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National Security Information Legislation Amendment Bill 2005

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National Security Information Legislation Amendment Bill 2005

Date Introduced: 10 March 2005

House: House of Representatives

Portfolio: Attorney-General

Commencement: The formal provisions commence on Royal Assent; the substantive provisions commence 28 days after Royal Assent

Purpose

To provide a statutory regime governing the use of national security information in civil proceedings. Existing legislation governs the use of national security information in criminal proceedings.

Similar to the regime for criminal proceedings, the proposed civil proceedings regime:

- may prevent the parties to civil proceedings and their lawyers from having access to national security information (as defined)
- means that witnesses whose mere presence might disclose national security information can be excluded from civil proceedings
- means that lawyers for the parties in civil proceedings and the parties themselves will have to be security cleared before they can see national security information that may be relevant to their proceedings, and
- provides custodial penalties for anyone convicted of contravening the requirements of the legislation.

Background

Australian Law Reform Commission and national security information

In April 2003, then Attorney-General Daryl Williams asked the Australian Law Reform Commission (ALRC) to review the handling and protection of classified and security sensitive information in legal proceedings. After receiving amended terms of reference, the Commission was asked to report by 31 May 2004.

A copy of the Commission's report, *Keeping Secrets. The Protection of Classified and Security Sensitive Information* can be found at:

http://www.austlii.edu.au/au/other/alrc/publications/reports/98/

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The ALRC considered whether existing mechanisms provided adequate protection for national security information in legal proceedings. These mechanisms include public interest immunity; statutory provisions allowing for closed courts and restrictions on publication; statutory and administrative regulations providing sanctions against unauthorised disclosure of classified material; and the standards found in the *Commonwealth Protective Security Manual*.[1]

These protections notwithstanding, the ALRC made a number of recommendations for change including the enactment of a new National Security Information Procedures Act, which would apply to criminal, civil and administrative proceedings in all courts and tribunals. The ALRC's recommendations were designed to take account of the *rights of individuals* to fair and open trials; the *Government's need* to maintain official secrets; and the *public interest* in safeguarding national security; while facilitating the prosecution of terrorists and spies; maintaining the fairness, integrity and independence of the judicial system; and adhering to the principles of 'open justice' and 'open and transparent executive government'.[2]

While the ALRC's report suggested some differences in approach to criminal and civil proceedings, its recommendations generally applied to both 'with the basic thrust of the recommendations attempting to move all participants away from the idea that the public interests in full disclosure and in proper confidentiality are necessarily completely opposed, and that the only solution must necessarily favour one at the expense of the other'.[3]

Just before the Commission's report was due to be submitted, the Government introduced legislation dealing with national security information in criminal proceedings into Parliament.

National security information and criminal proceedings

Two Bills—the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004—were introduced into the House of Representatives on 27 May 2004. The Bills were referred to the Senate Legal and Constitutional Legislation Committee ('the Committee' or 'the 2004 Committee') for inquiry and report. The Committee supported the Bills subject to a number of amendments.[4] However, the Bills lapsed when the 40th Parliament was prorogued for the October 2004 General Election.

Two new Bills, incorporating some of the Committee's recommendations were introduced into the 41st Parliament in November 2004. The new National Security Information (Criminal Proceedings) Bill was amended in both the House of Representatives and the Senate. Both Bills received Royal Assent on 14 December 2004. Their substantive provisions commenced on 11 January 2005.

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Bills Digests Nos. 59-60 2004-05, covering the two new Bills introduced in November 2004, provide a thorough discussion of the Bills and their implications.[5]

The *National Security Information (Criminal Proceedings) Act 2004* (the Principal Act) has been amended once since its passage. The *National Security Information (Criminal Proceedings) Amendment (Application) Act 2005* applies the Principal Act to federal criminal proceedings occurring after 11 January 2005, even though those proceedings may have commenced before that date. The present Bill adopts a similar approach (see below).

When might national security information arise in criminal proceedings?

In criminal proceedings, national security information might be an issue in prosecutions for offences such as terrorism offences, espionage, treason, sabotage and hijacking. And given the wide definition of 'national security', such information might also be an issue in prosecutions for offences under a variety of other statutes—for example under Division 3, Part III of the *Australian Security Intelligence Organisation Act 1979*,[6] the *Witness Protection Act 1994*, the *Australian Crime Commission Act 2002* and the Principal Act itself.

When might national security information arise in civil proceedings?

