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PARLIAMENTARY DELIBERATION ON CONSTITUTIONAL LIMITS IN THE LEGISLATIVE PROCESS

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> The more our uncertainty, the greater is our need to deliberate; and the more serious the issues, the more we feel the need to seek the advice of others.[1]

Like the other branches of government, parliaments are 'responsible constitutional agent[s]'.[2] They play a formative part 'in expressing and pursuing' constitutional government.[3] A dimension of this agency is that parliaments, and more specifically parliamentarians, have a responsibility to consider whether proposed laws overstep the constitutional boundaries of their powers.[4] When, as is the wont of constitutional principles, the relevant limits are uncertain, the task of deliberating about constitutional validity can be challenging. Difficulties increase when a proposed law is an innovative attempt to respond to emerging problems at the edge of doctrine espoused in previous constitutional decisions. This article focuses on an area of constitutional law that has presented Australian parliaments with frequent challenges in the last decade: Chapter III of the *Constitution*. Chapter III principles are, at both the federal and state level, famously subtle and technical.[5] Parliamentarians therefore often face acute difficulties when legislating at the boundaries of Chapter III.

In Part I of this article we argue that, in these circumstances, constitutionality should be one factor in a holistic deliberative process. We develop a normative

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1 Roger J Sullivan, *Morality and the Good Life: A Commentary on Aristotle's Nicomachean Ethics* (Memphis State University Press, 1977) 65.

2 Neal Devins and Keith E Whittington, 'Introduction' in Neal Devins and Keith E Whittington (eds), *Congress and the Constitution* (Duke University Press, 2005) 1, 2.

3 Amy Gutmann, 'Forward: Legislatures in the Constitutional State' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) ix.

4 See generally Gabrielle Appleby and Adam Webster, 'Parliament's Role in Constitutional Interpretation' (2013) 37 *Melbourne University Law Review* 255; Andrew Lynch and Tessa Meyrick, 'The Constitution and Legislative Responsibility' (2007) 18 *Public Law Review* 158, 163–4.

5 *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90 (Barwick CJ).

model of deliberation over constitutional norms. Part II uses three case studies to evaluate contemporary practice against this normative account: the Commonwealth's 2005 anti-terror reforms; the introduction, and repeated amendment, of South Australia's anti-organised crime laws from 2008; and the 2015 amendments to Commonwealth citizenship legislation. While many factors contribute to the large gap that is seen between practice and our normative model, including the restrictions placed on genuine deliberation by party discipline, these case studies reveal that it can at least be partially explained by inadequate constitutional resources and assistance available to parliamentarians. Therefore, in Part III we examine the assistance parliamentarians are currently provided with in this endeavour. Unlike the executive, which has an accepted source of constitutional advice in the Solicitor-General and other highly specialised government lawyers, many parliamentarians – more specifically non-government members, but also possibly government backbenchers – lack ready access to a dedicated source of expert constitutional advice. We argue that existing structures do not adequately support the constitutional deliberative role of parliamentarians. To address these shortcomings we propose two reforms: increased disclosure of legal advice received by the government regarding the constitutional validity of proposed legislation; and the creation of a position of 'Counsel to the Parliament' specialising in constitutional law.

I PARLIAMENTARY DELIBERATION AND CONSTITUTIONAL LIMITS

In the United States, a rich scholarship has explored the separate obligations of Congress and the Executive to deliberate about and interpret the *Constitution* during the legislative process, as well as in their other functions. The idea that these branches of government have obligations – and rights – to interpret the *Constitution* is known variously as 'coordinate construction'[6] or 'departmentalism'.[7] Celebrated American Chief Justice Earl Warren explained that, even if one accepts the supremacy of judicial review, '[i]n our democracy it is still the Legislature and the elected Executive who have the primary responsibility for *fashioning and executing* policy consistent with the *Constitution*'.[8] Such inquiry is not limited to the American system; there have also been some attempts in Canada to engage with these questions in the context of a parliamentary system operating under responsible government with a written constitution.[9]

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6 See, eg, Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press, 1988) ch 7.

7 For a good introduction to the concepts of departmentalism and judicial supremacy in the United States debate, see Keith E Whittington, 'Extrajudicial Constitutional Interpretation: Three Objections and Responses' (2002) 80 *North Carolina Law Review* 773, 783.

8 Earl Warren, 'The Bill of Rights and the Military' (1962) 37 *New York University Law Review* 181, 202 (emphasis added).

9 See, eg, Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (McGill-Queen's University Press, 2010); see also Richard W Bauman and Tsvi Kahana (eds), *The Least*

We start from the position that in Australia too, Parliament and individual parliamentarians have a responsibility to consider the constitutionality of proposed legislation. Other scholars have explored the basis for the constitutional responsibility of Australian parliaments.[10] Our intention in this Part is to develop a normative model of the form that constitutional deliberation by parliaments should take when the constitutionality of proposed legislation is uncertain. We suggest parliamentarians have an obligation – albeit imperfect in many respects – to consider whether proposed legislation falls within the boundaries of the Parliament's constitutional power. This obligation flows from the very fact parliamentarians are members of a government institution in a system governed by the rule of law. In addition to these normative justifications, there are obvious practical reasons why parliamentarians should be mindful of constitutionality in deliberating on legislation: if legislation is held invalid, Parliament will not achieve the policy goal it was pursuing by passing the legislation, and may also lose substantial resources in the course of defending any resulting litigation.

In Australia, courts have the ultimate authority to interpret the *Constitution*.[11] However, unlike other systems such as Canada,[12] the High Court's 1921 decision that federal courts may not issue advisory opinions has meant the courts are constitutionally prohibited from assisting the Parliament in the course of the passage of proposed laws.[13] This remains the position despite recommendations, at regular intervals, that the High Court ought to be able to provide advisory opinions.[14]

The norms underpinning the rule of law and constitutionalism, together with the practical considerations identified above, equally compel the executive to engage in careful consideration about the constitutionality of legislative proposals it develops and puts before Parliament. While the executive's obligations in this respect are an important topic for study in their own right, these obligations do not mean Parliament can take constitutionality for granted. Because Parliament performs a fundamental constitutional role in the legislative

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Examined Branch: The Role of Legislatures in the Constitutional State (Cambridge University Press, 2006).

10 See, eg, Appleby and Webster, above n 4; Lynch and Meyrick, above n 4; Daryl Williams, 'The Australian Parliament and High Court: Determination of Constitutional Questions' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 203.

11 See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 263 (Fullagar J) ('*Communist Party Case*').

12 See *Supreme Court Act*, RSC 1985, c S-26, s 53, upheld in *Reference re Secession of Quebec* [1998] 2 SCR 217.

13 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

14 See *Report of the Royal Commission on the Constitution Together with Appendixes and Index* (Commonwealth Government Printer, 1929) 255; Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Advisory Opinions by the High Court* (1977); *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention Held in the Legislative Council Chamber, Parliament House, Perth: 26–28 July 1978* (Government Printer, 1978) 28–9; Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988) 417; John Williams, 'Re-thinking Advisory Opinions' (1996) 7 *Public Law Review* 205, 207; John M Williams, 'Advisory Opinions: "A Well-Covered Harbour"' (2010) 22 *Bond Law Review* 169.

process, it ought not to delegate its responsibility to satisfy itself of the constitutional propriety of its part in that process.

Further, the contribution of Parliament to deliberation about the constitutionality of proposed legislation is different from that of the executive. Constitutional deliberation within the executive is, unlike parliamentary debates, largely hidden from public view. John Uhr has described Parliament's public features 'as a mark of recognition of the value of public accountability'.[15] The publicity of parliamentary process enhances its value as a deliberative forum.

Parliament's substantive contribution to deliberation about constitutional boundaries will also be distinctive from the executive's. Amongst the hallmarks of ideal deliberative decision-making, Ron Levy and Graeme Orr identify inclusivity, cooperation across multiple perspectives and open-mindedness.[16] Parliament provides a forum for minority and dissenting voices on constitutional issues, adding an important dimension to the deliberative enterprise, even if the majority view ultimately prevails. As well as being likely to privilege majority opinion, deliberation within the executive may be influenced by the politics of government and governing; they may, for example, place a premium on taking tough action against crime. Different Members of Parliament ('MPs') may make different assessments of the importance of a legislative goal and, therefore, the level of constitutional risk that can be justified. Different minds applied to the same problem may come up with different suggestions for change that could ameliorate constitutional difficulties. For all these reasons, deliberation about constitutionality within the executive is not a substitute for deliberation by Parliament.

If parliamentarians have an obligation to consider the constitutionality of proposed legislation, what is the content of this obligation? While '[e]very proposed statute has a constitutional dimension',[17] often validity is uncontroversial and no deliberation – or no sustained deliberation – is necessary. In very rare cases, a proposal will clearly be unconstitutional and Parliament ought not to pass the legislation. In other instances, constitutionality will be contested. This can happen when complex, unsettled constitutional principles apply to an innovative legislative measure. It is in these situations that Parliament's obligation to consider constitutionality becomes most challenging.

We do *not* think Parliament should legislate only when certain the legislation will be constitutional; nor that Parliament should necessarily make a priority of avoiding constitutional challenges to its actions. Parliaments often seek to create innovative laws that respond to new community problems and needs. Doing so may take Parliament into uncharted constitutional territory. This is particularly the case in areas where the constitutional norms are unsettled or complex, making it difficult to predict the likelihood of constitutional validity. This is likely to arise when the government is pursuing new policies that address

15 John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) 96.

16 Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2017) 21.

