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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: National Security Information Legislation Amendment Bill 2005

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Wednesday, 13 April 2005

Members: Senator Payne *(Chair)*, Senator Bolkus *(Deputy Chair)*, Senators Greig, Ludwig, Mason and Scullion

Participating members: Senators Abetz, Barnett, Bartlett, Mark Bishop, Brandis, Brown, Buckland, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Hogg, Humphries, Kirk, Knowles, Lightfoot, Lundy, Mackay, McGauran, McLucas, Nettle, Robert Ray, Ridgeway, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

Senators in attendance: Senators Greig, Ludwig and Payne

Terms of reference for the inquiry:

National Security Information Legislation Amendment Bill 2005

WITNESSES

Committee met at 9.01 a.m.

CHAIR—This is the hearing for the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005. The inquiry was referred to the committee by the Senate on 16 March 2005 for report by 11 May 2005. The bill proposes to extend the operation of the National Security Information (Criminal Proceedings) Act 2004 to include certain civil proceedings. The bill aims to prevent the disclosure of information in civil proceedings where the disclosure is likely to prejudice national security.

The committee has received 15 submissions for this inquiry, all of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses, and further copies of those notes are available from the secretariat. I also remind witnesses that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

[9.03 a.m.]

Evidence was taken via teleconference—

EMERTON, Mr Patrick Charles, Private capacity

CHAIR—Welcome, Mr Emerton. You have lodged a submission with the committee, which we have numbered 8. Do you wish to make any amendments or alterations to that submission?

Mr Emerton—No.

CHAIR—I will invite you to make a short opening statement and at the conclusion of that we will go to questions from members of the committee.

Mr Emerton—I would like to begin by thanking the committee for the opportunity to give evidence in relation to the bill and I am particularly grateful for the opportunity to give evidence by teleconference, without having to travel to Canberra at short notice. My submission is quite long. I apologise if it seems overly long but I find this sort of legislation quite complicated to work through to get a sense of how it will operate and what its likely consequences will be. Having done that, I think some of my basic points can be stated fairly briefly.

It seems to me that this legislation has no clear purpose when it comes to protecting national security information. I say that because the attempts to impose a security clearance regime, which operates primarily through, I think, clause 46G plus the additions that will be added to the definition of 'permitted disclosure' in the existing section 16, have no obvious logic. For example, as far as I can tell, the interaction of the two sections result in an outcome where A could talk to B if A was security cleared or if B was security cleared but A was not, but not if neither was, but there would be no requirement that both be security cleared—and I ask what the logic is of this. It seems to me that all the security regime really achieves is to undermine the integrity and the independence of lawyers by making them beholden to the Commonwealth and by making it harder for litigants to be represented by a lawyer of their choice.

It seems to me that the closed hearing regime and other important and apparently significant information protecting elements of the regime can produce absurd outcomes which seem to have nothing to do with protecting information. It seems that, in a typical civil matter in which no matter is involved, we could see the court reach a decision after the closed hearing that certain information is to be excluded or to be admitted only in a limited way. This would be the court in its capacity as a court of law deciding that, in its capacity as a tribunal of fact, it is not allowed to consider the information. Again, one asks what the logic is of this. If the court has to consider the information at the closed hearing, why then can it not consider the information at trial? In a typical civil trial there is no jury from whom information must be kept secret.

Having said that there is no evidence of a clear information protecting purpose, it seems to me that the clear effects that the bill would have would be to give the Commonwealth executive, through the Attorney-General, unprecedented power to interfere in non-criminal

proceedings. I think this possibility of political interference exists in at least six ways. Firstly, there is the control of the issuing of security clearances by the Attorney-General's Department, who also get to decide whether or not a level of clearance is sufficiently appropriate for disclosure to be permitted. Clause 6(a) would make it the Attorney-General who gets to decide whether or not the bill applies to any particular matter. The Attorney-General, by issuing certificates in response to notice being given by one of the parties, could exert considerable influence over the course of a proceeding by making it illegal as long as the certificate remains in force to lead certain evidence or call certain witnesses. The Attorney-General would have the power to issue a certificate, even if no party had given notice. The Attorney-General will be the only one guaranteed a right to be present at all stages of a closed hearing. Finally, after a closed hearing, the Attorney-General would have the right to seek amendment to the record of hearing and also to the statement of the court's reasons for its orders.

It seems that, in a matter to which the Commonwealth is a party, this would be even more outrageous and there would be the very obvious threat of these powers being exercised in a biased way to advance the Commonwealth's case. This possibility is only increased by the fact that the definition of 'permitted disclosure' together with the fact that the Commonwealth controls the granting of security clearances mean that the security clearance regime will be no obstacle to the Commonwealth's preparation of its own case.

I think the bill has other adverse consequences for litigants, besides the threat of political interference. First, the extreme breadth and vagueness of the definition of 'national security' means that the burden of disclosure on litigants once the Attorney-General has decided to invoke the regime will be quite onerous. Second, and far more serious, the bill threatens to undo many of the administrative law safeguards that have been included in recent so-called antiterrorism legislation. It is quite widely accepted, if not universally accepted, that such recent measures as the power of the executive to ban organisations under the Criminal Code or under the Charter of the United Nations Act and also the power of ASIO to compulsorily question and detain non-suspects in relation to terrorism offences are not consistent with Australia's traditional rule of law values.

Proponents of these new laws have pointed to various safeguards included in the legislation—such as the right to apply for delisting of a banned organisation or the right to seek a court order declaring ASIO detention unlawful. In a number of cases, the incorporation of these safeguards has been vital to securing bipartisan support for the legislation. It seems to me that this bill threatens to undo these safeguards because the bill would oblige the court in deciding whether or not information is to be admitted as evidence to give the greatest weight to the risk of prejudice to national security. This would be given more weight than a substantial adverse affect on the substantive hearing in the proceeding—which is mentioned in clause 38L(7)(b)—and would also be given more weight than serious interference with the administration of justice, which is mentioned in section 3 of the act. This has the potential to make it very difficult for a person who is seeking a declaration of unlawfulness against the Commonwealth in relation to one of these terrorism matters to lead the necessary evidence. Furthermore, clause 19 of the bill provides that, in the event that a court thinks its order under clause 38L might have a substantial adverse effect, it may stay the proceeding. But, in any

administrative law proceeding where the Commonwealth is a defendant, a stay is as good as a win for the Commonwealth.

In summary, it seems to me that the regime that the bill would establish serves no clear purpose when it comes to protecting information but it would give the Attorney-General wide-ranging powers to interfere in non-criminal matters. In a situation where the Commonwealth is a party this could be exercised in a way so as to give the Commonwealth significant advantages. Most outrageous of all, it seems to me, we can imagine a situation where if a person in ASIO detention wished to seek an order from the Federal Court that her detention is unlawful, the bill would allow the Attorney-General or perhaps the nominated minister under those extra paragraphs of clause 6A to delay the case through the issuing of certificates, then to argue at the closed hearing that the relevant evidence not be heard, and then, if the exclusion of this information made the whole case unfair, to have the status quo of detention protected through the issuing of a stay. The possibilities of these sorts that the bill raises seem to me to make a mockery of fundamental rule of law principles such as the individual's basic right to liberty and the obligation of the government to comply with the law. It is for those reasons that I think the bill should be opposed.

CHAIR—Thank you very much for, as you have indicated, a comprehensive submission, Mr Emerton. It is very helpful to the committee to have all that detail. Just to go to one point that you made before I turn to my colleagues, you talked about the bill not containing some aspects that you refer to as administrative law safeguards, which you describe as being in the previous antiterrorism legislation. Is it your suggestion that if those matters were included in this legislation it would be more satisfactory to you?

Mr Emerton—No, it is not so much the absence of safeguards in this legislation as the effects that this legislation would have on existing safeguards. For example, suppose you have an individual who is in ASIO detention, the lawfulness of that detention depends upon the Attorney-General's having formed the view that no other method of getting the information from that person in detention would have any reasonable chance of success. It also requires the Attorney-General to have formed the reasonable opinion that that person who is in detention would abscond, destroy certain evidence or alert another person if they were not detained. So certain matters have to be established for the detention to be lawful.

Suppose that the person in detention were seeking a constitutional writ against the Attorney-General or an order for habeas corpus. To get that, they would have to lead some evidence as to what the Attorney-General did or did not reasonably think, and that would require affidavits perhaps from the Attorney-General, from the Director-General of ASIO or from ASIO officers to establish the evidentiary basis for the suit's claim for unlawfulness. At the moment that could raise issues of Crown privilege but that would all be sorted out under section 130 of the Evidence Act, which gives the court the discretion to waive the various considerations. In that situation the court currently will give a great deal of weight to the fact that this is a suit for liberty and that if the detention is unlawful the person should be let go.

Under this bill, because the greatest weight has to be given to the protection of national security, getting all that evidence from ASIO and the Attorney-General will be quite difficult, because naturally the Attorney-General or the other minister acting instead of the Attorney-General might form the view that it is national security information. Then the bill, as it were,

purports to erect this safeguard of last resort, the stay. But when you are trying to have a suit to declare your detention unlawful or perhaps to get damages for false imprisonment or something like that, a stay of the matter is as good as a win for the Commonwealth.

My worry is that allowing crucial evidence in those sorts of matters to be excluded and then setting up a stay, the outcome of last resort, has the potential to gut all those safeguards that have been put into the recent legislation and make it very difficult for a plaintiff to make out a case. It would be very difficult to lead evidence which could be easily declared national security protected evidence. If they cannot lead the evidence the best they can get is a stay, and a stay is as good as a win for the defendant. That is my worry: not that it lacks safeguards but that it undermines a whole raft of existing safeguards in this area of antiterrorism law. I hope that makes some sense.

CHAIR—It does. Thank you very much for clarifying that for me.

Senator LUDWIG—Just on that point, whilst you say that it has the potential to affect existing safeguards, it seems to me that the legislation's main focus for fairness is the stay provision. Would you agree that that is at least the backstop in it?

Mr Emerton—It is.

Senator LUDWIG—Is there another mechanism that you have turned your mind to which would alleviate some of your concerns in relation to the effect on existing safeguards other than a stay order? A stay order, as you can appreciate, can work both ways.

Mr Emerton—It can.

Senator LUDWIG—It can advantage the Commonwealth and it can also advantage the other party.

Mr Emerton—That is right. Broadly a stay, it would seem to me, would advantage the defendant, whomever that happens to be. My concern is that a particular significant class of actions is likely to be affected by this legislation, where the defendant is the Commonwealth and the suit is a suit for a declaration of unlawfulness of a certain executive action. But I admit that there could be other matters where the Commonwealth might be the plaintiff, and so the stay would work against the Commonwealth.

As to your question about other mechanisms, to be honest I have some difficulty seeing what is wrong with existing provisions in relation to Crown privilege or the public interest immunity under section 130 of the Evidence Act. The court is allowed to consider the claim for protection of the information. It is allowed to consider its impact upon the proceedings. It can consider what is at stake, particularly in some of these matters I am worried about. Very fundamental issues of liberty, lawfulness of detention or lawfulness of proscription are at stake. The court can decide at its discretion how best to weigh up and act on all those competing interests. The existing Evidence Act does not impose a statutory weight on one factor to make it override another factor, whereas my concern about that aspect of this legislation is that it makes the court give the greatest weight to the protection of national security. I am not entirely persuaded of the need to move the balancing issues away from the Evidence Act. I can see that, as was mentioned in the Law Reform Commission report, there might be some benefit in enhancing certain procedures or perhaps in increasing the range of

orders available to the court—for example, to close the court in certain respects so that members of the public cannot come in and see the evidence led—but I do have doubts about the need to fundamentally change the way the court weighs the various issues.

What, to me, reinforces that is that, depending on exactly how the closed hearing proceeds, there is a reasonable chance that at the closed hearing the court will, in any event, get to see the information in question or at least get to hear various pieces of testimony on the nature of the information, what is contained in it and so on. It is therefore odd that the court gets to participate in all that as a court of law, but then, in a typical civil matter where there is no jury and the court is also the finder of fact, in its capacity as the finder of fact, the court has to pretend it did not hear any of that stuff. That strikes me as quite odd. It would depend on how the arguments at the closed hearing proceeded. On any given matter it might seem more absurd or less absurd, depending on how much of the information emerged at the closed hearing.

The fundamental idea that the court as a tribunal of law needs to protect disclosure to itself as a tribunal of fact strikes me as quite strange. It is very different in the criminal area because there is a jury. In Lappas, which I gather was part of what got all this stuff going, disclosure to the jury was the real issue and it was the issue that the United States was concerned about. But in a typical civil matter there will be no jury to whom there will be disclosure.

Senator LUDWIG—Not in every instance. There may still be a jury in defamation matters.

Mr Emerton—That is true. In a small class of matters there may be a jury, but particularly in administrative law matters, which seem to me to raise the greatest degree of concern because they are the cases where it will be the Commonwealth who is the defendant, and it will be the Commonwealth who has a very great power to control access to the relevant evidence through the use of the certificates and its rights to appear at the closed hearing and so on. It will be those admin law matters in particular where the bill's impact will be most extreme, but it is precisely in those matters where there will not be a jury; there will just be a Federal Court judge or a High Court judge. So on mechanisms, perhaps additional options for the court to exclude the public from certain parts of a hearing could make sense, just to allow it to better regulate its proceedings to prevent unwarranted disclosure. But the idea that a court of law, as a court of fact, has to protect information from itself strikes me as just silly.

Senator LUDWIG—I understand your submission in respect of that. The point I raise is that, if you look at the ALRC recommendations in their report of 1998 and in their submission to this committee, they effectively say that they support the introduction of the National Security Information Legislation Amendment Bill 2005 and the extension to cover federal civil proceedings. In fact, they raise the quite separate issue that it does not also apply to tribunal decisions. They then say—these are my words—that in fact we have moved on in terms of the current immunities that are provided and that there is a need to govern the use of classified and security sensitive information in all stages of proceedings. So there seems to be at least an acceptance from the ALRC and others who have made submissions that more is required than what is currently in place. We are left in a position where we have this bill, which goes a long way and is supported by some.

In your submission, you have identified an area where there is potential for unfairness to be visited upon defendants, especially in the types of proceedings you have highlighted. The question that raises, which of course I have already asked you, is that, if the stay is not affected, is there another area? If you think of something, let us know by all means. If your position is that it is not adequate, I will rely on that as well.

Mr Emerton—I did read the ALRC submission and, as I read it, a lot of their focus seems to be on the details of procedures. I think they are quite concerned about the existence of trained staff to handle classified security information in the court proceeding. I have no worries about that sort of thing. They talk about notifying various parties at the pretrial stage of what might emerge—in a sense, increasing communication and effective management of information at the pretrial stage—which I think the bill contemplates in the ability to have pretrial conferences and so on.

Again, I have no strong objections to those areas of information management and security management. But I do not believe that the ALRC report—and I am trying to remember their submission, but I do not think it does either—argues that there is a great need to change the weighting that governs the court's decision as to whether or not to admit evidence. And that issue—the statutory obligation to weight protection of security over even a substantial impact upon the fairness of the trial—is a significant part of my submission. I think that is novel to this legislation and to the act which it is amending. I do not think that statutory weighting emerged from the ALRC report, as I have read it. That is one aspect of my concern.

