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THE OPERATION, EFFECTIVENESS AND IMPLICATIONS OF TERRORISM-RELATED CITIZENSHIP LOSS PROVISIONS CONTAINED IN THE *AUSTRALIAN CITIZENSHIP ACT 2007*

Opening Statement by Dr Renwick

DR RENWICK: Good morning, ladies and gentlemen. Welcome to this hearing under section 21 of the *Independent National Security Legislation Monitor Act.* The hearing is being transcribed and live-streamed and I've decided it's not necessary to require evidence to be given on oath or affirmation.

I have handed out detailed written comments because some areas we are considering today are quite detailed, but let me give you a summary by way of opening of my current, although, maybe not necessarily my final thinking.

Sitting next to me is my Principal Adviser Mr Mooney, and Counsel Assisting Mr del Villar and Mr Buckland.

As the Monitor I am an independent statutory office holder, appointed by the Governor General, under the *INSLM Act* and I review the operation, effectiveness and implication of Australia's counter terrorism and national security laws and critically, whether they adequately protect individual rights, whether they are proportionate to threats and whether they are necessary.

The Attorney-General, Mr Porter, has asked me to look at citizenship laws introduced in 2015 and I'll come to the detail of those shortly. I have the benefit of two detailed, earlier reports by the Parliamentary Joint Committee on Intelligence and Security, and I've considered them and the submissions to them. I should say at this stage I'm very grateful for the detailed submissions received from everybody and to indicate that I've already held extensive private hearings with the relevant agencies.

May I start with the concept of allegiance, because it's fundamental. Some people think it's an out of date notion but it's highly relevant to the law we are considering today. It's relevant in international law, it's relevant in Australian and UK law.

Based on that concept, since World War 2 we have had the idea that citizenship may be lost through deemed renunciation of allegiance by fighting for the enemy. In 2015 for the first time, the Parliament passed

laws saying that the same thing could happen when a person engaged in serious terrorist acts or fought for, for example, ISIL.

The concept of allegiance is really to do with loyalty. I've set out in the written notes, a reference to a High Court case where three Justices of the High Court said:

> *The central characteristic of the status of an alien is owing obligations, that is, allegiance to a sovereign power.*

The difference between a citizen and an alien in this context is that the citizen owes allegiance.

I've set out in some detail my thoughts about adequacy of constitutional power to pass these laws. Some submitters have doubted they are validly enacted. That's not my current view. It seems to me that while the law with respect to naturalisation and aliens in the *Constitution* is a wide power and may be sufficient entirely to support these laws, it seems to me also, that the laws which are of most concern to me relate to places, persons, matters or things physically external to Australia, which is the definition of the external affairs power. There may also be other available powers.

So turning then to the question of necessity and proportionality and human rights. A number of submitters have argued that the laws aren't necessary or proportionate although, critically, I think almost all submitters agree that at least in some circumstances, possibly exceptional, such laws are justified. Some submitters have said it's contrary to rule of law to distinguish between citizens and non-citizens in this way, but it seems to me that there are fundamental and legitimate distinctions between the two; the right to vote, to enter the country and to obtain diplomatic assistance abroad as a citizen are all examples of that.

If, as I think most people would accept that obtaining citizenship on the ground of fraud might justify its revocation then equally as a matter of logic, renouncing one's allegiance also justifies it and I set out a quote from the Human Rights Commission, saying loss of citizenship should never be automatic. It needs to be done after careful consideration, reasonable justification and due process, and there is force in that.

Let me say something briefly about the threat picture. I've set this out in detail in the written document but since the end of 2014 the threat of a terrorist attack in Australia has been at the probable level and that is something likely to continue for some time I suspect. The threat is principally of lone actors using simple but deadly weapons with little if

any warning, but also includes the possibility of more complex or extensive attacks. There is of course, no guarantee that the authorities will detect and prevent all attacks, although they have been able to do so mostly.

Where do the threats come from? Principally from radical and violent Islamist action, not to be confused with the significant world religion of Islam. Also, increasing concerns about radical, violent, right-wing activity.

The implications of the recent atrocities in Christchurch and Sri Lanka remain to be worked out in the threat picture as indeed do the roles of the remnant foreign fighters for ISIL. So let me turn then to ISIL; there is no doubt when one reads the second reading speeches for the Bill in 2015 which inserted these provisions that a principle aim of the legislation was to deal with foreign fighters and that is, largely, although not completely, ISIL.

In contrast, say, to declared area criminal provisions which so far have only focused on Mosul and Raqqa, these laws have the capacity to operate anywhere in the world, because after all, an Australian who is a terrorist recruiter, financier or perpetrator may be anywhere in the world.

But let me return to ISIL; its rise, which led to the so called caliphate, took almost everyone by surprise and I expect its capacity to surprise will continue. It has produced a large, now widely dispersed, radicalised, highly trained diaspora of actual and potential terrorists, many of which remain with their supporters and adherents including children, and most of whom remain outside their principal country of citizenship.

ISIL though, presents a threat wider than that. I quote in the paper from the UK Home Secretary, Sajid Javid MP, who said in a speech last month in London:

> *Of all the terrorist plots thwarted by the UK and western allies last year, 80 percent were planned by people inspired by ISIL or the ideology who had never actually been in touch with the so-called caliphate.*

There is much debate including today I suspect, about how best to respond. Let me make a couple of general remarks.

Loss of citizenship doesn't necessarily mean that a person can't be extradited to Australia for criminal trial but as we will discuss today, some criminal offences require one to be, for example, an Australian citizen and

it may be that there is an unintended effect that loss of citizenship means that you can't prosecute such people for those offences.

Secondly, and this I expect will be a large focus for this morning; it is right that the loss of citizenship and exclusion from Australia isn't a guarantee in every case that the threat will disappear. It is theoretically possible I suppose but it might make it worse as some people have submitted and some examples are given in the paper. I'm most interested to hear Government Agencies' responses to that view.

Let me say something about children. There's been a great deal of reporting about the plight of children, and let me say something about children in that context, although I don't wish to say anything which would interfere with their safe return or Australia's diplomatic and aid efforts. The position of children isn't straightforward. Of course, as a matter of humanity, very young children are in a distressing situation and, reflecting the Convention of the Rights of the Child, everyone hopes for their safe return, but beyond the very young, the position is more complex.

As I said in my report to Prime Minister Morrison last year, concerning the *Prosecution and Sentencing of Children for Terrorism Offences*, there are parallels between child soldiers and Australian children in territory controlled by ISIL. The fact that each are certainly victims doesn't mean they can't also become perpetrators, and thus each remains a cohort of interest.

It's critical with children to consider three categories; those under 10: no criminal responsibility; those under 14: a presumption against criminal intent; between 14 and 18: as I explained in that last report, it is far more complex.

May I then turn to the two categories of citizenship laws of most concern. One is fairly conventional, and in my opinion, passes muster under the *INSLM Act*, and one is less conventional and in my opinion does not pass muster under the *INSLM Act.*

First, to deal with section 35A which is the fairly conventional provision that essentially says that if someone has been convicted of a specified terrorist offence by a jury (necessarily) sentenced to at least 6 years imprisonment, is a dual Australian and foreign national and the Minister is satisfied they have thereby repudiated their allegiance. Then and only then, the Minister can consider a range of factors to determine whether it's in the public interest to revoke their citizenship, and it seems to me that by reason of the safeguards, and by reason of the fact that one considers the individual circumstances of the person, that that law passes muster.

Fundamentally, as I have mentioned, it seems to me that for historical and legal reasons allegiance remains a proper basis for revocation of citizenship in some circumstances at least.

May I then turn to what I might call less conventional provisions: operation of law provisions. They essentially say this; a dual and foreign national who is over 14, who is outside Australia who engages in fact in particular terrorist activity or fights for example for ISIL then – and this is the critical point: operation of law, without any further intervention by a minister, an official, a judge, a jury or a tribunal member, then and there they lose their citizenship, whether or not they are at the high end or the low end of the spectrum of serious conduct.

Two other key factors are the Minister may choose not to notify the person, and that has happened – that is, non-notification, in 11 out of the 12 cases, the Government has indicated when these provisions have operated. Finally, it is relatively difficult to regain your citizenship compared to its loss.

What are the problems with these laws in terms of my mandate under the *INSLM Act*? First, the law operates in an uncontrolled and uncertain manner. The Government has said only 12 people have been affected so far, but there must be at least a significant risk, perhaps even a high probability that there are people who have not come to the attention of authorities but who nevertheless have already lost their citizenship. It seems to me to be unsatisfactory that the Government can't tell at a particular time that a person has or hasn't ceased to be a citizen.

It is a bad thing in principle not to have the traditional and desirable accountability which comes from an individual or an institution taking responsibility for a decision and being able to be challenged in the courts about it.

Thirdly, the blanket nature of the law, as I've already suggested, means there is no differentiation between the most serious terrorist who has no redeeming qualities and a person at the lower end of the scale who may, for example, have had a change of heart, be assisting the authorities and may perhaps have dependent Australian children. The law should be able to distinguish between those two possibilities.

I do think there is much force in the Department of Home Affairs' submission that each of these individual circumstances are unique and complex and as they go on to say, one should be able to manage it on a

case by case basis and I agree with that, and it's because I agree with that, it seems to me that these provisions should not stay.

The problems are compounded by the capacity of the Minster not to give notice, as has happened in most cases. Only Neil Prakash has been the subject of a public statement that he's lost citizenship, although there it is notable that on the one hand the Australian Government says 'he's Fijian', and the Fijian Government says, 'no he's not'. That points to some of the difficulties perhaps with the law.

Take the possibility, as I've mentioned in the paper, of an Australian woman who decided to give birth to another child under the incorrect assumption that her children would be Australian when they are not. That seems to me to be highly problematic. There are real problems with review and scrutiny and we'll come to those.

Finally, the Department of Home Affairs itself has intimated that there are complexities in relation to criminal justice processes, intelligence agency powers and on occasion, the ability of Australia to manage its broader bilateral relationships. The Prakash example would seem to be a case of that.

I say in some detail why (in the opening notes) I do not consider Chapter 3 of the *Constitution* to be a problem but essentially it is because this is not the adjudication of, or punishment for criminal guilt, and it is not punishment involving the loss of liberty such as detention. There are a number of fairly recent High Court cases which support that approach.

What then is to be done, if it is accepted that the operation of law provisions should be repealed? And pausing there, there will be a real question about, if that's to happen, whether that should be retrospective or not.

It seems to me there are two models we can usefully look to for guidance, both of which have quite a pedigree now. One is the Security Appeals Division of the Administrative Appeals Tribunal, where quite frequently a decision to take someone's passport away or refuse to issue them with a passport on security grounds can be independently reviewed, and importantly intelligence information can be safely received. That is one model very worthy of consideration.

The other is the English Special Immigration Appeals Commission or SIAC which a number of submitters, including Dr Rayner Thwaites, who will be here today – consider is worthy of our regard. One of the things used in SIAC which has been approved in principle in Australia for

control orders, although none have yet been appointed, is the idea of special advocates. That's the concept of having security cleared independent advocates who can see all the closed material and make submissions on behalf of their client, even though their client can't see the material.

So, ladies and gentlemen, with those remarks, I'm very pleased you are all here today. It is, I think, an enormously important and timely inquiry and with those opening remarks I welcome the Government Agencies and first up we are delighted to have the Department of Home Affairs led by Ms Geddes and I invite them to make any opening statement.

Department of Home Affairs

MS GEDDES: Thank you, and thank you for that opportunity.

The *Australian Citizenship Act 2007* was amended in 2015 to include citizenship loss provisions because the threat environment was characterised by the danger that foreign terrorist fighters presented to Australia and its interests. Particularly those who may seek to return to Australia after fighting with the Islamic State in Syria and Iraq.

Australian citizenship is a privilege and with that privilege comes responsibilities including to obey the law and uphold Australian values. It carries with it a duty of allegiance to Australia. Conduct such as acts in preparation for a terrorist act or intentionally associating with a terrorist organisation is contrary to Australia's democratic values and beliefs.

It is a repudiation of a person's allegiance to Australia and it would be contrary to the public interest for such a person to remain an Australian citizen. The citizenship loss provisions were enacted because the Parliament recognised that Australian citizenship is a common bond involving reciprocal rights and obligations and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.

While the number of Australians attempting to travel to the conflict zone has markedly diminished, with around 100 Australians and former Australians remaining in Syria and Iraq, some of these individuals may attempt to leave the conflict zone and return to Australia. Amongst them, some may continue to show commitment to violent extremism, while others may no longer present security concerns at all.

Each of these individuals' circumstances are unique and complex. There are a suite of counter-terrorism measures that are used to manage the risk presented by individuals who pose a threat to Australia's safety and security.

There is no doubt that the threat environment will continue to evolve. What works to address one threat may not necessarily work for another.

Australian authorities need a range of measures to enable action to protect Australia and Australians. The citizenship loss provisions are considered part of this suite of measures. To date, the provisions have ensured that those individuals who have dual citizenship, who have repudiated their allegiance to Australia, are no longer part of the fabric of Australian society. The provisions have helped protect the community and limited membership in the community to only those who embrace and uphold Australian values. Thank you.

DR RENWICK: Thank you very much, Ms Geddes. Perhaps I can begin by asking, you will have seen the submissions in this review which cast doubt on the effectiveness of these provisions. Some submitters say that Australia has one of the most robust and comprehensive counter-terrorism frameworks in the world, whereas stripping citizenship will leave dangerous former Australians in the hands of countries with fewer resources to deal with them. What is your response to that concern?

MS GEDDES: As the Government has said on a number of occasions, its first priority is to keep Australia and Australian interests safe, and to keep them safe from those who seek to do us harm. As I mentioned in my opening remarks, these provisions are but one counter-terrorism measure to keep Australians safe and it also serves as a form of deterrence from those who may wish to seek to do us harm.

MR BOPPING: In addition to the Coordinator's comments, I would add that one: we should not over-simplify the practice of counter-terrorism. We should understand counter-terrorism as existing in a complex and multidimensional threat environment. Secondly, the presence of these measures should not be conflated with their primacy.

As the Coordinator has set out, these measures exist alongside others that are both applicable in the offshore and the onshore environment such as extradition, prosecution in place and prosecution in Australia with respect to domestic environments and indeed continuing detention. It is important in talking around this issue that you raise that we understand the suite of measures in its entirety.

In addition to the deterrence of which the Coordinator speaks, we would also add that the question presupposes that Australia allows former Australian terrorists to be dispensed with to other countries. I would point out that our operational agencies and security agencies maintain very strong operational and security relationships with countries outside of the Five Eyes, that have been developed over the course of many years and that continue to be maintained across a number of threat vectors including terrorism.

DR RENWICK: Thank you. Can I just follow up with: how do you deal then, with the example I gave in the submissions in the opening, that it is too blunt an instrument to automatically lose citizenship in this circumstance? You can imagine, on the one hand the most serious of offenders, with no redeeming qualities, you can imagine someone equally at the lowest level who, for example decides to assist Australian authorities and has many personal qualities which would favour them staying here. Isn't the problem, as some submitters have put, that the operation of law principles don't allow you a case by case response? Isn't that one of the problems?

MS DE VEAU: I'm happy to attempt to answer that one, thank you. Pip De Veau, General Counsel. In its design, noting the operation of law provisions in relation to offshore conduct, the design was quite deliberately matched with the ability to rescind and exempt the operation of law effect. In the circumstances where a person, for instance, is providing assistance to authorities, or has compelling compassionate reasons, those things can quite adequately be addressed by the Minister making a decision for a person who had lost their citizenship by their conduct to, in a sense, set that aside in its effect as if it has never been lost at all.

The features that are set out and the things that one must consider when turning his or her mind to that sort of rescinding and exempting, highlight some of those things that would be relevant in those sorts of examples. So, the age, the interests, the connections to Australia, the family ties, the international relations – there's a whole list of measures that would be relevant that provide that while it is operational law, that bluntness can be taken away and removed where it is appropriate to do so.

DR RENWICK: Ms De Veau, some submitters would say the legislation has got it the wrong way around, but if you were starting again with a blank piece of paper, you might set out the exempting factors at the beginning and say "Aha! Let's take all of those into account. Let's come up with a tailor made solution, rather than do it the other way around."

MS DE VEAU: And, that's an appropriate response where, you have a model where the decision maker is actually exercising a discretion, whether that's a court or a minister or a member of the public service but for this model, it has to work in this way where there is an operation of law and then a consideration as to what might happen next. And that model is not too distinct from other examples, for instance, in the *Migration Act* where, while it is not operation of law, there can be a cancellation of a visa based on criminal convictions and then there is the mechanism by which a discretionary decision can be made to set that cancellation aside to intercept or revoke an effect. So, it is not unique in its circumstances and it simply is a question of which order you wish to put those things under – the different equities that I guess may be persuasive as to what is the appropriate order for the particular circumstance.

DR RENWICK: But you would accept, wouldn't you, that there is a difference between the s501 *Migration Act* example that you were giving and the operation of law conceptually. One is a blanket the law operates, a human being doesn't make the decision. On the other hand, a human does make the decision weighing up all the factors. You would accept there is that difference, isn't there?

MS DE VEAU: To an extent but if you look at the mandatory cancellation of visas, that's triggered by a person being convicted and sentenced, I think that's far closer to an operation of law model where you can then have a decision to, in a sense, set the effect of that aside.

DR RENWICK: All right. Can I turn then to the submission which is being made that – and this in no criticism of course of any of the agencies, that it is simply not possible to say that there have only been 12 people affected by these laws. In the same way that police forces don't catch all criminals, it's not possible for us to know whether there are other people in the world who have been caught. You must accept that that there's that possibility, is there not?

MS DE VEAU: Yes, there is that possibility. Yes.

DR RENWICK: So, there is to that extent – the Government is in the difficult position that you may not know, perhaps until years later whether a person has lost citizenship and equally, it may be hard to say they lost citizenship at this point in time. You agree with that, don't you?

MS DE VEAU: That's right, yes.

DR RENWICK: And maybe this is something more for the AFP or the Attorney-General but there are some criminal offences; I'm thinking of the declared areas provisions, where it may be important to know when a person lost their citizenship. You would agree with that, wouldn't you?

MS DE VEAU: And I think the AFP is probably well positioned to answer that but in working with the AFP we have looked at the complexities of what occurs when you have an offence that you are seeking to prosecute in Australia for which Australian citizenship or nationality is an element.

In some of those offences it may only be that residence is an element, so there is some room to move and - not dispelling the complexities that it creates because I don't want to do that, there is the ability, once again, to activate the rescinding and exempting if that will assist with the extradition and prosecution. Noting that you don't have to be an Australian citizen to be extradited to Australia.

That might be a question for the Attorney-General can expand on, but there remains complexities even if you were to rescind and exempt in order to enliven the ability to prosecute because of that citizenship element for some offences. Of course, not all of the terrorist offences include that, there is a subsection of them that do. So, there are complexities but there are equally there are some ways that can assist to attempt to overcome that.

DR RENWICK: Can I just unpack, though, that last answer? So, take a case where the Minister decided to, in effect, reinstate someone's citizenship for the purpose of them being prosecuted here; in that hypothetical situation the power to revoke citizenship based on that act is spent, isn't it? So, in other words if they were convicted of the offence you can't then re-enliven the operation of law provisions for that person.

MS DE VEAU: Not under the same provisions.

DR RENWICK: Not under the same provisions?

MS DE VEAU: You would still have available to you the discretionary decision making power - - -

DR RENWICK: The conviction power.

MS DE VEAU: - - - based on the conviction under 35A.

DR RENWICK: Certainly. Thank you. Turning then to another more general topic; some submitters say that selectively applying these laws to dual nationals as opposed to say, the Canadian approach, where some years ago they had laws like this but then they revoked them and said "in effect these people are our problem." You're part of the nation building department in an immigration sense. Is there a concern that this law may marginalise dual citizens in the Australian community, in particular communities perhaps?

MS GEDDES: That is correct, that the Department of Home Affairs is the nation building immigration and social cohesion department. Dual citizens: there are many of us walking around Australia at any one time but these laws apply to terrorists. They do not apply to dual citizens that abide by our values that are part of our fabric of society.

MR BOPPING: Further to that, Dr Renwick, I would just say that in addition to the Coordinator's comments, that the laws aren't being applied or the laws were not designed as a matter of selective policy, they were designed in the only way that the laws can operate which is with respect to dual nationals.

So, that would be the first thing I would say. And again, going to the broader point that has been made, we need to understand these laws in a broader context. I know that today we are looking at this set of provisions but in understanding these laws in the broader context, we will see that they sit alongside other legislative measures that apply irrespective of whether is one is a dual national or whether one is not.

Again, it is important to look at what sits to the left and the right of these laws, insofar as dealing with terrorism as a whole and when looked at it from that vantage point, I think it's quite clear that they are not designed to be marginal to any one particular segment of society at all.

DR RENWICK: Just to unpack that comment; so, as I understand it there are a number of categories of laws which do focus on citizenship as a criteria for criminal punishment. One is the declared areas provisions, another is the requirement – so, some laws under the criminal code, geographical category B, I think, require that you are a citizen?

MR BOPPING: Yes.

DR RENWICK: So, that might be an example. A third, I think, is the requirement for the Attorney-General's consent where the conduct occurs wholly overseas and occurs by someone who is not an Australian citizen. I only mention those to say that there are complexities, perhaps

unintended complexities with the operation of law provisions by reason of those limitations on jurisdiction. You would agree with that, wouldn't you?

MR BOPPING: Yes, and that is true. I would make the point that if we look even more broadly about the laws that are applicable to terrorism in general, we can point to specific criminal provisions and control order provisions that are agnostic as to whether one is a dual citizen.

DR RENWICK: Can I just ask a technical, legal question either to Mr Deane or Ms De Veau? It's this: I'm thinking of the situation of a child between 14 and 17, say, who was brought into Mosul and Raqqa by their parents. They didn't choose to go, they were required to come along with their family unit. Is the way the law avoids fixing on those people that they are presumed not to have had the terrorist intention in subsections 3 to 5 of 33AA, is that the answer?

MS DE VEAU: Yes, that is the answer. So, a child who might be under 14 at the time might be taken into a declared area, for instance, by a parent and the parent is no longer there and they remain there. Potentially enlivened to the conduct aspect of being in a declared area, or a child, you know, who's turned 14 and is now then within the remit of the Act, either remains there or enters there.

The declared area aspect is only the conduct element and quite apart from the fault element that is relevant to that conduct in the code, this Act works in a way that you would ignore that and put it to one side. You only take the conduct, so that the 14 or 15 year old is in the declared area but they will only be within the remit of these provisions so as to lose their citizenship if they have that conduct accompanied by a very high threshold in relation to terrorist-like intent.

That's all to do with connecting it to the loss of allegiance, which is underpinning the constitutionality of these provisions. Simply being taken by a parent left there or entering there as someone who enters a declared area won't get you there, you will also have to have the particular intent which, I'm just looking at the - - -

DR RENWICK: It's effectively, if I can summarise it, terrorist-like intent.

MR DEANE: Yes.

MS DE VEAU: The intent of advancing a political, religious or ideological cause and the intention of coercing and influencing by

intimidation a government of the Commonwealth, State, Territory, foreign country or intimidating the public or a section of the public. So, that terrorist-like intention has to be there before factually, there can be any circumstances under which the Minister's awareness will be enlivened that the person has lost their citizenship.

DR RENWICK: When I wrote my declared areas report a couple of years ago, one of the reasons I supported its retention is I accepted the evidence from the police and Attorney-General that in effect under ISIL, you were either an active supporter or you were in some way supporting ISIL. You know, you were being tithed or supporting it in some way. So, really I suppose my question is: I appreciate its operation of law, but the citizenship review board has to form a view based on the ASIO qualified security assessment about whether these facts have come to pass, yes?

So, it might be quite difficult in particular cases to form a view about intention in some cases, might it not?

MS DE VEAU: Yes. That's correct. So, unless there's material from which you can establish that the citizenship has been lost, and that includes both as to the conduct and accompanying intent, then there's no work to do under this Act because the Minister's awareness will have to be triggered on a series of assertions that the conduct in fact occurred, accompanied by the intention.

DR RENWICK: Can I ask any one of you just about the notice provisions? Now, a lot of submitters say, it's terribly unfair that people are not told as it happens in most cases, that they've lost citizenship and there's two aspects to that: one is the fairness or unfairness of it. The other is: isn't it a bit of an illusion anyway, because, at some point if that person happens to turn up to an Australian mission overseas saying "Hello, I've lost my passport. I'd like another one" at some point you are going to have to say to them, aren't you? "I'm sorry, you're not entitled to one." isn't that right?

MS DE VEAU: I think at some point it's designed in a way that the person will become aware so it's all about the timing, in fact the starting position in the notice provisions are that the Minister must notify; so that's the starting position. Then there is a carve-out as to the circumstances under which you could delay the notification.

DR RENWICK: Yes.

MS DE VEAU: And, you can only delay it for a period of 6 months before you review that decision again.

DR RENWICK: But that can be then – sorry to interrupt – that could be rolled over indefinitely, can't it?

MS DE VEAU: So long as the circumstances that take you within that exception remain alive, and when you look at the circumstances you can imagine that some circumstances under which they are quite valid reasons to not notify. So, you might have an ongoing operation that could be jeopardised, you might have a foreign relationship with another government.

DR RENWICK: No, certainly.

MS DE VEAU: So, I accept what you say about the number of matters for which there hasn't been notification, but that set of circumstances that provides the exception has to have been triggered in that instance and there will need to be a review as well as reporting to the PJCIS in relation to that.

You are quite right as to say, well, in some circumstances the person may find out before the decision is made that they now fall within, you know, revert to notification and that I think would be what it is. We can't change that other than to say there would be good reasons and it might be that when that person presents, that presentation in of itself changes the circumstances so that the application is no longer such that you wouldn't notify.