17 J Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System* (Duke University Press, 2004) 29.

changing social, economic, environmental and security contexts – such as the national security threat posed by terrorism after the attacks of the early 21st century or the increasing activities of organised crime gangs. Many of the most innovative and important legislative initiatives that have fundamentally altered the operation of Australia's constitutional system have been enacted in the penumbra of known constitutional validity.[18]

Nor do we argue that constitutionality should necessarily be the overriding consideration, even in a situation of significant constitutional risk. Parliament ought always to consider the merits of proposed legislation, its responsiveness to the needs of the community, its proportionality and its effectiveness. Failure to do so because of an exaggerated emphasis on constitutionality can lead to what Mark Tushnet has described as 'policy distortion'.[19]

Further, if a constitutional issue arises (for example, incompatibility with Chapter III of the *Constitution*), parliamentarians should engage with the values underlying the norms (such as judicial independence, the rule of law, accountability of government power and the liberty of the individual) as well as with the danger that the law will be held invalid. In relation to parliamentary scrutiny of legislation against charters of rights, Stephen Gardbaum has observed that 'too great a focus on legal and judicial … reasoning' can come 'at the expense of more independent political judgment that takes a broader and more direct approach to the moral and policy issues involved'.[20]

Therefore, possible constitutional invalidity should not be the overriding consideration when Parliament is deliberating whether to pass legislation; but nor should it be irrelevant. Instead, we argue that, as responsible constitutional agents, parliamentarians have an obligation to consider the constitutionality of proposed legislation as part of a holistic deliberation about the legislation. As Levy and Orr identify, 'holistic' consideration and weighing up of different interests at stake within the legislative process is another hallmark of deliberative democratic decision-making.[21]

Parliamentarians might engage in this holistic deliberation by asking themselves five broad questions.

1. What is the degree of constitutional risk in passing this law? How certain is the relevant body of constitutional law? How close to the line does the proposed law fall? Are there different views on the legal position?
2. What will be the consequences if this law is passed and later held invalid? For example, will individuals have suffered non-reversible infringements of their rights? Or will it mean that the legislative design can be implemented, but by a different unit within the federation?

18 Appleby and Webster, above n 4, 275–6; Helen Irving, 'Advisory Opinions, the Rule of Law, and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 105, 132.

19 Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 245.

20 Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) 237.

21 Levy and Orr, above n 16, 28.

3. Is the law consistent with underlying foundational constitutional principles – the rule of law, separation of powers, democratic principles, accountability of government power, federalism and the protection of individual rights – even if such principles are not strictly relevant to validity?
4. How important is the policy objective this law pursues? Some policies may be so crucial that a high degree of constitutional risk is justified, which should be informed by considerations in the second question above, as well as the possibly significant public expense that will be incurred in the event of a constitutional challenge.
5. Can the design of the proposed law be changed in a way that reduces constitutional risk? If so, will this change reduce the efficacy of the law in achieving its policy goal and will the reduction in efficacy be worth it? Parliamentarians ought to consider and weigh alternative policy options carefully by reference to the constitutional risk associated with them.

In relation to the final point, the adoption by a majority of the High Court in *McCloy v New South Wales* of a structured proportionality test may indicate an increasing focus on the availability of alternative measures when considering whether legislation breaches a constitutional norm involving a proportionality test.[22] Therefore, considering alternatives as part of the parliamentary deliberative process may contribute not only to enhanced legislative deliberation on constitutional norms, but also to a richer form of constitutional 'dialogue' between the court and Parliament.

In summary, constitutional validity, risk of challenge and its consequences should be factors (not necessarily determinative) in holistic parliamentary deliberation about policy design.

Our model of parliamentary constitutional deliberation involves some fairly modest assumptions about the characteristics of parliamentarians. We assume most parliamentarians are committed to fulfilling their responsibilities as both constitutional actors and representatives of their constituents. However, we assume most parliamentarians do not have extensive expertise in constitutional law.[23] This is not a criticism of parliamentarians; the qualities required in a good MP and those required in a good constitutional lawyer are different (though not mutually exclusive). Some parliamentarians have a legal background, but many do not.

We acknowledge that the form of constitutional deliberation we envisage is challenging; but no more challenging than other deliberative tasks in which parliamentarians regularly engage. We also accept that parliamentarians are, in practice, subject to party discipline and other party political pressures that may

22 Such as the implied freedom of political communication: *McCloy v New South Wales* (2015) 257 CLR 178, 210–12 [57]–[63] (French CJ, Kiefel, Bell and Keane JJ); or the freedom of interstate trade and commerce: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 479–80 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) ('*Betfair (No 1)*').

23 Although some do. For example, former Senator Linda Kirk lectured in constitutional law before entering politics.

affect their ability to engage in deliberation. This does not undermine our normative analysis of the deliberation in which parliamentarians *should* engage. However, as we explore in greater depth below, it does partly explain the large gap between our normative model of deliberation and the observable evidence of constitutional deliberation in Australian parliaments. It is to this practical experience that we now turn.

II CASE STUDIES

We have set out our position on how parliaments *should* deliberate about constitutionality. In this part we consider how Australian parliaments *have* engaged in such deliberation. We do so through three case studies – two federal and one state. Each raised questions of whether legislative proposals breached the limits of Chapter III of the *Constitution*. These case studies have been chosen because each presented a rich opportunity for parliamentarians to engage in the kind of deliberation for which we advocate. In each case study, a legislative proposal attempted to use innovative means to respond to an emerging threat to community safety, while pushing at the known boundaries of constitutional law. The case studies demonstrate the shortcomings of the current framework for deliberation, including the lack of assistance available to parliamentarians in performing this role.[24]

The case studies fall within the politically charged territories of law and order, and terrorism. This produces some particular challenges for Parliament when deliberating about proposed legislation. Parties and individual parliamentarians may find it politically difficult to oppose government policy for fear of being labelled 'soft' on crime or terror. Cognisant of this, throughout the case studies we are not arguing that parliamentarians who followed our normative model would necessarily have voted against the legislation for constitutional reasons. Rather, our argument is that closer adherence to the normative model would have led to higher quality debate and, importantly, the opportunity to explore alternatives to, and improve the design of, the legislative proposals put forward by the government.

Governments proposing new legislation on law and order and terrorism often claim that it is 'urgent' to pass the legislation in order to protect the community. This atmosphere of perceived urgency has the potential to stifle and truncate parliamentary deliberation.[25] Indeed, there is the potential for the executive to

24 For a similar position in the Canadian context in relation to a prostitution law proposed in 2014, see Adam Dodek, 'Why Won't MacKay Release his Legal Advice on Prostitution?', *The Globe and Mail* (online), 8 July 2014 <https://www.theglobeandmail.com/opinion/why-wont-mackay-release-his-legal-advice-on-prostitution/article19506781/>.

25 See Nicola McGarrity and George Williams, 'When Extraordinary Measures Become Normal: Pre-emption in Counter-terrorism and Other Laws' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 131, 141–4; Andrew Lynch, 'Legislating with Urgency – The Enactment of the *Anti-Terrorism Act (No 1) 2005*' (2006) 30 *Melbourne University Law Review* 747, 776–7; Greg Carne, 'Hasten Slowly:

manipulate the rhetoric of urgency to achieve just that: reduced parliamentary scrutiny of controversial measures.[26] Our position is that this is often not justified. Contemporary anti-terrorism and anti-organised crime laws are notable not only for raising constitutional issues, but also for abrogating individual rights and subverting fundamental principles of criminal law. We agree with Nicola McGarrity and George Williams that the need for public deliberation on, and justification of, such exceptional measures is heightened.[27] However, we acknowledge that the urgency paradigm, with its attendant tension between the institutional roles of the executive and the legislature, forms part of the context of our case studies, explaining (without excusing) some of the shortcomings we identify.

A Case Study One: Commonwealth Anti-Terror Reforms

In 2005, following the London terrorist bombings, the Australian government moved to introduce the Anti-Terrorism Bill (No 2) 2005 (Cth). The Bill included provisions empowering the Federal Magistrates Court to issue control orders against individuals curtailing their movement, communication and associations,[28] and for the executive and judges acting *persona designata* to make preventative detention orders against individuals.[29] As well as being controversial on policy grounds, the Bill raised serious constitutional questions. The power to issue control orders threatened to breach the second limb of *R v Kirby; Ex parte Boilermakers' Society of Australia* by conferring non-judicial power on a federal Court, or requiring the Court to exercise the power in a non-judicial manner.[30] The preventative detention orders potentially breached the first *Boilermakers' Case* limb by conferring judicial power on bodies other than Chapter III courts.

Therefore, this was a situation in which Parliament was faced with constitutionally uncertain legislation that adopted innovative means to meet new threats. Our model of parliamentary deliberation suggests the risk of invalidity ought to have been a factor in the process of legislative deliberation. Further, the legislation would authorise serious, non-remediable infringements of fundamental rights and freedoms, indicating greater attention should be paid to the risk of invalidity. The manner in which Parliament actually approached its task fell short of this ideal.

On 18 November 2005, the Parliamentary Library issued a detailed 'Bills Digest' on the Bill. That document, which was available to the parliamentarians and committees subsequently considering the Bill, explained the constitutional issues the Bill raised in clear and succinct terms.[31] It expressed no view on the

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Urgency, Discretion and Review – A Counter-terrorism Legislative Agenda and Legacy' (2008) 13(2) *Deakin Law Review* 51.

26 See Lynch, above n 25, 768–75.

27 McGarrity and Williams, above n 25, 144.

28 Now contained in the *Criminal Code 1995* (Cth) div 104.

29 Now *Criminal Code 1995* (Cth) div 105.

30 (1956) 94 CLR 254 ('*Boilermakers' Case*').

31 Sue Harris Rimmer et al, *Bills Digest*, No 64 of 2005–06, 18 November 2005, 53–5.

likely resolution of the contested issues, instead providing references to further analysis and commentary on these questions.[32]

On 3 November 2005, the Bill was referred to the Senate Legal and Constitutional Legislation Committee. The Committee was given less than a month to report, being asked to finalise its investigation by 28 November. The Committee received a large number of submissions from academic experts and practitioners that engaged with the constitutional issues.[33] The Committee also had access to advice received by the Australian Capital Territory government from leading constitutional counsel Stephen Gageler SC, raising constitutional issues with the preventative detention regime.[34]

Despite this wealth of opinion, the Committee's consideration of the constitutional questions in its final report was cursory.[35] The Chapter III issues were dealt with in two paragraphs.[36] These merely raised the issues then deferred to the Government's statement that it had received advice that the laws 'would withstand any constitutional challenge'.[37] The Prime Minister told the media that the Solicitor-General had provided a 'strong view' that 'the constitutionality of this legislation [was] in good order'.[38] The Government refused to provide this advice to the Committee despite an Opposition Senator in the Committee hearings asking for it to do so.[39] Advice from the Commonwealth's Chief General Counsel, Henry Burmester QC, apparently expressing serious doubts about the constitutionality of the scheme, was leaked to the media.[40] This led one Committee member, Senator Linda Kirk, to add some additional comments to the Committee's report recording her 'significant concerns' about constitutionality and suggesting ways in which the legislation could be amended to reduce these constitutional doubts.[41]

Andrew Lynch and Tessa Myrick suggest the Committee and Parliament's response amounted to an abdication of Parliament's obligation to reach its own

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32 Ibid 62–3.

