermissibly authorise the Minister to exercise the judicial power of the Commonwealth, by determining that a person has ceased to be an Australian citizen in the circumstances set out in proposed s 35A(1).[13]

10. In accordance with the doctrine set out in *R v Kirby; Ex parte Boilermakers' Society of Australia*,[14] the judicial power of the Commonwealth may only be exercised by the courts described in s 71 of the *Constitution*. Any exercise of that power by a member of the Executive, such as the Minister, would be contrary to Chapter III of the *Constitution*.

11. The power conferred on the Minister under the proposed s 35A(1) does not appear to fall within Griffith CJ's frequently cited description of judicial power in *Huddart, Parker & Co Pty Ltd v Moorehead*, being:[15]

> … the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

12. However, that formulation is not definitive; and the proposed s 35A(1) power could nonetheless be characterised as a form of judicial power if the removal of citizenship is understood to be a form of punishment following the establishment of criminal guilt. As explained by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*:[16]

> There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to and "could not be excluded from" the judicial power of the Commonwealth. That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the sub-sections of s. 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive.

13. It is not a remote prospect that the High Court would find that the removal of citizenship by the proposed s 35A is a punitive step – it might properly be described as a form of civil

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13 See, for example, Hansard, Parliamentary Joint Committee on Intelligence and Security, 30 January 2019, pp 8-9.

14 (1956) 94 CLR 254.

15 (1909) 8 CLR 330, 357. See also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J).

16 (1992) 176 CLR 1, 27 (references omitted).

death. If the High Court adopted that characterisation, then removal of citizenship by ministerial decision could well be found to amount to an unconstitutional violation of the separation of judicial power demanded by Chapter III of the *Constitution*.

14. A counter argument (in defence of the proposed s 35A) might rely on the High Court's decision in *Falzon v Minister for Immigration and Border Protection*.[17]

    14.1 In that case, the Court found that the Minister's exercise of a power to cancel a visa by reference to a person's prior criminal offending did not involve the imposition of punishment for an offence, and did not involve the exercise of judicial power.[18]

    14.2 However, *Falzon* can be distinguished on the basis that the case related to the cancellation of a visa held by a non-citizen, rather than the removal of citizenship from a citizen.

    14.3 On balance, I believe that there is a substantial risk that the proposed s 35A would be found to offend Chapter III of the *Constitution*.

(3) THE PRINCIPLE IN *ROACH*

15. Finally, the submissions to, and evidence before, the Inquiry raise for consideration whether the Bill may be unconstitutional because it would "remove the capacity of a person to vote in federal elections" in a way that is inconsistent with the High Court's decision in *Roach v Electoral Commissioner*.[19] A similar point was raised in the Advisory Report published by the Parliamentary Joint Committee on Intelligence and Security before the passage of the 2015 Amending Act.[20] In *Roach*, a majority of the High Court held that it was not constitutionally permissible for Parliament to suspend the voting rights of prisoners serving a jail term of less than three years.[21]

16. Applying the principle in *Roach* to the present situation would require some extension of the principle. The principle was premised on there being certain rights and obligations which flow from "citizenship and membership of the Australian federal body politic", which may only be restricted in certain circumstances.[22] While *Roach* therefore provides guidance as to

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17 [2018] 92 ALJR 201.

18 *Falzon v Minister for Immigration and Border Protection* [2018] 92 ALJR 201, 210-211 [45], [47]-[48] (Kiefel CJ, Bell, Keane and Edelman JJ), 216 [88]-[89] (Gageler and Gordon JJ) and 217 [93]-[94] (Nettle J).

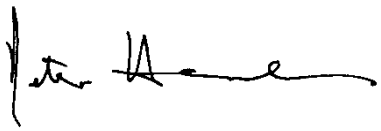
19 (2007) 233 CLR 162; see also Dr Pillai and Professor Williams AO, Submission to the Inquiry, 20 December 2018, [4] and Professor Irving, Submission to the Inquiry, 10 January 2018, 1-2 [1.2].

20 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 31-32 [3.29]-[3.33].

21 (2007) 233 CLR 162, 182 [23]-[25] (Gleeson CJ) and 204 [101]-[102] (Gummow, Kirby and Crennan JJ).

22 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 198-199 [83] (Gummow, Kirby and Crennan JJ).

the circumstances in which particular rights and incidents of citizenship may be restricted, it does not speak directly to the circumstances in which citizenship itself could be removed.[23] For that reason, unless the principle in *Roach* was extended in some way, it would be unlikely to provide a basis on which the Bill may be found unconstitutional.



PETER HANKS QC

9 February 2019

23 Cf. Professor Irving, Submission to the Inquiry, 10 January 2018, paragraph 1.2.

Attachment B

Shadow Attorney-General
Shadow Minister for National Security
Federal Member for Isaacs

The Hon Christian Porter
Attorney-General
Parliament House
Canberra ACT 2600

1 February 2019

Dear Attorney-General

I refer to the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (the ***Citizenship Loss Bill 2018***) which was introduced into the parliament on 28 November 2018 and referred to the Parliamentary Joint Committee on Intelligence and Security (the ***Committee***) on 30 November 2018. The Citizenship Loss Bill 2018 is currently the subject of an inquiry by the Committee (the ***Inquiry***).

As a matter of urgency, I request that you:

- provide the Committee with a copy of the legal advice prepared by the Office of General Counsel within the Australian Government Solicitor regarding the constitutionality of the Citizenship Loss Bill 2018;
- provide the Committee with a copy of the legal advice prepared by the Office of International Law within the Attorney-General's Department regarding the Citizenship Loss Bill 2018's compliance with international law;
- instruct the Solicitor-General of Australia to provide written advice to the government on the constitutionality of the Citizenship Loss Bill 2018; and
- provide a copy of the Solicitor-General's advice to the Committee.

