CHAPTER 2

BACKGROUND TO THE PROPOSED LEGISLATION

2.1 This chapter briefly outlines the background and the main provisions of the Bill and the Consequential Amendments Bill.

Background

2.1 The proposed legislation, which is concerned specifically with the use of national security-sensitive information in criminal proceedings, seeks to resolve the difficulty in protecting Australia's national security without unduly encroaching on the fundamental right to a fair trial.

2.2 In introducing the Bill and the Consequential Amendment Bill into Parliament, the Attorney-General recognised the problem confronting the Commonwealth Government where prosecutions for Commonwealth security offences (such as terrorism and espionage) may depend on information that relates to, or the disclosure of which may threaten, Australia's national security.[1]

2.3 The Attorney-General has also noted that, in such cases, the Commonwealth Government faces the choice of either:

- taking the risk of disclosing sensitive information relating to national security or;
- abandoning a prosecution, even though the alleged offences are serious.[2]

2.4 In his Second Reading Speech, the Attorney-General argued that the proposed legislation would 'strengthen the procedures for protecting information that may affect our national security' and would 'also protect an individual's right to a fair trial'.[3] He has also noted that, most importantly, it would 'provide a court which has found that sensitive security related information should not be disclosed, with an alternative to simply dismissing the charge'.[4]

2.5 At the moment, there are a number of options available to Australian courts to ensure classified or sensitive material is used appropriately—confidentiality undertakings from parties and their legal advisers; restricted access to documents or

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1 The Hon Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard,* 27 May 2004, p. 29307.

2 Attorney-General, The Hon Philip Ruddock MP, News Release no. 078/2004, 27 May 2004.

3 The Hon Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard,* 27 May 2004, p. 29308.

4 News Release, Attorney-General, The Hon Philip Ruddock MP, no. 078/2004, 27 May 2004.

parts of documents; court proceedings closed to the public; and restricted publication of proceedings.

2.6 Noting that there are procedures already available to the courts to address the problem of the disclosure or non-disclosure of sensitive information in court proceedings, the following section of the report considers the need for the proposed legislation. It starts with a discussion of the investigation by the Australian Law Reform Commission (ALRC) into the use of classified or sensitive national security information in criminal proceedings.

The ALRC's investigation into the use of sensitive information

2.7 On 2 April 2003, the Attorney-General referred the matter of measures to protect classified and security information in the course of investigations and proceedings to the ALRC for inquiry and report. The ALRC released a background paper in July 2003, a discussion paper in January 2004, and its report in May 2004.

2.8 The background paper recognised that tensions exist between the rights guaranteed in Australian and international law regarding the right to a fair trial and the operation of mechanisms designed to protect classified and security sensitive information. It was in no doubt that 'there is some information which, in the national and public interest, should not be disclosed publicly; nor that there are occasions where the public interests in open justice and open government are in conflict with a proper need for secrecy'.[5]

2.9 The ALRC was of the view that it was important for its inquiry to consider whether current circumstances require any substantial departure from the existing principles and procedures that underpin Australia's justice system. It posed a number of questions including:

- Is there a need to consider a special category of defendant where some of the normal protections usually afforded to a criminal accused are withheld in order to protect classified and security sensitive information?
- If so, what modifications of these protections should be considered? Would such modifications be consistent with Australia's obligations under international law?
- Should guidelines be developed for the disclosure, withholding and use of classified and security information in a criminal matter?[6]

2.10 The ALRC invited submissions and comment on the contents of its background paper.

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5 ALRC, *Protecting Classified and Security Sensitive Information,* Background Paper, July 2003 p. 9.

6 ibid, pp. 104 & 107.

Submissions to the ALRC's inquiry

2.11 One of the major arguments mounted in submissions to the ALRC against introducing new measures to deal with arrangements for dealing with classified and security sensitive information was that there are existing mechanisms in place that both appropriately and adequately cover the circumstances set down in the Bill. They include closed hearings and court undertakings such as suppression orders prohibiting the publication of certain information.[7]

2.12 The Law Council of Australia (Law Council), in its submission to the ALRC's inquiry, also accepted that courts have 'adopted more restrictive measures to suit the exigencies of the occasion, including, for example, hearing the proceedings *in camera*, suppressing the names of parties or witnesses, or by making orders restricting or limiting publicity associated with the proceedings, or indeed, by excluding parties or their representatives from specific items of evidence'.[8] It argued that '(t)here are … well established mechanisms, including the use of confidential sealing orders, for protecting sensitive information, such as the protection of informants.'[9] For example:

> … section 85B of the *Crimes Act 1914* (Cth) and section 93.2 of the *Criminal Code Act 1995* (Cth) provide sufficient power to enable judges exercising federal jurisdiction to protect security sensitive information by closing proceedings in whole or in part or making restrictive orders.[10]

2.13 Nonetheless, the Law Council accepted that 'the practical application of public interest immunity law is difficult and complex, and that some further work on the systematisation of the various circumstances involving public interest immunity would be valuable'.[11]

2.14 The Attorney-General's Department argued strongly in favour of changes to the current legislation. It maintained:

> … the existing rules of evidence and procedure do not provide adequate, consistent and predictable protection for national security information that may be adduced or otherwise disclosed during the course of proceedings.[12]

2.15 Further, the Department was of the view that, currently, there is 'no comprehensive, reliable and consistent procedural mechanism in place which protects security classified information'.[13]

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7 See for example, submissions to the ALRC by the Victorian Bar Association, 31 March 2003; New South Wales Police, 29 August 2003; Law Society of New South Wales, n.d.

8 Law Council submission to the ALRC, 12 September 2003, p. 8.

9 ibid, p. 9.

10 ibid, p. 10.

11 ibid, p. 15.

12 Attorney-General's Department submission to the ALRC, Executive Summary, p. 1.

13 ibid.

Findings of the ALRC

2.16 Having considered the responses to its background paper, the ALRC produced a discussion paper in February 2004. On announcing its release, the President of the ALRC, Professor David Weisbrot, observed that:

> At the moment, it isn't clear how far our courts can go to accommodate legitimate national security concerns. As a consequence, the government may be forced to drop or reduce criminal charges against an individual or to settle a civil claim—even though the result is unsatisfactory—because ultimately this better serves Australia's strategic interests.
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> It is not simply a matter of balancing the rights of an individual to a fair trial against those of the government to maintain official secrets. There are also compelling public interests in safeguarding national security; facilitating the successful prosecution of spies and terrorists; maintaining the fundamental integrity and independence of our judicial processes; and adhering—to the greatest extent possible—to the principles and practices of open justice and open government.[14]

2.17 The discussion paper proposed a detailed statutory scheme that would govern the use of classified and security sensitive information in all stages of proceedings in all courts and tribunals in Australia.[15] The ALRC again invited submissions and comments on the views presented in its paper.

2.18 Before the Commission published its final report, the Commonwealth Government introduced the Bill and the Consequential Amendments Bill which adopted a number of the ALRC's proposals. The ALRC informed the Committee during the course of this inquiry that the Commonwealth Government did not consult it during the development or drafting of the Bill and the Consequential Amendments Bill.[16]

2.19 In its final report, the ALRC reinforced the findings that underpinned its proposal for the enactment of legislation to deal specifically and solely with the protection of classified and sensitive national security information in court and similar proceedings. It concluded that Australia's courts and tribunals must change the way they operate when dealing with classified and security sensitive information. It suggested that 'courts, tribunals and government agencies need clearer and more refined procedures to ensure the proper handling of such highly sensitive material'.[17]

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14 ALRC, Media Release, *Courts need new laws to protect national security information, 5 February* 2004.

15 ALRC, *Protecting Classified and Security Sensitive Information,* Discussion Paper, January 2004, pp. 11-12.

16 *Submission 1*, p. 4.

17 ALRC, Media release, *Justice system must adapt to meet terror challenges: ALRC,* 23 June 2004.

2.20 The ALRC endorsed its earlier proposal and recommended that the Commonwealth Government should enact new legislation 'to deal specifically and solely with the protection of classified and sensitive national security information in court, tribunal and similar proceedings'.[18] The report identified the general principles that would underpin the new statute and the court rules and regulations that courts and tribunals would need to adopt to give effect to the intention of the proposed legislation.

2.21 The Attorney-General has welcomed the release of the ALRC's report and has stated that, in light of its recommendations, he would examine the Bill in further detail.[19] It should be noted that the Explanatory Memorandum to the Bill supports the ALRC's finding that the existing rules of evidence and procedure do not provide adequate protection for information relating to national security where that information may be adduced or otherwise disclosed during the course of a criminal proceeding. To address this problem, the Bill allows sensitive information to be provided in a form that would facilitate the prosecution of an offence but without prejudicing national security and the rights of the defendant to a fair trial.