Again, I do not think the ALRC report is quite so strongly in favour of this particular regime of certificates as is the bill. They discuss certificates and so on, but I think they take the view that passing certificates should not be the be-all and end-all, whereas the certificate regime in this bill is very strong. Say in the context of ASIO detention which lasts for a maximum of seven days, if the Attorney-General is given notice by a party and then sits on the notice for seven days, your remedy is gone before the certificate comes out. Again, to try to force the Attorney-General to decide more quickly would require trying to get mandamus under section 75(v) of the Constitution or something to try to force an order to come out more quickly. That in itself complicates proceedings. Again that could raise issues under this legislation.

In a time-critical administrative law action such as a suit to challenge the legality of detention by ASIO, the way that this particular regime of certificates creates automatic adjournments and gives the Attorney-General or the delegated minister so much power to intervene and control the way the action evolves at that stage strikes me as really worrying. So, on the topic of mechanisms, I have no objection to those which facilitate custody discussions about the use of information and establish in advance effective procedures to manage that. My worry is about procedures which try to limit the access of litigants to national security information in a way that systematically gives an advantage to the Commonwealth in litigation. The way it is currently structured under public interest immunity allows the court to be the gatekeeper and reconciler of the different interests. I hope that is making sense as to which mechanisms I have no concerns about and which mechanisms I have doubts about. I am not so sure that the ALRC was very strong on that second set of mechanisms and about the need to change the balance in question. I hope that is of some help.

Senator GREIG—Thank you for your submission. You have presented a strong critique to the committee. I was going over your conclusion again. You summarise basically your four key points in terms of your opposition to the legislation. You argue that there is no clear purpose to the bill; it would apply to a wide range of proceedings; it would advantage the Commonwealth in cases, giving it a bias in terms of outcomes; and it removes safeguards that were earlier implemented on that balance between civil liberties and the law.

Mr Emerton—Yes.

Senator GREIG—Were you able to turn your mind to or can you conceive of some amendments that might satisfy you? At the end of your oral submission this morning you said that you strongly oppose the bill. Would that still be the case if there were to be some amendments which addressed, in whole or in part, some of the key criticisms that you have raised? Could you speak to that or do you still maintain that the bill itself is too flawed to persist with?

Mr Emerton—I will speak to that. There are two ways of looking at this. I think it is obvious that my submission is coming from a reasonably strong civil liberties and traditional rule of law type perspective. From that perspective, to be honest, I actually have really grave doubts about the merits of the whole national security information regime as it is implemented in the existing act and as it will be extended by this legislation. I opposed the original act quite strongly in a submission to the committee's inquiry there. On the other hand, being realistic, one can see that it seems the bill is likely to go through in some form. It seems to me that it could go through in a much better form that it is currently in.

I guess for me the few amendments I could see which would really make a significant difference would be, firstly, to change the statutory weighting in clause 38L. I think that is set out in subclauses (7) and (8), from memory. Those subclauses set out the factors to which the court must have regard in deciding whether or not to admit evidence and then the weighting it must give to those factors. I think if the weighting in favour of national security were removed it would make a big difference. I think the change really has to be in clause 38L(7) and (8). I think it has to be the court's right to weigh the protection of national security against the fairness to the litigants involved and to itself be able to assess all of those factors with no statutorily imposed weighting in favour of one consideration against another. That would then leave it open to the court to give the orders that would be appropriate for that.

It would be better that the court be allowed to consider the information in its finding but that the decision of the court not be made fully public if that is required to protect certain information. That is a better outcome than all the court's reasons being public but running the risk that people remain in unlawful detention because they cannot have their suits heard. If we have to trade off fairness and legality in administrative law against keeping certain court reasons partially secret, I would go in favour of secrecy of court reasons over the spectre of unlawful detention. That is one area where there could be amendments which would make the bill better.

The other area—and it is hard for me to think of minor amendments to this—is the way that the whole regime unfolds. The Attorney-General flicks the switch under 6A, the Attorney-General gets to decide what to do in response to notice under those main operative

provisions about the duty to give notice and so on, the Attorney-General has the power to intervene and issue certificates of his own motion, the Attorney-General turns up in court to argue for national security protection, and the Attorney-General controls the record. This constant vesting of these highly discretionary powers in the Attorney-General is very concerning.

It would be quite different, for example, if, instead of issuing certificates, notice was given and the Attorney-General could immediately file a claim with the court to try to seek an adjournment and then immediately argue in front of the court as to how the information should be dealt with. As it currently is under the certificate regime, the Attorney-General can issue that certificate. In a sense, the burden then falls to the court to respond to it, so it is the Attorney-General who has the control rather than the court. Once the certificate is issued, disclosure becomes an offence, which then in practical terms impedes all the other litigants except for the Commonwealth in the preparation of their case. Something closer to the situation where the Attorney-General comes to the court and starts to argue the matter—something like the current processes and where the Attorney-General would intervene to argue for public interest immunity—would be a reasonable amendment. You need something that reduces the strong power of the Attorney-General to intervene, which I find very disturbing, particularly in relation to these matters where the Commonwealth is likely to be the defendant in a suit for a declaration of unlawful detention or on the listing of an organisation.

Senator GREIG—In that context, did you have an opportunity to look at comparable jurisdictions to determine how this kind of law was being considered or enacted in similar countries?

Mr Emerton—I am sorry, I do not really have much understanding of that. The only remark I can make on that is that the ALRC in its report noted that the American legislation has not always worked effectively and is regarded as being very complex. It seems to me, imagining how this legislation will play out, that those descriptions might be true of this—it is not a simple regime and it does threaten unforeseen consequences. Regarding the details of comparative law, I am sorry, I do not know enough about that to say anything useful.

Senator GREIG—Thank you very much.

Senator LUDWIG—You have written quite a substantive paper on the particular issue. I wonder if you would turn your mind to those matters which may fall within civil proceedings but will not necessarily be caught by this legislation—those matters which may have the same outcome where the Attorney-General might want to have an interest. The types of proceedings I am thinking about are, for example, where there is a contract dispute between Defence and a contractor or even two contractors over, maybe, the building of a sub where there might be highly sensitive information that is contained within the contract on the provision of contract services. Rather than fight it out in the civil court, they both agree to arbitration as a way to resolve the matter and, as a consequence, highly sensitive material may be provided. Would they fall within or without the legislation, in your view? It is a difficult one.

Mr Emerton—It is. Allow me to quickly turn to the bill.

Senator LUDWIG—While you are turning your mind to that, the other area is the tribunals. Although they mentioned family law as an issue where there may be sensitive information provided, it also could end up in disputes about unlawful dismissal or unfair dismissal, where the AIRC is a tribunal. They may have an interest. Also there are other tribunals that come to mind where it would seem not to be a civil proceeding, although I will ask the Attorney-General's Department its view on this as well.

Mr Emerton—I am looking at page 6 of the bill, clause 15A (1), which says:

> … civil proceeding means any proceeding in a court of the Commonwealth, a State or Territory, other than a criminal proceeding.

It seems that certainly arbitration would be out and administrative law type tribunals would be out. It is quite interesting here in Victoria because VCAT, our Civil and Administrative Tribunal, has much more than just an administrative law function; it has a number of quite substantial functions which could equally be performed by the County Court or the Supreme Court, particularly in relation to some sorts of building matters. If it is about building Defence property, that could be relevant. If one thinks about the family law issues, one wonders about mediation prior to or instead of a court hearing in a family law matter. I do not know. I guess that would depend on the procedure by which one lodges a claim to get involved in mediation.

The issue about arbitration is quite interesting. That one is going to be much more difficult, because at least with some of these tribunals and so on the Commonwealth, in a sense, has statutory control of the tribunal and how it is done. But if you have got two private parties going into private arbitration, they are not obliged. That is, in a sense, a private arrangement between them. Currently there is no obligation, as such, for them to notify the Commonwealth and no obvious mechanism by which the Commonwealth would get involved. The case that you raised is an interesting one, and it is not obvious to me how one might amend this legislation to catch it.

Senator LUDWIG—If it is about catching those people that might be jurors or busybodies then private arbitration might exclude them. But in the arbitrations that I understand have taken place, you do get a significant number of players that might have an interest in it. Once you go beyond two people, it changes from a rumour to fact.

Mr Emerton—Yes. Your question does raise another related issue, which I canvassed briefly in my submission and which is worth the committee turning its mind to. It is exactly how some of these regimes interact with chapter III of the Constitution, which establishes separation of judicial power and to some extent protects the Commonwealth judiciary from certain types of interference by the parliament or by the executive. In the bill as it stands, I wonder, for example, whether the Attorney-General's right to try and have the record of a hearing amended or to have the statement of reasons for an order from a hearing amended are entirely consistent with chapter III. I am not an expert on chapter III; I have the questions but I am not entirely sure of the answers. I also wonder about, even more broadly, this very strong certificate regime, which really can interfere substantially in the proceedings in front of a court. There are chapter III issues that are raised by the existing definition of civil proceeding. Of course, they would not apply to any attempt to extend the regime to administrative law tribunals.

Senator LUDWIG—A number of other submitters have raised the chapter III issue, and I have questions I intend to ask them about those matters as well.

CHAIR—Thank you very much, Mr Emerton. I do not think there are any further questions. I thank you for appearing by teleconference today. I know it is not always the easiest procedure to participate in. We are very grateful for your assistance and, as I said earlier, for your submission. There may be a couple of matters which we need to follow up with you, and I hope you will be able to assist the committee with those if we do.

Mr Emerton—Certainly I will be able to. I thank you again for the opportunity to appear, and to appear by teleconference.

[9.40 a.m.]

CONNORS, Ms Kathleen Holley, Legal Officer, Australian Law Reform Commission

WEISBROT, Professor David, President, Australian Law Reform Commission

CHAIR—Welcome. The ALRC has lodged a submission with the committee, which we have numbered 6. Do you wish to make any amendments or alterations to that submission?

Prof. Weisbrot—No. We confirm that, notwithstanding the 1 April date on it, it is genuinely the submission of the ALRC.

CHAIR—Thank you. I now invite you to make a short opening statement, and at the conclusion of that we will go to questions from members of the committee.

Prof. Weisbrot—We do not have a great deal to add to the written submission other than to acknowledge that the ALRC did substantial work in this area in the course of its inquiry, which culminated in the report entitled *Keeping secrets: the protection of classified and security sensitive information*, which you are aware of. The original legislation that dealt with criminal proceedings was initially presented in parliament before the completion of the ALRC's report and then referred to this committee, which made substantial recommendations for amendments that brought the bill much more into line with the ALRC's recommendations, so that the final product closely tracks, but not entirely follows, the recommendations made in that report.

One area in which the ALRC differed from the current statutory position is that we suggested that the legislation cover not only criminal proceedings but also civil proceedings and administrative hearings, including merits review tribunals. This is the second stage in extending it to civil proceedings and, in the ALRC's view, it would be quite important to also extend it to administrative proceedings. In our view, that is where most of the action is likely to occur, given that, in all the areas pertaining to visas, passport cancellations, security clearance matters and so on, those would appear in the administrative tribunals, primarily.

CHAIR—Ms Connors, do you wish to add anything?

Ms Connors—No.

CHAIR—Does it seem unusual to you, Professor, that the administrative tribunal proceedings would not have been included in this bill, given that this bill was going to civil proceedings anyway?

Prof. Weisbrot—I am not sure if 'unusual' is the right word.

CHAIR—Neither I am. I was looking for a word.

Prof. Weisbrot—If it is a staged process in which the administrative provisions will be the next off the rank, I will be happy with that. I would be concerned if it ended with civil proceedings, because, as we mentioned, we expect that there will be a lot of activity—and there already is a lot of activity in this area—in the administrative realm. So we think that with the clarity, coverage and flexibility given to courts and, ultimately, tribunals for resolving these sorts of matters it would be very helpful to be played out more fully.

CHAIR—I guess that if it is a staged process, we can look forward to doing this again, for what would be the fourth time.

Senator LUDWIG—I suspect that that is how it will be.

CHAIR—There are a number of other issues that you raise in your submission. One I am particularly interested in is your suggestion about security officers, which comes towards the end of your submission. Has it been discussed extensively in the Australian context, as far as you are aware, in your report?

Prof. Weisbrot—It is the subject of recommendations in the report. I am not aware of whether there is any departmental activity aimed at implementing that. The reason the ALRC took that up was partly principle and partly happy coincidence. When I was in Washington to talk to officials of the CIA, the FBI, the US prosecutor's office, human rights NGOs and defence counsel that have significant experience in this area, it was flagged that one of the reasons that the proceedings operate reasonably well in the federal courts there is that they have trained court security officers who are able to explain to counsel for both sides exactly what their obligations are and how not to make mistakes—not downloading classified materials that are not allowed to go out of the building onto their laptops and taking them home in the evening, and safely transmitting documents from government sites or other sites to the court and back to help secure the sensitive witnesses. They explain those sorts of issues. That was considered to be a very useful service.

My minder on that tour was an Australian Federal Police officer in the Washington embassy who was quiet through most of the proceedings but brightened up when we were discussing that. She said: 'I was the person who was assigned that role in a major case in Australia and I had to do it flying by the seat of my pants. There was no real guidance there, and it would have been fantastic if I had had some proper training, if somebody was doing that regularly and it was not a one-off matter.' When we thought about that further and made further inquiries, it seemed that that was a very sensible thing to do.

In the US there are several centres where these trials tend to come up. The Washington area, the northern district of Virginia, is one of them, and there are numbers of trained officers there. Oklahoma City, sadly, is another place where they have had experience dealing with that. So there are not sitting court security officers all over the country but they can bring somebody in who has significant experience when a case arises.

Senator GREIG—A number of submissions, including one from Amnesty, argued that if the bill were to proceed it would result in delays and additional costs in civil proceedings. Is that something that your organisation had envisaged and, if so, how might that be mitigated against?

Prof. Weisbrot—There is certainly the potential for that. One of the central pieces of logic in the legislation, which is also reflected in the ALRC's recommendations, is that where classified or security sensitive material is likely to be an issue in a proceeding it be notified early and brought right up to the start of the proceeding or preferably pretrial. Hopefully some of those matters could be dealt with more quickly in that way. That would not interrupt a proceeding that was already under way. I think that is one important feature.

We also suggested a range of flexible measures that courts could have which we enumerated and which would not limit the courts. Those were other efforts at trying to have trials proceed as quickly and efficiently as possible so that it would not be a matter of arguing endlessly about whether material should be presented full stop but whether sensitive material could be presented in a way that minimised any security risk. There were a list of things including redaction, having sensitive witnesses appear behind screens or in some other masked form and having material that was available to the judge and/or jury but through closed-circuit TV, laptops on desks or whatever technology so that it was not available in open court but available to the people who needed it. Those are all measures aimed at trying in the real world of trial proceedings to get things to move as quickly and smoothly as possible. Nevertheless, there will inevitably be some delay. Delay is a feature of our court proceedings generally.

