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National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004

Jacob Varghese
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National Security Information (Criminal Proceedings) Consequential Amendments Bill 2004

Date Introduced: 27 May 2004

House: House of Representatives

Portfolio: Attorney-General

Commencement: The substantive provisions commence 28 days after Roayl Assent

Purpose

These Bills have two key purposes:

- to allow prosecutors and courts to use information prejudicial to the national interest (national security information) in criminal proceedings while preventing broader disclosure of such information including, in some circumstances, disclosure to the defendant

- to allow certain witnesses, whose mere presence might disclose national security information, to be excluded from criminal proceedings, and

- to require that defence lawyers undergo security clearance before they can view national security information that might be relevant to a criminal trial.

Background

Key changes proposed

This Bill would make the following key changes:

- allowing summaries and edited (or 'redacted') versions of national security sensitive documents to be adduced as evidence of the contents of those documents
- creating a procedure for preventing the disclosure of national security information in criminal trials through oral testimony
- creating a procedure for the exclusion of certain witnesses, and
- requiring defence lawyers to undergo security clearance in certain cases.

Balancing public interests

Restriction on the use of information that might be prejudicial to the national interest in criminal trials inevitably involves a conflict between several conceptions of 'the public interest'.

On one hand, there is an obvious public interest in the defence and integrity of the nation and the prevention of harm to individuals. In many circumstances, the pursuit of that public interest involves keeping certain information from the public, a fact which has long been recognised by Australian law and convention.[1]

On the other hand, there is a powerful public interest in the fairness and openness of the judicial system given the extraordinary power that system holds over individuals, especially in the criminal law where it can order the deprivation of a person's liberty. Information is central to fairness and openness. Under the Australian adversarial system, the traditional principles of fairness involve, among other things, the right of accused people to mount a defence, examine the evidence against them, be represented by counsel of their choice and be tried by a jury. The restriction of an accused person's right to access information, present information before a jury or provide information by way of instruction to their lawyer has a bearing on each of these principles.

Fairness does not only concern the rights of the accused; it also concerns rights of the prosecution to similarly call witnesses, cross-examine defendant witnesses and present evidence that proves its case. These rights are required if the effectiveness of the judicial system in convicting those who have broken the law is to be maintained. Like the accused, the prosecution can be stymied by rules restricting the use of information. In the Commonwealth context, the government may find itself in a quandary over whether information is best kept secret, thereby reducing the chances of a successful prosecution,

or best used in court, thereby risking national security. Where the defendant is accused of crimes relating to national security — such as terrorism or espionage — this dilemma may be particularly acute, as national security risks might be attached to either option.

Openness of the system is valued as a means of ensuring scrutiny of judicial power, the development of precedential law and the education of the public on the role of courts and the law. The means of ensuring openness in court include public hearings, publication of transcripts and decisions and the archiving of court documents. Restrictions on the use of information in open court and provisions for closed hearings involve some compromise to this principle of open justice.

Developing laws and rules for the management of national security information in court cases clearly involves weighing and balancing these competing public interests. The law already has some mechanisms for dealing with this balance, which are discussed below.

These Bills affect this balance in two ways. Firstly, they propose a scheme that will allow the prosecution to access and use national security information that will not be available to the defendant, either to use or respond to. In this way, they attempt to resolve the situation in which protection of national security may frustrate a prosecution. In doing so, they privilege the prosecution over the defence, compromising the 'equality of arms' principle. Secondly, they prioritise national security interests over open justice by providing that more information available to, and used by, courts will not be available to the public.

Current mechanisms for protecting national security information in court proceedings

Public interest immunity

Currently, the principal mechanism for preventing the disclosure of national security information in criminal proceedings is the concept of *public interest immunity*. This is a concept recognised by both statute—through s 130 of the *Evidence Act 1995*—and the common law. The statutory version of the rule applies only at trial, with the common law version applying to the pre-trial phase of proceedings.

Both versions of the rule allow courts to prevent the introduction of evidence in proceedings if required to do so by public interest. This involves a careful balancing of the competing public interests in:

- preventing sensitive information from being disclosed, where disclosure would cause damage to the public interest, and
- allowing evidence to be used in court cases, to ensure:
  - the defendant's right to use evidence to disprove the charges against them

- that evidence is available to prosecutors to prove their charges, and
- that open justice is maintained.

Section 130 of the Evidence Act specifically spells out the considerations the court must have in weighing these competing public interests.

In both the common law and statutory guises, a court may hold that a public interest immunity applies whether or not it is claimed by the parties. Unlike forms of 'privilege', such as the protection of client–lawyer communications for use as evidence, the public interest immunity cannot be waived. That is, the decision as to whether or not information is best kept secret or best used to convict is not necessarily in the hands of the Commonwealth or the Director of Public Prosecutions. However, the Commonwealth can make a claim for public interest immunity and, for practical purposes, a judge will normally rely on evidence provided by the Commonwealth in determining the extent to which disclosure of the secret information would be prejudicial to the public interest.[2]

Limitations of the public interest immunity

The public interest immunity is a blunt instrument, requiring that the information is 'all in' or 'all out'.[3] Once evidence is excluded on public interest grounds it cannot be used in any form to prove the guilt of the defendant.

This became an obstacle in the case of *R v Lappas and Dowling*[4] ('*Lappas*'), which the Attorney-General has cited as a precipitant for the current Bill. *Lappas* involved the prosecution of a Defence Intelligence Organisation (DIO) officer who allegedly gave classified documents to a third person with a plan that they should be sold to a foreign power. In order to succeed on one of the charges, the prosecution was required to prove that the defendant intended that the documents in question would be useful to the foreign power. This was impossible without adducing the content of the documents as evidence.

The Commonwealth claimed public interest immunity over the documents. The prosecution proposed, with the Commonwealth's concurrence, to lead oral evidence that would describe the whole documents in general terms and provide the court with 'empty shells' of the documents. [5] These empty shells would have the substantive text blocked out, but headings and markings indicating the secret nature of the documents still showing.

