

Constitutional validity

- 3.1 A large number of submissions and witnesses at public hearings discussed the constitutional validity of the Bill.¹ The discussion centred on two constitutional questions:
- does the Constitution grant the Commonwealth power to legislate with respect to citizenship and the conditions under which it is held, and
 - are there constitutional limitations that might apply, specifically arising from the separation of powers provisions in Chapter III and the implied right to vote.
- 3.2 The following chapter discusses the constitutional issues raised by submitters in relation to the Bill as proposed.

1 Mr Paul McMahon, *Submission 7*, p. 4; Australian Defence Association, *Submission 8*, p. 4; Executive Council of Australian Jewry, *Submission 9*, p. 3; Professor Helen Irving, *Submission 15*, pp. 1-5; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 1-4; Australian Lawyers for Human Rights, *Submission 20*, p. 7; NSW Society of Labor Lawyers, *Submission 25*, pp. 3-6; Law Council of Australia, *Submission 26*, p. 8; Muslim Legal Network (NSW), *Submission 27*, p. 4; Centre for Comparative Constitutional Studies, *Submission 29*, pp. 6-7; Castan Centre for Human Rights, *Submission 30*, pp. 2-4; Councils for civil liberties across Australia, *Submission 31*, pp. 2-4; Professor Kim Rubenstein, *Submission 35*, pp. 5-6; Immigration Advice and Rights Centre, *Submission 36*, p. 4; Migration Law Program, ANU College of Law, *Submission 40*, pp. 5, 10; Australian Bar Association, *Submission 43*, p. 2; Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 1; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 12; Mr Peter Wetheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, Canberra, 4 August 2015, p. 24; Laureate Professor Cheryl Saunders, Foundation Director, Centre for Comparative Constitutional Studies, *Committee Hansard*, Canberra, 5 August 2015, p. 36; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44; Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, p. 45.

Constitutional head of power

- 3.3 The Explanatory Memorandum states that ‘the principal source of power for a person’s Australian citizenship ceasing is the aliens power in section 51(xix) of the Constitution’.² In so doing, the Bill relies on the concept that an ‘alien’ is ‘a person lacking allegiance to Australia’.³ However, there has not yet been a High Court case in which it has been necessary for the Court to decide the constitutional meaning of ‘alienage’, or for it to determine the ‘outer limits’ of Parliament’s power under section 51(xix).⁴
- 3.4 The Constitution, on its face, does not define citizenship or expressly limit the Parliament’s power with respect to citizenship law.⁵ Indeed, the High Court has consistently held that citizenship in Australia is a matter for legislation, and its acquisition or loss follows from what the Parliament legislates.⁶
- 3.5 As such, the Parliament has the power to ‘create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode’.⁷ However, the High Court has also held that an important qualification operates to limit the Parliament’s powers:
- The qualification is that ... Parliament cannot, simply by giving its own definition of ‘alien’, expand the power under s 51(xix) to include persons who could not possibly answer the description of ‘aliens’ in the ordinary understanding of the word. However, within the class of those who could answer that description, Parliament can determine who it will be applied.⁸
- 3.6 Therefore, while the Parliament is authorised to define the conditions on which citizenship depends, that power is not unlimited and may be subject to implied constitutional limitations.⁹ That is, as Ms Shipra
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2 Explanatory Memorandum, p. 5.

3 Explanatory Memorandum, p. 5. See *Koroitamana v Commonwealth* (2006) 227 CLR 31.

4 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 4.

5 Professor Helen Irving, *Submission 15*, p. 2; Centre for Comparative Constitutional Studies, *Submission 29*, p. 6.

6 Professor Helen Irving, *Submission 15*, p. 2; Law Council of Australia, *Submission 26*, p. 8; NSW Society of Labor Lawyers, *Submission 25*, pp. 4–5; See also *Singh v Commonwealth* (2004) 222 CLR 322; *Re Yates*; *Ex parte Walsh* (1925) 37 CLR 36.

7 *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Te* (2002) 212 CLR 162 per Gleeson CJ at 173.