2.22 However, while both the ALRC and the Commonwealth Government recognise the need for the introduction of legislation that deals specifically with the disclosure of sensitive material in Federal criminal proceedings, there are significant points of departure between the ALRC's legislative proposal and the Bill.

Key provisions of the Bill

2.23 The main intention of the Bill is to introduce special procedures for dealing with sensitive national security information during Federal criminal proceedings. The next section of this chapter provides a brief overview of the provisions of the Bill.

2.24 The Bill defines a Federal criminal proceeding to mean a criminal proceeding in any court exercising Federal jurisdiction, where the offence concerned is against a law of the Commonwealth or in relation to a matter arising under the *Extradition Act 1988* (Cth).[20]

2.25 Under the Bill, a criminal proceeding is intended to apply to all stages of a proceeding for a Commonwealth offence. It means a proceeding for the prosecution, whether summarily or on indictment, of an offence and includes any pre-trial, interlocutory or post-trial proceeding. The Bill makes clear that the proposed legislation would include proceedings such as a bail proceeding, a committal proceeding, the discovery, exchange, production, inspection or disclosure of intended evidence, a sentencing proceeding and a proceeding with respect to any matter in

18 Recommendation 11–1.

19 News Release, Attorney-General, The Hon Philip Ruddock MP, no. 102/2004, 23 June 2004.

20 Clause 14.

which a person seeks a writ of mandamus or prohibition or an injunction against an officer of the Commonwealth.[21]

Clauses 19 and 20—Management of information

Pre-trial

2.26 The Bill provides for either the prosecutor or defendant to apply to the court, before the trial in a Federal criminal proceeding begins, to hold a conference of the parties to consider matters relating to any disclosure of information that relates to or may affect the national security. The court is required to hold a conference as soon as possible after the application is made.[22]

During trial

2.27 At any time during a Federal criminal proceeding, the prosecutor and the defendant may agree to an arrangement about any disclosure of information that relates to or may affect national security. The court may make an order to give effect to the arrangement.[23]

Clause 22—Notification of expected disclosure of security sensitive information

2.28 A central clause in the Bill requires the prosecutor and defendant, at any stage of a criminal proceeding, to notify the Attorney-General, the other person, and the court of expected disclosure of information relating to or affecting national security.[24] The court must adjourn the proceedings until the Attorney-General gives a copy of certificate or advice to the court on the matter.

Clause 23—Witnesses expected to disclose information in giving evidence

2.29 Clause 23 sets down the procedures to be followed where it is expected that a witness may disclose information prejudicial to national security. The court must adjourn proceedings and hold a closed hearing. At the hearing, the witness must give the court a written answer to the question which the court must show to the prosecutor. If the prosecutor knows or believes that if the written answer were to be given in evidence, it would disclose information that relates to national security or that may affect national security, he or she must advise the court of the matter and as soon as practicable, give the Attorney-General notice of that knowledge or belief. The court must adjourn the proceedings until the Attorney-General gives it a copy of a certificate or advice to the court.

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21 Clause 13.

22 Clause 19.

23 Clause 20.

24 Subclause 22(3).

Clause 24—Attorney-General's certificate

2.30 Clause 24 sets down the provisions under which the Attorney-General provides a non-disclosure certificate. This provision allows the Attorney-General to consider the information and decide whether it can or cannot be disclosed or disclosed in another form such as with material deleted. The Attorney-General must give the court a copy of a certificate and the respective amended documentation and where relevant a summary or statement of facts. If the Attorney-General decides not to provide a non-disclosure certificate, he or she must, in writing, advise each potential discloser and the court of his or her decision.

2.31 In cases where the Attorney-General has been notified, or expects, that a witness will or is likely to disclose information by his or her mere presence which is likely to prejudice national security, the Attorney-General may give a certificate to the prosecutor or defendant, as the case may be, that states that the prosecutor or defendant must not call the person as a witness. The Attorney-General must give a copy of the certificate to the court.

Clauses 25 and 26—Consequences of the Attorney-General giving non-disclosure certificate

2.32 The court must hold a closed hearing to decide whether to make an order in relation to the disclosure of the information or the exclusion of a witness subject to the Attorney-General's certificate.