Constitutional and international law concerns with the Citizenship Loss Bill 2018
Many of the submitters to the Inquiry – including numerous of Australia's most eminent constitutional lawyers and scholars – have expressed doubts about the constitutionality of the Citizenship Loss Bill 2018. Professors George Williams and Kim Rubenstein, for example, told the Committee on 30 January 2019 that, in their view, it is more likely than not that the provisions of the Citizenship Loss Bill 2018 would be struck down by the High Court. Moreover, Professor Williams has said that the Citizenship Loss Bill 2018 could result in the whole citizenship deprivation scheme in the *Australian Citizenship Act 2007* (Cth) being ruled unconstitutional by the High Court.

Given these concerns, my colleagues on the Committee and I were surprised to learn that the government has not sought the advice of the Solicitor-General regarding the constitutionality of the Citizenship Loss Bill 2018. Instead, the Department of Home Affairs sought legal advice from the Office of General Counsel in the Australian Government Solicitor. At the public hearing on 30 January 2019, the Department declined my request to provide to the Committee with a copy of that advice and also declined to reveal anything about the content of the advice.

As such, neither the Committee nor the Australian public have been provided with any assurances about constitutionality of the bill – or even that the government itself is confident that the Citizenship Loss Bill 2018 is constitutional.

Separately, numerous submitters – including the Australian Human Rights Commission – have told the Inquiry that, in their view, the Citizenship Loss Bill 2018 does not comply with international law. The Department of Home Affairs has told the Inquiry that advice was sought from the Office of International Law within the Attorney-General's Department on that subject but representatives of the Department declined to provide a copy of that advice to the Committee or to reveal what the advice says.

Assurances provided by the former Attorney-General in respect of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

You may recall that there were also concerns expressed about the constitutionality of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the ***Allegiance to Australia Bill***), the precursor to the Citizenship Loss Bill 2018. Those concerns were detailed in the Committee's bipartisan *Advisory report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*.

In light of those concerns, some members of the Committee asked to see the then-Solicitor-General's advice to the government about the constitutionality of the Allegiance to Australia Bill – a request that was denied.

Ultimately, the bipartisan Committee was prepared to rely in good faith on a written assurance dated 27 August 2015 from the then-Attorney-General, Senator George Brandis, as to the prospect of the Allegiance to Australia Bill withstanding constitutional challenge. Specifically, the Attorney-General stated that:

> *the Government has received advice from the Solicitor-General, Mr Justin Gleeson SC, that, in his opinion, there is a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the draft Bill.*

That letter was included as an attachment to the *Advisory report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*. For your reference, I enclose a copy of that letter.

Regrettably, it subsequently came to light that Senator Brandis had misled the Committee about the advice that the government had received from the then-Solicitor-General, Justin Gleeson SC.

In October 2016 the Senate Standing Committee on Legal and Constitutional Affairs received a copy of a letter dated 12 November 2015 from Justin Gleeson SC to Senator Brandis. In that letter, Mr Gleeson wrote that he had provided "an urgent advice under acute time constraints" on a version of the Allegiance to Australia Bill on 23 June 2015. Mr Gleeson's letter goes on to say:

> *The Bill which was introduced into Parliament some 24 hours later reflected new changes that were made without seeking my further advice. However, a written statement was later made by you to Mr Dreyfus QC, and ultimately published as an appendix to the Advisory Report of the [Committee], that I had advised that 'there is a good prospect that a majority*

of the High Court would reject a constitutional challenge to the core aspects of the draft Bill'.

In other words, Mr Gleeson did not provide the government with advice on the version of the Allegiance to Australia Bill that was introduced into the parliament and considered by the Committee. Nor, Mr Gleeson goes on to say in his letter, did the Solicitor-General provide advice on the version of the Allegiance to Australia Bill that was ultimately passed by the parliament – despite public assurances from the government suggesting that he had.

I enclose a copy of Mr Gleeson's letter to Senator Brandis.

The Committee and the people of Australia need assurances that the Citizenship Loss Bill 2018 is constitutional and complies with international law

To assist the Committee in its review of the Citizenship Loss Bill 2018, my Labor colleagues and I ask that you provide the Committee with written assurances that the bill, if passed:

- would be likely to withstand a constitutional challenge; and
- is likely to comply with international law.

Regrettably, given that this government misled the Committee about the legal advice it received in respect of the Allegiance to Australia Bill, a letter from you or the Minister for Home Affairs that merely refers to legal advice received by the government is unlikely to provide that assurance.

Accordingly, as a matter of urgency, I request that you provide the Committee with the written advice of the Office of General Counsel, the Office of International Law and the Solicitor-General as detailed at the commencement of this letter.

It is especially important that the Solicitor-General, as the second law officer of the Commonwealth of Australia, be instructed to provide the government with written advice. As the former Solicitor-General told the Senate Legal and Constitutional Affairs Committee in November 2016:

> *[s]uch is the respect for the independent advice of the Solicitor-General that the Government or the Governor-General may release the advice of the Solicitor-General or refer to having received that advice as a way of addressing the concerns the Parliament, the legal profession or the public may have about a controversial legal issue.*
> …
> *[T]he advice of a Solicitor-General is treated as a form of binding precedent by other Commonwealth lawyers and subsequent Solicitors-General. This reflects not only respect for the authoritative and independent voice of a Solicitor-General but the importance to the rule of law of the Commonwealth acting consistently and with certainty in respect of its legal position.*[1]

My Labor colleagues on the Committee and I support stripping Australian citizenship from citizens with dual nationalities who have demonstrated that they no longer owe allegiance to Australia. That is why we supported the Allegiance to Australia Bill and why we are committed to working constructively with government members of the Committee on the Citizenship Loss Bill 2018.

