



**This is a new edition of a Bills Digests (no.25-26 2004-05) previously prepared for the 40th Parliament.**

## National Security Information (Criminal Proceedings) Bill 2004

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## **National Security Information (Criminal Proceedings) Bill 2004**

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

**Date Introduced:** 17 November 2004

**House:** Senate

**Portfolio:** Attorney-General

**Commencement:** The substantive provisions commence 28 days after the Bill receives Royal Assent

### **Purpose**

These Bills have three key purposes:

- to allow prosecutors and courts to use information the disclosure of which would be 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**

Similar Bills by the same names were introduced in the 40<sup>th</sup> Parliament on 27 May 2004. See [Bills Digest No. 25-26 2004–2005](#) for information on those Bills. Those Bills were referred to the Senate Legal and Constitutional Legislation Committee, which [reported](#) on 30 August 2004.<sup>1</sup> The Committee supported the Bill subject to thirteen proposed amendments.<sup>2</sup> The Bills lapsed with the prorogation of the 40<sup>th</sup> Parliament.

These new Bills have adopted some of the recommendations made by the Committee.

This Digest is an updated version of the previous Digest to take account of the changes made in the new Bills.

The recommendations of the Committee are tabulated against changes to the Bills in the Appendix.

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## 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.<sup>3</sup>

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 an accused person 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 may not be available

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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.<sup>4</sup>

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### Limitations of the public interest immunity

The public interest immunity is a blunt instrument, requiring that the information is ‘all in’ or ‘all out’.<sup>5</sup> 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*<sup>6</sup> (*‘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.<sup>7</sup> 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.

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.<sup>8</sup> 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.

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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.**

The diagram in Appendix 2 outlines the essential elements of this process. The details are explained more completely in the Main Provisions section below.

### 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.<sup>9</sup>

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.

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## 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 official investigations and court or tribunal proceedings of any kind ...<sup>10</sup>

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 thirty-five 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 original 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 original 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.<sup>11</sup>

The ALRC noted that the original 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.<sup>12</sup>

The Senate Committee heard evidence from the ALRC and seems to have taken on board ALRC views in the development of its own recommendations. To the extent that the new Bills have adopted some of the Committee's recommendations, the ALRC report has now had some indirect influence on the Bills in their current form.

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## 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).<sup>13</sup>

*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 physical 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:

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- 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.<sup>14</sup>

The current Bill also includes a definition of the term *likely to prejudice national security* so that it requires ‘a real, and not merely remote, possibility that the disclosure will prejudice national security’ (**clause 17**). This did not feature in the original Bill. The second reading speech suggested that this new definition ‘has been included to mean a real likelihood and not a remote possibility’.<sup>15</sup> **However, if anything the new definition has the opposite effect.** Unless otherwise defined, the expression ‘likely’ would not normally include mere possibilities, whether real or remote. **In fact, the *Explanatory Memorandum* contradicts the Minister, saying that the new definition ‘avoids the application of a “more likely than not” test’.**<sup>16</sup> The phrase is an important one as it forms the test that the Attorney-General and courts must apply in deciding whether or not evidence should be excluded from criminal proceedings. This definition widens the scope of the term and with it the scope of excludable material.

Another important change in the current Bill is the addition of **subclause 19(2)** which ensures that courts retain the power to stay criminal proceedings on fairness grounds, notwithstanding that similar grounds were considered in the statutory process for the exclusion of evidence and witnesses. This adopts a recommendation of the Senate Committee.<sup>17</sup>

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

### Division 1 – Management of information

**Clause 21** 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.

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**Clause 22** gives 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. **Clause 22** also allows the court to make orders to give effect to arrangements agreed between the parties at other stages in the proceedings.

The ALRC recommended a process to resolve issues relating to national security information at the earliest possible stage in criminal proceedings.<sup>18</sup> 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.<sup>19</sup> **Clauses 21** and **22** go 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.<sup>20</sup>

**Clause 23** 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 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.<sup>21</sup>

## **Division 2—Attorney-General’s certificates for protection of information**

When must the Attorney-General be notified?

**Clauses 24** 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.

The new Bill includes an additional sub-clause requiring the notifying party to also notify the other parties and the court that notice has been given to the Attorney-General (**sub-clause 24(3)**).

**Clause 25** 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

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affecting national security. However, in this scenario, before notice is sent to the Attorney-General, the witness must write the answer down and give it to the court who must then shown 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.

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 40 and 41**).