Justice Gray of the ACT Supreme Court rejected this proposal. Firstly, he upheld the Commonwealth's claim of public interest immunity preventing the adduction of the documents. Secondly, he held that the defendant could not receive a fair trial without the opportunity to give evidence concerning those parts of the documents the Commonwealth would not allow the court to see. Thirdly, he held that evidence relating to the documents to which the public interest immunity applied was inadmissible by virtue of s 134 of the *Evidence Act 1958*. This section provides that evidence is inadmissible if it cannot be adduced as a consequence of a s 130 immunity.

Nevertheless, the only option left was to stay the prosecution of that particular charge. Nevertheless, the defendant was later found guilty on a different charge that did not require the prosecution to show that the defendant intended that the documents would be useful to the foreign power. It was therefore unnecessary to disclose the relevant documents.

Other mechanisms

In addition to the public interest immunity, courts have a range of other procedures at their disposal to prevent disclosure of national security information through court proceedings. These can include ordering that hearings be closed to the public ('in camera'), that the names of witnesses or parties be suppressed from publication or that certain witnesses give evidence using a mask or voice distorter to protect their identity.[6] The power to make these orders can be found in the inherent jurisdiction of courts to determine their own procedures. In such a case, their use would always be balanced by the courts' regard for the fairness of their procedures, the rights of the accused and the interests of open justice.

In other circumstances, statutes require that courts take certain steps to protect information. An example is s 15XT of the *Crimes Act 1914* (Cth), which provides that courts and tribunals must conduct in camera hearings and make suppression orders necessary to ensure that the real identities of undercover officers are not disclosed.

In all these cases, however, the accused person and their legal representatives would almost always be given access to any information before the court, including the identity of witnesses.

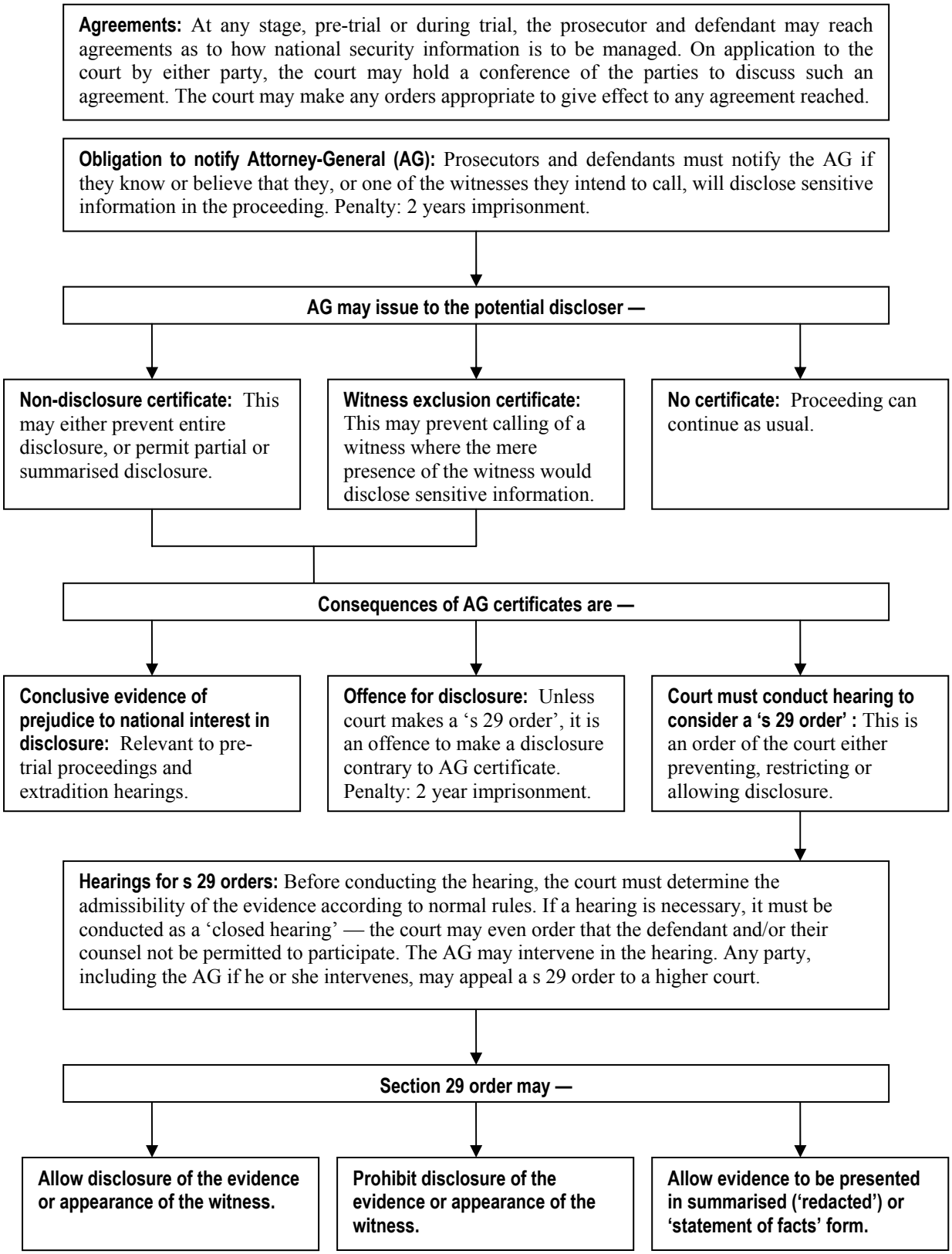
The proposed scheme for preventing certain disclosures

The present Bills propose a system for the control of the national security information in criminal proceedings. This would apply in addition to the mechanisms outlined above.

In short, this process requires the vetting of evidence and witnesses by the Commonwealth Attorney-General where the parties to the proceedings know or believe that the evidence or presence of the witness could disclose sensitive information. Importantly, the final decisions on whether and how evidence can be used remains with the court, at least at the trial stage of the proceedings.

Figure 1 outlines the essential elements of this process. The details are explained more completely in the Main Provisions section below.