8 *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Te* (2002) 212 CLR 162 per Gleeson CJ at 173; See also Centre for Comparative Constitutional Studies, *Submission 29*, pp. 6–7.

9 *Hwang v Commonwealth* (2005) ALR 83; Law Council of Australia, *Submission 26*, p. 8.

Chordia, Ms Sangeetha Pillai and Professor George Williams (Chordia et al) explained, the Parliament's power is 'not ... an unfettered discretion to determine when such allegiance is lacking'.¹⁰

- 3.7 Importantly, the link between the constitutional head of power (the aliens power) and citizenship law is a question of allegiance. Indeed, current interpretation of the 'aliens power' with respect to citizenship law, defines citizenship as the 'obverse of alienage, or aliens are not citizens'.¹¹

Professor Helen Irving explained:

The test for characterising the law as a law, with respect to citizenship, rests upon a formal attribution of allegiance versus absence of allegiance. A person becomes a citizen by satisfying the criteria under the *Citizenship Act*. They acquire citizenship. With that, in a formal, technical sense, they acquire allegiance. What makes a person an alien is that either they have no allegiance to Australia or they have no allegiance to a state at all. They are either a citizen or a national of another state or they are stateless.¹²

- 3.8 Professor Irving went on to say that a 'characterisation connection' between the aliens power and citizenship law may lead to a constitutional problem if that citizenship law seeks to define a person as an alien without a specific test of allegiance.¹³ The mere statement that certain conduct amounts to a breach of allegiance would be unlikely to be sufficient.¹⁴

Professor George Williams explained:

It was on that basis that the High Court struck down [the] Communist Party dissolution act, on the basis that parliament said, 'We think it demonstrates something,' and the High Court said, 'No, that's for us.' Merely stating that this amounts to a lack of allegiance or, in that case, 'You are a communist,' is not sufficient. The High Court will examine it itself and, if the High Court takes the view that any of the grounds put in the bill do not give rise to a necessary lack of allegiance, we have a real problem

10 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 4. See also NSW Society of Labor Lawyers, *Submission 25*, p. 4; Muslim Legal Network (NSW), *Submission 27*, p. 4; Centre for Comparative Constitutional Studies, *Submission 29*, p. 6; Immigration Advice and Rights Centre, *Submission 36*, pp. 4-5.

11 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 50.

12 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 50.

13 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 50. See also, Professor Kim Rubenstein, *Committee Hansard*, Canberra, 4 August 2015, p. 37.

14 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 19 (citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1).

... on constitutional grounds, because you are rendering people aliens where there is no valid legal basis for doing that.¹⁵

- 3.9 The Centre for Comparative Constitutional Studies also noted this tension, commenting that the Bill's definition of an 'alien' as a person lacking allegiance to Australia rested on an 'unusual, extended use of the notion of allegiance'.¹⁶ Although a number of High Court cases have included statements on the extent of the Parliament's power to make laws for the renunciation of allegiance, the Centre commented that these statements 'have been made in entirely different factual contexts ... and the Bill extends well beyond any other legislation based on [the aliens power, and] ... its constitutional validity should not be regarded as assured'.¹⁷
- 3.10 Chordia et al expressed similar concerns, and ultimately concluded that 'it is likely that certain provisions of the Bill exceed any power that Parliament does have to determine [when allegiance is lacking]'.¹⁸
- 3.11 The Law Council of Australia expressed concerns that the 'basis for and scope of the Commonwealth's power to enact citizenship legislation is uncertain'.¹⁹ However the Law Council also noted that 'issues of Constitutional validity will ultimately be a matter for the High Court to determine'.²⁰
- 3.12 The Law Council of Australia suggested that other heads of power granted in section 51 of the Constitution may provide supplementary support for parts of the Bill – such as the defence power (section 51(vi)), external affairs power (section 51(xxix)), and the immigration power (section 51(xxvii)).²¹ However, such provisions may not support the Bill in its entirety.²²

15 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 19. See also Ms Sangeetha Pillai, *Committee Hansard*, Canberra, 4 August 2015, p. 19.