Similarly, breach of **clauses 24 or 25** by failing to notify the Attorney-General is also an offence punishable by two years imprisonment, (under **clause 42**).

When can the Attorney-General issue a certificate?

**Clause 26** provides that the Attorney-General can issue a *non-disclosure certificate* in the following circumstances:

- if he or she has been notified under clause 24 or 25 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.

A new **sub-clause 26(5)** has been provided in the current version of the Bill. This provides that a non-disclosure certificate ceases to have effect once the court has made an order in relation to the use of information and that order is no longer subject to appeal.<sup>22</sup> Certificates can also be revoked at any time by the Attorney-General.

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**Clause 28** 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 24**, or on his or her own initiative. As with non-disclosure certificates, these certificates will cease to have effect from the time the court has made an order in relation to whether or not the witness may appear and that order is no longer subject to appeal.

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 43 and 44**), with a penalty of two years imprisonment.

Further, **clause 27** 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 27** 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. If the certificate is received before the trial, the closed hearing must also occur before the trial. (In the original Bill, the hearing was to take place 'as soon as the trial begins' in these circumstances. The new formulation gives courts more control over the timing of the closed hearing. This change adopts the Senate Committee's Recommendation 9.<sup>23</sup>) If the receipt is received after the trial has already begun the court must adjourn for the closed hearing.

The effect of **clauses 27, 43 and 44** is that the Attorney-General's certificate bans the disclosure of the information until the court has conducted its closed hearing. This could preclude the use of the information in several important pre-trial steps in that might occur before the closed hearing, including application for bail, committal hearing and pre-trial disclosure. The significance of this prohibition is increased by **clause 35** 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. However, compared to the last version of the Bill, this problem has been alleviated by allowing courts more control over the timing of the closed hearing.

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

Under **clause 31**, the court may make its own order regarding non-disclosure or witness exclusion ('a s 31 order') after conducting a closed hearing (as required by **clauses 27 and 28**).

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Who may be present at a closed hearing?

**Clause 29** 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 30**), and
- any witnesses allowed by the court.

The original Bill allowed defendants and their lawyers to be excluded from the closed hearing if the court determined that their presence was likely to prejudice national security. Taking into account the recommendations of the Senate Committee, the current Bill has given defendants slightly more access to the closed hearing. Firstly, defendants' lawyers may only be excluded when they do not have appropriate security clearance. This clearly improves protection of defendants' rights, although any defence lawyer acting without the ability to seek instruction from their client remains at a substantial disadvantage. Secondly, the defendant and his or her lawyer must be given an opportunity to make submissions responding to any argument made by the prosecutor or Attorney-General in favour of excluding evidence or a witness from the trial. However, as nothing in the Bill requires the defendant to have access to the information on which the argument was based, this right might prove illusory as defendants' would be able to construct merely abstract opposing arguments. These issues are considered further in the Comments section.

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 31**, the court may make a non-disclosure or witness exclusion order along similar lines as the Attorney-General's certificates. Importantly, the court may alternatively 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

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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 31 order?

**Sub-clause 31(7)** outlines the factors that a court must consider in making a s 31 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 substantially adverse effect on the defendant's right to a fair hearing, *including in particular on the conduct of his or her defence* (the italicised phrase was not included in the original Bill), and
- any other matters it considers relevant.

In essence, 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 31(8)** 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'.<sup>24</sup> The Senate Committee recommended that the equivalent subclause of the previous Bill be removed or amended.<sup>25</sup> It remains in exactly the same form as in the previous Bill.

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 45**)
- an adjournment may occur on the request of either party so that they may consider and make an appeal against the order (**clause 36**), 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, to the extent that it is admissible under the normal rules of evidence (**subclause 31(3)**).<sup>26</sup>

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### Reasons for a s 31 order

One significant change appearing in the new Bill is a requirement for the court to provide written reasons for its s 31 order (**clause 32**). This adopts the Senate Committee's Recommendation 5.<sup>27</sup>

Under the process outlined in clause 32 the court must provide a written statement of reasons for making its s 31 order to the person who is the subject of the order, the parties and their counsel and the Attorney-General if he or she has intervened in the closed hearing. However, before making these reasons available to the above, the court must provide the prosecutor (and the Attorney-General if he or she has intervened) with a proposed statement of reasons. The prosecutor or Attorney-General may then request that the court vary its statement, if they believe that the statement contains information likely to prejudice national security. The court must make a decision on that request. If the court does not agree to the requested variation, the prosecutor or Attorney-General may appeal that decision to a higher court (**clause 38**). While the appeal is pending, the court may not provide the written statement (**clause 33**).

