



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION  
COMMITTEE

**Reference: National Security Information (Criminal Proceedings)  
(Consequential Amendments) Bill 2004; National Security Information  
(Criminal Proceedings) Bill 2004**

MONDAY, 5 JULY 2004

SYDNEY

BY AUTHORITY OF THE SENATE



## **INTERNET**

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to:  
**<http://parlinfoweb.aph.gov.au>**

**WITNESSES**

**BECKETT, Mr Simeon, National Committee Member, Australian Lawyers for Human Rights ..... 28**

**CONNORS, Ms Kate, Legal Officer, Australian Law Reform Commission..... 1**

**DOBINSON, Mr Jonathan, Legal Officer, Australian Law Reform Commission ..... 1**

**JACKSON, Ms Maggie, Acting Principal Legal Officer, Attorney-General’s Department..... 36**

**KOBUS, Ms Kirsten Leigh, Acting Principal Legal Officer, Attorney-General’s Department..... 36**

**RICE, Mr Simon, OAM, President, Australian Lawyers for Human Rights ..... 28**

**RYAN, Ms Inez Bernadette, Policy Officer, Australian Press Council ..... 23**

**SELTH, Mr Philip Alan, Executive Director, New South Wales Bar Association..... 11**

**WALKER, Mr Bret William, SC, Former President, Law Council of Australia ..... 11**

**WEISBROT, Professor David, President, Australian Law Reform Commission ..... 1**

---

**SENATE****LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE****Monday, 5 July 2004**

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

**Participating members:** Senators Abetz, Bishop, Brandis, Brown, Carr, Chapman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Hunphries, Kirk, Knowles, Lees, Lightfoot, Mackay, McGauran, McLucas, Murphy, Nettle, Ray, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

Senator Bartlett for matters relating to the Immigration and Multicultural Affairs portfolio

**Senators in attendance:** Senators Bolkus, Brandis, Mason and Payne

**Terms of reference for the inquiry:**

National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004.

**Committee met at 9.04 a.m.**

**CONNORS, Ms Kate, Legal Officer, Australian Law Reform Commission**

**DOBINSON, Mr Jonathan, Legal Officer, Australian Law Reform Commission**

**WEISBROT, Professor David, President, Australian Law Reform Commission**

**CHAIR**—I declare open this hearing of the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the [National Security Information \(Criminal Proceedings\) Bill 2004](#) and the [National Security Information \(Criminal Proceedings\) \(Consequential Amendments\) Bill 2004](#). On 17 June 2004 the Senate referred the provisions of these bills to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 19 August 2004. The explanatory memoranda advise that the bills seek to protect information from disclosure during a proceeding for a Commonwealth offence where the disclosure is likely to prejudice Australia's national security. This is the first hearing that the committee has held into these bills.

I welcome witnesses from the Australian Law Reform Commission. The Australian Law Reform Commission has lodged a submission with the committee—submission No. 1. Do you have any amendments or alterations to make to that submission?

**Prof. Weisbrot**—No, though there are a few inconsequential typos for which I apologise.

**CHAIR**—I invite you to make an opening statement. At the conclusion of that, we will go to questions from the committee.

**Prof. Weisbrot**—We completed the report that we were commissioned to do on the protection of classified and security sensitive information, which we called *Keeping secrets: the protection of classified and security sensitive information*. The report looks

comprehensively at how to deal with classified and security sensitive information, starting from the point of the nature, organisation and content of the *Protective Security Manual* all the way through to prosecuting people for various offences relating to unlawful disclosure and everything in between.

In relation to legal proceedings, the commission's scheme is meant to apply not only to criminal proceedings—which is the substance of the present bills—but also to administrative proceedings and civil proceedings. In terms of sheer numbers, we think that there will be many more administrative proceedings dealing with this sort of information than there will be criminal trials. The ALRC's report touches on many or all of the issues dealt with in the present bills but also goes beyond that.

**CHAIR**—In the process of the legislation being produced, was the ALRC consulted?

**Prof. Weisbrot**—No.

**Senator BOLKUS**—In all your deliberations, have you looked at constitutional issues we might have in relation to this legislation?

**Prof. Weisbrot**—That came up mainly in the area of security clearances. The Commonwealth has the power to deal with matters of national security. We particularly looked at whether judges or juries might be security cleared. There has been some suggestion in the media that that would be an option, and there has been some suggestion in other countries about that possibility. Our view, as is stated in the report, is that it would be improper under chapter III of the Constitution to seek to security clear judges or juries sitting under section 80 of the Constitution.

**Senator BOLKUS**—Did you say 'improper'?

**Prof. Weisbrot**—Yes, it would not be proper.

**Senator BOLKUS**—In your view, would it be constitutional?

**Prof. Weisbrot**—It would be unconstitutional. That view is the same as is taken in the United States, where there has never been any effort to security clear judges and juries in these matters.

**Senator BOLKUS**—That is one aspect of possible problems. The legislation provides for a capacity to have a prosecution where the defendant does not know the evidence against him or her, does not have the right to have a lawyer present in some circumstances, may not know the identity of the witnesses and may not be present themselves. Have you looked at whether those sorts of aspects in the judicial process would be found to be within the constitutional requirements?

**Prof. Weisbrot**—We did not consider the legislation as part of our report because the report was functionally completed by the time it came out. We tried to provide an appropriate balance with the court at the centre of any controversy in relation to the way proceedings were handled. In terms of evidence that was going to be brought forward, the essence of the scheme is that all of it be brought forward as far possible, preferably before trial, so that the court would have an opportunity to look at the nature of the evidence being presented and to consider the government's pleas to restrict disclosure to the extent possible, balancing that against fundamental fairness to the accused.

Ultimately the government would have the right to not put forward evidence that it felt was causing any concern to national security, but the court would have the ultimate authority in the proceedings to say that it would be unfair to the accused to be in a position where they could not cross-examine a key witness or could not to see a critical piece of evidence. The court would then be in a position to say that the charges would have to be withdrawn or that it would amount to a breach of process.

**Senator BOLKUS**—This legislation may provide in some circumstances for that process to be early in the actual trial, but what about in pre-trials and committee hearings? Is that a relevant consideration to a fair trial?

**Prof. Weisbrot**—Our proposal would be that before any evidence of this sort is brought—whether it was a bail hearing, a pre-trial hearing or any of those—these are the matters that would be taken into consideration.

**Senator BOLKUS**—So what you are saying is that you have not considered this bill; you are talking about your own model.

**Prof. Weisbrot**—The bill was not part of our report.

**Senator BOLKUS**—What I am trying to get at is your information, knowledge or advice in respect of some of the provisions in the legislation that is before us. You talk about one aspect of the legislation which would make it unconstitutional in your view but, as it is proposed, the legislation would involve the court making a judgment as to the facts—a consideration that one would find to be the province of juries and federal criminal proceedings. Have you had any advice, and do you have a view, as to whether that sort of provision would run contrary to chapter III protection?

**Prof. Weisbrot**—I did not read the bill that way. To explain the particular concern, as our scheme was developed, and as I understood the bill would work, the court would look at evidence admissible but would not give it particular weight or determine what effect it would have on the proceedings. So, if material classified as security sensitive information was an issue in the trial, the court would look at the material and see whether it could be presented in its current form, having regard to security concerns; whether there might be some need to have it redacted; or whether it could be presented in full form but shielded from external gaze so that the judge and jury might have regard to it. There would be screens or electronic means of preventing it from broader public disclosure. Sensitive witnesses might appear before the court, with a screen or some sort of blocking mechanism that would protect their identity. The court would have a role in that sense, as it would in any other case, in deciding what evidence was admissible and how it was presented, but the court would not make findings of fact that were relevant to the party in that sense.

**Senator BOLKUS**—I think in some respects we are at cross-purposes here. You are keen on your model, which is not reflected in the legislation. We have legislation before us that we have to give some consideration to. I do not think your model is the one that is preferred by the government. Are you in a position to talk about this legislation at all?

**Prof. Weisbrot**—Which particular provision are you asking about?

**Senator BOLKUS**—The ones I keep on asking you about. I have asked you about two so far, and you have veered off and answered about your model. For instance, have you considered whether this legislation conforms with article 14 of the International Covenant on Civil and Political Rights?

**Prof. Weisbrot**—The particular piece of legislation was not something that was before the commission. We took into account the ICCPR in developing our recommendations.

**Senator MASON**—Why do we need this legislation? What is wrong with the old protections that have been in this country since Federation?

**Prof. Weisbrot**—Ultimately, you could continue to operate in that way. Most of the comparable countries to Australia that we looked at—the US, Canada, New Zealand and the UK—had moved to a specific legislative scheme that governed this area. I suppose it is because these issues are more and more before the courts in one way or another. Again, fortunately, we have not had a large number of criminal matters relating to classified security sensitive information. It does come up more frequently in the case of administrative proceedings—for example, public servants or others who were denied the security clearance level that they believed they deserved, passport cancellations, visa denials or restrictions, and a range of other matters like that.

The idea here is that it would clarify the role of the courts and the options that the courts would have available to them. At the moment some courts do allow for redacted statements, for example, or do take certain precautions in relation to public disclosure of evidence, but there is no formal scheme under which they operate. We thought it would be preferable to set out very clearly how this was done. The other benefit of the scheme is that it would move, as I said earlier, all of these matters up to the front of the trial or preferably pre trial or pre proceedings, so that these issues could be got out of the way very early on.

Again, discussions overseas suggested that that was a feature of the legislation in, for example, the US, that was very much favoured by prosecutors, defence counsel and the intelligence community, who had an idea early on as to what strategic decisions they might have to make. A problem in leaving it later is that you can get the sort of grey-mail cases that arise where a party to the proceedings pretty much knows what is in evidence and they try to force the disclosure of that evidence basically in exchange for either charges being dropped or charges being reduced.

The other mechanism that we wanted to bring in was a court security officer, which we found worked well overseas as well. We interviewed the person who served in effect as the court security officer in the Lappas case. That person was a member of the Australian Federal Police. She told us that she was essentially flying by the seat of her pants and that there was no precedent about how to deal with it, how to securely transfer material offsite into the courtroom, how to secure it in the courtroom, how to give the advice to counsel and the courts about what they could or could not put in the laptops and what they had to do with that.

**Senator MASON**—Is that right? So there is no workable precedent in the common law world for dealing with this situation?

**Prof. Weisbrot**—There is in the common law world. We have essentially adopted the model of a court security officer that is used in the United States. There was no precedent in

Australia. There was no guidebook or manual about how to deal with these issues. That is because they come up so rarely. Again, when the Lappas case came up, it was a very unusual one, and the Wispelaere case was dealt with offshore. We thought that this was a very useful mechanism. As with the issue in relation to security clearances of lawyers, it has simply not been dealt with sufficiently for the courts to have a clear regime in mind.

For all of those reasons, we thought that it would be useful to encapsulate all of those mechanism and options into a discrete act. We had some considerable debate about whether it should go into the Evidence Act and be another part of it. We decided on balance that these were extraordinary measures and we did not want them to leak into the normal day-to-day court proceedings, so we wanted them in a discrete act.

**Senator MASON**—Having said that, do you think it would have been practical to restrict the application of this legislation more specifically? It applies to a criminal proceeding in any court exercising federal jurisdiction. Would it have been appropriate or practical to narrow the application of this act simply to legislation dealing with, for example, terrorism and not have it dealing with every single criminal proceeding—or would that be impractical?

**Prof. Weisbrot**—We did say that it applies only in those cases where classified and security sensitive information is at issue. Terrorism would be one grave class of those, but it would also come up in areas of espionage, in alleged whistleblower cases or in a whole range of administrative type proceedings. It can also come up in civil proceedings. There is a law suit against the Commonwealth in relation to the suicide of an intelligence officer. I presume that issues of classified and security sensitive information will arise in the course of that civil proceeding so, for those reasons, we did not seek to restrict it to terrorism cases but more broadly to those issues in which national security information was at issue.

We did wish to make it separate from other cases where sensitive information more generally comes out. Threshold questions for us were whether there was something different about this class of cases from, say, an undercover drug operation and whether there were issues about protecting the technology—the means by which information is accumulated. There are also issues about how you protect the identity of undercover agents, and those are all very sensitive. Those are dealt with under the ordinary realms of the law and public interest immunity and so on. We thought there was an added dimension here, however. If a drug operation comes unstuck that may be unfortunate in the public interest, but national security cases by their definition go to the heart of Australia's security. Also, there are very significant international elements. As we understand it, a preponderance of Australia's security information is overseas sourced, and there are always strong considerations about protecting the integrity of that information and the continued flows of that information. So there are some added dimensions we thought that merited a separate regime.