Figure 1: Proposed scheme for control of national security information in criminal proceedings – Part 3 of the Bill



Security clearance for defendants' lawyers

The issue of security clearance for defendants' lawyers was also raised in the *Lappas* case. In that case, the defendant's lawyer refused to apply for security clearance and the judge stated that he could not order the lawyer to do so. This frustrated the prosecution, who were again in a bind over whether information was best kept secret or best used in the prosecution, which would involve the lawyer receiving the information. Ultimately, the Commonwealth was satisfied with a confidentiality undertaking the lawyer provided to the court.[7]

Laws requiring security clearances for defence lawyers were previously proposed by the Government in the Australian Security Intelligence Organisation (Terrorism) Bill 2002 [No 2]. In that Bill, only 'approved lawyers', vetted by the Minister on security grounds, would be allowed to act in certain terrorism-related matters. That proposal was opposed by the Senate. The *Australian Security Intelligence Organisation Act 1979* (ASIO Act) now provides that defendant lawyers do not require security clearance, but that regulations may limit the information that can be provided to non-cleared lawyers (see s 34VA, ASIO Act and reg 3B, *ASIO Regulations 1980*).

In addition, the Government has made changes to Legal Aid Guidelines requiring that funding be withheld in certain cases unless lawyers have received security clearance.

Keeping Secrets — the Australian Law Reform Commission's report

In April 2003, the then Attorney-General Darryl Williams asked the Australian Law Reform Commission (ALRC) to conduct an inquiry into the protection of classified and security sensitive information. The Terms of Reference included

> the operation of existing mechanisms designed to prevent the unnecessary disclosure of classified material or security sensitive material in the course of criminal and or other officieal investigations and court or tribunal proceedings of any kind …[8]

In other words, a large focus of the ALRC inquiry was to be the very issues that these Bills address. The ALRC prepared a Background Paper, Discussion Paper, took 35 written submissions and undertook consultations with experts and stakeholders. Originally, it had been asked to report by 29 February 2004, but this was extended to 31 May 2004.

The current Bills were introduced a mere four days before this reporting date, which meant that the ALRC had little time to analyse the Bills. Nonetheless a summary highlighting the differences between the ALRC recommendations and these Bills appears on pages 38–41 of the report.

In its submission to the Senate Legal and Constitutional Affairs Committee the ALRC noted of the current Bills:

> The ALRC was not consulted during the development or drafting of these Bills, nor was this parallel process referred to in consultations, or in the submissions from the Attorney-General's Department and the Australian intelligence community.[9]

It seems unfortunate that the Bills were introduced shortly before the ALRC presented its report. The ALRC notes that the Bills:

> represent somewhat different ways of achieving the same aims and outcomes, rather than a direct rejection of the ALRC's recommended approach or the application of a fundamentally different philosophy.[10]

Given that the executive has chosen not to avail itself of the ALRC's careful consideration of the issues, Parliament should note those areas that conflict with ALRC recommendations. For convenience, this Digest highlights those areas.

Main Provisions: National Security Information (Criminal Proceedings) Bill 2004

Part 2 — Interpretation

The scope of the proposed scheme

Proposed Division 2 determines the types of information affected by the proposed scheme by defining *national security* and related terms. National security is defined as 'Australia's defence, security, international relations, law enforcement interests or national interests'. *Security* has the same meaning as in the *Australian Security Intelligence Organisation Act 1979,* that is:

> (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
>
> (i) espionage;
> (ii) sabotage;
> (iii) politically motivated violence;
> (iv) promotion of communal violence;
> (v) attacks on Australia's defence system; or
> (vi) acts of foreign interference; whether directed from, or committed within, Australia or not; and
>
> (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).[11]

International relations is defined as 'political, military and economic relations with foreign governments and international organisations'. *Law enforcement interests* are taken to include the avoidance of disruption to national and international law enforcement efforts, protection of intelligence technologies and methods, protection of informants and ensuring that intelligence and law enforcement agencies are not discouraged from sharing information with other government agencies. *National interests* are defined as the

'economic, technological or scientific interests important to the stability and integrity of a nation.'

These provisions give the Bill a very wide scope. In particular, the definitions of international relations and national interests—which include certain political, economic, technological and scientific interests—extend the application of the Bill well beyond information that could cause prejudice to the defence and security of Australia and its citizens. This issue is discussed further in the Concluding Comments section.

Proposed Division 3 sets out the type of proceedings to which the proposed scheme would apply by defining *criminal proceeding* and related terms. In short, the scheme would apply to:

- proceedings to prosecute summary or indictable crimes against Commonwealth law, whether in federal or state courts, including all the stages of the proceeding (pre-trial, trial and post-trial)
- actions for judicial review of an administrative decision by a Commonwealth officer to prosecute a person for Commonwealth crimes or otherwise related to a criminal justice process decision
- proceedings arising under the *Extradition Act 1988*, and
- other parts of a criminal proceeding prescribed by regulations.

In other words, this Bill is limited to the protection of national security information in criminal and criminal-related proceedings only. It will not affect civil claims, administrative claims or any other non-criminal actions in courts or tribunals. By contrast, the ALRC has recommended that a single scheme be established to cover all court and tribunal proceedings.[12]

Part 3 – Protection of information whose disclosure is likely to prejudice national security

This part establishes the scheme outlined earlier in Table 1.

Division 1 – Management of information

Clause 19 provides that either party may apply to the court to hold a pre-trial conference of the parties to consider national security information issues that may arise in the trial. Once an application is made both the court and the other party are obliged to participate. **Clause 20** gives further effect to pre-trial conferences by providing that the court may make any such orders necessary to give effect to arrangements agreed between the parties.

The ALRC recommended a process to resolve issues relating to national security information at the earliest possible stage in criminal proceedings.[13] In the *Lappas* case, Justice Gray regretted that the claim for public interest immunity should be raised by the Commonwealth at a late stage in the proceeding, where concerns raised at the committal stage would have given the court and the parties more flexibility to deal with the issue.[14] Clause 19 goes some way to providing a pre-trial mechanism, reliant on consensus being reached between the parties. The ALRC proposals go further, providing a hearing as soon as the possibility is raised that national security information would be used as evidence, in which the court could impose a resolution on the parties.[15]

Clause 21 deals with the protection and storage of information disclosed in criminal proceedings. It allows regulations to be made to set storage rules and allows courts to make their own orders consistent with those regulations. The rules for the protection and storage of national security information have implications for principles of open justice. The notion that documents that bear on justice system outcomes can be kept secret is compromises the principle that citizens should be free to study and scrutinise that system. The ALRC recommends that courts should amend their own rules to provide for the handling and storage of national security information.[16]

Division 2—Attorney-General's certificates for protection of information

When must the Attorney-General be notified?