Where such an appeal is made, the Bill is unclear on the role of the other party in the appeal. Presumably, the higher court will need to read the proposed statement before deciding whether to uphold the lower court's decision not to vary the statement. According to normal principles of procedure, the other party would be entitled to see the proposed statement in order to make submissions to the appellate court. That would clearly undermine the very purpose of **clause 33**. The alternative, that the defendant not see the proposed statement, would disadvantage the appellate court as they would only receive substantive submissions from one party.

### Division 4—Appeals

**Clause 37** would allow either party or, if he or she has intervened, the Attorney-General, to appeal a s 31 order to a higher court.

### Part 4—Security clearances

**Clause 39** 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 46** 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

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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 46** would severely frustrate the task of representing an accused person in a matter where national security information is a significant issue. The preference for security cleared lawyers is further enhanced by the new provision that only uncleared lawyers may be excluded from closed hearings.<sup>28</sup> For practical purposes, the Bill makes it almost 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 47** 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

There are no substantive changes between the previous version of this Bill and the present one.

## 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 26 and 28 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.

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**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.

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## 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 as 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.<sup>29</sup> 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.<sup>30</sup>

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 31(2)(f)**). Firstly, this subjective

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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 31(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 (uncleared) 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. 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. This problem is somewhat mitigated by changes to the Bill’s present form which allow security cleared lawyers to remain in the closed hearing and guarantee the defence an opportunity to make arguments in favour of inclusion. But these changes are very limited in practice. Firstly, the ability of cleared lawyers to effectively represent their clients will be severely curtailed if they are not free to discuss the substance of the hearing and obtain relevant instructions from their client. Secondly, it could be argued that the right to make submissions as to why a document should not be excluded or redacted is illusory if the defendant cannot see the document in question.

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

First, it has already been noted that the ‘statement of facts’ process reduces the common law standard of proof in criminal trials.<sup>31</sup>

Second, 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 on 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’.<sup>32</sup> 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.<sup>33</sup>

Third, allowing the prosecution to have access to the court in closed hearings while the defence does not compromises the principle of ‘equality of arms’.<sup>34</sup> 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

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real concern that secret proceedings tend to encourage the use of unreliable evidence, including double and triple hearsay'.<sup>35</sup> 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 meaningful input from the defendant's lawyers will be at a significant disadvantage and open to the apprehension of bias.

Fourth, 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'.<sup>36</sup>

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.<sup>37</sup> It is at least possible that a scheme allowing judges to vet and redact substantive information before it reaches a jury offends 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 may be brought before the court as evidence places some limitation on the right of an accused person to conduct their defence. The same applies to any restriction on witnesses who may be brought before the court to give evidence. 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

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public but in view of the defendant, jury and lawyers, who may therefore still observe the witness's demeanour.<sup>38</sup>

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.<sup>39</sup> 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'.<sup>40</sup> 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'.<sup>41</sup>

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.<sup>42</sup>

Lawyers groups have pointed out that existing court procedures for the vetting of lawyers on character grounds, together with procedures to enforce confidentiality undertakings,

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professional ethics and crimes for the unlawful disclosure of sensitive information, provide a sufficient basis for maintaining the secrecy of documents provided to lawyers.<sup>43</sup>

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.<sup>44</sup>

The ALRC reached the conclusion that security clearance for lawyers may be necessary in certain circumstances.<sup>45</sup> However, the ALRC recommends that courts decide when information should be kept from lawyers without clearance. The Senate Committee made a recommendation along similar lines.<sup>46</sup> The current Bills take a much broader approach, proposing that uncleared lawyers be denied access to any information where 'disclosure is likely to prejudice national security' (clause 46).

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.

### 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.<sup>47</sup> 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.<sup>48</sup> In other cases it has been argued that, where Parliament enacts legislation which makes certain requirements for the

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functioning and procedure of court cases, it may be usurping the judicial power which constitutionally resides in the courts.<sup>49</sup> 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.<sup>50</sup>

Using these arguments, the High Court has held that the Constitution does provide some, albeit limited, protection of due process.<sup>51</sup> 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'.<sup>52</sup>

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 the 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.