33 See Lynch and Meyrick, above n 4, 159 n 8; Senate Legal and Constitutional Legislation Committee, *Submissions Received by the Committee as at 23/11/2005* (23 November 2005) Parliament of Australia <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2004-07/terrorism/submissions/sublist>.

34 Stephen Gageler, 'In the Matter of Constitutional Issues Concerning Preventative Detention in the Australian Capital Territory' (2005) 9 *University of Western Sydney Law Review* 159.

35 The constitutional issues are covered primarily in a section in Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) 11–14. Specific constitutional issues are dealt with as they arise at other points of the report – see, eg, the discussion of the implied freedom of political communication and its application to the new sedition laws: at 91.

36 Ibid 12 [2.37]–[2.38].

37 Ibid 14 [2.48].

38 Laurie Oakes, Interview with John Howard, Prime Minister of Australia (Television Interview, 30 October 2005), extracted in Lynch and Meyrick, above n 4, 161.

39 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 14 November 2005, 8 (Geoff McDonald).

40 Lynch and Meyrick, above n 4, 161–2; Samantha Maiden and Dennis Shanahan, 'Terror Laws an Untested Legal Area', *The Australian* (Canberra), 26 October 2005, 10.

41 Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2)*, above n 35, 199–201.

view about constitutionality.[42] They argue that, by failing to engage with the constitutional issues, the Committee 'helped set the stage for [the] costly and complex litigation'[43] on the validity of the control order provisions that was *Thomas v Mowbray*.[44] The High Court has not yet considered the validity of the preventative detention provisions; if and when it does, we can expect the litigation to again be costly and complex.[45]

As explained above, we do not believe it is *necessarily* undesirable that Parliament pass laws that give rise to costly and complex constitutional litigation. But we say that such risk should consciously be weighed in the overall deliberative process. There is no evidence that the constitutional risk taken in the Bill was justified by reference to careful deliberation about the necessity of the policy design. Careful deliberation would have involved considering, for example, how the amendments proposed by Senator Kirk might have affected the operation of the policy design. Instead, this case study demonstrates a failure to engage in an informed calculation and acceptance of constitutional risk, even though Parliament was on notice of the constitutional issues.

B Case Study Two: South Australian Bikie Laws

Our second case study shows how an inability to engage with constitutional issues can lead non-government parliamentarians to adopt a constitutionally conservative position. It also reveals a further possibility: that parliaments, lacking adequate constitutional expertise and advice, will pass over real constitutional dangers.

In 2008, South Australia introduced tough new legislation targeting members of outlaw motorcycle gangs: the *Serious and Organised Crime (Control) Act 2008* (SA) ('*SOCCA*'). Although these laws were the first of their kind in Australia, elements were taken from the 2005 Commonwealth terrorism legislation, notably the control order regime outlined above. The Attorney-General was given power to make a declaration that an organisation was, in effect, a criminal organisation.[46] The Commissioner of Police could apply to the Magistrates Court for a control order in respect of a person. If the person was a member of a declared organisation the Court was *required* to make a control order without regard to any other criteria.[47]

In 2008, when the *SOCCA* was introduced, the *Kable* principle, which limits the state Parliaments' power to legislate with respect to their courts by reference

42 Lynch and Meyrick, above n 4, 163–4.

43 Ibid 159.

44 (2007) 233 CLR 307.

45 For an analysis of the validity of the preventative detention provisions, see Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38 *University of New South Wales Law Journal* 756.

46 *SOCCA* s 10(1), later amended by the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) s 6.

47 *SOCCA* s 14(1), later amended by the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) s 6.

to the safeguards in Chapter III, appeared dormant. Despite many challenges,[48] apart from *Kable* itself, the High Court had never invoked the principle to invalidate a law. Understandably therefore, the South Australian Parliament seemed lulled into a sense of security as to the limits of its own powers.[49] The parliamentary debates about the *SOCCA* contain almost no references to the possibility that the Bill transgressed constitutional limits.

The lone reference to constitutional principles is revealing. The Shadow Attorney-General asked why the legislation did not name specific gangs (such as the Hells Angels and Gypsy Jokers), instead leaving it to the Attorney to declare organisations. The Attorney-General responded that this would amount to a bill of attainder. He said this would 'raise constitutional issues', referring to the *Communist Party Case* while acknowledging possible differences between State and federal legislative power.[50] He concluded:

> I am not interested in being bogged down in a jurisprudential argument in the High Court. I would rather do it the way we are doing it and remove even the whiff of constitutional risk.[51]

The Shadow Attorney-General still had doubts:

> I would have thought that there was some case law that said that you cannot achieve indirectly what you cannot achieve constitutionally directly either, so I would expect the gangs will still try to take the same constitutional point, but that aside I move on to [the next clause of the Bill] …[52]

This exchange shows how, without constitutional expertise and advice, parliamentarians – even those with legal expertise – are unable to engage in effective constitutional deliberation even when they suspect constitutional problems exist.

The High Court was about to return to the *Kable* principle with renewed vigour. Between 2009 and 2011, the Court struck down three laws on *Kable* grounds.[53] These included *Totani v South Australia*, in which a key provision of *SOCCA* was declared invalid.[54] This attracted significant media attention in South Australia, causing political embarrassment for the South Australian government.[55]

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48 *Fardon v A-G (Qld)* (2004) 223 CLR 575; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Baker v The Queen* (2004) 223 CLR 513; *Silbert v DPP (WA)* (2004) 217 CLR 181.

49 Gabrielle J Appleby and John M Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1, 5–6.

50 South Australia, *Parliamentary Debates*, House of Assembly, 26 February 2008, 2145 (Michael Atkinson).

51 Ibid.

52 Ibid (Isobel Redmond).

53 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

54 (2010) 242 CLR 1 ('*Totani*').

55 See, eg, Sean Fewster and Adam Todd, 'High Court Throws Out South Australian Government's Anti-Bikie Laws', *The Advertiser* (online), 12 November 2010 <http://www.adelaidenow.com.au/news/high-coutr-throws-out-south-australian-governments-anti-bikie-laws/news-story/1692c4bec53ae65a977303c0a91efc44>; South Australia, *Parliamentary Debates*, House of Assembly, 11 November 2010, 2025, 2031 (Isobel Redmond, Leader of the Opposition).

In 2012, the South Australian government introduced substantial amendments to the *SOCCA*,[56] modelled on a New South Wales regime that the High Court had indicated would likely be valid.[57] In contrast to 2008, constitutional considerations played a large role in Parliament's deliberations about the 2012 amendments. The Attorney-General, John Rau, described the amendments as 'constitutional repair'.[58] He explained the attitude with which the government had sought the advice of the Solicitor-General and others, including the Attorneys-General of the States, Territories and Commonwealth:

> Please have a look at this and, if there is anything is here that you think stands out as being a beacon for concern, let us know and we will either modify it or take it out. If we cannot modify it sufficiently to make it harmless, we will take it out.[59]

The Opposition was equally aware of the constitutional risks of the legislation, with one Opposition member stating: 'The Liberal opposition's concern in relation to constitutional issues is to minimise the risk that we will end up back in the High Court'.[60]

Despite Parliament's *concern* about constitutionality, its ability to *deliberate* about constitutional issues was limited. For example, a minister was able to give a reasonably clear answer to a question about the specific amendments that would increase the chances of validity.[61] But in answer to a question about why the amendments had not been modelled more closely on other jurisdictions' legislation in order to minimise constitutional risk, the Minister simply rejected the premise of the question and declined to comment further without being taken to specific provisions.[62]

The Shadow Attorney-General asked for an assurance that this legislation would survive constitutional challenge.[63] The Attorney-General explained that, despite an exhaustive process of seeking advice on constitutional validity, 'no person short of a clairvoyant could possibly give … an absolute guarantee' that the new laws were valid.[64] Because, as the Attorney-General pointed out, the law was so uncertain, it would have been helpful for parliamentarians to be better informed about the degree of constitutional risk. The Shadow Attorney-General expressed her 'disappointment' that the government's advice had not been provided to Parliament.[65]

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56 *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA).

57 Despite invalidating the *Crimes (Criminal Organisation Control) Act 2009* (NSW), the Court indicated the Act may have been valid but for a section relieving eligible judges from an obligation to give reasons for making a declaration: *Wainohu v New South Wales* (2011) 243 CLR 181, 220 [72] (French CJ and Kiefel J), 230 [110]–[111] (Gummow, Hayne, Crennan and Bell JJ).

58 South Australia, *Parliamentary Debates*, House of Assembly, 15 February 2012, 78.

59 South Australia, *Parliamentary Debates*, House of Assembly, 29 February 2012, 422. See also South Australia, *Parliamentary Debates*, House of Assembly, 1 March 2012, 517.

60 South Australia, *Parliamentary Debates*, Legislative Council, 29 March 2012, 836 (Stephen Wade MLC).

61 South Australia, *Parliamentary Debates*, Legislative Council, 3 April 2012, 880 (Gail Gago).

62 Ibid.

63 South Australia, *Parliamentary Debates*, House of Assembly, 29 February 2012, 421 (Vickie Chapman).

64 Ibid 423–4 (John Rau).

65 Ibid 421 (Vickie Chapman); South Australia, *Parliamentary Debates*, House of Assembly, 1 March 2012, 507 (Vickie Chapman).

In this situation, Parliament's ability to deliberate about constitutionality was hamstrung by lack of access to expert advice. Knowing a serious constitutional issue was present but unable to engage in nuanced debate about it, non-government parliamentarians could do little more than urge a constitutionally 'conservative' approach[66] and accept the government's assurances about the advice it had received. Concerns about constitutionality did not translate into debates about how the legislation could be placed on constitutionally surer footing without compromising the policy goals.