**Senator MASON**—I suppose I asked the question because the bill defines 'federal criminal proceeding', as it always does, as a criminal proceeding in any court exercising federal jurisdiction, whether the offence or any of the offences concerned are against the law of the Commonwealth or a court proceeding or in relation to a matter arising under the Extradition Act 1998. The scope of the application of the bill is very broad. I wonder whether it would be appropriate and practical to restrict the application of the bill in relation to a listed matter of offences rather than to have it in relation to every federal criminal proceeding.

**Prof. Weisbrot**—It may be possible. You would have to sit down and work out a detailed schedule. Obviously it would apply to some anticipatable offences such as terrorism offences. I imagine it could apply to a whole range of other offences that are incidental to acts of terrorism or other sorts of criminal conduct that may have a goal of breaching national security. I guess the restricting factor is not so much the nature of the offence but the fact that classified and security sensitive information will be adduced at trial. You would not expect that would come up in a run of the mill assault or malicious damage to property or so on.

**Senator MASON**—You are right, but the committee, as always, is concerned about the potential for citizens' liberties to be impinged upon, and this bill does that. It should restrict it as much as possible. There is a very good argument, and you have outlined that we need this legislation firstly, because of new concerns about international security and, secondly, because there is not a streamlined procedure for so doing. I understand that—that is fair enough—but we would not want citizens' liberties to be further curtailed in areas not directly related to that. That is the committee's concern.

**CHAIR**—Professor, as I understand the ALRC report, it has a greater focus on the role of the court in proceedings, as opposed to the centrality of the Attorney-General as it is seen perhaps in this draft bill. Is that a reasonable observation?

**Prof. Weisbrot**—We were pleased to see that the bill does not provide for conclusive ministerial certificates. That would run directly contrary to the essence of our recommendations in which we put the court at the centre. The ministerial certificates that are provided for in the bill are ones that are given to the court. I guess the difference in the pattern of our recommendations and the bill is that we provide the court with a little bit more discretion about how to deal with that certificate and how to deal with the evidence. We give the court a little bit more discretion and a little bit more wiggle room. There is not that fundamental split between the bill and our recommendations that there would have been if the bill had tried to utilise the mechanism of conclusive certificates. We traced in our report that the position in other comparable Commonwealth countries—the US, Canada, New Zealand and the UK—is similar in that they have not gone the route of conclusive ministerial certificates.

In both cases, the court is still at the centre of making those key determinations and making those balances between restrictions on evidence coming in and trying to afford the defence or the plaintiff in a civil matter with the range of tools that they need to properly present their case.

**CHAIR**—I think you have the advantage certainly over me—though I am not sure about the rest of the committee—in terms of international comparisons in this area. If you combine the concept of the use of statement of facts, where the court is making the judgment about what facts the information in the document would be likely to prove, with dealing with what might be substantive issues of fact in closed hearings to which either the accused or their counsel or both are possibly excluded so that a right to be tried in one's own presence and defend oneself in person or through legal assistance of one's own choosing—to paraphrase the ICCPR—is removed and then to allow the prosecution to have access to the court in closed hearings while the defence does not, do those elements appear in comparable international provisions in relation to this area?

**Prof. Weisbrot**—Not that I am aware of. I think I now understand the essence of Senator Bolkus's earlier question. Our proposals would not permit a situation where there were criminal proceedings without the presence of the accused. Our mechanism in relation to issues about counsel related to security clearances was to suggest—again, because these matters were dealt with very early on—that the court would say to counsel, 'This is material which we've now decided can only be seen by someone with an appropriate level of security clearance. Do you have that? If not, you should go get one and that process should be facilitated by the relevant part of executive government. If you're not prepared to get one or you can't get one, you should withdraw from the case and allow counsel who has that clearance to participate.' We were concerned that the defendant would not have effective assistance of counsel.

In that area we again left a bit more room for the court's discretion. For example, the court might say, 'We will allow you access to this evidence under some strict undertakings,' which might facilitate more effective assistance of counsel. We were trying to avoid a situation we were told about by British human rights lawyers where, in some of the not criminal proceedings but secret immigration proceedings in the UK, counsel who were not security cleared would have to sit outside the room while important issues were being determined inside the court. We did not wish to see that. We saw that the most important thing was for the lawyer to be in there and for the person to be properly represented. Again, our proposals made no recommendations for criminal proceedings to go ahead absent the accused and ideally the person's counsel.

**CHAIR**—And you are not aware of any international example where they can go ahead absent the accused and counsel?

**Prof. Weisbrot**—Not off the top of my head. In the UK, immigration proceedings do allow that in some circumstances but not in criminal proceedings. My recollection is that it is detailed specifically in the report.

**Senator BOLKUS**—I have one last question. It follows in a sense from Senator Mason's question. My concern is why we would not allow the current level of discretion in the courts that we have now. Where is the perceived problem? Isn't the judiciary best placed to make the assessment? The A-G's department has contended that the existing processes do not provide adequate, consistent and predictable protection but we are talking about cases coming from all sorts of perspectives and situations in the normal course of judicial work. I am yet to be convinced that there needs to be some sort of regimentation—a definition of particular instances, cases and outcomes. Why not leave it to the courts?

**Prof. Weisbrot**—If you talked about regimentation, I would agree. The focus of the ALRC was more about standardisation and providing the courts with an adequate statutory framework in which to do their business so that you could assume there would be comparable decision making across the various courts.

**Senator BOLKUS**—Is that a problem now? Is there not comparable decision making across the courts?

**Prof. Weisbrot**—There is no statutory framework.

**Senator BOLKUS**—I am not asking you about a statutory framework; I am asking you whether there is a real problem. Is there inconsistent decision making across the courts?

**Prof. Weisbrot**—We do not know.

**Senator BOLKUS**—You say there is a need for there not to be. But is there a need? Do we have a situation now that courts are inconsistent? You cannot tell me that we do have that situation.

**Prof. Weisbrot**—I guess it is our same basic policy on having a uniform Evidence Act and having other standard legislative schemes that indicate the basic framework for the court to operate. It was not our intention to fetter the court's discretion, and I do not believe we have done that. We have made clear in the report that our balance was not to limit the court's discretion and to increase the power of executive government; rather, what we have done is to say to the courts, 'Here is a clear and consistent framework for dealing with this sort of information.' The stakes in these cases are quite high.

**Senator BOLKUS**—I am sorry to interrupt you. There is a framework now, isn't there? The court has to take into account certain considerations?

**Prof. Weisbrot**—In the very broad. There is no court security officer mechanism to provide that basic assistance. There is nothing that tells them when or whether redacted information is appropriate for use. At present these matters do not necessarily come up early on in a special hearing when all of this can be worked out. I think the scheme is meant to provide just the greater rationality to these sorts of proceedings.

**Senator BOLKUS**—Your scheme might, but you are talking about a process early on. That is not provided for specifically in the federal scheme. That is not a requirement.

**Prof. Weisbrot**—It is, although in the bill it is only triggered by a prosecution alerting the court or by a ministerial certificate. In our scheme it would be triggered by either of the parties or the court or tribunal on its own motion.

**Senator BOLKUS**—How early on is it provided for in the federal scheme?

**Prof. Weisbrot**—I guess as soon as the prosecutor notifies the court that there is an issue, or as soon as there is a ministerial certificate.

**Senator BOLKUS**—So it could be halfway through the trial?

**Prof. Weisbrot**—It could come late in any proceeding where the awareness of the need for that information comes late. You could have a garden variety case which suddenly turns out to be about terror. It may be about the purchase of certain materials and it then turns out that the person has been under observation for matters relating to national security.

**Senator BOLKUS**—In that circumstance, the prosecution would be aware of that. They would be aware early on in the process.

**Prof. Weisbrot**—You would assume so.

**Senator BOLKUS**—So what do we say—that they should be allowed to leave that as a back-pocket issue to raise halfway through the trial?

**Prof. Weisbrot**—Under our scheme, and I believe even under the bill, if there was an awareness of that at any time, it should come as early as possible. I would imagine that the court would treat as a rather serious breach of the ethical obligations on a prosecution for a prosecution not to raise matters of that severity at the very first instance.

**Senator BOLKUS**—But what is the deterrent? What can the court do in those circumstances?

**Prof. Weisbrot**—In those circumstances—as has happened in other cases—they can refuse to admit evidence that is introduced at a late time, they can declare that it is an abuse of process or they can drop certain charges. The courts have a fair amount of discretion where they believe that the parties have not acted in good faith.

**Senator BOLKUS**—If they can prove the absence of good faith. The court in a sense—or in a practical way—would be stuck in a corner.

**Prof. Weisbrot**—As a matter of practice, I think it would normally be fairly evident whether the prosecution had access to that evidence at that particular time.

**Senator MASON**—Just to follow up from Senator Bolkus, I suppose the point the committee is trying to stretch is that this is a matter of degree. I suspect that in a few minutes time the Law Council and Mr Walker will make a submission saying that there are some aspects of the pre-trial conference and the Attorney-General being informed that are good things but the major overhaul perhaps is not necessary. The point that we are trying to make is that somewhere there is perhaps the right answer. Whether, as Senator Bolkus was saying, the existing protections are sufficient or nearly sufficient, is the issue for us. That is what we have to be satisfied on.

**Prof. Weisbrot**—I understand that. That was of course a threshold question for the ALRC. Our terms of reference asked: are the existing mechanisms sufficient to protect the various interests of accused people as well as the government's interest in protecting national security of the nation? Our concluded view was that it would be advantageous for Australia to enact legislation, as we recommended, that would provide some clarity and consistency and give an idea for the courts. Again I make the point that the centrepiece of our recommendations was the enactment of a national security information procedures act, but we went well beyond that on both sides. We also had many recommendations in relation to the *Protective Security Manual*, training of government officers, providing disclosure regimes, whistleblower regimes in appropriate cases, and looking at mechanisms for assisting the courts—as in court security officers.

**Senator MASON**—Of course there is a lot of agreement—even in other submissions. On some of those other issues you mention, I think there is agreement all round.

**Prof. Weisbrot**—On the issue of whether we needed specific legislation here, in talking to both US attorneys and defence counsel in the United States—including some of the human rights NGOs that were involved in the brokering of their CIPA (Classified Information Procedures Act (US))—we found that there was a view that it was useful to have it set down in a legislative code and it was particularly useful to have all of these things brought up very early on in the proceedings. In those circumstances, our view was that it would be better to have this sort of legislation. Again, our concession to it not filtering back into the process and

turning what we think are extraordinary circumstances into the norm was to have it set out in a separate piece of legislation dealing clearly with classified and security sensitive information, not something simply in the Evidence Act. We were concerned, for example, about some things that are brought in as supposedly extraordinary procedures dealing with drug trafficking cases that eventually find their way back into the norm of criminal procedure.

**CHAIR**—Professor, I do not think there is anything further but, if there is, the committee may take those matters up with you on notice and we would appreciate the commission's assistance in clarifying any of those further questions. Thank you very much for appearing this morning.

[9.40 a.m.]

**SELTH, Mr Philip Alan, Executive Director, New South Wales Bar Association**

**WALKER, Mr Bret William, SC, Former President, Law Council of Australia**

**CHAIR**—Welcome. The Law Council of Australia has made a submission to the committee which we have numbered 8. Are there any amendments or alterations you wish to make to that submission?

**Mr Walker**—No, there are not.

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

**Mr Walker**—I am a former president of the New South Wales Bar Association, a former president of the Law Council of Australia and the Law Council's delegate for this morning. The emphasis that the Law Council would seek to place upon the submissions it has already made, and for that matter upon the observations contained in the Australian Law Reform Commission's 1998 report, is really focused on the one point—fair trial values. There are a couple of matters of detail that arise out of that but, in general principle, we first of all have a major concern that, under an action made in accordance with this bill, what we would call critical or fundamental aspects of the assembly and testing—two different concepts—of a prosecution case will fall under the control of the court and the prosecution in the exercise of its decision making processes without the defence being present or participating. This will largely represent a sea change for the bench. Hitherto, the hands-off exercise by the bench in relation to prosecutorial decision making is because the bench sits between defence and prosecution, and the impartiality of the bench requires that it not be engaged in prosecutorial decision making. There is no assurance whatever in this bill, except in the institutional impartiality we expect from our judges, that the prosecution and the court will not in effect be constructing part of the prosecution case against the defence in the absence of the defence. We have never had that happen before in criminal proceedings. That is because the judges are forced to make decisions involving balance between a number of matters in which, among other things, they are commanded to rate so-called national security higher than fair trial. In truth, the act requires an almost impossible calculus. There is no doubt that, because the prosecution makes the decisions about what evidence will be the subject of this kind of special procedure, the judge is becoming closely involved, in the absence of the defence, in deciding what will and will not be part of the case against the defence.