The current version of the primary Bill attempts to address these potential constitutional problems through **clause 19** (see above, Main Provisions). This clause reaffirms the power of courts to control federal criminal proceeding and, importantly, provides that clause 31 does not prevent a court from staying an entire trial on the grounds that a fair trial cannot be conducted. In doing so, it probably protects the entire Bill from being unconstitutional. However, it does not prevent the Constitution constraining the way courts implement the Bill. In practice, any order allowing the exclusion, summarisation or redaction of documents or exclusion of defendants or witnesses might be unfair and/or unconstitutional. The *Lappas* case demonstrates this. As Gray J noted of the prosecution's

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suggestion to redact the relevant documents—a process this Bill seems intended to allow—‘the whole process is redolent with unfairness’.<sup>53</sup> Using subclause 19(2), it is possible that Gray J would have reached exactly the same position under the Bill as without it. If courts determine that their discretions under the Bill are circumscribed by countervailing constitutional principles, it would undermine significant elements of the Bill and its purpose.

### **Broad scope of the scheme**

Parliament may want to consider the scope of the Bills’ proposed scheme. It was noted earlier 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’, and ‘stability and integrity’ are very vague terms. The definition of international relations does not even have this proviso. Parliament might consider whether the protection of all information relating to ‘political, military and economic relations with foreign governments and international organisations’ justifies significant limitations on the rights of accused, or only those which might affect Australia’s physical security.

The new definition of ‘likely to prejudice national security’ effectively broadens the scope of the Bill even further (**clause 17**). In essence it includes ‘unlikely but a real possibility’ in the definition of ‘likely’.

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.<sup>54</sup>

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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).<sup>55</sup> [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'.<sup>56</sup> 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 necessarily 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.

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## Appendix 1: Recommendations of the Senate Legal and Constitutional Legislation Committee compared to current Bill

Senate Committee Recommendations <sup>57</sup>	Response in the current Bill.
<p><b>Recommendation 1</b> The Committee recommends that Subclauses 23(4), 25(5) and 26(5) of the Bill, which require the court to hold closed hearings, be removed so that the court retains its discretion to determine whether its proceedings are open or closed.</p>	Not adopted in current Bill.
<p><b>Recommendation 2</b> The Committee recommends that the Bill be amended to include a provision requiring the court to provide a written statement of reasons outlining the reasons for holding proceedings in-camera.</p>	Adopted—clauses 32 and 33.
<p><b>Recommendation 3</b> If Recommendations 1 and 2 are not supported, the Committee recommends that, as a commitment to the right of a defendant to a fair, public trial, the Bill should be amended to include a provision requiring the Attorney-General to publish a statement of reasons for any decision to hold a closed hearing.</p>	Not adopted in current Bill.
<p><b>Recommendation 4</b> The Committee recommends that Subclause 27(4) of the Bill be amended to allow the courts the discretion to determine to what extent a court transcript or parts of it should be sealed or distributed more widely and any undertakings required for people to have access to the transcript.</p>	Not adopted in the current Bill.
<p><b>Recommendation 5</b> The Committee recommends that the Bill be amended to include a provision requiring a court to provide a statement of reasons for any restriction placed on the distribution of all or part of a court transcript.</p>	Not adopted in the current Bill.
<p><b>Recommendation 6</b> The Committee recommends that Clause 27 of the Bill be amended to provide that defendants and their legal representatives can only be excluded from hearings in limited specified circumstances, and courts will retain the power to stay proceedings if the defendant cannot be assured of a fair trial.</p>	Adopted, to some extent. Clause 29 (previously 27) now provides that security cleared counsel cannot be excluded from closed hearings and defendants must have the opportunity to make submissions before evidence or witnesses are excluded. Clause 19 provides that courts retain the power to stay proceedings.
<p><b>Recommendation 7</b> The Committee recommends that the Bill be amended to include a provision that requires the court, when making an order allowing information to be disclosed as being subject to the Attorney-General's non-disclosure certificate, to be</p>	Not adopted in the current Bill. However, paragraph 31(7)(b) now provides that 'substantial adverse effect' on the conduct of the defence must be factor for particular consideration by the court in deciding to