MS GEDDES: I might just add, our security agencies continue to monitor the activities, the whereabouts of these individuals even though they've lost Australian citizenship and there are points in time where advice will be provided to the Minister and that would be to say – I mean, at the moment most of those people are either in detention or they are in a camp or potentially, we don't even know – they could have died. But, there are points in time where we would be putting to the Minister that it is time to notify, but you can't rule out the example that you gave that someone comes to an embassy to seek travel documents and that would be managed effectively.

DR RENWICK: And my understanding - and I stand to be corrected about this is that in Britain where they have removed citizenship in many instances, over a hundred I believe, I think they always try to notify the individual. Now, sometimes that's not possible because they are in a war zone and they seem to take the view that generally speaking the person won't want to tell the Government in question, in the place that they are at

and that as a matter of fairness they should be told. So, that is a different model that seems to work for them.

All right, can I just ask you about review rights. In relation to dual citizenship, I think I accept that difficult though it practically might be if someone is overseas, they could at least approach a Federal Court and seek a declaration that they were never a dual citizen, in which case the law never applied.

We do know from the section 44 of the *Constitution* cases in the High Court, that is not always easy, but that's inherent in citizenship so I think we all agree, that is something which can be done at least in theory. It may not practically be easy, but it can be done.

Can I then change to the other part of the equation which is the conduct which has triggered the operation of law, so the terrorist activity, the fighting for ISIL to take two examples.

My understanding of the process, and your submission put the graph in showing the role of the different agencies. So, ASIO produces a qualified security assessment which makes remarks about whether the conduct has or hasn't occurred, that is right, isn't it? And that then comes to the citizenship review board and everyone has an opportunity to make remarks about that.

Take a case where a person has lost citizenship wants to challenge the conduct finding. It may be a hypothetical case, but they say "look, I was never in the Middle East. I've never been there in my life. You think I was there, but it wasn't me." So, how do they go about challenging that under the current law?

MS DE VEAU: So, the judicial review aspect would apply to the decision as a whole, not just the dual citizenship aspect of it and so, that would be able to be challenged in a judicial review fashion and if the fact underpinning the operation of law was such that it was not reasonable, it couldn't be met or it couldn't be established, then for instance that's what underpins the Minister's awareness and decision to issue a notice, so that could be challenged in that way, and while it might be a qualified assessment that is underpinning the factual circumstances that enliven that awareness of the conduct or the intention.

It could be any number of things, it could be a Facebook image, you could draw your information from any number of areas but factually in any judicial review of the operation of the loss and the issuing of a notice or

the decision not to issue a notice would have the ability to be challenged. You would think that there is no factual basis for that to operate.

MR DEANE: Can I just mention, in that example you just raised, I think the obvious place to review it would be the AAT. And the challenge to the - - -

DR RENWICK: And that's the existing merits review available in the Security Appeals Division?

MR DEANE: - - - of the QSA, correct.

DR RENWICK: Of the QSA, and effectively ASIO is the respondent in that?

MR DEANE: Correct.

DR RENWICK: And am I right in thinking that is a bit like a passport case where the AAT gets classified and open tribunal documents that the applicant doesn't get to see the classified documents but the tribunal does. And the tribunal can question the decision maker and then it can come to a decision on the merits about whether that conclusion was justified.

Now, let's assume that hypothetically they did and they say "Yes, we're satisfied that you were never in Syria" for example. So that quashes or sets aside the QSA. Is it your view that that's it? That from the Commonwealth point of view in this hypothetical case, everyone accepts "Yes, you didn't lose citizenship because that conduct which was the basis didn't exist." Do I understand that correctly?

MR DEANE: I think in that example, there would be a very strong reason to go to the Minister and ask him to seriously consider rescinding and exempting. It's not one of the events that are set out in the legislation which automatically reverses the citizenship loss.

DR RENWICK: All right. Do I take it then that the setting aside of the QSA does not automatically mean that citizenship is restored but it would be a strong practical basis to go to the Minister and say "Dear Minister, would you consider exempting?"

MR DEANE: That seems to be the effect of the legislation. But there is a list of events, If you like, that lead to the automatic reversal.

MS DE VEAU: And I think there's some good reasons why it wouldn't be automatic because there might be other evidence that you could rely on

that has come to light, or, takes its place. But, if there's a complete failure of a factual basis through that challenge to the QSA, in addition to the Minister rescinding and exempting, were that not immediately to happen then the person would be engaged with the Australian system on the basis that they've been involved in that challenge would equally be able to then say in judicial review, there's no reasonable basis for the decision of the Minister to either issue the notice on the basis that the conduct occurred or - - -

DR RENWICK: You hope it wouldn't get that far in that circumstance, but it could in theory, yes, because you would agree with me that the person who has lost their citizenship is otherwise in a very difficult position as a litigant. Leaving aside the AAT because they may well not have any details about the QSA and I suppose there are nice questions about who bears the onus of proof in the Federal Court but in reality there would be a toe-hold for them to attack the operation of law decision. Leaving aside the status of citizenship, I mean, you would agree with that wouldn't you? It would be a difficult thing to successfully challenge it in the Federal Court in most cases, wouldn't it?

MR DEANE: Well, they should have access to the QSA, or at least an unclassified version of it because there's an obligation under the *ASIO Act* to give them notice of the QSA.

DR RENWICK: Yes. Just while we are dealing with onus of proof and the problems that might arise, and again, this may be more of a question for the AFP or AGD: what happens in a criminal prosecution where an element of the offence is that, for example, you're an Australian citizen? So, the criminal code says that the prosecution needs to prove beyond reasonable doubt each element of the criminal offence; do you accept it may be quite difficult in particular cases to prove that a person was a dual citizen?

MS DE VEAU: I think this has been a matter that AGD and AFP and indeed the Commonwealth DPP have been turning their minds to, and one of the concerns is whether the prosecution would need to in a sense, establish the double negative.

DR RENWICK: Exactly.

MS DE VEAU: That is, when there is a positive element that person is an Australian citizen, they may have to have the onus of proof on them to demonstrate that citizenship was not in fact lost. Even if it's not necessarily at an evidentiary point, said to have been lost.

DR RENWICK: But, you are agreeing with me, that it may be a difficult thing for the prosecution - - -

MS DE VEAU:- - - And that's one of the complexities that I was alluding to. In saying that there's been a series of issues that have been considered as to the interaction of the operation of law provisions, with a prosecution. I'm not saying that they're not all insurmountable, but there's a series of complexities and in such instances, there's information that demonstrates that citizenship was in fact being lost, you've got the rescinding and exempting. But if it's one those cases where there is no such information, does the prosecutor have to turn his mind his mind – as part of the elements for the offence, to show positively that it has not been lost?

DR RENWICK: All right. Moving on to just a couple of other issues then. You suggest in your submissions that there may be difficulties for intelligence agencies depending on whether someone is a citizen, or not. Let's take the *Intelligence Services Act*, as an example. It says that if the Australian Signals Directorate – if ASD wants to do certain things in relation to an Australian citizen, it needs Ministerial authorisation. That's what the statute says. Do I take it that's the sort of thing you have in mind, that because you may not know whether citizenship has been lost or not, that causes practical problems. Is that what you have in mind?

MS GEDDES: Yes, that's correct, it's around those provisions in the *ISA Act* – the ISA. But also, the relationships with their Five Eyes partners, as well.

DR RENWICK: All right. Just in relation to Mr Prakash, I think in the PJCIS, it was made clear that expert advice from Fiji experts in Fijian citizenship law wasn't sought before Mr Dutton made his announcement. I think, Ms Geddes, you said you agreed with that. Do you agree that it's better if there's an opportunity in the review process, where it might be, the AAT or the Federal Court, the people to have the opportunity to adduce that expert evidence on a challenge?

MS GEDDES: In the case of Neil Prakash, we sought advice, we sought second advice, and we remain confident that he's not Australian. And we would normally not need to seek expert advice within a particular country.

DR RENWICK: But just to take that example – because that is a public example. You do appear – and it's not for me to say who's right or wrong legally about it, but there is a public stand-off between two sovereign nations. Which means that, Mr Prakash, he may have de jure rights to citizenship, but de facto, he would seem unlikely to be able to enter either Australia or Fiji. That's just based on what's publicly known. How does

one solve that particular problem, under our country's law? Does he have to seek a declaration in an Australia court?

MS DE VEAU: That would be the measure to be taken if there is a contest as to whether in fact he was a dual citizens at the time of the conduct was engaged in. And we wouldn't have progressed the matter without some confidence and, in fact more than confidence, that he held dual citizenship at a particular time. If that is misplaced, and factually it's asserted by him, that he was nothing other than an Australian citizen. The avenue to have that legal debate is a review of the operation of law provision.

DR RENWICK: You agree with me, Ms De Veau, that you might be right de jure as a matter of law. In practice though, if another country won't let someone in, that citizenship is not of a great deal of value to them, in that context. That's just stating the obvious, isn't it?

MS DE VEAU: It is, but it's also, you would presume, open to be challenged in that country, as to whether he should be allowed entry because he's in fact a Fijian citizen.

DR RENWICK: All right. Look, last question from me, subject to any of my colleague's questions. You've seen, and you've heard in my opening, and in the Lowy speech I gave that one of the things I'm considering is having a merits review, decision-making model, as an alternative – as a more nuanced, alternative, as a fairer alternative to the operation of law provision. Can I ask you first, do you have any general comments about how well the current Security Appeals Division system works? From your point of view, does it work satisfactorily enough?

MS DE VEAU: I think that's probably a question best directed to the agencies who are directly represented there.

DR RENWICK: All right. And so, do you wish to make any comments then about the alternative proposal I've come up with as a possibility?

MS GEDDES: I can certainly comment on my views, as the coordinator for Ministerial Determination. If we were looking to create this now on a blank piece of paper, certainly giving the Minister the information in front of him or her, to be able to make a determination. That's something that we continue to explore.

DR RENWICK: And just finally then, as you know, the Government has accepted in relation to control orders, that there should be special

advocates, security cleared, independent lawyers. Do you have any remarks about the idea of extending that to a possible AAT model?

MS GEDDES: Look, I've seen the special advocates in the UK. I think there are a few issues with those. It's something that I would need to turn my mind to a little bit in more detail.

DR RENWICK: Mr Del Villar has a couple of questions.

MR DEL VILLAR: Ms Geddes, I just wanted to ask one question about the concept of renunciation of allegiance, which seems to underpin the automatic revocation provisions. It's your understanding, and I just want you to really confirm this, that even though the person may engage in a terrorist attack that is directed to another country altogether, the fact they engage in a terrorist act with the requisite intention is regarded as them renouncing their allegiance to Australia. Is that the way the legalisation works?

MS DE VEAU: There has to be a link to Australia that underpins the connection to the head of power. And you will see that particularly in relation to the 35A model, which has a consideration that specifically turns the Minister's mind to that.

In relation to the declared organisations, the 35 model – which is conduct and operation of law, has to do with fighting for, or in service of a declared organisation. It's that declaration that links its connection to Australia. So there might be terrorist organisations in the world for whom a person is serving, that have no connection to Australia and Australia's values and interests. Such that they're not a declared organisation, for the purposes of this act, because of that. So there has to be a link to the Australian allegiance, not simply a terrorist act will in and of itself automatically amount to that. That's the way it's been structured, to have that underpinning and its connection to the head of power.

MR DEANE: Can I just add though, is it in relation to the conduct of the 33AA, it's the conduct itself and the definition of the offences which provide the Australian link. I say, in relation to 33AA, and the conduct, operation of law by conduct, it's the offences, the nature of the offences that provide the link to Australia.

DR RENWICK: Doesn't it come back to this: it picks up in 33AA (3-5) the definition of a terrorist attack in the *Criminal Code*, as we all know, that permits it to be the intimidation of a foreign government, not just an Australian Government. So, really I think, you'd agree, wouldn't you, that

it could be a foreign government which is being intimidated. And that's the terrorist act?

MR DEANE: Yes. As is the case in the *Criminal Code*.

MR DE VILLAR: And intimidation of the foreign government, in that situation would be regarded as renunciation of the allegiance to Australia?

MS DE VEAU: Yes, because it's the contradiction to Australian values and Australians interests that would enliven and underpins it.

MR DE VILLAR: Sorry, just one other question, and that's just in relation to the earlier statement about the way the provisions operate. You said they operate automatically and then the Minister can then step in and decide to rescind. Given that structure, why is the Minister not obliged to consider whether or not to rescind in particular cases? Why is that a non-compellable power?

MS DE VEAU: That was a policy decision in relation to the choices that were made to the model when it was introduced.

DR RENWICK: Unless there's anything further, I'd like to thank the Department of Home Affairs very much for attending, and invite the Australian Federal Police to come forward.

Australian Federal Police

So we welcome the Australian Federal Police, led by Deputy Commissioner Leanne Close. Deputy Commissioner, did you want to make any opening remarks?

DEPUTY COMMISSIONER CLOSE: Yes, thank you, Dr Renwick. Thank you very much for the opportunity to appear here, today. The AFP does value the oversight and recommendations provided by INSLM that you provide through these reviews.

As we've heard, the threat environment, both domestically and overseas, remains a real challenge for the AFP and for all relevant agencies. Terrorism remains a significant threat to Australia's national security and the safety of all Australians.

The AFP's response is multi-faceted. The prevention and disruption of terrorism and protection of Australians at home and off-shore are our primary objectives, and the operational tempo remains high.

Since 12 September 2014 when the national terrorism threat level was raised to probable, 93 people have been charged as a result of 41 counter-terrorism operations in Australia. Overall, since 2001, 72 individuals have been convicted of terrorism offences in Australia and many are still serving sentences of imprisonment. The AFP has a further 39 active arrest warrants relating to alleged foreign fighters who are off-shore.

We note the Home Affairs' submission to this inquiry, which confirms around 80 Australians, or former Australians, remain in Syria and Iraq. Some of these individuals may attempt to return to Australia, and may continue to show commitment to violent extremism. Current key priorities for the AFP include on the one hand, managing the return of these Australian foreign fighters and their families from the conflict zone, and on the other, managing the increasing number of individuals who have been prosecuted, convicted, and are now serving sentences for terrorism offences, and who may pose an ongoing risk to the community when they are released.

In relation to the Citizenship Loss Board, as you're aware, this was established in February 2016, following the passage of the *Allegiance to Australia Act* in late-2015. The AFP is a permanent member on the Citizenship Loss Board, and we strongly value this roundtable approach.

The AFP's role on the board is to provide advice on law enforcement matters, including the impact that citizenship loss may have on ongoing investigations, police-to-police relationships, and law enforcement options for managing risk.

Citizenship loss provisions can have operational benefits for law enforcement; they contribute to efforts to prevent terrorism onshore, and the threat of citizenship loss may also have a deterrent effect, discouraging would be perpetrators from engaging in terrorism, or travelling to conflict zones.

I'd like to speak for a moment about the role that citizenship loss provisions have had in responding to returning foreign fighters. The AFP continues to be very concerned about the activities of Australians who have participated illegally in conflict zones overseas and who now seek to return to Australia, where they may present a risk to the Australian community, onshore.

As a cohort, returning foreign fighters may have increased capability and potential willingness to carry out attacks. Historically, addressing the issue of foreign terrorist fighters who wanted to return home has not been simple, and there will never be a strategy or a solution that fits all cases.

To deal with this issue effectively, agencies require a range of treatment options available; one of those options is citizenship loss, which restricts the ability of individuals to enter Australia and to move within the community freely.

Although we're here today to talk about citizenship loss provisions, it would be remiss not to mention some of the other treatment options that are considered for returning foreign fighters:

(a) Where there is evidence of criminal offending under Australian law, the AFP's preferred option is always to pursue prosecution.
(b) Returning foreign fighters who are not subject to criminal charges are assessed for their level of risk to the community and considered for intervention programs.
(c) Where there is information that a person poses a risk to the community, and it is not possible to affect an arrest, the AFP may seek a control order or monitoring orders.

We're certainly interested in ensuring that the legislative frameworks that support these options operate seamlessly.

While I don't intend to speak in detail about a particular matter, I think it is important to use the *Prakash* matter as an example:

As you are aware from public reporting, the fact that Mr Prakash's Australian citizenship has ceased has not impacted on the fact that he is also wanted by Australia for criminal justice purposes. There is a warrant for his arrest in existence, and his extradition is still being sought so that he may face prosecution in Australia for serious terrorism offences.

While the AFP supports citizenship loss for terrorism related conduct, so far as it contributes to mitigating risks posed to Australia, it's certainly not without challenges for law enforcement. Investigations may be impacted because of the automatic nature of citizenship revocation due to a person's conduct; for example, some terrorism related offences like foreign incursions and being in a declared area only apply to Australian citizens or residents. If a person's citizenship ceases, they may not be able to be prosecuted for these offences after the point at which their citizenship ceases, because an element of the offence was not made out.

Where this is the case, we may need to rely on other terrorism offences or other mechanisms for addressing the risk a person poses. The AFP supports a legislative framework that enables us to consider different options for each individual, on a case-by-case basis.

Finally, I just want to touch on the topic of onshore conviction-based citizenship loss. Again, this is one treatment mechanism that sits alongside other options like continued detention for high-risk terrorist offenders, control orders, and potentially in the future, extended supervision orders.

As I've mentioned, there are more individuals who have been convicted of terrorism offences than ever before in Australia; some have already completed a sentence of imprisonment, but many will be released into the Australian community in coming years.

Part of the AFP's role on the Citizenship Board is to provide advice on how the risk any individual may pose to the community safety, and can be addressed through holistic consideration of the different treatment options.

So thank you very much, again, for inviting us here today. I'm happy to take any questions.

DR RENWICK: Thanks, Deputy Commissioner. So just to start then with that last point about the onshore conviction-based loss; so 72 people have been convicted. If a decision was to be made to use the conviction as a basis for asking the Minister for Home Affairs to remove citizenship, I take it that's something which would be considered when release was fairly imminent, as opposed to immediately after conviction? They've got to be sentenced for six years anyway. Is that the position?

DEPUTY COMMISSIONER CLOSE: That's correct. So again, on a case-by-case basis, we will have a look at all of the circumstances, the closer we get to potential release dates. We're already turning our minds to working with other agencies, whether it's the state police, corrections authorities or others, to be gathering information, intelligence, and presenting those facts, ready to be presented to the Minister, if they're a dual citizen.

DR RENWICK: Can I ask a more general question, just about numbers of people? You accept, don't you, that with the best will in the world, you can't definitively say there's only been 12 or thereabouts people affected; that must be right, mustn't it?

DEPUTY COMMISSIONER CLOSE: That's correct.

DR RENWICK: In the same way that you don't know all criminal activity, generally.

DEPUTY COMMISSIONER CLOSE: Absolutely, that's correct.

DR RENWICK: All right. What do you say then, about people who say that the blunt approach with the operation of law provision doesn't adequately differentiate between, as I hypothesized, the most serious, unrepentant offender overseas, and someone at the lowest end who perhaps has decided to assist you and has other features which suggest they should be allowed to remain a citizen?

DEPUTY COMMISSIONER CLOSE: Absolutely. We would take all those circumstances in consideration, and we would provide that information through to the Minister in relation to citizenship loss provisions. But for us as well, automatic revocation of citizenship, as I said, doesn't preclude investigation or ascertaining if there are other mechanisms such as a control order or supervision orders for us to instigate, depending on the circumstances of each case.

DR RENWICK: And it's true, I recommended that control orders be continued, but I think it's equally true that there haven't been any sought for some time, and they're a relatively high cost, difficult option, aren't they?

DEPUTY COMMISSIONER CLOSE: They are complex to obtain, and complex to manage and maintain, going forward; but they are certainly one of our tools that we have available to us for this sort of violent crime, terrorist offending.

DR RENWICK: All right. Can I ask you about extradition, just generically? Does the loss of citizenship complicate return of people to Australia under extradition law?

DEPUTY COMMISSIONER CLOSE: No it doesn't, because we can still extradite non-citizens to Australia, if we allege that they've committed criminal offences. We work with the Attorney-General's Department, with the Commonwealth DPP in respect of those sorts of matters, so it happens anyway through other sorts of investigations, not just for terrorism related matters.

DR RENWICK: Now, you may not be able to answer this in a public forum, but are you able to say anything about the present capacity to charge any of the remaining 80 or so Australians overseas; if they were to return today, hypothetically, would you be able to charge any of them?

DEPUTY COMMISSIONER CLOSE: So as I mentioned, we have 39 arrest warrants in place, and that's been a considerable increase of arrest

warrants since the fall of the so-called caliphate. So we had around about 25; and our team has continued to work in obtaining evidence, speaking with witnesses, working in the Middle East with our counterparts, foreign law enforcement agencies, Five Eyes partners.

So as I mentioned, we've increased that in recent times to 39 arrest warrants, and we continue to work on gathering evidence and material to ensure that should any person return to Australia, we're as prepared as we can be to have them face our justice system.

DR RENWICK: Can I just explore a little, the extradition question? Under Australian law, you've given your answer, but is it your experience that sometimes the domestic law of the foreign country treats more harshly, or is more difficult to obtain extradition if we're not seeking an Australian citizen?

DEPUTY COMMISSIONER CLOSE: That's probably more a question for the Attorney-General's Department, in terms of how those laws operate. I can certainly speak from a law enforcement perspective in terms of the fact that we do have good co-operation with our partners offshore, and that continues, even in these sorts of difficult circumstances. So the Attorney-General will also work with us, and Prakash again is a good example, where the court in Kilis, the Kilis Criminal Court in Turkey, has denied our request for extradition, however, we're certainly taking steps - and the Attorney-General can probably expand on that - in terms of appealing to a higher court.

MS WILLIAMSON-DEVRIES: And again, it's probably the detail is with the Attorney-General's Department, but we're not aware that that initial refusal of the request had anything to do with Mr Prakash's citizenship status. I also should note, in addition to the Deputy Commissioner's comments, that none of Australia's extradition agreements with foreign countries preclude extradition on the basis that the person is not a citizen of the country that is seeking their extradition; I think it's widely appreciated that countries seek to bring alleged criminals before their justice systems, regardless of what their citizenship status is.

DR RENWICK: You will have heard the questions I asked Home Affairs about the problems in prosecuting for certain Australian offences caused by the operation of law provision. So can I just talk through with you some of the examples?

So take the case of someone who entered the declared area of Mosul or Raqqa when it was a declared area; so they walked across the invisible line and they, then and there, commit an offence. But if they are to stay

there for say, two or three years, in the normal course you would want to charge them under that offence as having been there for two or three years, because that fully reflects the criminality. So you'd agree in-principle with that?

MS WILLIAMSON-DEVRIES: Yes.

DR RENWICK: All right. If they're then a dual citizen, there's a nice question, isn't there, about whether at the instant they cross the line, assuming they had the terrorist intent that the *Citizenship Act* required, then and there, what happens, do they lose citizenship first, or do they commit the offence first? There's a sort of a nice question.

Let's assume though, they commit the offence and immediately after that, they lose citizenship; unless you exempted them, you couldn't then prosecute them either at all, or in a way which fully reflected their criminality, could you?

DEPUTY COMMISSIONER CLOSE: You're right, Dr Renwick; it is complex, that's why it's very much a case-by-case circumstance. So really, the simple answer is there, the impact depends on the timing of both their conduct and also the date of citizenship ceasing. So we certainly work on a case-by-case basis with the Commonwealth CPP to look at all the circumstances, to identify what the conduct is that we allege has occurred, all the dates.

And there are a range of offences; there's only a small subset of offences where loss of citizenship or residency is an impact on the offences. We have other offences that we certainly look at as well, often not just that one in isolation. Again, depending on the conduct of the individual.

DR RENWICK: But just to unpack that a little: I think I gave three examples to Home Affairs of the way it could operate: first, you can have the example where an element of the offence is that you're a citizen or resident and so on. The second there could be a jurisdictional requirement that you have to be an Australian citizen; sometimes, that's the case. And thirdly, you've got the overall factor, no matter how wide the geographical reach of their provision, of the need to get the Attorney-General's permission - I think the expression is "to commence proceedings," so you can arrest people.

DEPUTY COMMISSIONER CLOSE: Yes.

DR RENWICK: And if you don't, there may be problems later on, if the whole of the action - and this occurs overseas - and the person is not an

Australian citizen. So it sounds to me like there's all sorts of potential pitfalls for a successful prosecution caused by the operation of law provision, in contrast to a situation where it's a decision-making model and the Minister can weigh all those factors up.

A minister might decide in a particular case, "Look, I'm not going to revoke citizenship at this point. I'm going to keep open the conviction-based option."

DEPUTY COMMISSIONER CLOSE: Yes.

DR RENWICK: You'd agree that could, in theory, be a preferable approach?

DEPUTY COMMISSIONER CLOSE: Absolutely. And in the example that you gave us about it being the whole offence, then I would imagine that we would immediately write to the Minister with the DPP advice, and ask for him to consider revocation of the loss of citizenship.

DR RENWICK: Yes.

DEPUTY COMMISSIONER CLOSE: Yes.

DR RENWICK: I mean, there are other complexities one can fairly readily imagine. I gave the example about a child, and they may not have come with the relevant intent, but because they may be swept up into the service of ISIL, they may end up with the requisite intent. It could be very difficult to show those things, couldn't it?

DEPUTY COMMISSIONER CLOSE: Absolutely, it is. So again, we speak with the Commonwealth DPP, we look at any possible defences that may be available to an individual in that circumstance, all of the conduct related to the circumstances for that particular individual; and then we determine whether we believe there is sufficient to mount a prosecution or not.

DR RENWICK: And the other, I suppose again, quite possible, although hypothetical example, is you know, you want to prosecute someone for say, what they've done in Mosul or Raqqa, but it turns out they actually have a long pedigree of terrorist behaviour elsewhere, and so they've lost their citizenship many years before but no-one realises that until very late in the day.

I suppose what I'm trying to do by way of these examples is to make the point that there may be all sorts of unintended - and frankly, undesirable -

consequences for your work or the prosecution because you've got the blunt instrument, rather than considering things on a case by case basis.