The next point flows from that. It is not a simple black-and-white matter to look at evidence which may hurt an accused's prospects—that is, contribute towards proof of guilt—and evidence which may help the prospects of the defence; that is, give rise to the possibility of exculpation, particularly bearing in mind that one can be exculpated not by proving that one is innocent, perish the thought, but by simply leaving a reasonable doubt at the end of a prosecution case. It is not the case, as I am sure any prosecutor will tell you, that they can divide their witnesses up into the goodies and the baddies—the goodies are for the prosecution and the baddies are for the defence—and every word the goodies say supports guilt and vice versa. That is simply not true.

So a decision not to call a witness not only spares the accused that witness's testimony against the accused but also spares the court the prospect that weaknesses in that witness's evidence not only will affect the credibility of that witness's testimony but also may affect the whole credibility of the case. It is for those reasons that the judge will, in the absence of the defence, be engaged in an exercise which makes, as I say, a prosecution case—assembles a prosecution dossier—and the judge cannot possibly appoint himself or herself as defence counsel in that. They do not know what the defence case is, assuming that the concept of a defence case is a useful one in any event.

We very much deprecate and regard as raising some very serious matters of judicial process and thus, ultimately, when push comes to shove, of chapter III validity in relation to critical decisions about the prosecution case involving judicial determination. What is the alternative to that? The alternative model of course is that upon which the courts have insisted for a long time: the prosecution exercises its discretion and makes its decisions as to the witnesses to be called, subject to some very well-known, ultimately judicially supervised, professional obligations—which, for example, the directors of public prosecutions around this country have cemented into some extremely sophisticated and, in my view, enlightened disclosure policy processes and protocols. That of course leaves the court out of the decision and does not list the court as one of the authors or editors of the prosecution dossier against the accused.

The second point that we are concerned about really arises from some comments that one can pick up in the explanatory memorandum and then try to trace through into the bill. On page 2 of the explanatory memorandum under the subheading 'Trial' there is general reference to the pre-trial process of attorneys, certificates and court rulings. The explanatory memorandum—written, one assumes, by people who are intimately aware of the political intentions of the bill but are equally technically aware of what its words are meant to mean—simply gives two possibilities. One is that the Attorney-General wins the pre-trial rulings, that the information not be disclosed et cetera 'in which case the trial continues or the defendant appeals'. That means of course that, if the defendant appeal fails, the trial continues. That is the essence: the trial continues. The same thing is said to follow if the Attorney-General loses the rulings—that is, 'in which case the trial continues or the prosecution appeals'.

This notion of the trial continuing has given rise in relation to fair trial values to the following problems from the text of the bill. Section 18 of the bill says:

The power of a court to control the conduct of a federal criminal proceeding—

which is one of the most important powers we give judicial officers under chapter III of the Constitution—

in particular with respect to abuse of process—

so the target of this provision is really clear—

is not affected by this Act—

If you stop at that point, you think, 'That's marvellous; chapter III is preserved in pristine glory,' but it goes on to say—and here is our fear:

except so far as this Act expressly or impliedly provides otherwise.

One thing to be said about that is that these are completely redundant words. If we are concerned about what the act ‘expressly or impliedly provides otherwise’, that is provided otherwise and it will just have effect.

Why is section 18 in? To make it very clear, including ultimately to the High Court, that where you can find diminution of the ‘power of a court to control the conduct of a federal criminal proceeding, in particular with respect to abuse of process,’ do not be surprised because parliament has thought about that and is willing to have it happen ‘expressly or impliedly’.

The implication arises from remembering those words of the explanatory memorandum I have quoted and then going to section 29 and the succeeding provisions. It would appear that the implication of the scheme of this act is that, once there has been a determination concerning restricted disclosure—either complete nondisclosure or redacted disclosure—and in particular, the one that most concerns us, once there has been a decision about a witness not being called, a witness who may exculpate as well as inculpate, then at that point the expectation, indeed the implied requirement on this argument—one day, perhaps, I will have a brief to argue there is no requirement, but you can see what the bill’s authors have as an ambition—is to proceed. The significance of that is that in this country, and dear to parliament’s heart in particular, we are used to the idea that there are some ‘national interest matters’ which may trump fair trial, not by forcing a trial to go on but by remaining unmoved by the prospect of an unfair trial.

Let me give you an example: parliamentary privilege. We are all used to the idea that, where matters have been said under parliamentary privilege, or where matters may not be revealed in a court because of parliamentary privilege, and that affects the fairness of a trial—for example, someone may not be contradicted by a published statement with which they may not be confronted in a court; defamation proceedings are the classic example—then the court’s response is normally to stay the court’s proceedings conditionally or permanently, depending upon the likelihood of the house in question waiving the privilege, so that an injustice will not be done. But there will not be a trial which is unfair. We are used to that idea; we just accept that balance. Parliamentary privilege is so important that we will not allow an unfair trial to go ahead. We do not say, ‘Parliamentary privilege is so important it will remain intact, and we will accept a diminution in the fairness of the trial and force the trial to go on.’ That in our view is what the scheme requires. It is subtly announced in section 18 and rather more plainly seen in the explanatory memorandum of this act—that, when a witness in particular is held back from a jury, meaning held back from cross-examination on the part of the accused, then trial will nonetheless go on.

The High Court in *Dietrich* said, ‘Of course the court does not control the funding of criminal trials, perish the thought, the executive does.’ But, when we observe that there is a lack of legal representation—and let me assume that that comes about through a lack of funding—of such a kind in such a case that there will be unfair process, the court does not say: ‘Bad luck. Let’s steam ahead.’ The court stops it notwithstanding the evident public interest in the vindication of law by the prosecution of crime. It is for all those reasons that we respectfully suggest that there has already been a cultural balance struck in this country and in similar countries that we will not allow unfair trials on any basis ever. It seems to me that

there is a technical legal argument, which happens also to have a strong social foundation, in Chapter III of the Constitution which says that that is actually an untradable aspect of the administration of justice—that parliament cannot require unfair trials. One thing that is clear to anybody who has ever argued these points or heard argument on these points is that the line or the categorisation of pigeonholing of aspects of a trial to make them unfair or fair does not proceed neatly and is not easy, but it can be safely suggested that depriving the defence of an untrammelled opportunity to be heard about the admissibility of evidence is one of those. There is not a big difference conceptually between the admissibility of evidence and what I am going to call the ‘nondisclosability’ of it. They both have the effect that the evidence does not get in.

If you contemplate that this bill correctly and very neatly concentrates attention on the minutia of a trial, all this apparatus may suddenly spring out of the ceiling of the courtroom into action at a point of a particular question being asked, the answer to which a prosecutor guesses or fears. That means that we do contemplate that, with the best will in the world, this will not be pre-trialled; it will come out because of cross-examination. In this country the accused’s representative does not have to forewarn the Crown of its cross-examination. So at that point you have the spectacle of a Crown witness; the defence wanting them to answer; a forensic judgment that the answer will assist in either enhancing the prospect of reasonable doubt emerging or actually running a positive case, for example; the Crown bringing all of this apparatus in; the judge being forced to adjourn, no discretions involved; and the judge then being forced to make a decision in which a fair trial is said to be of less weight than national security.

The final thing that we want to say is that we think that a fair trial is part of national security. It is just not true to say that a free citizenry stands apart from national interests. It is just not true to say there is any transcendent national interest to protect Australia which does not involve protecting and enhancing Australian freedoms. They are not separate concepts; they are all the same thing.

So you go back finally to the definition of national security and you wonder what on earth is going on. In the bill national security means: our defence, which is the one that dominates thinking in the area, and correctly; security, which is getting a little woollier; and international relations, which is ludicrous—international relations involved, for example, not offending people who will be tyrants. That is absurd. We are not seriously interested in all this apparatus being involved because evidence in a court proceeding may offend a tyrant—for example, by calling them a tyrant. The bill states that national security also means law enforcement interests. That is a bit closer to motherhood because it involves, in particular, the international cooperation without which neither organised crime nor terrorism could be combated. On the other hand, it also involves liaison with police forces whom Australian citizens would deplore.

Finally, the bill states that national security also means national interests. I am sorry, but ‘national interests’ is far too vague to be a banner under which this apparatus deliberately entrenching upon fair trial should ever be put forward. National interests include, for example, the enhancement of exports—or at least I hope it does. For the life of me, I do not understand how matters of that kind, of national interest—which ought thoroughly to describe everything

of the houses of parliament debate—could be seen as an appropriate definition by which one intrudes this alien element into criminal process. That completes what I wanted to say.

**CHAIR**—In fact, Mr Walker, the definition of national interest is ‘economic, technological or scientific interests important to the stability and integrity of a nation’.

**Mr Walker**—Yes.

**CHAIR**—So one imagines our trading interests at least fall into part 1 of that definition. You have concentrated on a couple of issues in your remarks this morning, but I want to ask you in relation to fair trial values about the position of the defendant in the proceedings that might play out under this bill and perhaps the Law Council’s view on where a defendant would find themselves.

**Mr Walker**—They would find themselves in certain circumstances. I would align myself with everybody who comfortingly says ‘rare, we hope’, but that is not the test of whether the law is a good one. Quite literally, they find themselves outside the room. All of us are already used to the idea that, in some cases, the defendant cannot be present. But those are the cases where the defendant insists on tearing the dock to pieces and throwing the fragments at the judge or yelling and screaming. In other words, the exception exists only in order to allow the fair trial to proceed. You cannot have a fair trial if it is disrupted.

Exceptions that are designed to promote the rule are always acceptable. But these exceptions are designed to promote something which is outside fair trial; that is, they involve this somewhat amorphous concept of national security which will steamroller the particular trial rather than be served by the trial. The Law Council’s position has no nuances at all. We simply and plainly oppose any concept whereby a non-disruptive accused is absent for any aspect of the trial process.

The question as to pre-trial processes is therefore not merely technical but also substantive. It is not the case that accuseds are routinely present to hear their counsel argue *voir dire* matters before arraignment or before a jury is empanelled—as, for example, in New South Wales. Largely that has to do with inconvenience and security problems with prisoners on the road, literally. Obviously video link will permit a virtual presence if not a physical one. None of that will be availed of, because the notion of these provisions is precisely to deny them knowledge of what is going on. Without knowledge you cannot argue against it, and without argument against it you do not have accusatorial proceedings—and the court, as I say, comes on board unwillingly.

I do not know what the court or the judge is meant to do. You cannot appoint yourself defence counsel and you should not be a friendly part of the prosecution, so it is a very odd exercise. In this country the accused’s position ought to be that they are present at every argument, either personally or through their representative, which will have an effect on the outcome of the process. On that basis—which includes a presence by their representative—you can see that the Law Council is fundamentally and adamantly opposed to some of the very important parts of this scheme. They are not incidental parts; they are very important parts.

**Senator BOLKUS**—In my 24 years in politics I have seen some fairly offensive pieces of legislation but, unless I have got it wrong, this one appears to be the most pernicious of the

lot. You say that under this legislation—if I have got it right—there is provision to ensure there is no right of presence; witnesses may not be identifiable to the defendant; witnesses who may be available to be used to clear them may not know the evidence and cannot test it; given the mechanism of the criterion of ‘likely to’, the burden of proof is watered down; and hearings can be held in camera without notice. In fact, I believe it is quite possible that the whole case could fall under one or another of those legs. Does the council have a view as to whether each of these provisions in themselves or a combination of them would raise sufficient constitutional questions to strike this legislation out under chapter 3?

**Mr Walker**—Yes and yes: yes, we have a view; and yes, it does.

**Senator BOLKUS**—Would it be a combination of these provisions or just the individual aspects?

**Mr Walker**—It will always be a combination. Some aspects you have just named would not trouble me. Using a test of ‘likely’ is not something which, for an adjectival issue, would threaten any fundamental principle. Obviously that is not the issue of guilt; it has to do with the effects of giving evidence—and that is probably an orthodox approach. I would venture to suggest that it is the combination of critical junctures in the process, including its pre-trial phase, being determined without representation of the accused.

I have a particular interest in the notion that, by reason of the absence of the accused and the absence of contesting arguments, the judge is in danger of appearing to be enlisted with the prosecution. It is as though they come out from behind a curtain at some phase in the trial and say to the accused, ‘The news is that we’ve been in this back room and we’ve come up with the following: you may have that information in this reduced form; you may not ask any questions of that witness.’

You will recall that there is a provision in proposed section 31 of the bill which denies that orders have the effect that there are grounds for re-conducting any part of the proceedings that took place before the trial began, for example. That is one of the indications in relation to the section 18 point I made that this scheme implies there will be contractions of fair trial expectations.