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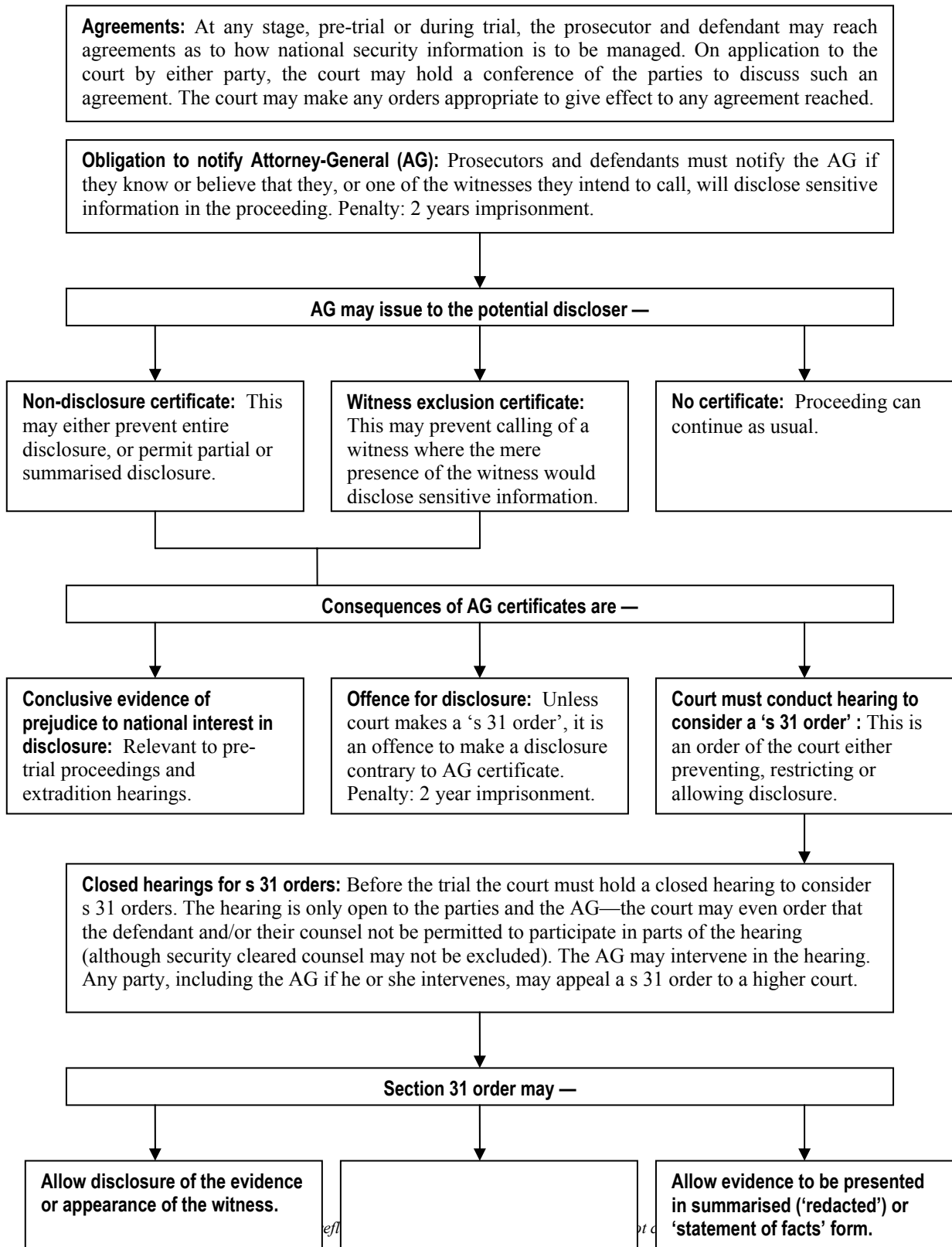
satisfied that the amended document and/or substitution documentation to be adduced as evidence would provide the defendant with substantially the same ability to make his or her defence as would disclosure of the source document.	exclude evidence or witnesses or draw a statement or facts.
<b>Recommendation 8</b> The Committee recommends that the Bill be amended to include a provision that requires the court, when making an order to exclude a witness from the proceedings, to be satisfied that the exclusion of the witness would not impair the ability of the defendant to make his or her defence.	Not adopted in the current Bill. However see discussion of Recommendation 7.
<b>Recommendation 9</b> The Committee recommends that the Bill be amended to allow the court to make decisions about the use of information before the commencement of the trial.	Adopted—subclauses 27(3) and 28(5).
<b>Recommendation 10</b> The Committee recommends that the court assume a more active role in determining whether a defendant's legal representative requires a security clearance before he or she can access information. The Committee recommends that the Bill adopt the recommendation by the ALRC that 'the court may order that specified material not be disclosed to a lawyer unless he or she holds a security clearance at a specified level'.	Not adopted in the current Bill.
<b>Recommendation 11</b> The Committee recommends that Subclause 29(6) be amended to allow the court the discretion to make decisions in relation to the admissibility of evidence containing classified or sensitive national security information at such time as the court considers appropriate.	Adopted—deletion of previous subclause 29(6).
<b>Recommendation 12</b> The Committee recommends that the term 'substantial' be removed from paragraph 29(8)(b) of the Bill.	Not adopted in the current Bill.
<b>Recommendation 13</b> The Committee recommends that Subclause 29(9) of the Bill be removed from the Bill, or at the least, amended to reflect the response received from the Attorney-General's Department.	Not adopted in the current Bill.