DEPUTY COMMISSIONER CLOSE: All criminal law is very complex, Dr Renwick; so we work in this complexity all the time in terms of the operation of various offences, intersection with other provisions of different legislation, so it's certainly something that our teams are well-versed in. And again, we seek expert advice, whether it's from Attorney-General's, Commonwealth DPP or others, in terms of taking these matters forward.

MS WILLIAMSON-DEVRIES: And Dr Renwick, I would just add in addition to the Deputy Commissioner's comment, that timing is always a factor, and consideration in every individual case is given. But with the example that you just gave, for example, the declared areas offences came into effect in late-2014 with the passage of the *Foreign Fighters* Bill. And of course, foreign incursions offences have been on the statute books for a much longer time, but the ability for a person's citizenship to be ceased has only been possible since December 2015.

So there is a period of time, recognising the activities that were going on between 2014/15, where it's clear that perhaps those offences would not be affected by loss of citizenship, if the conduct occurred within a very specific period.

DR RENWICK: I mean, I think you've got my general point that the whole problem with the operation of law is, it's not an individualised approach; it's a rather blunt approach. Anyway, just one further thing from me, and to an extent, Deputy Commissioner, you've dealt with this in your opening: what do you say to the people who say that in a particular case, loss of citizenship will not protect Australia?

So the Executive Council of Jewry I think gave as an example what Professor Greg Barton said about Neil Prakash; and just quoting what they said, they said, "Look, this is a person who seems to be very adept at communicating over the Internet and inspiring others to act," and they compared that with a hypothetical bomb-maker who might not be so good on that sort of communication. And on the one hand they said, "Well, you know, the problem with the operation of law provisions is that we've made a decision to keep this person out of Australia as a citizen, anyway, appreciating he might be able to be brought back to face trial." And that may be part of the answer, of course.

But would you care to respond to that?

DEPUTY COMMISSIONER CLOSE: We are extremely concerned about the ongoing enduring threat of terrorism, and anything that may affect Australians, either in Australia or offshore. Part of our approach has been the strength of Australia's relationships with foreign law enforcement, with security and intelligence agencies, to try and identify where threats may be.

And it may not be even Australians, and we've certainly seen that with the ISIL examples in recent years, how people who had no affiliation or history, citizenship within Australia, were certainly impacting through social media, videoing, et cetera, messaging out to people to use their propaganda to encourage people to either commit acts of terror or to go overseas and join the so-called caliphate. So that's an enduring threat, and we're certainly concerned about that.

What we do is, we try to ensure that we have strength of our investigative processes, intelligence gathering, understanding the environment, the landscape, and we work extremely hard to try to prevent those sorts of activities happening. It is difficult because we don't know every time, what's in a person's mind.

DR RENWICK: No. And just perhaps one more general question to finish, from me anyway: you heard in my opening, my assessment is that the full impact of the atrocities in Christchurch and Sri Lanka, and how they might affect the terrorist threat in Australia, and by Australians overseas, remains to be fully worked out; do you agree with that?

DEPUTY COMMISSIONER CLOSE: Yes. So we again have seen people like the instance in New Zealand with this lone actor, what we allege is a lone actor, who has become radicalised for various reasons and history in that person's life, and that will be certainly explored through the court process and through the royal commission as well.

From an Australian perspective, those examples always seek to remind us that the threat is enduring, that we've certainly thwarted seven criminal attacks in Australia; unfortunately, we haven't been able to avert a further 15 since 2014. And again, that's because as you outlined earlier Dr Renwick, the concept of these lone actors potentially out there with low sophisticated intent to commit violent terrorist actions is there, and ever present.

So we're certainly working with our partners across the globe, again; I'd reiterate, you know, the intelligence, the law enforcement relationships that we have are key to us understanding that. Monitoring the environment within our own country, and working with the community as

well is a really critical part of that for us, in gathering information to identify where a threat may be raised.

DR RENWICK: Just following on, on the lone actor: am I right in thinking that the experience, both here and in England, has been that the time between the thought and the act by the lone actor is ever-decreasing, and that makes your task that much harder?

DEPUTY COMMISSIONER CLOSE: Yes, that's certainly been our experience in recent years. Decades ago, we saw much more sophisticated, much more complex, larger plots being considered; and we saw that example with Holsworthy threats, we've seen it in the aviation sector overseas. That has significantly changed, and some of it has been around the rhetoric, and also the examples of an individual who commits a very low sophisticated act using different means that are available to anybody. We've certainly seen that.

DR RENWICK: A knife, a car, a truck, that sort of thing.

DEPUTY COMMISSIONER CLOSE: Exactly, exactly. We've seen that examples overseas, and then that always tends to have that impact of inspiring, inciting people within our own country to undertake similar actions.

DR RENWICK: All right. Well, I think it's morning tea time. So can I thank the Australian Federal Police very much for attending. And we'll break for half an hour, after which we'll have the Attorney-General's Department come up. Thank you very much.

ADJOURNED **[1027]**

RESUMED **[1058]**

DR RENWICK: Ladies and gentlemen, we might resume at this point and the resume the live stream, and we very much welcome the Attorney General's Department, led by Deputy Secretary Sarah Chidgey. May I ask, did you have any opening remarks?

Attorney-General's Department

MS CHIDGEY: No.

DR RENWICK: All right, thank you very much. I don't know if you've had an opportunity to glance at my opening remarks, but you may there

have seen that my fairly firm view is that there is neither a lack of constitutional heads of power to support the laws we're looking at, nor Chapter 3 issues, did you wish to make any remark about that?

MS CHIDGEY: No.

DR RENWICK: All right, can I ask then, an international law question, and if we can look at the *Convention on the Reduction of Statelessness* in 1961, a number of submitters have commented on the fact that unlike the United Kingdom, we didn't enter into a reservation at the time we entered into – we acceded to that convention. Has that caused any practical difficulties with the citizenship laws we're talking about today?

MS ROBERTSON: Sue Robertson, head of International Division at Attorney-General's Department, no it has not. The *Act* in question implements Australia's international obligations on statelessness by ensuring that the removal of citizenship can only occur when an individual is a national or a citizen of a state other than Australia. Through that mechanism, Australia's obligations are protected and accordingly, where Australia acts in accordance with that legislation – we're acting in accordance with our obligations.

DR RENWICK:All right. Can I unpick that a little bit, so as we know there's a distinction in the cases between de jure citizenship and de facto citizenship. The Supreme Court in the United Kingdom had to come to grips with that in *Pham's* case. *P-h-a-m*. But if we can take the practical example, in the one case we can say something about publicly of Mr Prakash; on the one hand Australia says, and the Home Affairs Department said this morning,

> *"They're very confident that their understanding of Fijian law is correct, and that as Mr Prakash retained his Fijian citizenship, he therefore could lose his Australia citizenship and it's a matter of public record that Fiji has said, or know, he was, at least not in recent years, not one of ours."*

So there is a real sample of the difference between two sovereign governments about whether an individual is a citizen of one or the other. Now, under Australian law, as you rightly say, Ms Robertson, we take pains to ensure people are not made stateless. How an in a practical matter does one resolve those sorts of issues?

MS CHIDGEY: That would be ultimately resolved by judicial review. A court could make a declaration on that issue, if it was found that a person didn't have a second citizenship.

DR RENWICK: And I suppose difficult issues of conflict of law might arise if a Fijian Court took a different view to Australian Court about a matter of Fijian citizenship?

MS CHIDGEY: That's possible. Obviously the question of whether a person has second citizenship is resolved by reference to the laws of that other country, but it's possible there could be different views about that.

DR RENWICK: But it would be open, wouldn't it to the Minister for Home Affairs, in a situation where the other citizenship didn't exist de facto. In other words, the other country said "We're not going to let you in, because we don't consider you're a citizen". It would be open in a particular case – I'm not talking about Mr Prakash now – in a particular case for the Minister to say: "Well, because they have a closer connection to Australia, in this particular case, to exempt them from loss of Australian citizenship".

MS CHIDGEY: That's right, a Minister does have the capacity to rescind a notice and exempt an individual.

DR RENWICK: And that would be one practical way, wouldn't it, of ensuring that we maintain, not only the letter, but the spirit of international obligations to avoid statelessness?

MS CHIDGEY: Yes, that would certainly be a course open to the Minister.

DR RENWICK: All right. Can I ask you a question about the UN Human Rights Committee, which has as I think you know, has adopted a fairly broad interpretation of own country; which extends beyond the concept of citizenship. Are you satisfied on the law as it stands, that notwithstanding the loss of citizenship, Australian citizenship, Australia would not still be seen as the persons own country? Because, the hypothetical person wouldn't have connection at all with the other country of citizenship, as they're own country? I hope I've made that sufficiently clear.

MS ROBERTSON: Yes, we would be satisfied and we address this is in the Commonwealth statement of compatibility on the *Act*, and I might quote from that, if I may?

DR RENWICK: Yes, please.

MS ROBERTSON: And what we say is that:

Where a person has repudiated their allegiance to Australia, which under the new provisions will necessarily be in circumstances where they hold another citizenship, and renounce their Australian citizenship, or their citizenship ceases. Any ties have for the purposes of article 12, 4 of the ICC PR, have been voluntarily severed.

In other words, the person should not gain any advantage from the relationship that they themselves are responsible for breaking.

DR RENWICK: I see. That might be a good time to ask you, Ms Robertson, in international law, so some people have submitted to me, that the notion of the allegiance is somehow an outdated legal concept. My understanding in both Australian law and frankly UK law, but also international law, is the concept of allegiance is alive and well, and includes within it, and that if one does something wholly inconsistent with that notion of allegiance or loyalty to a nation, international law permits citizenship to be removed. Do I understand that correctly?

MS ROBERTSON: Yes, we would agree with that.

DR RENWICK: There's a number of UN Security Council resolutions, I think 1373 which immediately post-dated 9/11 and 1566. Does the Department consider we've complied with those Security Council resolutions, in relation to the twelve people who are identified so far as having lost citizenship?

MS ROBERTONS: Yes, we do. Those resolutions state quite a margin of appreciation regarding how states decide to bring terrorists to justice. And certainly, these citizenship loss provisions don't prevent us from ensuring that those that participate in acts of terrorism, or support terrorism, are brought to justice. If not prosecuted in Australia, we can certainly assist prosecutors in other countries through mutual legal assistance, for example.

DR RENWICK: Well that I think segues to my next question. This morning I've asked a number of questions about attempts to extradite or prosecute, and the AFP have said, of course, their starting point is they would always prefer to prosecute. And the mere fact that someone has lost Australian citizenship in general, doesn't prevent them being extradited to Australia. Is that also your view that generally speaking, a loss of Australian citizenship doesn't prevent extradition?

MS ROBERTSON: That's correct. As a matter of law, yes.

DR RENWICK: All right. Nevertheless though, in a practical sense, have there been complications with extradition, due to loss of citizenship, that you're able to talk about?

MS ROBERTONS: Apart from Prakash, no. And I probably won't go into any detail there, but we are not aware of any complications other than that case.

DR RENWICK: All right.

MS CHIDGEY: And I might just add, our view wouldn't be that there's been any sort of extradition undermined, just some additional steps that have needed to be taken.

DR RENWICK: All right. I mean, for example, speaking generally if Australia is a party to an extradition request overseas, there may be an obligation under the law of that country to update Australia's understanding about the status of the proposed extradite.

MS CHIDGEY: That's right, depending on the terms of the agreement with that country.

DR RENWICK: All right. Can I move then from extradition to mutual assistance in international crime cooperation more generally, what has been the Department's experience with those schemes and processes, and how they've operated under the loss of citizenship provisions?

MS CHIDGEY: There haven't been sort of issues with the operation of extradition and mutual assistance processes, to date, other than the additional steps we've taken in that one case.

DR RENWICK: All right. There have been some discussions this morning about the practical legal problems that arise in criminal prosecutions in Australia, because variously there might be an element of the offence that the person is a citizen. There might be geographical limitation under the *Criminal Code* that you have to be an Australian citizen to be guilty of the crime. Or, in relation to all categories of crimes, if it's wholly committed overseas and the person is not an Australian citizen at the time, the Attorney-General must consent to the proceedings now. Do you have any remarks about those provisions, and how they've been working, and in relation to the citizenship loss provisions?

MS CHIDGEY: There haven't been any issues, other than in the sort of one case where it's meant considering sort of when conduct occurred, and what offences are then relevant during which time periods. I think it's also

possible that because a person would need to undertake conduct and commit the offence sort of immediately prior to loss of citizenship.

But clearly in a sort of practical sense, working out exactly when that occurred as a matter for evidence and then ultimately consideration by the DPP in taking a matter forward, potentially add some complexities when pursuing investigations and prosecutions of those offences where they might be a loss of citizenship.

DR RENWICK: Let me just to unpack that a little, so the hypothetical person crosses the line into Mosul or Raqqa, which is a declared area, they are a dual Australian and other citizen, there's a nice legal question, isn't there (as we lawyers say) about whether at that instant they've committed the offence first, or lost their citizenship first, and can they be prosecuted for that?

MS CHEDGEY: Yes, and we would take the view that they have committed the offence. But clearly some practical evidentiary issues where there are courses of conduct over time, that's not always straight forward, where citizenship loss occurs via operation of law.

DR RENWICK: This morning, I think either Home Affairs or Police said that what could happen there, legally, is that the Minister for Home Affairs could, for the purpose of the prosecution, exempt the – to use the language of 33AA – in other words, reinstate citizenship. The person could be prosecuted and then if they're convicted and sentenced to more than six years, then the conviction based citizenship loss could then operate in relation to them.

MS CHIDGEY: That's right, we agree with that.

DR RENWICK: All right. Can I ask you something then about review, now you're the Department with whole of Government integrity oversight? And your Minister administers a number of important *Acts*: the *AAT Act;* the *Judicial Review Act;* the *Judiciary Act;* the *Ombudsman Act;* the *Inspector General of Intelligence and Security Act*.

Let me just with that preamble ask a couple of questions. In relation to Ombudsman or IGIS type review into - what I think is said in the *Ombudsman Act* is called "maladministration" - it's a broad term. You'd agree with me, wouldn't you, that because the citizenship loss board is comprised of people who fall solely within the Ombudsman's jurisdiction, and also people who solely fall within the IGIS's jurisdiction, that neither really could affectively investigate any complaint by themselves, as the law now stands? Have I got that right?

MS CHIDGEY: Yes, but I'd add that both the Ombudsman and the IGIS, their functions are to review the actions of individual agencies, so that would be the case in any event even if all individual agencies were covered by one, and they can work together cooperatively.

I think the other issue about the citizenship loss board is it's an inter-agency committee. Ultimately the advice provided to the Minister for Home Affairs is prepared and provided by the Department of Home Affairs – which is subject to the Ombudsman. The citizenship loss board itself has no legal identity and there's no decision making power.

DR RENWICK: Just to understand that fully, Ms Chidgey, is it the view of Attorney-General's that the citizenship loss board is not subject to oversight by either the Ombudsman or the IGIS, is that right?

MS CHIDGEY: That's right, like all inter-departmental committees, neither the Ombudsman nor the IGIS cover them, their functions relate to the actions of agencies and departments as legal entities.

DR RENWICK: I mean, one of the criticisms made of the law as it stands at the minute by some of the submitters is that, it is true it's an operation of law system, but it nevertheless must, like anything, have its implementation through human beings. And when you look at how it actually works, the ASIO qualified security assessment comes up to the citizenship loss board and there is then a discussion about whether the citizenship loss has in fact already occurred. Has the conduct happened? Was there in fact dual citizenship?

So I understand your point that technically, legally, they're not a decision making body. But in fact the view they come to, that the provision has operated and the recommendation Home Affairs then makes to the Minister for Home Affairs that: "Minister, you need to consider whether to tell the person that they've lost citizenship or not." They're not an unimportant inter-departmental committee, and they do have impacts upon the relevant people, don't they?

MS CHIDGEY: Possibly, but through a number of filters. So, the views that - so I mean there's obviously the QSA from ASIO, Home Affairs, advice on dual citizenship, Home Affairs provide the advice to the Minister for Home Affairs. And then I suppose ultimately the practical consequences of an assessment that there has been, by operation of law, a loss of citizenship.

In terms of its practical implications to people that then the other individual departments making a decision - say, on passports, or other consequences of citizenship loss. I think from our perspective, we don't think it would be appropriate and don't see benefit in suggesting that – there would be legislative amendment to have the IGIS or the Ombudsman cover a consultative coordinating inter-agency committee.

DR RENWICK: All right. Well let's then look at what recourse an affected person does have. Take the hypothetical case of a person who is notified that you just loss citizenship. Because, for example, we think you've been supporting ISIL - take that hypothetical case. In relation to, if they say: "Well, I was never a dual citizen." I think it appears to be fairly universal view that they can fairly readily go to the Federal Court and seek a declaration to that effect, and if they get a declaration that they never were a dual citizen, then the law has never operated. You agree with that? All right. You'd agree though, the more difficult problem for a person in that situation, is if they say: "But I never went to Syria."

Hypothetically, how then does that person restore their citizenship if they were – I suppose, option (a) is they will have received probably, an unclassified version of the qualified security assessment from ASIO. And under the *AAT Act*, they can go to the Security Appeals Division of the AAT.

I've explored this a bit with Home Affairs before the break, but again, let's take this hypothetical example. If the AAT says: "Well actually, we accept your evidence and your alibi evidence that you were never in Syria." And therefore the QSA should be set aside. What Home Affairs said - well, in that situation, technically speaking, they would probably still need to go to the Federal Court to seek a declaration, or they would need to ask the Minister to exempt - because that's just setting aside the QSA. Do you agree with that?

MS CHIDGEY: Yes, I do.

DR RENWICK: All right. If they then chose to start in the Federal Court but not the AAT having received the QSA, you'd agree with me, wouldn't you, that generally speaking it will be pretty hard for them to obtain a declaration that the conduct, which has led to the loss of citizenship, hasn't occurred.

MS CHIDGEY: Not necessarily.

DR RENWICK: Could you give me an example? I mean, what you have in mind?

MS CHIDGEY: I'm not sure if I can give an example, other than that as with most matters it would be a question of evidence before the Court. I mean, it's hard to speculate on the information a person might be able to present, but I don't think it would necessarily be impossible, or any more difficult before a Court than before the AAT.

DR RENWICK: Well, one difference between the AAT review and seeking, say a declaration at the Federal Court is the Federal Court would not see as evidence the classified version of the QSA.

MS CHIDGEY: It could see the classified version of the QSA and it would.

DR RENWICK: Well, if that were to happen, how would you allow the Federal Court, say, to see it without showing it to the applicant?

MS CHIDGEY: There are provisions under the *National Security Information Act* for controlling the information. It would need to give consideration to the evidence. It would be put forward from that I think, sort of hard to answer in the abstract, but - - -

DR RENWICK: Well, let me give you a "for example". You agree with me that a public interest immunity claim over, say, the classified QSA, means that the court doesn't see it by definition. They see it for the purpose of ruling on the claim, but they don't take it into account. That's step one.

But if it's to be taken into account, and perhaps I need to go back and look carefully at the *National Security Information Civil and Criminal Proceedings Act*, I think there, well, I'd be interested - perhaps you can take this on notice, but – I'd be interested in understanding better how under that *Act* you could stop the client seeing it, that is to say, the applicant seeing it. Could you take that on notice?

MS CHIDGEY: Yes, we'll do that.

DR RENWICK: Yes, all right. Just another general question then, to go back to my hypothetical example about the QSA being set aside on the grounds we've discussed, I do note – and this is just what the *Act* says – the Minister, of course, can't be compelled to consider whether to exempt or not. It's entirely optional for the Minister to consider that question. Isn't that right?

MS CHIDGEY: Yes.

DR RENWICK: All right. Do you – I appreciate that ASIO are normally, well Home Affairs are normally the respondents in these cases, but as the Department with oversight of the *AAT Act*, do you consider that the Security Appeals Division architecture works reasonably well, at the minute?

MS CHIDGEY: Yes, we're not aware of any issues. As you said, ASIO would have a more practical experience, but from our perspective, our understanding it works effectively.

DR RENWICK: You may remember that in my control orders report I recommended, and I think the Government accepted that for control orders there be special advocates, , private lawyers with security clearances who are authorised, in say control order cases, to see classified material although they can't show it to their clients. You're familiar with that concept? Can I ask just generally, what stage are we at in relation to the appointment of special advocates? Is that something which is about to happen?

MS CHIDGEY: We've done a lot of work on how we might set up that scheme, including administrative and legal support, who might be available as special advocates. We're still working through those issues.

DR RENWICK: If I were to recommend, as I outlined in the – that I might in the opening – that special advocates have a role in relation to any amendment to the *Citizenship Act*, the Department has already done some thinking about how special advocates might be appointed and used, and so on.

MS CHIDGEY: In the control order context.

DR RENWICK: Sure, all right.

MR DEL VILLAR: I just wanted to ask about something in the Australian Human Rights Commission's submission about our international obligations. And they've suggested that these automatic loss provisions are – this is in paragraphs 143 to about 150 of the Australian Human Rights submission. But the suggestion seems to be that the automatic loss of citizenship provisions are inconsistent with our obligations to prosecute international crimes, and I just wanted to get your views on that?

MS CHIDGEY: Because we can still extradite the loss of citizenship, is therefore not a barrier to prosecution.

MR DEL VILLAR: You wouldn't accept that criticism that they've made there?

MS CHIDGEY: No, we wouldn't.

MR DEL VILLAR: The next question I have was just in relation to the concept of allegiance and renunciation. It's the case, isn't it that for the purposes of these provisions, the terrorist act that's committed, or the terrorist conduct that gives rise to the loss of citizenship, may involve an act that's directed at a completely different country, not just Australia. Is that – that's your understanding as well, isn't it?

DR RENWICK: Just to explain that a little further, this came up in the last questioning. When you look at section 33A, I think subsections 3-5, it picks up, if I can call it, terrorism like intent from the *Criminal Code* definition? And as you may recall that talks about an act intended to intimate or coerce, not only an Australian Government or the Australian population but a foreign government. That's the context, I think, in which that question arises. Just to give you the background.

MS CHIDGEY: Sorry, we might need the question repeated.

MR DEL VILLAR:I guess what I am really interested in is the concept of renouncing one's Australian citizenship which seems to underpin these provisions, and as James was indicating, in section 33AA, there's a reference there to provisions which allow for coercing or intimidating the Government of the Commonwealth or a state, or a Foreign Country or a part of a state territory or Foreign Country. I guess I just wanted to get your view on the proposition that for the purpose of our citizenship laws, we would say one renounces Australian citizenship by committing a terrorist act directed at a completely different country. You'd accept that?

MS CHIDGEY: Yes.

DR RENWICK: I just wonder as a follow up question, does that have a consequence for – I mean I wonder whether it has a number of consequences – but, it might mean one has to rely more on the external affairs power than the aliens power conceivably. In other words, I think what follows from Mr Del Villar's question is that the concept about something which is against - is contrary to your allegiance to Australia. If it were done to a foreign government, who was not an ally of the Australia might even be, an opponent of Australia. It seems to stretch the logic a little, doesn't it?

MR DEL VILLAR: Yes, so just wanted to get your view on that.

MS CHIDGEY: I don't think it goes to the sort of universal reprehensibility of terrorist acts.

DR RENWICK: No, no. I understand that, but anyway I again you might want to take this on notice, but I just wonder whether it does have a consequence for the theory of renunciation of allegiance. If what you're talking about is an act directed to a third country, which it could be, when that third country could well be far from being an ally of Australia, in legal theory?

MS CHIGEY: I think it would be - that would be more a matter for Home Affairs – who deal with citizenship matters.

DR RENWICK: That's it from us, so thank you for your replies and we thank you for attending. Ms Chidgey, yes, If you could liaise with Mr Mooney about answering those question on notice, I'd be very grateful. And thank you all for coming in and I invite the Department of Foreign Affairs representatives to come forward.

Department of Foreign Affairs and Trade

DR RENWICK: I warmly welcome Acting Deputy Secretary Larsen, and Ambassador Foley, representing the Department of Foreign Affairs. Gentlemen, did either of you have an opening statement?

MR LARSEN: I have some very few words, if that would be convenient?

DR RENWICK: Yes.

MR LARSEN: Good morning and thank you, Dr Renwick, for the opportunity to participate in today's public hearing on the operation of terrorism related citizenship loss provisions in the *Australian Citizenship Act*.

Citizenship loss is one of a range of measures used by Government to manage Australians of counter terrorism interest and acts in conjunction with other measures to limit any threat posed by those individuals. The Department of Foreign Affairs and Trade plays a role in the citizenship loss process, as a member of the citizenship loss board. For offshore cases, citizenship loss does not operate through the decision of any Minister, but applies automatically by operation of law.

DFAT's role on the board is to advise on the international implications of the cases presented. This includes the manner and timing of any engagement with countries of second citizenship, and/or countries where the individual is physically located.

DFAT also provides input to the board's recommendations on whether or not the individual should be given notice of their Australian citizenship loss. This includes implications for consular services and the provision of travel documents. DFAT's advice on these matters is included in the advice that goes to the Minister for Home Affairs

Citizenship loss by its very nature, presents challenges for Australia international interests. These interested are managed actively on a case by case basis with relevant international partners. Thank you.

DR RENWICK: Just to begin then, I'm sure we can agree that it's a serious step to take someone's citizenship away?

MR LARSEN: Yes, indeed.

DR RENWICK: And to unpack that a little, you've referred to consular services and travel documents. The right to consular assistance, is that simply national practice, or is that to be found in international law as well?

MR LARSEN: The Australian Government's perspective on consular assistance is that there's not a right to receive it as such, as the Australian consular charter sets out. Consular assistance may be provided by the Government in particular circumstances and that assistance will always depend on the particular circumstances. But assistance is provided on a case by case basis and the distinction between, I guess, a right or obligation on the part of the Government, which the Australian Government would not accept in relation to consular assistance. And the provision – the circumstance in which consular assistance is provided, that's made clear in the consular charter where we explicitly state:

> *You don't have a legal right to consular assistance and you shouldn't assume that assistance will be provided. We may limit assistance where, for example - - -*

We go with a number of particular circumstances.