[1] Letter from the Solicitor-General of the Commonwealth of Australia to the Committee Secretary, Senate Legal and Constitutional Affairs Committee (3 October 2016) paras 21-22.

It is also why it is so important that any proposed changes to the citizenship deprivation scheme in the *Australian Citizenship Act 2007*(Cth) be on a strong constitutional footing. As I am sure you would agree, it would be a particularly perverse outcome if the passage of the Citizenship Loss Bill 2018 significantly increased the likelihood of the whole citizenship deprivation scheme in the *Australian Citizenship Act 2007* being struck down by the High Court – a view that has been expressed by Professor George Williams.

Australians are not made safer by laws that are struck down by the High Court as unconstitutional.

I request a response from you in writing by 4 February 2019.

Yours sincerely

Mark Dreyfus QC MP

ATTORNEY-GENERAL

CANBERRA

27 August 2015

The Hon Mark Dreyfus QC MP
Member for Isaacs
Parliament House
CANBERRA ACT 2600

Dear Mr Dreyfus

I understand that the Opposition has requested that the Government provide the Parliamentary Joint Committee on Intelligence and Security (the Committee) with the Solicitor-General's Opinion on the Australian Citizenship and other Legislation Amendment (Allegiance to Australia) Bill 2015 (the Bill) on the basis that the Opposition perceives the existence of an unacceptable level of constitutional risk.

As you know, it has been the practice of successive governments not to publish or provide legal advice that has been obtained for the purposes of drafting legislation. I do not propose to depart from that precedent on this occasion.

Nevertheless, given the concerns raised by the Opposition and the desire of the Government to assist the Committee in its deliberations on the Bill, I can assure you that the Government has received advice from the Solicitor-General, Mr Justin Gleeson SC, that, in his opinion, there is a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the draft Bill.

Due to the number of Australians fighting for ISIL overseas and the growing threat from home grown terrorism, it is critical that this legislation be dealt with by the Parliament without further delay. The Government looks forward to the Opposition's continued commitment to this important national security measure.

Yours faithfully

(George Brandis)

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

ATTACHMENT A

Solicitor-General of the Commonwealth of Australia

Senator the Hon George Brandis QC
Attorney-General of the Commonwealth
Parliament House
CANBERRA ACT 2600

Dear Attorney

Process for seeking and acting on Solicitor-General advice in significant matters

I write to request a meeting with you. I seek to discuss my concerns that insufficient procedures are in place to ensure, first, appropriate coordination within Commonwealth agencies, and between agencies and my office, in matters of high legal importance, and secondly, the accurate public representation of Solicitor-General advice. I consider that my capacity as Second Law Officer to provide you and the broader Commonwealth with the best legal advice and advocacy on matters of significance to the Government is being hampered by these issues.

In order that we may discuss these matters constructively, I consider it best that you have the details of my concerns in writing.

As you know, the Office of Legal Services Coordination within your Department has issued a guidance note (Guidance Note 11) setting out the manner in which the Solicitor-General is to be briefed in order to perform the functions conferred on that office by s 12 of the *Law Officers Act 1964* (Cth). Guidance Note 11 provides a framework directed to ensuring that: (a) the Solicitor-General is requested to advise at an early stage on matters of high legal importance, particularly where it is contemplated that the Solicitor-General will appear in

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Queens Square
SYDNEY NSW 2000
Tel: (02) 9230 8902
Fax: (02) 9230 8920

Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
Tel: (02) 6141 4139
Fax: (02) 6141 4099

proceedings concerning those matters; and (b) there is appropriate coordination of advice across government on such matters.

I do not consider that these processes are being followed in a manner that best facilitates my performance of my statutory functions. I identify below three recent examples that indicate the urgency of improved coordination.

Citizenship: In August 2014, I provided an opinion (SG No 23 of 2014) on the first version of a proposal to suspend or revoke a person's Australian citizenship. In March 2015, as I learned much later, the proposal was significantly revised within the Department of Immigration and Border Protection. For the next three months, the proponents of the Bill obtained various advices from the Australian Government Solicitor (AGS) on the revised proposals. Almost by accident, the matter came to my attention again in June 2015. At that point, on request, I advised (SG No 10 of 2015) [redacted]. The proposal was then further revised, and on 23 June 2015, I provided an urgent advice under acute time constraints on the next version (SG No 14 of 2015).

The Bill which was introduced into Parliament some 24 hours later reflected new changes that were made without seeking my further advice. However, a written statement was later made by you to Mr Dreyfus QC, and ultimately published as an appendix to the Advisory Report of the Parliamentary Joint Committee on Intelligence and Security (Joint Committee), that I had advised that "there is a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the draft Bill". That statement has been repeatedly picked up in the media, including in this morning's *Sydney Morning Herald*.

In September 2015, the Joint Committee published its Advisory Report recommending 26 changes to the Bill. On 11 November 2015, I learned from media reports that the further revised Bill would be amended again, including to implement the Joint Committee's recommendations, and debated in Parliament this week. I have informally learned that urgent advice on the Bill's constitutionality has been sought from AGS. No-one involved in this latest revision process has engaged with my office to seek my further advice.

ATTACHMENT A

In this morning's *Sydney Morning Herald*, the Prime Minister is reported to have made the following statements about the current version of the Bill before Parliament:

> The Government's advice is that the [citizenship] laws, if challenged in the High Court, would be upheld. But of course, advice isn't always born out. ...
>
> [The Bill has] gone through a proper process now, and we are confident that it would survive a High Court challenge, but only time will tell.

Those statements, in context, are capable of being understood as statements about the Solicitor-General having advised on the current Bill, and about the content of that advice. If so understood, they are inaccurate.