National security information may also arise in civil proceedings. A number of examples have been provided by the ALRC, the second reading speech and in submissions to the Senate Committee considering the current Bill.[7] As the Australian Law Reform Commission has pointed out, such proceedings might involve claims:

> brought against a government department or agency by, for example, members of the defence forces, intelligence personnel or their dependents or estates;
>
> against the Government by private third parties, the evidence surrounding which involves classified or security sensitive information that would emerge in the normal course of that litigation; and
>
> brought by the Government against a private third party arising, for example, out of damage caused by that third party to property, the existence or significance of which the third party was unaware, or which would emerge if evidence that would normally be disclosed is produced.[8]

The Attorney-General's second reading speech makes specific reference to accident compensation and family law proceedings. And, as a submission to the 2005 Committee points out, national security information may also be raised in proceedings for judicial review of administrative action. Examples might include applications for review of decisions by the Attorney-General to list an organisation as a terrorist organisation or to refuse an application to de-list such an organisation. National security information may

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also arise in an application for a remedy in relation to a detention warrant issued under Division 3, Part III of the Australian Security Intelligence Organisation Act.[9]

The existing regime for criminal proceedings and the proposed regime for civil proceedings

The scheme governing the use of national security information in criminal proceedings set out in the Principal Act is broadly similar to that proposed for civil proceedings. A summary of some key differences can be found in the Explanatory Memorandum for the National Security Information Legislation Amendment Bill 2005.

Some relevant definitions in the *National Security Information (Criminal Proceedings) Act 2004*

A number of definitions in the Principal Act are important in any consideration of the current Bill because they also apply to it. In particular, the definition of 'national security' is 'central' to the legislative scheme because 'it is used as the basis for non-disclosure of information' in legal proceedings.[10] Some key definitions are:

- '*national security*' means 'Australia's defence, security, international relations or law enforcement interests'[11]
- '*security*' means:

  (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).[12]
- '*international relations*' means 'political, military and economic relations with foreign governments and international organisations'[13]
- '*law enforcement interests*' includes interests in such matters as avoiding disruption to national and international efforts relating to law enforcement and criminal investigation; protecting methods used to collect and analyse criminal or security intelligence; protecting informants; and ensuring that intelligence and law enforcement agencies are not discouraged from sharing information with government,[14] and

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- '*likely to prejudice national security*' means that there is a real not merely a remote possibility that a disclosure of national security information will prejudice national security.[15]

The definition of 'national security' was narrowed during the passage of the Principal Act to remove 'national interests' from its ambit.[16] Nevertheless, comments in *Bills Digest* No. 59 2004-05 about the breadth of the definition remain apposite. As the *Digest* remarked, the definition gives the legislation a very wide scope and 'extend[s] … well beyond information that could cause prejudice to the physical defence and security of Australia and its citizens'.[17] In particular, Parliament may wish to note the reference to 'international relations' and 'law enforcement interests' in the definition and the broad coverage given to those terms.

Main Provisions

Items 1-3 of **Schedule 1** rename the Principal Act and insert references to civil proceedings. The Principal Act will be re-titled the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

Application to civil proceedings

The amendments will apply to civil proceedings whether commenced before or after the legislation commences once the requisite notice is given [**subclauses 6A(1) and 6A(2)**]. Importantly, the Bill enables the Attorney-General to issue notices and certificates in relation to civil proceedings, irrespective of whether he or she is a party to those proceedings.

A notice issued by the Attorney-General under the proposed legislation advises a party and the court that the Act applies to the proceedings. This may have important implications for the parties, their lawyers and witnesses and may expose them to criminal sanctions for breach.

If the notice is given after the proceedings have commenced it will only apply to those parts of the proceedings that take place after the notice is given [**clause 6A(5)**].

Notices and appointments are not legislative instruments for the purposes of the *Legislative Instruments Act 2003* [**clause 6A(6)**]. The consequence is that they need not be tabled in Parliament and are not disallowable.

Where the Attorney-General is not a party to the proceedings

The legislation will apply to civil proceedings in which the Attorney-General is *not* a party if he or she gives written notice to the parties that the Act applies [**clause 6A(1)**].

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Where the Attorney-General is a party to the proceedings

If the Attorney-General *is* a party to civil proceedings, then another Minister must be appointed in writing for the purposes of the Act, including the issuing of notices and certificates [**subclauses 6A(2), (3) and (4)**].[18]

The provision for an appointed Minister to perform the Attorney-General's functions is a point of difference between the Bill and the Principal Act. Provision for the appointment of a substitute is not necessary in criminal proceedings. Although not invariably the case, criminal proceedings generally involve the Director of Public Prosecutions.

Definitions and interpretation provisions

Clause 15A defines 'civil proceeding' to mean a proceeding in any Australian court other than a federal criminal proceeding.[19] The term includes contempt proceedings and all stages of civil process (for example, discovery, appeals, interlocutory proceedings and proceedings prescribed by regulation).

The application of the proposed legislation to any Australian court is wider than in the case of criminal proceedings. In the case of criminal proceedings, the Principal Act is limited to proceedings for Commonwealth offences in courts exercising federal jurisdiction and to extradition proceedings.