In 2013, South Australia again amended the *SOCCA* in response to constitutional concerns.[67] The amendments picked up elements of Queensland's anti-organised crime legislation, upheld in *Assistant Commissioner v Pompano Pty Ltd*.[68] Once again, Parliament's deliberation focused primarily on constitutional considerations. The Attorney-General explained that the amendments represented the 'constitutionally safe course'.[69] The amendment attracted bipartisan support, with the Shadow Attorney-General expressing hope that it would 'limit the risk' of having to pay for High Court litigation.[70]

South Australia did not adopt all the features of the Queensland legislation upheld in *Pompano*. The Queensland legislation provides for the involvement of a Criminal Organisation Public Interest Monitor ('COPIM') to be involved in dealings with criminal intelligence, thus mitigating the worst dangers of using secret evidence.[71] In *Pompano*, for most of the judges, the COPIM was not relevant to the constitutional validity of the legislation.[72] South Australia's failure to introduce its own COPIM arguably shows that the legislative aim was directed to ensure formal constitutionality only.[73] We make two observations on this point. First, the failure to introduce a COPIM increased the severity of the secret evidence regime to the detriment of the rights of individuals who faced substantial restrictions on their liberty. The second is that, if it were accepted that parliaments ought to deliberate not just on questions of constitutional validity, but also the effect of legislation on fundamental constitutional principles, this might have encouraged parliamentarians to consider the introduction of the COPIM as constitutionally *desirable*, even though it might not have been constitutionally *necessary*. As we indicated in Part I, such an argument is beyond the immediate scope of this article, but should be considered related to questions of strict validity.

The 2012 and 2013 amendments provide an insight into the role played by Oppositions in parliamentary constitutional deliberation. Opposition parties often feel pressured to offer support to government law and order initiatives, lest they

66 South Australia, *Parliamentary Debates*, House of Assembly, 29 February 2012, 421 (Vickie Chapman).
67 *Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013* (SA).
68 (2013) 252 CLR 38 ('*Pompano*').
69 South Australia, *Parliamentary Debates*, House of Assembly, 4 July 2013, 6421 (John Rau).
70 South Australia, *Parliamentary Debates*, House of Assembly, 23 July 2013, 6459 (Vickie Chapman).
71 *Criminal Organisation Act 2009* (Qld) pt 7.
72 (2013) 252 CLR 38, 86–7 [111]–[112], [115] (Hayne, Crennan, Kiefel and Bell JJ), 114 [208] (Gageler J), cf 64–70 [51]–[65], 78–9 [87] (French CJ).
73 Gabrielle Appleby, 'The High Court and *Kable*: A Study in Federalism and Rights Protection' (2014) 40 *Monash University Law Review* 673, 695–6.

be seen as insufficiently 'tough' on crime. Doubt about the constitutionality of a government proposal can give Opposition parties a reason to oppose policies when they might otherwise be politically nervous to do so. Political advantages might be gained by alleging the government has been constitutionally reckless in relation to a serious public safety issue, resulting in lost time, money and opportunity to combat the threat to the community.

Yet, having made constitutionality an issue, the South Australian Opposition was unable to engage in nuanced debate about the constitutional issues. It is difficult for MPs, who are (largely) not constitutional law specialists, to debate the nuances of constitutional issues surrounding proposed legislation without access to the advice the government has received; or, indeed, to other specialist constitutional advice.

We are not arguing that the Opposition, in these circumstances, should have refused to support Government legislation without seeing the constitutional advice the Government had received. Nor do we say that the Opposition's concerns about constitutionality should necessarily have translated into votes against the Bills. Rather, better information about the constitutional issues could have changed the nature and quality of the public debate, bringing it closer to the normative model developed in Part I. This could have led to a more nuanced consideration of alternative measures and a careful weighing of constitutional risk against policy benefits.

Instead, in this case study, non-government parliamentarians who raised the constitutional issue simply urged the government towards a constitutionally conservative position. This arguably contributed to an instance of policy distortion. Perhaps anticipating the Opposition's strong position on constitutionality, the government took a correspondingly conservative approach to framing proposed legislation so as to have a ready response to any constitutional criticisms. The resulting legislation was designed for validity rather than efficacy.

C Case Study Three: The Commonwealth's 2015 Citizenship Laws

In February 2015, the Prime Minister announced that the Government would consider the recommendations of a report into the 2014 siege in Sydney's Martin Place.[74] Among the recommendations were changes to the law governing revocation of citizenship for people involved in terrorist activities.[75]

One of the earlier proposals considered by Cabinet would have conferred on the Minister for Immigration and Border Protection the discretion to revoke citizenship if, in the Minister's opinion, the person had engaged in terrorist activity.[76] This plan met opposition from within Cabinet and from the community

74 Commonwealth Department of Prime Minister and Cabinet and New South Wales Department of Premier and Cabinet, 'Martin Place Siege: Joint Commonwealth–New South Wales Review' (Report, 4 February 2015).

75 Ibid ix (Recommendation 3).

76 Peter Hartcher and James Massola, 'Cabinet Revolt Over Tony Abbott and Peter Dutton Plan to Strip Australians of Citizenship', *Sydney Morning Herald* (online), 26 May 2015 <http://www.smh.com.au/

because, inter alia, it empowered the Minister to take action that would seriously affect a person's rights without a finding, by a court, of criminal guilt. Apart from the policy objections to this course, there was the possibility that this would confer judicial power on the Minister in breach of the *Boilermakers' Case* principle. There were leaks that the Commonwealth Solicitor-General had advised that the proposal was likely to be unconstitutional.[77] However, the actual terms of that advice – including how strongly it was framed in terms of likely constitutional invalidity – were not released. Academic experts differed over the likelihood of invalidity of the proposal.[78]

On 24 June 2015, the Minister for Immigration and Border Protection introduced the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) to the Parliament. The Bill appeared to have been drafted with the concerns regarding the potential breach of the separation of powers in mind.[79] Under the Bill, a person 'renounced' their Australian citizenship by engaging in certain conduct such as engaging in a terrorist act or fighting for a declared terrorist organisation. The operation of the provisions did not depend on a court finding a person guilty of an offence. Nor, though, did it purport to depend on the Minister's discretion. Instead, the provisions purported to operate 'automatically' when the person engaged in the relevant conduct. The Minister had power to exempt the person from the operation of the provisions on discretionary grounds.

The Attorney-General referred the Bill to the Parliamentary Joint Committee on Intelligence and Security. While the Committee's report raises several constitutional issues,[80] the most relevant for present purposes was the potential that the legislation might breach Chapter III by usurping the exercise of judicial power by the courts or by conferring judicial power on an executive officer.[81]

The Committee received at least 13 submissions addressing the constitutional issues.[82] The constitutional experts who contributed to these submissions – including academics, practitioners and government officeholders – did not

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federal-politics/political-news/cabinet-revolt-over-tony-abbott-and-peter-dutton-plan-to-strip-australians-of-citizenship-20150526-gh9q8y.html>.

77 ABC, 'Stripping Terrorism Suspects of Their Citizenship Possibly Unconstitutional', *Radio National Breakfast*, 15 June 2015 (Fran Kelly) <http://www.abc.net.au/radionational/programs/breakfast/stripping-terrorism-suspects-of-citizenship-possibly-unconsitut/6546064>.

78 Lenore Taylor, 'Tony Abbott's "With Me or Agin Me" Rhetoric Cheapens Citizenship Debate', *The Guardian* (online), 4 June 2015 <http://www.theguardian.com/australia-news/2015/jun/04/tony-abbotts-with-me-or-agin-me-rhetoric-cheapens-citizenship-debate>.

79 A representative of the Attorney-General's Department who gave evidence before the Parliamentary Joint Committee on Intelligence and Security confirmed that the Bill was drafted with constitutional concerns in mind: Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) 32 [3.34]–[3.35].

80 Ibid ch 3.

81 This issue is discussed in the Committee's report: ibid 27–31 [3.13]–[3.28]. Other issues were whether the law would be a valid exercise of the aliens power in s 51(xix) of the *Constitution* (at 24–6 [3.3]–[3.12]) and whether it breaches the implied right to vote (at 31–2 [3.29]–[3.33]).

82 Ibid 28 n 28. Note also the Parliamentary Library Bills Digest considered constitutional issues: Margaret Harrison-Smith and Cat Barker, *Bills* Digest, No 15 of 2015–16, 2 September 2015, 9–10, 26–7. Consistent with the purpose of Bills Digests, the Digest sets out the constitutional issues and identifies the competing positions but does not evaluate the relative strengths of those positions.

believe the drafting of the Bill wholly removed the Chapter III issue identified in the initial proposal.[83]

A representative of the Department of Immigration and Border Protection who gave evidence before the Committee indicated that '[t]he government has advice to hand that suggests that we are on legally sound ground'.[84]

In light of the constitutional uncertainty, the Committee requested that the government provide further information about the Bill's constitutional validity.[85] In response, the Attorney-General, Senator George Brandis QC, provided a letter informing the Committee that:

> the Government has received advice from the Solicitor-General, Mr Justin Gleeson SC, that, in his opinion, there is a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the draft Bill.[86]

The government declined to provide the Committee with the Solicitor-General's advice.[87]

The Committee's report indicated that a majority of members were 'reassured' by the Attorney-General's letter.[88] A minority, however, thought more was needed:

> 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 that without the benefit of substantive explanation from the Government, the very serious concerns [about constitutionality] remain unanswered.[89]

This passage reflects a commitment, on the part of these parliamentarians, to deliberating in accordance with the model put forward in Part I of this article. But ultimately, the minority recommended that the Bill be passed despite their 'outstanding concerns about the constitutionality of the Bill', noting that they had 'relied on the assurances made by the Government as to the Bill's ability to withstand constitutional challenge'.[90]

The government adopted the recommendations of the Committee. On 30 November 2015, the government introduced two further, last-minute amendments, including one that departed from one of the Committee's recommendations in order 'to address the constitutional risk identified by

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83 Parliamentary Joint Committee on Intelligence and Security, above n 79, 32 [3.34]–[3.35], 28–31 [3.20]–[3.27].

84 Ibid 32 [3.36].

85 Ibid 33 [3.39].

86 Letter from George Brandis to Mark Dreyfus, 27 August 2015, extracted in ibid app D ('*Letter from Brandis to Dreyfus*').