We took issues about security clearance, for example, seriously. We got assurances from the Attorney-General's Department that the kinds of figures that are quoted about the general run of security clearance time frames, like a year or 18 months, are not necessarily applicable to those circumstances because most of those are departmental officers who are applying for upgrades in status. There is no special urgency about those cases and so they kind of fall towards the rear. What they suggested was that, in cases—particularly in criminal proceedings, but I guess in important civil proceedings as well—they would try to fast-track those sorts of clearances where it was necessary for the proceeding to go ahead and avoid delay. The experience in the US seemed to be that that was the case as well. Discussions with the FBI revealed that, while the ordinary time frame for a high-security clearance was substantial, when it came to those sorts of court proceedings, they gave that their full attention and the time frames were much more limited.

Senator GREIG—That was going to be my next question, which I also put to the previous witness: have you had an opportunity to look at some comparable jurisdictions or international standards in this area and how do you feel the Australian legislation sits within that broad mix?

Prof. Weisbrot—It is comparable in many ways to the US legislation now, as amended and as in law in the criminal proceedings and similarly in the civil ones. Oddly, it is probably—if you are putting an Attorney-General-directed model and a civil libertarian model at either end—a little more civil libertarian than the Canadian model, although we normally look to Canada for that sort of model. I would say that it probably tips more towards courts and protection of rights than a lot of the complex array of legislation in the UK, much of it developed and run in the Northern Ireland conflict rather than as part of current efforts. I think the current pattern of legislation is much more cognisant of the need for the court to be involved in the critical decision making and I think it has more protections for accused people and for litigants in civil proceedings. That is a very rough summary. Of course the detail is there in the report. If there are specific questions that you want to put to us on notice we would be happy to dig out the relevant bits and send them to the committee.

Senator GREIG—Thank you.

Senator LUDWIG—The matter of the stay seems to work both ways, in the sense that it could potentially advantage either the Commonwealth, as the defendant in the matter, or the

other party. Have you turned your mind to whether there are any other procedures that may ensure that neither party is advantaged where these certificates are issued or where there is a national security interest involved that requires protection?

Prof. Weisbrot—Do you mean besides the stay or in relation to the stay?

Senator LUDWIG—I mean that may add to the stay or besides the stay or in conjunction with the stay. The stay seems to be, in criminal proceedings, a helpful device for parties, but in civil proceedings it can be unhelpful for a litigant seeking damages or compensation from the Commonwealth when the proceedings are stayed for a long time or indefinitely and the compensation claimant may then effectively lose their case. That could be just as a consequence of the security information involved—and it may in fact be security information that does require protecting, so it could be legitimate. In that instance, are there ways that you have considered or thought of—you may have touched upon them in your original submission—that may help overcome some of those perceived unfairnesses?

Prof. Weisbrot—The commission did acknowledge that the stay could operate differentially in those circumstances. Of course that is true in all litigation. It is similar with delay, which disadvantages some parties greatly, while other parties are thrilled to spin out proceedings as long as possible. In these sorts of circumstances, it is true that, in the bulk of civil cases that I can envisage, either delay or stay would favour the government's interests because the government would normally—but not always—be the defendant in those proceedings. We did not have a solution for that other than to say that, if the proceedings were more court-centred—if they were proceeding in that way rather than on the basis of prescriptive certificates—the court would be able to fashion some sort of balance to try to make sure that the proceedings could go ahead if possible. That was why we spent a fair bit of time trying to develop that strategy of flexible mechanisms that the court could use.

It is not always a black-and-white issue. The court may say, 'This is highly sensitive material and the government is reticent to have it presented in open court but it might be preferable to redact it to use evidence in some other form or to have witnesses present the evidence and have their identity obscured.' Those sorts of solutions might allow the proceeding to go ahead. Given the lower onus of proof in civil matters particularly, it may be possible that those flexible processes would operate well. The other thing is that ultimately we said that, although not in criminal cases, we recommend that in civil cases it be possible to close the proceedings. It would take a fairly powerful set of circumstances for a court to say there was no chance of having a trial at all in civil proceedings, although it could happen. The only other thing that occurs to me there, and I am not sure whether we referred to it in the report, is that of course if the government were seen to be taking that sort of action illegitimately, if it were saving embarrassment or using it as a negotiating lever or trying to avoid payment of a genuine debt or potentially genuine debt—

Senator LUDWIG—That is hard to discern sometimes.

Prof. Weisbrot—Yes, but I would have thought that would come up in the political arena. There are mechanisms for dealing with that through the parliamentary process and questions as well. That is hardly ideal but it is another thing to take into account.

Senator LUDWIG—On the procedure contained within this bill, there is some suggestion in other submissions that it breaches a number of UN conventions. Have you turned your mind to whether or not it does?

Prof. Weisbrot—Sorry, does it what?

Senator LUDWIG—Whether it breaches some of the UN conventions. There have been a couple of suggestions that it breaches the International Covenant on Civil and Political Rights, particularly the right to a fair and public hearing, article 14 subparagraph 1, and the right to provide an effective remedy for violations of human rights, article 2 subparagraph 3.

Prof. Weisbrot—I do not have troubles with that, frankly, because that black-and-white reading of the covenant tends not to be how the world works in practice. We do allow proceedings to be closed in a number of circumstances, such as in the Children's Court and so on. So those rights are balanced against what is reasonably justifiable in a democratic society. In the particular circumstances of dealing with highly sensitive national security information, I think that those are some of the trade-offs you have to make. If we were not utilising a court-centred process I would have more concerns. If things were proceeding purely by secret hearings or by administrative fiat then I would share those concerns. Given that we are putting things into the court process and giving the court the decision about ultimately whether things are conducted in closed hearings and how evidence is presented and whether it should be presented and ultimately whether fairness to the parties means fully proceeding or issuing a stay, I think those protections are well guarded.

In the administrative area, if we do not play out these sorts of balances further there could be concerns along those lines because in some of those cases we are dealing with long-term detention of people, so there is not a way of testing those sorts of procedures and testing the validity of information that is presented to tribunals, for example, or a government decision that is subject to some sort of administrative review. I am not saying that they are direct breaches of human rights law but I have more concerns that we were not providing a rounded enough strategy for courts and tribunals to deal with those things. It is back to our opening comment. I would like to see this pattern of legislation extended across into administrative proceedings.

Senator LUDWIG—Just on that particular point, you say in your submission that you would like it extended across to those tribunals, but where is the line currently in this bill for civil proceedings which would be captured by the provision, in other words steps on the way to civil proceedings and where the parties may have a choice to either proceed into civil proceedings or proceed into other forms of either mediation or arbitration which are not civil proceedings?

It seems to me that the line there is now blurred, in that a civil proceeding as we know it and can understand it also has preliminary steps, which may not be captured or where courts view those steps as a civil proceeding as such and then they fall outside it. But it would still be a forum where parties would air their particular issues, which could then raise national security issues. There does not seem to be any requirement under this bill to notify the Attorney-General in those circumstances—and that is even before we then enter the world of

the tribunals proper, such as the Administrative Appeals Tribunal, the Australian Industrial Relations Commission or others. Do you have a view about that?

Prof. Weisbrot—I did not when I came into the room, but I heard your question to the preceding witness and I thought it was a very good question. The definition that is provided in the act of a 'civil proceeding' under 15A does include interlocutory proceedings and pretrial skirmishing like discovery, exchange of documents and all of that. It does not refer expressly, and I am not sure a court would say it refers impliedly, to a matter that is, say, between a contractor and a subcontractor in the defence area, where it says that any dispute should be resolved by arbitration or mediation. I am not sure it would apply to those sorts of proceedings. My first impression, not having given it a lot of thought, is that that is a gap that needs to be remedied, because the underlying need to scrutinise and then protect classified and security-sensitive information may not be properly dealt with in those kinds of cases.

Senator LUDWIG—It was troubling me to the extent that it may be about having a closed hearing, where it is then certainly not made public and so that protects the national security information. Or is it the twin goal of having both a closed hearing to protect it—which can then determine whether it should be redacted or dealt with in whichever form and not heard in closed proceedings—and the people who dealt with that material being security cleared? So you would then have two mechanisms to ensure that it does not get out into the public where it should not go. But in proceedings where you might have a contract with the Navy, Army or Air Force where they might have subcontractors, they might put in the head contract that—and it would seem strange—there would be no arbitration, or, if there were arbitration, it would be deemed to be civil proceedings. That may be a way to do it. But if parties left that out of the contract or if in between contractors or subcontractors there were subsequent agreements which did not then follow the model, that would seem to be an area of concern. It depends on whether or not it is a private arbitration, because then it is not information that is getting out to the public, but it is then being dealt with by people who may or may not have security clearance. Unless you can think of any more, those are the matters that I considered just this morning.

The other area is that interface where a party might have a choice—and maybe you could help me on this—whereby they might proceed to civil proceedings or they might in turn proceed down the administrative path. I am trying to recollect, but I think there is the opportunity in the legislation to proceed down an administrative path rather a court process whereby the result differs with this legislation and is dealt with differently, although it is the same issue.

Prof. Weisbrot—No examples come readily to mind, but I think you are right in saying that there are some factual circumstances that would lend themselves to proceeding in either direction. It may be that, to handle the sort of arbitration or mediation issue, 15A could be amended to say—and this is drafting on the run—something along the lines of 'including where arbitration or mediation or similar efforts at dispute resolution of any matter are in the nature of a civil proceeding'.

I think where it is ancillary to court processes, where the Federal Court judge says, 'This is not a matter that should go to trial and you are to go off and try to resolve the matter,' that would probably currently be captured by 15A. However, where it is the invocation of an

arbitration or mediation clause in a contract—and I suspect it would not be on the current reading—I think that could be captured here.

The other point to make is that the protection of classified information is not only a part of this legislative pattern but there are also specific sections that make it a criminal offence to improperly divulge classified information—or security sensitive information, depending on the definition in the circumstance—so it would be a breach. I would think that defence contractors and people in that area would be quite aware of those sorts of provisions, and so there would be sanctions against divulging that material to a third party for the purposes of dispute resolution. That is only half the equation. The stick is there, but we also want to make sure that that does not happen in the first place. I think that there may be other means of trying to capture it within this protective legislation.

Senator LUDWIG—Yes. And it crossed my mind that it can come up inadvertently as well where the material is used and it is only post that that they realise that they have offended the proposed legislation. Alternatively, their cases cannot proceed on the basis that they would offend and therefore there is no resolution of the dispute at hand and nowhere to go to be able to have it resolved, because neither party can divulge the security-sensitive information that may be germane to the case. That would be unsatisfactory as well because it may involve significant issues that required resolution for the contract to proceed.

Prof. Weisbrot—It sometimes happens in a reverse direction. In Australia and overseas there are instances of so-called grey mail, whereby the party knows that the material is highly sensitive and uses that as leverage to try to gain a favourable outcome—in other words, they say, 'We will sue, because we know that these sorts of documents will become an issue. The government does not want this to become an issue, and so it might prefer to settle the matter in the civil context.' That is not life shattering, but it is a matter of protecting the public purse.

In the criminal area, it is of particular moment. We had direct evidence, but no specific cases for security reasons, from both prosecutors from the DPP in Australia and prosecutors overseas, of cases that they would have liked to have brought to prosecution but felt that there was no practical way of doing so, given that the party would invariably raise material that they did not want to see raised. So either some more serious charges were dropped in favour of more minor ones or no prosecution eventuated at all. Again, there is that subtle balance that you have to think about. That was one of the reasons why we wanted the courts to have the opportunity to look at the material and to say, 'We think we can get around that by operating in this way, by using one of those flexible tools.'

CHAIR—One of the other issues which arises from your submission and has some slight conflict at least with the bill is the powers that are left in the hands of the court versus the powers that are given to the Attorney-General and/or the Attorney-General's delegated minister. I think you suggest that the courts should retain more control of their own proceedings. Would you like to make some comments on that?

Prof. Weisbrot—In a general sense that summarises it. For example, with regard to the weight given to national security matters, the legislation is prescriptive in saying that the greatest weight should be given. How that plays out in practice is hard to say. You need to see how the cases start to run. But, in the ALRC's view, judges are making those kinds of difficult

balances all the time—for example, on whether important evidence is more prejudicial than it is probative and one side or the other is urging strongly that it is an important matter for their case. We think the courts are already sensitive and skilled at making those kinds of balances and we did not think it was necessary to provide that further direction. Similarly, on whether to close proceedings—those are the two that come to mind readily—the ALRC's recommendations were more along the lines of allowing the court to make those determinations itself.

In the end, whether there would be a significant difference in practical terms between what decisions the courts would make given a free hand and what decisions they would make under the current terms of the legislation is not clear. There may not be that big a gap but, in principle, the ALRC thought it was more appropriate for the courts to be making those decisions themselves. Ultimately of course it is the government that controls that sensitive information and so there may be many cases in which they say, 'We're just not confident, or the overseas source of that information is not confident, that the matter will be handled with sufficient discretion, so we simply can't allow the information in at all.' The ultimate say is always going to be in the hands of the Attorney-General and the government as the possessors and protectors of that information.

CHAIR—Indeed. As there are no further questions, I thank you both very much for your appearance, your submission and your assistance this morning.

[10.12 a.m.]

CHONG, Ms Agnes Hoi-Shan, Co-convener, Australian Muslim Civil Rights Advocacy Network

KADOUS, Dr Mohammed Waleed, Co-convener, Australian Muslim Civil Rights Advocacy Network

CHAIR—Welcome. The network has lodged a submission with the committee which we have numbered 3. Do you need to make any amendments or alterations to that submission?

Dr Kadous—No, thank you. We have some additional recommendations which we will make in the process of our opening statement.

CHAIR—Please proceed. At the end of your opening statement, we will have questions from members of the committee.

Dr Kadous—I would like to thank the committee for providing AMCRAN with the opportunity to appear before you again. I wish to apologise for any inadequacies in our submission and in our ability to answer questions here today. The window for preparation for both submission and today's appearance was of the order of days not weeks. The Australian Muslim Civil Rights Advocacy Network is an organisation that provides a Muslim perspective in the civil rights arena by drawing on the rich civil rights heritage of Islam. It does this through political lobbying, grassroots community education and communication with and through the media.

The National Security Information Legislation Amendment Bill, as it stands, deeply affects the independence of the court and fails to protect the interests of litigants. Further it deprives the public of both open justice and open and accountable government. The main reason for this is that it empowers the Attorney-General to directly intervene in a case and to issue a certificate that has the potential to limit the admissibility of evidence and the calling of witnesses. The Attorney-General provides a summary of the evidence to a judge but that is all that the judge sees, so bias can enter into the preparation of the summary itself.

Furthermore the cards are directly stacked in favour of the Attorney-General in sections 38L(7) and (8), which the previous speaker alluded to, where the court is told to give greatest weight to national security implications and not the impact on the independence, fairness and impartiality of the proceedings. If there is some absence of clarity on this issue, I think it is important that that be clarified. The potential for abuse of this power in civil cases is far more real than in criminal cases. It is rare for the government to be the defendant in a criminal case but it is hardly rare for it to be the defendant in a civil case. One would expect, given the obvious conflict-of-interest issues inherent in the legislation, that the scope of the legislation would be defined very specifically.