The ALRC report considered the constitutional implications of extending a National Security Information Procedures Act to all Australian courts. It concluded:

> … eight heads of power …—together with any inherent power that the Australian Government may have to legislate for the defence, security and integrity of the Commonwealth—would seem to cover all likely legal proceedings in which classified or sensitive national security information would arise. However, whereas the Australian Government inarguably has the power to legislate to govern the procedure to be adopted in federal courts, reliance on these disparate heads of power to extend the proposed regime to all Australian courts might mean that there is some room to argue in marginal cases that the proposed regime does not apply. If it did not in some exceptional case, the existing common law and legislative powers would remain and could be relied on, if appropriate.[20]

The Principal Act enables national security information to be disclosed for 'permitted purposes'. With the expansion of the legislation to cover civil proceedings, the definition of 'permitted purposes' is widened. For instance, permitted disclosures will include disclosures where a party to civil proceedings or their lawyer has been security cleared and discloses the information in the proceeding or in the course of their duties in relation to the proceedings [**paragraphs 16(aa) and (ac)**].

Item 13 amends section 19 of the Principal Act. As things stand, section 19 enables a court hearing federal criminal proceedings to stay those proceedings if an order made

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under section 31 of the Act would have a 'substantial adverse effect on a defendant's right to receive a fair hearing'. This provision safeguards a court's power to control its own proceedings. **Item 13** inserts a similar provision in relation to civil proceedings.

Items 14-21 are consequential amendments that identify the criminal proceeding provisions in the Act.

Protection of national security information in civil proceedings

Item 22 inserts **new Part 3A**—'Protection of information whose disclosure in civil proceedings is likely to prejudice etc. national security'.

Management of information in civil proceedings

Before a substantive hearing in civil proceedings begins, a party can ask the court for a pre-trial conference to consider national security information issues that may arise.

If the Commonwealth Attorney-General is not a party to the proceedings, notice must be given to him or her. The Attorney-General may attend the conference. If the Attorney-General is a party to the proceedings, notice must be given to the Minister appointed to represent him or her.[21]

The court must hold the conference as soon as practicable after the application is made (**clause 38A**).

Clause 38B enables the Commonwealth and the parties to agree to an arrangement about the disclosure of national security information in the proceeding. The court is then given a discretion whether to make an appropriate order to give effect to such an arrangement.

Clause 38C provides that regulations may be made prescribing how information that is disclosed to a court in a civil proceeding must be stored, handled or destroyed. Courts can make orders about such matters so long as they are not inconsistent with the regulations.

Attorney-General's certificates for protection of information in civil proceedings

When must the Attorney-General be notified?

Clause 38D provides that a party to civil proceedings must notify the Attorney-General as soon as practicable if they believe that:

- they will disclose information during the proceedings that relates to or affects national security, or
- a person whom they intend to call as a witness will disclose information by way of evidence or their 'mere presence' that relates to or affects national security.

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Notice must be in the prescribed form. Once notice is given, the proceedings must be adjourned.

The party must also give written advice to the court, the other parties to the proceeding and any affected witness that notice has been given to the Attorney-General. This advice must also contain a description of the information.

Under **clause 38E** if a witness in a civil proceeding is asked a question and a party to the proceeding believes that the answer will disclose information that is related to or may effect national security, then the party must advise the court. In such a case, the court must require the witness to provide it with a written answer to the question, adjourn the proceedings and give the written answer to the Attorney-General. Proceedings will be adjourned until the Attorney-General responds either by issuing a certificate or a making a decision not to issue a certificate.

The Bill creates a number of related offences—both in terms of failure to comply with the requirement to notify the Attorney-General and in terms of certain post-notification conduct.

Clause 46C provides that if national security is likely to be prejudiced by disclosure in proceedings, it will be an offence for a party to:

- fail to notify the Attorney-General of an expected disclosure in civil proceedings that relates to national security
- fail to comply with the requirements for notice in **subclause 38D(3)**
- fail to advise other parties and the court that notice has been given to the Attorney-General, or
- fail to advise the court that a witness may disclose national security information.

The maximum penalty is 2 years imprisonment.[22] As has been pointed out, these (and similar provisions) place onerous obligations on parties, require compliance in the context of a wide definition of 'national security' and mandate assessments of when it is likely to be prejudiced.

In the period *after* the Attorney-General has been notified under proposed sections 38D or 38E and *before* the Attorney has issued a certificate or decided not to issue a certificate, it is an offence:

- for a party or another person to disclose information likely to prejudice national security if the disclosure does not occur in 'permitted circumstances', or
- for a witness to disclose written information likely to prejudice national security to a court if the disclosure does not occur in 'permitted circumstances' (**clause 46A**).

These offences are also punishable by a custodial sentence of up to 2 years.