Marriage equality: I understand that one proposal under active consideration by the Government [redacted] To date, however, I have not been asked to advise on the proposal. Instead, AGS has provided draft advice in the matter. I have raised this concern with your Office and also with your Department. I am told there may be a request for my advice at some unspecified point in the future.

Correspondence between Sir John Kerr and the Queen in 1975: On 9 November 2015, the *Australian* newspaper reported that you and the Prime Minister had decided that this correspondence has been falsely labelled as "private", and that the Governor-General will be advised by his responsible Ministers to request the Palace to release the correspondence. Assuming this reporting to be accurate, you may not have known in advance that, in 2013, I had been asked by the then Governor-General, with the approval of the then Attorney-General under s 12(b) of the *Law Officers Act*, to advise on this very issue. A purpose of Guidance Note 11 is to avoid the risk that one part of government might proceed in ignorance of the Solicitor-General's advice on a matter of high legal importance. Conscious of the

gravity of these risks in the context of such a sensitive issue, I asked my Counsel Assisting immediately to advise your Chief of Staff of the existence of my opinion (JG No 5 of 2013) and to state that, if you so requested, I would ask the Governor-General to consent to releasing it to you. My office has not received a response.

In my view, the processes for coordination of my advice function with my responsibilities to appear, and for coordination of advice across government, are not working adequately. In addition, where public statements are made about the content of advice to the Government on matters of the highest importance, it is critical that they do not convey that advice has come from the Solicitor-General if that is not the fact.

I would be grateful if we could meet to discuss these matters at your earliest convenience.

I have copied the Secretary into this letter, as the concerns I have raised also bear upon the manner in which your Department interacts with the Solicitor-General.

Yours sincerely,

Justin Gleeson SC
Solicitor-General of the
Commonwealth of Australia

12 November 2015

cc: Chris Moraitis PSM, Secretary

Attachment C

JOURNALIST: No, on the Integrity Commission, if I may. Couple of questions, will [inaudible] where this will capture, just to be clear, does it capture elected officials and will it act retrospectively, so a perciveid corrupt action was happening today, might be captured by a Commission that is not legislated until the future?

ATTORNEY GENERAL: It will not operate retrospectively. If we might offer a view from the Government - retrospective criminal law is probably the most serious and unwarranted thing that any government anywhere, in any democracy can do. So we're not doing that here.

But in answer to the first part of your question, it would cover elected officials, so parliamentarians, ministers. The way in which the body would operate is that you'll see with the multiagency framework that there are already a whole range of institutions that deal with different parts of the public service. So for instance, an organisation that this Government created, the Independent Parliamentary Expenses Authority looks into expenses and issues in respect to parliamentarians. If that body for instance, in the course of one of its' inquiries, found something that it considered might constitute criminal corruption, they would refer that matter to this new body, who would take over the investigation of that matter. So this is a system of referral inside the multiagency framework that presently exists.

JOURNALIST: What protection will whistleblowers and journalists receive under the Integrity Commission?

ATTORNEY GENERAL: Well, there's been some steps forward recently on the whistleblower issues in federal politics. Obviously in the drafting process here and we'll consult heavily, that is an issue as with Parliamentary and legal privilege, that final detailed drafting needs to be landed on.

But we want to do three things with each of those issues; not abrogate legal or parliamentary privilege and ensure that there's sufficient protection for whistleblowers. But that's part of the detailed drafting process.

JOURNALIST: Can I ask on an unrelated issue?

PRIME MINISTER: On the commission?

JOURNALIST: No.

PRIME MINISTER: Let's stay with commission, I'm happy to come back to it.

JOURNALIST: You mentioned a "kangaroo court" can you expressly state whether you think the NSW ICAC is a kangaroo court?

PRIME MINISTER: All I can say both as a resident of New South Wales and having watched this over a long period of time, there's a litany, a litany of cases there, which didn't come close to best practice. The way that it has been used here in New South Wales, as a tool to pursue any number of different issues, the rules that sit around access to information, puts information into the public - and frankly on occasions acting outside its own rules, it would seem - how it's released information, it has been the lesson in what not to do.

ATTORNEY GENERAL: I might just add to that, this body is one of referral from existing multiagency approaches. It is not a body that will conduct public hearings and it will not write reports where it makes findings of corruption on a piece of paper against an individual. It is an investigative body with serious investigative tools, that is well-resourced, specialised and the peak body for building briefs against people who have acted corruptly and moving those briefs to the DPP. The reason for that, if I might just give you

Attachment D

List of recommendations

5 Conduct-based provisions – proposed sections 33AA and 35

Recommendation 1

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to limit the operation of proposed section 33AA to individuals who have:

- engaged in relevant conduct offshore; or
- engaged in relevant conduct onshore and left Australia before being charged and brought to trial in respect of that conduct.

Recommendation 2

The Committee recommends that changes be made to clarify that the conduct leading to loss of citizenship listed in proposed section 33AA of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 is intended to be considered in light of the meaning of the equivalent provisions in the *Criminal Code Act 1995*, and is not intended to be restricted to the physical elements.

The Committee recommends that, if possible, these amendments be made in the Bill, with additional amendments to the Explanatory Memorandum where necessary.

Recommendation 3

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to include explicit criteria that the Minister must be satisfied of before declaring a terrorist organisation for the purpose of proposed section 35. The criteria should make clear the connection between proposed section 35 and the purpose of the Bill.

Recommendation 4

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to make the Minister's declaration of a 'declared terrorist organisation' for the purpose of proposed section 35 a disallowable instrument.

Further, the Committee recommends that the Bill be amended to enable the Parliamentary Joint Committee of Intelligence and Security to conduct a review of each declaration and report to the Parliament within the 15 sitting day disallowance period.

Recommendation 5

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and the Explanatory Memorandum be amended to clarify the intended scope of the term 'in the service of' a declared terrorist organisation.