Unfortunately, this is not the case. The definition is very broad. To quote the committee's report on the National Security Information (Criminal Proceedings) Bill on the previous inquiry into the legislation that is being amended here, the committee said:

… the Committee believes that the definition contained in the Bill is broad in the extreme, especially considering it is being used as the basis for the non-disclosure of information in criminal proceedings.

It continued:

The Committee notes that the definition of national security incorporates such broad areas of national activities which in effect may make the definition unhelpful or unworkable for the defendant.

It went on further:

The Committee considers that in light of the broad and vague definition of national security, the Bill may place a heavy and unfair burden on the defendant to comply with its requirements.

I cannot really add much more to that. These issues are particularly relevant in the case of criminal proceedings, and even more so in civil proceedings. Thus we have legislation that not only allows the government to interfere with the independence of the court but also provides it with a wide scope to do it. As the above quote demonstrates, it also places a huge burden on the parties, who—in addition to having legislation that requires them to obtain security clearance to conduct their normal business, have access to the information relevant to their case—have now to try to second-guess what the Attorney-General thinks of as national security or face two years imprisonment.

I wish the committee to consider the case of Mamdouh Habib, and there is discussion of this in our submission. Mamdouh Habib's lawyer has already publicly indicated that he intends to pursue civil action against the government, as we are probably all aware. The timing of the introduction of this legislation seems to have closely followed his return to Australia. Whether this is coincidence or convenience, I do not know. In any case, were this legislation to be introduced, it would not only severely limit his access to justice but, if handled badly by the government, it would also significantly dent the credibility of the entire judicial system.

I will elaborate a bit more on that. One issue that may be examined before a court is whether the Australian government had knowledge that Habib was being rendered by the US government from Pakistan, where he was first detained, to Egypt. Egypt has a reputation for torture and there are various UN bodies that have already indicted that. If the government did allow Mr Habib to be rendered, whether the government violated international treaties in doing so may be a major issue. Mr Philip Ruddock, the Attorney-General, has already publicly stated that the government did not know of the rendition. Hypothetically, however, if there were evidence that Mr Habib could present, or witnesses that he could call, to prove or indicate that the Australian government did in fact know of his rendition then the Attorney-General, or any member of his party, would have an obvious conflict of interest between his responsibility as the guardian of Australia's national security and his own political future. Were it to be revealed that he had misdirected the public and that his government were involved or somehow implicated in the torture of one of its citizens, it may have an impact on the party's public standing. The pressure Mr Ruddock would be under to use his powers under the legislation would be immense. Exchanging Mr Ruddock for another minister does very little to alleviate the problem.

Similar issues arise for people seeking remedies in relation to ASIO detention warrants or even in terms of ASIO abusing its powers. The power to intervene in cases has the potential to create huge conflicts of interest as the government conducts its business. Prudent law making requires that wherever there is such a dangerous conflict of interest the powers be clearly

separated. That is why, for example, the Reserve Bank sets interest rates not the government. The separation of powers is one of the oldest traditions of western democracies and is deeply enshrined in our Constitution. It is also a fundamental part of the tradition of Islamic jurisprudence, in narrations of the Prophet of Islam, Mohammed. In fact, the Prophet said that he would not even intervene in the case to save his own daughter, let alone his own political future. He referred to situations where those in power have special powers under the law as the jurisprudence of the age of ignorance.

All our recommendations follow from these observations. These include recommendations to tighten the definition of 'national security', as the committee itself has recommended, and most importantly of all, that the power to issue certificates be moved away from the representative arm of government to a senior public servant. In particular, rather than the Attorney-General deciding whether a case has national security implications, we suggest it should be given to some other office, perhaps to the Inspector-General of Intelligence and Security, although we are not firm on this and we are open to other suggestions. The Inspector-General of Intelligence and Security obviously has the security clearances required and is well equipped in the role to balance the need for security against the rights of Australian citizens. That is his day-to-day job. At the very least, this should be the case when the Commonwealth is one of the litigants in a civil case, instead of the government sitting in judgment of itself. If even this is not possible and the committee is not in a position to make that recommendation then steps should be taken at least to make sure that the Attorney-General's process for issuing certificates is as transparent and as reviewable as possible, including perhaps reference to the inspector-general.

Another recommendation includes steps to correct the apparent bias in subclause 38L(7) and (8), and another recommends that the clause 46C offence for failing to inform the Attorney General be removed. One final thing that we would suggest is that there should be a sunset clause placed on the legislation, since its impact on the judicial system is not yet clear. As I am sure the committee is aware, because of the changing nature of the international security environment things can move very quickly, and I think a review in three years time to evaluate the impact of this legislation would be prudent. I thank the committee for its time and patience.

CHAIR—Ms Chong, do you have anything to add?

Ms Chong—No.

Senator LUDWIG—Could you expand a little more on the issue of whether the warrant under ASIO would be affected by this outcome. I want to understand the concerns that you raise in your submission about how this bill will impact upon that area.

Dr Kadous—Agnes may elaborate on this, but my understanding is that if ASIO were to detain a person unfairly there are already provisions under the existing antiterrorism legislation that would make it very difficult for a person to discuss what has happened to them for a period of two years after their detention. However, seeking some sort of civil remedy would likely be almost impossible because that would raise national security issues. Any witnesses would probably be covered by national security, and it would be a very hard case. It would be very hard for a person who had issues with the way they were detained and what

happened to them while they were under detention to really run an effective case at all. I would argue it would be near to impossible.

Senator LUDWIG—Have you had the opportunity to look at Mr Emerton's paper? It could also apply in actual proceedings where the person may want to challenge the lawfulness of the detention or the warrant, for instance, and they would then apply for judicial proceedings to examine it. Of course, if it contains or raises the issue of national security it may be difficult to proceed with it.

Dr Kadous—It would be almost impossible in a time frame of seven days. For starters, the lawyer has to be security cleared if he is to be there in the first place, as I understand it. If the person did not have a lawyer present they would have to get a lawyer. The lawyer that they chose may not have security clearance. A closed hearing would then have to be conducted. It is unrealistic that someone could, within the seven-day time frame, raise a court case and have it heard while they are being detained. It is basically automatic that they will be detained for seven days if that is what the prescribed authority allows. There are issues that a person arrested under the detention laws can raise with the prescribed authority, and they can always appeal to the Inspector-General of Intelligence and Security, but I think it would be very difficult for them to undertake civil proceedings while detained. We would have to rely on those other mechanisms, like the ones provided through the Inspector-General of Intelligence and Security, rather than the conventional courts, and that is problematic because it is not really the Inspector-General's job to look at those kinds of issues. That is something that a court should look at.

Senator LUDWIG—The ALRC raised the issue of tribunal decisions and the like being captured by this legislation as distinct from civil proceedings. Do you have a view about whether it should extend to tribunals and the like?

Dr Kadous—Under the current arrangement, where the Attorney-General is the person who decides and issues certificates, I would have extreme concerns about it. We are not averse to the concept of national security per se, and it would be nice to have an independent, uniform system that applies to all of the courts. However, as has already occurred, the Attorney-General or the minister for immigration can intervene in certain administrative processes in immigration cases. In my opinion, that has not proved to be very successful, and there have been issues about whether the former minister for immigration, Philip Ruddock, was acting correctly with respect to certain friends he had in the community.

So, under the current regime, no—I would object to any extension to these laws. I do not think they should even apply in civil or criminal cases, and I do not see why they should be extended to administrative cases. However, if the law is reformed in such a way that the person who decides what is a national security issue is someone who is distinct from ASIO, someone who is distinct from the AFP and certainly someone who is distinct from the representative arm of government then, yes, I would consider that. It would come down to the details, but that is something that I would pay due attention to and would approach with an open mind.

Senator LUDWIG—You have also indicated that the definition of 'national security' may be too broad. Would you like to elaborate on that.

Dr Kadous—I think other people are more capable of elaborating on that but I will highlight one of the phrases, which is 'international relations'. My understanding of the legislation is that international relations covers any political, economic or military activities that occur between Australia and any other country. That is huge. That covers anyone who is a naturalised citizen and any immigrants. Some of the other parts of the definition are well defined, particularly to do with safety and so on, but I am not exactly sure what the parts are. But when it comes to political and economic ties, I do not see why they should be covered. The issue is not that they should not be covered but that they are so broad. For example, let us say that I happen to like Anwar Ibrahim, who is a well-known dissident in Malaysia, because he has expressed the view that courts should be independent and free and that Malaysia should be free from corruption. According to the definition, and I know it would be a stretch, I am now talking about political issues. So, if I expressed support for Anwar Ibrahim, does that now fall under that definition of national security?

It is just that there are potentials for abuse, and in the past whenever there has been legislation that has given a discretionary capability it has always been subject to abuse. The example that we looked at in our previous submissions related to the ability of New South Wales policemen to have move on powers, as I understand it—the New South Wales police power with respect to consorting laws—and that was applied in a very discriminatory way to young people and to people of, say, Aboriginal background. So I think it is important, especially when you have a case like this, to limit the discretionary capability and to be as specific as we can because of the strength of these powers. That is something that the committee itself has found. But I think the sore point is the term 'international relations', because it is a wide-open door. If it is restricted to security or military arrangements that is sensible, and I can understand that. But why does it include political and economic relationships?

CHAIR—Some of the details in your submission do not apply just to this legislation. It is a much broader concern that you are raising with the committee, which you have raised before in other hearings, and we do value that contribution that your organisation makes. In terms of the principle involved, though, and the approach that the government is trying to make to deal with the sensitive issue of managing the national security information process in legal proceedings, would I be right in summarising your concerns as being that, if you can insert more independence into the process, and you suggest using IGIS, for example, in certain circumstances and not having government as a party in others and so on, that would in your view ameliorate some of the concerns that you have raised?

Dr Kadous—I am not a lawyer, but I think the devil is in the detail; but in principle I would not have an objection to national security concerns being made part of the court system. I understand that there are some issues that need to be regarded, but there should always be a trend or a preference for open accountability and open court proceedings. I do understand that there is occasionally the need for national security, but at least that process itself should be independent of the government. Having it in the hands of the government will make it just too tempting, and the old adage applies: imagine that these powers were not in your hands but in the hands of your worst enemy—that is, the opposing political party; imagine how they would soon be used.

CHAIR—You have not met the enemies I have got in my own.

Senator LUDWIG—Touche.

CHAIR—I am sorry, do go on.

Dr Kadous—I think that basically covers the point. It comes down to the details. It is very hard to discuss in abstract but in principle, no.

CHAIR—I appreciate the difficulty of discussing it in abstract, but it is an important part of the principle of this discussion. As I said to a previous witness, I think this is our third effort in the committee process to examine aspects of this legislation. One was substantive, one was a minor amendment and this is substantive. There is a suggestion, as you may or may not know, from the Australian Law Reform Commission and other groups that we need to extend these procedures so we have certainty in the administrative tribunal process as well. I imagine that if we do that we will be seeing you again.

Dr Kadous—Yes, you are right. I point out that Dennis Richardson, who I am sure you would know is the head of ASIO—

CHAIR—We have met, yes—from a distance, I might say.

Dr Kadous—points to the fact that it is an important part of Australia's culture to have this robustness in a political discussion. I look forward to the opportunity to participate once again. I think it is an important part of the way laws are made here to prevent problematic legislation from getting through—in particular, because we all know it is much harder to get legislation off the books than it is to get it on them. As Justice Dowd has pointed out, it would be hard to imagine a politician that would have the guts to claw back some of this terrorism legislation on the basis of civil rights, especially when we know there is kind of an arms race with regard to law and justice issues generally.

CHAIR—I think that is a reasonable observation. The other aspects of your submission you might want to refer to briefly concern the question of security clearance requirements and what your perspective is on those issues.

Dr Kadous—Our main concern is that the security clearance, as we understand it, goes through the secretary of the Attorney-General's Department. It is one of our primary concerns that the Attorney-General's Department are once again involved. Sure, they talk to ASIO and to the AFP, but it is the Attorney-General that is once again in the box seat and has control over that process. We do understand that in international law it is an important principle that a person has a choice as to which lawyer he chooses. The problems also relate to the fact that security clearance is based on an ethereal document called the Protective Security Manual, which is not even public and is amended without reference to the parliament, so we do not even know the basis on which security clearance is decided. There are also very vague terms in some of the definitions that are being made publicly—for example, reliability, truthfulness, honesty or what have you. These things are extremely subjective, and our concerns relate to the issue of security clearance. As you pointed out, this is not restricted to the particular issue of the National Security Information Legislation Amendment Bill, but it is a general problem in the antiterrorism area. As I mentioned earlier, if you are being detained by ASIO, for example, the lawyer that you choose has to be security cleared.

Another issue that we are concerned about that you also alluded to in your earlier questioning relates to the length of time that it will take to get security clearance for a lawyer. Although the law does not specifically require someone to get security clearance, it basically makes it impossible to conduct a case since they cannot even see all the evidence against them. One particular situation about which we are deeply concerned is the situation where a lawyer has access to security information and has security clearance but the client of that lawyer does not have access to security clearance. That imposes an impossible burden on the lawyer. There are usually things like lawyer/client privilege that would allow him to speak openly with his client but, in this case, it is a very difficult situation. You would have to feel sorry for the lawyer in that case, because he is kind of making all kinds of assumptions about what his client would want to do, because he has access to the information that the client does not.

CHAIR—The right to a fair trial and the right of the defendant to know what is happening in relation to their trial are issues the committee has grappled with—and I acknowledge that we have previously been considering that in a criminal context. In their submission, the ALRC talk about security clearances. In fact, they had some discomfort about making a recommendation which would require a court or a tribunal to order a lawyer to submit to the security clearance process but they do note:

> ... if important material is not available to counsel in the proceedings, they run a risk of failing to provide their client with effective assistance, and consequently should consider seeking a security clearance or withdrawing from the proceedings.

Dr Kadous—Exactly.

CHAIR—The submission continues:

> The ALRC suggested that the proper focus should not be on the dignity or convenience of the lawyer, but rather on the *client* receiving the best possible representation in circumstances in which highly classified information must be protected.

In the course of the committee's deliberations, that has been an issue I have had—I speak for myself—in the back of my mind.

Dr Kadous—And that is especially a concern. I know the legislation says one thing, but, if a client is really interested in presenting the best possible case, then realistically that person, if their lawyer does not get security clearance, will have to hire another lawyer and once again go through the process of briefing that lawyer—at their own expense, possibly, if they happen to lose the case. In addition, that new lawyer has to go through a security clearance. The person could be on this roundabout picking lawyer after lawyer that he trusts but that the government does not want to give security clearance to. Eventually he has to settle for a lawyer that already has security clearance, even if he would not like to choose that particular lawyer. So it does inconvenience the client. This issue of finding a lawyer with security clearance, and, if they do not, continually stopping the case and conducting an inquiry over whether a person can get security clearance or not, is a very problematic thing. It would be quite traumatic. Already the proceedings would take forever because of the analysis of the closed hearings, but this would make it even harder.