We think there are difficulties and we do not think it is easy to strike these balances, but we doubt whether the mischief exists to justify such a different form of act. We say that for this reason: take one of the aspects of national security which is really important and which will exist until there ever comes the happy day of there no longer being international terrorism—that is, no doubt organised crime will continue as long as there are human beings—and which involves international law enforcement cooperation. All organised crime—policing, investigation and prosecution—involves informers.

We have in our legal culture a very well established privilege in relation to the identity of informers. I have cross-examined them behind screens or behind video barriers, for example, where they are given code names and where there is a restriction on what can be said. I know that, if I do anything to reveal their identity, I will never practise law again and I will probably go to jail. It seems to suffice. There is not a long history of defence counsel betraying informers whose identity is required to be concealed. The courts are used to the idea of balancing the need for accusatorial fairness so that you can test an informer in cross-

examination and the need, in the public interest, to encourage informers to come forward. So we have the protected witness regime about which, as you know, there could be lots of argument as to detail. But there is an attempt to strike a balance which sets up standards which have not been applied here.

We are entitled to say, ‘Apart from American concern’—which we know is what drives this in relation to the Lappas problem—‘what is the great big mischief?’ How many trials have not been able to go ahead? Perhaps the public ought to know that; we are not separate from the national interest but are the object of national interest. We know of no trials that have not been able to go ahead, but there must be some. And is that such a bad thing? After all we are used to the idea that some trials can never go ahead because there are interests which are more important than getting the person in that particular case.

I am not worried about the idea that some trials can never be had, because you cannot fairly call all the witnesses you want to—they are either still in the field doing things which are more important than getting a particular culprit, or they will be in the sort of danger where they cannot be protected by Commonwealth officers. I do not have any difficulty with that. That just seems to me to say that the whole of life cannot be conducted in a courtroom, which I am disappointed to say I think is true.

**Senator BOLKUS**—So would that be your response if the Commonwealth were to put to us that the Simon Lappas case is an instance of a problem in the system?

**Mr Walker**—That is one case. I am not sure that one case ever makes a pattern; more to the point, I am sure that it does not. If it is an anomaly, I do not think you have a bill to deal with that. Lappas also involves what I call the clause 34 problem in relation to security clearance. The subheading says it all: ‘security clearance for defendant’s legal representative’. No doubt the Crown tells you that they do not appoint prosecutors unless they are security cleared. But, on the face of it, it is a fairly unfortunate singling out of one side of what is meant to be an even-handed process.

**Mr Selth**—What do not seem to be coming out, at least in the material I have seen, are the realities of security clearing, be it with those who are legally represented or others. They seem to be pretty one-sided. Some years ago I had a short experience with security clearing: I had to be security cleared as well as clear others. That could take over a year. I hope things are a bit smarter these days. I think we would accept that overseas agencies have a particular interest and this will mean, of course, that a defendant will be sitting in jail for X weeks or months—or theoretically years. We have all seen recent examples and a two-year wait for trial is unacceptable.

I do not know but I would hope that the committee has been informed that the system now is such that you do not wait for weeks, months or, on occasion, years for a security clearance. The alternative seems to be that you do not have your counsel of choice; either you have to go and get somebody else halfway through the trial or you have somebody you just do not want in the first place.

**Senator BOLKUS**—We heard earlier that there is a perception that there are no conclusive certificates generally, but on page 6 you express concern about the capacity of the

Attorney-General basically to ensure that some evidence is conclusive. How critical an issue is that?

**Mr Walker**—The balance between what I will call executive certification and judicial determination is not really straightforward in the bill. It would not be fair to describe the regime as either, on the one hand, completely conclusive or, on the other hand, thoroughly provisional. I do not think I can go any further than what is in the council's written submission other than to observe that, to the extent that there are elements of conclusiveness—including non-discretionary steps that have to be taken by a court in response to a position being taken by an attorney or a prosecutor—indications begin to accumulate which favour much too heavily the executive in a prosecution. I am not sure that at the end of the day they will much matter because, while ever the court determines these matters—and the court gets to determine a lot of them—ultimately that will be satisfactory.

**Senator BOLKUS**—Another question I have goes to the definition of 'national interest'. In recent years some fairly active debates have been generated by people like Andrew Wilkie, Major Collins and Peter Jenkins. In your view, would those sorts of debates be covered by the definition of 'national interest'? Have you had a chance to consider that?

**Mr Walker**—Yes, I have had a chance to consider it. First of all, I note that 'national interests' are defined in proposed section 12. But that section does not provide the outer limits of national security; it defines only a part of national security. National security also means:

... defence, security, international relations, law enforcement interests or national interests.

Then you get to national interests, which are pretty wide. Proposed section 12 has this technical defect—and I hope it never gets to be argued: it uses the word 'important'. Ultimately I suppose that means 'important' in the eyes of a judge. At that point you have a real culture clash of the kind that we are used to. But judges do not rule the country; governments do. That is why there is a well established common law deference—you will see it in the context of public international law—where there are rules, for example, about simply recognising as a fact the executive government's recognition of another government.

Here you are asking a judge to make a decision—which is really for the executive government, controlled by the houses of parliament—about what is important to the stability and integrity of a nation. With the word 'stability' you can hear 'law and order' in the background and, before you know it, you have strong men on white horses. I do not know what stability really means. If it means lack of dissent then it does not sound to me as though it promotes the national interests—for example, 'to be dampening dissent'. Then there is 'integrity' of a nation, and again that is a really ugly word. If that means that people do not divide themselves off from each other because they disagree with each other, that is horrid. They are the sorts of words you would really expect from Marshal Petain rather than from General de Gaulle.

**Senator MASON**—To summarise this in my own mind: you accept that rules of evidence and trial are a balance; but you argue that, where this bill applies, trials will be less fair and therefore unfair.

**Mr Walker**—The last bit does not necessarily follow. Fairness of a trial is not like pregnancy: you can be a little bit unfair and I think be tolerable. It is not an absolute quality

and there are trade-offs. We have trade-offs all the time anyhow. Trade-offs are referred to in sections 135, 136 and 137 of the Evidence Act; it says ‘perform trade-off calculations’ to the court. We can tolerate that.

It therefore does not follow that every element inimical to full accusatorial even-handedness and thus fairness in this bill will end up making a trial unfair in the sense that for it to continue would be an abuse of process. It is simply that every step down that track is in the same direction towards that ultimate point. I think that it has been well and truly reached when you have decisions which are critical to the nature of the prosecution case, including possibly exculpatory elements, being determined in the absence of the accused or his or her representative by a judge who is proceeding in secret and—as Senator Bolkus has pointed out—without the accused even knowing of the occasion.

**Senator MASON**—So in this instance these trade-offs go too far?

**Mr Walker**—Yes.

**Senator MASON**—Professor Weisbrot gave some evidence earlier and I think he used the term—I hope I am not misrepresenting him—‘greymail’. That is, an accused might potentially intimidate or at least pervert the potential prosecution by letting it be known that he or she will divulge national security information, let us say.

**Mr Walker**—Yes; that is why an injunctive power is needed.

**Senator MASON**—I suppose you have pre-empted my question. But we have the problem of potentially there being very serious offences and serious criminals. I am just not certain that the public—and we in parliament try to represent them—could withstand the criticism that we were not doing everything possible to catch these people, to prosecute them to the full extent of the law and, if necessary, to put them in jail. It might sound very simplistic but, from a political point of view—

**Mr Walker**—No, I am sure you are right. I agree with every word you have said. However, let me put it in a broader context. I have been involved in the politics of law and justice for long enough to say the following without being in the slightest degree cynical or facetious: there is a very large body of opinion—it may not be a majority body but it is pretty close to it—that is quite impatient with fair trial values altogether. It is not true that the Australian populace represents a population committed, with any personal sense of conviction, to fair trial values. I think they are accorded grudgingly, because people—and I share the same feelings—really dislike criminals, in particular those who are violent and, more particularly, those who are violent who hurt children.

**Senator MASON**—Or terrorists.

**Mr Walker**—I was about to say that at that point you have set up a fantastic foundation for people who are violent and kill not only children but indiscriminately and who do so for motivations that we find strange, bizarre or confronting, particularly if it involves suicide et cetera.

All of that adds up to this: for a lot of people the rhetorically fostered metaphor of war rather than justice dominates thinking in this area. None of this requires a fair trial before an enemy soldier, pointing a gun at us, is shot. Frankly, while ever the rhetoric of war dominates,

there is really not much hope that the little tin whistle of justice will be heard; it is drowned out utterly.

I come back to the notion of the resistance of members of parliament to this kind of body of opinion. By and large, notwithstanding the Cassandra statements made by people like me over the years, chambers of parliament resist the ‘hang ’em high’ approach to the administration of criminal justice—and I am not suggesting for a moment that this bill comes anywhere near that kind of vulgarity. However, it seems to me that leaving aside constitutional arguments, which after all will not be determined in the chamber, there are social values that are more important than the understandable anger or outrage of a threatened populace. Part of having a representative chamber rather than direct rule by the people is precisely to enable some form of dilution of the worst and concentration of the best in the place where our laws are debated and our executive is held responsible. That involves necessarily getting rid of anything to do with mere vengeance and anything to do with partisanship in criminal justice.

But we know that the so-called war on terrorism certainly involves both vengeance and partisanship. It is how one always aligns as a citizen when there is a war: you want to take revenge on your enemy and you certainly want to be partisan. That has nothing to do with the administration of criminal justice. While ever that conduct is being dealt with by criminal justice—as the Law Council thinks it should be—rather than by warfare, it is the role of the houses and the members of the houses, in our respectful view, to continue to dilute the worst and concentrate the best.

We are absolutely sure that it is the balancing process that makes this a difficult exercise, which is why we commend what the ALRC—we do not always agree with it—has done. Its report is probably one of the most important there is in terms of law standing between the citizenry, the executive and what I call the nasty outside world. It proposes a far safer trade-off for our longer term future than is represented by this bill. It is the longer term future beyond that which involves pictures of the twin towers in the course of their destruction that drives what the Law Council thinks about it.

**Senator MASON**—That was beautifully put. But I am a politician who represents Queensland. I always worry about what Queenslanders will think of the justice system and about their respect for it, if we do not do all we can to put away terrorists.

**Mr Walker**—So we should.

**Senator MASON**—If we do not do all that we possibly can, I am concerned that respect for the justice system may diminish.

**Mr Walker**—I have no doubt that you are right.

**Senator MASON**—It is political.

**Mr Walker**—I do not deprecate that at all. After all, lawyers are citizens as well and we understand there are other instincts at play. Perhaps I can use an analogy.

**Senator MASON**—Can I jump in here? I am sorry to interrupt and I apologise, but my point is that respect for the justice system, particularly with really serious issues like this, warrants what you describe as trade-offs. Maybe this is a trade-off we have to pay. I know,

and I am sure you know too, what the public thinks about these issues. It is a very difficult balance.

**Mr Walker**—I do not pretend at all to know what the public thinks, but I do listen and read. I do not like suggesting how many think what. I would say this: yes, it is always a trade-off. The administration of justice is not a religion; it does not have to proceed in absolutes. With respect to what we have identified in writing and in my remarks this morning, the trade-offs have gone too far and have created dangers—particularly the definitions involved with ‘national security’ and the like—that we should not be threatened with. Ultimately, day by day, our real interests—not just at the end of the day but at the end of the analysis—lie in promoting fair trial values and in regarding the Australian population and its ‘security’, to use one of the words from the definition, as definitionally excluding the possibility of concealing too many things from those same people. You do not keep the population secure by maximising the number of secrets that must be preserved. That being said, you cannot fight either crime or terrorism without some secrets. We all understand that, and that is why the trade-offs are really important. But the police informer trade-offs that the law has allowed for a long time perhaps provide a decent model.

This bill is partly modelled on that sort of thing. This bill is not all bad—far from it. A very conscientious attempt has been made to balance some very difficult things. It is just that, in the upshot, I think one of the prevailing views is that trade-offs have gone too far. A lot of people think it is wimpy and silly to fight a war while being bound by the Geneva conventions. In any pub or street you will find people who think, ‘That’s ridiculous: if you’re going to war, don’t go with one hand tied behind your back’—that sort of language. They ask, ‘Why do we have the Geneva conventions?’ and their answer is, ‘Because of pacifists and Quakers, because people in 1919 were dwelling too much on the immediate past.’

As you would gather from my statement, I think people who talk like that are very dangerous for humankind. However, isn’t there an analogy to be made with people who say, ‘You do not pursue criminals by giving them rights’? I am sorry, but I disagree. I do not care if it sounds paradoxical. You do pursue criminals by giving them rights—otherwise, we had better get used to the idea that a trial is simply a waste of public time and money—a ritual before you shoot someone. We know that they are saying that about Saddam. I would have thought that we would not want to have any part of that approach.