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When can the Attorney-General issue a non-disclosure certificate or a civil witness exclusion certificate?

Clause 38F provides that the Attorney-General can issue a *civil non-disclosure certificate*:

- if he or she has been notified under **clause 38D or 38E** that a party or other person will disclose information in a civil proceeding, or
- on his or her own initiative—if he or she, 'for any reason', expects that national security information will be disclosed by a party or another person in a civil proceeding, and
- he or she considers that the disclosure is likely to prejudice national security.

A civil non-disclosure certificate must describe the national security information but need not be issued with any accompanying material. It may be given to 'potential disclosers'—a term defined in **subclause 38F(9)**.

If the information is in the form of a document, a civil non-disclosure certificate may be used to prohibit use of the document (except in permitted circumstances) or to provide a redacted (edited) version that can 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 information is not in documentary form (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 a statement of facts that may be disclosed.

Another certificate that may be issued by the Attorney-General is a *civil witness exclusion certificate*. Under **clause 38H**, the Attorney-General can issue a witness exclusion certificate:

- if he or she is notified under **clause 38D** that a party to civil proceedings believes that a person they intend to call as a witness will disclose information by their 'mere presence', or
- on his or her own initiative—if 'for any reason', the Attorney-General expects that a person likely to be called as a witness will disclose information by their 'mere presence', and
- he or she considers that the disclosure is likely to prejudice national security.

A civil witness exclusion certificate means that the party must not call the person as a witness. A copy of the certificate may be given to the relevant party or their lawyer and must be given to the court. If the Attorney-General decides not to issue a civil witness exclusion certificate, the Attorney-General must advise the relevant party and the court.

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It is an offence to disclose information contrary to a civil non-disclosure certificate or a call a witness contrary to a civil witness exclusion certificate. The maximum penalty is 2 years imprisonment (**clauses 46D and 46E**).

None of the following is a legislative instrument for the purposes of the Legislative Instruments Act: non-disclosure certificates, witness exclusion certificates and the written advice that must be provided to potential disclosers and the court [**subclauses 38F(8) and 38H(10)**].[23]

What are the consequences of the Attorney-General's civil non-disclosure certificate or civil witness exclusion certificate?

A certificate issued by the Attorney-General is an interim measure banning disclosure. It operates until a court makes its own order either overturning the certificate and allowing the disclosure or accepting the certificate and thus requiring information to be withheld or the witness to be excluded. As indicated above, while the Attorney-General's certificate is in force, it is an offence to disclose information or call a witness contrary to the requirements of the certificate.

Under **clause 38G**:

- if a certificate is issued before the substantive hearing in a proceeding begins—the court must hold a hearing to consider making an order under **clause 38L**
- if a certificate is issued after the substantive hearing in a proceeding begins—the court must adjourn the proceedings to consider making an order under **clause 38L**.

Such hearings are closed hearings.

Closed hearings and non-disclosure or witness exclusion orders in civil proceedings

As indicated above, after conducting a closed hearing, a court makes its own order about non-disclosure or witness exclusion.

Who may be present at a closed hearing?

The requirements for closed hearings are set out in **clause 38I**. Only the following people can be present at a closed hearing:

- the magistrate or judge(s)
- court officials
- parties to the proceeding and their lawyers
- the Attorney-General (if he or she intervenes) and his or her lawyer, and
- any witnesses allowed by the court.

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However, if they have not been appropriately security cleared, the parties, their lawyers and court officials can be excluded from any part of the proceedings in which the Attorney-General or their lawyer provides details of why information should not be disclosed or witness excluded and the court considers the disclosure is likely to prejudice national security.

If the Attorney-General or their lawyer argues that information should not be disclosed or that a witness should not be called to give evidence, then the other parties to the proceedings and their lawyers must be able to make submissions to the court. However, as *Bills Digest* No. 59 2004-05 pointed out in the context of criminal proceedings:

> As nothing in the Bill requires the defendant to have access to the information on which the argument was based, this might prove illusory as defendants would be able to construct merely abstract opposing arguments.[24]

Records of closed hearings

Subclauses 38I(5)-(9) and clause 38J deal with records of closed hearings.

A court conducting a closed hearing must make a record of the hearing. This record:

- must be made available to an appeal court, and
- must be made available to the Attorney-General and their legal representative if the Attorney-General has intervened in the proceedings.

The record must also be made available to an unrepresented litigant with appropriate security clearance or, if a party is represented, to their lawyer if appropriately security cleared. However, in these cases, the record that is provided may have been varied so that it does not disclose national security information. The Attorney-General or their lawyer can ask the court to vary the record in this way. The court's decision in response to this request can be appealed and the Attorney-General can ask the court to delay access to the record or varied record to allow the Attorney to make a decision about an appeal. In the meantime, the court must grant the request that access be delayed.