DR RENWICK: All right. Then talking about travel documents, one of the propositions I put to one of the departments this morning was that the Minister has chosen – it seems that the Home Affairs Minister, in 11 out

of 12 notified cases, to not tell the person for six month periods, and so on, that they have lost their citizenship. And the point I made to them though, is that that may end up being ineffective because if an Australian, or someone who thinks they're Australian overseas, turns up at an Australian mission overseas and says: "Hello, I'd like a travel document." Either, you need to process that and give it to them, or you need to say, don't you: "I'm sorry, you're no longer entitled to it" as a practical matter.

MR LARSEN: Well certainly, I think as contemplated, within the legislative regime, the Minister has the ability to make a decision that no notice will be provided.

Obviously, there are a wide range of particular circumstances which would be taken into account in relation to that decision. One possible circumstance could be that the person in relation to whom the decision has been made, not to provide a notice could turn up a consulate or embassy to find only in that circumstance that they don't have a right to what they're seeking.

That is a possibility, but I think in fact though, the broad legislative regime potentially covers any number of other different circumstances where, notwithstanding, the disadvantage that might arise in the particular instance you've identified. It would still, nevertheless, be valid and maybe even necessary step to take.

DR RENWICK: Yes, I am not criticising the decision by the Minister to not give notice, I'm simply making what I thought was an obvious point that may turn out to be ineffective if the person happens to turns up and say: "Here I am, where's my passport?"

Because your options, I assume, overseas are limited in those circumstances to saying: "Yes, we'll process it" or: "No, I'm sorry, you're not entitled to anything."

I'm not trying to be tricky, but is that broadly right?

MR LARSEN: That is a possible consequence, yes.

DR RENWICK: All right. Well then, can I just ask a bit about representations and the death penalty, just talking generically. Australia for many years has had a strong view against the death penalty, we don't have the death penalty in Australia, we condemn it overseas and so on. And we've seen cases in the past like the Bali Nine, where significant diplomatic consequences have followed for another country who chooses to execute Australian citizens. Not talking about any case, we're talking

hypothetically, isn't it one of the consequences of the loss of citizenship that any further representations DFAT were to make would be treated by the other government as generic, rather than specific and therefore would be likely to lose their force?

MR LARSEN: I think that's uncertain. I think it depends on the particular case, the particular country, or government, that we're dealing with, the nature of the bilateral relationship that we have with that country.

Clearly in circumstances where the Government is advocating for a national, there will be instances where that has a particular resonance. However, I think particularly in circumstances where you might be talking about a loss of citizenship, for instance, if the Government continues to make representations against the death penalty being applied in relation to an individual. I think that notwithstanding the fact that that individual may have lost his or her Australian citizenship, I don't think the citizenship issue will be determinative of their success or otherwise of the representations. It may an influencing factor, as to how those representations are taken into account by the receiving government, but I don't think it's clear that it will be determinative.

DR RENWICK:You may have seen in the Home Affairs submission that one of the – mention a number of complexities. One is criminal prosecutions, one is the activity of intelligence agencies which need to get additional permission to take action against Australian citizens, as the *Intelligence Services Act* contemplates and the third is complications for bilateral relationships. We're not talking about any particular case, are you able to say anything at all about how the operation of law and loss of citizenship provisions might have an impact in bilateral relations?

MR LARSEN:Of course. I mean, I think there are two bilateral relationship contexts in which to this will arise; the first relates to the relations one has, or the Government has with another country or Government which may be responsible for holding an individual; the second, of course, will be the bilateral, if any, consequences that might arise with respect to a country of alternative or second or third citizenship.

In relation to any of these incidences, I think ultimately it will always be case by case. It will depend on all of the circumstances. It will be the case in some instances where a detaining country may think more adversely about the case, or perhaps more adversely about Australia's standing in relation to the matter, if it becomes aware that the relevant individual has lost Australian citizenship.

But I think it will depend in the many instances that the individual will of course be facing criminal or other proceedings in that country and I think the evidence suggested the question of loss of citizenship doesn't necessarily undermine those proceedings. And of course as we know, loss of citizenship does not undermine the capacity of the Australian Government to pursue return of the individual, pursuant to relevant extradition processes. I think these issues will always have to be carefully managed, of course.

In terms of how we engage with the relevant government, and one of the considerations which we will be mindful of is the importance of ensuring - in relation to a certain number of countries anyway - that you have continuing good law enforcement cooperation and good intelligence cooperation where it's relevant. You clearly do not want a case of loss of citizenship to undermine those interests, so how you manage the relationship with the country that might be holding the individual is going to be important, in that respect.

I think appropriately contextualising the loss of citizenship circumstances, appropriately explaining the nature of our laws to that country that will always be an important responsibility of our diplomatic representatives in the relevant country.

In the case of - - - I beg your pardon?

DR RENWICK: No, no, Please go on.

MR LARSEN: In the case of a country which might be the country of second or other citizenship, there's clearly a strong interest in making sure at an appropriate time, there is close engagement again, contextualising explaining the circumstances of Australia's position.

DR RENWICK: And to take that latter example, one of the complications caused by the operation of law provisions, in contrast to the conviction based Ministerial decision making model is that in the latter you can easily fix it a time when citizenship is lost, in the former, you may not be able to. And that's a complication, obviously. You just don't know.

MR LARSEN: I would agree with that, and of course in our engagement with third country governments, appropriately contextualising how our current law works is in that regard is very important.

DR RENWICK: Can I ask, I think you were here when I asked Attorney-General's about complications – using the Prakash case as an example, the Shamima Begum case may it be another example between de facto and

de jure, and that's something you would be involved in I suppose at some level. That in a particular case a person may have a passport, they may have a citizenship certificate, but the other country says "I'm sorry, they're never coming here." And that's an additional complication, I think Attorney-General's agreed one way you could resolve that, possibly, to ensure you didn't breach the convention on statelessness was for the Minister for Home Affairs to in effect, reinstate Australian citizenship. But did you want to comment on that scenario, and how one might deal with it?

MR LARSEN: I think those issues are probably more properly dealt with by the Attorney-General's Department and Department of Home Affairs. But it is clearly a matter we turn our mind to and how you navigate between the various different positions, yes.

DR REWICK: But it's something your Department would have to take up at a practical level, wouldn't you, if you were trying to understand why a person who apparently had de jure citizenship wasn't being allowed back to the other country at a practical level, isn't that something DFAT would try and understand? In consultation with the other nation?

MR LARSEN: Certainly, when you look at the exemption and notice of revision provisions are under the legislation, of course, one of the matters that the Minister may take into account, of course, is international interests and law enforcement cooperation and those matters. Those issues will play in the Department of Foreign Affairs and Trade is represented on the citizenship loss board, and it's in that context that the Department of Foreign Affairs and Trade provides advice or information to the board and the expectation is that that advice or information will inform the material that's provided to the Minister for Home Affairs.

DR RENWICK:Different countries obviously take different approaches; there've been statements by the United States that people should have their foreign fighters return for prosecution. I think the French may have said something similar. We clearly take a different approach. There's obviously a variety of approaches which one can see in the international arena.

MR LARSEN: I agree.

DR RENWICK: Can I ask you, Ambassador, can you say a little more about your current role as Ambassador for Counter-Terrorism?

MR FOLEY: Certainly, my role is largely engaging with international partners on the CT issues, and ensuring that international trends are

reflected in the Australian domestic context and discourse and also vice-versa.

DR RENWICK: One of the things (I don't think you were here for the opening) but one of the things I have to do is form a view about the current threat level and whether the laws are proportionate to the relevant threat and one of the things I said is the atrocities in Christchurch and Sri Lanka are yet to be fully worked out in their implications for threats to Australia. But as we sit here now, what is your appreciation of the impact of those acts?

MR FOLEY: Well I think the threat environment internationally is still a serious one. Obviously everyone was pleased, the countries were pleased with the territorial defeat of ISIL, but that does not in any way undermine its ongoing seriousness. As a threat, it still has active affiliates, it is still an effective underground, body and it has the ability to motivate lone actors. Al-Qaeda is still there, and of course as you said, Dr Renwick, there is an emerging issue of the growing threat of right-wing extremism in many countries and how that feeds into the threat of Islamist extremism.

Overall, the threat is still very serious, it's still serious, it's evolving, and it's becoming more complicated, dispersed and disparate. It is certainly a threat which continues to engage our national security interests.

DR RENWICK: Can I just read you something I said in the opening, and I'll just ask you whether you agree with it, or have any comments:

> *ISIL's rise which led to the so called "Caliphate" took almost everyone by surprise. I expect its capacity surprise may continue. ISIL has produced - - -*

And this is the bit I'd like you to comment on:

> *ISIL has produced a large, now widely dispersed, radicalised highly trained diaspora of actual law potential terrorists. Many of whom remain with their supporters independence, including children, outside their countries of citizenship.*

Do you agree with that?

MR FOLEY: Yes. It's clear that one of the distinctive factors of ISIL was the large number of people who went to join it. And a good number are in detention in Syria or their current location is unknown and they continue to pose a threat, either where they are, or with their networks at

home, or through their potential to disperse to other countries, including our home country.

DR RENWICK: And various numbers have been mentioned about the numbers of Australians who went, the number of Australians who have presumed who have died, and Home Affairs' submission says it's estimated there's roughly 80 foreign fighter's independence left. How does, per capita, how does Australia's involvement in ISIL measure in world terms – we're relatively high up the list, aren't we?

MR FOLEY: I wouldn't say we're high up the list. I think it's – we're probably in about the middle. I think it's per capita, I don't think we're near the top. As I said, I think we're about in the middle.

DR RENWICK: All right. Just again, a generic question. Does the loss of citizenship affect the sharing of information with other countries? I know that's a very high level question.

MR LARSEN: Without wishing to appear facetious, other than I think it depends. On balance, I would argue that to date the experience has been noted that it hasn't impacted. That's a consequence of careful engagement, careful contextualisation of our regime. It's a possible risk, but I don't think it's a particularly high risk based solely on the question of citizenship.

DR RENWICK: All right. Well that's been very efficient gentlemen, I think we've come to an end. Thank you so much for coming in. Ladies and gentlemen, I think we get an early lunch. We're coming back, I think at, 1:15 and we will certainly finish by 4. Thank you very much. We will pause the live stream there.

ADJOURNED **[1151]**

RESUMED **[1312]**

DR RENWICK: So good afternoon ladies and gentlemen; I welcome you back to this hearing in relation to citizenship loss provisions.

Australian Human Rights Commission

And we now warmly welcome the Australian Human Rights Commissioner, the Commissioner, Edward Santow, and the Deputy General Counsel, Graeme Edgerton. Gentlemen, can you both hear me?

MR SANTOW: Yes, I can. This is Edward Santow here.

MR EDGERTON: Yes, Dr Renwick; Graeme Edgerton here.

DR RENWICK: Did you have any opening statement, either of you?

MR SANTOW: Yes, I do. On behalf of the Australian Human Rights Commission, thank you for the opportunity to give evidence.

Under the *Australian Citizenship Act*, a dual citizen can lose their Australian citizenship for particular terrorism-related conduct. The law aims to ensure the safety of Australia and its people, and to ensure our community is made up of people who are loyal to Australia.

The Commission supports robust laws that pursue these legitimate, important aims; however, international law requires that any Australian Act is proportionate to the relevant threats and does not unnecessarily limit human rights. The Commission considers these requirements have not been met in a number of these provisions, and that Australia therefore would be in breach of its international human rights law obligations.

In our written submission, the Commission outlined six key concerns, those being very briefly:

(1) The automatic citizenship loss provisions;
(2) The application to children as young as 10 years old;
(3) The lack of procedural safeguards;
(4) Fourthly, the lack of independent external review of many decisions;
(5) Next, the breadth of conduct that could lead to loss of citizenship which is unclear, and may include conduct that doesn't demonstrate a person's repudiation of allegiance to Australia;
(6) And finally, the retrospective application of citizenship loss in some cases.

If I may, I might briefly expand on the first three issues, the first being the conduct-based provisions, operate automatically; so no formal decision is made to remove an individual's citizenship by a court, a Commonwealth office, or anyone else. The individual doesn't need to be convicted of an offence; instead, citizenship ceases immediately upon certain conduct

being carried out; so what that means is, whether and when someone has lost their citizenship is uncertain, or at least can be uncertain.

That process also means there's no opportunity to consider an individual's particular circumstances to determine whether the loss of citizenship is warranted. So, to give a practical example: a 14-year-old may donate $1 to a terrorist cause, and could automatically lose their citizenship for financing terrorism, in exactly the same way as an adult who travelled overseas to fight for Islamic State.

There is no objective measure of gravity of conduct, in other words, or the degree of threat to Australia, and that raises serious concerns about the necessity and proportionality of automatic citizenship loss.

We note that there are already extensive tools in Australian law to address these sorts of threats, and that suggests that the citizenship loss provisions may be disproportionate to their aim, as they appear to give little or no additional protection to the community.

The second example or issue that we wanted to draw on was the procedural safeguards in the conduct provisions; we see those to be inadequate, as there's no natural justice requirement and an individual won't have the opportunity to make submissions about why that citizenship should not be lost, or to respond to adverse allegations.

There is no requirement to provide reasons, and while there is a notification requirement, that's subject to broad exemptions, and we understand that no person has been successfully notified of their loss of citizenship, to date.

There is no avenue for merits review and only a limited ability to seek judicial review. And while we acknowledge that the Minister can restore a person's citizenship, the Minister is not required to consider exercising that power.

The final point that we wanted to expand on briefly is that the Commission is seriously concerned about the adverse impacts of these provisions on a child's right to nationality, and their right to have their best interests considered as a primary consideration when decisions are made that affect them.

Children, we know, are at risk of being manipulated or exploited by adults; they may be victims more than they are perpetrators. And so in light of their physical and mental immaturity and developing neurological

make-up, children should be treated differently to adults and afforded additional protection.

Overall, the Commission considers that loss of citizenship should be possible only after criminal conviction for the gravest conduct that also repudiates allegiance to Australia.

If that recommendation isn't accepted, then we submit that the procedural safeguards should be strengthened. We say the loss of citizenship should never be automatic, especially for children; it should require a positive decision by an appropriate Commonwealth officer, after careful consideration, reasonable justification, and due process. There should be robust review and oversight mechanisms.

We're happy to answer questions.

DR RENWICK: Yes, thank you, Mr Santow. Can I firstly say, thank you for your, as always, comprehensive and helpful submissions?

Can I start perhaps with what might be called the slightly more conventional provisions, 35A, and your recommendations 10 and 11 on page 9 of your submissions?

MR SANTOW: Yes, certainly.

DR RENWICK: In dealing with those conviction-based limitations, do I take it that's subject to recommendations 9 and 10 being activated; you don't otherwise have a particular concern about those provisions? Because there would be a relevant criminal conviction, punishment of at least six years. And if it didn't apply then to children, you might not be happy with them but you would regard them as adequate?

MR SANTOW: Yes. If those recommendations are followed, that we would not say that those provisions are inconsistent with international human rights law.

DR RENWICK: Now, it's the case though that those provisions haven't actually been used so far; we don't have any experience of them. That may be partly because the time for considering whether to apply those provisions has not yet arrived in relation to the 72 people who have been convicted, assuming any of them in fact are dual citizens; so that's something to keep an eye on.

But can I then turn to really the far more problematic operation of law provisions and just go through those?

So I have already made, I think, fairly clear that my pretty strong prima facie view is that they are neither necessary nor proportionate, nor do they adequately protect human rights. If, however, that sort of recommendation from me was not accepted, firstly, I assume you would agree that the Citizenship Loss Board should be able to be investigated for maladministration by the Ombudsman, and/or the IGIS; whereas, at the minute, because it's made up by a combination of intelligence and non-intelligence officials, neither the IGIS nor the Ombudsman would appear to have full jurisdiction over the Citizenship Loss Board.

MR SANTOW: Yes, agree with both of those propositions. The primary position that those other provisions should be repealed, that's also our primary position. And yes, we have made a number of recommendations for greater oversight over the decision-making process, and the additional measures that you've just flagged make sense.

DR RENWICK: Just a more general question, then: you'd agree, wouldn't you, that within limits, states can regulate the acquisition and loss of nationality, for example, within the limits set by international law?

MR SANTOW: Yes.

DR RENWICK: All right. So I really don't need a great deal of further persuasion about the many problems with the operation of law provisions, to be frank; what I'd like to explore for a minute is what might take their place.

So one analogy might be with provisions like section 501 of the *Migration Act*, whereby if the Minister is satisfied of certain matters, then the Minister may do certain things, but there is, at least, judicial review.

Now, one of the concepts I'm considering is whether you would look for a combination of the Security Appeals Division of the AAT, which presently deals with loss of passport cases in security matters, and the procedures adopted by the Special Immigration Appeals Commission in the UK, relevantly, but not only, the idea of special advocates.

Just to explain that a bit further: one of the difficulties in this area is that the information that a minister might have that someone has been, for example, supporting ISIL, may not be admissible evidence; that may have something to do with the sources of the information, or the methods by which it was obtained. But nevertheless, it might be probative material of the type a minister could have regard to, say, under section 501 of the *Migration Act.*

So do you have any broad comment about the permissibility in making administrative decisions? Let's assume we have a ministerial-based model of the Minister looking at evidence which might be classified, providing it's probative.

MR SANTOW: And I make a general observation - and I might hand over to the Deputy General Counsel to make some more detailed observations - but the broad proposition is that we supported, as our recommendation I think makes clear - the existence or the inclusion of some provision for independent merits review and more, I guess, comprehensive and practical measures for judicial review.

That, in turn, means that some I guess account needs to be made of the fact that some of the material, the evidentiary material that is relied on for these decisions, may be security-sensitive. And so yes, we put some detail in our submission that basically said, "Okay, well, here are the sorts of things that could be done in order to ensure that there is both merits and judicial review that is practical and effective, but that also doesn't cause problems for the protection of national security."

But perhaps I can pass over to my colleague to expand a bit more on that?

DR RENWICK: Sure.

MR EDGERTON: Thanks very much. Graeme Edgerton here, Deputy General Counsel.

In terms of the form that that merits review would take, I think that we agree with your opening comments, Dr Renwick, that it could well be a combination of the existing procedures with the Security Division of the AAT, augmented by a special advocate process as they have in the UK, and has been set up under legislation in relation to control orders.

The starting point from our point of view is identifying what decision would be subject to merits review, and you will have seen from our submission that we think that this should be a conviction-based regime with a decision by the Minister; that decision would take into account the nature of the conviction, whether the conduct of the person shows that they've repudiated their allegiance to Australia, and whether removal of citizenship is appropriate, having regard to all of the circumstances.

So that is the model that's now in section 35A; that's the decision that we say should be subject to review. We say that merits review is appropriate

because of the very significant impact that citizenship loss has on individual rights.

As you've said, in some cases it might not be possible to conduct such a review in public because there might be information that was considered by the decision-maker that has the potential to affect national security if that was made public.

The Security Division of the AAT already has existing structures to deal with this kind of information. At present, that Division is responsible for reviewing adverse or qualified security assessments by ASIO, decisions by National Archives about access to ASIO records, and also decisions made by issuing authorities under the *Criminal Code*, to make preventative detention orders.

In the case of ASIO security assessment reviews, those reviews are conducted in private. In general, the applicant has a right to be present during the hearing, but ASIO may certify that some of the evidence or submissions are of such a nature that disclosure would be contrary to the public interest because it would prejudice security or the defence of Australia. If ASIO gives a certificate of that nature, then the applicant must not be present while the evidence is adduced or the submissions are made. The applicant's representative may be present but only with the consent of the relevant minister.

So while there are some procedural fairness issues raised by this process, the Commission considers that it's preferable to having no merits review at all. We think that the process could be improved by allowing for a security-cleared special advocate to be present. And as I mentioned, that could follow the regime already established for control order proceedings.

DR RENWICK: Thank you. So just to unpick that a little: let's assume then that 35A, the conviction-based model, then has both merits review and I suppose, the constitutionally available judicial review of the Minister's subsequent decision. So, let's take that sort of model.

The problem, it seems to me, with the adequacy of judicial review - and I think this runs up hard against some Constitutional limits - is that cases like *Graham* in the High Court tell us that in contrast to public interest immunity which says the information is not taken into account by the decision-maker, it will not be constitutionally valid for the Parliament to tell a court exercising federal jurisdiction, "You may never have regard to this particular information."

And so unless you have a special advocate-type procedure in say, the Federal Court, that's going to be a practical problem, isn't it, just dealing with judicial review for a minute?

MR EDGERTON: I think that would be a practical problem if the legislation prohibited a court from reviewing that information and taking it into account. So if there were judicial review proceedings, then the court would need to be able to, at least itself, have regard to that national security information, even if there were restrictions on access, to the applicant.

DR RENWICK: And I think you agree with this proposition: that's why in this instance, the additional availability of merits review in the Security Appeals Division with the add-on of a special advocate would be highly desirable.

MR EDGERTON: Yes, that's right. And we see a real benefit in having merits review alongside judicial review, largely because of the nature of the decision and the very significant impact on individual rights. Merits review allows the reviewing tribunal to step into the shoes of the original decision-maker and consider whether that decision was a correct and preferable decision, which is a sort of broader review right than would be available if only judicial review was available.

DR RENWICK: Well, can I ask you this, then? And this may test your knowledge and my knowledge of what happens in England; and I know Dr Thwaites knows more about this and he's going to give evidence later. But there are a couple of policy issues there, so I suppose one question is what deference, if any, the AAT shows to a ministerial-level decision about the public interest?

A minister, in our system, is thought to be uniquely placed to take into account that multitude of factors; now, the Minister could give reasons, but is it appropriate that the tribunal show a measure of deference to it? Because what I think happens in Britain - and again, we'll check this - is it is not a full merits review, if I can put it that way; it's rather considering the reasonableness of the Minister's decision, albeit in that tribunal context.

MR EDGERTON: I might have a go at answering that question first, and I'll see if Commissioner Santow has anything else to add in relation to it.

In terms of the taking into account of public interest factors, my understanding is that tribunals in Australia do make independent decisions, but have regard to policy and guidance documents that are

issued by various government departments, when they're making those decisions. So, there is an acknowledgement of policy that's set by the executive and the desirability of decisions that are to be made, consistent with that policy.

In terms of the UK position, I note that the Law Council has made reference to some concerns about the Special Immigration Appeals Commission, particularly a review that was done by the House of Commons Constitutional Affairs Committee. We haven't reviewed that in detail, but we would urge any policy-makers developing a new merits review system here to have regard to any concerns that have been expressed about how the system in the UK did operate.

MR SANTOW: And I'll just add, I obviously endorse everything my colleague has said.

I guess if you follow the logic, Dr Renwick, of your argument or your point, the danger then is, you end up having the Minister, or someone at first instance, certifying certain matters that simply cannot be kind of reconsidered in merits review. And I guess it detracts from the level of scrutiny that is available.

I think where that occurs - and it only occurs very rarely in the current law - I think that it does, I guess, mean that that independent, external merits review, that independent component of that merits review, diminishes.

DR RENWICK: I mean, there are different ways you could do the model, isn't there? I mean, you could have a certificate saying that's it, but you equally could build-in, in a formal way, some recognition that a Minister of the Crown, appropriately informed, does have a particular status when making decisions about the public interest which even a tribunal should be cautious before it overturns.

I suppose that is the concept, rather than a certification saying it's off-limits, that I was raising.

MR SANTOW: And I think if it were very carefully crafted in that way, then there may be merit in looking at that. I guess the other countervailing point though, is if a merits review tribunal were to, I guess, stray beyond what was objectively reasonable in the circumstances and kind of substitute its own unreasonable view on an important question of national security, then of course, that would be susceptible to challenge and judicial review; and appropriately so.

DR RENWICK: I think that must be right. A couple of other things: I mean, certainly what I do know about SIAC - and having spoken to some of the special advocates - is that one of the first things they do in a closed hearing when they've got the classified brief of evidence or tribunal documents, is usually to argue very strongly that things have been over-classified and that more information should be given to the applicant.

And that is certainly something I would favour in this type of model, and I assume, you know, that would almost go without saying?

MR SANTOW: We agree with that.

DR RENWICK: So the special advocate is entitled to be present throughout the entirety of the hearing, and then at the end of the process, both open and closed reasons are produced; the closed reasons are made available to the special advocate, and the special advocate would then also be entitled to utilise those in an appeal on a question of law under section 44 of the *AAT Act*, to the Federal Court. And the Federal Court would also have access to the closed reasons and the open reasons, so you would avoid any *Graham*-type constitutional problem, and also make the right of appeal on a question of law, meaningful.

Do you have any views on that?

MR SANTOW: I don't. Did you want to add anything, Graeme?

MR EDGERTON: No, no, I mean, that sounds like a sensible approach.

DR RENWICK: So we've been talking about that hypothesis in relation to a conviction-based regime.

I suppose my question then, from a policy point of view is, accepting that there will be cases where there will not be available evidence which meets the criminal standard for conviction, what is the Human Rights Commission's view about the alternative possibility where you've got that probative evidence and you then could still have the merits review so it can be tested with a special advocate; what are your comments on that?

MR EDGERTON: Look, I think our primary position is that if there is evidence of wrongdoing but it's insufficient to establish a conviction, there is still other action that the Australian Government can take in respect of an Australian citizen, to, I guess, ward-off or diminish the threat that they might post to national security, and the Australian community more generally. And that that should be the focus of the Australian Government, not on removing that person's citizenship.

DR RENWICK: I just wanted to ask you a couple of questions about the rights of children, which, as always, is something of great concern. Do you want to say anything more about what you have in mind in relation to children?

I mean, in the hypothetical regime we've been talking about, of merits review following a conviction-based regime, if it involves someone, say - well, there are two issues, aren't there? Let's take the case of someone between 14 and 17: they have criminal capacity and *doli incapax* doesn't apply, and then if there are particular questions of vulnerability or there are questions about their mental or other immaturity, that could be taken up, presumably, at the merits review stage by any necessary expert medical evidence, could it not?