In deference to those among your constituents whose ire you fear, I would say, ‘I’m sorry, but ultimately you cannot compromise those views.’ There is no trade-off in favour of a view that says, ‘Let’s kill civilians in war and let’s shoot accused people in the street.’ They are not things about which there can be trade-offs.

**CHAIR**—I am having some trouble in working out how, under the legislation as it currently stands, you would get a solid conviction. As you put it earlier in your remarks: in the first place you have critical decisions about the prosecution case which involved judicial determination; then you have the judge instructing the jury, one assumes at the end of the process, on matters—which may or may not have involved the defendant let alone the defendant’s legal representatives—of which they may or may not have known; and you expect to get a rigorous conviction. How is that possible?

**Mr Walker**—You have put your finger on it: that is the problem. A fair trial will ultimately come to be judged by an appellate tribunal looking at the whole of the process. We have—and it is a good thing too—an accusatorial system whereby the prosecution has to make their case with a test being applied ultimately in what I will call the relative scepticism of the jury. In our view, you will not have a trial which passes the requisite tests if there have been these blank spots where the defence goes off the air at critical moments.

Your example is a good one: the judicial summing up. The appellate courts apply, relatively leniently, a test to appellate argument, and that will prevent some who might otherwise have succeeded—if experienced counsel did not take the point at the time—from succeeding. It is not applied across the board and they are relatively lenient because, not coincidentally, they are more interested in ensuring that the process is fair than that the game is hard played. That would make no sense whatever if you were sitting listening to a summing up and you had no idea of whether the judge had got a little bit right or not. You would know you might be committing an offence or straying into that area if you were to stand up and say, ‘Your Honour, can I know what lies behind that?’

It just seems to me that this tries to do something which our forebears were not slack about. It is not that they did not think these things were important. For a long time there have been national security prosecutions or, more to the point, non-prosecution cases that people have decided should not go ahead. It is not new to us. I suspect our forebears, politically, judicially and legally, decided that it was just too much trouble—and I think they might have been right.

**CHAIR**—Mr Walker and Mr Selth, thank you for appearing this morning and assisting the committee and for the Law Council’s submission. We are very grateful.

[10.32 a.m.]

**RYAN, Ms Inez Bernadette, Policy Officer, Australian Press Council**

**CHAIR**—Welcome. The Press Council has lodged a submission with the committee, which we have numbered 3. Do you wish to make any amendments or alterations to that submission?

**Ms Ryan**—No.

**CHAIR**—I invite you to make an opening statement and, at its conclusion, members of the committee will ask questions.

**Ms Ryan**—Our submission is fairly self-explanatory. I do not know that we really need to add anything to it, unless you wish us to clarify certain points. We have two areas of concern. One is obviously with the issue of fairness to defendants. I would assume that on most aspects of that particular problem we would be inclined to defer to what the Law Council has said.

Another aspect of the bill we find concerning is the bill's potential to have the effect of excluding from public debate issues which ought to be in the public domain. That could occur, both intentionally and unintentionally, in a number of ways. The most obvious way is that the media, as I am sure you are aware, has the right to publish fair and accurate reports of proceedings in public courts. This bill would obviously impact upon that.

But there could also be unanticipated consequences. For example, if information was disclosed to the media by a participant in proceedings which were subject to this legislation and that information was then published in the media, the media potentially could find themselves in breach of the legislation. That is our second aspect of concern.

We are also concerned with the issue of in-camera hearings, particularly when this legislation could potentially affect very controversial proceedings in courts—proceedings that the media and the public would have an interest in. We are always nervous about any proceedings being held in camera unless it is absolutely necessary.

We are also concerned that there is scope for abuse in this legislation. To some extent, we recognise that the proposed legislation makes a sincere attempt to address a very real problem; but whether or not it will have the desired effect or will go over the top, so to speak, will depend on how it is administered by the Attorney-General and the courts. We believe that there is a possibility for in particular the Attorney-General to abuse or rather to distort the intent of the legislation. In particular, the breadth of the definition of 'national security' leaves it wide open for the Attorney-General to exclude, from the courts and from the public, information which really ought not to be excluded. I think that more or less sums up what we have to say.

**CHAIR**—The Press Council in its submission raises an issue concerning the definition of 'national security' which was adverted to briefly by Mr Walker. Would you like to expand on that and how you think it should be addressed?

**Ms Ryan**—In summary, the way to address it initially would be for it to be redrafted. It has to be narrowed down. I know that is a very difficult task. I have thought about it and tried to

anticipate how it could be redrafted, and I realise it is quite a challenging thing to do. But it is absolutely essential because—I do not mean to be offensive—the definition is ridiculously wide. It has the potential for just about anything to be included in it. Anything that is likely to be the subject of government action or government legislation could potentially fall within that definition. In particular, it has been extended to include things like stability of national security. Under section 12, it has been extended to include:

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

That is vastly broad. That would include just about anything you could imagine. You could take two approaches to that: either you could make what is included far more specific, or you could put in specific exclusion clauses to state what is not included. I realise that is only a partial solution because you have to leave a certain amount of discretion in. But it has to be narrower than that.

This has real potential for abuse by the Attorney-General. In particular, we are concerned that this leaves enormous scope for the Attorney-General to exclude information which may or may not threaten national security but which is embarrassing or inconvenient for the government of the day. There is real potential for the Attorney-General to have a conflict of interest. There may be information which the government, for political reasons, does not want revealed, and this definition has the potential for the issuing of certificates in such circumstances. There needs to be a much more specific, much more stringent test for what falls under the definition of ‘national security’.

In our submission we state that another mechanism you could use to address that problem would be to place a positive onus on the Attorney-General to avoid conflict of interest scenarios. We have stated that a clause could be inserted into the legislation stating that it is an offence to issue a certificate for inappropriate purposes—such as to conceal corruption, incompetence or similar problems.

I realise that may not necessarily prevent the Attorney-General from issuing certificates inappropriately, but at least it sets a certain tone of responsibility and would make an Attorney-General think twice before issuing a certificate purely for political purposes. You obviously cannot prevent the Attorney-General from doing it, but you can certainly create a consciousness in the Attorney-General of his or her responsibilities and of the potential to be caught out further down the track. That does act in some sense to mitigate the problem of the breadth of the definition.

**CHAIR**—Thank you. That is helpful.

**Senator BOLKUS**—Your advice on the definition you talk about is consistent with the Law Council’s. Have you had senior counsel advice on this point?

**Ms Ryan**—No, I wrote the whole thing myself.

**Senator BOLKUS**—Two aspects arise from it. You refer to section 24 of the bill and you say there is an inequity there, in that the Attorney-General can issue a certificate if he expects that national interest may be affected, but there is no requirement that that expectation be soundly based. Would you like to elaborate on the implications of that?

**Ms Ryan**—As you can appreciate, I did not have very long to do the research before writing the submission. It was very short notice. The reason I made that point was that my reading of the legislation is that there is no requirement for the Attorney-General to justify that there is an expectation: it is simply his or her opinion. As to the consequences of that, it is very difficult to anticipate exactly what impact that would have. I would like to think, in an ideal world, that the Attorney-General would not issue a certificate based purely on an expectation that there would have to be something more, such as a report or a briefing from a member of the security staff advising him that there was such an expectation. However, there being no clause in the bill which specifies such a justification, I assume that that is not necessary.

My understanding would be that, if there was litigation on foot that for whatever reason was anticipated, that would be a sufficient basis for the Attorney-General to issue a certificate based only on a personal concern that security sensitive information might be adduced in evidence. There would be no necessity for the information in question to be highly sensitive; it would only require that the Attorney-General felt that a certificate was warranted. That could potentially lead to unfairness to an accused. I would imagine that it would be of particular concern if, for example, Andrew Wilkie had some legislation on foot. In the circumstances where he had been prosecuted for disclosing information or someone with whom he had had an association had been similarly prosecuted and the government for political reasons did not want that information to be disclosed, my understanding is that the Attorney-General could potentially issue a certificate.

**Senator BOLKUS**—The other aspect which attracted me was the second-last paragraph on the second page. We have this outrageous situation at the moment where David Hicks is in jail in Guantanamo Bay, the prosecution and the administration can make statements about what he is supposed to have done or not have done but his lawyers—for example, Steve Kenny—cannot. Because there are all sorts of requirements in the interests of national security, David Hicks's lawyers cannot speak to the media. That, of course, is unfair debate. Are you saying that this legislation will have potential to do the same sort of thing? I know you talk about the prosecution being allowed in some permitted circumstances to disclose information, but the prosecution is the Crown, which is the government.

**Ms Ryan**—Obviously you understand that, although I am a solicitor I have never practised in criminal litigation, so I would defer to the Law Council on these matters. However, my reading of the proposed legislation is that it is very biased in favour of the prosecution, in favour of the government and against the defence. It does give the impression that it gives additional rights to prosecution counsel which it does not give to the defence counsel—access to the information, the right to appear in court and to make representations to the court in relation to information and so on. Although that is not the primary concern of the Press Council—it is only a secondary concern for us—it is a matter of concern.

**Senator MASON**—I have a quick question relating to the first paragraph on the second page of your submission. It says:

A second area of concern is the reliance on in camera proceedings.

It then says:

... the media should be given standing to address the court as to whether or not the court should be closed to the public.

On what basis do you think that? Do you think the media speaks on behalf of the public interest?

**Ms Ryan**—In many instances it does—not entirely perhaps but, if not the media, then who?

**Senator MASON**—It is an unusual request.

**Ms Ryan**—Did you think so? I find that request pops up in a lot of issues that we deal with.

**Senator MASON**—How do you justify that?

**Ms Ryan**—I think you have to accept that in a country like Australia, whether or not we like it, the media is the primary source of information by which Australians receive information about government proceedings or politics or anything to do with public discourse, and people get 99 per cent of their information through the media. It is a fact. Politicians might not be happy about it, but it is the way things are. The media have a very legitimate right to at least put to the court an argument about whether or not they be excluded from access to the court. My view of the common law, and I think this is a view that is pretty widely held, is that it is based on the notion of justice being held or considered in public and a notion that, if you remove justice from public view, it is questionable whether you can achieve justice at all.

**Senator MASON**—I accept that, and the committee would generally accept that that is dead right, except in very unusual circumstances, but I question that the media should be given standing to address the court about whether that is appropriate. There are in-camera hearings, for example, in many family law matters. The information may be very exciting and the media might love to be in there, because the information might be titillating or wonderful for their circulation, but that does not mean that it is in the interest of justice that the media be in there to report the event.

**Ms Ryan**—With respect, that is not what we are saying. We are not saying that the media should have access to the court at all times. We accept the fact that there are going to be instances when it is appropriate that the media be excluded. What we are saying is that before the court is closed the media should have an opportunity to at least approach the judge on behalf of the court and present their arguments as to why this particular instance should be one where the media should not be excluded.

**Senator MASON**—On behalf of the public or on behalf of the shareholders?

**Ms Ryan**—I suspect both.

**Senator MASON**—That is a very honest answer.

**Ms Ryan**—It is true that the vast majority of Australia's media is in the business of making a profit—we do not deny that—but they are also there to act as a way of informing the public. I think most journalists, if they had to choose between their principles and their employer, would say that they would choose their principles. There would be very few exceptions to that. I suppose it depends on which publication you are talking about, but most journalists

would fight every inch of the way for their integrity. They really do feel as a matter of principle that the public should be informed.

**Senator MASON**—Good luck in your battle. I think you may have a way to go before you get this.

**CHAIR**—There being no further questions, thank you very much Ms Ryan for assisting the committee and particularly for the Press Council's submission. We do realise that this has been a very constrained time frame, so we are very grateful.

**Ms Ryan**—Extremely constrained. I am curious to see whether parliament will be reconvened to pass the bill.

**CHAIR**—You're curious! Imagine how we feel.

**Proceedings suspended from 10.50 a.m. to 11.01 a.m.**

**BECKETT, Mr Simeon, National Committee Member, Australian Lawyers for Human Rights**

**RICE, Mr Simon, OAM, President, Australian Lawyers for Human Rights**

**CHAIR**—Welcome. ALHR has lodged a submission with the committee, which we have numbered 10. Do you need to make any amendments or alterations to that submission?

**Mr Rice**—No.

**CHAIR**—I realise the convening of the hearing today was at very short notice and possibly not at the most convenient time, particularly for you, Mr Rice. We are very grateful that you are able to attend and assist the committee.