87 Parliamentary Joint Committee on Intelligence and Security, above n 79, 33 [3.39].

88 Ibid 34 [3.43].

89 Ibid 33 [3.41].

90 Ibid 33–4 [3.42].

the Solicitor-General'.[91] The Committee had recommended that the Minister be obliged to consider whether or not to exempt persons who had automatically lost their citizenship by reference to a list of criteria.[92] The change removed the Minister's statutory obligation to consider exemption in every case. The Attorney-General provided a summary of the Solicitor-General's advice but not the full opinion. In the summary, he referred to the Solicitor-General's view that the original version carried a 'significant risk' that the Court might find the provision to be in breach of Chapter III.[93] The amendments, he explained, 'are specifically designed to maximise the bill's prospects of withstanding a constitutional challenge'.[94]

The amendments have the potential to impact substantially the rights of individuals by removing the right to compel the Minister to consider exemption from the automatic loss of citizenship. There was almost no debate on whether the reduction of constitutional risk justified this diminution of rights. Indeed, much of the parliamentary debate in the House of Representatives had concluded by the time the final version of the amendment was introduced.[95] The debate was also hampered by the refusal of the government to release the Solicitor-General's opinion on which the amendments were based, which may have provided parliamentarians with a more particularised understanding of the level of constitutional risk involved. While the Shadow Attorney-General observed that it was regrettable that the government had refused to make the Solicitor-General's advice available to the House,[96] Labor supported the amendments, accepting the government's summary and assurances regarding the advice of the Solicitor-General.[97]

Once again, our intention here is not to argue that better information about the constitutional situation would have led to the downfall of the proposed legislation, given the bipartisan political support that exists for anti-terror measures. We contend that better information would have shifted the *debate* rather than the *outcome*, ensuring that legislation was passed in full cognisance of the constitutional risks and with the possibility of amendments to the legislative design to accommodate those risks.

D What the Case Studies Tell Us about Constitutional Deliberation

In none of the case studies examined in this article have parliamentarians engaged in detailed constitutional deliberation of the kind we advanced in Part I. Instead, the constitutional issues have either been dealt with in a cursory way, or

91 Commonwealth, *Parliamentary Debates*, Senate, 1 December 2015, 9508 (George Brandis).
92 Parliamentary Joint Committee on Intelligence and Security, above n 79, xix–xx (Recommendation 15).
93 Commonwealth, *Parliamentary Debates*, Senate, 1 December 2015, 9508 (George Brandis).
94 Ibid.
95 See the comments of Mark Dreyfus, Shadow Attorney-General: Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2015, 14113.
96 Ibid 14114; see also Commonwealth, *Parliamentary Debates*, Senate, 1 December 2015, 9499 (David Leyonhjelm).
97 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2015, 14114 (Mark Dreyfus).

parliamentarians have seemed unable to do more than raise a constitutional concern without taking the point any further. Where constitutionality has been made an issue, it has sometimes led to legislative design choices that are, from a policy point of view, less than optimal.

Several factors may explain this gap between our deliberative ideal and practice. It may be that for the policy areas in which constitutional issues most frequently arise – such as the organised crime and terrorism areas examined in this article – the political context does not lend itself to carefully considered weighing of alternatives in light of constitutional risk. But these circumstances are not exceptional; instead, they should be understood as part of the regular context in which some of the most challenging constitutional deliberations take place.

Paradoxically, it may be in these situations that constitutional arguments are most politically powerful. A party in opposition may not wish to be seen to oppose strong law and order measures, yet might feel comfortable raising constitutional objections. But without access to sufficient information, this deliberation is unlikely to be adequate; as we saw in South Australia, it is more likely to consist of urging the government to take the constitutionally safe road. A more basic political explanation for lack of full consideration and deliberation also emerges in these charged situations: opposition members might be politically content to rely upon government assurances around validity. This leaves open the possibility of shifting full blame onto the government should a court later strike down the legislation.

Party politics undoubtedly played a significant role in both the legislative outcomes and the manner of deliberation in each of our case studies. However, there are indications in each of the case studies that parliamentarians are willing to deliberate about constitutionality. This can be seen in the extensive (if superficial) debate on constitutional issues in South Australia following *Totani*, and in the concerns raised by individual parliamentarians in the committee process in both anti-terror case studies. The case studies demonstrate that, even in a system in which the capacity of individual parliamentarians to deliberate on specific pieces of legislation is restricted by party discipline, constitutional deliberation can occur. Individual parliamentarians are expressing constitutional concerns and considering alternatives based on these concerns.

The constitutional issues in each case study were complex and uncertain. But, under the normative framework advanced in Part I, this does not justify Parliament deferring to the executive's assertions of constitutionality. Parliamentarians ought to have informed themselves further about the constitutional risk. While we should not expect parliamentarians to understand the detail of the High Court's Chapter III jurisprudence, they should be able to understand enough about the constitutional risk to enable them to weigh that risk against other factors.

This leads to the next Part of this article: under the current structure, what assistance is available to Australian parliaments when deliberating about constitutional issues?

III ASSISTING PARLIAMENTARIANS' DELIBERATION ABOUT CONSTITUTIONAL ISSUES

As our three case studies demonstrate, there are several sources to which parliamentarians may turn for assistance when deliberating about constitutional issues. Historically, legal and constitutional advice would have been provided to Parliament by the Law Officers (the Attorney-General and Solicitor-General). Historically both Law Officers, in the majority of Australian jurisdictions, sat in Parliament.[98] This is still the practice in the United Kingdom, where it is still considered part of the role of the Law Officers to advise the Parliament on Bills, particularly where they raise matters of legal policy or affect the rule of law.[99] However, even in the United Kingdom the Law Officers are no longer considered the only source of advice to Parliament.[100] In Australia, with the politicisation of the Attorney-General's role, that office no longer performs this function.[101] Indeed, as occurred in each of the case studies, it is often the Attorney-General defending and promoting constitutionally controversial legislative proposals in the Parliament, thus undermining his or her ability to provide 'independent' advice to Parliament.

While the arrangements vary across the jurisdictions, no Australian parliament has a dedicated legal team of constitutional advisers. Sources of constitutional assistance for parliamentarians include:

(a) in-house services such as the staff of committee secretariats (some committees employ legal advisers)[102] or parliamentary libraries;[103]
(b) clerks of the chambers may be asked for advice on the procedure of the Houses, which may raise issues of constitutional interpretation;[104]
(c) the clerk of the chamber may be requested by parliamentarians to brief counsel and can, with the consent of the Attorney-General, obtain an opinion from the Solicitor-General or another government lawyer;[105]

98 Gabrielle Appleby, 'The Evolution of a Public Sentinel: Australia's Solicitor General' (2012) 63 *Northern Ireland Legal Quarterly* 397, 402.

99 Edward Garnier, 'The Law Officers and Legislative Procedure' (Speech delivered at the Administrative Law Bar Association Summer Conference, 17 July 2010) <https://www.gov.uk/government/speeches/speech-to-the-constitutional-and-administrative-law-bar-association>.

100 Andrew Kennon, 'Legal Advice to Parliament' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing, 2013) 121.

101 For discussion of the politicisation of the Attorney-General's role in Australia, see Fiona Hanlon, 'The Modern First Law Officer in Australia' in Gabrielle Appleby, Patrick Keyzer and John M Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate Publishing, 2014) 119.

102 Those committees that do employ legal advisers include the Senate's Scrutiny of Bills Committee, the Senate's Regulations and Ordinances Committee and the Joint Committee on Human Rights but, surprisingly, not the Senate Standing Committee on Legal and Constitutional Affairs.

103 See, eg, the advice provided by the Parliamentary Library on the Anti-Terrorism Bill 2005 (Cth): Rimmer et al, above n 31. Parliamentary libraries also provide specific, confidential advice to individual parliamentarians, as is discussed below. See also Daryl Williams, above n 10, 210.

104 See Gabrielle J Appleby and John M Williams, 'A Tale of Two Clerks: When Are Appropriations Appropriate in the Senate?' (2009) 20 *Public Law Review* 194.

105 Appleby and Webster, above n 4, 279.

(d) organisations and individual experts – including academics, practitioners and judges – who make submissions (sometimes supplemented by evidence) to parliamentary committees; and
(e) parliamentarians' own contacts within the profession or the academy who are willing to provide assistance with constitutional matters.[106]

The case studies in this article indicate that in practice, Australian parliamentarians tend to rely on two main sources of constitutional assistance: assurances by the government about advice given by the Solicitor-General or Crown legal officers; and submissions of experts (including legal professionals and academics) to parliamentary committees.

In the final part of this article, we argue neither of these sources provide Parliament with adequate assistance with its deliberation in situations of constitutional uncertainty. In each instance, we propose a reform.

A The Advice of the Solicitor-General or Other Government Lawyers

If proposed legislation raises serious constitutional questions, the government will generally seek advice from the Solicitor-General or another constitutional specialist.[107] The Commonwealth Office of Parliamentary Counsel has also issued a detailed direction and a 'constitutional checklist' to assist legislative drafters to ensure 'that the consideration they give to the constitutional validity of the legislation they work on is systematic and thorough'.[108] The directions indicate that, when a drafter submits Bills to the Legislative Approval Process ('LAP'), they give 'an assurance that he or she is satisfied that the Bill is constitutionally valid (except to the extent to which any concerns or reservations he or she has about the constitutional validity of the Bill are set out in the LAP memo)'.[109] This assurance will either be based on the opinion of the drafter or advice that has been received by the drafter. The Drafters' Manual indicates that drafters should refer legal issues to the Australian Government Solicitor for advice where 'there is a real issue of constitutional law'.[110]

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106 Daryl Williams, above n 10, 211. A recent example is the assistance provided by Rebecca Ananian-Welsh to South Australia's Shadow Attorney-General on the 2015 amendments to *SOCCA*: see South Australia, *Parliamentary Debates*, House of Assembly, 16 June 2015, 1635.

107 In a number of jurisdictions, this has been formalised by way of protocol: see, eg, Office of Legal Services Coordination (Cth), 'Briefing the Solicitor-General' (Guidance Note 11, 5 July 2016); Brian Wightman, 'Guidelines for Seeking Advice from the Office of the Solicitor-General' (Attorney-General (Tas), February 2012); Department of Justice (Vic), 'Protocol for Briefing the Solicitor-General' (28 July 2011) (for internal use only, not publicly available). At the Commonwealth level as well, cl 10A.2 of the *Legal Services Directions 2017* (Cth) state that the Attorney-General's Department or the Australian Government Solicitor may consult with the Solicitor-General on whether constitutional advice should be given by the Solicitor-General or the Australian Government Solicitor, although this does not *require* consultation. In other jurisdictions, similar matters are briefed to the Solicitor-General by convention: Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016) 182.