MR EDGERTON: Yes, we would want it to be. And ideally, that should be something that is spelt-out as a mandatory or relevant consideration.

DR RENWICK: And then for children who have the legal capacity to commit a crime but are under 14, you say it shouldn't apply to them at all, even though at least in theory, they are able to be convicted of a criminal offence?

MR SANTOW: That is correct. We see that the risk that such young people pose is outweighed by the negative impact of removing their citizenship. And I guess, also because of their extreme youth, if I can put it like that, they are much more likely to have been exploited or influenced improperly by others, adults. And you know, on the other side, because they are so young their capacity for reform is much greater.

DR RENWICK: So one final question from me: in my opening I gave the example I used at the Lowy Institute the other day. You may remember, Mr Santow, of the case of an Australian woman who is not notified that she's lost her citizenship; she goes ahead and brings children into the world, in the mistaken assumption that they are Australian citizens and they're not.

And there must be a possibility on that hypothesis, they might be stateless as a result. It seems to me, strictly speaking, that's not a breach of the Convention on the Rights of the Child, nor on the Convention on Statelessness; it is, to my mind though, deeply troubling.

Is there any legal framework by which I can measure that sort of instance?

MR SANTOW: I must admit, I haven't turned my mind to that question, but perhaps my colleague has.

MR EDGERTON: I'm not sure, off-the-cuff, whether I can add any more, actually.

DR RENWICK: No, that's all right. But if you did think of something fairly soon on that, I'd be interested in your views. But in the absence of any other questions, I just repeat that yet another very helpful, detailed, submission, and thank you both for taking part.

MR SANTOW: Thank you, Dr Renwick. Could I make one very brief comment before we go? When we were talking about the deference to be owed to government policy, the decision I had in mind was Brennan J's decision when he was then President of the AAT, in *Drake v Minister for Immigration and Ethnic Affairs No.2,* 1979 2ALD 634.

DR RENWICK: I do remember that one. Yes, thank you. Thank you both and we'll leave you to it.

MR SANTOW: Thank you.

MR EDGERTON: Thank you, Dr Renwick.

Civil Society Representative - Australian National University

DR RENWICK: Professor Rubenstein, are you happy to come forward? We're delighted to welcome a distinguished academic, Professor Kim Rubenstein, to give evidence this afternoon. Professor, did you want to make any opening remarks?

PROFESSOR RUBENSTEIN: Yes. And I might just say for the record, that I pronounce my name Rubenstein, so I'm Kim Rubenstein.

DR RENWICK: I'm so sorry.

PROFESSOR RUBENSTEIN: No problem at all. And I'm delighted to be able to appear before you. And indeed, my opening comments are a form of a submission, because I did not have the capacity to provide a written submission. Although as I'll explain, I've been on the record many times, discussing these provisions in a range of different contexts, and I'll draw from those in my comments to you. And I will also be delighted to respond to some of the questions you've been raising with some of the other individuals this morning, in a range of different ways.

So what I might do is just give you a slight background in terms of my interest. I've brought with me two texts that are relevant, and of course, my book on Australian citizenship law, and I'll be referring to that in a moment.

I also brought with me this edited collection with my colleagues Fiona Jenkins and Mark Nolan called "Allegiance and Identity in a Globalised World." And what I will do after this session is send through the introduction to your office, because there are aspects that I will speak to shortly about allegiance that I think might assist you in your thinking through the place of allegiance in the legal framework.

DR RENWICK: Yes, please. Yes.

PROFESSOR RUBENSTEIN: The other thing that I thought I would also note is, in addition of course to my academic role, I have maintained a practising certificate since I was admitted in 1989, and have been on the roll of the High Court, and I have now appeared in three High Court matters on citizenship; I was, in fact, the junior to the Solicitor-General in *Singh* that you've cited from, which occurred after I appeared opposite him in a special leave application in a matter to do with deprivation of citizenship.

And, then later appeared also for the applicant in a very significant deprivation of citizenship case called *Ex parte Ame*, which is also relevant I think, and will, if this ever does come before the High Court, be relevant in an assessment of the capacity of the Commonwealth to strip individuals of their citizenship.

So I've had that experience. In addition, I was the consultant between November 2004 and June 2007, to the then Department of Immigration and Multicultural Affairs and Indigenous Affairs, for its rewriting of the 1948 Act as the 2007 Act; I was the drafter of those provisions, obviously with the work of the Parliamentary Council, and so have an understanding. Of course, I will not share anything that is not on the public record in relation to that, but it does also assist in my understanding of the earlier deprivation provisions and how they compare to the current provisions.

And then finally, in 2008 I was a member of the independent committee that was established by the then Minister for Immigration and Citizenship, Chris Evans, reviewing the Australian Citizenship Test, and was the drafter of the report, "Moving Forward: Improving Pathways to Citizenship."

In many ways that is also a frame for thinking about what I would encourage you in your office to be thinking about: the place of citizenship in Australia, as a more macro-notion, which has to sit side-by-side your concerns for its role in terms of security. And that is another theme that I will come back to, in terms of my concerns about these deprivation provisions in relation to what is otherwise, in a more holistic sense for citizenship, a measure for social inclusion, a measure to encourage a more cohesive society.

Historically, Australia has used citizenship legislation as a frame to encourage people to become citizens as a way of ensuring their commitment and loyalty and connection to Australia, as opposed to what I would say is the frame of this legislation of a form of exclusion, of seeking to exclude rather than to include. And I think that that has overtones for the consequences for social cohesion, which must be relevant to questions of security internally in Australia, not only in terms of overseas.

And you did raise a question earlier today about what is the impact of this on dual citizens? And I'd like to come back to that, because I think that.

DR RENWICK: Please.

PROFESSOR RUBENSTEIN: Because I think that is actually very important.

So that's a slight background to my interests. And I have, as I said, made written submissions before on other iterations of this, so I'll be drawing on those in terms of these opening comments.

In terms of the history of citizenship in Australia, as you would know, the actual status did not come into being until 26 January 1949. And I think what is really interesting in terms of these deprivation provisions, there are only two provisions that were in that Act that led to loss of citizenship in an operation of law type of frame; one which you've identified already, which is the section that is now modelled on the earlier section 19 of the Act, which is if you're a dual citizen and you fought for a country at war with Australia, you automatically lost your citizenship, on the books.

Now, what is really interesting is when I wrote the first edition of this book, I contacted the Department to ask if there was anyone they were aware of who had lost their citizenship by operation of that provision, and the formal answer - which I write about in the book and still in the second edition - is that no-one could ever have lost their citizenship under that provision because Australia had never formally declared war; so that there

had never been a circumstance that the government had identified for someone - - -

DR RENWICK: You mean after 1949, we hadn't declared war? We'd declared war before that.

PROFESSOR RUBENSTEIN: Yes. So since the Act came into being in 1949, to the date of the first edition of my book, which was 2002, and which, to this very day, has not changed.

DR RENWICK: Yes.

PROFESSOR RUBENSTEIN: So there are two points about that: one is the very narrow framework, because no-one had ever lost it.

DR RENWICK: No.

PROFESSOR RUBENSTEIN: And secondly, that because no-one had ever lost it, there had never been an opportunity for it to be tested before the High Court, or before the court. So I think that's significant, in terms of the untested nature, which of course, makes it vulnerable given we do not have a decision in relation to the capacity of a state to strip someone of their citizenship.

The second, which I think is fundamentally interesting because it links back to the whole question of dual citizenship, is that there was a provision, the former section 17, which said, "If you're an Australian citizen and you voluntarily," and then later it changed to, "And your sole and dominant purpose is to take up a new citizenship," you automatically lost your Australian citizenship. Now, there are many people who did lose their Australian citizenship as a result of that section.

Now, in the process of reviewing the *Citizenship Act*, in a series of points over our history, but most particularly in 2000, Sir Ninian Stephen chaired a committee that reviewed citizenship in Australia. There were very strong submissions to seek the repeal of that section; indeed, in 1996 the Keating Government almost repealed that provision, because of the changing nature of our globalised world, where so many Australians are part of an Australian diaspora, and have not lost their sense of connection to Australia by virtue of being overseas residents, and who were feeling compromised because they wanted to be able to live fully in that other country, without it having any consequence on their allegiance to Australia.

And the long and the short of that story is that on 4 March 2002, that provision was repealed.

DR RENWICK: And just pausing there, that's when really, for the first time, you could make a deliberate decision to have dual citizenship as an Australian.

PROFESSOR RUBENSTEIN: It was the first time that people born in Australia could make that deliberate decision, because of course, the other anomaly of that section - which was another policy reason for its repeal - is that if you were a migrant to Australia and you became an Australian citizen, the other country's laws were relevant as to whether you could be a dual citizen.

So, if that country allowed you to take up a new citizenship without losing your former citizenship, there was nothing in the Australian law which forced you to remove that. Of course, we now know that section 44(1) requires you to renounce it for the purposes of being a Member of Parliament. But it's never, ever been required for the purpose of becoming an Australian citizen, and there's nothing, and never has been, in the Act that requires you to renounce your former citizenship.

What had caught people - and this is part of the history of section 44(1) - is that there was a period of time where the pledge that you made when you became Australian was that, "I renounce my former citizenship." And the High Court, in *Sykes v McCleary* said, "Well, it's all very well for you to say you renounce that former citizenship, and that might've been the wording of the oath," but it had no legal consequence because of course, you have to follow the law of the other country, and it's the other country that determines whether you continue to be a citizen in that country.

Which, of course, is relevant to these dual citizenship provisions that we'll come back to, in terms of how do you determine, under these current provisions, whether someone is, in fact, a dual citizen? The law, in my view is very clear: Australia can't make that decision; it's the other country and their determination of their laws as a sovereign nation, as a matter of international law.

And so, that is relevant in that context, but it is also relevant to the changing notion of allegiance, which is what I would like to come back to in terms of your preliminary comments and what you've shared with us in terms of your sense of the constitutionality in relation to allegiance.

So there are two aspects that I perhaps would want to press you on in relation to your thinking about allegiance, because it's not that allegiance

is an outdated concept. But what I would submit that we need to think about, in the way this operates under the citizenship law, is that it has changed from being a sole and exclusive notion, so that you can have multiple allegiances without that undermining any of your other allegiances.

What I would argue is that this drafting of the legislation is outdated in its thinking of allegiance as a singular notion, and not only does holding another citizenship not deny your continued allegiance to Australia - which I'll also come back to in terms of the extract you had from *Singh* - but it also means that you can conduct activities that may not necessarily be consistent with Australian values, but does not necessarily undermine a notion of allegiance, because allegiance is a much more fluid, multiple-dimensional concept than it was in 1948 when the Act was first introduced.

That is the nature of a globalised world: it has pushed concepts of allegiance beyond that sole notion of allegiance.

DR RENWICK: Does it follow from that, you say that what, you can never have a law like we've got now - - -

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: - - - under the aliens' power?

PROFESSOR RUBENSTEIN: Yes. So this is what is very interesting: first of all, as you've identified, it's the aliens' power that governs the *Citizenship Act*. And what is problematic about the extract that you have identified in *Singh* - - -

DR RENWICK: Yes.

PROFESSOR RUBENSTEIN: And it's not that it's problematic because you've identified it, but it's problematic because of the court's framing here. And this is something that academic commentators other than I have highlighted: when you look at that extract it says,

> *"The central characteristic of the status of an alien is, and always has been, owing obligations, allegiance, to a sovereign power, other than the sovereign power in question."*

Here, Australia.

DR RENWICK: Yes.

PROFESSOR RUBENSTEIN: But dual citizenship means that a dual citizen under that framing is both a citizen and an alien at the same time, because an Australian citizen can be a dual citizen, which means that if you are a citizen of a foreign power, then that notion of connection to and obligations to another country sits side-by-side your connections to, and obligations to, Australia. So that, in and of itself, creates problems that I think a case that may ultimately come before the High Court if this legislation continues to stand, and someone who is affected by it seeks to challenge it.

We'll have to unpack further, in terms of the breadth of the aliens' power; can a dual citizen effectively be - which is what this is trying to do - stripped of their citizenship status, just by virtue - and this is what is happening here - just by virtue of their dual citizenship status?

And if I can pick up on Mr Del Villar's question, which I think is very insightful earlier: the current provisions are effectively identifying actions that are not about ending the Australian state, which you could argue the earlier iteration of that provision, of fighting for a country that is at war with Australia, is the direct, and I would say only, context where allegiance may kick in, because you are seeking to end the state. If you are at war with a country, its ultimate plan is to overtake and create sovereignty of the other country over Australia.

And that, I would argue, would be the only context that would be constitutionally valid and never got before the court. Because you're seeking to end the state, and of course, how can you be a citizen of a country that is no longer there? So that that action of fighting directly against Australia, I would say, is arguably the only valid exercise of deprivation on the basis of a negation of your allegiance, because anything else has the potential to be the beginning of a very slippery slope towards the executive - and this is the rule of law concept - determining that allegiance to Australia actually means.

What would stop, under the current iteration of government, saying, "We are so abhorred by paedophilia in this country. It is such an un-Australian value. Protection of our children is the highest, fundamental centrality to Australia as a nation. We will extend this to dual citizens convicted of paedophilia, being able to be stripped of their citizenship."

DR RENWICK: Well, let's take that one as an example.

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: Why, if you couldn't do that under the aliens' power, if you're talking about paedophile activity overseas, why couldn't citizenship be stripped under the External affairs power?

PROFESSOR RUBENSTEIN: And I think that's a valid question: you're thinking in terms of a head of power that would enable you to exercise power, but you're exercising power to strip someone of the very fundamental connection to the country of which the legislative power arises from.

So I would say citizenship is unlike any other content of executive power, in the sense that there has to be some fundamental change to your relationship to the country, in its capacity to exist, to be able to take out the most fundamental legal connection you have to that country. And in a way, this comes to your separation of powers Chapter 3-type of comments.

DR RENWICK: Just before we get to that, though.

PROFESSOR RUBENSTEIN: Yes?

DR RENWICK: Can I just press you on this, though?

PROFESSOR RUBENSTEIN: Yes, sure.

DR RENWICK: I mean, normally it doesn't matter if you can find three or four heads of power; one will do.

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: There are exceptions, like acquisition of property, unjust terms.

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: But normally, if you can find three or four heads of power, if you don't succeed under one, you succeed for validity under another. Are you saying - and if so, what is the constitutional or broader support for the idea - that if you can't act under the aliens' power, you also cannot act under the external affairs power for acts external to Australia, which is at the core of the external affairs power?

PROFESSOR RUBENSTEIN: So I think this comes down to a more fundamental question about the place of citizenship as a prohibition or a restriction on exercise of power.

So there is one aspect, as you're absolutely correct, of what head of power you are acting under, but is there are any other constitutional restriction that prevents you from exercising that power?

And so that takes me back to the discussion that I had with you on when section 17 had existed, where there were provisions for stripping of citizenship by virtue of taking up another citizenship.

Senator Balkas, when he introduced the legislation in relation to the removal of that section, actually tabled in Parliament an opinion of Ron Caston at the time - which I referred to in my book and I think I've already sent the references to - in relation to a significant question mark as to whether those provisions were constitutionally valid, not because of the head of power but in relation to the question of equality before the law, a fundamental constitutional principle in relation to, that your foundational connection to the Constitution is through your status as a non-alien. And has the executive the capacity to change your status as a non-alien to an alien, just by choosing any head of power?

MR DEL VILLAR: Sorry, Professor Rubenstein.

PROFESSOR RUBENSTEIN: Yes?

MR DEL VILLAR: I just wanted to clarify: is what you're saying that there is as yet an unrecognised implication in the *Constitution* that would prevent someone from being stripped of their citizenship on the basis of equality?

PROFESSOR RUBENSTEIN: It's not that it's unrecognised, it hasn't been tested against this particular provision. So for instance, on page 271 of my book I refer to Ron Caston's brief to Parliament, where his argument was that section 17 fell beyond the limit of Constitutional power because it sought to exclude from the people of the Commonwealth, in a Constitutional sense, persons who, in truth, have not ceased to be such people, but who nevertheless in that context, wish to take out dual citizenship but who nevertheless have conducted some terrorist activity.

I mean, I've written, some of his reasoning relied on the Constitutional concept of equality under the law, which Justices Gaudron and Dean had referred to in earlier High Court decisions.

MR DEL VILLAR: Can I just pause there?

PROFESSOR RUBENSTEIN: Yes, sure.

MR DEL VILLAR: I mean, the notion of equality before the law which you're referring to there is in *Leed*'s case.

PROFESSOR RUBENSTEIN: Yes.

MR DEL VILLAR: And as far as I can recall, that notion has never actually been picked-up and applied in any subsequent High Court authority, to reach the sort of conclusion that you're suggesting here.

PROFESSOR RUBENSTEIN: Sure.

MR DEL VILLAR: Would you accept that, or?

PROFESSOR RUBENSTEIN: There's no doubt that it hasn't been developed. But I would submit that a scenario such as this, which is as grave - as I'll come back to - as I would submit is of a different calibre to any other example that has been raised before, in terms of migration, in terms of passports, in terms of anything else: that the status of citizenship in any democratic society is so fundamental that this could be the sort of case that enlivens that concept which exists in High Court jurisprudence, even though it hasn't most recently.

MR DEL VILLAR: Sorry to just ask one further question just on that.

PROFESSOR RUBENSTEIN: Sure.

MR DEL VILLAR: Because it's a very interesting point that you've raised.

PROFESSOR RUBENSTEIN: Yes.

MR DEL VILLAR: Are you suggesting that pursuant to any of the heads of power, you could, for example, make it an offence punishable by death for an Australian citizen to do something overseas, such as you know, to commit some child sex offence overseas, you could make that punishable by death as a crime in Australia, but you couldn't prevent that person from losing their citizenship; is that the outcome of the sort of argument that you're suggesting?

PROFESSOR RUBENSTEIN: I'm not sure that the analogy is a fair analogy. I'm trying to think through what you're - you're trying to say that - - -

MR DEL VILLAR: What I'm really saying is - - -

PROFESSOR RUBENSTEIN: - - - the loss of life is less significant than loss of citizenship?

MR DEL VILLAR: Well, what I'm saying is, it would seem that the implication that you're raising does not necessarily apply in any other circumstance, even when someone's life is at stake, but when it comes to citizenship, that's in a different category; is that correct?

PROFESSOR RUBENSTEIN: Well, I think I would. I mean, I'd have to think about it a little bit more. But my initial response is that they are slightly different. Obviously, they're significant in terms of the person's capacity to exercise their human rights, but there is a fundamental difference in terms of citizenship, in terms of a constitution. And this comes back to a rule of law concept: is the very essence of saying a government is bound by law and the government in a constitutional sense, is bound to be restricted in its exercise of power in a democratic sense.

And as Kirby J in the *Armay* case alluded to, if the executive has the capacity to remove someone from the people of the Commonwealth - and I would say that the *Armay* case may be another avenue to extend their equality before the law point - you are essentially removing anyone from the people of the Commonwealth, and removing them from any of the protections that come from being a citizen or a non-alien in a democratic state, just through the power of the executive to determine when allegiance is or isn't enlivened.

DR RENWICK: So even if that's not yet constitutional law, you would still say as a matter of rule of law, as a matter of policy, you shouldn't be taking citizenship away by this sort of conduct? I imagine you would point to the approach taken by the Canadians, where - - -

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: - - - they originally had laws not unlike ours, and then they have taken them away.

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: Could I just ask you this: so just as a matter of policy, if you look at 35A, the conviction-based loss of citizenship regime.

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: And you heard me discussing with the Human Rights Commission, the idea of tacking onto that Security Appeals Division merits review.

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: Do you have any comment about that, just as a matter of policy?

PROFESSOR RUBENSTEIN: So I think anything that provides for independent merits review is obviously going to be stronger than the current provision.

DR RENWICK: Sure.

PROFESSOR RUBENSTEIN: I think that there's no doubt about that.

DR RENWICK: That's true.

PROFESSOR RUBENSTEIN: I think that in order for a sort of rule of law notion to be played out even further, there needs to be clear criterion as to when the Minister has the capacity to strip citizenship.

DR RENWICK: Yes.

PROFESSOR RUBENSTEIN: Because ultimately, as your discussion led onto, if, ultimately, the Minister has a discretion as to what is and isn't in the public interest, there will be limitations on the court in relation to an assessment of what is deemed to be more of a political question, rather than a legal question, in terms of when it is appropriate to strip someone of their citizenship.

DR RENWICK: Just to go back to 35A, as you know - - -

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: - - - step one is conviction, step two is sentence for six years or more.

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: And that's just the gateway provisions.

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: And then when that happens, the Minister has to ask him or herself two things: does that amount to repudiation of allegiance? And if so, does it also mean that it's in the public interest? And there are a whole lot of factors which the Minister is bound to take into account.

PROFESSOR RUBENSTEIN: Account, yes.

DR RENWICK: And no doubt, you could add to those factors?

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: Can I just concentrate particularly on the ministerial determination about repudiation of allegiance, using Mr Del Villar's example?

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: So do you say that except in the wartime example, when you're seeking to overthrow your country; so treason would be an example of such an offence, perhaps?

PROFESSOR RUBENSTEIN: Example, exactly. Indeed.

DR RENWICK: For everything else, it is not, on a proper understanding of allegiance, properly to be seen as a repudiation of allegiance.

PROFESSOR RUBENSTEIN: Yes, I think that is my position as a matter of policy.

DR RENWICK: Yes.

PROFESSOR RUBENSTEIN: I certainly think that they should be subject to criminal sanction. So there is no question about the law having some role in relation to managing these security issues; I just deeply believe that the diminishment of citizenship as a framework for inclusion is overwhelmingly diminished by using citizenship as a frame for dealing with these security measures.

DR RENWICK: What about the example I gave earlier on, that there would be general acceptance, I think, that people who obtained citizenship by fraud for example?

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: I think most people would say, "Well, that's fair enough," you know, "That could justify a loss of citizenship." And I take your point about the operation of law being a blunt and indiscriminating instrument, and I think you understand that I agree with that.

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: But are you really saying that in those circumstances, you can never take citizenship away?

PROFESSOR RUBENSTEIN: So I think the distinction is a really valuable one, because first of all, if you obtain citizenship by fraud, then the very basis upon which you became a citizen is negated. So that is a clear and I think unequivocally, acceptable notion that you were never really entitled to citizenship and so the basis upon which you've gained it is revocable.

And this is a really significant distinction with the current provisions, because it doesn't matter - and the legislation is quite clear - whether you are a dual citizen by virtue of having been a citizen of another country first and becoming an Australian citizen, or whether you were what in old terms used to be called "natural born citizen" in terms of being born in Australia and having citizenship by virtue of birth, and one of your parents.

It doesn't matter which way you became a citizen. So if you were born in Australia, your other citizenship is truly nominal in the sense that you got it by virtue of parents or grandparents, or great grandparents. The government is utilising that technical status to devoid you of your real or dominant nationality. In adding to the blunt nature of the legislation, no matter what way you are a citizen, you have the capacity to have it stripped.

And then there's the other equality notion, which I think is so fundamental, which is that me, as a singular Australian citizen, I only have Australian citizenship, and the person next to me who has dual citizenship; the two of us can do exactly the same things overseas, but it is only the dual citizen that has the capacity to lose their citizenship.

I think that that is relevant to an equality before the law notion of the rule of law and our *Constitution*, and it's not just about anything; it's about your status as a member of the democratic polity which gives rise to the *Constitution* in the first place. So I do think it is more fundamental than just distinguishing discriminating treatment on the basis of dual citizenship in any other context.

DR RENWICK: Can I ask you this: do you take the view, as I think the Law Council does, that an Australian citizen has a constitutional right to enter Australia at all times?

PROFESSOR RUBENSTEIN: So, this has not been tested either and I've written about this as well. So the current position is that if you're an Australian citizen, you need to effectively show that you're an Australian citizen under the *Migration Act*, in order to return to Australia.

DR RENWICK: And if you do - just hypothetically - you turn up with your passport - - -

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: - - - do you take the view that you then have a constitutional right to enter?

PROFESSOR RUBENSTEIN: Well, there's a difference between a legislative right to enter, which is currently the position under the *Air Caledonia* case. And we've never had the court telling us whether there is a constitutional right in relation to it, and I would argue that you do have a constitutional right, because what is citizenship, if not for the capacity to live in the country of which you are a citizen?

DR RENWICK: Assume that's so.

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: Assume, like the Law Council, you say there is a constitutional right; it follows then, from what you're saying, that if you've got a hypothetical cause of a very dangerous terrorist overseas, assume that person says, "I want to come back and commit many more terrorist offences in Australia." It follows, I think, from what you're saying, that the one option the Parliament doesn't have is to say - - -

PROFESSOR RUBENSTEIN: "You're not allowed back in."

DR RENWICK: - - - "You can't come back in."

PROFESSOR RUBENSTEIN: Yes.

DR RENWICK: Assuming they're a dual citizen. Because it would be wrong, or possibly unable to - - -

PROFESSOR RUBENSTEIN: Unconstitutional.

DR RENWICK: Unconstitutional to - - -

PROFESSOR RUBENSTEIN: Yes, to deprive him of that right.

DR RENWICK: - - - exclude you.

PROFESSOR RUBENSTEIN: Yes. Well, that has not been tested.

DR RENWICK: No.

PROFESSOR RUBENSTEIN: The *David Hicks* matter that was in the Federal Court, the then Solicitor-General David Bennett sought to make an argument that Australia did have the capacity to prevent an Australian, but it's never been tested. I mean, I refer to all of this in the book. But it hasn't been tested.

I would say that there is a very strong argument that that would be unconstitutional, to prevent an Australian from coming in, particularly - and this is, I guess, the relevant matter - and as each of the departments have said, this is one of a host; this is not the only way of managing terrorism.

DR RENWICK: Yes.

PROFESSOR RUBENSTEIN: And so - - -

DR RENWICK: No, no.