16 Centre for Comparative Constitutional Studies, *Submission 29*, p. 6.

17 Centre for Comparative Constitutional Studies, *Submission 29*, p. 7.

18 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 4; see also Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 13.

19 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 1.

20 Law Council of Australia, *Submission 26*, p. 8.

21 Law Council of Australia, *Submission 26*, p. 8.

22 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 4; Law Council of Australia, *Submission 26*, p. 8.

Constitutional limitations

Separation of powers

3.13 Chapter III of the Constitution outlines judicial power, such as the interpretation of law and adjudication according to law, and places well-recognised limits on the exercise of judicial power. Specifically, neither the Parliament nor the Executive may exercise judicial power, which is the exclusive domain of the courts.

3.14 Indeed, the High Court has held that:

When an exercise of legislative power is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chapter III [of the Constitution]. For that reason it is beyond the competence of the Parliament to invest with any part of the judicial power anybody or person except a court created pursuant to section 71.²³

3.15 A number of participants in the inquiry commented that the Bill in its current form reflects an attempt to avoid the direct conflict with the separation of powers that would arise in the event of a Minister having a unilateral power to revoke a person's citizenship.²⁴

3.16 Certainly, proposed sections 33AA and 35 (where a court conviction is not required) involve 'operation of law' provisions: once a person engages in certain prescribed conduct, the law operates automatically (without a Ministerial decision) to cancel that citizenship. In such situations, there is no 'decision' but rather, a finding of fact (that the person has engaged in certain conduct). For example, the Law Council of Australia stated:

The current drafting of the Bill may avoid Constitutional invalidity on the grounds that it is not inconsistent with Chapter III of the Constitution. This is because it purports to avoid the Executive exercising an essentially judicial function of adjudicating the law by way of the Bill's self-executing provisions.²⁵

3.17 In order to enliven the administrative actions that will flow from the automatic loss of citizenship (by operation of law), an administrative process (or a finding of fact) would occur.

23 *R v Kirby; Ex parte Boilermakers' Society of Australia* [1965] HCA 10, para 5 per Dixon CJ, McTiernan, Fullagar and Kitto JJ. See Executive Council of Australian Jewry, *Submission 9*, p. 3.

24 For example, Paul McMahon, *Submission 7*, p. 4; Professor Helen Irving, *Submission 15*, p. 3; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 2; Australian Bar Association, *Submission 43*, p. 2; Mr Geoffrey Kennett SC, Chair, Administrative Law Committee, Law Council of Australia, *Committee Hansard*, Canberra, 4 August 2015, p. 3; Dr Rayner Thwaites, *Committee Hansard*, Canberra, 5 August 2015, p. 48.

25 Law Council of Australia, *Submission 26*, p. 8.

3.18 Importantly, the High Court has held that a ‘finding of fact’ is distinct from a ‘decision’ and is therefore not an exercise of power, though there are undisputed limits that remain exclusively exercised by the judiciary:

If ... the only powers conferred upon a so-called tribunal are in the nature of calculation or the mere ascertainment of some physical fact or facts, and not the declaration of or giving effect to a controverted matter of legal right, it may be that they do not appertain, except incidentally, to the judicial power. ... Convictions for offences and the imposition of penalties and punishments are matters appertaining exclusively to that [judicial] power.²⁶

3.19 Reflecting on the High Court’s jurisprudence quoted above, the Executive Council of Australian Jewry commented that a finding of fact under proposed section 33AA ‘may amount to ... a declaration of or giving effect to a controverted matter of legal right, which would be an exercise of judicial power’.²⁷

3.20 A large number of participants questioned whether an operation of law provision can operate in relation to the type and complexity of conduct covered by proposed sections 33AA and 35.²⁸ The Commonwealth Ombudsman was of the view that the operation of law provisions (also referred to as self-executing or automatic provisions) of the Bill ‘conceals administrative decision-making process, given that that must logically occur for the Bill to operate’.²⁹ In a submission to the inquiry, the Commonwealth Ombudsman described this as a ‘legal fiction’.³⁰

3.21 Dr Rayner Thwaites similarly noted ‘no law is entirely self-executing; it needs the interposition of human judgement ... somebody needs to reach a determination that the conduct triggering revocation of citizenship has

26 *Waterside Workers’ Federation v JW Alexander Ltd* (1918) 25 CLR 434, at 443 per Griffith CJ. See Executive Council of Australian Jewry, *Submission 9*, p. 3.