In particular, the Bill should be amended to make explicit that the provision of neutral and independent humanitarian assistance, and acts done unintentionally or under duress, are not considered to be 'in the service of' a declared terrorist organisation for the purposes of proposed section 35.

Recommendation 6

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 and the Explanatory Memorandum be amended to provide that staff members or agents of Australian law enforcement or intelligence agencies are exempted from sections 33AA and 35 of the Bill when carrying out actions as part of the proper and legitimate performance of their duties.

6 Conviction-based provisions – proposed section 35A

Recommendation 7

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to give the Minister discretion to revoke a person's citizenship following conviction for a relevant offence with a sentence applied of at least six years imprisonment, or multiple sentences totalling at least six years' imprisonment.

In exercising this discretion, the Minister should be satisfied that:

- the person's conviction demonstrates that they have repudiated their allegiance to Australia, and
- it is not in the public interest for the person to remain an Australian citizen, taking into account the following factors:
  - ⇒ the seriousness of the conduct that was the basis of the conviction and the severity of the sentence/s,
  - ⇒ the degree of threat to the Australian community,
  - ⇒ the age of the person and, for a person under 18, the best interests of the child as a primary consideration,
  - ⇒ whether the affected person would be able to access citizenship rights in their other country of citizenship or nationality, and the extent of their connection to that country,
  - ⇒ Australia international obligations and relations, and
  - ⇒ any other factors in the public interest.

The rules of natural justice should apply to the Minister's discretion under section 35A.

Recommendation 8

The Committee recommends that the list of relevant offences in proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to remove reference to section 29 of the *Crimes Act 1914*.

Recommendation 9

The Committee recommends that the list of relevant offences in proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to exclude offences that carry a maximum penalty of less than 10 years' imprisonment and certain *Crimes Act* offences that have never been used.

The Committee notes that the following offences would be removed:

- Section 80.2, *Criminal Code Act 1995*, Urging violence against the Constitution, the Government, a lawful authority of the Government, an election, or a referendum,
- Section 80.2A(1) *Criminal Code Act 1995*, Urging violence against groups,

- Section 80.2B(1) *Criminal Code Act 1995,* Urging violence against members of groups,
- Section 80.2C, *Criminal Code Act 1995*, Advocating terrorism,
- Section 25 *Crimes Act 1914*, Inciting mutiny against the Queen's Forces,
- Section 26 *Crimes Act 1914*, Assisting prisoners of war to escape, and
- Section 27(1) *Crimes Act 1914,* Unlawful drilling.

Recommendation 10

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be applied retrospectively to convictions for relevant offences where sentences of ten years or more have been handed down by a court.

The Ministerial discretion to revoke citizenship must not apply to convictions that have been handed down more than ten years before the Bill receives Royal Assent.

7 Administrative application of the Bill

Recommendation 11

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended such that section 39 of the *Australian Security Intelligence Organisation Act 1979* is not exempted, and consequently a security assessment would be required before the Minister can take prescribed administrative action.

Recommendation 12

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to provide that, if citizenship is lost (under proposed sections 33AA or 35) or revoked (under proposed section 35A), then the Minister must provide, or make reasonable attempts to provide, the affected person with written notice that citizenship has been lost or revoked.

Such notice should be given as soon as possible, except in cases where notification would compromise ongoing operations or otherwise compromise national security.

If the Minister has determined not to notify the affected person, this decision should be reviewed within six months and every six months thereafter.

Recommendation 13

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to provide that, where the Minister issues a notice to the affected person advising that their citizenship has been lost or revoked, the notice must include:

- the reasons for the loss of citizenship, and
- an explanation of the person's review rights.

Recommendation 14

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to include the rights of review available to a person who has lost their citizenship pursuant to proposed sections 33AA, 35 or 35A.

Recommendation 15

The Committee recommends that proposed sections 33AA(7) and 35(6) of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to require the Minister,

- to give consideration to exercising the discretion to exempt a person from the effects of the relevant provisions upon signing the relevant notice, and
- when considering whether to exercise the discretion to exempt, to take into account the following factors:
  - ⇒ the severity of the conduct that was the basis for the notice to be issued,
  - ⇒ the degree of the threat posed by the person to the Australian community,
  - ⇒ the age of the person, and for persons under 18 years of age, the best interests of the child as a primary consideration,
  - ⇒ whether a prosecution is underway, or whether the person is likely to face prosecution for the relevant conduct,
  - ⇒ whether the affected person would be able to access the citizenship rights in their other country of citizenship or nationality, and the extent of their connection to that country,

⇒ Australia's international obligations and relations, and

⇒ any other factors in the public interest.

Recommendation 16

The Committee recommends that proposed sections 33AA and 35 of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to clarify that citizenship is taken never to have been lost if the facts said to ground a finding of fact concerning loss of citizenship are subsequently found to have been incorrect.

Recommendation 17

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to give the Minister power to annul a revocation decision if the relevant conviction is later overturned on appeal or quashed, such that the person's citizenship is taken never to have been lost.

Recommendation 18

The Committee recommends that the Explanatory Memorandum to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to clarify that:

- the giving of notice under proposed sections 33AA and 35 is intended to constitute official recognition that a person's citizenship has ceased by operation of one of the provisions, and
- any consequential action by Government agencies will only take place after the notice has been issued pursuant to the Bill's provisions.

Recommendation 19

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to clarify that if the Minister exempts a person from the effect of proposed sections 33AA or 35, the person is taken never to have lost their citizenship.

8 Children

Recommendation 20

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to limit the extent of its application to children. The amendments should provide:

- that no part of the Bill applies to conduct by a child aged less than 10 years, and

- that proposed sections 33AA and 35 do not apply to conduct by a child aged under 14 years.