**Mr Rice**—I am grateful to your staff for juggling times.

**CHAIR**—I invite you to make a short opening statement, at the conclusion of which we will go to questions.

**Mr Rice**—We are very happy to speak to the submission. Perhaps most usefully Mr Beckett can illustrate the point we wish to make, as we foreshadowed in the submission, by way of an example. I respectfully suggest that it is difficult to understand the legislation's import out of context. It is all about how trial will operate. To really understand what we strongly submit are the deeply problematic dimensions of the legislation might best be illustrated through the illustration that Mr Beckett can take you through. The most important point I feel we can make, in addition to our written submission, by way of opening remarks is that this is an issue that you would be aware was traversed over a long period of time in considerable detail on a national basis by the Australian Law Reform Commission.

The deliberations—which, with the greatest of respect, were much more extensive than this committee's inquiry could ever be—resulted in a large number of recommendations to address just the sorts of concerns that this bill is designed to address, yet the bill pays little regard to the ALRC's recommendations. It is remarkable how far removed the bill is, in its practical import, from the many concerns, particularly the preservation of fundamental rights that the ALRC grappled with through a discussion paper and in its final recommendations. Perhaps the simplest position would be to exhort the government to have regard to the ALRC report in the final draft of this legislation—which is no doubt necessary, because the legislation addresses a very difficult issue—but this is precisely why the reference to the ALRC was appropriate and we would recommend that report and its recommendations.

**CHAIR**—I will ask Mr Beckett to go through some of those issues that you adverted to, because I think the committee would find that beneficial. I would just note that the ALRC report was finally tabled on 23 June or thereabouts this year and the bill was referred to the committee before that—it was introduced even before that—so I am sure the government had the opportunity to be privy to the ALRC report.

**Mr Rice**—It is no reflection on the committee. It is an issue with the government's drafting of the bill. The committee has only been loaded up with the task at short notice.

**CHAIR**—This one and many others, might I say just for the record.

**Mr Rice**—I am very happy for you to put that on the record. Equally for the record, we understand and respect that the purpose of the committee's discharge of its functions is to ensure that there is public consultation. The manner in which the committee is burdened and has to discharge its functions in such a short space of time really raises questions about the sufficiency of its process when it comes to public consultation. This organisation, as you know, is substantially committed to the very business that this committee deals with. We cannot do it; we cannot keep up.

**Senator BOLKUS**—Nor can we.

**Mr Rice**—There you go. If you cannot, and we cannot, we really wonder about the efficacy of this process. I hasten to say that is no reflection on the great efforts you make.

**CHAIR**—We appreciate that. In this environment and in this context we are doing our best, but we are also very aware of the constraints under which we operate.

**Mr Rice**—Although I understand the timing issue you have pointed out, that is why the ALRC report may be a very useful point of reference. The discussion paper was available to the government at the time they drafted the bill. It traversed a lot of the issues that do not appear to have been addressed in the bill.

**CHAIR**—Thank you for those observations. Mr Beckett?

**Mr Beckett**—There are a number of points that I would like to make. They are essentially set out in paragraph 5 of the submission and go through some of the main concerns for ALHR about the fairness of this bill to defend and appear in criminal proceedings. What I want to say first of all, though, is that this morning I looked at the state interest immunity provisions of the Evidence Act, which is in many ways the precursor to this bill—in other words, the Evidence Act provides the ability for the Commonwealth to claim state interest immunity over particular material. For example, a subpoena is issued by the defendant to obtain certain documents, the materials brought before the court by that process or in the possession of the defendant are handed up and tendered in particular proceedings and, at that stage, the Commonwealth claims an immunity. That is sorted out by the judge concerned going through a balancing exercise and looking at the two crucial points of that sort of application; namely, the importance of the particular material for the proceedings at hand—is it evidence that is important to the prosecution, and does it make out or assist in making out one of the essential elements of the offence—weighed against the submissions or evidence that the Commonwealth puts on to say that this material, if revealed in open court or if restricted in any way but still revealed in court, would prejudice national security. Obviously there is an affidavit or some form of statement made by the Commonwealth—somebody, perhaps, from the Attorney-General's. The court then considers and weighs those two issues. Obviously if it gets to the Lappas point—in other words, the prosecution is going to fall over if this material is not provided and the Commonwealth is still claiming state immunity—then the let-out clause is that the judge would then move to stay the proceedings. That is the sort of structure within which this bill is working.

In summary form, it essentially removes that initial judgment about whether the Commonwealth has substantial evidence upon which to make a judgment about whether it affects national security. It takes it out of the hands of the judge and gives it to the Attorney-

General. So you are removing it from a judicial process and making it an administrative process. That is what would occur when the Attorney-General issues a certificate—where he or she provides a summary of the document concerned or has certain information provided to him or her by the department as to the evidence that a witness might give. They produce a summary and provide that document to the court. So effectively what has happened is that the judicial process, at least in judging whether state interest immunity is justified, is removed from the court and is made administratively. It is with that in mind that many of our submissions flow.

There is also no ability for a court to have a look at that certificate. The Attorney-General obviously receives representations from the Commonwealth DPP, or perhaps from the Attorney-General's Department. He has a look at the material and says: 'Okay, we're going to issue a certificate on that basis. I have representations from an official who says this is going to prejudice national security, because it is going to reveal the identity of a key informant or somebody like that. I am satisfied that that is material upon which I should issue a certificate.' The material, in its expurgated form, is then given to the defendant and the defendant is then unable to review the decision of the Attorney-General, except perhaps under administrative law grounds. Essentially the defendant will never obtain the raw documentation and will never be privy to the decision that the Attorney-General has made. So essentially there is an 'unreviewability'—there is an inability for the defendant to say: 'That document was important to our case. Once I have had a look at it, because it provides a line of inquiry, we might want to adduce further documentary evidence. We might want to speak to these witnesses and so forth. In the proper preparation of our case, we really need that material.' That is quite a general point.

Mr Rice said earlier we would give an example. I want to go through the way the bill deals with a document that might be crucial to a defendant's case. Say the issue is about passing of important communications between an ASIO officer and a foreign power, or whatever the scenario might be, but in any event the defendant knows there is a document or a series of documents that would impact upon his or her defence. He goes through the process under the act, first of all, and informs the court and the prosecutor of that document. He does not necessarily have that document but he informs the court and the prosecutor. The matter then comes before the Attorney-General. The Attorney-General has a look at the document and says, 'I think this will prejudice national security.' He issues a certificate saying that the defendant may not disclose that information to the court or may not disclose it publicly. Both the certificate and the source document are given to the court, but the defendant does not have it at that stage. The Attorney-General then issues a certificate under section 25(1), unless the previous certificate is sufficient, saying that the contents of the certificate will prejudice national security. It is only then that you go to the section 29 hearing—supposedly a review of what has occurred to date—by the court. During that inquiry not only will the defendant and his or her legal representatives not have access to the document but they may be excluded from the section 29 hearing. That is just an extraordinary proposition. I understand why they would not want the material revealed to the defendant, but the whole question is whether the defendant will be able to properly present their case to the court and whether they will have access to all the relevant information which will allow them to properly present their side of the story—their evidence—in very serious proceedings.

The court then goes on to undertake the section 29 hearing, and it is important to remember that the power under section 29(8)—or section 29(5), I think it is—is very limited. It does not allow for the production to the defendant of that original material; it only goes to look at the disclosure of what is in the certificate. So it is not as if the whole matter is opened up and reviewed by a court in the way that it would be under an application for state interest immunity under section 130 of the Evidence Act. There is a limited proposition before the court—namely, whether the certificate should be disclosed or whether it should be disclosed in a limited form—and that is when the court comes to the stage of taking into account the fairness to the defendant and the likelihood not that the core document will be revealed but that the certificate or the expurgated document will be revealed in contravention of any requirement by the Attorney-General that it not be released.

Even then, looking at that limited power, the bill says under section 29(9) that you have to take national security as being of greater weight than the fairness to the accused. So we get to the end of that process and it may be that the court says: ‘I have looked at the original document; I have looked at the certificate: it is not really going to assist the defendant in any way—there is so little information. But I think that, basically, it remains fundamentally unfair to proceed with this case on the basis that the defendant has not been able to adduce certain evidence in his or her case.’ If that is the case, then the court really has to make the same order as it did in *Lappas*, or at least the first part of *Lappas*—namely, that it then stays the proceeding because it would be fundamentally unfair to the defendant.

Where do we get to in all of that? After all that technical restructuring of how you deal with the state interest immunity question you get to the end and say, ‘The court still has the power to stay the proceedings.’ And before that what has gone on? What has gone on is effectively a shift of consideration of that issue from the judiciary to the executive. Along the way there are many unfairnesses, and we have set those out in the submissions. But the core issue, whether the material is limited in the prosecution’s case or in the defendant’s case, has to be: has the defendant been able to present his or her case as fulsomely as possible so as to discharge fairness and properly prosecute the defendant? If there are these sorts of limitations placed upon the defendant and the evidence that he or she has to give, then I think the answer is ‘no’.

**CHAIR**—Thank you very much. Senator Bolkus?

**Senator BOLKUS**—I draw you to two aspects of your submission. One is paragraph 10, where you talk about the bill giving the Attorney the right to intervene generally as a party, as opposed to the ALRC’s recommendation. Can you explain how that would operate and what the concerns are there?

**Mr Rice**—It is difficult to see how it would operate. For the Attorney to be a party to criminal proceedings, whether he is joining the prosecution or the defence or what his interests in the proceedings are such that he could prosecute the interest, is difficult to imagine. It is easier in civil proceedings, where he might be able to identify some interest, but it is an unusual proposition that somebody would become a party to the prosecution. That is the first point: it really does not make a lot of sense in criminal proceedings, and the ALRC identified the interest that the Attorney may have.

A court will always attach to leave to intervene a consideration of the interests that somebody demonstrates in order to intervene. In an ordinary case it would be incumbent on the Attorney to identify his interest in the entire prosecution if he was to be given leave to intervene. The legislation purports to transcend any of those considerations; it will just put him in the court. In the McBain case, the High Court was unusually clear about what it thought the role that a nonparty had in pursuing proceedings. Our reference to it is to remind the government that they have already been told by the High Court that a nonparty cannot maintain proceedings because they cannot demonstrate an interest. In criminal proceedings, beyond the ALRC's recommendation we do not see how the Attorney or indeed anybody could maintain an interest such that they could intervene in criminal proceedings.

**Mr Beckett**—In a way, the executive is already represented in any prosecution—in the federal sphere at least—by the Commonwealth DPP. In essence, this provides the potential for some form of conflict between the DPP and the remainder of the executive because it essentially says that the issues that the DPP has to weigh up in mounting an appeal from a particular interlocutory decision about particular evidence is different from that provided by the Attorney-General. As Mr Rice has said, you get into problems, such as in the McBain case, in the Catholic bishops case, if there is a party with a separate interest who would not normally be party to those proceedings but who is there with a different agenda, if you like, with different instructions, which may be different from the one between the relevant parties.

**Senator BOLKUS**—Are you saying that it is unprecedented for the Attorney-General to have such a right to intervene generally?

**Mr Rice**—He always has his fiat but I think the High Court has made the limitations on the use of the fiat fairly clear. The fiat does not allow proceedings that could not otherwise be maintained to be maintained. The fiat allows the Attorney-General to express the legitimate interest he may have in proceedings. We think that the ALRC properly described at its highest the very real interest that the Attorney would have in these proceedings. The Attorney is in no stronger position than anybody else when it comes to intervening. As Mr Beckett has said, he is already there by virtue of it being a criminal prosecution. He does not have any greater interest by virtue of being Attorney that would entitle him to take a role in the proceedings.

**Senator BOLKUS**—Taking that point, your other points and your assertion in paragraph 11 that the 'Main Bill fatally undermines the ability of an accused to gain a fair trial', are you saying that this could be in breach of chapter III provisions?

**Mr Rice**—With regard to a fair trial. Mr Beckett referred to the end position that the court comes to. This is the odd thing: the bottom falls out of the bill when you are reading it, in a funny way. You go through this lengthy process, which is problematic in itself in many ways, but you ultimately end up with the court finally exercising its own discretion.

It is not a chapter III problem that I am addressing now, but senators would recall generally the Dietrich case and the principle that the High Court made very clear in Dietrich. They would recall the consequent conduct of criminal trials across Australia since then and similarly the management of legal aid funds. Trials will be stayed when to proceed with them would result in an unfair trial. In Dietrich it was for want of legal representation in serious criminal matters that would have given rise to an unfair trial. Courts are going to have to stay

trials if to proceed with them would be unfair. As we have suggested, they will be unfair if relevant material is kept from the defendant.

I think we have a very clear indication that trials that are subject to this way of managing security sensitive information are highly likely to be stayed permanently. Against that, the Evidence Act is already providing a way of dealing with it. The ALRC has already provided a way of dealing with it. It would seem unnecessary for this act to proceed in the face of that risk and the alternative options.