CHAIR—As I said, this is one of the issues with which the committee has grappled. As there are no further questions, I thank you both for appearing before the committee today, for your submission and for your assistance.

Dr Kadous—We thank the committee for giving us the opportunity to present our case.

Proceedings suspended from 10.37 a.m. to 10.50 a.m.

HUNYOR, Mr Jonathon, Senior Legal Officer, Human Rights and Equal Opportunity Commission

LENEHAN, Mr Craig, Deputy Director, Legal, Human Rights and Equal Opportunity Commission

CHAIR—Welcome. The Human Rights and Equal Opportunity Commission has lodged a submission with the committee, which we have numbered 12. Do you need to make any amendments or alterations to the submission?

Mr Lenehan—Regrettably, we do.

CHAIR—That is good, because I always ask that question and most people say no. So it is nice for someone to actually say yes.

Mr Lenehan—We are happy to help out. Yesterday I emailed a letter to the secretariat, which drew attention to one error in our submission. Unfortunately, we have since discovered two more, and I will direct you to those now if that is acceptable to you.

CHAIR—Yes. I have your letter. It refers to the final dot point in paragraph 11.

Mr Lenehan—That is right.

CHAIR—It is in relation to the Passports Act—and the other two?

Mr Lenehan—There is also an error in paragraph 19 of our submission. At the second dot point, there should be a capital L between the 38 and (8). I am afraid we have got a little bit excited in paragraph 29 and referred to the provisions of the criminal proceedings bill in anticipation of your having something to say about those. We should have referred to the provisions of the current bill. Sections 25(3), 27(3) and 28(5) should read 38G(3) and 38H(7). Again, we do apologise.

CHAIR—One bill at a time, please. We cannot keep up! Having dealt with that, we now invite you to make an opening statement and then we will go to questions.

Mr Lenehan—I have been authorised to read this statement by the Human Rights and Equal Opportunity Commission. The commission thanks the committee for inviting us to appear before the inquiry. In broad terms the bill before the committee relates to Australia's national security interests. Legislative measures directed at national security have become increasingly prevalent in the wake of the September 11 2001 attacks on the World Trade Centre, the Bali bombings and the bombings in Madrid.

Those attacks were undoubtedly great tragedies. They involved the violation of the right to life, which is the most fundamental human right. Since those attacks, Australia, like many other nations, has found itself in a period of uncertainty and fear, particularly about the possibility of an attack on Australian soil or further attacks on Australian interests overseas. That uncertain context makes the task of a legislator a very difficult one, particularly when the legislative processes are sometimes presented as involving choices between, on the one hand, the fundamental freedoms which Australians have taken for granted and, on the other, the security of the nation and the lives of its citizens.

The fundamental question is sometimes expressed as: 'Where do you draw the line between those two supposedly competing interests?' The commission would like to suggest that international human rights law provides the answer to that difficult question. International human rights law was forged in the wake of devastating periods of global conflict and already strikes a balance between security interests and the rights which are considered fundamental to being human. It allows for protective security actions to be taken by states but it demands that those actions remain within carefully crafted limits. In short, human rights law is all about drawing lines. It is not simply for idealistic purists; instead, it lays down a map which can be followed by hard-headed pragmatists seeking guidance in uncertain times.

In its submission, the commission has tried to apply those principles to the bill. The bill raises two particular issues in terms of international human rights law: firstly, the right to a fair and public hearing; and, secondly, the right to an effective remedy for violation of human rights. The commission's key concerns in relation to both those rights arise from the manner in which the bill applies constraints upon judicial discretion. For example, proposed section 38L(8) refers to the court's discretion in making orders for dealing with national security information, such that the court is required to give most importance to the issue of prejudice to national security. In addition, the bill contains a legislative direction to courts to hold closed hearings when considering such orders.

As the commission has stated in its submission, such constraints can operate to diminish the court's power to ensure equality between parties, which is one of the fundamental characteristics of a fair trial. Similarly, it can limit the court's capacity to provide effective remedies for violations of human rights. The commission's approach has therefore been to suggest amendments which would return power to the courts. That approach was recently commended by Ms Louise Arbour, the United Nations High Commissioner for Human Rights and a former Canadian Supreme Court justice. The high commissioner also observed that such an approach actually lessens the likelihood of social upheaval and makes for a more stable and thus secure society.

The commission has also suggested some amendments which more clearly provide that certain human rights issues are relevant considerations in the exercise of the court's discretions. This is largely to avoid any doubt that such matters should be taken into account by the court. Of course, the bill largely reflects the approach taken by parliament in existing provisions in the National Security Information (Criminal Proceedings) Act. The commission has suggested that this committee might take the opportunity to revisit some of the provisions of that act. However, even if the committee decides not to reopen those matters, it should recognise that there will be cases in the civil arena which have even more dire consequences for human rights than is the case with criminal matters. For example, civil proceedings may be the only thing that stands between a person and their deportation to a country where they face persecution and death. Further, unlike criminal proceedings, the court's power to stay proceedings or order dismissal would generally work against the interests of a person seeking to use civil proceedings to obtain a remedy for an actual or future violation of their human rights.

The commission has also suggested that this committee might have regard to existing provisions of Commonwealth law dealing with the use of national security information in

courts, including those in the Migration Act. The provisions of that act go a step beyond the bill. They permit a court to rely upon secret evidence that is not disclosed to a party for the purposes of a substantive hearing and visa cancellation proceedings. The commission is by no means convinced that such an approach is desirable or consistent with the human rights principles discussed in its submission. However, if it is to continue it should at least be subject to the safeguards proposed by the ALRC, including the principle that it should only be permitted in the most extraordinary circumstances.

On a related point, and this has been discussed this morning, the commission notes that in its submission to the inquiry, the ALRC has repeated its recommendation that the bill apply to administrative tribunals as well as to courts. As the ALRC observed in its report, a number of tribunals are empowered to rely upon secret evidence not disclosed to a party for the purpose of a substantive decision. The commission did not address tribunals in its submission as it understood that they were outside the scope of the bill. However, should this committee feel that it is able to address that issue, the commission would support the ALRC's suggestion that there be a consistent scheme which covers tribunals. If such a scheme allows tribunals to continue to make use of secret evidence for the purposes of substantive decisions which, again, the commission considers should be the subject of close examination then the safeguards proposed by the ALRC should apply.

Administrative tribunals and judicial officers are vital protections against violations of human rights. Restrictions upon their powers arising from concerns over disclosure of national security information must be scrutinised closely and should only be implemented in a manner which follows the road map provided by human rights principles.

CHAIR—Thank you very much, Mr Lenehan. Mr Hunyor, did you wish to add anything?

Mr Hunyor—No.

CHAIR—There are a number of issues arising out of your submission. I am sure my colleagues will have questions as well. Let us begin with the stay provisions because you have some concerns about those. The ALRC have said in their submission, in relation to the stay provisions, that the consequences of a stay of any given proceedings would always be considered by the court, and I suppose they take some comfort from that. What is your observation in relation to that and is there any way to amend the stay provisions that might address your concerns?

Mr Lenehan—The way we look at the stay provisions is that they were undoubtedly a great comfort to various people, including this committee, in criminal proceedings and the provisions of the existing act. Our concern is that in civil proceedings they stand to cause potentially great injustice and deny altogether any sort of remedy, let alone an effective remedy.

We do not have any recommendations for the amendment of the provisions of the bill that deal with the granting of stays. However, we regard the safeguards we have proposed concerning other provisions of the act to be amendments which would better protect the rights of people who would otherwise potentially be subject to those sorts of orders by the court. I should add that we have listened with interest to the evidence of Mr Emerton this morning. I take it that Mr Emerton is of the view that, in many circumstances, perhaps, secret evidence

should be considered by the court. That would be another way of getting around the potential injustice caused by the act.

Secret evidence has been the subject of fairly adverse comment, to put it mildly, by the Human Rights Committee, so I think that is quite a difficult issue. I am happy to take on notice, however, the question of whether that may be able to be implemented in a matter that is consistent with human rights. I suppose it could be envisaged that, if that was done with the consent of the parties, perhaps, and if it were subject to other safeguards, possibly including the presence of an amicus curiae before the court, that fairly difficult question could be addressed. I do not have the views of the commission on that, but I am happy to seek them.

CHAIR—I appreciate that. If you could take that on notice and give us the benefit of the commission's views when you have an opportunity, that would be helpful. You go on in your submission to raise some concerns in relation to the provisions for closed hearings.

Mr Lenehan—We do.

CHAIR—As I have said to previous witnesses, the committee has grappled with these issues before in relation to the right to a fair trial. We are also grappling on an ongoing basis with the amount of discretion and the flexibility that is left with the court. That is another matter to which the ALRC adverts in their submission and their testimony today. You make the observation that the ICCPR does in fact still make provision for exclusion from trials in certain circumstances, including national security. Could you elaborate on the concerns that you have with these provisions for closed hearing and why you think they might still be offensive to article 14?

Mr Lenehan—I should start with the observation that you made concerning whether the ICCPR allows closed hearings in civil matters. Whilst it does not state that expressly, it does say that a defendant in a criminal hearing has a right to be present at their trial. It does not make the same express provision for a civil hearing.

CHAIR—Yes, that is what I understand the gap to be.

Mr Lenehan—So civil parties are left with the general protection provided by article 14(1), which is the general requirement for a fair hearing. One of the things that the committee has tended to emphasise in relation to that obligation is set out in the case involving Finland in our submission. The committee has said:

> ... the Committee notes that it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.

That seems to us to be somewhat problematic if you are talking about excluding parties to proceedings from a particular hearing. However, there may be ways of getting around that. We have suggested some in our submission at paragraph 35. What we have suggested there is that the court be required in express terms to consider those interests. In exceptional circumstances where an exclusion order is made under the bill, the court should be required—consistent with the other terms of the bill, for that matter—to consider how else that material, the submissions of the Attorney and any evidence they bring along might be provided to the parties so that they can meaningfully do what seems to be contemplated by proposed section 38I(4)—that is, to make submissions about non-disclosure or witness exclusion. That relates

to exclusion of a party. If you are also asking about exclusion of the public, that is another issue.

CHAIR—Why don't you elaborate on that for us?

Mr Lenehan—That certainly is expressly provided for in article 14(1). However, it is not an unqualified right. The committee has suggested that the requirement for a public hearing is fundamental in preserving the integrity of judicial processes. I should note there that the committee and most human rights experts regard domestic courts as being vital cogs in the protection of people's human rights. So preserving the integrity of the courts is considered to be important.

The requirement for a public hearing in article 14(1) is allowed to be departed from in certain circumstances including in the interests of national security. But, as we have said, that does not give you an open cheque to have a closed hearing whenever an issue of national security comes up. Rather, you have got to stick to the principle of proportionality, which we have discussed with you before, and I know that other witnesses before the committee have also elaborated on this. We find it hard to see how the bill meets the requirement of proportionality when it contains a legislative direction, with no exceptions, that the court is to hold a closed hearing in the circumstances where the bill is effectively activated by the Attorney. That is a one size fits all approach. It does not admit of any variation between particular cases. It is not in those circumstances, in our view, limited to what is strictly necessary to meet the circumstances of the particular case.

CHAIR—So that brings us back to the flexibility and the discretion aspect of this discussion.

Mr Lenehan—Yes. It is a simple point that we make, Chair, but we think it is an important one. It is one that very clearly comes out of all the jurisprudence of the committee.

Senator LUDWIG—Concerning how this legislation will operate, you have made a couple of comments so far about the stay of proceedings and issues in terms of fairness between the parties, which is one of the ways of looking at it, and then how that would ensure security. Have you turned your mind to the provisions that could be canvassed to ensure that those twin goals are met, that national security issues are kept as matters of national security and that defendants and plaintiffs in civil proceedings can proceed with resolving their complaints to finality? A stay provision contemplated by this bill—though it may interrupt proceedings—does not seem conclusive in that the proceedings will fall away as a consequence of the stay. That could in fact happen because the proceedings cannot then proceed if the crucial evidence is found to concern national security and is sensitive, and it cannot be redacted or parties do not want it to be redacted, which is another way of expressing it. That has been a theme in a number of submissions and I have asked Mr Emerton about it. He even went back further, in fairness, and said that there are underlying issues that could in fact change the process, rather than concentrating on that. I wonder whether you would have a look at that. I am cognisant of the discussion you have already had with the Chair about this.

Mr Lenehan—Yes. We should state clearly that we do not—and I think this departs from Mr Emerton's approach—oppose the passing of this sort of legislation. We do oppose the passing of this sort of legislation without adequate safeguards. So the recommendations that

we have made in trying to beef up the safeguards that are there in the bill have been with that real problem of the potential injustice caused by a stay or a dismissal order in mind. As well as the stay, we also have regard to the fact that, as I mentioned before, civil proceedings have the potential to provide remedies for really fundamental rights, including the right to life in deportation proceedings. Our consistent approach has been to say where we think the safeguards are inadequate and how they could be improved, and we think we have made fairly practical suggestions for doing so.

As I have said to the Chair, Mr Emerton's idea of allowing a court to consider secret evidence in the extreme case of there being no other alternative but a stay may be something that is valuable to explore with the commission. Having said that, there would need to be very strict provisions providing for the use of that sort of evidence. As I mentioned, one possibility would be to require the consent of all parties. Another would be to have the presence of amicus curiae where that sort of evidence is considered. There may be other possibilities.

Senator LUDWIG—On the breadth of civil proceedings or where they might stop and still be quasi civil proceedings but not fall within that definition of civil proceedings, have you exercised your mind as to whether or not you can discover any of those? It seems to be that there are administrative decisions which fall outside, so that seems clear. There are those classes of proceedings which, although they may not be interlocutory steps to civil proceedings, may in fact be as an adjunct or a stage which are distinct and separate from civil proceedings which may not fall within that definition.

Then there are those proceedings where people, and I am trying to get to a book and find it, can choose between whether they proceed down a civil path or proceed down a tribunal path. This may be an inadequate example but, from memory, the AIRC has a procedure where you can proceed to the recovery of wages in a tribunal in Queensland with the tribunal, or alternatively you could take a complaint and proceed as a prosecution, although a quasi criminal prosecution in that sense. There is a choice of which avenue you may take. It would be unlikely that national security information may arise in that context, but it could. However, I suspect there are others where it might. In trying to define civil proceedings, this legislation may not have defined it adequately. Do you have a view about that?

Mr Lenehan—I do not have a considered view. My reading of the proposed section 15A is similar to Professor Weisbrot's in that I think you would at least have to have commenced proceedings in a court. It would presumably draw in the sorts of matters that you have mentioned, which are ancillary to those proceedings. For example, 15A(2) talks about an ex parte application discovery and inspection of documents and evidence and other interlocutory proceedings. It would seem that, say, court ordered mediation may be included there, although it is not altogether clear. When it comes to a choice between a tribunal and court proceedings, upon making the election you would be outside the provisions of this act depending on the particular statute that provided for that choice. It may become an administrative decision, depending upon how it proceeds and under whose auspices it is done. It is an interesting question, and I would be happy to seek the commission's views if that would be of assistance.