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## Appendix 2: Outline of the proposed scheme to control national security information in criminal proceedings



## Endnotes

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- 1 Senate Legal and Constitutional Legislation Committee, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004*, Senate Legal and Constitutional Committee, Canberra, August 2004. (Hereafter, Senate Committee.)
- 2 *ibid.*, p. vii-viii.
- 3 For example, through the public interest immunity rule in the law of evidence, discussed below.
- 4 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98, Sydney, May 2004, p. 317. (Hereafter, ALRC.)
- 5 *ibid.*, p. 324.
- 6 [2001] ACTSC 115. (Hereafter, *Lappas*.)
- 7 *ibid.*, paras 2 and 8.
- 8 ALRC, *op. cit.*, p. 274.
- 9 *ibid.*, p. 182.
- 10 *ibid.*, Terms of Reference
- 11 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.
- 12 *ibid.*
- 13 Section 4, *Australian Security Intelligence Organisation Act 1979*
- 14 ALRC, *op.cit.*, p. 41.
- 15 Senator Ian Campbell, 'Second reading: National Security Information (Criminal Proceedings) Bill 2004', Senate, *Debates*, 17 November 2004, p. 9.
- 16 *Explanatory Memorandum: National Security Information (Criminal Proceedings) Bill 2004*, Philip Ruddock, Attorney-General, Canberra, 2004, p. 7.
- 17 Senate Committee, *op. cit.*, p. 25.
- 18 ALRC, *op.cit.*, p. 41.
- 19 *Lappas*, *op.cit.*, para 18.
- 20 ALRC, *op. cit.*, 500 (Recommendation 11-9).
- 21 *ibid.*, 508, 11–37.
- 22 A new **clause 20** provides that an order is considered no longer subject to appeal after an appeal has been determined or the period for making an appeal has lapsed.
- 23 Senate Committee, *op. cit.*, viii.

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- 24 ALRC, op. cit., 41.
- 25 Senate Committee, op. cit., p. 43.
- 26 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.
- 27 Senate Committee, op.cit., p. 21-22.
- 28 See above p. 13.
- 29 See above, Background.
- 30 *Lappas*, op.cit., para 14.
- 31 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.
- 32 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.)
- 33 See *R v Abrahams*, (1895) 21 VLR 343, p. 346 quoted in ALRC, op.cit., 234.
- 34 See ALRC, op.cit., p. 236.
- 35 ALRC, op.cit., p. 379.
- 36 Williams, op.cit, 107, discussing the judgement of Deane J in *Kingswell v The Queen*.
- 37 See Williams, op.cit., pp. 103-110.
- 38 ALRC, op. cit., p. 275.
- 39 *ibid.*, pp. 275-284.
- 40 ICCPR, op.cit., Article 14(3)(e).
- 41 *ibid.*, Article 14.3 (b) and (d).
- 42 Bob Gotterson, QC, ‘Lawyers reject ‘unnecessary’ security clearance laws’, 27 May 2004, media release, Canberra. <http://www.lawcouncil.asn.au/read/2004/2396653433>
- 43 See discussion in ALRC, op.cit., pp. 181-201.
- 44 In ALRC, op.cit., p. 189.
- 45 *ibid*, pp. 200-201.
- 46 Senate Committee, p. 40.
- 47 See generally Williams, op.cit., p. 215.
- 48 *Leeth v Commonwealth* (1992) 174 CLR 455.
- 49 For example, the approach taken by Deane and Gaudron JJ in *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
- 50 *ibid.*, per Deane J, p. 607.

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- 51 See Williams, op. cit., pp. 220-225 and *Dietrich v The Queen* (1992) 177 CLR 292, p. 362 (per Gaudron J).
- 52 *Leeth*, op. cit, (per Mason, CJ, Dawson and McHugh JJ), p .470.
- 53 *Lappas*, op.cit., para. 14.
- 54 ALRC, op. cit., p. 438.
- 55 Attorney-General's Department, *Commonwealth Protective Security Manua 2000*, Canberra, 2000, Glossary.
- 56 ALRC, op. cit., p. 439.
- 57 Senate Committee, op. cit., p. vii-viii.

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