**Senator BOLKUS**—In paragraph 7 you talk about examples. Have you given all the ones you would like to give or is there something else you would like to add?

**Mr Rice**—Just while Mr Beckett is remembering the example that we deleted—

**Mr Beckett**—I think that is the example I gave earlier. The process where there is a document that the defendant knows exists—whether he or she can have access to it.

**Senator BOLKUS**—All the questions have been exhausted over the course of the morning. Thank you very much.

**CHAIR**—I have one area I want to pursue, which I raised towards the end of the Law Council's evidence and that is whether you would end up with a sustainable conviction out of this process. Mr Rice has just adverted to that in his previous comments. The point that Mr Walker made particularly was that because of the construction of the bill and the nature of the requirements for the judge you have a situation where the court becomes quite comprehensively involved in making critical decisions about the prosecution case. I think he described it as those decisions involving 'judicial determination'. At the end of the case in the judge's summary and instructions to the jury you end up with the judge, I guess, adjudicating in some way on their own participation earlier in the process. I wonder how you can get a sustainable conviction out of that. How can you instruct a jury, for a start, on matters that you have adjudicated on yourself and, secondly, without wishing in any way to cast any views about the judiciary—I am not—also instruct the jury in relation to matters where the defendant may not have had access to the material or may not even know that certain events have occurred or that certain material is available and has been seen by the prosecution but not by the defence and their lawyer has not been able to participate and so on?

**Mr Rice**—It is part of the process. It makes no sense to us. As Mr Beckett said, you go through this very elaborate process that raises all these problems and you get to the stage where the court is ultimately exercising its discretion. Senator, you have identified a very difficult position that the court finds itself in. I would throw in another one: the process anticipates the Attorney making a final finding of fact—that the Attorney's finding that the matter is national security sensitive information is prescribed by the legislation to be evidence in the proceedings. You have an executive act resulting in admissible evidence—a proven fact; a fact in issue in the proceedings. I would throw that up as another example. We really do not understand how the legislation holds together in terms of, as you put it, a final conviction.

I can respond in part to that and pick up on Senator Bolkus's point about the chapter III considerations. The ALRC in chapter 10 of its report addressed just this issue. Paragraph 10.8 says:

... legislation sanctioning reliance on secret evidence in a Chapter III court runs the strong risk of being declared unconstitutional—especially where such evidence is central rather than incidental to a prosecution.

They then go on and elaborate at some length on exactly that concern. They draw a very useful distinction between evidence that will and evidence that will not raise those concerns. It is that sort of finessing that perhaps could be brought to the legislation.

**CHAIR**—Do you have a view about the definitions in the act for national security including, as they typically might, defence and security and then international relations, law enforcement interests or national interests where national interests are being defined as ‘economic, technological or scientific interests important to the stability and integrity of a nation’?

**Mr Rice**—It certainly purports to be pretty all-encompassing. We would say this much: there is more to say. The concept of national interest, where it is used elsewhere, for example, in the treaties area when Australia assesses its national interest, which is a reasonably definitive way of looking at it, includes environmental, social and cultural interests. I can see why cultural interests would not strike one as immediately relevant when looking at national security. However, on consideration certainly social if not environmental and occasional cultural interests could arise. It is not the normal definition of national interest and we would prefer to see some consistency and at least that the phrase ‘environmental, social and cultural’ added to the reference to economic. The phrase ‘important to the stability and integrity of a nation’ is, as far as we can see, new. We are not aware of that having been a defining feature before.

**CHAIR**—Who would make the decision ‘what is important to’ means?

**Mr Rice**—Precisely. We are not aware of that phrase having been used before or of any process for assessing that. For example, in the treaties process, national interest has to be assessed and there is a degree of subjectivity about it. But as you say, Senator, the relativity of ‘important’ is very problematic. It comes back to the point I made before about the Attorney-General. In these proceedings under the act it is the Attorney-General who is going to decide that. The Attorney will issue the definitive certificate but as far as we can see it may well be an unreviewable decision. It is certainly a decision that is then binding on the court.

It is so hard to piece this together. When we get to section 29(8)(a) we find that ‘the Court must have regard to the Attorney-General’s certificate’ is one of the factors to be considered by the court. In having regard to it, the court must give the greatest weight to that certificate as against—and this is really striking—the availability to the defendant of a fair trial. So the Attorney-General’s certificate looms very large in these proceedings, so large that it is actually prescribed to be more important than a fair trial to the defendant.

To come back to your point, Senator, the Attorney-General has come to that view—and I draw your attention to 29(8)—and it is not an unimportant view that he has come to. It is a finding of fact which is binding on the court to the extent that it even outweighs a fair trial. In coming to that view, as you say, the Attorney-General has decided that whatever is in this document is important to the stability and integrity of a nation. So it is a very important

decision the Attorney-General is making, which appears to be binding on the court, outweighing a fair trial, and unreviewable.

**CHAIR**—Which the defendant or their legal representative may have absolutely no capacity to protest.

**Mr Rice**—None at all. They do not even know what the Attorney-General has looked at to come to that view. All they know is that the court has been told that whatever is in that document is so important that it is more important than a fair trial.

**CHAIR**—Mr Rice and Mr Beckett, thank you very much for assisting the committee and thank you for your submission. We appreciate it.

[11.35 a.m.]

**JACKSON, Ms Maggie, Acting Principal Legal Officer, Attorney-General's Department**

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

**CHAIR**—I welcome representatives of the Attorney-General's Department. The department has not made a submission, but I would ask you, Ms Jackson, if you would like to make an opening statement and at the conclusion of that we will go to questions.

**Ms Jackson**—I would like to respond to a number of the concerns that have been raised with the committee this morning. One of those concerned the breadth of the definitions that surrounds national security, and we would agree that they are very broad definitions. Like others, we grappled with how these could be narrowed. One of the areas we explored was to try and identify certain offences to which the legislation would apply, but then things like fraud may have been excluded—but you may have fraud in a Defence contract involving the purchase of sensitive equipment or something where the issue might arise as well.

We decided that that was not really a very satisfactory way to go, so the bill provides that it only kicks in when the DPP issues a notice. Of course, the issue of that notice itself is subject to the AD(JR) Act, and the provisions really only become operative as far as the court is concerned if the Attorney-General decides on examining the material that it could prejudice national security. That certificate is subject to judicial review under 39(b) of the Judiciary Act and of course subject to review by the trial judge and then on appeal.

It is the closed court hearing which seems to have caused the greatest amount of concern. In fact, the closed court hearing is envisaged to be a *voir dire* by another name. Its purpose is solely to determine whether and in what form the information that is the subject of the Attorney-General's certificate may be given during a normal trial process. There has been concern that the defence could be excluded from those proceedings. The legislation provides that that is solely at the discretion of the court, and we would not envisage that security-cleared counsel would be excluded from those proceedings. However, we have not made a security clearance mandatory for defence counsel. Of course, all prosecution counsel will be cleared. The bill provides for the secretary of the department to issue counsel with a notice requesting that they be security cleared. The only sanction, if you like, for a failure to obtain a clearance is that the court can explain to the defendant the consequences of running with an uncleared counsel—one of which is the inability of that counsel to have national security information—and recommend that the defendant seek other counsel who is, or is prepared to be, security cleared. So it is for that reason and that reason alone that the bill gives the court the discretion to exclude the defendant.

Much has been made of 29(8) which people say gives the Attorney-General's certificate some kind of elevated status. That is certainly not the intention of clause 29. Clause 29 asks the court to take the Attorney-General's certificate into account in determining whether and in what form the national security information is to be led. In that context, the protection of the national security information is to be the primary consideration. Having made a decision on whether or not the information can be led and in what form, the trial then resumes unless

appeals are immediately lodged. The court is then, subject to its normal powers, to stay the proceedings.

It has been said that the process is very much one which favours the prosecution. But as we saw in the Lappas case, in fact, the end result of the consideration of some of that national security information was to favour the defendant and the DPP withdrew some of the charges. That is still a consequence of this legislation. This legislation gives the court more flexibility than it had in Lappas in that it can edit the information by making deletions or providing a summary or whatever. But there will still be cases where the court says, ‘No, this information is of a kind that does not lend itself to editing, and it is of a kind which has to be protected and therefore cannot be led.’ The DPP will be in the same situation of having to withdraw the charge or the court to stay the proceedings.

I must say I have had a little difficulty reconciling some of the arguments that have been put to the committee with the terms of the legislation where the closed hearing is not a secret trial. The trial then resumes with the evidence admitted in the form that the court has ordered unless an appeal is lodged. So there is no secret trial. The redacted information or perhaps even all the information is led before the jury and possibly an open court, if that is what the court permits during the course of the normal criminal trial. The closed hearing is akin to a voir dire.

**Senator BRANDIS**—A voir dire is not closed to the public; it is closed to the jury.

**Ms Jackson**—But the purpose of the closed hearing is basically the same as the voir dire to determine whether or not and, if so, in what form evidence can be admitted. It is true that the public will not be admitted for obvious national security reasons, but if the information is in fact going to be led and the trial continue, it will be led in open court in most circumstances. The court will retain its discretion to close that part of the hearing as well, but that will be entirely a matter for the court.

**Senator BRANDIS**—It is not right to say that the purpose is the same; the method might be the same. The purpose of a voir dire and the purpose of this procedure are different. Are they not? This is about national security; the voir dire is simply not to corrupt the mind of a jury with evidence, the admissibility of which is, at that stage, contestable.

**Ms Jackson**—At that point of the closed hearing the admissibility of the national security information is also contested. There was some confusion also about the Attorney’s right to intervene under the legislation. I think clause 28 makes it clear that the Attorney’s intervention is in the closed hearing, and then the appeal provisions enable him to appeal the decision on the admissibility of the national security information, but it is not the case that he becomes a party to the criminal trial itself.

**CHAIR**—It is just in the closed hearing?

**Ms Jackson**—Yes.

**CHAIR**—Did you have anything further you wanted to place on the record at this stage, Ms Jackson?

**Ms Jackson**—No, I do not think so.

**CHAIR**—Could I then start by asking about the recommendations of the ALRC report and the divergence between the bill and a number of those recommendations, and seek some advice from you as to the differences between the two.

**Ms Jackson**—One of the main differences is that the Law Reform Commission seems to envisage that, at each potential stage of the criminal process, the admissibility of this national security information will be tested again. This was one of the difficult issues with which we grappled—that you may end up having this information relevant to the bail hearing, to the committal and to other interlocutory type actions, and on each occasion its admissibility will be tested. The Law Reform Commission acknowledges the argument along these lines that was put to us by the Legal Aid Commissions, but in our view that does not really resolve the issue. Those pre-trial proceedings being administrative, we have made the Attorney's certificate conclusive for those proceedings. So, that is one of the areas of difference.

Also, under its regime the Attorney-General's certificate seems to kick in at the end of the process. So the court looks at the admissibility of the evidence, possible redactions and so on, and if the court rules that the evidence is admissible then the Attorney-General's certificate can be sought and can override the decision of the court in some way. This bill puts the process for the Attorney-General's certificate at the beginning. He looks at the information and determines whether or not it will prejudice national security, and then the court—with the benefit of the Attorney's judgment on the issue—looks at it afresh for itself.

**Senator BOLKUS**—That is at the beginning and only at the beginning?

**Ms Jackson**—At the time the certificate is issued.

**Senator BOLKUS**—No, you said it puts the Attorney-General's certificate at the beginning; at the beginning of what?

**Ms Jackson**—It is at the beginning of a process that considers national security—

**Senator BOLKUS**—It is not at the beginning of the trial?

**Ms Jackson**—It is not necessarily at the beginning of the trial.

**Senator BOLKUS**—So why are you telling us it is at the beginning when it is not at the beginning?

**Ms Jackson**—Well, it is at the beginning of the process of considering national security information.

**Senator BOLKUS**—Which could be the last day of the trial.

**Ms Jackson**—I suppose that is a theoretical possibility.

**Senator BOLKUS**—So it is at the beginning of nothing then, isn't it?

**Ms Jackson**—Under the bill there is an obligation on the prosecution and the defence counsel to notify the Attorney-General as soon as they become aware that national security information is going to be an issue at the trial. Yes, it is theoretically possible that that could happen on the last day of the trial, but it is a very unlikely event. So the Attorney—

**Senator BOLKUS**—It has happened before.

**Ms Kobus**—will be brought into it at the earliest opportunity.

**Senator BRANDIS**—There is no capacity, is there, under this bill to challenge the decision to treat information as national security information?

**Ms Jackson**—There is a capacity to review the original decision of the DPP to notify that the proceedings are ones to which the legislation will apply, and that is subject to ADJR, and the Attorney's decision to issue a certificate is subject to judicial review under section 39B of the Judiciary Act.