The amendments should make the Bill's application to children explicit on the face of the legislation.

The Committee notes that in relation to proposed section 35A, section 7.2 of the *Criminal Code Act 1995* or section 4N of the *Crimes Act 1914* will apply to a child aged 10 to 14 years.

Recommendation 21

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended so that section 36 of the *Australian Citizenship Act 2007* (which enables the Minister to revoke a child's citizenship following revocation of a parent's citizenship) does not apply to proposed sections 33AA, 35 and 35A.

9 Concluding comments

Recommendation 22

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to require the Government to publicly report, every six months, the number of times a notice for loss or revocation of citizenship has been issued under each of the grounds contained in Bill, and provide a brief statement of reasons.

Recommendation 23

The Committee recommends that *Intelligence Services Act 2001* (IS Act) be amended to extend the functions of the Parliamentary Joint Committee on Intelligence and Security to include monitoring and reviewing the performance by the Department of Immigration and Border Protection of its functions under the provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015. The extended functions should be consistent with the Committee's current remit under the IS Act.

The IS Act should also be amended to enable relevant agency heads to brief the Committee for the purpose of this new function.

Recommendation 24

The Committee recommends that the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be amended to require the Minister to advise the Parliamentary Joint Committee on Intelligence and Security upon issuing a notice for the loss of citizenship under the Bill. A

subsequent briefing should be offered to the Committee within 20 sitting days of the initial notice being issued. The advice given to the Committee should detail whether notice has been provided to the person, the conduct that engaged the Bill's provisions and whether an exemption has been given by the Minister.

Recommendation 25

The Committee recommends that the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor to finalise a review of the revocation of citizenship provisions in the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 by 1 December 2018.

Recommendation 26

The Committee recommends that the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to complete a review of the revocation of citizenship provisions in the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 by 1 December 2019.

Recommendation 27

The Committee recommends that, following implementation of the recommendations in this report, the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be passed.

Attachment E

Excerpt from Revised Explanatory Memorandum - Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Circulated by authority of the Minister for Immigration and Border Protection, the Hon. Peter Dutton MP)

Independent National Security Legislation Monitor Act 2010

2 Section 4 (before paragraph (a) of the definition of counter-terrorism and national security legislation)

249. The amendments to the *Independent National Security Legislation Monitor Act 2010* ('the INSLM Act') implements Recommendation 25 of the Committee report.

250. This amendment inserts new subsection 4(aa) into section 4 of the INSLM Act, with the effect that new sections 33AA, 35 and 35A of the *Australian Citizenship Act 2007* and any other provisions of that Act as far as it relates to those sections are added to the definition of *counter-terrorism and national security legislation* for the purposes of the INSLM Act.

251. Recommendation 25 of the Committee report provides that the INSLM Act be amended to require the Independent National Security Legislation Monitor (the Monitor) to finalise a review of the revocation of citizenship provisions in the Bill by 1 December 2018.

252. The INSLM's role is to review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis. This includes considering whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or threat to national security or both, and remain necessary.

253. Item 2 amends the INSLM Act to list the new provisions providing for the loss of citizenship due to undertaking specified terrorist-related conduct in the INSLM Act as matters that the Monitor can review. The Prime Minister will make a referral to the Monitor under section 7 of the INSLM Act for the Monitor to undertake a review of the relevant new citizenship provisions in the amended Bill to be completed by 1 December 2018.

Attachment F

CHAIR: I think the general public would understand that committing a terrorism offence constitutes repudiating allegiance to Australia, but, for the purposes of this hearing, could you go in more detail into the elements of repudiating allegiance to Australia. Could you just articulate it a bit more clearly.

Ms Williamson-de Vries: Mr Hastie, one thing I might just clarify: some of the witnesses this morning spoke about the fact—well, there was an imputation—that, by lowering this threshold, perhaps the minister didn't need to consider that a person had repudiated their allegiance; that it was just taken, given they've been convicted of the offence, that they had. That's not the case. This bill does not change the fact that it remains a separate, additional criterion that the minister must be satisfied that the person, by the conduct that they have been convicted of, has repudiated their allegiance to Australia. That's not automatically taken under section 35A at the moment, and that won't be changed with this bill.

I think it's fair to say—and Ms De Veau has already referred to the fact—that it links to the constitutionality of the provisions, but these provisions also apply to non-terrorism offences, to other national security offences, that—

CHAIR: For example?

Ms Williamson-de Vries: For example, espionage and foreign interference. I would make it clear, of course, that they are not affected by the provisions in this bill. They are of such a serious nature that the person is showing that they no longer wish to be a part of the Australian community; that they wish to do the community harm.

Ms Geddes: And essentially they don't abide by our laws, our democratic values and our way of society.

Mr LEESER: I want to go through some of the figures that are in your submission. You say that since 2015 there have been seven terrorist attacks in Australia and 15 potential disruptions. You mention both the Bourke Street incident, as you did in your opening remarks, and the arrest of people in Melbourne on 20 November. You say that, since 2001, 58 individuals have been convicted of terrorism offences and, of those, 46 have been convicted in the last three years. You note we have removed the citizenship of 12 offshore individuals but none onshore.

Ms Geddes: That's correct.

Mr LEESER: Why is that? Why that disparity?

Ms Geddes: It's to do with priorities. Really, up to now the focus has been on foreign fighters looking to fight offshore in the conflict zone to harden their skills and to bring those skills and those learnings back to Australia. So the priority has been focusing on those people, and we, through the citizenship loss borders I mentioned before, manage that on a risk basis. Our focus has been offshore. Now that the nature of terrorism and its impact in Australia is changing, with the caliphate's demise, people are still being influenced in Australia—people have been convicted of terrorist offences—and we continue looking at both offshore and onshore as a matter of priority. As I mentioned, we've got, over the next five years, 15 terrorist offenders looking to come off prison, and we'll start looking onshore over the next while.