108 See further Office of Parliamentary Counsel (Cth), 'Constitutional Law Issues' (Drafting Direction No 3.1, October 2012) 19 [107] <https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf>.

109 Ibid 19 [107].

110 Office of Parliamentary Counsel (Cth), 'OPC Drafters' Manual' (Edition 3.1, February 2016) 27 [195].

The executive will often disclose to Parliament that legal advice has been received (from the Solicitor-General, government lawyer, or other source) to reassure parliamentarians that they are acting within their constitutional limits. However, it is very rare for the advice itself to be disclosed, or the detail or nuance of that advice revealed, including any risk-assessment relating to validity. This was the situation in each of the case studies considered in this article: advice was received but not disclosed. Lynch and Meyrick observe that it has become standard practice for the executive simply to provide an assurance that it has received advice that proposed legislation is likely to withstand constitutional challenge.[111] This was evident across the case studies. In refusing to disclose advice received about the 2015 Citizenship Bill, the Attorney-General told the Parliamentary Joint Committee on Intelligence and Security 'it has been the practice of successive governments not to publish or provide legal advice that has been obtained for the purposes of drafting legislation'.[112]

An exchange between the Senate Standing Committee on Regulations and Ordinances and Finance Minister Mathias Cormann in 2014–15 shows how entrenched this position has become.[113] The Committee asked the Minister for an explanation of how a proposed regulation was supported by the relevant heads of power. When dissatisfied with the opaque response it received, the Committee made three consecutive requests for the Government's legal advice on this matter. The Minister adhered to 'the long-standing practice of successive governments not to publish or provide legal advice obtained in the course of developing policy and legislation', providing as evidence of that practice statements from parliamentarians on both sides of politics.[114] On another occasion, the government's refusal to disclose advice led to a regulation being disallowed.[115] This incident shows how, when parliamentarians decide to take a stand on constitutionality but lack adequate information, they may choose the blunt instrument of obstructing legislative action, rather than engaging in nuanced constitutional deliberation.

Indeed, there have been very few occasions over the past decade where governments released Solicitor-General advice.[116] Decisions by government to

111 Lynch and Meyrick, above n 4, 161.

112 *Letter from Brandis to Dreyfus*, above n 86.

113 The full exchange is recorded in Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, No 13 of 2015, 13 October 2015, 4–18.

114 Ibid 9.

115 This was the *Financial Framework (Supplementary Powers) Amendment (2015 Measures No 3) Regulation 2015* (Cth): see Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, No 10 of 2015, 10 September 2015, 8–14.

116 Reference here is to contemporaneous release. Note the publication of early opinions in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia with Opinions of Solicitors-General and the Attorney-General's Department – Volume 1: 1901–14* (Australian Government Publishing Service, 1981); Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia with Opinions of Solicitors-General and the Attorney-General's Department – Volume 2: 1914–23* (Australian Government Publishing Service, 1988); James Faulkner et al (eds), *Opinions of Attorneys-General of the Commonwealth of Australia with Opinions of Solicitors-General and the Attorney-General's Department – Volume 3: 1923–45* (2013). The opinions spanning these three volumes, as well as those in the nominal 'fourth volume' covering the years 1946–

table advice are often politically motivated.[117] For example, in 2011, the Commonwealth released the Solicitor-General's joint advice following its failed attempt to implement the Labor Government's 'Malaysia Solution',[118] in order to pressure the Senate to pass amendments to the *Migration Act 1958* (Cth). The Queensland Government released a co-authored Solicitor-General advice after concerns were raised that its changes to the parliamentary committee system were in breach of the separation of powers.[119]

The Solicitor-General's advice has been publicly released or tabled in Parliament when the advice pertained to Parliament's own powers. For example, the Solicitor-General's advice was released to the President of the Senate by the Attorney-General in 2016 when concerns were raised regarding the eligibility for election of a Senator;[120] advice was tabled when there were constitutional questions raised about the position of Speaker after the return of a hung Parliament in 2010.[121] In the 1980s, Attorney-General Gareth Evans tabled in Parliament the advice of the Solicitor-General in relation to whether the conduct of Justice Lionel Murphy might amount to 'misconduct' as to engage the powers of the Parliament to remove him from office under s 72 of the *Constitution*.[122]

Outside of the ministry, there is a record of more frequent release in recent times. As Governor-General, Quentin Bryce had a notable record of releasing advice provided to her by the Solicitor-General.[123] The Committee appointed by the government to inquire into human rights protections in Australia publicly

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50, were published online in 2015: Australian Government Solicitor, Attorney-General's Department and National Archives of Australia (eds), 'Selected Opinions of Attorneys-General of the Commonwealth of Australia with Opinions of Solicitors-General and the Attorney-General's Department: 1901–50'(Online Publication, 2015) <http://legalopinions.ags.gov.au>.

117 One exception to this was the release of two Solicitor-General opinions and private counsel opinions preceding the enactment of the *Native Title Amendment Act 1998* (Cth). See Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Constitutional Aspects of the Native Title Amendment Bill 1997* (1997) app 1.

118 Stephen Gageler, Stephen Lloyd and Geoffrey Kennett, 'In the Matter of the Implications of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* for Offshore Processing of Asylum Seekers under the *Migration Act 1958* (Cth)' (S-G Opinion No 21, Solicitor-General (Cth), 2 September 2011).

119 Walter Sofronoff and Steve Marton, 'Re: Draft Parliamentary Service and Other Acts Amendment Bill 2011 – Matters relating to the Committee of the Legislative Assembly' (Memorandum of Advice, Solicitor-General (Qld), 9 May 2011).

120 See Attorney-General Senator George Brandis, 'Senator Rod Culleton' (Media Release, 2 November 2016) <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FourthQuarter/Senator-rod-cullen.aspx>.

121 Stephen Gageler, 'In the Matter of the Office of the Speaker of the House of Representatives' (S-G Opinion No 37, Solicitor-General (Cth), 22 September 2010).

122 See discussion in H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2001) 102–3.

123 Stephen Gageler, 'In the Matter of the Governor-General' (S-G Opinion No 33, Solicitor-General (Cth), 26 August 2010); Letter from Robert Orr (acting Solicitor-General) to Stephen Brady (Official Secretary to the Governor-General), 26 June 2013 <https://www.gg.gov.au/sites/default/files/media_files/letter_to_the_acting_solicitor-general_and_letter_to_the_official_secretary.pdf>. See also Anne Twomey, 'Advice to the Governor-General on the Appointment of Kevin Rudd as Prime Minister' (2013) 24 *Public Law Review* 289.

released the advice it received on the likely constitutional validity of a federal human rights Act.[124]

The refusal to release advice of the Solicitor-General in Australia rests not on legal professional privilege but on what John Edwards (the leading scholar on the United Kingdom Law Officers) has referred to as the 'Law Officers' Convention'.[125] This is the convention that Parliament refrains from requiring the divulgence of confidential Law Officers' opinions. In Australia, the matter is one of convention only: Parliament has the power to call for documents from the government even where the documents are subject to a valid claim of legal professional privilege or, at least in some circumstances, public interest immunity.[126] However, while the power may exist, its exercise is often curtailed by practical and political pressures. As then Victorian Solicitor-General, Pamela Tate, explained, when called to give evidence and produce documents before a parliamentary select committee:

> The integrity of my role as the second Law Officer of the Crown is dependent upon my capacity to maintain the confidentiality of the instructions and information given to me for the purpose of securing my advice. Unless the Crown is able to confide in me in a full and free manner, and, in turn, I am able to advise the Crown fully and freely on its legal rights and obligations, the performance of my functions as Solicitor-General would be compromised. I could not provide proper or adequate advice to the highest levels of government on matters of State if I could not discharge my obligation to maintain the confidentiality of all the instructions and information provided to me for the purpose of obtaining my advice.[127]

The practical exercise of the power ought to be, and currently is, governed by political convention and custom. However, as with any convention or custom, its practice ought to be subject to critical analysis as to its ongoing utility. It is our view that where there is a greater argument in the public interest against disclosure of government legal opinions, Parliament should not insist upon such disclosure. Where there is a greater argument in favour of disclosure, the

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124 Stephen Gageler and Henry Burmester, 'In the Matter of Constitutional Issues Concerning a Charter of Rights' (S-G Opinion No 40, Solicitor General (Cth), 15 June 2009), extracted in Frank Brennan et al, 'National Human Rights Consultation Report' (National Human Rights Consultation, September 2009) app E <http://webarchive.nla.gov.au/gov/20101130132405/http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>.

125 In the United Kingdom context, see discussion of the confidential nature of the Law Officers' opinions in John Ll J Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) 256–61; K A Kyriakides, 'The Advisory Functions of the Attorney-General' (2003) 1 *Hertfordshire Law Journal* 73. See further discussion of the convention in Australia in Anthony Mason, 'The Parliament, the Executive and the Solicitor-General' in Gabrielle Appleby, Patrick Keyzer and John M Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate, 2014) 49, 65.

126 *Egan v Chadwick* (1999) 46 NSWLR 563.

127 Letter from Pamela Tate (Solicitor-General) to Richard Willis (Secretary, Select Committee on Gaming), 11 April 2007, 5 [3.9]. See also Letter from Rob Hulls (Attorney-General) to Richard Willis (Secretary, Legislation and Select Committees), 11 April 2007. Both letters are extracted in full in Select Committee of the Legislative Council on Gaming Licensing, Parliament of Victoria, *First Interim Report upon Gaming Licensing* (2007) apps E–F.

government should divulge the opinions (either of its own accord or in response to a request from Parliament).