What orders can the court make?

A section 38L order can:

- prohibit a person from disclosing the information except in permitted circumstances but enable them to disclose a copy of the document with the information deleted or a copy of the document with the information deleted and a summary of the information or a statement of facts [**subclause 38L(2)**]
- prohibit a person from disclosing the information except in permitted circumstances or calling the witness [**subclauses 38L(4) and paragraph 38L(6)(a)**]

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- provide that a person may disclose the information in the proceeding or call the witness [**subclause 38L(5) and paragraph 38L(6)(b)**].

What factors must the court consider in making a section 38L order?

Matters that the court must consider when deciding what order to make are set out in **new subclause 38L(7)** and in section 3 of the Principal Act. Under **subclause 38L(7)** these matters are:

- whether there would be a *risk of prejudice to national security* if the information were disclosed or the witness called
- whether the order would have a *substantial adverse effect* on the *substantive proceeding*, and
- any other relevant matter.

Section 3 of the Principal Act sets out the objects of the legislation. These objects are to prevent the disclosure of information likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice. When a court exercises powers or performs functions under the Act it must have regard to the objects of the legislation [subsection 3(2) of the Principal Act].

Of the matters listed above, a court must give the greatest weight to national security [**subclause 38L(8)**]. In contrast the ALRC report, *Keeping Secrets*, recommended 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'.[25]

Reasons for court orders

Clause 38M requires that a written statement of reasons for a section 38L order must be given to:

- the person who is the subject of the order
- the parties and their legal representatives
- the Attorney-General and his or her legal representative—if the Attorney-General has intervened under section 38K.

If section 38K applies then a copy of the statement of reasons must first be given to the Attorney-General. The Attorney-General can ask the court to vary the statement if he or she considers that it will disclose information likely to prejudice national security. As is the case with records of hearings, the Attorney-General can ask a court to delay giving its statement of reasons to allow time for a decision to be made about appealing the decision (**clause 38N**). The court must grant the request for a delay.

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

The Bill provides that:

- orders do not come into force until they cease to be subject to appeal and they remain in force until revoked by a court (**clause 38O**)
- it is an offence to intentionally contravene a court order. The maximum penalty is 2 years imprisonment (**clause 46F**)
- if a section 38L order is made, the parties to proceedings can apply for an adjournment while they consider whether to appeal against the order or withdraw the proceedings. An adjournment can also be applied for to make an appeal or withdrawal (**clause 38P**)
- if a court orders a redacted document or a statement of facts to be prepared, it is adducible as evidence of the full contents of the document, to the extent that it is admissible under the rules of evidence [**subclause 38L(3)**].

Appeals in civil proceedings

Clauses 38Q-38S set out who can appeal against various court decisions and orders.

Security clearances in civil proceedings

In a civil proceeding, the Secretary of the Attorney-General's Department may notify a party, their lawyer or a person assisting their lawyer that national security information may be at issue in the proceeding. A person who receives such a notice can apply to the Secretary for a security clearance. The Secretary also determines the level of clearance required. During the clearance process the matter must be adjourned on the request of a party or their lawyer who wants to apply for an assessment [**subclauses 39A(1), (2) and (3)**].

If a party or their legal representative does not apply for a security clearance within 14 days of being so notified or is not given a security clearance, then the Secretary may advise the court. The court may then advise the party or their lawyer of the consequences of not being given an appropriate security clearance and recommend that the party engages another lawyer [**subclause 39A(6)**].

The security clearance provisions represent another point of departure between the Principal Act and the Bill. Under the Principal Act, a defendant cannot apply for or obtain a security clearance.

It should be noted that security clearances are given in accordance with the *Australian Government Protective Security Manual*. This document is not a classified document but its availability is restricted to government departments, agencies and contractors working to government.[26]

Offences

Clauses 46A–46G contains offence provisions relating to civil proceedings. Most of the offence provisions are dealt with above. However, **clause 46G** is described here.

Clause 46G provides that is an offence to disclose information for the purposes of civil proceedings to a party or their lawyer if that disclosure is likely to prejudice national security. There are exceptions to this prohibition—when giving evidence in the proceedings, in 'permitted circumstances',[27] to a security-cleared party or their security-cleared lawyer or with the approval of the Secretary of the Attorney-General's Department. The maximum penalty is 2 years imprisonment.

Clause 46G is a general offence, which does not appear to be triggered by the issuing of notices or certificates. It may inhibit a party who is not security-cleared from discussing their case with a lawyer who is not security-cleared.

Report to Parliament on the number of certificates issued

Item 28 repeals section 47 of the Principal Act and replaces it with a provision requiring an annual report to be tabled in Parliament that:

- states the number of non-disclosure and witness exclusion certificates issued both in criminal and *civil proceedings*, and
- identifies the criminal and *civil proceedings* to which the certificates relate.