Mr LEESER: What about the adequacy of the laws as they apply onshore? Has that been a factor as well? Is that part of the reason for this?

Ms Geddes: For onshore?

Mr LEESER: Yes.

Ms Geddes: No, it hasn't been a factor. The priority has been looking at those highly trained terrorist offenders offshore for now. These amendments will certainly broaden to encapsulate a lot more terrorist offenders that will not be showing that terrorism is not a priority for them any further.

Mr LEESER: You say there's been an increase in people serving less than six years and that people serve between 44 days and 44 years for terrorism offences. That's a technical statement, the 44 days and 44 years? It's not just a piece of puffery, as it were?

Ms Geddes: It's a range, absolutely.

Mr LEESER: It is that range, 44 days—

Ms Geddes: Yes. There is a person that has been convicted for 44 days for a terrorism offence, and up to 44 years.

Ms Williamson-de Vries: Just to clarify, Mr Leeser: I don't think we've said that there's an increase in people being sentenced to shorter terms of imprisonment. I think we've said that there's an increase, certainly, in the

Senator WONG: Yes, I apologise; I didn't realise you'd changed the timetable.

CHAIR: Welcome, Senator Wong. These things are always shifting.

Mr DREYFUS: When did the Minister for Home Affairs or the department determine that the measures proposed in this bill were necessary?

Ms Geddes: We provided advice to the minister, to the government, in November.

Mr DREYFUS: The Minister for Home Affairs announced on Thursday, 22 November last year, 2018, that the government would lower the bar to strip Australian dual citizens with terrorist convictions of their citizenship. At the time of that announcement, had the bill that's now before us been drafted?

Ms Williamson-de Vries: No, I don't believe so.

Mr DREYFUS: So the department provided advice in November; the minister announced it on 22 November; and sometime in the next few days the bill was drafted—is that right?

Ms Geddes: It's something, though, that we have been considering for a couple of years now, particularly as we're looking offshore and looking onshore at ways to continue to ensure that this provision is fit for purpose to the evolving threat to Australia.

Mr DREYFUS: You said before, Ms Geddes, that the current section 35A has not been used, because of priorities, and not to do with the effectiveness of the provision—did I get that right?

Ms Geddes: That's correct.

Mr DREYFUS: Given that nothing has happened that demonstrates the inadequacy of the current section 35A, because you haven't used it—it's been in place since 2015; you didn't want to use it, because of priorities—what possible basis is there for suggesting that the current law is inadequate?

Ms Geddes: I wouldn't say that we didn't want to use it. It's just that we didn't use it, because our practice—

Mr DREYFUS: Well, which is it, Ms Geddes? Is it that you made a priorities decision and you were concentrating on offshore and you weren't looking at all of the local issues, or you decided some other thing? It can't be both.

Ms Geddes: What I was saying, Senator, is that it's not that we didn't want to use it—

Mr DREYFUS: It's Mr Dreyfus, thank you.

Ms Geddes: Sorry. It's not that we didn't want to use it; it's that our priorities were looking at offshore. We did look at onshore cases, but we didn't progress them, because of managing risks in the offshore caseload. So it's not that we didn't want to use it; it's just that we chose to focus on offshore because of the risk posed to Australia.

Mr DREYFUS: In the six days between the minister's announcement and 28 November, when the bill was introduced to parliament, during which time apparently the bill was drafted, who was consulted about the bill, about the drafting?

Ms Geddes: We certainly consulted through the Citizenship Loss Board with the agencies.

Mr DREYFUS: In that six-day period?

Ms Geddes: And leading up to—as I said, this has been something that we continue to engage on regularly, as we meet.

Mr DREYFUS: I'm focusing on the six-day period between the minister's announcement on 22 November and the introduction of the bill on the 28th.

Ms Geddes: That was a very hectic period, and we engaged with all agencies over that period.

Mr DREYFUS: Was DFAT consulted on the drafting of the bill?

Ms Geddes: Yes, they were.

Mr DREYFUS: And what was the nature of the consultation?

Ms Williamson-de Vries: I think it was part of government consultation processes on reform.

Mr DREYFUS: That doesn't tell me anything. I'm sorry. What was the nature of the consultation?

Ms Geddes: I personally had a phone call with one of the deputy secretaries in DFAT around this to sort of lay out what our plans were and engage with him on that.

Mr DREYFUS: Did you send DFAT a draft of the bill?

Ms Geddes: I'd have to check that one.

Mr DREYFUS: I'm happy for you to tell us later whether you did send a draft of the bill to DFAT. What was the response of the deputy secretary?

Ms Geddes: It was, 'Yes, okay.' I'm not sure where this is going.

Mr DREYFUS: It's not for you to worry about where it's going. I'm asking you: what was the response of the deputy secretary?

Ms Geddes: I think the deputy secretary said something like, 'Okay, if there's anything that we can do to help, let me know.'

Mr DREYFUS: But you didn't think it necessary to send them a draft of the bill?

Ms Geddes: I'm not saying that. I said we'd have to confirm that. I'm fairly sure that we did, but we'll have to confirm.

Mr DREYFUS: Before the minister made the announcement on 22 November, did ASIO ask for any of the changes that we see in this bill?

Ms Williamson-de Vries: I think not specifically, but, as Ms Geddes has said, discussions about possible reforms to strengthen these provisions have been ongoing for some time, and of course ASIO sits within our portfolio, so we have a very close dialogue. Of course, it sits on the Citizenship Loss Board and would have been involved in all of those discussions.

Mr DREYFUS: Did you ask the Department of Foreign Affairs and Trade whether the bill breached international law?