Clauses 22 requires that prosecutors and defendants notify the Attorney-General if they know or believe that:

- they will disclose information in the proceedings that relates to national security or whose disclosure may affect national security, or

- a person whom they intend to call as a witness will disclose information, either in giving evidence or merely by his or her presence, that relates to or affects national security.

Similarly, **clause 23** provides that notice to the Attorney-General may be required when the defendant or prosecutor knows or believes that, in the course of proceedings, a witness has been asked a question the answer to which may involve information relating to or affecting national security. However, in this scenario, before notice is sent to the Attorney-General, the witness must write the answer down and hand it to the prosecutor. It is then up to the prosecutor to decide whether or not it requires notice to be given to the Attorney-General. It is not clear why this determination should be made by the prosecutor, rather than, for example, the party who had called the witness, the party who had asked the question or the judge. Criminal lawyers may have concerns that this privileged position could be abused by prosecutors for tactical purposes, for example to interrupt the flow of

their opponent's cross-examination or to check the answer to one of their own questions before it is learnt by the court.

Under both clauses, once notice is sent to the Attorney-General the proceedings are adjourned until a response has been received. In the intervening time, it is an offence punishable by two years imprisonment to disclose the information or to call a witness who is subject to the notification (under **clauses 35 and 36**).

Similarly, breach of clauses 22 or 23 by failing to notify the Attorney-General is also an offence punishable by two years imprisonment, (under **clause 37**).

When can the Attorney-General issue a certificate?

Clause 24 provides that the Attorney-General can issue a *non-disclosure certificate* in the following circumstances:

- if he or she has been notified under clause 22 or 23 that a party or other person may disclose information in a criminal proceeding, or
- on his or her own initiative, if *for any reason* he or she believes that a party or witness in a criminal proceeding will disclose national security information, and
- he or she considers that the disclosure is likely to prejudice national security.

Where the relevant information is in the form of a document, a non-disclosure certificate may be used to prohibit use of the document (except in permitted circumstances) or to provide a redacted version that may be used. The redacted version may be a copy of the document with text deleted with or without a summary of the information that has been deleted or a statement of facts that the information in the document would, or would be likely, to prove.

If the relevant information is not in the form of a document (for example, oral testimony), the certificate may prohibit the disclosure of the information, with or without provision of a written summary of the information or statement of facts that may be disclosed.

Clause 26 allows the Attorney-General to issue a witness exclusion certificate to prevent either party calling a witness whose mere presence would disclose information prejudicial to national security. As with the non-disclosure certificate, a witness exclusion certificate can be made when the Attorney-General is notified under clause 22, or on his or her own initiative.

What are the consequences of the Attorney-General's certificate?

Unless a court has overturned a certificate, the Bill proposes that it be an offence to disclose information or call a witness in defiance of the certificate (**clauses 38 and 39**), with a penalty of two years imprisonment.

Further, **clause 25** provides that a non-disclosure certificate is conclusive evidence that the disclosure of the information would be likely to prejudice national security in the pre-trial phase of criminal proceedings. The same goes for pre-proceeding phases of extradition matters.

Clause 25 also provides that where a certificate has been issued, the court must hold a closed hearing to determine whether it will maintain, modify or remove the ban on disclosure or calling of witnesses. In criminal proceedings, this must occur 'as soon as the trial begins' or immediately upon receipt of the certificate if the trial has already begun. In extradition matters, the hearing must occur as soon as the proceeding begins or immediately upon receipt of the certificate if it as already begun.

The effect of **clauses 25, 38 and 39** is that the Attorney-General's certificate bans the disclosure of the information until the court has conducted its closed hearing. This can occur 'at the beginning of the trial' at the earliest. Accordingly, this precludes the use of the information in several important pre-trial steps in the criminal process, including application for bail, committal hearing and pre-trial disclosure. The significance of this prohibition is increased by **clause 31** which provides that a subsequent court order overturning the Attorney-General's certificate is not grounds for re-conducting parts of the proceeding conducted before the order. This issue is discussed further in the Concluding Comments section.

Division 3—Closed hearings and non-disclosure or witness exclusion order

Under **clause 29**, the court may make its own order regarding non-disclosure or witness exclusion ('a s 29 order') after conducting a closed hearing (as required by **clause 25**).

Who may be present at a closed hearing?

Clause 27 provides that the closed hearing may only be open to the following:

- the presiding magistrate, judge or judges
- court officials
- the prosecutor
- the defendant and his or her counsel

- the Attorney-General and his or her counsel (if the Attorney-General exercises his or her right to intervene in the hearing under **clause 28**), and

- any witnesses allowed by the court.

However, if it determines that their presence is likely to prejudice national security, the court may order that the defendant and/or defence counsel be barred from those parts of hearing in which the information is disclosed, including during the prosecutor's arguments in favour of non-disclosure. It should be noted that the standard for barring the defendant from court is that his or her presence is *likely* to prejudice national security, not merely that such prejudice is a possibility.

The court is required to make a record of the hearing which may only be made available to a court considering an appeal.

What orders can the court make?

Under **clause 29**, the court may make a non-disclosure or witness exclusion order along similar lines as the Attorney-General's certificates. Importantly, the court may order that the relevant information may be disclosed or the relevant witness may be called, effectively overturning the Attorney-General's certificate.

In a non-disclosure order, the court may provide that disclosure of documents is allowed on a redacted basis, by summary or by 'statement of facts'. However, the court may not allow disclosure of oral testimony on a redacted or 'statement of facts' basis. The court must order that oral or other non-documentary evidence may be disclosed in full or not disclosed at all.

What factors must the court consider in making a s 29 order?