Amendment of other Acts

Part 2 of **Schedule 1** contains amendments to the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the *Judiciary Act 1903*.

Amendments to the ADJR Act:

- prevent ADJR Act review of Ministerial decisions to issue notices under section 6A or to issue certificates while a relevant civil proceeding or an appeal is taking place (**item 30**)
- will mean that a person seeking ADJR review of decisions to issue notices or certificates will not be able to obtain reasons for those decisions (**item 31**).

Concluding Comments

The right to a fair and public hearing in civil and criminal matters by an independent judiciary lies at the core of Australia's judicial system. It is protected by Chapter III of the Commonwealth Constitution. It is also recognised by international law.[28] Article 14(1) of the International Covenant on Civil and Political Rights provides:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a right to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Like the Principal Act, the Bill contains a number of provisions which may impact on judicial independence, judicial process and on transparent and fair civil proceedings.

The potential impact of the legislation on evidence and witnesses in civil proceedings could be substantial given the broad definition of 'national security' in the Principal Act. This expression extends to 'Australia's defence, security, international relations or law enforcement interests'. Parliament may wish to note that 'international relations' and 'law enforcement interests' are themselves defined very expansively. 'International relations' includes Australia's economic relations with foreign governments and international organisations as well as political and military relationships. 'Law enforcement interests' include ensuring that intelligence and law enforcement agencies are not discouraged from sharing information with government.

Closed hearings

The Bill requires a court to close civil proceedings in order to consider a civil non-disclosure or witness exclusion certificate issued by the Attorney-General. In accordance with its view that 'closure of courts should be a last resort'[29] the ALRC report, *Keeping Secrets*, recommended that the decision whether or not to close a hearing should be a matter for the court, not the Executive. The ALRC approach was endorsed by the 2004 Committee.

Court orders and Ministerial certificates

The Bill restricts a court's discretion to decide whether it will accept a civil non-disclosure or witness exclusion certificate. When weighing up the listed factors, the Bill requires a court to place greatest weight on 'national security'. Apart from this explicit requirement, the words of the section also tip the scales in favour of national security—on the one hand, the threshold for national security considerations is a '*risk of prejudice*'.[30] On the other hand, the threshold for other matters is much higher—for example, whether the order would have a '*substantial adverse effect* on the substantive hearing' or whether preventing disclosure would '*seriously* interfere with the administration of justice'.

Because the Federal Government may be a party in civil proceedings, the use of certificates and provisions relating to the granting of court orders, may create a perception

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in particular cases that the legislation could be used to evade civil liability.[31] In its submission to the Senate Committee considering the Bill, the Law Council of Australia remarks:

> It could not unreasonably be suggested that, in a dispute between the Federal Government and, say, a contractor for the supply of military hardware, in which considerable damages might be sought by one or each party against the other and security sensitive information might well be germane to the resolution of the litigation, that the use of Ministerial certificates might frustrate the proceedings or be perceived as providing an unfair advantage to one of the parties, most probably the Federal Government.[32]

While **item 13** of the **Schedule** preserves the court's power to order a stay of proceedings, it has been suggested that such an order 'is more likely to have adverse consequences for parties [in civil proceedings] than the stay of criminal proceedings'.[33] This issue is discussed in more detail below.

Security clearances

The security clearance provisions in the Bill raise a number of issues including the role of the Executive Government vis à vis the courts, the potential for uncleared unrepresented litigants to be excluded from parts of their own proceedings and the potential for litigants to be denied access to the lawyer of their choice if that lawyer is unable to obtain an appropriate security clearance.

The function of deciding whether a party or their lawyer needs a security clearance is given to the Secretary of the Attorney-General's Department. The Secretary of the Department is also the person who decides what level of security clearance is needed and it is his or her department that carries out the security clearance. The court is given no role in deciding whether a security clearance is necessary. Both the ALRC report and the 2004 Committee recommended giving a court a more active role in determining whether a lawyer requires a security clearance. The ALRC also recommended that a court retain a discretion to decide that, subject to conditions, lawyers should be given access to national security information even though they are not security cleared.

If the Bill is passed, the result may be that unrepresented litigants who are not appropriately security cleared will be denied the opportunity to participate fully in their own civil proceedings. However, unlike the Principal Act, which does not enable defendants in criminal cases to obtain a security clearance, the Bill has the advantage of permitting the parties in civil proceedings to seek and obtain security clearances. The Explanatory Memorandum explains that, 'unlike defendants accused of serious criminal offences, parties to civil proceedings come from all walks of life and many may already have or qualify for security clearances'.[34]

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Lastly, despite the importance of security clearances, neither the Principal Act nor the Bill requires the Executive to advise a court that a security clearance has not been sought or has not been granted. Nor is the court, once notified, required to advise an affected party of the consequences of employing a non-security cleared lawyer. In a submission to the 2004 Committee considering this Bill, the ALRC suggested that the Bill should make such advice a requirement rather than a matter of discretion.[35]

Offences

Like the Principal Act, the Bill contains a variety of offences relating to the disclosure of national security information and contravention of the requirements of certificates and court orders. These offences attract a maximum penalty of two years imprisonment.