27 Executive Council of Australian Jewry, *Submission 9*, p. 5.

28 For example: Human Rights Committee, Law Society of NSW, *Submission 11*, pp. 3–4; Australian Lawyers Alliance, *Submission 14*, p. 4; Professor Helen Irving, *Submission 15*, p. 3; Dr Rayner Thwaites, *Submission 16*, pp. 1–2; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 2; Australian Lawyers for Human Rights, *Submission 20*, p. 7; NSW Society of Labor Lawyers, *Submission 25*, p. 11; Councils for civil liberties across Australia, *Submission 31*, p. 4; Commonwealth Ombudsman, *Submission 34*, p. 1; Australian Bar Association, *Submission 43*, p. 2; Mr Bill O’Connor, *Submission 42*, p. 1; Australian Bar Association, *Submission 43*, p. 2; Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 14; Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44.

29 Mr Colin Neave, Commonwealth Ombudsman, *Committee Hansard*, Canberra, 4 August 2015, p. 35.

30 Commonwealth Ombudsman, *Submission 34*, p. 2.

occurred'.³¹ Professor George Williams also commented that 'no law self-executes':

It is a very odd provision in that it is described as self-executing but, of course, it is not; no law self-executes. What it effectively does is push the key decision-making away from the minister and to the department ... That is why it does not cure the ministerial discretion point; in the end, it is still the executive that is making the key decisions ... You have got on the record a letter from the Department itself ... making it very clear that you can expect the departments will make decisions and engage in these matters in the way that certainly does not cure the prior concern about the Executive making key decisions.³²

3.22 The Australian Human Rights Commission summarised the central concern about operation of law provisions and separation of powers when it stated '[t]he key point is that it is not for the Executive to be passing laws along these lines and then making judgements as to whether the laws have been breached'.³³

3.23 Professor Helen Irving commented that if this fact finding process purported to be a decision of a judicial nature, in that it 'empowered a Minister to determine guilt as a condition for the revocation of a person's citizenship, that legislation would not be [constitutionally] valid'.³⁴ At a public hearing, Professor Irving was sceptical about the self-executing nature of the proposed sections, stating:

... a determination must be made that such conduct has been undertaken, and if in fact this determination is made by the minister, notwithstanding that the provision attempts to remove executive determination from the picture, a constitutional objection will arise ... [If] the bill is attempting to take the revocation of citizenship as a consequence of conduct out of the hands of the courts, it is unlikely to succeed [constitutionally] since the conduct is defined by reference to [criminal] offences.³⁵

31 Dr Rayner Thwaites, *Submission 16*, p. 2. Referencing Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action*, 5th ed (Sydney: Lawbook Co, 2013), and *Australian Postal Corporation v Forgie* [2003] FCAFC 223.

32 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 14. See also Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 2.

33 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 5 August 2015, p. 13. See also Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 10 August 2015, p. 27.

34 Professor Helen Irving, *Submission 15*, p. 3.

35 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 44.