Before considering whether to make a non-disclosure order, the court must consider whether the relevant information is admissible according to the normal rules of evidence (for example, relevance, hearsay or privilege). If it would not be admissible, the court must not make a s 29 order.

If the evidence is admissible, **subclause 29(8)** outlines the factors that a court must consider in making a s 29 order. These are:

- whether the disclosure of the information or presence of the witness would constitute a risk of prejudice to national security, having regard to the Attorney-General's certificate

- whether an order to prevent disclosure or calling of a witness would have a substantial adverse effect on the defendant's right to a fair hearing, and

- any other matters it considers relevant.

In other words, the court is required to balance the competing interests of national security and justice to the individual defendant. This involves a similar calculus as that required under the public interest immunity test, although with less detailed considerations than those applying under s 130 of the Evidence Act. However, **subclause 29(9)** provides that the court 'must give greatest weight' to the risk of prejudice to national security. In other words, courts are to be expected to err on the side of reducing risks to national security over the rights of the accused. The ALRC has rejected this approach in favour of a scheme which 'acknowledges the possible prejudice to national security ought to be given great weight, but formally would leave the court with more discretion to ensure that the interests of justice are served in the case before it'.[17]

What are the consequences of a non-disclosure or witness exclusion order?

Once a court has made a non-disclosure or witness exclusion order, the following would apply:

- intentional contravention of the order would be an offence punishable by two years imprisonment (**clause 40**)

- an adjournment may occur on the request of either party so that they may consider and make an appeal against the order (**clause 32**), and

- if a court orders that a redacted document or statement of facts be drawn, it becomes adducible as evidence of the full contents of the document (**paragraph 29(3))**. [18]

Although provision is made for an adjournment to allow an appeal, no provision is made to allow parties to apply for an adjournment for either party to re-consider their case in light of the order. This might be particularly relevant where pre-trial disclosure of certain documents has not been made due to a certificate of the Attorney-General, but where the court has subsequently allowed disclosure. In such a scenario, the defendant may need more time to provide instructions, obtain new statements or consult expert witnesses. Granting such an adjournment would remain within the inherent jurisdiction of the court on application of the party. Nonetheless, it seems appropriate that a legislative scheme that interferes with pre-trial disclosure should also provide an adjournment by right if the grounds for that interference are subsequently removed.

Division 4—Appeals

Clause 33 would allow either party or, if he or she has intervened, the Attorney-General, to appeal a s 29 order to a higher court.

Part 4—Security clearances

Clause 34 provides that certain legal representatives of defendants in federal criminal proceedings must obtain security clearances if they are to have access to national security information. The requirement to obtain a security clearance is activated if the Secretary of the Attorney-General's Department provides written notice to the defendant's lawyer or a person assisting the lawyer. The Secretary must decide which level of clearance is appropriate. If the lawyer does not apply for a security clearance the court must advise the defendant of the consequences of engaging a lawyer without a clearance and recommend that he or she instruct another lawyer.

Clause 41 provides that it be an offence to disclose information likely to prejudice national security to a defendant's lawyer, or person assisting that lawyer, unless that lawyer or person has a security clearance or the Secretary has specifically approved the disclosure. The main effect of this would be to prohibit defendants from providing certain instructions to their uncleared counsel. It may also effectively limit the ability of prosecutors to provide certain information by way of pre-trial disclosure.

The offence has a broad scope, applying to all disclosures 'likely to prejudice national security'. The offence could apply regardless of whether or not the information is classified, is subject to a certificate of the Attorney-General or is disclosed with any intent to cause prejudice to national security. It is broadened further by the wide definition of 'national security' described above. The broad application of the offence would require defendants to tread very carefully in providing instructions to an uncleared lawyer.

Altogether, without security clearance, **clause 41** would severely frustrate the task of representing an accused person in a matter where national security information is a significant issue. It effectively makes it compulsory for lawyers representing the accused in sensitive cases, and their staff, to obtain security clearances.

Part 5—Offences

Part 5 outlines the offences proposed by the Bill. These have all been addressed above in relation to the substantive provisions they enforce.

Part 6—Miscellaneous

Clause 42 requires the Attorney-General to report annually to Parliament on the number of certificates he or she has issued in the preceding year and the criminal proceedings to which they applied.

Main provisions: National Security Information (Criminal Proceedings) Consequential Amendments Bill 2004

Schedule 1—Amendment of the *Administrative Decisions (Judicial Review) Act 1977*

This schedule proposes changes to the Administrative Decisions (Judicial Review) Act (AD(JR) Act) to ensure that the Attorney-General's decisions to give certificates under clauses 24 and 26 of the primary Bill are not reviewable under that Act.

Item 1 provides that the Attorney-General's decision to give a certificate is a 'related criminal justice process decision' under s 9A of the AD(JR) Act. Under this section, a defendant in a criminal matter may not seek review of such decisions under the Act.

Item 2 provides that the Attorney-General's decision to give a certificate is added to Schedule 2 of the AD(JR) Act. The effect of this is that a person who has been given a certificate would have no right, under the AD(JR) Act, to request reasons for the decision.

Schedule 2—Amendment of the *Judiciary Act 1903*

Item 1 provides that the Attorney-General's decision to give a certificate is a 'related criminal justice process decision' under s 39 of the Judiciary Act. The effect of this would be to prevent applications for judicial review of these decisions to the Federal Court. It would not prevent such applications to the High Court, which are guaranteed under the Constitution.

Concluding Comments

Protecting national security information

The main effect of these Bills is to prevent the disclosure of national security information in criminal proceedings. It is not so much to prevent disclosure of such information to the public, but to prevent disclosure to other participants in the proceedings, including defendants and jurors. Courts already have mechanisms to prevent the disclosure of sensitive information to the public, through use of the public interest immunity and procedural mechanisms such in camera hearings and suppression orders. These mechanisms might be considered inadequate because they either prevent the prosecution from using information in their case or require disclosure to the defendant and jurors. By allowing prosecutors to use and courts to consider information that might not be available to defendants and jurors, these Bills go to that supposed inadequacy

Rights of the accused

It was noted at the outset that the control of information which might prejudice national security in criminal proceedings involves complex balancing of the public interest in keeping such information secret against the public interests in judicial fairness and open justice. Here, the central issues in the balance appear to be the supposed inadequacy of the current mechanisms for protecting national security information and the rights of the accused. Any proposal to allow information to be kept from defendants or jurors will have severe implications for the right of those accused to fair trials.