For instance, it will be an offence not to notify the Attorney-General that information will be disclosed in a civil proceeding that '*relates to*' or '*may affect*' national security or that a witness will be called who will disclose national security information either in evidence or by their '*mere presence*' (**clause 46C**). Given the very broad definition of 'national security' contained in the legislation, the fact that, for example, the information need only 'relate to' national security and the difficulties that parties may have in making these assessments, Parliament may wish to consider whether these offence and penalty provisions are appropriate.

Constitutional questions

The doctrine of the separation of powers is designed to uphold the rule of law by protecting against the exercise of arbitrary power, maintaining the independence and impartiality of the judiciary, and contributing to public confidence in the administration of justice.[36] It is constitutionally entrenched and has two limbs. The first is that the judicial power of the Commonwealth can only be exercised by a Chapter III court.[37] The second is that a Chapter III court can only exercise judicial power or power incidental to the exercise of that power.[38]

The Bill gives considerable power to the Executive Government to intervene in the conduct of court proceedings. In particular, the Attorney-General can ask a court to vary its records and its statement of reasons for issuing orders. Questions may arise whether such requests could involve a Chapter III court behaving in a way that is incompatible with the exercise of federal judicial power or even amount to an impermissible exercise of judicial power by the Executive Government.[39] Other provisions may also raise such questions. For instance, although the Executive Government may itself be a party to proceedings, it is the Executive that decides whether a party can have access to evidence through the security clearance process. Additionally, the Bill enables litigants and their lawyers to be excluded from parts of civil proceedings, contains some constraints on the powers of courts to control their own proceedings and may impact on a litigant's right to the lawyer of their choice.

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On the other hand, the Bill contains measures that may address any constitutional difficulties. For instance, a party can be security cleared and a court makes the final decision about whether information can be excluded or used in summary or edited form. And importantly, the Bill gives a court the power to stay proceedings that would not be fair. A similar power is given to a court hearing federal criminal matters and may help to prevent constitutional problems arising under the Principal Act. But is the effect of staying proceedings in *civil* proceedings different from staying proceedings in *criminal* matters? As a submission to the present Senate Committee inquiry by legal academic, Patrick Emerton, points out in a *criminal* trial the prosecution must prove its case beyond reasonable doubt. Failure to do so means that a not guilty verdict is returned and the accused person goes free. In this situation, it can be argued that a stay of proceedings serves the interests of justice. However, whether the interests of justice are served by a stay of civil proceedings is less certain:

> For the defendant in a civil suit, a stay is as good as a win, and so by making a stay the last resort in the interests of justice, the Bill establishes as the default position a victory for the defendant.[40]

National security information and administrative proceedings

The ALRC report, *Keeping Secrets*, recommended that its proposed National Security Information Procedures Act apply to criminal, civil and *administrative* proceedings in all Australian courts and tribunals.

A criminal proceedings statute has been enacted. The Bill proposes a regime for civil proceedings. What of administrative proceedings? This question was asked by members of the Senate Committee inquiring into the current Bill. The answer from the Attorney-General's Department is as follows:

> There are existing regimes which are in place to cover the use of security sensitive information during proceedings in those Commonwealth tribunals where such issues are likely to arise. These provisions have been specifically tailored to deal with the types of national security information likely to arise in those proceedings: for example sections 36 and 39A of the *Administrative Appeals Tribunal Act 1975*. At a future date and in light of experiences with the operation of these regimes, the Government may revisit the issue of extending the application of the NSW Act regime to tribunal proceedings.[41]

Endnotes

1 Australian Law Reform Commission, *Keeping Secrets. The Protection of Classified and Security Sensitive Information, Report 98*, May 2004, p. 33.

2 ibid, pp. 10–11.

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[3] Australian Law Reform Commission, *ALRC Submission on the National Security Information Legislation Amendment Bill 2005*, 1 April 2005, p. 4 at:

http://www.aph.gov.au/senate/committee/legcon_ctte/national_sec/submissions/sub06.pdf

[4] 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*, August 2004 at:

http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/national_security/report/index.htm

[5] Jacob Varghese, National Security Information (Criminal Proceedings) Bill 2004, *Bills Digests* No. 59–60 2004-05 at:

http://www.aph.gov.au/library/pubs/bd/2004-05/05bd059.pdf

http://www.aph.gov.au/library/pubs/bd/2004-05/05bd060.pdf

[6] For instance, in relation to the prosecution of a police officer or person exercising authority under a warrant for an offence of contravening safeguards (section 34NB, Australian Security Intelligence Organisation Act); or in the prosecution of a non-disclosure offence under section 34VAA of the Act.