Senator LUDWIG—It would be helpful. The Queensland tribunal is one way where it is a lesser cost avenue to proceed with recovery of wages; the tribunal is more informal. It is perhaps easier than for the parties to state their cases than in a quasi criminal proceedings

prosecution before an industrial magistrate, which requires a different standard of proof and sufficient grounding in evidentiary matters to be able to proceed. Therefore, if the election is the latter, it may be forced upon the party because of the non-agreement of the other party. Therefore, there may be a position where the Commonwealth says to parties, 'In these issues, because there could be the potential for national security implications, then we will only proceed in civil proceedings and not tribunal or administrative decisions.' Or the other way around; not to blame the Commonwealth too often. That is one of the areas that may be open.

Mr Lenehan—It is an interesting question. The other point that I made in the opening statement is that, as the ALRC has noted, there is a bit of inconsistency across the federal tribunals as to how this sort of material is received and what is then done with it. In some circumstances there is the capacity to receive evidence without the parties knowing anything about it—or at least its content—and for that material to then be used to make the substantive decision. For us that seems to be something that requires some very serious examination in light of the obligations that we have pointed to. For that reason we think that extending the bill to those sorts of tribunals is something that we would support, with the proviso that the safeguards that the ALRC has proposed for use of secret evidence be put in place.

Senator LUDWIG—I refer to the area where security clearance cannot be obtained or where there might be self-represented litigants in civil proceedings. Have you turned your mind to how self-represented litigants might wend their way through these issues where national security implications may be raised on the other side?

Mr Lenehan—The bill does allow for a self-represented litigant to obtain a security clearance, so in one sense that issue does seem to have been contemplated. The real issue that we have raised in the submission about security clearance is that the disclosure regime that applies to information in these matters should again be something that the court decides. Courts have extensive experience dealing with this sort of information and, for that matter, confidential information in a private sector context. As a private practitioner, I have signed up to all manner of confidentiality agreements, some of which have been described as superconfidentiality agreements. Courts have very flexible procedures for dealing with this sort of material. That is our fundamental point: it really should be left with a court rather than being dependent upon the exercise of a discretion by the executive.

Senator LUDWIG—And you support your view by saying that issues such as trademarks, secret formulas and all other types of things have been dealt with by courts for quite a long time?

Mr Lenehan—Yes. If you were to ask the parties to litigation dealing with that sort of subject matter how important that was to them, they would express their views very strongly.

Senator LUDWIG—Let us come back to the earlier question I asked in relation to the application of the self-represented litigant. It seems there is an appropriate level to be eligible to apply for financial assistance under the non-statutory special circumstances scheme. That is still a decision that has to be made; it is not automatic, is it?

Mr Lenehan—That is my understanding.

Senator LUDWIG—So there could be circumstances that arise where that is refused?

Mr Lenehan—Yes.

Senator LUDWIG—And the self-represented litigant is then required, if they want to proceed with the matter, to take that cost on board themselves.

Mr Lenehan—Yes. In some circumstances that is going to mean that the potential of the court to provide an effective remedy is going to become illusory, so where violations of human rights are concerned that again is going to raise article 2 of the ICCPR.

Senator LUDWIG—So it could have some application in those circumstances, depending on the reason for the refusal of this financial assistance?

Mr Lenehan—Yes.

Senator LUDWIG—So that is something that needs to be watched carefully, or at least the Attorney-General should provide a relatively straightforward answer on that issue. The other area is how the migration legislation will be impacted. You mention that on pages 15 and 16 in relation to secret evidence. Would you elaborate on that, please?

Mr Lenehan—Sure. The Migration Act—and in our view this will be unaffected by the passage of the bill in its current form—allows a court in proceedings regarding the cancellation of visas to go a step beyond what is provided for in the bill and rely upon evidence that is not disclosed to the party to the proceedings, the party bringing the application for review. It goes even further than that and allows the minister to test the waters, if you like, by disclosing the material in question to the court and then asking the court whether it is prepared to make orders for the non-disclosure of the information. In the event that the court does not make those orders, then the information can be withdrawn and not used in the substantive proceedings. So you get two goes at it potentially, if you like.

The information in question is information that has been received from gazetted agencies, and that has been an expanding term as the minister has gazetted more and more entities, but it does include Australia's security agencies. We have noted in paragraph 49 that the ALRC directed some criticism of the procedure. It said this:

The options available to the Federal Court or the Federal Magistrates Court in dealing with information under the Migration Act are limited. The court will either never have access to the information itself—

I should pause there and just add that the minister does not have to disclose this sort of information to the court. It is entirely at the minister's discretion. It continues:

or, where the Minister authorises disclosure to the court, it can make interim or permanent non-disclosure orders on the application of the Minister to refuse or make such non-disclosure orders.

The ALRC says:

It would be desirable for the courts to be able to consider a greater number of options in making an order resulting in the withholding of evidence from an affected party. The principle that secret evidence should only be used as a last resort in the most exceptional matters in order to protect classified or sensitive national security information highlights the desirability for statutory provisions—

modelled on the American provisions—

which expressly set out the powers of a court to make orders in lieu of full disclosure.

In other words, the ALRC states that the sort of statutory regime that they are proposing should also apply—or there are arguments that it should apply—to the Migration Act. In the final result, the ALRC does not go as far as making a recommendation to that effect but points out that there are difficulties.

Senator LUDWIG—So they have a double go?

Mr Lenehan—We find it a deeply troubling procedure, Senator.

CHAIR—Senator Greig has questions but is not here at the moment. Are there any other issues you wanted to follow up with HREOC, Senator Ludwig?

Mr Lenehan—Chair, I might be able to fill in a little time by pointing you in the direction of a human rights principle that applies to the issue that has been discussed with other witnesses this morning, being that of delay. Delay is also relevant to the obligation to provide an effective remedy, and we have not addressed this. In the context of the equivalent provisions of the European Convention on Human Rights, which also provide that there should be an effective remedy for violation of the rights in that instrument, the European Court of Human Rights has stressed that an effective remedy really has to be seen in its practical operation such that it must be effective in practice as well as in law. In cases where a person has not been able to access a court in sufficient time to prevent the violation in question taking place, the European Court has said that that constitutes a violation of the right to an effective remedy. The commission has addressed this in submissions made to the joint committee on ASIO and DSD regarding the detention provisions of the ASIO Act, and that is now on the committee's web site.

In that submission we referred to the case of Keenan in the United Kingdom. In that case, Mr Keenan was a prisoner in a British prison. He was subjected to ill-treatment in the prison and, as a result, ultimately committed suicide. He also had some difficulties with his mental health. The European Court, applying the principles that I just referred to in that context, said that the fact that there was judicial review, the fact that there was provision for a complaint to the ombudsman and the fact that there was a procedure for making an internal complaint in the prison was not enough because the time frame in question—which was a period of seven days—would not have allowed Mr Keenan to seek a remedy in a sufficiently speedy fashion. On that basis, the court found a breach of that provision. Those same principles seem to us to apply in the circumstances that have been mentioned this morning, particularly the question of detention warrants under the ASIO Act, where the upper limit on detention is seven days. If you are going to get a habeas remedy that does anything for a potential violation of your right not to be arbitrarily detained, you are going to have to do something fairly speedily.

One way of potentially dealing with the issue that Mr Emerton has drawn the committee's attention to, which is that the Attorney does not have any obligation to make a decision on the issuing of a certificate within any given time, would be to impose a time limit or, perhaps more sensibly, subject that procedure to a time limit imposed by the court. Again courts are quite adept at dealing with difficulties that arise in cases where time is of the essence. There would be an argument, I suppose, that, under the current provisions of the act, you could seek mandamus to compel the Attorney to make a decision. Again that is going to be time

consuming, and in those circumstances we would doubt that the requirements to provide a practical and effective remedy are really going to be satisfied.

Senator LUDWIG—How would a time limit on the issuing of a certificate operate in the frame of seven days that a person can be held under an ASIO detention warrant? One of the strong points made during proceedings of this committee as to why that legislation has safeguards in it was that the legal representatives on behalf of the person could apply immediately for a review of that decision. That was one of the main safeguards. Mr Emerton was saying that that is undermined, perhaps not directly but certainly indirectly, by this legislation where there may be a problem with national security information being released and being dealt with in those proceedings. You say that one of the solutions could be a time limit on the certificate. How would that work in practice in that frame?

Mr Lenehan—This is why I think that my second suggestion is probably the preferable one. As we will be coming back to discuss with you later today, we see a problem with inflexible time limits in civil proceedings generally. I think that a court supervised process is probably the more desirable one. Indeed, that again gets back to our central point of giving power back to the courts. The process that I suppose I have in mind is that a person who is detained would instruct their legal representative to approach the court for habeas corpus. The court would, at a very early stage, be empowered under an amended version of this act to inquire of the Attorney whether he or she ought to invoke it and would give them a time frame for doing so. That would then ensure fairness for the detained party in that any delay on the part of the Attorney could not be used to derail the proceedings, if you like, assuming that security information is a central part of that sort of application. I can certainly see that, given the broad definition of national security information which other witnesses have taken up with you, it could quite easily be argued that it does.

Senator LUDWIG—The nub of the problem is this: if a person is detained under an ASIO detention warrant—I will not go into the details but it extends for a period of time—and a person seeks to challenge that, one of the safeguards is that they can then challenge that in a court and have it overturned if it is unfair. This is if the parties had a strong case for the detention to be overturned. The raising of national security is one mechanism—although not a polite mechanism—to stretch the proceedings out so that it becomes a moot point as to whether the proceedings would be successful or unsuccessful because the time of detention would have expired. That is the issue.

Mr Lenehan—There is that potential for abuse, and the suggestion that I have put forward would be a way of dealing with that.

Senator LUDWIG—Thank you.

Senator GREIG—There was some mention earlier—I forget from which witness—about a sunset clause. You have spoken in a general sense about revisiting the legislation. If a sunset clause were to be inserted into this, would that placate you somewhat or are you more interested in looking at amendments to more acutely address the issues that you have raised this morning?

Mr Lenehan—Unfortunately I do not have the views of the commission on that point. I will take that on notice and seek them. On a very preliminary basis, a sunset clause would

address some of those concerns in this respect. We have pointed out in the submission that the ICCPR allows you to take certain security measures, with the qualification that they need to be proportional and necessary in the particular circumstances. A sunset clause would—if we accept that we are in circumstances where there is heightened concern about security information—ensure that the provisions of the bill do not go beyond what is necessary to protect that information in this particular period. If we become more relaxed about it in the future, if there is less cause for concern, then that is more likely to keep it within those limits. But that is an off the top of my head response and I am happy to seek the views of the commission on that suggestion.

Senator GREIG—Thank you.

CHAIR—Thank you very much for your submission and for your assistance to the committee.

Proceedings suspended from 11.32 a.m. to 11.43 a.m.

WEBB, Mr Peter, Secretary-General, Law Council of Australia

CHAIR—Welcome. The Law Council has lodged a submission with the committee, which we have numbered 15. Do you need to make any amendments or alterations to that submission?

Mr Webb—No.

CHAIR—We invite you to make an opening statement, at the conclusion of which we will go to questions from members of the committee.

Mr Webb—Our submission is not in broad compass, but it is underpinned by what we see as desirable principles. I will quickly run through those. The Law Council generally prefers that courts supervise or review the actions of the executive in circumstances where that is appropriate and practicable. The Law Council also prefers that impediments not be put in the way of clients choosing their own lawyer. As well, we believe criminal offences should be necessary and proportionate to the matter they are designed to address. We note that Australian courts have a long history of being able to manage sensitive evidence in all kinds of situations and there is no reason to believe that security sensitive information could not be handled by the courts and by the legal representatives of parties to best effect consistent with the proper administration of justice.

Our submission focuses on three or four things. The first is the power to stay proceedings. We agree that where a fair hearing cannot be guaranteed a power to stay proceedings should reside in the courts. However, we note that in cases where the federal government is itself a defendant to the proceedings, an unfortunate perception could be created: that a stay of proceedings compelled by difficulties relating to the admission of security sensitive information and ministerial certificates has enabled the government to evade a civil liability for which it might otherwise have been found responsible. We cite in that respect the potential for difficulties in disputes between the federal government and, say, contractors for the supply of military hardware.

On the issue of security clearances for lawyers, we believe that if a system must operate, the courts should retain a discretion over the process, rather than the secretary of the Attorney-General's department having that discretion. We have no reason to cavil at the occupant of that post; the Secretary of the Attorney-General's department, Mr Cornall, is an admirable public servant and this is, of course, not personal to him. We believe that sufficient resources need to be applied to the process of obtaining security clearances so that matters can be dealt with and civil proceedings not be held up.

In our submission we made a number of suggestions about the scope of the offences that are found in the bill. Most of them are predicated upon the disclosure of information that is likely to 'prejudice national security' or disclosure that 'may affect national security'. We think these terms are very broad and it would presumably be very difficult for anybody who objects—to what would likely be the evidence of expert witnesses that the element has been satisfied—to do so in any meaningful way. It would also be quite difficult for courts to make an assessment about those issues. So we suggest that concepts of reasonableness and so on might be best introduced into those elements of the offences. Concepts of materiality might

also be useful. And in relation to one offence in particular—clause 46G, which appears to be absolute in its application—we think that legislation which imposes a criminal sanction, for what could be quite unwitting and innocent disclosure, is inappropriate. At the very least a defence of reasonableness for the disclosure should be permissible. That is all I have to say in the opening statement.

Senator LUDWIG—We have been seeking comment on a couple of matters which have been raised today. One of them is the adequacy of the stay provision in this bill. It will operate, as I understand it, to stay proceedings, as it is generally described. One of the effects of that is that it could be used or abused by the litigants in the process to avoid an outcome, or otherwise to make an outcome more expensive to obtain—in other words, it could be used to deny someone justice in those circumstances in civil proceedings. Do you have a view about how that would operate or do you see that it would operate in a fair manner between parties—similar to what happens in criminal proceedings, where this provision, I take it, has come from? Obviously it operates to allow fairness between the parties in criminal proceedings but civil proceedings, by their very nature, can be in areas from the Family Law Court to contract disputes between parties, and stayed provisions may not necessarily operate in the same way as you would expect them to operate in criminal proceedings, or provide fairness.

Mr Webb—I imagine the point of concern is the role played by the federal executive.

Senator LUDWIG—Yes, as to how they would operate, by and large.

Mr Webb—That is right.

Senator LUDWIG—It could also occur in contract disputes where contractors or subcontractors to various contracts may use stay proceedings to lengthen them.

Mr Webb—But they are not in the position of the minister or the Attorney-General to issue a certificate.

Senator LUDWIG—No, they do not have the ability to issue the certificate.