Redacted documents, statements of fact and closed hearings

A key feature of these Bills is that they would allow courts to devise redacted documents and 'statements of facts' that may be adduced as evidence of the contents of those documents. This is a significant change to the current law regarding the use of documents as evidence.[19] It could significantly undermine the fairness of criminal trials by relying on inevitably subjective, but incontestable, decisions about what information can stay in a document and what can be left out. The problem was explained by Gray J in *Lappas* when responding to the prosecution's request to adduce redacted documents:

> Such an interpretation involves value judgements as to what the deponent considers should be revealed. Presumably, there could be no cross-examination on whether the interpretation accurately reflected the contents for that would expose the contents. Nor could a person seeking to challenge that interpretation give their own oral evidence of the contents for that also would expose those contents. The whole process is redolent with unfairness.[20]

The use of 'statements of facts' is particularly problematic. These would involve the court making highly subjective judgements as to what facts the information in the document 'would, or would be likely, to prove' (paragraph 29(2)(f)). Firstly, this subjective function normally belongs to juries in federal criminal proceedings, not judges. Under this Bill, juries may be required to take at face value decisions made by judges as to what facts are proved by the contents of a document. Secondly, and radically, it also involves a significant compromise to the normally high burden of proof in criminal proceedings, which requires that the prosecution prove its case *beyond reasonable doubt* (cl 13.2, *Criminal Code Act 1995*). Under paragraph 29(2)(f) the judge may determine the contents of the statement on the basis of facts which 'would, *or would be likely to*' be proven by the document. 'Likely to' is a test that falls short of 'beyond reasonable doubt'. Although the jury will still be required to make a finding of guilt beyond reasonable doubt, it may make this finding on the basis of facts presented to it that may only be 'likely' to have been proven by documentary information the jury has not seen.

The closed hearing rules compound these problems. These rules allow that a defendant and his or her lawyer may be excluded from the hearing at which the judge determines whether and how a document should be redacted or a statement of facts drawn. The

defendant's lawyer may be excluded from this hearing even if he or she has obtained a security clearance in accordance with Part 4. Accordingly, not only does the defendant lose their right to present their case to the jury on how the documents should be interpreted, they may also lose their right to argue this case to the judge or even see the documents which are to be used in their prosecution.

The combined effect of redaction/statements of facts and closed hearings constitutes a significant compromise of several common law, international and constitutional requirements of a fair trial.

Firstly, it has already been noted that the 'statement of facts' process reduces the common law standard of proof in criminal trials.[21]

Secondly, dealing with substantive issues of fact in closed hearings to which the accused and his or her counsel may be excluded may violate Article 14 of the *International Covenant in Civil and Political Rights* (ICCPR). Among other things, this requires that an accused person have the right 'to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing'.[22] It is also an important principle of the common law that defendants have a right to be present at their trial, unless their behaviour disrupts the court or they waive that right.[23]

Thirdly, allowing the prosecution to have access to the court in closed hearings while the defence does not compromises the principle of 'equality of arms'.[24] This principle requires that neither party enjoy a procedural advantage over the other. In the case of closed hearings, this can have an important substantive effect. The ALRC notes that 'there is a real concern that secret proceedings tend to encourage the use of unreliable evidence, including double and triple hearsay'.[25] In the adversarial system, judges rely on submissions by the parties' lawyers in making their determinations. According to the logic of the system, a judge deciding how a document should be redacted or statement of facts drawn without input from the defendant's lawyers will be at a significant disadvantage and open to the apprehension of bias.

Fourthly, the limitation of the role of the jury offends a long-standing principle of criminal justice and, potentially, the Constitution. It has already been seen that the current Bill proposes that judges be permitted to reach determinations on the 'facts' that might be gleaned from documents to which the jury would have no access. This would usurp the function of juries as triers of facts in serious criminal proceedings, which has been a 'fundamental component of the justice system in Australia at least since the inception of the Constitution, and indeed in England since the fourteenth century.'[26]

It is also a function guaranteed by the Constitution, whose s 80 requires that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury'. While the High Court has interpreted the element of 'indictment of any offence' narrowly—effectively allowing Parliament to label any offence non-indictable in order to circumvent the jury requirement—it has been strict in setting out the requirements of a jury trial where

one is required.[27] Although no case appears to have dealt with legislation that allowed some of the substantive facts of a case to be determined by judges rather than the juries, it is at least a possibility that such a scheme would be unconstitutional because in some situations it excludes a role for the jury in contravention of s 80. The question is to what extent a jury can be excluded from aspects of a trial before it is no longer a 'trial by jury'.

Exclusion of evidence and witnesses

Any restriction on the information that, or witnesses who, may be brought before the court as, or to give, evidence places some limitation on the right of an accused person to conduct their defence. In order to establish their innocence, defendants need to present documents and call and examine witnesses. The right to adduce evidence in one's defence is not limitless; it is restricted by various privileges and immunities, including the public interest immunity.

However, the public interest immunity could not normally be used to exclude a witness on the basis that his or her mere presence could disclose information against the public interest. It may be used to prevent a witness answering certain questions, but it is possible that a witness whose presence may disclose national security information may also be able to answer questions that assist the defence without consequence to national security. In such circumstances, courts have deployed a variety of methods to protect the identity of the witness, including:

> referring to the witness or informant by letter or number only (for example, Witness 'X'); orders suppressing the person's identity; the use of a mask or voice distorter; and providing protective screens behind which a witness testifies, hidden from the public but in view of the defendant, jury and lawyers, who may therefore still observe the witness's demeanour.[28]

The present Bills go much further. While they would allow courts to use these methods, they would also allow courts to exclude witnesses altogether. Parliament may want to consider whether this is a necessary power, given the options already open to the court to protect the identity of those giving evidence. If current methods to protect witness anonymity are not effective, they could be improved along the lines suggested by the ALRC before allowing for witness exclusion.[29] The current Bill proposes no reform to enhance witness anonymity.