[7] On 16 March 2005, the Senate referred the Bill to its Legal and Constitutional Legislation Committee ('the 2005 Committee') for inquiry and report. The Committee is due to report by 11 May 2005. Information about the inquiry can be found on the Committee's website:

http://www.aph.gov.au/senate/committee/legcon_ctte/national_sec/index.htm

[8] ALRC (2005), op. cit, pp. 2–3.

[9] See Patrick Emerton, Submission to the Inquiry into the Provisions of the National Security Information Legislation Amendment Bill 2005.

[10] See National Security Information (Criminal Proceedings) Bill 2004, Supplementary Explanatory Memorandum, p. 1.

[11] Section 8, *National Security Information (Criminal Proceedings) Act 2004*.

[12] Section 8, *National Security Information (Criminal Proceedings) Act 2004*, which incorporates a definition of 'security' from the *Australian Security Intelligence Organisation Act 1979*.

[13] Section 10, *National Security Information (Criminal Proceedings) Act 2004*.

[14] Section 11, *National Security Information (Criminal Proceedings) Act 2004*.

[15] Section 17, *National Security Information (Criminal Proceedings) Act 2004*.

[16] The definition of 'national security' was 'Australia's defence, security, international relations, law enforcement interests and *national interests*.'

[17] Varghese, op. cit, p. 7.

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[18] If there is an appointed Minister, references to the Attorney-General are, in general, read as references to the appointed Minister [paragraph 6A(2)(e)].

[19] While a commonsense approach would militate against such an interpretation, does the definition of 'civil proceeding' as meaning 'any proceeding in a court of the Commonwealth, a State or a Territory, *other* than a federal criminal proceeding …' suggest that State and Territory criminal proceedings come within its ambit?

[20] ALRC (2004), op. cit, p. 436. The eight heads of power cited by the ALRC were powers over defence, external affairs, posts and telecommunications, aliens, immigration and emigration, the influx of criminals, railways in relation to the naval and military purposes of the Commonwealth, and the express incidental power.

[21] See clause 6A.

[22] A court may substitute a pecuniary penalty or a pecuniary and a custodial penalty. It is not *required* to impose a custodial penalty in these circumstances. See subsection 4B(2), *Crimes Act 1914* (Cwlth).

[23] In contrast, while the Principal Act provides that non-disclosure certificates and witness exclusion certificates are not legislative instruments it does not make similar provision for the written advice that must be provided under subsections 26(7) and 28(10).

[24] Varghese, op. cit, p. 12.

[25] ALRC (2004), op. cit, p. 41.

[26] See Attorney-General's Department website:

http://www.ag.gov.au/agd/www/Protectivesecurityhome.nsf/Page/RWP3ABEF2858B90B6D3CA256BB3001AE07C?OpenDocument

[27] The definition of 'permitted circumstances' means that Commonwealth officers who disclose information likely to prejudice national security in the course of their duties are exempt from the penalty.

[28] In the context of national security information and *criminal* proceedings, there is a detailed discussion of the rights of an accused person, Chapter III of the Constitution and the broad scope of the scheme in *Bills Digest* No. 59 2004-05. Readers are referred to the Concluding Comments section of that Digest.

[29] ALRC (2004), op. cit, p. 353.

[30] As *Bills Digest* No. 59 2004-05 pointed out, the expression 'risk of prejudice' is defined to mean a 'real, and not merely remote, *possibility*', avoiding the application of a stricter, 'more likely than not test.'

[31] Law Council of Australia, Inquiry into the National Security Information Legislation Amendment Bill 2005. The Law Council acknowledges that the legislation requires the Attorney-General to step aside in favour of another appointed Minister if the litigation involves the Attorney-General. The submission can be found at:

http://www.aph.gov.au/senate/committee/legcon_ctte/national_sec/submissions/sub15.pdf

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[32] ibid, p. 3.

[33] ALRC (2005) op. cit, p. 5.

[34] Explanatory Memorandum, p. 1.

[35] ALRC (2005), op. cit.

[36] Anthony Mason, ‘A new perspective on separation of powers’, *Canberra Bulletin of Public Administration*, No. 82, December 1996, pp. 1–9 at p. 6.

[37] *New South Wales v. Commonwealth* (*Wheat Case*) (1915) 20 CLR 54.

[38] *R v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[39] For a discussion, see Emerton, op. cit.

[40] ibid, pp. 24–5.

[41] Attorney-General’s Department, Questions taken on Notice, National Security Information Legislation Amendment Bill 2005, Public hearing 13 April 2005, p. 2.

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