- 3.24 It is not within the constitutional powers of the Executive to make a determination about conduct and impose a penalty for the commission of that conduct. Professor Irving was of the view that this is ‘an essential weakness’ of proposed section 33AA because a court would be unlikely to ‘treat a reference to the provisions of the Criminal Code as purely definitions, when the conduct itself amounts to an offence under the Code’.³⁶ Professor Irving commented that any advice that indicated the Executive could ‘make a determination based on criminal guilt, then that must be clearly flawed advice ... [as] an administrative determination [would] ... be very clearly contrary to the separation of powers’.³⁷
- 3.25 During the hearings, questions were raised about why the existing section 35 provision in the *Australian Citizenship Act 2007* (which provides for an automatic cessation of citizenship where a dual national ‘serves in the armed forces of a country at war with Australia’)³⁸ has not attracted similar constitutional concerns.
- 3.26 Although already enacted, Professor Williams noted that existing section 35 ‘suffers from the same’ separation of powers problem. Professor Williams explained that the existing section was introduced in 1948, prior to the decision by the High Court in the ‘Boilermakers’ case’ of 1956,³⁹ where it specifically restricted the use of judicial power to courts established under Chapter III of the Constitution. Professor Williams stated:
- So if you are following that model from 1948 you are following it at a different time in our constitutional evolution before the High Court identified these restrictions as binding in this way. Indeed, if someone was to lose their citizenship under the existing section 35, a challenge would be open to them based upon that 1956 precedent of the High Court.⁴⁰
- 3.27 Professor Irving concluded that although the Bill ‘does not appear to be unconstitutional on its face’, it may in its operation, breach the separation of powers.⁴¹ Professor Williams commented that in any court challenge, the High Court would approach these matters by not looking ‘simply at the form of the law but at the substance – how it operates in practice’.⁴²
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36 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 49.

37 Professor Helen Irving, *Committee Hansard*, Canberra, 5 August 2015, p. 49, see also Australian Bar Association, *Submission 43*, p. 3.

38 *Australian Citizenship Act 2007*, section 35.

39 *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

40 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 13.

41 Professor Helen Irving, *Submission 15*, p. 9.

42 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 14.

Consequently, Professor Williams concluded that ‘this is the first time that I am prepared to say that I am confident not only that there is a strong case against this Bill, but more likely than not it would be struck down by the High Court’.⁴³ Professor Williams had earlier stated publicly that the Bill ‘may well be constitutional, but this does not mean it will produce a sound and sensible reform’.⁴⁴

- 3.28 The administrative process to make findings of fact is discussed in greater detail in Chapter 5.

Implied right to vote

- 3.29 Some participants in the inquiry also raised the possibility of a constitutional challenge on the grounds that the Bill would remove the capacity of a person to vote in federal elections.⁴⁵
- 3.30 The Constitution states that ‘these people of the Commonwealth’ must directly choose the members of the federal Parliament.⁴⁶ The High Court has held that it is within the Parliament’s power to temporarily suspend the right to vote for citizens or the ‘people of the Commonwealth’.
- 3.31 Any suspension of a citizen’s right to vote must be for a legitimate purpose. The High Court has held that the suspension of voting rights to a person serving a prison sentence of less than three years is not constitutionally permissible as the length of the sentence did not represent sufficiently serious criminal conduct to justify the suspension.⁴⁷
- 3.32 Chordia et al identified that, although the Bill’s goal of fostering national security ‘may qualify as a legitimate purpose’, the ‘manner in which it pursues this purpose is not likely to be proportionate to this goal’.⁴⁸ More specifically, they explained that the range of conduct that will trigger loss of citizenship is ‘far wider than necessary’ and the processes for

43 Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, pp. 12–13.

44 Professor George Williams, ‘Deeply flawed citizenship law casts wide net’, *The Age*, 25 June 2015, p. 24.

45 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 2–3; NSW Society of Labor Lawyers, *Submission 25*, p. 5; Australian Bar Association, *Submission 43*, p. 2.

46 Australian Constitution, sections 7 and 24.

47 *Roach v Electoral Commissioner* [2007] HCA 43; see also Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 3, and Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 13.

48 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 3; see also Australian Bar Association, *Submission 43*, p. 2.

citizenship loss are 'inappropriate, unfair and inconsistent with the standards that apply in other national security legislation'.⁴⁹

- 3.33 In order for the Bill to be a proportionate response to the goal of promoting national security, Chordia et al were of the view that the range of conduct captured by its provisions should be narrow and strictly limited to 'offences that demonstrably involve actions that are inconsistent with allegiance to Australia'.⁵⁰ The range of conduct captured by the Bill will be discussed in Chapters 5 and 6.