PROFESSOR RUBENSTEIN: - - - given there are other mechanisms, we're not arguably undermining Australia's security by recognising as a democratic rule of law country, that Australian citizens have a right to re-enter, and we use our other criminal law sanctions and other sanctions, as a mechanism of dealing with them as people who conduct reprehensible activity, as opposed to stripping them of their citizenship.

DR RENWICK: So my final question for you, Professor, is do you have any views about a possible Security Appeals Division SIAC model; just your views on that?

PROFESSOR RUBENSTEIN: I have a few. But can I just also pick-up on some of the other points that you made this morning in relation to some of the other matters that were brought up? One is the dual citizenship issue; when you asked whether there has been any investigation about the

impact on dual citizens. As you recognise, there are estimates of you know, up to four, five million, and it's possibly even more, by virtue of that.

DR RENWICK: Sure.

PROFESSOR RUBENSTEIN: And so I have written an article which I can send through as well, in relation to - - -

DR RENWICK: Thanks.

PROFESSOR RUBENSTEIN: - - - the fact that this move has made dual citizens more vulnerable, so that the normal notion of the more you have, the more you get, in the sense of some game that the more you have of anything the better it is. The reality, by virtue of these deprivation provisions, is that the more citizenships you have, the more vulnerable you are to the loss of your Australian citizenship, which I think is a significant issue in terms of the lived experience of dual citizens in Australia.

But I think that there is also, in its coupling with terrorism, a concern about the broader social cohesion message that this has. And of course, one would need empirical evidence which I'm sure is being researched, in relation to the concept of othering that comes from identifying very plainly in legislation, that some citizens, being dual citizens, are more suspect than others.

And the flow-on effect in relation to communities of interest in terms of their sense of connection, loyalty, allegiance, commitment to a country, which is identifying them as being worthy of treatment different to other Australian citizens. And I think that that is concerning in a security sense, in terms of the unintended consequences of legislation like this in terms of a sense of equality of citizenship, which you would imagine bolsters social cohesion. I think that that really hasn't been I guess, tested in terms of the government's responses to those concerns.

The other matter that I wanted to raise with you is in relation to children.

DR RENWICK: Yes, please.

PROFESSOR RUBENSTEIN: You've asked on several points. So of course, the *Convention of the Rights of the Child* is significant.

DR RENWICK: Of course.

PROFESSOR RUBENSTEIN: But in addition, you said as a matter of humanity, but I think it's even more than that: there is a common law principle that the executive has a common law duty to children under the *parens patriens* common law principle, which Gaudron J referred to in the *Teoh* case, on the responsibility of the state to take into account the *Convention on the Rights of the Child*, in a deportation matter.

I think that those principles are also being undermined in this legislation, in relation to the protection of the rights of the child. And to directly link there the example you gave of a parent giving birth to a child, I think that the *Convention on the Rights of the Child*, together with the *Convention on the Reduction of Statelessness* would say that these provisions are in breach of those conventions, because a fundamental right of a child is a right to nationality.

Indeed, our *Citizenship Act* affirms that because there is a section in the *Citizenship Act*, section 21(8) - and your example of course is not a child born in Australia - but to show Australia's commitment to that principle, section 21(8) says a child born in Australia who would not otherwise be an Australian citizen - because birth in itself is not enough now, you need a parent to be a permanent resident or citizen - and who is otherwise not a citizen of another country, can apply to the Minister - and the Minister has no discretion, in essence - the Minister must grant, doesn't have a discretion to deny, if that child is stateless.

So Australia's commitment to not making a child stateless is broken by, or is not fulfilled here.

DR RENWICK: The only reason I said I didn't think it was in terms covered by either convention is, I don't think either convention talks about the rights of the unborn; that's all I meant.

PROFESSOR RUBENSTEIN: I see. But once that child is born - - -

DR RENWICK: Yes. No, I'm talking about the mother, or the possible mother, not being notified of her loss of citizenship, making a decision to have children.

PROFESSOR RUBENSTEIN: Right.

DR RENWICK: And it's at that point that there may not be a breach of either convention, but it is still deeply troubling.

PROFESSOR RUBENSTEIN: Yes, yes.

DR RENWICK: And I think we both agree on that.

PROFESSOR RUBENSTEIN: Yes, agree on that, yes.

DR RENWICK: All right.

PROFESSOR RUBENSTEIN: Sorry, there are two other points that I wanted to assist.

DR RENWICK: Yes, certainly.

PROFESSOR RUBENSTEIN: In terms of your comment to the Attorney-General's Department in relation to dual citizenship. And I think dual citizenship is a significant issue here in terms of the operation of the citizenship, by operation of law.

You have already identified, and the Department accepted, in Neil Prakash, that there was no attempt to determine, as a matter of international law, where there is a dual citizen. So there is, I would argue, an unlawful decision here because they haven't actually determined according to law, because the only way you can determine that is by the other country affirming whether in fact that person is a national.

But then you raised - and I think it's a really interesting point - the question of whether Australia would still have an obligation to that person under section 12 of the International Convention on Civil Political Rights. Now, what is very interesting is, the case that I think you were relying on is the *Nystrom* case, which is the case that the Human Rights Committee, under the International Convention on Civil and Political Rights determined what you acknowledged is the fact that, someone, even though they're not a citizen, may actually be able to claim citizenship.

Well, that case came to the international court because Australia has not followed that; Australia was found in breach of section 12 by virtue of removing to Sweden, Mr Nystrom, who was born in Sweden and within a month of his birth, came to Australia and only lived in Australia. And Australia has removed him, deported him, under the *Migration Act* because he never became a citizen.

The Committee found Australia in breach of that; Australia has not followed that Committee's ruling. So the fact that stripping someone of their citizenship doesn't stop the country from being responsible for it; Australia has not shown a commitment to that principle. Which then makes one concerned about the practical realities of the implication of that in this scenario, where there is a deliberate decision to remove someone

from the country, from their citizenship, let alone from not even having had citizenship.

And so I think that that also has a broader public policy concern in relation to enabling the executive to do it, when they're prepared to do it, and in another context, and are on the record for having not done that.

Which - sorry - leads me to one other point before: the question to do with SIAC. And I guess it comes back to my fundamental point at the beginning about citizenship being different to the migration sphere, being different to passports. First of all, in the migration zone, as you've identified, you're dealing between citizens and non-citizens, and so that distinction is fundamental in relation to the Minister's capacity, however one - I mean, there are separate administrative law questions, but from a more foundational public policy notion, as you said, there is a distinction between a citizen and a non-citizen.

But here, we're dealing with citizens and citizens, as in, a single citizen versus a dual citizen. And there is an operation of law provision in place for a citizen, so that is so much more dramatic than just in the migration zone; or even in passports, where passports are one of the incidents of citizenship, but you still are a citizen. And there are more fundamental questions.

So I think one of the things that I have written as the theme in my book is that one of the aspects of Australian citizenship law that is concerning is that it's being governed by migration law, or being governed by other policy considerations, rather than a commitment to citizenship as a much more holistic notion.

I think these provisions are telling, in that sense of moving away from citizenship as not only being about migration, or not only being about security, but being a more holistic, fundamental concept that we should be very careful about playing with, because of the consequences for citizenship in a rule of law society.

So that was just one other final point from the earlier discussions this morning, that I was keen to raise with you.

In relation to SIAC, having just handed in this morning my final marks for my Administrative Law students' class, it's really in that context. I was going to share with you Brennan J's decision in *Drake*, if the Human Rights Commission hadn't done that.

DR RENWICK: Yes.

PROFESSOR RUBENSTEIN: I think there's an undeniable reality that in any executive decision-making if you have merits review, you are providing a greater accountability; it enhances our rule of law.

In relation to the Security Division and I think there's no question that having a special advocate would again better protect an individual; I think the cases, as you've discussed, are really interesting in relation to *Graham* and in relation to the capacity of the court to look at matters, and why there might've been resistance by the government of the day to introduce that sort of mechanism, because of a concern that the courts would be coming to a different decision than the Minister.

But I think that those concerns that you've raised, and that others have raised, would of course be lessened if you did have a mechanism available. So if we take away the constitutional holistic notion and we just move to it as a pure administrative law, rule of law concept, I think anything that would provide for external review that lessens that overreach of the executive - which I think this Act - - -

DR RENWICK: Has to be an improvement?

PROFESSOR RUBENSTEIN: Has to be an improvement. My colleague, Dr Thwaites, as you know, is here, and has done some research - - -

DR RENWICK: I know.

PROFESSOR RUBENSTEIN: - - - on that area, so we can also benefit from his contributions.

DR RENWICK: Professor, you've given us an enormous amount to think about.

PROFESSOR RUBENSTEIN: Thank you.

DR RENWICK: So thank you so much for coming in.

PROFESSOR RUBENSTEIN: My pleasure. And I'll send in those things that I've referred to.

DR RENWICK: We're very grateful. Thank you so much.

Law Council of Australia

I am delighted to now welcome Arthur Moses, Senior Counsel, the President of the Law Council of Australia, and Dr Natasha Molt, the Director of Legal Policy Division, welcome to you both. I should immediately say I am grateful for your very detailed and as always thoughtful written submissions, and may I place on record as I always do that the Law Council support to my office is invaluable and much appreciated. Mr Moses, did you want to make any opening remarks?

MR MOSES: If that was convenient, just a short opening we have prepared and then we will answer any questions that you have.

So I am the president of the Law Council of Australia, and as the monitor would be aware, the Law Council is the national body representing the legal profession in Australia. We thank you for the opportunity to provide evidence in respect of this review of the terrorism related citizenship loss provisions in the Australian Citizenship Act, and for your continued consideration of these important matters. The Australian Parliament, the executive and the courts, have a responsibility to ensure the security of Australia and its people. Critical to this is the concept of citizenship and participation by the citizens in the political life of their state. Citizenship is the highest form of membership of the Australian community, which comes with great privileges but also with important responsibilities. The removal of citizenship results with the loss of those privileges and is likely to have a profound impact on an individual's life including the potential for deportation, detention, prevention from entering Australia and no longer receiving consular assistance overseas. Due to the gravity of these decisions, measures to remove citizenship could carefully consider the legal principles on which our democracy is founded and must strive to be a necessary and proportionate response to potential threats. In particular, the Law Council highlights the need for the exercise of power to be subject to proper scrutiny and oversight, and the critical role of appropriate mechanisms for review. The primary position of the law counsel is this: we acknowledge that the terrorism related citizenship loss provisions which are subject to the current review seek to pursue the legitimate objective of preventing terrorism and providing consequences for citizens who are deemed to no longer be loyal to Australia and its people. The Law Council accepts this as a valid policy priority in the current environment and recognises the challenges involved in reaching an appropriate balance in this regard.

However, as we've set out in our written submission, the Law Council maintains the view that the existing citizenship revocation provisions in relation to terrorism cases are neither necessary nor proportionate in their current form. As our primary position, we are of the review that the provisions relating to revocation of citizenship should not occur

automatically, and should only take place following a criminal conviction of a serious terrorism-related offence by an independent, impartial and competent court. If following conviction, a decision is made by the minister to revoke citizenship, this should only occur after the minister is satisfied there is evidence that the person poses a substantial risk to Australia's security. The Minister's decision should be made after complying with the requirements of procedural fairness and be subject to clear and effective judicial review. This conviction based approach would best ensure the application of the principles and safeguards fundamental to the rule of law that are present in the present criminal justice system that operates within this country. We also submit that section 33A and section 35 of the Act, as they apply to conduct as opposed to conviction, should be repealed.

The Law Council appreciates that when the Parliamentary Joint Committee on Intelligence and Security undertook its inquiry in the Australian Citizenship Amendment – Allegiance to Australia Bill, it raised the issue that it is not always possible to secure a conviction and there should be remain a means by which loss of citizenship, based on certain terrorism related conduct, can occur to protect the Australian community. If you, Monitor, determine that citizenship revocation remains appropriate in the absence of conviction, we recommend that consideration be given to conviction determination model, whereby a court will be required to make an order for the revocation of citizenship. Under this alternate model, the Minister would be permitted to make an application to the court where satisfied the person poses a substantial risk to Australia's security and after consideration of relevant factors. Before making an order, the court would be required to be satisfied at least to the civil standard of proof of the conduct relied on the justifies the cessation of citizenship and that the individual is a citizen or a national of another country. In our view, this would allow for a more transparent process that would provide stronger procedural safeguards to ensure that innocent people do not lose their citizenship and that lawful decisions are made. This would maintain public confidence in the scheme and ensure there is a separation of judicial from executive power, while avoiding the very real difficulties the self-executing model.

In terms of the involvement of the AAT, you'll note that what we've said is that in relation to the potential role of the AAT, and the broader role for the Security Appeals Division, the tribunal for the revocation of citizenship, this does provide some difficulties in that it is of course not a Chapter III court, it is not a superior court of record such as the UK model. Whilst we support merits review by the tribunal of any decision made by the Minister as to whether a person poses a substantial risk to security and international obligations for the revocation of citizenship, the

real question is whether that body should be the body that actually determines, in the first instance, whether citizenship should be removed. The problem here is the informality of tribunal proceedings in comparison to the rigorous process that takes place in a court which is bound by the rules of evidence. If the procedures for losing citizenship are inconsistent with fundamental rule of law principles, including the presumption of innocence, the right to a fair trial and natural justice, this diminishes the value, sanctity and integrity of the concept of citizenship for all Australians which should be jealously guarded. It is important that the removal of citizenship in terrorism cases should only occur following a court determination rather than a tribunal. We've made further recommendations as to the Act and its operation, but we thank you for your patience this afternoon in hearing our opening submissions and we are prepared to answer any questions you may have.

DR RENWICK: Yes thank you Mr Moses. Well, could perhaps I focus the discussion in this way – I do not need any more persuasion that the operation of law provisions are deeply problematic and neither necessary or proportionate, nor provide adequate protection for individual rights. So, perhaps just for our purposes, if we can concentrate on 35A, the conviction-based model, and secondly, the hypothetical possibility that where conviction is not possible, what other model might be used? So if we can start with the conviction based model and perhaps if I can start with the *Constitution* – do you see a constitutional problem with the current conviction-based model? Is that --- I mean, I have read your submissions, but I note that you had concerns about the operation of law provisions. If we can put that to one side – if I can just indicate my preliminary views are that even if that conviction based model is not fully supported at the outer limits by the aliens power, there are other heads of power which may be relevant if any of the Acts in question by the person (indistinct) external to Australia, the external affairs power may help. The defence power, based on cases like *Thomas v Mowbray* may help, and here may be others, but perhaps I should just ask you – is it the Law Council's position that there is a present constitutional problem with the conviction based model in section 35A?

MR MOSES: I think the issue that has been raised for concern is the automatic revocation provision may not formally require an authoritative decision to be made by a departmental officer, a minister or indeed, a court. There must at some point be some sort of jurisdictional fact, if I can call it that – the prerequisite that then triggers the automatic loss of citizenship based on conviction. And one needs to determine what is it that the board is actually considering or expressing a satisfaction of in order to trigger that? There has to be something - and that's been our

concern in terms of understanding the transparency of that approach - because at the moment, we do not know how that operates.

DR RENWICK: So can I just ask you then about the conviction based model – what I am thinking about recommending there is that you retain the conviction based model, but when the minister makes a decision, that both as you know there's two gateways. Conviction, and then the Minister's view that there's been a repudiation of allegiance. Then it opens up the whole question of what's in the public interest/. There's a list of factors, maybe other factors could be added, but I take it you would support an additional step whereby when the Minister makes that decision, you can have merits review, you have undoubtedly got judicial review – I mean that's a decision by an identifiable person, you can't take that away, that's a constitutional right. And you can do what you will with that. But I take it you would agree that it would be desirable to have some sort of merits review to the Security Appeals Division.

MR MOSES: We do agree with that.

DR RENWICK: And I take it that you also agree that an additional desirable add-on would be having special advocates, security cleared advocates, so that unlike the present position in the Security Appeals Division where the applicant may be sent out, when the classified material is shown, their special advocate at least would be entitled to be present ---

MR MOSES: I think that would be a very important initiative because you would then have somebody there at the very least acting in the interests of that individual which would provide a further safeguard in relation to the operation.

DR RENWICK: And then following through the tribunal would come through with open and closed reasons, the special advocate would be entitled to see the closed reasons, they could then be utilised on appeal on the question of law to the Federal Court, and the Federal Court equally with proper protections could see. So that—

MR MOSES: That does ameliorate some of the concerns, if that was an initiative that was able to be something that the Government was persuaded could be put into the legislation.

DR RENWICK: So that if I could call it – if you like, the simpler issue. You've got an existing position as a conviction based model and so on, and that by definition assumes you have got evidence which has

persuaded a jury beyond reasonable doubt. The much more difficult policy question is where you may have probative evidence – that is to say, the sorts of things that decision makers take into account all the time, which may well, because of their source or because of the methods to get them may be highly classified. So they are the sorts of things the Minister can rely on now in various *Migration Act* decisions, which can require people to leave the country. I suppose, just as a matter of policy, why shouldn't - we can talk about review rights in a minute, but why shouldn't the Minister, as in those *Migration Act* cases, be allowed to act on legally probative material, including intelligence material in making a decision about loss of citizenship – providing of course there are proper review rights?

MR MOSES: And this is quite apart from conviction based determination?

DR RENWICK: Yes in addition to –

MR MOSES: So prescribed conduct, some of the type of conduct?

DR RENWICK: Yes, so for example, you mentioned the hypothesis that there isn't sufficient information to obtain a conviction. As I understood what you said, you said, in other words, you wouldn't have material to prove beyond reasonable doubt that your preferred option there is to come to a court, the Minister comes to a court with evidence which must be admissible and must meet the standard – the civil standard. And it is only the court which can make that decision to take away the citizenship?

MR MOSES: And I think that that is the issue which was raised with the earlier witnesses in terms of constitutionality because it feeds into that as well. Because based on some of the commentary in the *Re Kavanagh* decision, what we were talking about there was in effect the High Court potentially expressing a doubt there as to whether a member of the executive could in effect make a determination that results in somebody losing their citizenship. That model that we're proposing would, we think, further enhance the possibility this would survive a constitutional challenge and from a public policy point of view the court really should be the one that makes that determination as the independent judicial body as to whether somebody has lost their citizenship in accordance with an Act that Parliament commands operates in a certain way. There is a concern as to where is the line where you give a member of the executive the right to determine certain conduct which then results in somebody losing their right to be a citizen? Because then you don't know where that line will change – it may be for terrorism related offences, and we talk about

proportionality. But in future there may be another government that may take the view that the activities of certain individuals or people who come from certain ethnic backgrounds, that should be a weighting factor for a minister to make a determination. And that's the real concern that we have here, in terms of where do we have the line here in terms of a member of the executive determining who loses the citizenship? That's a question mark for us.

We make no suggestion at all about the current government having those (indistinct). But we're worries about setting a precedent – as to where does the line start and where does it finish?

DR RENWICK: Well I suppose if we're talking about drawing lines, then we've already got as I mentioned, provisions under the *Migration Act*, whereby a ministerial decision can lead to someone being excluded from Australia.

MR MOSES: That's true.

DR RENWICK: So the point of distinction would seem to be that citizenship is if you like the red line that mustn't be crossed in that regard. Just to continue though, with the other possible model, if you do – so you assume, a bit like the operation of law pre-conditions, you've got activity outside Australia, step one. Therefore, it seems to me, strong support from the external affairs power, there's something external to Australia after all.

MR MOSES: We don't disagree with that.

DR RENWICK: No, alright. And then the Minister, as I say, acts on the basis of probative material which may include intelligence material, but that's part of a continuum which includes the full right of merits review. Remembering at that point that there's likely to be a qualified security assessment from ASIO, so you've already got in place something which can be the subject of review to the AAT. I'm just trying to work out why the Law Council would object to that.

MR MOSES: Because you still have the executive making that decision and the AAT, which is a part of the executive, reviewing that decision. The AAT is not of course a Chapter III court unlike the UK model, it's not considered to be a superior court of record, it's not enshrined in statue. And without again in any way making any comments critical of the AAT who do their job without making exception of good faith, they are still effectively part of the executive, they are appointed by the executive, they hold office for limited periods of time, they are subject to re-appointment

by the executive. It is the appearance of that process again – because what we have got to bring here with us for the public to have confidence with this system, we can't have public confidence with this system, if it is somehow structured in a way in which the executive holds all the cards in determining the revocation of citizenship for an Australian. I think we then get into potential difficulty even with the observations made in *Re Kavanagh*, but also - maintaining public confidence in that a citizen of this country should only have their citizenship revoked in circumstances where the judicial government is satisfied, upon application by a minister of the Crown that certain criteria – that if you have a merits review, where in effect the body that is part of the executive that is reviewing the decision of a member of the government, it does create issues that concern that.

DR RENWICK: I mean I want to make sure I do understand your submission about the independence of the AAT, I mean they make many decisions which affect peoples' rights. Again, is it something unique to citizenship which makes them unsuited to make this decision compared to decisions about people's tax or whatever it might be?

MR MOSES: It is a very important observation you have made. I think the first question that I have which has been exercised in my mind is the constitutionality issue, which is in effect providing the right to the executive to revoke citizenship and having the review of that done by the tribunal which is in effect part of the executive. That's the constitutional issue which is a question which I think your counsel assisting and yourself, who are far more eminent constitutional (indistinct) than I am, would be able to answer that question.

The second issue from a policy point of view is in terms of – do you want to have the executive, in effect, determining the revocation of citizenship, and for that to be reviewed by a tribunal that forms part of the executive? Will that enhance public confidence in the system? And I think about communities who may be sceptical about these processes and they feel targeted in some way, you would want them to know as part of our adherence to the rule of law in this country, that the government does not determine who the citizens of this country are. That is determined by reference to the parliament, our constitution and if there's a dispute then our judiciary, which are fearlessly independent, not only seen to be independent but are independent, are able to discharge that. And the problem I think with the AAT point is, I think we still get into that circular argument about the constitutionality here in my respectful---

DR RENWICK: I have your point about the constitutional validity, so I take it some of your concerns would be ameliorated if the AAT was

constituted by, in these sorts of the cases, the President who's a serving Federal Court judge, and deputy presidents who can be, they aren't always judges, that would go some way?

MR MOSES: I think that would go some way. I mean, the model that is in the UK as you know, it is constituted as a superior court of record with the same status as the High Court and the Supreme Court there. So we would think that that enhances the independence of that tribunal and dealing with the unique application that it does. I mean, it is a very effective body in the research we've undertaken but that certainly differs from the AAT which doesn't have that protection.

DR RENWICK: Mr Moses, how in our legal system do we deal with classified material? So, let us take a case where the information which shows that person X was fighting for ISIL comes from somewhere or somehow which we do not want to tell the applicant about. So you give the gist, you say you were fighting with ISIL in this month of this year, and they get in the box and say no I wasn't. And so then the Minister says, well I've got whatever the bit of – say, evidence – whatever the bit of material is which shows they were there.

Now if the only way you can take action to strip citizenship as a result of that is in the court, you run hard up against Chapter III problems, because assuming you do not want to show for security reasons the source or method to the applicant. There are real difficulties, certainly in a criminal case, but even in a civil case, of requiring the applicant not to see that material, *Graham*'s case in the High Court held unconstitutional a law which said the court could not have regard to certain material. It is not like public interest immunity, where as we all know that just means it is not available. We are talking about we want the tribunal making the decision – whether it's a court or a tribunal to see the material. What has been exercised in my mind is unlike in Britain we have those Chapter III problems which – how do you deal with the classified material? Whereas, I think on the AAT Security Appeals Division passport analogy, we do have a constitutionally valid system to the extent there's a sufficient analogy between passports and citizenship, which allows you to say, 'Alright, tribunal, you can see the classified material, I am proposing an improvement which is the special advocates, we are about to get them going because of the control order recommendations which the Law Council supported'. So that's the nub of my dilemma here – that if my recommendation is, you can only go to the court, in that sort of case, you can neither criminally prosecute nor take civil action to take citizenship away.

MR MOSES: There are cases of course, and we've appeared in some of them, is where one protects – as it were – the work method or the work product of law enforcement agencies in terrorism related matters and you seek certain orders. There is a problem I think where in terms of the substance of the evidence which needs to be disclosed to an individual, accused or otherwise, to be shown to them in order that they respond to it rather than a general question in order that they be afforded an opportunity to rebut the assertion that they have been involved in certain activity. And I think the answer is not to take it away from the judicial system because it would then be hard to have those matters dealt with, I think that would give more rigour to the system rather than through the tribunal process which may not need to disclose or have an individual be provided the material. Because we do know, regrettably, mistakes are made. We saw that with the Haneef case. We know mistakes are made, and what I'm worried about is that just one mistake is sufficient for someone to lose their citizenship and be sent out of this country or not allowed in which then results, mistakenly, in a situation occurring where there's a catastrophe, whether they lose their life or whatever, based on an error made in good faith by a Minister of the Crown. And I always think, there's always that safeguard there, where if you're going to take action against somebody, no matter who they are, you need to show the substance of the evidence against them – not how you got the material, but the material if you can in admissible form, how this is said to result in allegation against them. And that's what I'm worried about. If we slip it to islands, if I can call it that, specialist islands, bodies which don't have the rigour in terms of the evidentiary requirements that I court would have, are we lessening the standard? That's what I'm worried about. But the observation that you've made the special advocates, I think they are a very good idea. I think that would be a welcome initiative if you are able to persuade the government that they should equally apply in respect of this. Is it going to ameliorate all the concerns? Not all of them, because of the concern that we would have in that they would then use the tribunal as a way to in effect withhold the full extent of the evidence against an individual despite their special advocates that individual would not have access to the very nub of the material that would be deployed against them. That has always been our concern.

DR RENWICK: Thank you. Just in terms of more safeguards then, one of the government agencies this morning, I put to them the citizenship loss board – if it's to continue – is made up of intelligence and public servants. Neither the Ombudsman nor the IGIS has complete coverage, because on an allegation of maladministration or worse, because each can only look at the ---

MR MOSES: Their own material.