The Bill would allow witnesses to be excluded whether they are called by the prosecution or the defendant. But the only security benefit of excluding a witness, as opposed to ensuring their anonymity, is that it allows the identity of the witness to be kept from the defendant. Given this, there seems no reason that courts should be empowered to exclude witnesses called by the defendant, whom the defendant already knows. Such a measure seems to limit the defendant's right to run a defence without any significant benefit to national security.

The right to call witnesses is recognised by the ICCPR which provides that an accused person must have the right 'to obtain the attendance and examination of witness on his behalf under the same conditions as witnesses against him'[30]. Australia may be in breach of this Convention if courts make use of this Bill to exclude defendants' witnesses.

Right to counsel of own choosing

The provisions of the Bill that effectively require defence counsel to obtain security clearance in certain cases might be considered an incursion on the right of defendants to counsel of their own choosing. This is another internationally recognised right, with Article 14 of the ICCPR requiring that the accused be entitled to 'communicate with counsel of his own choosing' and 'to defend himself … through legal assistance of his own choosing'.[31]

The Law Council of Australia has argued that the requirement for security clearance does interfere with this right by providing the executive with the power to vet lawyers. Its president, Bob Gotterson, QC has said:

> What this security clearance proposal means is that you will not be able to choose your own lawyer if your case has national security overtones—you can only see a lawyer approved by officials appointed by the government of the day. The potential for discrimination here is grave—every citizen should be able to choose their own lawyer; and every lawyer should be free to act.[32]

Lawyers groups have pointed out that existing court procedures for the vetting of lawyers on character grounds, together with procedures to enforce confidentiality undertakings, professional ethics and crimes for the unlawful disclosure of sensitive information, provide a sufficient basis for maintaining the secrecy of documents provided to lawyers.[33]

On the other hand, the Attorney-General's Department has argued that current procedures for the admission of lawyers are insufficient as they rely heavily on voluntary disclosures and have little ability for systematic and subsequent review.[34]

The ALRC reached the conclusion that security clearance for lawyers may be necessary in certain circumstances.[35] However, the ALRC recommends that courts decide when information should be kept from lawyers without clearance. The current Bill takes a much broader approach, proposing that uncleared lawyers be denied access to any information where 'disclosure is likely to prejudice national security' (clause 41).

Aside from the policy debate surrounding this issue, the model for security clearance proposed by this Bill presents some practical problems which may concern Parliament:

- **timing:** it may take several months for security clearance to be granted, during which time the proceedings are adjourned. During this time the accused may be imprisoned awaiting trial, so the delay has a real and significant implication for that individual. No

provision is made for defence lawyers to obtain pre-clearance so that accused people can save time by instructing a lawyer already cleared

- **discretion on the requirement for security clearance:** the Secretary of the Attorney-General's Department appears to be given a very wide discretion in deciding whether or not a lawyer should be required to obtain clearance. There is no requirement, for example, that the Secretary have reasonable grounds for believing that the case will involve information likely to cause prejudice to national security, and

- **discretion on the level of clearance required:** the Secretary also has a wide discretion in determining the level of clearance a lawyer may need.

The exercise of these discretions may involve highly subjective assessments. The legislation provides no process for merits review of these decisions.

Pre-trial procedures

The rights of the accused before trail would also be affected by this Bill. Under the proposed scheme, information that is subject to a certificate of the Attorney-General may not be disclosed until the court has conducted a closed hearing and made an order under clause 29. This does not occur until the 'beginning of the trial' at the earliest. As a result, the accused may have no right, or only a circumscribed right, to use that information for any pre-trial procedures, including application for bail or the committal hearing. This might also affect the preparation of the defence by limiting the prosecution's duty to make pre-trial disclosure. It has already been noted that, while the court would retain the power to order an adjournment to allow the defendant to consider new information made available by a s 29 order, the Bill does not provide such an adjournment by right.

Chapter III of the Constitution

Chapter III of the Constitution vests the judicial power of the Commonwealth in federal courts. It is this chapter which ensures the separation of judicial from legislative and executive power. In a series of cases, the High Court has held Chapter III of the Constitution entrenches aspects of trial processes.[36] According to the logic of some of these cases, setting legislative requirements for courts might involve requiring them to act in a non-judicial way, which would conflict with Chapter III.[37] In other cases it has been argued that, where Parliament enacts legislation which makes certain requirements for the functioning and procedure of court cases, it may be usurping the judicial power which constitutionally resides in the courts.[38] Justice Deane put the argument as follows:

> Common sense and the provisions of Ch III, based as they are on the assumption of traditional judicial procedures, remedies and methodology (see below), compel the conclusion that, in insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch III, the Constitution's intent and meaning were that that judicial power would be exercised by those courts acting as courts with all

> that that notion essentially requires. Accordingly, the Parliament cannot, consistently with Ch III of the Constitution, usurp the judicial power of the Commonwealth by itself purporting to exercise judicial power in the form of legislation. Nor can it infringe the vesting of that judicial power in the judicature by requiring that it be exercised in a manner which is inconsistent with the essential requirements of a court or with the nature of judicial power. It would, for example, be beyond legislative competence to vest jurisdiction to deal with a particular class of matter in a Ch III court and to provide that, in the exercise of that jurisdiction, the judge or judges constituting the court should disregard both the law and the essential function of a court of law and do whatever they considered to be desirable in the public interest.[39]

Using these arguments, the High Court has held that the Constitution does provide some, albeit limited, protection of due process.[40] For example, judges in the majority in *Leeth* were prepared to accept that an attempt 'to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power'.[41]

The current Bills propose a scheme which provides several prescriptions for the functioning of court procedures. Some aspects of these adversely affect the rights of the accused, as discussed above. On the other hand, the scheme allows the court to retain discretion on several issues, including, most importantly, whether or not information should be excluded from a trial or used on a conditional (redacted) basis.