Mr Webb—They may be able to raise issues but, as I understand it, they cannot put them beyond the reach of the court, in a sense, or beyond the reach of the other party. This can cut both ways: the federal government might find that civil proceedings it wishes to take against another party might be frustrated by its own actions in issuing certificates for security sensitive information. Certainly we are not suggesting it could not have that effect. It may well frustrate the government as much as it frustrates, say, a plaintiff who is suing the government. In a situation where a plaintiff is suing the government, there would be this perception problem, I think, if in fact a stay were to be granted because of a ministerial certificate about security sensitive information. We posit the possible case of a contractual dispute where somebody supplying military hardware which could well have a strong security sensitive element to it wishes to canvass that in some way, shape or form, and it is relevant and perhaps crucial to the success or failure of the proceedings. The perception problem is that, if the government so acts as to cause the court to say that it cannot guarantee a fair hearing, the government will be seen to have self-interestedly frustrated those proceedings.

Senator LUDWIG—The perception is there.

Mr Webb—It is a perception. We draw attention to it because we think it is something that might usefully occupy the minds of the committee.

Senator LUDWIG—Have you considered an alternative mechanism or at least a mechanism to remove the perception that there could be unfairness in the system?

Mr Webb—No, not really. I am not sure that there is such a mechanism.

Senator LUDWIG—You may not be able to. There may not be a solution. It might be a problem without a solution. You raise concerns with the offence provision in clause 46A and 46G of the bill and you suggest an offence for unwitting and reasonable behaviour on the part of a person disclosing information. This is on page 6 of your submission. Perhaps you would like to elaborate on that and provide a reason as to why you say that would alleviate the problem.

Mr Webb—It seems that that particular offence, perhaps more than the other offences, is absolute in its application. If information disclosed is likely to prejudice national security and is not otherwise accepted, and if there are some exceptions allowed for in the offence, the state of knowledge about the information on the part of the person, who may be quite unaware of the security sensitive nature of it, appears to be immaterial, so there is no knowledge—what the criminal lawyers would like to call mens rea. There is no knowing commission of an offence. The offence is an absolute offence. If the information is disclosed and security sensitive then the person who disclosed it is guilty of an offence. This makes no allowance for unwitting, unknowing and inadvertent disclosure in a situation where, perhaps more so than in criminal proceedings, a large number of people might be expected to have access to the information in question and just regard it as information like any other piece of information.

Senator LUDWIG—Are you saying that that particular defence would be adequate in that instance?

Mr Webb—We think some allowance needs to be made for the reasonableness of the actions of the person disclosing the information. Perhaps it might even be a complete defence. Anything less than a complete defence means that the application of the offence provision remains absolute. That is an offence which seems to go a bit further than the other offences. We have singled that one out a little bit.

Senator LUDWIG—I see. Is that because of the potential outcome of it?

Mr Webb—It is because of the absolute nature of it.

Senator LUDWIG—Yes. The Attorney-General has provided a scheme for security clearance, but it is also for the self-represented litigants in the process who may be able to access funds for the defence or, as the case may be, to present the matter where the security clearance may not be able to be given. Have you had an opportunity to look at that provision to see whether it provides adequate protection for self-represented litigants?

Mr Webb—We have accepted what the Attorney has said on the face of it: that funds would be available and applications could be made. That seems to be quite an appropriate process and we have no reason to anticipate that that would not work as the Attorney-General has suggested it might.

Senator LUDWIG—Where there is a refusal to provide funds, where would the litigant then go? Would they have to abandon the proceedings or would they then have to fund them themselves? I guess it would be the latter if they wanted to proceed with it and the former if they did not want to.

Mr Webb—That seems to be the case, yes. I think it is an important point, and one would hope that in those situations assistance would invariably be forthcoming. It certainly is the case that unrepresented litigants occasionally have very good points to make to all sorts of courts, including even courts like the High Court where, even with recent changes in the High Court rules, the High Court makes considerable allowance for people appearing before it in person, because every now and then one of them comes up with a very good and valid point. Just because you are unrepresented does not mean that you might fall into the vexatious or frivolous category of litigant.

Senator LUDWIG—Notwithstanding that there is a considerable amount of work being done to try to get the frivolous and vexatious unrepresented litigants out of the system!

Mr Webb—Of course. Those that do that should probably be subjected to that regime, but just being unrepresented does not mean you are.

Senator LUDWIG—No. Unfortunately, I think they have been unfairly painted in that light in many instances. That is all the questions I have.

Senator GREIG—I just have one question. It seems to me that a core part of your submission is the notion that the courts have a long experience of dealing with sensitive information. In that context, do you feel that the bill as a whole is completely unnecessary—that there are existing mechanisms and procedures that can prevent the kinds of outcomes that the government is arguing it now needs to address in the context of terrorism?

Mr Webb—We have a lot of confidence in the courts and in the general administration of justice in this country. That is one of the starting points for many of our submissions. It is not hard to reflect on the really very diverse range of sensitive information—commercial, technical, technological—that from time to time needs to be dealt with by the courts; and the courts have evolved quite a sophisticated approach to dealing with that sort of information.

It well understood by the legal profession and by the courts themselves, perhaps more so in the higher courts, one would have to say in fairness, than in the lower courts. Given that this is clearly designed to catch the operation of all civil courts, which would include all sorts of interlocutory and other matters in presumably civil claims actions in the Magistrates Court and things of that nature, there may be less experience in those courts in dealing with that sort of information because it rarely surfaces in that low-level context. But, in the higher courts, there is certainly quite a deal of experience in both the profession and the judiciary in dealing with that sort of information. I think that is probably where, again, this sort of security sensitive information might be likely to present itself. It is not that we assume that there will be a great deal of this sort of information presenting itself in the civil court system of the country, but we do concede that, if you have a scheme for the criminal courts, logically one must also consider the civil court system for a similar scheme.

We continue to have faith in the capacity of the system to police itself and to deal with information that is sensitive in a very appropriate fashion. But of course one has to

acknowledge in the end that some security sensitive information may well be so sensitive as to perhaps warrant something more.

CHAIR—Thank you very much. I think my colleagues have asked most of the general questions that we wanted to pursue, Mr Webb, but I do have a question about one initiative that was suggested in the ALRC submission. I do not know whether you have had a chance to look at the Law Reform Commission's submission, which flows out of their report entitled *Keeping secrets: the protection of classified and security sensitive information*. They suggest:

In any proceeding in which classified and security sensitive information may be used, the court should have the assistance of a specially trained security officer—

which is apparently the practice in the United States—where, I venture to suggest, this is a burgeoning area of law. Is that something the council has contemplated as a proposition? The ALRC suggest that it would be of assistance to the court and to the parties in ensuring that they are properly informed about the correct handling of sensitive information, security and those sorts of issues.

Mr Webb—I have not seen that submission. But, if the role of that sort of person were confined to process issues—for example, giving advice about how to handle information and so on—that may well be useful. If in fact the role went further than that, I think we would have serious misgivings about a role that extended beyond simply the giving of advice about process and handling.

CHAIR—On my reading of their submission, I perceive it as a process suggestion. If you have any further comment to make on that the committee would be grateful. Mr Webb, thank you very much for appearing here today. I also thank the council for the submission.

[12.05 p.m.]

JACKSON, Ms Maggie, Special Adviser, National Security and Criminal Justice Group, Attorney-General's Department

KOBUS, Ms Kirsten, Acting Principal Legal Officer, Attorney-General's Department

CHAIR—Welcome. Ms Jackson, you had some trouble remembering your title there.

Ms Jackson—It has just recently changed.

CHAIR—We might need an aide-memoire for ourselves then. Before we begin, I remind senators that, under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy. If necessary, they must also be given the opportunity to refer those matters to the appropriate minister. Ms Jackson, do you have an opening statement?

Ms Jackson—I do. First of all I would like to thank the committee for its invitation to appear. I will confine my comments to what I understand to be the central issue of the inquiry of the committee in relation to this bill—that is, the provision that relates to the courts' power to stay civil proceedings. I would have to say that, in developing this provision, we had a great deal of difficulty finding much guidance from the cases in this area. The cases that deal with public interest immunity are particularly unhelpful. They do, however, indicate that, where there is a soundly grounded affidavit from a minister or from a senior public servant making a claim of public interest immunity, the courts are very reluctant to take the matter any further and that they accept that, in cases where material is excluded on the basis of public interest immunity, this will undoubtedly affect the proceedings. In fact, in the case of Air Canada and the Secretary of State of Trade, Lord Fox said:

> The law does in many cases accept that material facts may be withheld from the scrutiny of the court. The mere existence of the law of privilege postulates that.

And:

> There are cases where a party to litigation decides for reasons of delicacy or humanity not to call a witness whose evidence is highly material to his case. In an adversarial system this is acceptable.

We have not been able to identify cases that address the question of the circumstances in which a court should grant a permanent stay of proceedings after a claim of public interest immunity has been upheld. There is, however, an analogous case in Rann v Olsen in the South Australian Supreme Court which dealt with an application to stay civil proceedings, in fact defamation proceedings, in a case where evidence material to the case could not be led because of the Parliamentary Privileges Act. In that case Chief Justice Doyle said:

> The inherent jurisdiction of the Court to impose a stay to prevent injustice is a wide power. However, it is one to be exercised with care. There is no suggestion in the cases that it is exercised on the basis of a broad or subjective assessment of whether the outcome of a case will be regarded as fair by most people. The jurisdiction is more confined than that, although the relatively few cases do not enable one to state with any precision the scope of the jurisdiction.

He goes on to say:

... it is exceptional for the Court to be asked to say that the application of the law to a particular case gives rise to an unjust result, and that to avoid that result the Court should stay the proceedings.

Given that the Chief Justice had difficulty stating the rule with any precision, we likewise grappled with it when developing clause 19. We believe that the words used in that provision reflect, as closely as we are able to, the common law on that. It is certainly not our intention to alter in any way the common law. We recognise that the position of litigants in a civil case is very different from that of a defendant in a criminal case. The court has to consider the impact on the proceedings as a whole rather than seeing its role as protecting the interests of one party—namely, a criminal defendant. Thank you, Madam Chair.

CHAIR—Thank you, Ms Jackson. I appreciate your saying that. As you have observed, it has been a matter of some to-ing and fro-ing today and, I think, in almost all of our submissions. If perchance the impact is different from what you suggest, what capacity is there to review the operation of the provision to ensure that defendants are protected adequately?

Ms Jackson—I think the Attorney on many occasions in the parliament has stated that he sees all of the laws that deal with terrorism, this bill included, as a 'work in progress'—I think they are his words—or an unfinished canvas. I am sure that, if it became apparent this was an issue, he would very seriously consider it.

CHAIR—I suspect that the committee will take an ongoing interest as well, as you can imagine.

Senator LUDWIG—Of course, more effects flow from this legislation than from a painting that is unfinished, don't they? I was curious to hear your response to the issues that have been raised, particularly where stay proceedings may have adverse consequences. There are many ways in which it can happen, and you might be able to turn your mind to those as well. One way is where civil proceedings are on foot where compensation is being sought by a litigant against the Commonwealth in a security sensitive area. It may involve a department that is security sensitive or contain security information, where all or some of the parties might be security sensitive. The matter might revolve around a case in point that raises national security implications. The main issue may be about workers compensation or compensation for a tort or some other similar action and a stay is used to delay, frustrate or otherwise make the proceedings difficult to advance. That might occur for two reasons: it might be an abuse of process, or it might be legitimate in the sense that there are national security implications. A stay is required to examine how the matter will be proceeded with, which might otherwise cause time delays and expense and might frustrate the proceedings.

It seems to me that it is a very blunt instrument to use in these circumstances. It may very well be appropriate—and it seems to be appropriate so far—in criminal proceedings where a stay allows fairness to the parties. However, in civil proceedings, unlike criminal proceedings, it may not have the same effect. Do you have any comment about that?

Ms Jackson—In response, all I can really say is that the cases—to the extent that we have been able to find them—indicate it is very rare for a court in a civil case to grant a stay. With that in mind, I am sure it would be extremely unusual for this ever to arise. Of course, in a

situation like that, the court would look carefully at the impact of a decision to stay proceedings.

Senator LUDWIG—So your short answer to all of this is that it is unlikely to happen?

Ms Jackson—Yes.

Senator LUDWIG—I hope we can trust in that. The other issue, which was raised by the Human Rights and Equal Opportunity Commission, is the application of the 'double go' in the migration legislation. Have you had an opportunity of reading some of these submissions and turning your mind to the questions and issues they raise? Perhaps as a preface to my question I will ask you that first.

Ms Jackson—I have certainly had the opportunity to have a quick look at the submissions that have been raised by the committee. I am not sure that we can add a lot.

Senator LUDWIG—In paragraph 46, on page 16 of their submission, the commission notes:

... that existing provisions of the Migration Act 1958 (Cth) actually go a step further than the Bill and permit a Court to rely upon 'secret evidence' in substantive hearings regarding visa cancellation decisions.

In paragraph 48, HREOC says that that would:

... allow the Minister to 'test the waters' when disclosing such information to the Court. If the court decides not to make a non-disclosure order, the Minister can either adduce the evidence in the visa cancellation proceedings and the information can be supplied to the non-citizen applicant and his or her legal representatives, or the Minister can withdraw the information from the court's consideration, in which case the information will not be disclosed and cannot be relied upon by the court as evidence in the visa cancellation proceedings.

That seems to allow a second bite of the cherry, so to speak. In your view, does the way in which this legislation would impact upon the matter seem reasonable?

Ms Jackson—Yes, but that may well be a consideration that is borne in mind in deciding whether to apply the act to a particular proceeding.

Senator LUDWIG—Borne in mind by whom—the Attorney-General—

Ms Jackson—Yes.

Senator LUDWIG—or once the certificate is issued? We will never know what that is, because the Attorney-General does not provide us with an opinion as to what is in his mind when he issues a certificate, does he?

Ms Jackson—No, but I would think it is safe to assume that, in deciding whether or not to apply the act to the proceedings, great regard would be given to the adequacy of other mechanisms to protect the information. I would think that, for example, in many cases the application of public interest immunity would be considered sufficient and that the act would not be applied to particular proceedings. So, in a case where these provisions of the Migration Act applied, it is possible that those provisions would be considered to be adequate to protect the information in that particular case.

Senator LUDWIG—But there is nothing in the legislation which suggests that the Attorney should do that or take it into consideration before issuing a certificate, is there?

Ms Jackson—No, there is not.

Senator LUDWIG—Do you still say it is adequate? There is nothing then to point to it if the Attorney-General is not told that that provision exists. I suppose the Attorney-General knows that he may escape knowledge of provisions such as that, and we have no basis to understand whether he was informed of that provision before he issued the certificate, because there is no requirement to provide any ground as to why the certificate was issued.

Ms Jackson—That is true.

Senator LUDWIG—So we end up in this circular argument: did the Attorney-General take that into consideration or did he not? It is a question that is left unanswered. I suspect the Attorney-General post facto would say he did. But there is no way of knowing in advance, is there?

Ms Jackson—No.

Senator LUDWIG—There is certainly no requirement in the legislation to point the minister in that direction—

Ms Jackson—That is correct.

Senator LUDWIG—when making a considered decision, to take into account existing legislation which provides for how information should or should not be presented. What you have is a catch-all in terms of national security which covers the field, so to speak, which does not detract from existing mechanisms, does it?