DR RENWICK: And I was a little surprised to hear from one of the agencies that there was an objection to that, first because they didn't make any decisions. Well, legally they might be right, but they are obviously hugely influential here. But secondly there seems to be some suggestion that interdepartmental committees with intelligence components shouldn't be subject to Ombudsman and IGIS review. I have to say, I am pretty convinced now that they should be. And generally, and I take it the Law Council would support any gaps so that in a particular case it doesn't matter whether they're a decision making body, they can of course be highly influential even if they don't formally make something called a decision. I take that the Law Council would support a recommendation that in all cases involving intelligence either the Ombudsman or the IGIS, one or other at least, should be able to have full coverage. I take it you'd support that?

MR MOSES: We agree with that.

DR MOLT: If I may add, I think that certainly we would agree that it would be worth obtaining the IGIS's views and the Commonwealth Ombudsman's views in relation to that and I think obviously there is resource implications for those offices if they are to take a broader role, and we would definitely support in that instance increasing resources for those offices.

DR RENWICK: But it's an important principle, that ombudsman review. It's an important part of the administrative law package, and I take your point – there shouldn't be gaps. And really what I'm talking about is filling a gap. So, yes.

MR MOSES: We would support that.

DR RENWICK: Alright. Anything else?

MR DEL VILLAR: Just wanted to ask, in relation to paragraphs 123-125 of your submissions, where you indicated some difficulties that had been identified with Special Immigration Appeals Commission in the UK.

MR MOSES: 123?

MR DEL VILLAR: Yes, at the top of page 30.

MR MOSES: Thank you. Yes I have that, thank you.

MR DEL VILLAR: Is it still your view, having regard to what you have said earlier this afternoon, that you think there are significant difficulties with the model that will be based on the special immigration appeals commission, or do you think, having reflected upon it further, that it actually works reasonably well in the United Kingdom?

MR MOSES: This is my view, but I want Dr Molt to express her view. I think the SIAC Model, which has been subject of discussion here by Dr Renwick throughout the hearing, and has caused me to go back and look at the legislation, to think that it is something that perhaps we could import into our system here, and for it to work in a way that actually would benefit greater transparency and rigour in decision making. And I must admit – it's something that I have looked at after I just had it relayed to me some of the comments that were being made today by Dr Renwick in respect of the matter, to go back and have a look at that.

MR DEL VILLAR: And Dr Molt?

DR MOLT: I'd agree with that, noting the difficulties that Arthur mentioned early in relation to – under the SIAC Model, it's a superior court of record, and the processes under that model are not necessarily going to be as easily transferrable to what we have in Australia under the AHA.

DR RENWICK: Just another question I think I know the answer to, but if I were to recommend that the operation of law provisions be repealed, but replaced with a system whereby the Minister and the AAT together or the Minister with a court make the decision, I assume you would argue that those operation of law provisions should be repealed with retrospective effect?

MR MOSES: If you go ahead and recommend what you're indicating you may recommend, yes.

DR RENWICK: Well, I mean, you say they should be repealed in any event. I take it you say they should be repealed with retrospective effect?

MR MOSES: Correct.

DR RENWICK: And one reason or that I take it would be that the uncontrolled manner in which they've worked, you simply can't be sure

how many people it has affected, and there could be people who find out years later they've been affected in this way. Could I just ask one other practical question and it's this – it may be assumed, again we're talking about the idea of a decision making model where you can't prove it beyond reasonable doubt, so either you're going to the court to make an application or the Minister makes a decision and it goes to the AAT. The reality is, if you give advance notice to the dual citizen that you're about to do this by reason of offshore activity, talking about that for a minute, it's very possible, it may even be likely that they will take steps to divest themselves of that alternative citizenship so that the law doesn't operate. And that would be an entirely rational thing to do; it's what a lawyer might well advise them quite properly to do. But from a government policy point of view, how does one deal with the system being undermined in that way? There are plenty of cases including disciplinary matters for solicitors in Victoria, say, where what one does, is one looks at the whole process and says, overall, is it fair? And so, would it overall be fair – and I know this is not your primary submission – for the Minister, for the law to say the Minister can make the decision; there is an immediate right that firstly the person's got to be told, unlike the current system, that this has happened. They have an immediate right of merits review in the sense discussed, and can I pause there and say, my understanding is this is what happens, that everyone is told. Sometimes it's hard to tell them, because they're on a warzone somewhere. But in order to ensure the system is not set at naught, there being an express provision saying the minister doesn't need to give procedural fairness before making that decision, because procedural fairness and law merits review will take place in the tribunal.

MR MOSES: So that is specifically made clear in the legislation, and then---

DR RENWICK: It would spell it out, looked at overall – it would be a fair approach. I appreciate that is not your primary submission. You want it to be repealed retrospectively and not replaced, but were that not so---

MR MOSES: I think that is a fair observation to make in terms of the real world, in terms of what will happen, in that someone may seek to divest themselves of their citizenship but I was just thinking – what about if you have a scenario where the Minister makes the decision but before the merit's review they then take steps to divest themselves of the citizenship of the other country, so that the time they get to the merits review, they're stateless. What do we then do with them?

DR RENWICK: No, well on the hypothesis, they wouldn't be stateless as a result of anything Australia has done, because step one would be Minister takes away Australian citizenship. The Minister can only do that under our law if there is another citizenship available. If the person then tries to take that away, then that's their choice.

MR MOSES: I understand.

DR RENWICK: So I think that's the theoretical way you would avoid ---

MR MOSES: And just coming back to an earlier question that was asked concerning the citizenship loss board – you do have a problem in terms of it for instance satisfying itself that somebody else is a citizen of another country, because if they attempt to make contact with that other country to confirm the status of somebody, that country may decide to get in first to revoke citizenship before you get a chance to follow it. And you saw that standoff we had with Fiji in respect of Prakash, and there are practical problems here. I suppose – I don't like to say this, and I apologise if it seems dramatic, but it's really a race to the bottom, in that way to see who we can offload first. And it comes back to the policy question – France and the United States, amongst others---

DR RENWICK: And Canada.

MR MOSES: These are our citizens. These are our problem. We don't deport or offshore people who are our problem. We deal with them under our laws, our security agencies are the best in the world. Our security agencies are able to monitor these people, if these people come here probably better than if they were overseas, why do we want to have a policy that ships our citizens who are our problem overseas rather than us dealing with them over here? We have laws, and you pointed this out earlier I think Doctor, that require somebody to be an Australian citizen before we can charge them with certain crimes in terms of foreign fighters. Why would we enact a law that in effect offshores them and we don't deal with them under our laws? It's just got a niggling feeling, just from an Australian's point of view, that we are in effect, shipping our problem elsewhere rather than dealing with it, and rather than making it someone else's problem who may not be able to deal with it as good as we can, such as someone running around in Syria which doesn't have a proper infrastructure or government, and where they may cause more harm, rather than dealing with them in a country that is a democracy but has the best security agencies in the world. We deal with them here, and our courts that are the best in the world, deal with them here. Monitor them after their release, or do whatever we've got to do with them. It's

better to deal with them here, rather than with them running around devising plans as to how they can attack our interests overseas, or our citizens overseas. So that's my own personal concern.

DR RENWICK: It's the fundamental question I have to answer. All I would note perhaps by way of conclusion is that the executive council during their submission for example, picked up what Professor Barton said about Mr Prakash and said that because Prof Barton says he's the sort of fellow who can utilise the internet well, then expelling him as a citizen is not going to be effective. They did posit another possibility ---

MR MOSES: That is a very good point. I forgot about that. You have got a lot of – not referring to him – but we do have, regrettably, a lot of adults who are cowards who groom younger children through the internet to commit terrorism crimes and that's a very good observation.

DR RENWICK: I mean, I'm really just stating the fundamental issue. Unless you had anything further---

MR MOSES: No, we thank you very much for your courtesy and generosity of time this afternoon. Thank you very much.

DR RENWICK: Thank you very much. We'll pause for afternoon tea, ladies and gentlemen.

ADJOURNED [1506]

RESUMED [1521]

Civil Society Representatives - Australian Strategic Policy Institute

DR RENWICK: Ladies and gentlemen, welcome back. We're delighted to have representatives this afternoon: Doctor John Coyne, and Doctor Isaac Kfir. Have I said that correctly?

DR KFIR: Yes, sir.

DR RENWICK: Gentlemen, did you have an opening statement?

DR J COYNE: Yes we did, thank you. First off, Isaac and I would like to begin by thanking the Office of Independent National Security Legislation Monitor for inviting us to address this hearing.

Between us we carry about 30 years plus, of practical professional and academic experience in countering terrorism, both at a coal face and at a policy level.

We make this submission in our capacity - as in a private capacity - and we're not representing either of the Australian Government or the Australian Strategic Policy Institute.

Before we start, I would like to add and recognise that the threat of terrorism is pervasive. Terrorists seek to sow division and harm innocent people, as they ruthlessly pursue their ideology. And it is a credit to the security establishment in this country, including the police at state and territory and Commonwealth levels and community activists that Australia hasn't experienced a mass causality attack at this stage.

A core assumption that underlies in our submission is foreign fighters shouldn't be seen as a singular entity, as there is evidence that some have travelled to Iraq and Syria with a specific intention of joining al-Qaeda or ISIL – but weren't accepted into groups. Others travelled there because they wanted to help protect civilians from what they believe was oppression. Some travelled because they wanted to join an idealised, romanticised Islamic society. And others travelled because they wanted an adventure.

Therefore, we shouldn't deal with this issue of returning fighters through a blunt unitary instrument, but rather recognise that there are multiple pull and push factors that lead individuals to travel to countries like Iraq and Syria.

In making our submission, we argue that there is little empirical evidence in support of the contention that citizenship revocation deters individuals from joining extremist groups. In fact, we take the view that terrorism related citizenship loss provisions, undermine the risk mitigation that post-sentence offender management could have on Australian and global security.

We argue that the provisions in the *Australian Citizenship Act 2007*, may feed into the broader narrative of groups, such as ISIL, which aims to show that Western Governments are racist and anti-Muslim. Consequently, we are assert that the provision may cause more danger to Australia, Australians and our allies, as individuals affiliated with groups,

like ISIL, will seek new safe havens from which they can continue their propaganda campaigns.

Whereas, if they were permitted to return under a specific regime, they would be subject to various de-radicalization and disengagement programs which have been developed over the last decade from hard earned experience.

We argue that the demise of the territorial Islamic State, or caliphate. It is unlikely that other Australians would make the journey to join the group in Iraq and Syria, and therefore the amendment itself is unnecessary.

We recognise that the threat posed by foreign fighters is significant and evolving. We accept several countries have introduced citizenship revocation to prevent individuals who have travelled to Iraq and Syria from returning to their country of origin.

The UK has used passport revocation on at least 30 people since 2010. Which is permissible under the *1981 British Nationality Act* – as long as the individual is a dual national and the Secretary of State is satisfied that depravation is conducive to the public good. Under an amendment introduced in 2014, the Secretary of State may revoke the citizenship of a naturalised British citizen, who has no other nationality – as long as there are reasonable grounds for believing that the person is able to become a national of such a country or territory. The Secretary of State must therefore be satisfied that the individual has conducted him or herself in a manner which is seriously prejudicial to the vital interest of the UK.

Under article 25 of the *French Civil Code*:

> *An individual who acquired the French nationality may be declared by decree adopted after conforming assent of the* Conseil d'Etat *to have forfeited his French nationality. Unless forfeiture would have effect of making him stateless.*

And then of course in October 2014, the Austrian Interior Minister introduced a legislative measure allowing for the revocation of Austrian citizenship to any dual national that has been found to have fought abroad for a paramilitary unit.

We note that there are a handful of examples of returning foreign fighters who have committed terrorist acts. For example, on the 24 May 2014, Mehdi Nemmouche, a French national, killed 4 people in Belgium's Jewish museum in Brussels. He has spent a year of fighting in Syria with a group affiliated with ISIL. We argue that cases such as Mehdi, are the

exception to the rule. And the case occurred because none of the security measures that we have nowadays were in place when Mehdi committed his terrorist act.

We argue that in 2019, of the 80 or so remaining Australians that travelled to Iraq and Syria with the intention of joining ISIL, and those who are still alive – there is no publicly available evidence showing that they remain ideologically driven.

One British foreign fighter has said in an interview that by being in Iraq and Syria, their Jihad, was I quote:

> *Turned upside down.*

Adding:

> *Muslims are fighting Muslims. I didn't come for that.*

There are more anecdotal evidence supporting this view of foreign fighters becoming disillusioned with ISIL, and its vision.

We further argue that, if an Australian foreign fighter was to return to Australia, their travel to a declared area would make them candidates for control orders, if not prosecution for committing a host of offences. Therefore, they are likely to be placed in prison, which means that the authorities would know where they are, and they'll be able to participate in many of the disengagement and de-radicalization programs, such as the Proactive Integrative Support Model, or PRISM, managed by the New South Wales correctional services. There will also be the option of post-sentence preventative detention, if they're deemed to pose a security threat – which was introduced in 2015.

Additionally, we argue that the Government should revise the citizenship loss provisions in the *Australian Citizenship Act 2007*, because Australia, as a major supporter of the rules based international liberal order, supports the idea that individuals that have committed offences should be given the opportunity for rehabilitation.

There is plenty of evidence of individuals become disillusioned by the conflict. The groups, the dynamics, or because of personal experiences – they were unable to return. We therefore suggest that, if the authorities can ascertain the motivation behind the decision to travel to Iraq and Syria, coupled with an understanding of why these individuals want to return, there is a very strong possibility for rehabilitation. Especially as studies

indicated that aren't well versed in religion in the first place, but are rather bored, under employed, over qualified, and underwhelmed, young people.

Additionally, it has been argued by the Radicalisation Awareness Network, that through a multi-agency approach involving the family, community members, religious leaders, teachers, health professionals, and of course the police – it becomes possible to get someone to disengage from violent extremism. And we would argue that there is more evidence of successful PVE and CVE programs, than of returned foreign fighters committing acts of violence.

We also argue that citizenship revocation may have the unintended consequence or encouraging minority communities, many of whom, who already feel marginalised and discriminated, that their state is only targeting their people.

As part of this argument, we would encourage the Office of INSLM to remember that many of those from minority communities have dual passports, which is why we suggest that citizenship revocation may feed the Salafi jihadi narrative; that the Australian Government is hostile to Muslims.

We thank you for the opportunity to appear before the INSLM and we look forward to answering your questions.

DR RENWICK: Thank you very much, gentlemen. Can I start off by asking then, I take – I understand what you say about the lack of empirical evidence about the 80 or so remaining people. It's possible though, isn't it, that there are still, within that group, people who are unrepentant members of ISIL. We just don't know, that's what you're saying?

DR COYNE: Look I think that's the case. What we've seen is that if we look at past experiences of this in other countries. If were to look to, for instance, the formation of JI, and the number of people who return from fighting in Afghanistan – we would say it's hard to put an absolutely figure to it, but it's a small percentage probably still in double digits, from that example, we would say.

But that doesn't mean they're not manageable within the population, it just means they will still be motivated. And similarly, we see that in a range of offences here in Australia as well. We see that the end of custodial sentences - a number of offenders who are still likely, and to represent, a threat to the community.

DR RENWICK: Can I just ask though about the ISIL threat though, in the Middle East. What's your current assessment of the overall ISIL threat, not limited to the 80 Australians?

DR KFIR: Currently it's projected that by 233,000 Salafi Jihadists around the world. They're sort of split between members of al-Qaeda, and ISIL, and other groups. Al-Qaeda has developed a very different strategic vision of how they want to operate. ISIL is still developing its post-caliphate strategy. So the threat is certainly there. We are constantly seeing incidents of violence committed by ISIL, their affiliates, and of course by lone actors.

DR RENWICK: All right. I take it, it follows from what you said that certainly there needs to be a case by case approach to the 80 or so people.

DR KFIR: Yes.

DR RENWICK: You'd agree with that?

DR KFIR: Yes.

DR RENWICK: Do you say though, it's never justified to take someone's citizenship away in the circumstances we're discussing?

DR COYNE: I would argue that it's never justified. If we were to look at the framework of how to manage these people as offenders and potential offenders, people who present an unacceptable risk to the community. What we need to do is look and consider – protecting Australians is more than protecting Australians in Australia, it's about protecting Australians and Australian interests in both here and offshore. And if we look historically, Dr Renwick, we will see our most terrible tragedies, in terms of numbers, are certainly the Bali Bombings, we'd say. And that's, I think, is a really good indicator of what we ought to be concerned about here, which is if we have those people back here, it makes it incredibly difficult for them – because we are managing them through a clear framework that begins with custodial sentences, and has cut-outs all the way through, including post-sentence offender management.

DR RENWICK: Well if that's available, I mean, I suppose it must be possible, you've heard the Police this morning – they say there are 39 briefs of evidence. Home Affairs says there are 80 people, so what we might deduce from that is about half the people, if they were to turn up on the doorstep tomorrow – assuming they're still Australian citizens – the Police wouldn't, presently, be able to charge them with anything.

Certainly, control orders are going to remain, I think, a rarity. Looking at that other half of people you can't charge, do you still say though that, you know, in no case is it is permissible - - -

DR COYNE:- - - I think, Dr Renwick, if we look at the overall number of targets in the country, and I think we need to remember this in a sense that we have in the top targets in Australia a range of people who represent significant threats to the community, and which are being managed by our security agencies and law enforcement agencies, and when they tip over to the point where they're likely to actually undertake an attack – or undertake illegal activities, we've had an incredible rate of success over the last two decades in the war against terror.

In contrast, the thing is that it's a total wild card if we remove their citizenship and send them forth, it's a total wild card. We're talking about looking at having to manage case by case incredibly complex cases that represent varying levels of threat but with a variety tools, including community engagement. In contrast, with the free-flowing of people around the region, if you were to look at the example of Jemaah Islamiyah, I think you would say that the return of foreign fighters who fought with Mujahedeen, they were at the core of the Jemaah Islamiyah movement. They were the core of the bomb builders, they were the core of the operational planners, and they were the core of the leaders. And what we're talking about here is allowing these people to go unsupervised, and the wild card, I think, is too much of a threat in comparison.

DR RENWICK: All right. What progress do you think we've made on CVE programs, I know you've touched on that in your opening. Firstly, I think we have moved away from the notion of de-radicalisation, which after all may be the work of a life time, it might never happen. With disengagement, in other words, stopping the thought becoming the act, what success have we had, do you think, in that regard?

DR COYNE: First off we need to – in terms of success – we need to look at it in terms of in the culture approach that our law enforcement agencies at the Commonwealth and State level have demonstrated. And I think that if we look to the New South Wales and Victorian Governments – what we've seen over the last decade and half is consistent learning organisations that are not learning just with to deal with CVE issues, not just learning to deal with them in their silo of New South Wales or Victoria, but what we see is the programs continually evolving.

The answer to that question is, is that today we are at one level and we'll continue to get there. But I think that what we can say is, is that – and certainly in the New South Wales and Victoria - we see an incredibly

broad array of programs that are – that have achieved a degree of synergy that are managing everyone from the teenager who's in school saying inappropriate things and doing early intervention there, through to sentence – or in custodial sentences and being managed, both in the sense of the traditional surveillance intelligence collection, but more importantly, in terms of engagement, reengagement with their community. In terms of programs and religious programs that are being run within their custodial sentence and within the correctional institutes.

I don't know if you want to add anything to that?

DR KFIR: I would also add that obviously it's very difficult to provide you with a very clear matrix, a very clear qualitative system because of we are dealing with a counter-factual.

What I would say, having reviewed a number of these programs, is that nowadays, only the State and Territory level, Australia is at the higher end of understanding how to do this engagement than many other countries. We have a lot of dedicated state and local officials who are doing incredible job intervening early on to prevent those youngsters from being radicalised.

We have learned from our mistakes, we have done a lot better, there's always room very improvement. I recognised that this morning, for example, you raised the issue of online radicalisation. Again, by having these early interventions programs, we are able to intercede early enough and redirect those attentions to less nefarious activities.

DR RENWICK: All right. Can I ask you about the programs in gaol?

DR KFIR: Yes.

DR RENWICK: My broad understanding is New South Wales, or we have state based prisons here, of course. New South Wales has a concentration program - - -

DR KFIR: Yes.

DR RENWICK: - - - for the most serious terrorism offenders who are in one place. Whereas, Victoria has a dispersal program. What does the literature and what does experience internationally tell us about which approach is better?

DR KFIR:Again, that will require qualitative study, and I am hesitant to provide you with references. I can tell you that countries, for example: like

France have put them all in singular elements; United States has done the same; other have engaged in dispersals. Until we start to remiss these individuals from prisons, and if there is an element of recidivism, we simply won't know.

What can I suggest, is that the New South Wales program is voluntary, and that may be is an issue of concern and might require revisiting. But there is better training of correctional service officers, to spot individuals who are being radicalised. Or who might spread a radicalised ideology. Again, I would submit that the correctional services are very aware of the threat of prison radicalisations and are doing what they can to address those issues.

DR RENWICK: Even though it's voluntary in New South Wales, those people who've been convicted of terrorism offences have a huge incentive, of course, to participate. Otherwise they face the risk of a high-risk terrorist offender.

DR KFIR: That's correct.

DR RENWICK: That's very interesting. I think that's been very comprehensive, and I'm grateful to you both. Thank you very much.

DR KFIR: Thank you, sir.

DR RENWICK: And I invite Doctor Rayner Thwaites.

Civil Society Representatives - The University of Sydney

DR RENWICK: We welcome the very patient Rayner Thwaites here from the University of Sydney in a private capacity. Dr Thwaites, firstly can I say thank you very much for your written submission. Is there any opening remark you would like to make?

DR THWAITES: I would like to beg your indulgence for a short opening.

DR RENWICK: Yes, of course.

DR THWAITES: First of all, thank you very much for the invitation to appear.

DR RENWICK: I hope you found it interesting.

DR THWAITES: Yes, it has been very interesting. Thank you.

Taking my cue from your comments today, and to make best use of the time I'll skip over the conduct-based measures and look straight to the issues going to conviction-based revocation.

Look, essentially much of the discussion has been about an appeals mechanism in place of judicial review. And just to state, you know, this obviously raises difficult questions of institutional design; that's essentially what we're interested in here. And you know, where appropriate, I'll draw on work that I've done just for those points of institutional design, as distinct from sort of making comments about the direct legal boundaries; so drawing on the legal literature, but for what it tells us about institutional design.

We are very fortunate in developing something in the Australian context that we do have a lot of sort of grey literature, government inquiries, and parliamentary inquiries. In the British context, on the Special Immigration Appeals Commission, there's been a lot of secondary literature and testimony by special advocates as to what has worked and what hasn't worked, and we can certainly learn from the British experience in terms of where they have found problems.

In terms of just briefly framing some of the issues, perhaps the best shorthand way to do so is to say, "You have to be careful not to create what in the literature gets called 'a grey hole'". So as opposed to a black hole as made famous by the comments in the *Abasi* decision on Guantanamo. You know, a grey hole in a sense is where there is the façade or form of legality, but it doesn't, in truth, offer much by way of substantive legal protections.

And it will be of no surprise to anyone here that the main issue going to where there whether something offers substantive legal protections or grey holes here is how you handle confidential information. So it's the issues that stem from confidential information that raise the issues.

DR RENWICK: And just pausing there, can you also say something about what the tribunal is doing; is it in truth doing a full merits review, the deference issue to ministers and so on? If you could cover that?

DR THWAITES: I will, I'll come to that within the minute.

DR RENWICK: Yes, at your convenience.

DR THWAITES: But just to briefly say first, where I think SIAC has a much more uncomplicated and straightforward beneficial legacy that we can learn from is in relation to its statelessness determination procedure.

So it's very hard to review the jurisprudence of SIAC on these issues as they've arisen in the citizenship context, and fail to be impressed at the way in which it has conducted its inquiries. I realise that's my second question, but I'll briefly flag it upfront.

On the issue of the statelessness determination procedure, it's essentially a correctness standard; I mean, it's saying, "Is the person, or is the person not a foreign citizen?" Both the parties can make submissions, which are fully disclosed to the other party; there is no confidentiality that attaches to the question of whether someone has foreign citizenship or not.

And there is expert evidence. I mean, one of the things is, there is obviously a depth of experience that is capable of being drawn on in London at the moment, but there is a very sophisticated expert evidence, there is very adept cross-examination of the experts, and the way in which SIAC is constructed is that there are people with expertise in immigration and security who necessarily form part of the panel.

I am not saying this is necessarily generalizable, but in the case of SIAC, that has led to less deference, not more, in the sense of I would say SIAC on the whole is much more confident of doubting and seeing problems with the government position than the courts are: it's more common for SIAC to decide against the government, and then be overturned on appeal before the courts, than vice versa. So you know, it tends to be SIAC which takes a much stronger role in review of government action. And I think, certainly on the statelessness questions perhaps, is a body of considerable sophistication from which there is much to be learnt in terms of how it's conducted itself.

DR RENWICK: But just pausing there.

DR THWAITES: Yes.

DR RENWICK: At this stage. When you're dealing with statelessness here, that really turns on whether the person had dual citizenship or not.

DR THWAITES: Yes.

DR RENWICK: That's essentially the question. Why are courts not perfectly able now to deal with that by hearing experts on both sides? If there are matters personal to the individual which need to be adduced, well, they make a decision to adduce them or not and they can be tested.

DR THWAITES: Yes.

DR RENWICK: We've got the recent examples of the section 44 cases in the High Court.

DR THWAITES: Yes.

DR RENWICK: So just pausing there, why is, you know, the one thing that is available as a good appeal review right at the minute surely relates to the determination of citizenship?

DR THWAITES: Sorry, I'm misunderstood: I'm not arguing against the courts as the appropriate way here. This is not an argument for tribunals or courts; this is an argument for a particular process.

DR RENWICK: Yes, I see, okay.

DR THWAITES: And where that process is housed.

DR RENWICK: Right.