Departments' response

- 3.34 The Committee raised a number of these concerns with the Department of Immigration and Border Protection and the Attorney-Generals' Department at public hearings.
- 3.35 The Attorney-General's Department stated that 'obviously in terms of the drafting and the construction of the bill, it has been done with a view to ensuring constitutionality'.⁵¹ This was confirmed at a later public hearing:
- Obviously, constitutional considerations were looked at very closely in terms of the development of the Bill. The Bill was drafted with those considerations in mind, and the draft Bill as presented is informed by that.⁵²
- 3.36 The Department of Immigration and Border Protection similarly commented that '[t]he government has advice to hand that suggests that we are on legally sound ground'.⁵³

Committee Comment

- 3.37 The Committee notes the extent of constitutional concerns raised. In evidence, the Committee heard detailed concerns about the constitutionality of the Bill from expert witnesses, including a number of

49 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, p. 3; see also Professor George Williams, *Committee Hansard*, Canberra, 4 August 2015, p. 13.

50 Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, *Submission 17*, pp. 3–4.

51 Ms Katherine Jones, Deputy Secretary, National Security and Criminal Justice Group, Attorney-General's Department, *Committee Hansard*, Canberra, 5 August 2015, p. 59.

52 Ms Katherine Jones, Deputy Secretary, National Security and Criminal Justice Group, Attorney-General's Department, *Committee Hansard*, Canberra, 10 August 2015, p. 2.

53 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 10 August 2015, p. 2.

Australia's leading constitutional lawyers and the peak representative body of the Australian legal profession, the Law Council of Australia, and the representative body of Australian barristers, the Australian Bar Association. The Committee has referred to some of this material earlier in this chapter.

- 3.38 The Committee also notes the statements by the Attorney-General that the Commonwealth Solicitor-General was consulted and that it was the Government's intention to ensure the Bill is consistent with 'the rule of law and within the Constitution'.⁵⁴
- 3.39 The Committee requested further information from the Government about the constitutionality of the proposed Bill.⁵⁵ While the Government declined to provide the Solicitor-General's advice to the Committee, a letter from the Attorney-General, Senator the Hon George Brandis QC, was made available to the Committee and approved for publication. The letter stated:
- the Government has received advice from the Solicitor-General, Mr Justin Gleeson SC, that, in his opinion, there is a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the draft Bill.
- 3.40 The Attorney-General's letter is included at Appendix D.
- 3.41 Some members of the Committee continued to hold concerns about the ability of the proposed legislation to withstand constitutional challenge. These members considered that, although it is ultimately a matter for the High Court to determine the constitutionality of any Bill, it is incumbent on governments and parliamentarians to legislate in a manner which minimises the risk of a successful constitutional challenge. This is particularly so where the Parliament is considering national security legislation that impacts on the fundamental rights of individuals. The concerns of a minority of members were not allayed by the qualified assurances in the Attorney-General's letter. The view of these members is that without the benefit of substantive explanation from the Government, the very serious concerns raised in evidence remain unanswered.
- 3.42 In recommending that the Bill be passed, with amendments, this minority of members of the Committee with outstanding concerns about the

54 Senator the Hon George Brandis QC, Attorney-General, Transcript of Press Conference, Canberra, 23 June 2015.

55 Hon Phillip Ruddock MP, *Committee Hansard*, Canberra, 5 August 2015, p. 59; Hon Bruce Scott MP, *Committee Hansard*, Canberra, 5 August 2015, p. 59; Hon Anthony Byrne MP, *Committee Hansard*, Canberra, 5 August 2015, p. 59; Hon Mark Dreyfus QC MP, *Committee Hansard*, Canberra, 5 August 2015, pp. 59-60.

constitutionality of the Bill have relied on the assurances made by the Government as to the Bill's ability to withstand constitutional challenge.

- 3.43 A majority of the Committee were reassured by the Attorney-General's letter, which sets out advice the Government received from the Solicitor-General, namely that there is a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the Bill.