In Australia, the current insistence of the government on the Law Officers' Convention in all cases, and indeed Parliament's acceptance of it, is unsatisfactory. In the US, Harold Koh argued for the prompt publication of *all* legal opinions issued by the Office of Legal Counsel ('OLC').[128] Publication, Koh argued, serves a number of purposes, including that it can reveal the factual assumptions on which the opinion is based, and prevent the client (usually the government) from 'stripping a carefully nuanced opinion of all its subtleties and thereby reducing it to the simplistic conclusion that "OLC says we can do it."'[129] In an area as technical and unpredictable as Chapter III of the *Constitution* (and indeed many other areas of constitutional law), answers to constitutional questions are not always as simple as 'yes' or 'no'. When deliberating at the boundaries of constitutionality, parliamentarians need to understand the degree of constitutional risk involved and the possible consequences of a finding of constitutional invalidity. It would therefore be helpful for them to consider the basis of the advice given to government, and the degree of confidence with which it is offered, rather than accepting a simple assurance that the legislation is likely to be constitutional. Different members may have different views about how certain Parliament should be about the validity of its legislation, or may place different weight on the policy benefits of the proposed legislation. A proper understanding of the constitutional risk is needed in order for parliamentarians to engage in a holistic deliberative process.

When the executive reports receiving advice that proposed legislation is likely to be valid, the advice could conceivably contain anything from a confident assurance of validity, to a tentative and contingent conclusion. For instance, in the proposed reforms to citizenship laws in 2015, the government reported receiving advice that there was 'a *good prospect* that a *majority* of the High Court would reject a constitutional challenge to the *core aspects* of the draft Bill'.[130] This wording suggests the advice was heavily qualified; yet it was presented as an assurance that the Bill was within power.[131]

Government failure to provide responsible constitutional decision-makers with the full detail of legal advice came under heavy criticism in the 2016 Chilcot Inquiry's report into the Blair Government's decision to commit the United Kingdom to the Iraq War.[132] Before deciding to authorise force, both the

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128 A legal advisory office operating within the United States Department of Justice that provides high-level legal and constitutional law advice: Department of Justice (US), *Office of Legal Counsel* <https://www.justice.gov/olc>.

129 Harold Hongju Koh, 'Protecting the Office of Legal Counsel from Itself' (1994) 15 *Cardozo Law Review* 513, 517.

130 See *Letter from Brandis to Dreyfus*, above n 86, (emphasis added).

131 It was subsequently revealed this may not have been an accurate summary of the advice: see, eg, Matthew Doran, 'Opposition Quizzes Brandis on Whether Gleeson Was Consulted on Anti-Terror Laws Draft', *ABC News* (online), 18 October 2016 <http://www.abc.net.au/news/2016-10-18/george-brandis-quizzed-on-justin-gleeson-terror-laws-consult/7941084>.

132 Committee of Privy Counsellors, Parliament of the United Kingdom, *The Report of the Iraq Inquiry* (2016) ('*Chilcot Report*').

Parliament and Cabinet received only a summary of the advice of the Attorney-General, recording the Attorney-General's final position but not the basis of the opinion, nor the existence of alternative views; nor was an earlier draft advice, reflecting a far more qualified position, revealed.

B First Recommendation: Release of Advice

We recommend that, when the constitutionality of a proposed law is uncertain, Parliament should be given access to the full advice that the executive has received from the Solicitor-General or another legal officer. In these cases, we argue, the advantages of the Law Officers' Convention are outweighed by Parliament's responsibility to deliberate about constitutional issues.[133]

We acknowledge several arguments that may be made against this recommendation.

The constitutionality of any proposed law is, in one sense, always 'uncertain' unless and until the High Court rules directly on the point. At what level of uncertainty does the public interest tip in favour of disclosure? This is not, we accept, a matter that can be captured in a bright-line rule. It will be for Parliament to identify the point at which lack of access to advice inhibits its ability to fulfil its deliberative obligations. In the relatively small number of cases where it becomes evident that a proposed law is constitutionally doubtful, and the available material does not enable parliamentarians properly to weigh constitutionality in their assessment of the proposal, Parliament ought to require disclosure of the advice. Parliament might be alerted to constitutional uncertainty by submissions of experts that provide conflicting opinions or that emphasise that constitutional doubts exist.

There is the possibility, of course, that the power to subpoena documents may be abused for political reasons (for example, to access documents that embarrass the government). This possibility already exists. Broadening the circumstances in which the power can be used legitimately should not increase the circumstances in which it is used illegitimately.

A potentially more serious difficulty with our recommendation is the effect it may have on the way government lawyers provide constitutional advice. As the quote from Tate above illustrates, government lawyers and their instructors may believe the lawyers' ability to advise fully and freely depends on confidentiality. Publicity might have a chilling effect on legal advice provided; it might push lawyers to rely more heavily on oral advice. Is this really likely to be the case? Legal professional privilege exists to allow *clients* to give full and frank instructions;[134] not in order to protect the *lawyer* from their advice becoming public. The possibility that others will see the advice ought not, in principle, to affect the lawyer's view of the legal position. Indeed, serious concerns as to the ethics of the legal advice would be raised if the possibility of public disclosure

133 See similar recommendations about where the balance would lie in the Canadian context in Kent Roach, 'Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law' (2006) 31 *Queen's Law Journal* 598, 630.

134 See, eg, *Baker v Campbell* (1983) 153 CLR 52, 115–16 (Deane J).

would change the position a legal professional would take. Indeed, possible publicity might spur the lawyer towards more scrupulous adherence to ethical ideals of robustly independent advice.

A related concern is the possibility that disclosure of advice may reveal sensitive information relating to matters such as Cabinet deliberations, law enforcement, international relations or national security. Parliament's power to require the production of documents extends to documents over which a claim of public interest immunity is made (except, possibly, in a limited class of Cabinet documents).[135] However, as a matter of prudence, it would be appropriate for such material to be redacted from any advice released to the public (as opposed to the Parliament). In some cases Parliament may be adequately informed by receiving a redacted version of advice from the executive, rendering it unnecessary to insist upon disclosure of the full advice. It must also be remembered that the advice we suggest should be disclosed is advice about the validity of proposed legislation; in many cases, this advice will be based solely on the terms of the proposed legislation and on legal materials, both of which will already be public.

Finally, there are concerns that parliamentary and public release of the government's advice on constitutional validity of proposed laws is likely to result in more, earlier and more effective challenges to legislation, potentially stifling the legislative process. However, this overlooks the public interest in constitutional challenges to legislation. Further, these laws will often have detrimental consequences for individuals, and as such there already exist strong incentives for early constitutional challenge. Moreover, even less than ideal deliberation about constitutional issues is likely to alert possible future litigants to questionable constitutional validity.

By disclosing legal advice to Parliament, would the executive waive legal professional privilege in that advice, thus rendering the advice discoverable in proceedings involving the government and a third party? Privilege is waived by conduct inconsistent with the maintenance of privilege.[136] Disclosing government advice on a confidential basis to a non-government parliamentarian, for the purposes of allowing that member to assess the reasonableness of the government's conduct, has been held not to waive privilege.[137] Would a similar conclusion be reached where the executive disclosed advice to Parliament to facilitate Parliament's constitutional deliberation? As discussed in Part I, the public nature of parliamentary debates is a feature that distinguishes Parliament's deliberative processes from those of the executive. It is therefore desirable that, in some cases at least, the legal advice be made public, or at least discussed publicly in parliamentary debates. At this point, privilege would very likely be lost. We argue this possibility does not outweigh the benefits of making the

135 *Egan v Chadwick* (1999) 46 NSWLR 563. Spigelman CJ, Priestley and Meagher JJA expressed different views on whether this extended to Cabinet documents: at 576 [69] (Spigelman CJ), 594 [140] (Priestley JA), 597 [153]–[154] (Meagher JA).

136 *A-G (NT) v Maurice* (1986) 161 CLR 475, 497–8 (Dawson J); *Mann v Carnell* (1999) 201 CLR 1, 13 [28] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

137 *Mann v Carnell* (1999) 201 CLR 1.

advice available to MPs, given the strong public interest in facilitating informed deliberation about the constitutionality of proposed legislation.

There are international precedents for the regular disclosure of legal advice to the legislature to assist the deliberative process. In New Zealand, for example, advice provided by Crown Law to the Attorney-General on the consistency of Bills with the *Bill of Rights Act 1990* (NZ) is, as a matter of policy, made publicly available on the Ministry of Justice website.[138] Paul Fitzgerald observed that, in the context of parliamentary deliberation over Bills, 'the notion of legal professional privilege sits uncomfortably alongside the aims of informed public debate over Bills, better informed and focused parliamentary debate on possible inconsistencies, and ultimately, better legislation'.[139] These observations are, we argue, equally applicable to deliberation about the constitutionality of proposed legislation in Australian parliaments.

An alternative to disclosing advice given to governments is for government lawyers to produce two sets of advice: one for the instructor, which is expected to remain confidential, and one for a wider audience. While this would overcome some concerns about confidentiality, it would bring its own dangers. The Iraq war example, discussed above, shows the potential that a version of advice written for a general audience might be stripped of important nuance in order to put forward the legal position the executive wishes to be made public.

C Submissions of Experts

The second major source of constitutional advice to Australian parliaments is submissions on proposed legislation. When constitutional issues arise, it is common for academics, professional legal associations and interested lawyers to make submissions on those issues, together with other legal and policy points. People who make submissions may be called to give evidence before a parliamentary committee. Parliaments thus receive the benefit of expert opinions on constitutional issues.

Different experts may provide Parliament with different opinions on the same constitutional issue.[140] We do not see this as undesirable. Receipt of conflicting views on constitutional validity reflects the complex reality of constitutional law. Constitutional questions are often matters on which reasonable minds can differ. Different expert opinions show parliamentarians that different views exist; as we argued earlier, a simple 'yes' or 'no' answer to a constitutional question does not allow Parliament to calibrate the legislation against the degree of constitutional risk.

However, submissions are a rather ad hoc means of informing Parliament about constitutional issues. The opinions Parliament receives depend on who has the time and interest to make a submission. Parliament can, and does, invite

138 See also Ministry of Justice, *Bill of Rights Compliance Reports* (8 June 2017) <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/>.

139 Paul Fitzgerald, 'Section 7 of the New Zealand *Bill of Rights Act 1990*: A Very Practical Power or a Well-Intentioned Nonsense' (1992) 22(2) *Victoria University of Wellington Law Review* 135, 145.