DR THWAITES: What I would say is, having looked quite closely as SIAC's jurisprudence, having looked quite closely at the High Court section 44(1) jurisprudence, the SIAC's jurisprudence is much better. The High Court's approach to proof in the section 44(1) cases is much more open to criticism than SIAC's approach, and that is, partly, again a function of the fact that sitting as the Court of Disputed Returns, the normal rules of evidence don't apply.

If you look at the transcript of the *Canavan* decision or whatever else, the evidential basis of some of the decisions is wanting in ways that you know, would be corrected just by setting out more clearly what the evidential approach to be adopted before whichever body hears it, is.

So putting to one side - and I can return to it - but the statelessness determination procedure, and just focusing on the question of you know, review of the decision to deprive someone of citizenship. In that context, the UK jurisprudence is, on the citizenship materials of less assistance, because there is the UK case, a discretion of sort of breath-taking breadth: wherever the Home Secretary is satisfied it's conducive to the public good; it's a standard which was simply borrowed from the deportation provisions in the *1971 Immigration Act.* So, it's about as sweeping a discretion as you can have.

And because there are really no legal limits or parameters on that, and because the UK has no written Constitution and this is an uncodified context, where Parliamentary sovereignty is much less complicated, that

has meant that the only real legal limit that has been litigated is the statelessness issue. And the SIAC provides not a lot of guidance on the citizenship cases, because there is so little bay of sort of a legal hook, or to actually challenge the citizenship decision that's been made.

DR RENWICK: But can I just ask you this: am I right in thinking that in SIAC, the Minister or those acting for the Minister, do need to put forth some evidence; it's not just a matter of them saying, "The Minister has determined it's not conducive to the public good"? Do you disprove that?

DR THWAITES: You're right. What I would say is - perhaps I'll - - -

DR RENWICK: Yes, please.

DR THWAITES: I'll briefly elaborate it and then come back to it. What I would say is, the more instructive and helpful SIAC jurisprudence and not just of SIAC but also of the English courts more generally, is, in fact, in terms of handling confidential information, is in relation to control orders. And the control orders jurisprudence is, in fact, much more instructive as to you know, how to appropriately handle national security information.

And what I would say is that in the UK context, there are no issues about the constitutionality of the deprivation of citizenship, which I think mean that you have to be very careful about importing the UK material on citizenship into the Australian context, because I actually think there are constitutional limits that will be present in the Australian case that simply don't apply in the UK instance.

But in relation to control orders, what I think is particularly instructive in the control order jurisprudence is the dynamic which has, at least for periods of time, sort of been set in place, whereby one legal development leads to another in a sort of a beneficial direction of heightening protection. So sort of, the case law and the legal developments, as familiarity with the system grows.

So to put it very briefly, I endorse the comments of the Australian Human Rights Commission and the Law Council of Australia, that if you were going to have something like the Special Appeals Division of the AAT, it would need to be augmented because I think you need to be very careful about an analogy with passports. Passports are regulatory, civil, or administrative, in a way that deprivation of citizenship, whatever its ultimate categorisation, whether it be punitive or not; and I think there is more of a live issue as to whether it's punitive than perhaps is suggested in the opening remarks.

Whatever the categorisation, it's certainly towards the upper end of the scale in terms of the egregiousness or gravity of the conduct, and needs commensurately higher procedural protections than is the case in the passports instance.

What does that mean immediately here? I would say that one of the instructive elements of the UK jurisprudence is that there was a learning experience. So there was, in the early days, after the advent of SIAC in 1997, the Act that introduced the Special Immigration Appeals Commission; you know, there was a sense in the jurisprudence, and toing and froing with Canada, whereby the special advocates were introduced, and they were thought to be a panacea.

Experience with the special advocates spread disillusionment and there was a sense that the special advocates themselves needed supplementation, and there was a need to tweak and attend to their role. And there is, again, very sophisticated commentary, often by people who have been special advocates in the UK, as to what they saw as the most glaring and problematic limitations on their role.

And critically, in the control orders jurisprudence, the crucial supplementation was an irreducible minimum of disclosure to the applicant. So the absolutely critical feature that was added to the procedural innovation of the special advocate was in a series of decisions, culminating in *AF No.3* in 2009. There was the endorsement of the idea, and there are statements; the ones I've looked at most recently are by Lord Phillips in that decision to say, "Look, special advocates by themselves," he says it expressly, "are not enough." You know, there needs to be an irreducible minimum of disclosure.

So you, yourself, in the course of today's proceedings have mentioned the gisting requirements, but the question is how you best operationalise or give effect to those gisting requirements. And here perhaps it's instructive just to look for a moment - and I know it's moving outside closed material procedures to public interest immunity - but if we just focus on PII for a moment: in relation to PII, you know, Lord Kerr has said in the *Al-Rawi* decision, which is a security vetting decision; but in that context, and the phrase he uses, which I think is instructive is, he said, "Look, it introduces a healthy dilemma."

Because you can choose to disclose a highly minimal account in the open record, but then you risk the court saying, "Well, there's actually not enough here for us to decide the case in the government's favour." So if you want to successfully prosecute your case, you have an incentive to disclose more information. There is no suggestion in a PII context that

this is forcing disclosure of information; I mean, that would be the most alarming thing for the government if it thought potentially it had confidential information that it would be forced to disclose. It's not forced in the sense of it can always choose to, you know, drop the action.

DR RENWICK: It's a forensic forcing.

DR THWAITES: It's a forensic forcing.

DR RENWICK: Yes.

DR THWAITES: This is very much a shorthand sort of at a canter way of explaining things, but what's happened in the closed material procedure cases in the control order jurisprudence is that something similar has been introduced in the closed material context. So again, the claim is made if what is being contemplated is a particularly serious infringement of liberty - I shouldn't say liberty because the words actually used, which are more applicable to us, is rights - so if there is some very grave infringement of rights that is the subject matter of the dispute - and a lot of the case law is about exactly where the bounds of that fall.

But in those cases, the government has to either meet the gisting requirements as determined by the courts, meet the minimal level of disclosure, or risk, you know, not successfully establishing the action. That doesn't rule out the use of the closed material procedure, but it means that you can't, to put it crudely, have your cake and eat it too and say, "Everything is before the decision-maker to make a decision, but there is no incentive for us to disclose up to any particular level, to the applicant." So for example, just to take a statement from *AF No.3*, Lord Phillips said:

> *Look, in this case, the open material consists purely of general assertions. The case against the controlee is based solely or to a decisive degree on closed materials, such that the requirement of a fair trial will not be satisfied, however cogent the case based on the closed material may be.*

And lest it be thought there's no sort of foothold in the Australian context, you know, you can see something similar going on for example in the *Jaffarie* decision; so in the *Jaffarie* decision before the Full Court of the Federal Court here, you know, the court makes it very clear, quite near the end of its judgment, that it indicated to ASIO on its adverse security assessment that if ASIO wasn't more forthcoming with information, then ASIO faced a real risk of losing the case. There are dis-analogies, but it effectively presented ASIO with the healthy dilemma that Lord Kerr was describing in the *Al-Rawi* decision.

And again, in a Chapter 3 context, you can again take statements by Gageler in *Condon v Pompano*, and whatever else, essentially setting up some of the same dynamic whereby the person bringing the prosecution has to disclose it up to a certain level, otherwise the court will simply - the person can always pull the information. In *Condon v Pompano*, in the Chapter 3 context, there is the additional thing of if the decision-maker doesn't disclose information, then the court will say, "Well, look, this is contravening the situation of a Chapter 3 court," and leave the matter on that basis.

Essentially what you saw in the UK context was a sort of a slow evolution over time, because these measures were introduced earlier, whereby there was quite considered assessment on the part of, you know, Parliamentary committees and courts, crucially of courts, as to the limitations of earlier innovations. And because of the legal context, essentially because of court decisions, those innovations were then built on and further augmented until they got to a level where the court felt it was comfortable that there was some measure of justice or procedural fairness being afforded.

I skipped over, and I'm sure you're familiar with, but as part of what I think of as the background for the need for such augmentation, you will doubtless, because you've been thinking about the passports case, have looked at the *Hussein* decision from 2008. But in *Hussein*, the Federal Court, the Attorney-General issued a public interest certificate and the court stated, and I quote:

> *The specific features of the hearing that result from the issue of the certificate are such that the applicant will not know the case against him, or have the opportunity to response to that case.*
>
> *Hypothetically, the applicant may have a complete answer to the allegation made against him or her, but the tribunal will never learn the answer. The tribunal is not in a position to test any evidence led against the applicant; moreover, where the applicant's representative is not present because the Attorney-General has refused consent pursuant to 39(a)(viii) of the Administrative Appeals Act, the applicant is denied even the most basic right to have his or her case heard.*
>
> *Perhaps most notably, the tribunal is bound to abide by the Minister's certificate without having independently*

balanced the competing demands or justice and the public interest in a particular case.

So if that's the current state of procedural fairness on a passport application involving confidential material, that's an open court admission that it's extreme procedural unfairness, as the regime currently exists, you know? And that's part of what incentivises comments about how could we learn from the UK literature, to work-up something that is more procedurally satisfactory in this instance.

DR RENWICK: Yes. So to take SIAC for example, so just to understand a bit better how it works: so in a loss of citizenship case, the Minister has made this high-level statement that it's not conducive to the public good. But am I right in thinking when it gets to SIAC, the Minister needs to produce the evidence which underpins that, in a classified folder?

DR THWAITES: Yes.

DR RENWICK: Is that right?

DR THWAITES: So SIAC will release both a closed and an open judgment.

DR RENWICK: Let's just go back to - - -

DR THWAITES: In the interests of getting it - - -

DR RENWICK: Let's go back to the beginning.

DR THWAITES: Yes, okay. Sorry.

DR RENWICK: Minister makes a decision, day one.

DR THWAITES: Yes.

DR RENWICK: And the person is notified, and they're told they can go to SIAC. And am I right in thinking that at some point before the hearing, a classified version of the evidence underpinning the Minister's decision - not the tribunal's decision, the Minister's decision - goes to SIAC?

DR THWAITES: That's correct.

DR RENWICK: Okay. And then as I understand it, having spoken to some special advocates, there's a big battle right at the beginning where the special advocate comes along, and in closed session, says, "There's a

whole lot more things which need to be disclosed to the applicant," and SIAC rules on that; is that right?

DR THWAITES: That is correct.

DR RENWICK: Right.

DR THWAITES: And most of the special advocates speak of themselves as having a disclosure function and a representation function.

DR RENWICK: Yes.

DR THWAITES: So what you have just mentioned is the disclosure function, and that, in some ways, has been where the special advocates have been most happy; if you had to advocate between the disclosure and representative functions, it's the representative function that they're particularly troubled by.

DR RENWICK: Yes, sure.

DR THWAITES: And under the disclosure function, I suppose the critical thing I'm saying here is, in the control order context, the special advocates are greatly assisted by case law which establishes an irreducible minimum of disclosure. So they have a very real threat or legal sanction that's available to them.

DR RENWICK: Sure. And one of the reasons they're so unhappy is that the impossibility of getting instructions about, without being to provide the gist, yes. What exactly is SIAC doing then, when it looks at the Minister's decision? There's the question about whether it meets that very broad definition, but I take it because they've seen the underpinning evidence, they say, "Aha," in a particular case, "the relevant fact here was that applicant X fought for ISIL in Syria in around this period."

And I take it that if SIAC, on the merits - is this right - were not convinced that that happened, so if they received evidence saying - to take my hypothetical example - there is some way we're completely different, that they can substitute the Minister's decision with a decision to set that aside, which restores citizenship; is that right?

DR THWAITES: Funny thing, I'm 95 per cent certain, but I'll take it on notice - it's not a reassuring phrase, 95 per cent certain - but it's a de novo, it's essentially a de novo review. So it's a full merits review, you know?

DR RENWICK: Right.

DR THWAITES: They remake the decision, essentially. And one of my anxieties about use of the Special Appeals Division - and I'm not an expert on the Special Appeals Division - is that it's more constrained in terms of its merits review function.

DR RENWICK: Understood. But just to understand the suitability or otherwise of the SIAC system: so if that's right, then subject to the gisting issues that you talked about, which make representation frustrating for the special advocate, then at least in legal theory, you're doing the best you can to, on the one hand, preserve what should be preserved as secret, and on the other hand, giving some better fairness to the person most affected; I mean, that's the policy dilemma.

And note, there are differences of view about whether that balance is properly weighted. And there is no doubt, as you say, that when it came to criminal matters, the House of Lords I think eventually said, "No, enough. We're not having evidence not disclosed." That's in crime; we're talking now about an administrative procedure. And so you aren't, still, in the UK, entitled to know everything, but there's the gisting requirement.

DR THWAITES: Yes.

DR RENWICK: Okay. So here, you're quite right to say that it's up to the Minister whether to allow the applicant or the applicant's representative to be present, and I think it's almost invariably the situation that where there is classified material, the Minister doesn't give that approval.

So what I'm talking about is certainly not just that; it's adding on the special advocate. And what I am trying to work out is what additional recommendations one would make to make it a workable situation.

DR THWAITES: And I'd say that you could make a very strong case, on the basis of the UK experience, that the critical matter is a minimum level of disclosure, and the ability to insist, you know, where there is inadequate disclosure, that it endangers the action.

DR RENWICK: Yes. And one could always imagine a hypothetical case where the irreducible minimum of disclosure gives away a confidential source; and there, you've got the ultimate dilemma, which, in a criminal context in Australia is resolved on *Allister's* case by saying, "You get a permanent stay, or you withdraw the prosecution."

DR THWAITES: And what I would say is, you need something that hard, in a sense, because you know, in Australia, if you look through the

national security jurisprudence, the phrase that initially had its source in the statement of Brennan J in *Kioa*, and then most famously has been pulled out in the *Lagaya* decision: that procedural fairness can be reduced to nothing.

DR RENWICK: That's right.

DR THWAITES: And if you contextualise procedural fairness away to nothing, then you're at the problem, I was saying, of a grey hole; there, I think it becomes a genuine issue as to whether you are affording substantial protections or just a façade. And that has been appreciated as a very serious issue in the UK context, outside the criminal context, where they have essentially said that there are some non-criminal matters where the gravity of the rights infringement arises such that what is demanded by way of a minimum level of disclosure begins to approach what would be you know, potentially required in some criminal contexts.

DR RENWICK: What's the best case on that?

DR THWAITES: So it's not necessarily the best case, but it's the one which sort of finishes a particular line of cases - - -

DR RENWICK: Yes, please.

DR THWAITES: - - - is *AF No.3.*

DR RENWICK: Okay, *AF No.3*, all right.

DR THWAITES: And you'll see on the basis of that decision - I'll just pre-empt - that was heavily driven by - including some very grumpy statements by House of Lords judges - it was heavily driven by European developments. So the claim is not being made presently that we are in a similar legal position; we're just going to say that the process of learning in another legal context or an institutional design, led to that conclusion.

DR RENWICK: Now, with an inquisitorial model with a special advocate, where the special advocate sees everything, there's a de novo or full merits review; you'd accept that it doesn't necessarily follow that depriving the applicant of the gist means it's necessarily unfair. In other words, what is left, even if the applicant in a particular case is not told very much, if anything, about why they've lost their citizenship, is the capacity for an energetic tribunal to take on the respondent, to cross-examine the respondent's witness, for the special advocate to cross-examine the respondent's witness, and to test that as best you can without having full instructions from the applicant. That does remain.

And I appreciate that in some cases, that would not give much merits review, but in others, you'd accept it might?

DR THWAITES: I'd accept it might.

DR RENWICK: Yes, I understand.

DR THWAITES: As a sort of, almost, in theory. But if you review the work and the commentary on SIAC in the UK, there are grounds for pessimism in terms of you know, special advocates who I respect, as sort of legal practitioners and others have been decidedly gloomy about the prospects on the representation side of things without being able to put points to their client about matters.

Here, it's not just the UK jurisprudence that's relevant, but also the Canadian jurisprudence, on the right to make an effective challenge. So there are a number of Canadian cases, which similarly, in that case, are sort of motivated by the Canadian Charter and section 7 of the Canadian Charter, and have again, essentially arrived at the same point as the British jurisprudence: that there is a necessary right to be able to make an effective challenge to the case against you, even outside the criminal context.

And in that case, it's actually even more striking that it's actually in the immigration context; they've said there's a right to make an effective challenge, you know, for non-citizens, although it's been in relation to liberty.

MR MOONEY: Just one question. Going back to the robustness of the Statelessness Convention and SIAC, my understanding is that even in circumstance where the second country's government, if you like, gives evidence that the person is not a dual citizen, SIAC could nevertheless, based on its analysis of that country's law and expert evidence, make a finding that they are.

So in *Pham*'s case for instance, I think the Vietnamese Ambassador gave evidence to the effect that that person was not a citizen of Vietnam, but the tribunal and then the Supreme Court confirmed that that's not conclusive.

DR THWAITES: Actually, just with respect, in *Pham*, the tribunal agreed with the Vietnamese Government.

MR MOLONEY: All right.

DR THWAITES: So in *Pham*, SIAC examined the circumstances of the case. It opens into another issue, which is how we understand - the critical issue for statelessness is Article 1.1 of the 1954 Statelessness Convention and how that's understood; so you know, whether someone has another nationality under operation of its law is the crucial phrase.

And the jurisprudence of the treaty body on the 1954 Convention, which is the UNHCR, establishes that operation of law extends beyond law on the books and legislation, to encompass law in practice; so it encompasses sort of executive decrees, operation of discretion, review bodies and other matters.

And that position that it extends to law in practice has been endorsed by the UK Supreme Court in the *Pham* decision. So in the *Pham* decision, the court, while reaching the same conclusion as the Court of Appeal, effectively sort of rebuked the Court of Appeal and widened the scope of the operation of law provision.

What I will say is sort of, again, part of what I find impressive about SIAC in some ways is their way to enter into - given that it's a question of someone has to be a foreign national under the foreign nationality law, it goes into great detail to look at the actual operation of the system; in this case, within Vietnam. And it reached the conclusion that the Vietnamese Government was right.

In the Pham decision, it brought up a distinction between conventional and unconventional cases, and it related the Vietnamese nationality law as an unconventional case. And it said:

> *The Secretary of State and SIAC is not concerned with the reasonableness of the laws of the foreign state, or of decisions made to deprive a person of citizenship, but with their affect.*
>
> *If their affect is to deprive a person of citizenship, and that person has no nationality other than British, he may not be deprived of British citizenship.*

And then it went on to say:

> *If the preliminary question were to be decided by reference to the text of the legislative instruments set out above, we would've preferred the view of Dr Lang. But as one might expect, given the "if" the tribunal continued*

> *- the issue is not to be determined principally by reference to the text of the Vietnamese nationality laws.*

And it went on to say:

> *In Ambassador Bin's opinion, which we accept accurately reflects practice, a decision taken by a council of ministers, or a president, as appropriate, would not be open to challenge in the courts. And the 1988 Vietnamese legislation was deliberately ambiguous.*

All of this is to say that the distinction between de facto and de jure statelessness that you mentioned earlier, is indicated in SIAC's jurisprudence - and *Pham* is a beautiful example - to be much more complicated. So there is, in fact, a very large grey area between de facto and de jure statelessness. And that is substantiated, both as a matter of domestic law and as a matter of international law. So if you look at the UNHCR handbook and some of the UNHCR materials, it makes it very clear that there is a grey area.

I think the best decision in the *Pham* litigation is SIAC's decision because it is a very careful, nuanced consideration of all the evidence, including government practice, and including the operation. As I think the Court of Appeal did, it doesn't crudely apply British interpretive canons to Vietnamese law; it takes very seriously that it is looking at the question as a matter of foreign nationality under a foreign legal system, and sort of works through as assiduously and as in good faith as it can, what is the actual position under that foreign legal system.

DR RENWICK: One final question from me, on the question of deference and how that fits in with a de novo hearing or appeal. So do I take it that because it's de novo, there's simply no deference at all shown to the fact that it's a minister of the Crown who has previously made a determination it would be contrary to the public interest; is that right?

DR THWAITES: That's probably oversimplified, in the sense in which SIAC's jurisprudence, and the jurisprudence of the courts on SIAC, is quite complex on this point. But the most famous counterexample is the *Rehman* decision; that would be at one end of the continuum. Lord Hoffmann indicated that on national security matters that there's a very high level of deference.

I would say that much better legal commentators than I have said that Lord Hoffman's approach gives you whiplash, in that it's very deferential, until particular rights are invoked, and then it becomes a sort of a highly

demanding correctness standard. So you flip a trigger between highly deferential in some contexts and incredibly intrusive review in other contexts.

There is a lot more case law on exactly the approach to be taken by SIAC. But I would say if you actually look at the proof in the pudding of what SIAC has done, it would be unfair to characterise it as a rubber stamp; it has exercised quite a robust review role.

DR RENWICK: Including in loss of citizenship?

DR THWAITES: In loss of citizenship, it's very hard to evaluate, other than in the statelessness determination procedure.

DR RENWICK: Yes, because it's not public. Are there statistics published?

DR THWAITES: As far as I know, there have been cases in which citizenship revocation, a government decision to revoke someone's citizenship, has been overruled by SIAC because of the statelessness determination issues, as in *Pham*, and the *Abu Hamza* case is another instance of that. I'm unaware of any SIAC decision that has reversed a deprivation decision, on any other grounds apart from the statelessness issue.

DR RENWICK: And are statistics available about this?

DR THWAITES: I would believe they would be. The SIAC website is quite user friendly.

DR RENWICK: Okay, yes, we'll have a look.

DR THWAITES: And the open judgments are all there, tabulated I think in an Excel spreadsheet.

DR RENWICK: Sure, okay.

DR THWAITES: I would say, one of the main issues is overwhelmingly - and there are lurking legal issues here - overwhelmingly, the deprivation provisions are used when the individual is outside the UK. And because they are non-suspensive, any challenge to those decisions has to be brought against an individual while the individual is outside the UK, and excluded from return. And you know, that has served to put a break on the emergence of any jurisprudence, because - - -

DR RENWICK: Do you mean cases aren't brought, or they're just very hard to win, as a practical matter?

DR THWAITES: Both. And there are a range of matters, but particularly the first instance of, it's just very hard to bring a case.

And the only other thing relevant to what has been discussed today is the notice requirements before SIAC, in the citizenship deprivation cases, are one of the most heavily criticised aspects of the regime, because almost invariably - and you can point to numerous cases - where they wait until someone goes on a three week holiday outside the UK or something and then the revocation just so happens to happen in that three week period. And notice is provided to the parents, or to the last known place of business or somewhere else in the UK.

And there are, in many of the cases, issues about the effectiveness of the notice and when the person knew, and constructive notice, and some other issues.

DR RENWICK: Thank you.

MR DEL VILLAR: Just one question in regard to, I think you were talking about the division of responsibilities that SIAC has, and I think you were cautioning about necessarily importing a lot of what was said there to an Australian context.

But is it your view that the AAT, if we were to pursue the alternative model with having the AAT do full merits review, do you think it would be a good idea for the AAT to review, on public interest grounds, the decision whether or not to actually revoke citizenship in particular cases, or should it have a more limited review such as dealing with statelessness or whether a particular conduct occurred?

DR THWAITES: If I can just ask for clarification?

MR DEL VILLAR: What I'm really wondering is - - -

DR THWAITES: When you say on public interest grounds, what do you mean by that/

MR DEL VILLAR: Well, for instance if you had a regime in which the Minister, having been satisfied that the person engaged in particular conduct with a certain intention, then took the decision that, well having regard to a variety of factors, that person should have their citizenship revoked; as a question of sort of institutional design, do you think that the

AAT or the Minister should be responsible for that particular sort of public interest decision about the revocation, or do you think that the AAT or what other merits review body we create in Australia should be limited to things such as statelessness and whether, in fact, the conduct occurred, and so on?

DR THWAITES: Okay. So first, I'll just, as they say, bracket out one issue, which is I haven't read enough cases of the Security Appeals Division to know how confident I am as a commentator in its jurisprudence and approach. But just sort of taking in the abstract, an abstract merits review body - it may be the Security Appeals Division, it may be something else - is it appropriate as a public policy matter that there be full review? I would say absolutely; this is an incredibly serious decision.

Before there was mention in the Law Council of Australia's submissions about the issue of the executive making this decision. If you want to see where that idea has been substantiated with sort of great erudition and rhetorical flourish, it's in the US jurisprudence, where it's determinative of the US constitutional jurisprudence on citizenship revocation, which is much more restrictive than in Australia, that government is chosen by the people; the government doesn't choose its people. And it's taken very seriously and elaborated in some doctrinal detail, in depth, as to exactly what the consequences of that thought are.

One thing which is does mean is that they are very - reflecting an earlier period in the US history when the legal fiction of voluntary renunciation was very extensively employed, such that the idea that you had taken an action which, by your own action, you had renounced your citizenship. And that was an idea which was employed quite liberally and generously to deprive people of citizenship where it was obvious that you were stretching the idea that they'd voluntarily renounced citizenship as far as it could be stretched.

In direct reaction to that, the current jurisprudence of the US Supreme Court, beginning in the 1950s but really culminating in the *Afroyim* decision in 1969, imposes much tighter restrictions than I've seen elsewhere on requirements of materiality, you know, and insistence on real, genuine voluntariness in relation to revocation, if that idea is being used.

So the idea mentioned by the Law Council of Australia that there are real problems with the executive doing something this bold, and with this much affect; in the present context I'm just - sorry, to answer your question, I'm just saying, I have no problem at all with a ministerial

decision being fully reviewed. I realise it's by an executive body, in this case, that your question related to.

MR DEL VILLAR: It is, but it's normally regarded as wholly independent of the executive.

DR RENWICK: All right. Well, Dr Thwaites, thank you so much; that was enormously informative and valuable, and we're grateful that experts such as yourself take the time to come along. So thank you so much.

So at that point, ladies and gentlemen, may I just thank everyone for their attendance today. I think it's clear enough that the issues are, frankly, extremely difficult, and I will consider further and report by 15 August. thank you.

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