Ms Jackson—No.

Senator LUDWIG—Also, the Human Rights and Equal Opportunity Commission make certain recommendations—I put it that way. Have you had an opportunity to look at any of them?

Ms Jackson—Yes.

Senator LUDWIG—Do you have a view about any of them? Are they matters that warrant further consideration?

Ms Jackson—Many of the issues that were raised in the submission are issues that are common to both the criminal proceedings act and the bill. To the extent that those provisions are similar, it would certainly not be desirable, I think, to inject different procedures—for example, in relation to giving the court a greater discretion under 38L(7) and 38L(8). I think this would be an undesirable move away from the criminal proceedings. Though parliament has enacted those for the criminal proceedings in relation to the requirement to hold closed hearings when the courts consider whether or not to make orders under 38L, that seems to open up the question of whether the information will be not only the information itself but the reasons why they may prejudice national security and could become a matter of public record. It is partly on the basis of those sorts of concerns that this legislation was introduced to preclude that sort of public airing. That leaves the Attorney or, in a civil case, the parties with little option but to withdraw or to reach a settlement.

Senator LUDWIG—The general issue that has been raised by Mr Emerton concerns how the bill might undermine safeguards in other antiterrorist legislation. Have you had an opportunity to look at that as to whether or not it may have the potential to undermine it? To put you in the picture, when this committee was doing the antiterrorism legislation, there were a number of submissions from the Attorney-General about the safeguards and how the ASIO warrants would operate. They are my words and that is my recollection, but I think the point was made—and it is certainly fresh in my mind—that there was the ability to access the court if unfairness or any illegality was perceived in the detention regime. That seemed open to lawyers to proceed very quickly and to gain rights for the people so detained. In this instance, though, this has come later and covers the field insofar as Mr Emerton seems to raise the issue of the delay, or stay, of proceedings and how it may have an unintended consequence.

Ms Jackson—Putting the question of the stay of proceedings aside for one moment, if I may, it seems to me that, given that these bills in fact do little more than provide a formalised procedure for claims of public interest immunity based on national security grounds, I cannot see that the provisions of the bill would impact on the safeguards that are contained in the other terrorism legislation.

Senator LUDWIG—We call it 'general head'.

Ms Jackson—However, the question of the stay is a very vexed one. We think that the formulation that has been provided in clause 19 is one that reflects the common law such as it exists at the moment, and we concede that there is very little law on the subject.

Senator LUDWIG—I guess that may not be very satisfying to a person trying to proceed with this or deal with both these pieces of legislation in a real environment where there may be detention ongoing and a warrant and someone trying to argue against it, and it is in a national security environment. It does not add much comfort to that process though, does it?

Ms Jackson—No, Senator, but the potential really exists already under public interest immunity.

Senator LUDWIG—The line seems to be—and perhaps you could help me with this—where civil proceedings start and finish. It seems to encompass interlocutory proceedings and preparatory steps and it seems to require an application in a civil jurisdiction. Does it include mediation? If it were court ordered mediation, I would think that it does.

Ms Jackson—Yes.

Senator LUDWIG—If it is mediation which the parties both submit to before, is there a way of avoiding litigation, and maybe considering that rather than litigating that there may be a provision in the contract or there may be agreement between the parties to proceed? We know that the Attorney-General now promotes mediation and there is now also a body that deals with mediation and the parties might go to mediation prior to contemplating civil proceedings. Would it or would it not apply in those matters?

Ms Jackson—I would think not.

Senator LUDWIG—Where there is a contract dispute, would the parties then have a provision to go off to arbitration? They might be in the middle of civil proceedings and they decide to stay the civil proceedings and consider arbitration as a way of resolving their

dispute. The court does not order it but halfway through the proceedings the parties simply decide that it is becoming expensive to litigate in this way. A certificate may not have been issued at that stage but they may not have been at the point where they were going to talk about the tintacks of the issue—it may be a defence contract with sensitive information involved. Does this bill cover that arbitration?

Ms Jackson—I would think that it would not form part of the proceedings that are before the court and therefore would not be covered.

Senator LUDWIG—Because national security information could arise in those circumstances, what is the view of the department or the Attorney-General? These proceedings are no different from civil proceedings; they are really the same in that sense. They are a form of civil proceedings in the way in which people are at least encouraged not to take more formal proceedings but the same evidence could be adduced.

Ms Jackson—But there are offences of disclosing national security information other than in the course of your duties and where you are not under an obligation to disclose it to the court those provisions may well come into play.

Senator LUDWIG—That was the short answer given to me earlier. The offences are still there and it would be an offence to provide the information—although if you unwittingly provided it there is another issue there. But in the circumstances where that would then frustrate the proceedings, what do the parties do then? You have provided a mechanism in civil proceedings to deal with security sensitive information and you have provided a mechanism to stop people releasing information, but what about people in those two circumstances where they have the stay produced but they cannot then resolve the problem because they may have to deal with that security sensitive information maybe in a redacted form or in some other way but there is no procedure for that to occur? One may use it as a shield to prevent matters going ahead or the other may use it as a sword to strike matters down.

Ms Jackson—In those circumstances I think that the practical resolve would be that the parties seeking to disclose the information or to have it disclosed would seek permission from the agency whose information it is.

Senator LUDWIG—And if that is not forthcoming? I cannot imagine the agency agreeing, quite frankly. Can you?

Ms Jackson—I guess that depends on the information.

Senator LUDWIG—What if it were a contract dispute about the technical issues of a submarine or a ship—but anyway. You say that if that is not covered by the legislation then at least those two circumstances are erased.

Ms Jackson—No.

Senator LUDWIG—The ALRC raised the issue of tribunals and the like. They are currently not covered.

Ms Jackson—They are not.

Senator LUDWIG—Is there an intention to cover that field?

Ms Jackson—I am not really in a position to answer that question, but certainly the migration tribunals and the AAT already have fairly significant provisions that relate to the protection of sensitive information. For those Commonwealth tribunals there are already a range of mechanisms that can be adopted.

Senator LUDWIG—So there is nothing you can say as to whether there is an intention to cover this field?

Ms Jackson—No.

Senator LUDWIG—Are you in a position to find out and let the committee know whether there is an intention?

Ms Jackson—I will certainly do that.

Senator LUDWIG—That would be helpful. It would extend, of course, across the board. I understand your answer in relation to the migration area. I raised the point that they already have a mechanism to deal with information of that kind, and this would then add a layer to it. The other areas are tribunals which may incidentally run into this type of problem, such as disputes about employment and the like, which could occur at the Administrative Appeals Tribunal and other areas as well, I suspect. Although I am sure they have mechanisms for dealing with this type of information, it is still being prompted by existing courts having mechanisms to deal with this and that still has not stopped the introduction of this legislation, has it?

Ms Jackson—No, but the coverage of civil proceedings was recommended by the Law Reform Commission.

Senator LUDWIG—And they seem now to have suggested tribunals as well. As to the range of proceedings, is there any idea of what the problem is currently in civil proceedings? Other than anecdotal evidence, in how many civil proceedings does sensitive information arise which the parties have problems with or which otherwise comes to the attention of the Attorney-General, who then indicates that it is security sensitive information, and the relevant department is concerned and raises it through the Attorney-General's Department or the Attorney-General's Department says that the current procedures are inadequate to deal with it?

Ms Jackson—I cannot give you an exact figure for the number of cases where this arises in civil matters but certainly the numbers are extremely small—of the order of half-a-dozen per year. Our information is that some of those proceedings are family law proceedings where one of the parties is an intelligence officer. One of the other areas involves claims, as you mentioned before, of compensation that flow from the actions of persons who happen to be security intelligence officers.

Senator LUDWIG—If that is the case, are we not using a sledgehammer to crack a nut? Why do we then have legislation that is as broad as it is when there perhaps is only a small incidence and in only a narrow field? Why wouldn't we, in the alternative, just cover some of those small areas and see whether that is adequate for the moment? If it were a painting, as we say, that is being developed then we need to fill in only a square at a time, if we are following it by the numbers.

Ms Jackson—I think that is a policy matter that really ought to be addressed to the Attorney.

Senator LUDWIG—Perhaps you could take it on notice.

CHAIR—Please seek an answer for the committee.

Senator LUDWIG—It is helpful to understand that in bringing bills forward there has got to be a mischief in some respects that is being dealt with. One of the tests that I certainly apply—and I am sure the committee more generally applies this—is: what is the mischief, what is the scale of the mischief, what is the likelihood of that mischief continuing and is the bill appropriate to and adapted to resolving that in the first instance? There is also the breadth of it and whether it overreaches. Those are the issues, amongst other matters as well, to which I certainly turn my mind to make sure that you are not simply covering the field in a more general way and using this as such an opportunity where the nature of the issue is far smaller and narrower and may require a more measured response than this one. So I would like an answer to that.

Ms Jackson—Certainly.

Senator LUDWIG—As to clauses 46A to 46G of the bill, the Law Council of Australia suggest the defence of unwitting and reasonable behaviour on the part, I suppose, of the person in the information. Have you turned your mind to whether or not that would be more appropriate than what is currently provided for in the bill?

Ms Jackson—Bearing in mind the provisions of division 5 of the Criminal Code which import mental elements of intention insofar as disclosing the information and, in relation to the physical elements, import recklessness, we feel that the result of the existing provision is adequate to deal with unwitting disclosures.

Senator LUDWIG—So you say the Law Council have nothing to be concerned about?

Ms Jackson—I could not speak for the Law Council.

Senator LUDWIG—Do you say your provision is better than their suggestion?

Ms Jackson—I am saying—

Senator LUDWIG—You must be saying that at least.

Ms Jackson—What I am saying is that the existing Criminal Code applied to these provisions would require recklessness, rather than unwitting disclosure.

Senator LUDWIG—So you do not see any merit in the defence of unwitting and unreasonable behaviour?

Ms Jackson—Not insofar as the unwitting disclosure goes, because the current law requires an intentional disclosure and recklessness as to whether or not it is national security information.

Senator LUDWIG—I refer to the opportunity for unrepresented litigants to access the fund where they may be declined a security clearance. Could you tell me how that scheme will operate and how much funds are in that scheme? As I understand it, it is a current scheme.

Ms Jackson—Yes, it is.

Senator LUDWIG—I am happy for you to take that on notice.

Ms Jackson—Thank you, I would like to take that on notice.

Senator LUDWIG—I suspect there are safeguards built into it. My concern, if perhaps you have not already heard it, is that an unrepresented litigant might be denied access to the fund. That might be legitimate in the sense that it might be fair to make that decision—or it might be unfair to make that decision. Usually you expect that there is a way of communicating that to, in this instance, the unrepresented litigant in such a way that at least they are provided with reasons why that would be the case. If perhaps there is not an appeal mechanism, at least they would have the opportunity of understanding the decision, rather than simply being told 'no'. Whether that scheme operates in that way I do not know, so perhaps you could help me with that. Chair, I will come back to a couple of these issues.

CHAIR—You can continue or we can put anything extra that you want to ask on notice.

Senator LUDWIG—I will put some questions on notice anyway, as I turn my mind to some of the particular issues raised independently in some of the submissions as well as those raised today. I will leave my questioning at this point.

CHAIR—One issue that was raised both in submissions and by a witness this morning is some concern about the provision which enables the Attorney-General to appoint a minister to perform the Attorney-General's functions under the act, where the A-G is a party to the proceeding, and concern that that does not really adequately resolve any potential conflict of interest issues. A proposition has been put forward that it might be appropriate to have an independent third party fill that role, like the IGIS or something like that. Is that a viable proposition?

Ms Jackson—Certainly there are cases in which public interest immunity affidavits have been given by senior public servants, but whether they would be considered to be independent is really a matter of speculation. They would probably not be. I am not aware of a situation where there is provision for an independent person to make that assessment. Generally, the courts have said that the Attorney or a minister is an appropriate person to make a decision that concerns the public interest in so far as it relates to national security. The IGIS is probably an alternative. Whether it fits the independence that was suggested by the submitters is another matter.

Senator LUDWIG—There is the suggestion that a specially trained security officer should be available to the courts to assist in the management and protection of security information. That was in a submission by the ALRC, and I think it is also mentioned by Professor George Williams and Dr Ben Saul. Why would you rule those people in or out, as the case may be? In this instance they are not contained within this bill, but why would you then rule them out? It seems to be that assisting the court to ensure that this sort of information is dealt with appropriately—more so than what has been going on before, because obviously there is concern that what has been going on may in fact allow security information to be aired—is what, in part, prompted this legislation.

Ms Jackson—It is certainly envisaged that the Protective Security Coordination Centre would be available to provide ongoing advice to courts, legal representatives and litigants on the measures that should be taken to protect this information and that some training would be available if the courts were to seek to have staff specially trained by the PSCC in the measures that should be adopted. I am sure that that can be arranged.

Senator LUDWIG—If there is an obvious delay and increase in costs in these type of proceedings as a consequence of this bill—and perhaps this is policy decision, but I would be interested to hear from the Attorney-General on this—this matter should be revisited. It is obvious that in the family law area and the tort area there is already a concern that existing proceedings in these jurisdictions have delays and costs associated with them. If this adds another layer of burden and can be used by applicants or parties in those proceedings to create delay and cost, it would certainly be of concern to me—especially in the family law area, where the parties are, in the main, trying to resolve the situation as quickly as they can, particularly where children are involved. However, I think you are aware that there are instances and cases reported where people do not come to these things with a clear mind and do create delays and costs. If this is another way of utilising that process to increase costs and delays to achieve a different result, it would be of concern to me. I am not suggesting the Attorney-General had that in his mind when he did it, but certainly not everyone has as clear a mind as that.

Ms Jackson—I think there are cases in which an intervener in proceedings can have the costs of those proceedings awarded against them to the benefit of the litigants in the original proceedings. That was part of the reason for describing the Attorney's role in the closed hearing as an intervener. Otherwise, as to the question of what additional costs may be caused by this, there is not any specific provision in the legislation that deals with that.

Senator LUDWIG—You know the circumstance in family law—it has been anecdotally put forward—that one party can run up the costs and time of the other to cause them to abandon the proceedings or to just dry up their resources, as part of the horrible nature of the issue. They then might latch onto this as another way of achieving that end. There is a lot of current case management going on in the Family Court to stop that happening. This might just give parties another way of doing that. If it were to happen is really the question. I am not suggesting it could happen or it would be done by the litigants, but, if it were to be perceived to be happening, would the Attorney-General then come back and look at that issue again, especially in those circumstances?

Ms Jackson—I imagine so, yes.

Senator LUDWIG—Perhaps you could ask the Attorney-General.

CHAIR—I thank you for attending today and for your assistance. There are a couple of matters you have taken on notice. The secretariat will follow up with you on those. As you may be aware, the committee is trying to process three bills this week as far as the hearing arrangements—and reporting arrangements, for that matter—are concerned. So your assistance with returning those responses would be gratefully received. I thank all witnesses who have given evidence today and I declare this hearing adjourned.

Committee adjourned at 12.47 p.m.