Clause 27 and 28—Closed hearing requirements

2.33 The Bill allows the following persons to be present at a closed hearing—the magistrate, judge or judges comprising the court, court officials, the prosecutor, the defendant, any legal representative of the defendant, the Attorney-General and any legal representative of the Attorney-General and any witness allowed by the court. No-one else, including the jury, may be present.[25]

2.34 Under proposed subsection 27(3) the court may, if it considers that the presence of the defendant or any legal representative of the defendant is likely to prejudice national security, order that the defendant or the legal representative, or both, are not entitled to be present during any part of the hearing in which the prosecutor gives details of the information concerned or presents the reasons for not disclosing the information or for not calling the witness to give evidence.[26] The Attorney-General may, on behalf of the Commonwealth, intervene in such a closed hearing.[27]

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25 Subclause 27(2).

26 Subclause 27(3).

27 Clause 28.

Clause 29—Court orders

2.35 Having held the closed hearing, the court may make an order that any person to whom the contents of the certificate have been disclosed:

- must not, except in permitted circumstances, disclose the information except in the form of the respective amended document, summary or statement of facts as set out in the Attorney-General's certificate;
- must not, except in permitted circumstances, disclose the information;
- may disclose the information in the proceeding.

2.36 Before deciding whether to make such an order, the court under subclause 29(6), must first consider whether the information concerned is admissible in evidence in the proceeding. If it decides that it is not, the court must not make the order.[28]

2.37 Similarly the court, after holding a closed hearing on whether a witness should be excluded from the proceedings, may order that the prosecutor or defendant must not or may call the person as a witness.[29]

2.38 In deciding to make a court order, the court must consider whether there would be a risk of prejudice to national security if the information were disclosed in contravention of the certificate; or if a witness were called contrary the Attorney-General's witness exclusion certificate. The court must also consider whether the order would have a substantial adverse effect on the defendant's right to receive a fair trial as well as any other matter the court considers relevant.[30] It should be noted that clause 29(9) stipulates that in making its decision the court must give greatest weight to whether there would be a risk of prejudice to national security.

Clauses 32 and 33—Appeals against court order

2.39 Following the making of a court order, the prosecutor, under proposed clause 32, may apply to the court for an adjournment of the proceedings to allow time for him or her to decide whether to appeal against the order or to withdraw the proceedings. If the prosecutor decides to proceed, the court must allow time for him or her to make the appeal or withdraw the proceedings. The clause also allows the defendant to apply for an adjournment to allow time for him or her to decide whether to appeal against the order. Again if he or she decides to appeal, the court must allow him or her the time to do so. Under clause 33, the prosecutor, the defendant or the Attorney-General, if he or she has intervened in the closed hearing, may appeal against the order of the court.

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28 Subclause 29(6).

29 Subclause 29(7).

30 Subclauses 29(8) and (9).

Clause 34—Security clearance

2.40 Clause 34 allows the Secretary of the Attorney-General's Department to require the defendant's legal representative to have a security clearance at a level deemed appropriate by the Secretary before he or she is entitled to have access to information that is likely to prejudice national security.

Clauses 35–41—Offences

2.41 Part 5 of the Bill creates a number of offences, and imposes a penalty of 2 years imprisonment for each. The offences are as follows:

- disclosing information before the Attorney-General gives a non-disclosure certificate (clause 35);
- disclosing information before the Attorney-General gives a witness exclusion certificate (clause 36);
- contravening a requirement to notify the Attorney-General (clause 37);
- disclosing information contrary to the Attorney-General's non-disclosure certificate (clause 38);
- calling a witness contrary to the Attorney-General's witness exclusion certificate (clause 39);
- contravening a court order made under the Bill (clause 40); and
- disclosing information to certain persons (a legal representative of the defendant or a person assisting a legal representative of the defendant) where that disclosure is likely to prejudice national security, and those persons do not have appropriate security clearances (clause 41).

Clause 42—Report to Parliament

2.42 Proposed section 42 would require the Attorney-General to table a report in each House of Parliament as soon as practicable after 30 June each year. This report must:

- state the number of certificates given by the Attorney-General under clauses 24 and 26 during the year; and
- identify the criminal proceedings to which the certificates relate.