It is possible that elements of scheme conflict with Chapter III of the Constitution, especially those relating to the right to communicate with one's lawyer and to pre-trial procedures. It is also possible, and more likely, that certain outcomes of the scheme could be found unconstitutional, for example, where a lower court judge exercises his or her discretion to exclude a defendant from the closed hearing. If courts determine that their discretions under the Bills are circumscribed by countervailing constitutional principles, it could undermine significant elements of the proposed scheme.

Broad scope of the scheme

Parliament may want to consider the scope of the Bills' proposed scheme. It was noted earlier that that the definition of 'national security' includes certain political, economic, technological and scientific interests. These seem to go well beyond those interests that involve protection against threats to Australia's territorial integrity or direct threats of physical harm to its citizens or military personnel. Given the effects of the Bills on the rights of the accused, it might be considered more appropriate to limit their effect to information affecting these types of interests.

Another approach might be to limit the circumstances in which the Bills will apply to these interests against a yardstick of potential harm to, for example, territorial integrity or citizens. To some extent, this is done in the definition of national interest which only covers those economic, technological or scientific interests 'important to the stability and

integrity of a nation', although 'important' is still broader than alternatives such as 'essential' or 'necessary to ensure'. A similar proviso could be added to the definition of international relations, so that information relating to political and economic relations between nations would only receive the protections of the Bill where its disclosure would carry a risk to the security of Australia or its citizens. There is clearly a qualitative difference, for example, between information relating to international negotiation on the election of United Nations committee members and information relating to international negotiations on disarmament. Do both of these 'political relations' weigh up similarly when balanced against the rights of defendants in criminal proceedings?

The ALRC recommends that a statutory scheme for the protection of information in court cases should apply to the following categories of information:

- classified national security information
- security sensitive information—that is, national security information as defined in the Commonwealth Protective Services Manual (PSM) which has not, or not yet, been classified, and
- other national security information which might, if disclosed, prejudice Australia's defence or security.[42]

The PSM definition, for items in the second category, is very similar to the definition provided for national security in this Bill:

> **national security information** official information *whose compromise could affect the security of a nation* (for example, its defence or its international relations). National security information could be about security from espionage, sabotage, politically motivate violence, promotion of communal violence, attacks on Australia's defence systems or acts of foreign interference; defence plans and operations; international relations; and national interest (economic, scientific or technological matters vital to Australia's stability and integrity).[43] [Emphasis added].

However, the emphasised phrase marks an important difference between this definition and the one contained in the Bill, because it does limit the types of information covered to those affecting security.

The ALRC's third category is intended to ensure that information can not escape the scope of the scheme on a 'technical, definitional issue'.[44] Even then, this 'catch-all' element is limited to information whose disclosure might 'prejudice Australia's defence or security'.

It should be noted that narrowing the range of information that will receive the protection of the Bill would not affect the secrecy of the information not included. Such information would still be protected generally by existing laws for the protection of official secrets and in court proceedings by the public interest immunity.

Endnotes

1 For example, through the public interest immunity rule in the law of evidence, discussed below.

2 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98, Sydney, May 2004, p. 317. (Hereafter, ALRC.)

3 ibid, p. 324.

4 [2001] ACTSC 115. (Hereafter, *Lappas*.)

5 ibid., paras 2 and 8.

6 ALRC, op. cit., p. 274.

7 ibid., p. 182.

8 ibid., Terms of Reference

9 Australian Law Reform Commission, 'ALRC Submission on the National Security Information (Criminal Proceedings) Bill 2004', Submission to Senate Legal and Constitutional Committee, Sydney, 30 June 2004, p. 4.

10 ibid.

11 Section 4, *Australian Security Intelligence Organisation Act 1979*

12 ibid., p. 41.

13 ibid.

14 *Lappas*, op.cit., para 18.

15 ALRC, op. cit., 500 (Recommendation 11-9).

16 ibid., 508, 11–37.

17 ibid., 41.

18 Redacted or summarised documents may not currently be adduced as evidence of the contents of the document as a result of s 48, Evidence Act.

19 See above, Background.

20 *Lappas*, op.cit., para 14.

21 There has been some debate as to whether the criminal standard of proof (beyond reasonable doubt) is entrenched by the Constitution, although the approach taken by the High Court appears to suggest it is not. See George Williams, *Human Rights under the Australian Constitution*, Oxford University Press, Melbourne 1999, p. 214.

22 Article 14.2(d), International Covenant on Civil and Political Rights [1980] Australian Treaty Series 23 (Entry into force for Australia ,13 November 1980). (Hereafter, ICCPR.)

23 See *R v Abrahams*, (1895) 21 VLR 343, p. 346 quoted in ALRC, op.cit., 234.

24 See ALRC, op.cit., p. 236.

25 ALRC, op.cit., p. 379.

26 Williams, op.cit, 107, discussing the judgement of Deane J in *Kingswell v The Queen*.

27 See Williams, op.cit., pp. 103-110.

28 ALRC, op. cit., p. 275.

29 ibid., pp. 275 – 284.

30 ICCPR, op.cit., Article 14(3)(e).

31 ibid., Article 14.3 (b) and (d).

32 Bob Gotterson, QC, 'Lawyers reject 'unnecessary' security clearance laws', 27 May 2004, media release, Canberra. http://www.lawcouncil.asn.au/read/2004/2396653433

33 See discussion in ALRC, op.cit., pp. 181-201.

34 In ALRC, op.cit., p. 189.

35 ibid, pp. 200-201.

36 See generally Williams, op.cit., p. 215.

37 *Leeth v Commonwealth* (1992) 174 CLR 455.

38 For example, the approach taken by Deane and Gaudron JJ in *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

39 ibid., per Deane J, p. 607.

40 See Williams, op. cit., pp. 220-225 and *Dietrich v The Queen* (1992) 177 CLR 292, p. 362 (per Gaudron J).

41 *Leeth*, op. cit, (per Mason, CJ, Dawson and McHugh JJ), p .470.

42 ALRC, op. cit., p. 438.

43 Attorney-General's Department, *Commonwealth Protective Security Manua 2000*, Canberra, 2000, Glossary.

44 ALRC, op. cit., p. 439.