Ms Williamson-de Vries: I can confirm that we didn't ask the Department of Foreign Affairs and Trade that particular question, but, as part of our usual process in drafting the statement of compatibility on human rights, we of course engaged with the Attorney-General's Department, which houses the Office of International Law and is well placed to advise on those matters.

Mr DREYFUS: What was their advice?

Ms De Veau: Perhaps I can add to that answer as well. The Office of International Law was consulted, I think, through AGS as well, so there were some aspects of the consultation that go to the compliance with international law and obligations that was dealt with. I don't have the specific dates, but that was definitely looked at.

Mr DREYFUS: I will move to a different topic, because I'm conscious of the time. We heard this morning from Professor George Williams, the Dean of Law at the University of New South Wales, and from Professor Kim Rubenstein of the Law School at the Australian National University. In the view of both of those eminent scholars, it's more likely than not that the High Court would strike down the provisions of this bill as unconstitutional. That's their view, and I'm asking questions in that context. The department's submission to this committee does not refer at all to the Constitution of Australia. Given that there was a very extensive debate about the constitutionality of the 2015 legislation, which this bill amends, why didn't the department consider it necessary to address the potential constitutional issues in its submission to this committee?

Ms De Veau: I can't speak as to why it was not included in the submission, but the constitutionality aspect was the subject of advice. Obviously, what that advice says is not a matter that we would want to publicly pronounce here or in a public submission. We wouldn't want to waive legal professional privilege in relation to it, but I can say that it didn't come to the same conclusion as the one that you've voiced as having been expressed by Professors Williams and Rubenstein.

Mr DREYFUS: Sorry, I didn't quite catch what you just said.

Ms De Veau: I don't propose to go into detail as to what the constitutional advice said, other than to say it doesn't accord with the view that has been expressed through you as having been given by Professor Williams or Professor Rubenstein.

Mr DREYFUS: Has the department received legal advice regarding the constitutionality of this bill?

Ms De Veau: Yes.

Mr DREYFUS: Who prepared that advice?

Ms De Veau: The Australian Government Solicitor, but I don't propose to divulge what the advice says or go into it in detail in a public forum.

Mr DREYFUS: Was the advice of the Solicitor-General sought?

Ms De Veau: Not on the wording of this bill.

Mr DREYFUS: Why not?

Ms De Veau: Because the advice of the Office of General Counsel was.

Mr DREYFUS: Is it the Office of General Counsel in the Attorney-General's Department or the Australian Government Solicitor?

Ms De Veau: It was the Australian Government Solicitor that sits in the Attorney-General's Department.

Mr DREYFUS: I am trying to get which it is. There are two different thing here. We've got the Office of General Counsel in the Attorney-General's Department and we have got the Australian Government Solicitor and, as I understand it, they are separate.

Ms De Veau: It wasn't the Office of Corporate Counsel in the Attorney-General's Department; it was the Office of General Counsel in the Australian Government Solicitor.

Mr DREYFUS: When was advice sought from the Office of General Counsel?

Ms De Veau: I don't have the date with me but I can provide that on notice.

Mr DREYFUS: Can you do it while we're meeting today? Because the government has set a very quick timetable. Could one of your number perhaps inquire or one of your junior officers?

Ms De Veau: We'll do that.

Mr DREYFUS: When was the advice received from the Office of General Counsel?

Ms De Veau: Again, I would have to take that on notice.

Mr DREYFUS: Was the advice in writing?

Ms De Veau: Yes. I don't have it with me for obvious reasons.

Mr DREYFUS: I'd appreciate an answer to that question. What does the advice say, Ms De Veau?

Ms De Veau: I don't propose to canvas the advice in a public forum; even in a different forum, it's not the government's—

Mr DREYFUS: Would the department be prepared to provide a copy to this committee given the constitutional issues which have arisen in the course of this legislation before?

Ms De Veau: That would be a matter for the government. It's the government's policy as a starting position not to divulge legal advice, and I wouldn't depart from that without consultation.

Mr DREYFUS: I'm glad to hear it's only a starting position. Can you seek instructions from government as to whether that advice can be provided to this committee?

Ms De Veau: Yes.

Mr DREYFUS: Just by way of preface to the next questions, you would have seen from the committee's advisory report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 that this committee was very concerned about the ability of that bill, which is now law—it forms part of the Citizenship Act—to withstand constitutional challenge and that's why some members of the committee on that occasion asked to see the Solicitor-General's advice to the government, a request that was denied. But ultimately, this committee was provided with a written assurance, dated, I think, 27 August 2015, from the then-Attorney-General, Senator Brandis, as to the bill's ability to withstand constitutional challenge. The letter from the Attorney-General said:

The government has received advice from the Solicitor-General, Mr Justin Gleeson SC, that in his opinion there is a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the draft bill.

This letter that's annexed to the committee's report from 2015 has a very unfortunate history, which some of you may or may not be aware of—that is, that the Solicitor-General, in a letter to the Senate's Standing Committee on Legal and Constitutional Affairs, just short of a year later, or about a year later, advised this parliament that the Attorney-General of Australia had misled this committee when he wrote to this committee in his letter of 27 August 2015 because the Solicitor-General told the parliament that he had not given advice on the bill that the committee was looking at. He had not given advice on the constitutionality of the bill as introduced to the parliament. I am happy to provide you, if you need it, with the Solicitor-General's long letter to the parliament about this. With that preface and given the committee's previous concern—we devoted a chapter of our previous report on the previous bill to the constitutionality questions—we accepted the assurance by the then Attorney-General, Senator Brandis, which was false and shown to be false by the Solicitor-General. We've now got two eminent witnesses come before us today to tell us that in all likelihood the High Court will find this bill to be unconstitutional. How is it that the department proposes or, if it's separate, the minister proposes to satisfy this committee as to the constitutionality of the bill that we are looking at?