140 For more detail, see Daryl Williams, above n 10, 212.

particular organisations or individuals to make submissions, but it cannot compel submissions. The utility of submissions is linked, to some degree, to the strength of the committee system in a given Parliament. And even a robust committee system is vulnerable to political pressure, as illustrated by the short timeframe allowed for the Senate Committee to consider the 2005 terrorism legislation.[141]

While the quality of submissions received is usually high and the expertise of the authors often undeniable, the submissions are not equivalent to legal advice. There is often limited time to prepare submissions. Submissions will sometimes lack the inside knowledge of government operations and the full factual background to the policy that might inform advice of government lawyers. The detail with which particular issues are addressed is dictated by the author of the submission rather than the recipient. Submissions are also provided in a different professional context. The authors of submissions may have greater or lesser expertise in the area, and have given greater or lesser attention to the questions posed. There is no professional obligation compelling the authors to do otherwise. While these submissions play an important role in assisting parliaments with constitutional deliberations, they are not a direct substitute for advice provided by legal professionals in a lawyer–client relationship with Parliament.

D Second Recommendation: Counsel to the Parliament

Our second suggestion is the creation of a dedicated office of 'Counsel to the Parliament', specialising in constitutional and public law, as well as other areas in which parliaments are likely to need advice. We envisage that the holder of this position would be a person with outstanding experience and expertise in constitutional law, comparable to that expected of a Solicitor-General. Indeed, the position would hold a similar status as the Solicitor-General, but within the legislative rather than executive branch. In order to attract personnel of this calibre, it may be preferable to make the position a part-time appointment, so the person could continue to accept briefs from other clients.[142]

The development of a special office of Counsel to the Parliament that may be accessed by parliamentarians – including independent members, opposition and minor party members, and committees – would, we think, put parliaments in a better position to fulfil their obligations to deliberate on constitutional validity. Importantly, and in contrast to either accessing the advice of the Solicitor-General or receiving submissions, MPs would be able to frame the questions on which Counsel advised. They could ask, for example: what the degree of constitutional risk was; the constitutional implications of a particular change in

141 Which is not an uncommon occurrence, particularly in relation to national security legislation: see Gabrielle Appleby, 'The 2014 Counter-Terrorism Reforms in Review' (2015) 26 *Public Law Review* 4, and the sources referred to at above n 33.

142 The job description might be similar to that of the Legal Adviser to the Parliamentary Joint Committee on Human Rights, except that the expertise required would be in constitutional law rather than human rights law. See Letter from Philip Ruddock, 7 October 2015 (copy on file with authors) seeking expressions of interest in the position of external legal adviser.

legislative design; and what the consequences of invalidity might be for individuals affected by the legislation.

The position of Counsel to the Parliament should be distinguished from the roles of legal advisers that currently operate within the parliamentary committee framework. These advisers operate within the secretariat structure in the process of committee assessment of legislation. Rather than operating in this way, Counsel to the Parliament would, rather, operate as a barrister, providing opinions, on request, to individual parliamentarians, committees or even to the Houses of Parliament. In the immediate context of this article, such requests would relate to constitutional validity of proposed legislation. However, they might also relate to other constitutional questions, including parliamentary process and powers, and eligibility for holding office. Counsel to the Parliament must thus be an expert – and with well-respected status – in constitutional law. In relation to how the office would operate, its processes would have many similarities to those of the independent expert analysis of budget and fiscal policy provided by the Parliamentary Budget Office, provided at the individual request of parliamentarians.[143]

The services provided by Counsel to the Parliament would also differ from the services currently provided by other existing sources such as the Commonwealth Parliamentary Library's research services.[144] While these services can provide tailored responses to requests for advice from MPs, they are not a substitute for the specialist advice on complex constitutional issues we envisage. There are questions about their capacity to respond to complex and detailed constitutional issues given their other responsibilities; and they lack the constitutional law experience and status that is envisioned for the Counsel to the Parliament.

In developing a working model for the Counsel to the Parliament, foreign jurisdictions are helpful. The UK has two offices that are informative: the Office of Speaker's Counsel (which advises the Speaker and departments of the House, as well as scrutinising domestic secondary legislation and private bills to support committees) and the two constitutional law experts (currently two highly regarded constitutional law professors) that advise the House of Lords Constitution Committee.[145]

The Office of Senate Legal Counsel[146] in the United States performs a similar function: providing legal services and advice on legislative drafting and review to Senators.[147] Section 288(f) of the *Ethics in Government Act* states that there is an

143 See also *Parliamentary Service Act 1999* (Cth) pt 7 div 2. We are grateful to Shreeya Smith for drawing our attention to the similarities between our proposal and the work of this office.

144 See reference to such advice in, eg, Department of Parliamentary Services (Cth), 'Annual Report 2015–16' (30 September 2016) 101–2.

145 For more detailed explanation of the UK Parliament's obligations to the constitution, particularly in the context of a parliamentary system with no written constitution, see Jack Alaric Simson Caird, *Identifying the Value of Parliamentary Constitutional Interpretation* (PhD Thesis, Queen Mary University of London, 2014).

146 Established by the *Ethics in Government Act of 1978*, 2 USC § 288 (2012) ('*Ethics in Government Act*').

147 See also Office of the Legislative Council, *Services* United States Senate <http://www.slc.senate.gov/Services/services.htm>.

attorney–client relationship between Counsel (and employees of the Office) and members, officers and employees of the Senate. More directly equivalent to our proposed office, Elizabeth Garrett and Adrian Vermeule have proposed that the US also adopt an 'Office for Constitutional Issues' to provide members of Congress specifically with specialist constitutional law advice.[148] The proposed office would consist of a variety of experts to provide this advice: lawyers, political scientists, historians, and other public policy professionals. Under Garrett and Vermeule's proposal, the Office's reports should be publicly available 'so that citizens would have access to the information that shapes the constitutional deliberation and decision making of their representatives'.[149]

There would, no doubt, be some practical difficulties surrounding the creation of an office of Counsel to the Parliament. For example, there would need to be clarity about who the legal officer's client is. Is the client 'Parliament'? A parliamentary committee? A single House of Parliament? Individual parliamentarians? What happens if multiple 'clients' request advice on the same subject? If an individual parliamentarian instructs the legal adviser, is the advice available to other MPs? These difficulties are significant but guidance on their resolution can be drawn from other jurisdictions[150] and from existing Australian practice in relation to parliamentary counsel, the Parliamentary Library's research services, and similar arrangements. There would also need to be a clear distinction between the role of this legal officer (adviser to Parliament) and that of the Solicitor-General (adviser to the executive). At times, these two legal officers may give differing advice on the same issue. As we explained earlier in the context of expert submissions, we do not see this possibility as a negative; on the contrary, it can provide Parliament with an accurate picture of the complexity of the issue.

As with the release of the Solicitor-General's advice, a further design issue, to be addressed in the statute creating the office, is the confidentiality and privilege of advice provided by Counsel to the Parliament. Because the purpose of the office would be to facilitate well-informed public deliberation by parliamentarians about the constitutionality of proposed legislation, the policy reasons underpinning legal professional privilege would, we think, be absent from the relationship between Counsel to the Parliament and those seeking Counsel's advice. Therefore, while a full exploration of this issue is beyond the scope of this article, our preliminary position is that the statute creating the office of Counsel to the Parliament ought to provide that Counsel's advice does not (except, perhaps, in special circumstances) attract legal professional privilege.

One further response to our proposal is that, if parliamentarians require constitutional advice, they can simply seek that advice from the private bar. This would avoid some of the practical difficulties identified above and relieve the

148 Elizabeth Garrett and Adrian Vermeule, 'Institutional Design of a Thayerian Congress' in Neal Devins and Keith E Whittington (eds), *Congress and the Constitution* (Duke University Press, 2005) 242, 256–9.

149 Ibid 258.

150 For example, § 288(f) of the US Code (the Ethics in Government Act 1978), provides that the Office of Senate Legal Counsel 'and other employees of the Office shall maintain the attorney–client relationship with respect to all communications between them and any Member, officer, or employee of the Senate'.

public purse of the cost of specialist parliamentary counsel. We doubt, however, that this is an adequate response. This facility already exists and is rarely pursued. It places a significant cost burden on the parliamentarian seeking the advice and therefore favours well-resourced parliamentarians and those from major parties. Advice sought from different barristers at different times will lack the consistent quality, tone and focus of advice from a single source.

IV CONCLUSION

This article starts from the premise that parliaments and parliamentarians have an obligation to deliberate about whether proposed legislation falls within the Parliament's constitutional power. Constitutional norms are often complex and unsettled, making it difficult for parliamentarians to assess constitutional risk. The Chapter III issues in each of the case studies in this article were all issues on which constitutional experts could reasonably differ.

This does not mean it is acceptable for parliaments to defer uncritically to the executive's assurances of constitutionality. Unconstitutional legislation may be struck down on judicial review, but it may affect people's rights before this occurs; or it may never be challenged. Therefore, failure by Parliament to deliberate about constitutionality undermines the rule of law. It also increases the risk that legislation will be held invalid, resulting in wasted resources and lost opportunities for governments to deal with policy objectives. But nor should constitutionality be the dominant factor in legislative deliberation. Policy distortion may occur if parliaments insist on taking a constitutionally conservative position even when a constitutionally uncertain option is the better policy.

Our case studies indicate that even when parliamentarians want to debate constitutional issues, they are currently ill-equipped to deliberate in the manner we have argued is required.

To fulfil their constitutional deliberative role, parliaments need better access to specialist constitutional advice. For this reason, we have argued that the current practice of not releasing government legal advice should be reconsidered in some circumstances. We have also recommended the creation of positions for specialist constitutional advisers with a professional relationship with, and duties to, the Parliament. These reforms would assist parliamentarians to uphold the rule of law while making laws that best serve the needs of the community.

While the implementation of either proposal would be preferable to the current system, ideally both proposals should be adopted. They offer distinct, complementary advantages. Because it comes from within the executive, the government's legal advice is likely to be informed by a richer understanding of the factual situation and the practicalities of government than would the advice of Counsel to the Parliament. But the existence of a lawyer–client relationship between MPs and counsel would enable parliamentarians to direct the content and timing of advice in a way they could not do with government lawyers.

Ultimately, we do not expect access to constitutional advice to be a panacea for the problems identified in Part II. Its contribution to constitutional deliberation depends on the ability and willingness of parliamentarians to *engage* with the advice: to see it as something more than a box-ticking exercise; to understand, at least in broad terms, the reasons for the advice, to accept that the constitutional situation is not always clear, and to see constitutionality as one of multiple factors relevant to deliberation about proposed legislation. We acknowledge that political pressures may inhibit this kind of engagement, but we see signs that it is possible.