**Senator BRANDIS**—But what happens, for example, if an accused person is convicted and he or she appeals the conviction. Could it be a ground for appeal that material evidence tending to indicate the innocence of the convicted person was withdrawn from the jury by the operation of this act? It could not be, could it, a ground for appeal?

**Ms Jackson**—The closed hearing outcome is itself appealable before the trial resumes.

**Senator BRANDIS**—But that is the decision to adopt that unusual procedure. The ultimate determination of any criminal trial is either an acquittal or a conviction. A conviction would not of itself be impeachable on the ground that by reason of the operation of this bill material information tending to demonstrate the innocence of the accused person was withheld from the jury, would it?

**Ms Jackson**—No, because you have already had that opportunity at the conclusion of the closed hearing to appeal the decision of the trial judge at the closed hearing to a court of appeal.

**Senator MASON**—Is it the potential consequence of this legislation that exculpatory evidence could be excluded?

**Ms Jackson**—Yes.

**Senator BRANDIS**—Exactly. Can you just direct me to the provisions of the bill which set out the criteria to which the court is to have regard in making a decision to withdraw information from the jury?

**Ms Jackson**—On the closed hearing it is 29(8). Before the court gets to 29(8) it has to, under subsection 6, look at whether or not the evidence would in any event be admissible. If it is not admissible the issue does not arise.

**Senator BRANDIS**—Sure, I understand that. But let us say that the evidence would otherwise be admissible but for the operation of this act.

**Ms Jackson**—Yes.

**Senator BRANDIS**—Section 29(8)(b) reads:

whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing;

As you read 29(8), does subclause (b) qualify subclause (a)? What is the relationship between the two subclauses? I am sorry, the chair points out to me that (b) is subject to (a) in effect. So you could have a situation in which a material fact which would have a significant exculpatory effect was nevertheless withheld from the jury; and more, that by the statute, the court is specifically instructed to give that consideration an inferior weight to the national security consideration. Am I right in construing it in that way?

**Ms Jackson**—In terms of the closed hearing itself, that is correct. The issue that the court considers then is whether or not the information itself is such sensitive national security information that it should be withheld entirely or only admitted in a modified form.

**Senator BRANDIS**—But as you agreed with Senator Mason a moment ago, Ms Jackson, that could apply to evidence having an exculpatory effect.

**Ms Jackson**—It could.

**Senator BRANDIS**—What I am struggling to understand is, if that be the case, how any meaning could possibly be given to the words in 29(8)(b). How could it possibly not prejudice the accused's right to a fair trial if exculpatory evidence is withdrawn from the jury? How could it?

**Ms Jackson**—But having decided that the information cannot be led or can only be led in a particular form in the closed hearing, once the closed hearing has concluded and an appeal, if any, has also concluded, the court then retains its overriding discretion to stay the proceedings in the fairness of the accused. The issue that is being looked at in 29(8) is the protection of national security information.

**Senator BRANDIS**—I understand that.

**Ms Jackson**—Once the closed hearing is over, in the context of the whole trial, the consequences of the decision under 29(8) can be reassessed by the court and the court could say, 'Mr Prosecutor, unless you withdraw, I am going to stay the proceedings.'

**Senator BRANDIS**—Or does the judge still have the ordinary right that any judge has in a criminal trial at the end of the evidence to instruct the jury that it would be unsafe to convict?

**Ms Jackson**—This does not affect any of those fundamental rights of the judge. It deals with a particular kind of *voir dire* like situation.

**Senator BRANDIS**—So the judge in summing up to the jury could still say, 'Ladies and gentlemen of the jury, the defence wanted to lead evidence as to a particular matter which it contends would have tended to exculpate the accused, but by reason of the operation of the national security act I have made a decision—the grounds of which I am not at liberty to disclose to you—that that evidence said to be exculpatory cannot be led.' A judge could say that in summing up to the jury?

**Ms Jackson**—That would be a theoretical possibility, but I would imagine that any judge in that position would stay the trial.

**Senator BRANDIS**—I suspect that that might be right. If that is the case, can I ask you this rhetorical question: how on earth do you ever expect to get a conviction if this is invoked? No jury could ever convict and no judge could ever permit a jury to convict if evidence which might be exculpatory were withdrawn from the jury.

**Ms Jackson**—But the same could not be said if it were part of the prosecution case.

**Senator BRANDIS**—But the prosecution has to prove its case. The defence does not have to prove anything, except issues on which it bears an evidential or persuasive onus. At the end of the day it is the prosecution that has to prove the case, not the defence.

**CHAIR**—Ms Jackson, I think you were in the room during all of Mr Walker’s evidence. In relation to the conduct of the trial, he pointed to the words on page 2 of the explanatory memorandum under the heading of ‘Trial’. The explanatory memorandum says the court basically has two choices, to:

1. agree with the Attorney-General, that the information not be disclosed or disclosed—  
in a modified way—

in which case the trial continues or the defendant appeals; or

2. disagree with the Attorney-General and order disclosure of the information in which case the trial continues or the prosecution appeals.

He then pointed to clause 18, General powers of a court, and indicated that it says:

... the power—

of a court—

to control—

the conduct of—

a federal criminal proceeding, especially in relation to abuse of process—

is not affected by this act—

unless the Act expressly or impliedly states otherwise.

So the preceding words in clause 18 are in fact redundant, aren’t they?

**Ms Jackson**—Sorry?

**CHAIR**—Clause 18 reads:

... the power—

of a court—

to control—

the conduct of a proceeding is not affected by this act—

unless the Act expressly or impliedly states otherwise.

**Ms Jackson**—Yes.

**CHAIR**—So the court is quite clearly constrained by the act in how it conducts a proceedings, and that does have an impact on the values of a fair trial.

**Ms Jackson**—It is required to hold a closed hearing. It is required to make certain judgments about how this particular evidence is to be dealt with, but in the context of the trial it retains all its ordinary powers.

**Senator BOLKUS**—Say that evidence can be withdrawn from a defendant, that the defendant may not know about it, that there is no obligation on the judge to make that available to the defendant and that the defendant cannot test the evidence. It is not a normal operation of a trial when evidence is denied from one side.

**Ms Jackson**—If the court rules that the evidence is not to be produced, it is not produced at the trial; it does not form part of the evidence on which the case is based.

**CHAIR**—It might be useful on paper.

**Senator BOLKUS**—No. So an innocent person does not have evidence supporting his case before the court?

**Ms Jackson**—As I answered to Senator Brandis, I think in that case the court would almost certainly exercise its power to stay the proceedings. Otherwise we are in the somewhat absurd situation that he suggested where the e-court would have to make its address to the jury in terms of—

**Senator BOLKUS**—I think you are in a highly absurd situation; I do not think it is a limited one. It is across the spectrum of this legislation. Can I just take issue with one thing you said earlier? I do not know what frequency you were tuned into but we have been sitting here all morning and for you to say that the closed hearing aspect of the bill is the part that causes major concern is a total misreading of this morning's events. Those were your words. People have got a litany of concerns with this legislation and if you are reporting back to the Attorney you would be misleading the Attorney if you said the major concern was the closed hearing aspect. Where were you?

**Ms Jackson**—I was in this room. The closed hearing seemed to somehow equate to the secret trial.

**Senator BOLKUS**—No. The fact that a person cannot see or test the evidence, the fact that a person may not get notice of a hearing, the fact that a person or their counsel may not be present, the fact that there may be conclusive evidence in respect of the facts all lead one to believe that this is a Star Chamber process. Not the closed aspect of it in itself, but the denial of access of the contestability of evidence could actually lead to a situation where someone could have a trial, not know the witnesses, not know the critical evidence, not be present and be found guilty.

**Ms Jackson**—It is not really a consequence of this bill—

**Senator BOLKUS**—What is it a consequence of? That is what the bill provides for.

**Ms Jackson**—that the defendant does not know the identity of a witness. This bill enables a witness who might have been subpoenaed not to appear but that person does not give any evidence.

**CHAIR**—They may be a witness for the defendant, mightn't they?

**Ms Jackson**—They may.

**CHAIR**—Who may provide exculpatory evidence.

**Ms Jackson**—That is true. But the court retains its power, as in Dietrich or any other case, to stay the proceedings.

**Senator BOLKUS**—But on the basis of the criteria laid down in section 29(8).

**Ms Jackson**—No.

**Senator BOLKUS**—What is that there for?

**Ms Jackson**—That only applies to the closed hearing.

**Senator BOLKUS**—Are they not critical or important to the process?

**Ms Jackson**—Having decided that a particular document can be admitted with certain amendments, in making those amendments the right of the accused to a fair trial is not as significant as protecting the security of the information if it is extremely sensitive. But, having made that decision, there is subsequently when the trial resumes a question of whether the trial proceeds. That is not subject to 29(8).

**Senator MASON**—Correct me if I am wrong, but that decision was made without the benefit of defence counsel. Is that not correct?

**Ms Jackson**—Only if the court so orders and only if defence counsel is uncleared. The court has the discretion to remove counsel from a closed hearing.

**CHAIR**—Can the court remove security cleared counsel for the defendant from a closed hearing?

**Ms Jackson**—I would think that would be highly unlikely.

**CHAIR**—But can the court do that?

**Ms Jackson**—It is not expressed in terms of cleared and uncleared counsel in the legislation.

**Senator BOLKUS**—But they are not excluded from that provision, are they?

**Ms Jackson**—No.

**Senator BOLKUS**—So why would they not be covered by it?

**Ms Jackson**—They are covered by it.

**Senator BOLKUS**—They are; that is the honest answer then.

**Ms Jackson**—But I would imagine it would be very unlikely for the court to exercise its discretion to exclude cleared counsel.

**CHAIR**—I am not sure how much further we can take this but let me go back to the question of your willing agreement with the observations made in relation to the breadth of the definition, which is a matter of some concern to the committee. Defence, security and international relations are broadly defined, where:

... *international relations* means political, military and economic relations with foreign governments and international organisations—

whatever that actually is. Law enforcement interests are perhaps more cogently expressed. The definition of national interests includes things that are:

... important to the stability and integrity of a nation.

How are we determining what is important to the stability and integrity of a nation that is either from an economic, technological or scientific interest?

**Ms Jackson**—Those words are taken from the protective security manual and are replicated in the ALRC report. That would initially be a decision for the Attorney-General but ultimately it would be a question for the trial judge and possibly an appellant court.

**CHAIR**—In relation to the observation that Mr Walker made in relation to a reference to a head of state as a tyrant—who knows who he may have had in mind!—in international relations terms, we are all smiling but it does conceivably verge on the farcical, doesn't it?

**Senator MASON**—That is an unfair question of Ms Jackson!

**CHAIR**—It was rhetorical, a little like Senator Brandis's, but Ms Jackson chose to respond to Senator Brandis's rhetorical question. In its submission the Law Council makes a number of observations in relation to security clearance. They are observations they have made before; they are consistent in their position on this matter and the committee has not taken them up at great length previously. But they did ask one particular question, which pertains to the notice requirements in clause 22. I would appreciate it if you had a look at the Law Council's submission on that point at least and clarified on notice the matter they raised.

**Ms Jackson**—Thank you.

**CHAIR**—That would be helpful. I am still concerned about the chapter III issue raised by Mr Walker and referred to by Mr Rice. With the benefit of looking at the points that Mr Walker has made on the *Hansard*, would you possibly be able to respond to that on notice as well?

**Ms Jackson**—Yes.

**CHAIR**—Thank you very much.

**Senator BOLKUS**—I have one question following on from that. Have you taken advice as to the constitutionality this bill?

**Ms Jackson**—Yes, we have.

**Senator BOLKUS**—From the usual suspect, Henry Burmester?

**Ms Jackson**—I do not know whether it was from Mr Burmester personally on this occasion.

**Senator BOLKUS**—You have been assured that it is all constitutionally sound?

**Ms Jackson**—That is correct.

**Senator BRANDIS**—Has the person who drafted this bill ever had any actual practical experience in running a criminal prosecution or a criminal defence?

**Ms Jackson**—I do not know about the drafter's qualification, but the office of the Director of Public Prosecutions was involved in the preparation of the legislation.

**CHAIR**—If there are any other questions the committee will submit them to the department to be taken on notice, if that is agreeable.

**Ms Jackson**—Certainly.

**CHAIR**—We appreciate the department's assistance with that. There may be some further matters that we need to clarify. There are no further questions. Ms Kobus and Ms Jackson, thank you very much for your attendance today and your assistance to the committee. I declare this meeting of the Legal and Constitutional Legislation Committee closed.

**Committee adjourned at 12.09 p.m.**